



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 244 OF 2014

NM.....PLAINTIFF/APPLICANT

-VERSUS-

MOMBASA AIR SAFARI LIMITED.....DEFENDANT/RESPONDENT

CONSOLIDATED WITH CIVIL SUIT NO. 243 OF 2014

MAUREEN MOOMJY.....PLAINTIFF

-VERSUS-

MOMBASA AIR SAFARI LIMITED.....DEFENDANT

CONSOLIDATED WITH CIVIL SUIT NO. 245 OF 2014

AM.....PLAINTIFF

-VERSUS-

MOMBASA AIR SAFARI LIMITED.....DEFENDANT

CONSOLIDATED WITH CIVIL SUIT NO. 246 OF 2014

NM (A minor suing through her mother and next friend

MM).....PLAINTIFF

-VERSUS-

MOMBASA AIR SAFARI LIMITED.....DEFENDANT

RULING

1. The plaintiff/applicant in HCCC NO. 244 OF 2014 has lodged the Notice of Motion dated 28th March, 2019 supported by the grounds laid out on its body. The applicant is praying for the orders hereunder:

(i) THAT this Honourable Court considers as a preliminary point of law that the Convention for the Unification of Certain Rules for International Carriage by Air, opened for signature at Montreal on 28th May, 1999 (hereinafter referred to as the “Montreal Convention”) has force of law in Kenya by virtue of the ratification of the Montreal Convention by the Republic of Kenya, and pursuant to the Carriage by Air Act, 1993.

(ii) THAT this Honourable Court considers as a preliminary point of law that the Carriage by Air Act, 1993 operationalizes the Montreal Convention as part of the laws of Kenya.

(iii) THAT this Honourable Court considers as a preliminary point of law that the Carriage by Air (Application) Order 1993 applies the provisions of the Montreal Convention to non-international flights, that is to say, flights commencing and terminating within the country otherwise commonly referred to as domestic flights.

(iv) THAT this Honourable Court considers as a preliminary point of law that the Constitution of Kenya, 2010 operationalizes the Montreal Convention.

(v) THAT this Honourable Court be pleased to issue an order, as a preliminary issue of law, that the strict liability and limitation of liability rules prescribed under Article 21 of the Montreal Convention 1999 applies to the suit.

(vi) THAT this Honourable Court be pleased to issue an order, as a preliminary issue of law, that pursuant to the provisions of paragraph 2 of Article 21 of the Montreal Convention, the burden of proof of absence of the defendant's/respondent's negligence lies with the defendant/respondent.

(vii) THAT this Honourable Court be pleased to make a determination as a preliminary point of law, that damages to be awarded in this suit are to be awarded in accordance with the Montreal Convention.

(viii) THAT the orders sought herein do apply to HCCC NO. 243 OF 2014 (MM v Mombasa Air Safari Limited); HCCC NO. 245 OF 2014 (AM v Mombasa Air Safari Limited) and HCCC NO. 246 OF 2014 (NM (A minor suing through her mother and next friend MM v Mombasa Air Safari Limited).

(ix) THAT the costs of the application be provided for.

2. In her grounds, the applicant essentially argued that since the Montreal Convention was ratified in Kenya, the issue of liability and damages can be sought for under the said Convention.

3. The defendant/respondent filed Grounds of Opposition and Further Grounds of Opposition dated 23rd April, 2019 and 11th June, 2019 respectively in reply to the Motion. It basically argued that the issues being raised in the application can only be properly determined at trial and cannot therefore be raised at this preliminary stage, adding that in any event, the applicable laws in respect to the present case are the Carriage by Air Act and the Warsaw Convention and not the Montreal Convention as claimed by the applicant.

4. The respondent further conveyed its apprehension that there stands a high risk that either party will challenge this court's ultimate decision in respect to the application by way of an appeal, thus wasting both the court's time and the time that would have been properly utilized at trial.

5. Further to the above, the replying affidavit of *Mohamed Ali Harunany* was sworn in reiteration of the above-referenced Grounds of Opposition.

