



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL & TAX DIVISION
CIVIL SUIT NO. E254 OF 2020

INTERNATIONAL AIR TRANSPORT ASSOCIATION.....1ST PLAINTIFF

SAHAM ASSURANCE COMPANY KENYA LIMITED..... 2ND PLAINTIFF

-VERSUS-

SHIAN TOURS & TRAVEL LIMITED.....1ST DEFENDANT/APPLICANT

CHRISTOPHER GITUTO NGARE.....2ND DEFENDANT/APPLICANT

JANE WANJIRU MACHARIA.....3RD DEFENDANT/APPLICANT

R U L I N G

1. Before Court is a Notice of Motion dated 21/10/2020 brought under **Article 159 (2) (d) of the Constitution of Kenya, Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act, Order 1 Rule 2 & 15, Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules.**
2. The applicants sought *inter - alia* leave to file a defence and counterclaim out of time as well as to issue a Third-Party Notice under **Order 1 Rule 25 of the Civil Procedure Rules.** The application was supported by the affidavit of **Jane Wanjiru Macharia**, sworn on 21/10/2020.
3. The applicants contended that although they were duly served with the plaint and summons via email on 27/8/2020, they only learnt of the same on 6/9/2020 and immediately instructed their advocates who immediately entered appearance on 7/9/2020.
4. That however, they were unable to put in a defence on time for the reason that; following the termination of the 1st defendant's Agency Agreement with the 1st plaintiff on 2/5/2019, the defendants were locked out of the system which hosted all operations including all the documents vital for informing their defence. In the circumstances, it took long to source the said documents through alternative means.
5. Further, that the defendant's offices had been closed and it was not until the first week of October, 2020 that they were able to access their said offices. That the complexity of the matter meant longer time collecting documentation to put in a defence and counterclaim apart from joining in Third Parties.
6. The defendants further contended that they had a solid and meritorious defence with high chances of success. That their constitutional right to fair hearing under **Articles 25(c) and 50(1) of the Constitution** in these circumstances weighs more than the procedural requirement under **Order 7 Rule 1 of the Civil Procedure Rules.**
7. The respondent opposed the application vide a replying affidavit of **Ms. Karen Njagi** sworn on 9/11/2020. She averred that the defendants were required to file their defence by 21/9/2020. They failed to do so and the plaintiff properly requested for judgment on 29/9/2020.
8. That the defendants did not attach a draft defence to support their claim that they have a meritorious defense. That under the Passenger Sales Agreement entered between the 1st plaintiff and 1st defendant, the 1st defendant had an obligation to keep and maintain documents for at least 2 years from the date of the transaction. In the circumstances, the allegation that the defendants were unable to access documents after the termination of their Agreement is disingenuous.
9. The plaintiffs denied any existence of any insurance policy between the 1st defendant and the 2nd plaintiff. They contended that the policy

in place had been taken by the 1st plaintiff for its sole benefit. That the 2nd & 3rd defendant had undertaken to indemnify the 2nd plaintiff in the event of the 1st defendant's default. In the premises, the 2nd and 3rd defendant had been sued as indemnifiers.

10. In rebuttal to the defendant's averments, the applicants filed a supplementary affidavit sworn by **Jane Wanjiru Macharia** on 18/1/2021. In the affidavit, they denied the plaintiff's assertions and attached a draft defence thereto.

11. The parties filed their respective submissions which the Court has carefully considered. This is an application for leave to file a defence and counterclaim out of time and to enjoin 3rd parties to the suit.

12. **Order 50, rule 6 of the Civil Procedure Rules** provides: -

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise”

13. In view of the foregoing, the jurisdiction to enlarge time is a discretionary one. However, like all discretions, it must be exercised judiciously.

14. In the present case, the applicants admit that they were properly served with the plaint and Summons on 26/8/2020. They duly entered appearance through their advocates on 7/9/2020. Under the Rules, they were obliged to file a defence within 14 days from the date of appearance, that is by 21/9/2020. They did not file their defence and the plaintiffs proceeded to properly request for judgment on 29/9/2020.

15. The present application was lodged on 21/10/2020. As at that time, no interlocutory judgment had been entered yet. In their Supplementary Affidavit dated 18/1/2021, the applicants attached their draft defence in response to the plaint. The Court has looked at the said draft defence. Without expressing any firm opinion on it, the Court's view is that the draft defence does not seem vexatious or frivolous. It raises issues that may need to be looked at. Had an interlocutory judgment been entered, the principles applicable would have been different. See **Mbogo v. Shah [1967] EA 166**.

16. In **Richard Murigu Wamai v Attorney General & another [2018] eKLR**, the court cited with approval the case of **Sebel District Administration vs Gasyali & Others (1968) E.A. 300**, where the Court observed: -

“In my view the Court should not solely concentrate on the poverty of the applicant's excuse for not entering appearance or filing a defence within the prescribed time. The nature of the action should be considered, the defence if one has been brought to the notice of the court however irregularly should be considered, the question as to whether the Plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally I think it should always be remembered that to deny the subject a hearing should be the last resort of a court. It is wrong under all circumstances to shut out a defendant from being heard. A defendant should be ordered to pay costs to compensate the plaintiff for any delay occasioned by the setting aside and be permitted to defend.”

17. The Court agrees and associates itself with the above holding.

18. Although the applicants did not bring forth a very solid reason for the delay in filing the defence on time, the Court must consider the other factors in this matter. That is, the draft defence does not seem to be a total sham, the right to be heard is a Constitutional imperative and the only loss the plaintiffs stand to suffer is delay and nothing else. No Judgment has been entered yet.

19. The prejudice to be suffered by the plaintiff can be compensated by payment of costs. On the other hand, it may amount to a violation of the applicants' constitutional right to a fair hearing if they are barred from presenting their defence, a draft of which they have presented to Court. Our **Civil Procedure Act and Rules** gives this Court the discretion, which this Court is prepared to exercise to allow the defendants to be heard in their defence.

20. In this regard, the Court allows the application dated 21/10/2020 on condition that the defendants pay the plaintiffs thrown away costs assessed at Kshs.20,000/- within 14 days of the date hereof. The defendants are to file and serve their defence and counterclaim within 14 days of the date of this ruling.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF APRIL, 2021

A. MABEYA, FCI Arb

JUDGE