



REPUBLIC OF KENYA

IN THE HIGH COURT AT KENYA

AT MOMBASA

CIVIL SUIT NO.95 OF 2017

GRACE WANJA GITUE (*Suing as the administrator*)

of the estate of CHARLES WERE OPADO (DECEASED)....PLAINTIFF

VERSUS

1. KENYA PORTS AUTHORITY

2. INCHCAPE SHIPPING SERVICES

KENYA LIMITED.....DEFENDANT

RULING

1. The subject for consideration of this **Ruling** is a **Notice of Motion** Application dated the **8th April, 2019**, brought pursuant to **Order 2 Rule 15** and **Order 51 Rule 1** both of the **Civil Procedure Rules (2010)** and under the inherent jurisdiction of the Court. In this application the Applicant is seeking for the following orders: -

a) THAT the Plaint filed herein as against the Second Defendant be struck out on the grounds that it is frivolous, vexatious and an abuse of the process of this Honourable Court;

b) THAT the Plaintiff's suit as against the Second Defendant be dismissed with costs;

c) THAT the costs of this application be provided for.

2. The **Notice of Motion** is supported by an **Affidavit** sworn on **8th April 2019** by **Mark Mboloi**, the **Claims Manager of the 2nd Defendant/Applicant**. The motion is premised on the grounds that the suit herein emanates from an accident that led to the death of **Charles Were Opado**.

3. **Mr. Mboloi** has deponed that the suit as against the 2nd Defendant/Applicant should be struck out as the 2nd Defendant/Applicant has been the agent of the charterers of the **Motor Vessel "Pine 6"** at all material times.

4. It has been deponed that as an agent of the **Motor Vessel "Pine 6"**, the 2nd Defendant/Applicant's Protection and Indemnity Department issued a letter of undertaking dated **20th April, 2014** to the 1st Defendant/Respondent on behalf of the insurers of the **Motor Vessel "Pine 6"** for whom the 2nd Defendant/Applicant claim to be a local correspondent.

5. According to the 2nd Defendant/Applicant, it is merely an agent of the charterers and/or owners of the said **Motor Vessel "Pine 6"** and it cannot be strictly liable to the Plaintiff/Respondent for the accident as claimed at **paragraph 6** of the **Plaint**. Strict liability can only attach to the owners and charterers of the **Motor Vessel "Pine 6"**.

6. The 2nd Defendant/Applicant maintains that the letter of undertaking written on the **20th April, 2014** was done in its capacity as an agent for **Britannia Steam Ship Insurance Association Limited** and it cannot therefore be personally liable for any breach.

7. The 2nd Defendant/Applicant thus seeks that the court strikes out the **Plaint** dated **12th October, 2017** as against it for being frivolous, vexatious and an abuse of the court process.

8. The 1st Defendant has indicated to this Court that they are not opposed to the Application dated **8th April, 2019**.

9. The Plaintiff/Respondent had indicated that they intend to oppose the said application but did not file any Reply in the form of a Replying Affidavit and/or Grounds of Opposition.

10. The parties took directions on submissions. The Applicant filed its submissions on the **20th February, 2020** while the Plaintiff/Respondent filed submissions on the **7th May, 2021**. Parties relied on their submissions.

THE 2ND DEFENDANT/APPLICANT'S SUBMISSIONS

11. It was submitted that the claim by the Plaintiff arises out of an accident that occurred on the **13th October 2014** while **Charles Were Opado** (the deceased) was in the course of his employment with the 1st Defendant and had been assigned to work aboard the **Motor Vessel "Pine 6"**. It is stated that he was offloading coiled wires therefrom and while he was so engaged, a hook holding one of the said coils (measuring approximate 2 tons) snapped causing the coil to fall and land on the deceased's head, a result of which he **suffered fatal injuries and he died instantly**.

12. The 2nd Defendant/Applicant submitted that the said accident attached strict liability on the Defendants and, as it stands the Plaintiff does not disclose any facts imputing any liability on the 2nd Defendant/Applicant. It is stated that no factual situation has been pleaded in the Plaintiff as against the 2nd Defendant/Applicant. There is no claim of negligence or omission that led to the fatal injury and finally death of the deceased. The 2nd Defendant/ Applicant has maintained that in this suit, they have been an agent to the owners of **Motor Vessel "Pine 6"** at all material times.

13. The 2nd Defendant/Applicant has placed reliance on the cases of **Antony Francis Wareham t/a AF Wareham & 2 Others –vs- Kenya Post Office Savings Bank [2004]eKLR** and **City Council of Nairobi –vs- Wilfred Kamau Githua t/a Githua Associates & Another [2016]eKLR** to support their claim that an agent cannot be sued where there is a disclosed principal.

14. It was the 2nd Defendant/Applicant's case that the letter of undertaking dated **20th October, 2014** was only issued and signed by the 2nd Defendant/Applicant as only agents of Britannia Steam Ship Insurance Association Limited.

15. It deposes that the Plaintiff/Respondent, has a right to enjoin the proper party, **Britannia Steam Ship Insurance Association Limited** if they so wish and they ought to move the court properly through an application for joinder.

THE PLAINTIFF/RESPONDENT'S SUBMISSIONS

16. It was the Plaintiff's case that the late **Charles Opado** died while working aboard **Motor Vessel "Pine 6"** on the **13th October, 2014**. That subsequent to the accident and death of **Charles Opado**, the 2nd Defendant/Applicant issued a letter of undertaking to the 1st Defendant dated the **20th October, 2014** on behalf of **Britannia Steam Ship Insurance Association Limited** to pay an amicable sum of Kshs.10,000,000/=. Due to the letter of undertaking herein **Motor Vessel "Pine 6"** was allowed by the 1st Defendant to leave the port of Mombasa.

17. The Plaintiff/Respondent stated that the 2nd Defendant/Applicant was sued in the matter herein on the basis of the letter of undertaking which was issued to the 1st Defendant illegally, unconstitutionally, unlawfully and was wrongfully concealed.

18. According to the Plaintiff/Respondent, the Statement of Defence as filed by 2nd Defendant/Applicant dated the **20th February, 2018** raises several triable issues that require the matter be heard and the issues resolved through oral evidence.

19. It was stated that the suit herein discloses very strong causes of action as against the Defendants and the suit herein cannot be struck out as against the 2nd Defendant. The Plaintiff/Respondent has submitted that the suit as against the 2nd Defendant cannot be dismissed without the court herein being given an opportunity to examine the said letter of undertaking. The Plaintiff/Respondent has referred the Court to the case of **Madison Insurance Company Limited –vs- Augustine Kamanda Gitau [2020]eKLR** and **D. T. Dobie & Company (Kenya) Limited –vs- Joseph Mbaria Muchina & Another [1980]eKLR**.

20. The Plaintiff/Respondent has also submitted that the letter of undertaking places the 2nd Defendant/Applicant at the center of the case herein and there is nothing in the letter of undertaking that shows that the 2nd Defendant/Applicant is an agent of the said **Britannia Steam Ship Insurance Association Limited**.

21. It has been stated that the letter of undertaking executed by the 2nd Defendant/Applicant was issued to the 1st Defendant through which both parties spelt out the requisite obligations which was that the 1st Defendant was to allow **Motor Vessel "Pine 6"** to sail away whereas the 2nd Defendant/Applicant undertook to pay a set amount to the Deceased's Estate and his dependants. To expound on this the Plaintiff/Respondent has relied on the case **Agricultural Finance Corporation –vs- Lengetia Limited & Jack Mwangi [1985] eKLR**.

ANALYSIS AND DETERMINATION

22. After perusing all the pleadings filed in this case and the written submissions by the parties herein, I am of the view that the issue for determination is *whether the Complaint dated 12th October, 2017 should be struck out/dissolved as against the 2nd Defendant/Applicant.*

23. The 2nd Defendant/Applicant is before the court seeking to be removed from the suit herein on claims that they cannot be sued in their capacity as agents of the principal **Britannia Steam Ship Insurance Association Limited** and that the suit does not disclose any reasonable cause of action as against them as required under **Order 2 Rule 15(1)(a)** of the **Civil Procedure Rules**.

24. In the Plaintiff/Respondent's suit, the central issue arising for determination from the submissions, is that the 2nd Defendant/ Applicant issued a letter of undertaking dated the **20th October 2014** to the 1st Defendant to settle on behalf of **Britannia Steam Ship Insurance Association Limited** a sum of **KShs.10,000,000/=** to the family of deceased, **Charles Were Opado**. It was stated that without the said letter **Britannia Steam Ship Insurance Association Limited** would not have been allowed to leave the territory of **Mombasa**.

25. Before this court can strike out the suit herein as against the 2nd Defendant/Applicant, the court is called upon to determine whether or not it raises any reasonable cause of action as against the 2nd Defendant/Applicant. Madan JA in the case of **D.T. Dobie & Company (Kenya) Limited –vs- Joseph Mbaria Muchina & Another, Civil Appeal No.37 of 1978 [1980] eKLR**, held:

"The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof, before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage the court ought not to deal with any merits of the case for that 'is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits "without discovery, without oral evidence tested by cross-examination in the ordinary way". (Sellers, L.J. (supra) ...

"...No exact paraphrase can be given but I think reasonable cause of action means a cause of action with some chance of success when (as required by paragraph (2) of the rule) only the allegations in the complaint are considered...."

26. The arguments by the 2nd Defendant/Applicant on claim of being an agent and hence strict liability cannot attach to them does not seem to be an issue but a contention arises as shown by the Plaintiff/Respondent in regard to the letter of undertaking that was issued by the 2nd Defendant/Applicant to the 1st Defendant on **20th October 2014**.

27. The letter of undertaking dated the **20th October 2014** has been placed before the court and it reads: -

The letter is from Inchcape Shipping Services reproduced verbatim

"TO: The Kenya Ports Authority (KPA), on behalf of the family of

Charles Opado,

20/10/2014

LETTER OF UNDERTAKING

Dear Sirs,

Ship: PINE 6-At Mombasa on 13/10/2014

Claim/Incident: Death of Charles Opado (KPA employee), following accident on board on 13/10/2014

In consideration of, and upon condition that, you release from and/or refrain from arresting attaching or otherwise detaining the M.V. PINE 6 or any other ship or property in the same or associated ownership or management or control in connection with your claim against the owners of the M.V. PINE 6 relating to the above incident, we, Inchcape Shipping Services (K) Limited, on behalf of The Britannia Steam Ship Insurance Association Limited with whom the owners of the above mentioned vessel are entered as members for third party liability hereby undertake to pay to you such sum as may be agreed between the parties to be due to you as a result of an amicable settlement, or as may be found and adjudged to be due to you from the owners of M. V. PINE 6 by a court or tribunal of competent jurisdiction or, if appeals are made, after all appeals have been determined, provided always that our liability hereunder shall not in any circumstances exceed (including interest and costs) the sum of KENYA SHILLINGS TEN MILLION ONLY (KSHS. 10,000,000/=) or the limit of liability of the owners of the M.V. PINE 6 under the provisions of the applicable law whichever may be the less.

This agreement shall be governed by Kenya law and High Court of

Kenya shall have jurisdiction to hear and determine any action brought by you to enforce the provisions hereof.

This Letter of Undertaking is issued entirely without prejudice to any rights, claims, liabilities and/or defences which Messrs. Inchcape Shipping Services (K) Limited and the owners of M.V. PINE 6, her Charterers and Insurers may have under the relevant statutes in effect, all of which are hereby expressly reserved and none of which is to be regarded as waived.

Yours faithfully,

David Mackay,

Senior Vice President-Africa

Inchcape Shipping Services

(As Agents Only of The Britannia Steam Ship Insurance Association Limited)

28. **Order 4 Rule 5** of the Civil Procedure Rules, imposes an obligation on the claimant in the Plaintiff to show, who the Defendant is and that the Defendant is liable to be called upon to answer to the demand. At this point then, it is necessary to consider the facts as set out in the Plaintiff, being careful not to express opinions that would be prejudicial if this court finds that the suit raises a reasonable cause of action.

29. The Plaintiff/Respondent sued the 1st and 2nd Defendants as a beneficiary of the late **Charles Opado** who died aboard **Motor Vessel PINE 6** on **13th October, 2014**. The 2nd Defendant was sued on a claim that they issued a letter of undertaking dated **20th October, 2014** to pay the Plaintiff/ Respondent **Kshs.10,000,000/=** which reliance was placed upon to release the owners of **Motor Vessel "Pine 6"**. The **Black's Law Dictionary 8th Edition** gives the definition of an '**undertaking**' as, "**a promise, pledge or engagement**".

30. Upon considering the issues raised in the current suit, I find and hold that the applicants are important parties to this suit for the purpose of assisting the court to understand the circumstances under which the letter of undertaking was issued to the 1st Defendant on the **20th October, 2014** on behalf of **Motor Vessel "Pine 6"**.

31. Further, the joinder or mis-joinder of the "principal" as stated by the 2nd Defendant does not defeat a suit as is provided for under **Order 1 Rule 9** of the **Civil Procedure Rules**. Notwithstanding, the claims by the 2nd Defendant/Applicant that they are an agent to the principal, **Britannia Steam Ship Insurance Association Limited**, I find the suit raises a reasonable cause of action as against the 2nd Defendant/Applicant.

32. The upshot of the foregoing is that the application dated **8th April, 2019** herein is found to be without merit and accordingly dismissed.

33. Costs to be in the cause.

It is so ordered.

DATED AND SIGNED AT MOMBASA THIS 12TH DAY OF JULY, 2021.

D. O. CHEPKWONY

JUDGE

DELIVERED VIRTUALLY AT MOMBASA THIS 12TH DAY OF JULY 2021

A. ONG'INJO

JUDGE