6. The parties filed and exchanged written submissions on the application. In her submissions, the applicant argued that it would be necessary for this court to determine which treaty or law is applicable in the case to determine the course of the trial and facilitate proper use of judicial time and expedient resolution of cases.

7. The applicant went on to submit that Kenya ratified the Montreal Convention on 7th January, 2002 and that the said Convention came into force on 4th November, 2003. The applicant added that consequently, the Montreal Convention replaced the Warsaw Convention and therefore forms part of Kenyan laws pursuant to Article 2 of the Constitution.

8. It was also the applicant's position that the Carriage by Air Act, 1993 applies the Montreal Convention to domestic flights and that the Convention has been applied by the courts in deciding various cases previously; thus disputing the applicability of the Warsaw Convention.

9. The applicants went ahead to argue that there are no issues of fact that are being presented for determination by this court but that the issues are purely of law.

10. In its opposing arguments, the respondent restated that the points being raised by the applicants should be determined at trial and not as preliminary points of law and that there stands a high risk of either of the parties challenging the ultimate decision of this court, citing various international judicial precedents where the respective courts were unwilling to consider preliminary issues raised before them.

11. The respondent urged that the parties be heard at the earliest opportunity, pointing out that one of its witnesses is a retired pilot aged 75 years and there arises the apprehension that he may not be available to testify if the hearing continues to be delayed. The respondent was careful to add that the application touches on certain issues that are in dispute, including whether it was negligent or not.

12. It was equally the respondent's submission that it was a term of the carriage between the respective plaintiffs in the consolidated cases and itself that the carriage would be governed by the Warsaw Convention and the relevant national laws, further arguing that courts of law cannot rewrite contracts entered into between parties save in special and specific instances.

13. The respondent in turn challenged the applicants' argument that the Montreal Convention replaced or otherwise amended the Warsaw Convention, arguing instead that the two (2) Conventions operate concurrently. The respondent took the stand that Carriage by Air Act, 1993 gives the Warsaw Convention the force of law in Kenya.

14. While admitting that the Montreal Convention has been ratified by Kenya, the respondent refuted its applicability to domestic carriage by air and automatically, the present suit.

15. As concerns prayer (vi) of the application, the respondent contended that the same is untenable for the reason that the burden of proof lies

with the alleging party as portrayed in the Evidence Act.

16. In making oral highlights, *Mr. Tito* counsel for the applicants largely reiterated the written submissions, save to argue that the application merely seeks to determine the applicable law in determining the present dispute. The advocate made his point that the term ‘Convention’ stipulated under the Carriage by Air Act refers to the Montreal Convention and not the Warsaw Convention as the respondent claims, adding that the courts have on prior occasions applied the Montreal Convention in Kenya.

17. *Mr. Ochieng* counsel for the respondent on his part likewise reaffirmed the contents of his client’s submissions as filed and the supporting authorities, further contending that to grant the orders being sought in the application may have the impact of prejudicing the parties. He argued that as it stands, no court has opted to apply the Montreal Convention to domestic flights/carriage.

18. *Mr. Tito* rejoined by pointing out that contrary to the statement made by opposing counsel, the courts have previously applied the Montreal Convention and urged this court to determine that the Montreal Convention is the applicable international law.

19. I have cautiously considered the grounds set out on the face of the application, the affidavits in support of and in opposition to the same and the Grounds of Opposition.

20. It is well noted that the orders being sought relate to the applicability of the Montreal Convention in the present matter, raised as preliminary point of law.

21. What then constitutes a preliminary point of law? To begin with, the term ‘point of law’ was defined under the *Black’s Law Dictionary, 8th edition* as:

“A discrete legal proposition at issue in a case.”

22. While I have not come across a clear-cut definition of a preliminary point of law, I appreciate that the same is associated with the widely held case of *Mukisa Biscuit Manufacturing Company Ltd v West End Distributors Ltd 1969 EA 696* which sought to define the term in line with preliminary objections as follows:

“A preliminary objection consists of a point of law which has been pleaded, or which arises out of clear implication out of the pleadings and which if argued as preliminary point may dispose of the suit...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion”

23. Also, the court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others [2015] eKLR* appreciated the following:

“...in *Hassan Nyanje Charo v Khatib Mwashetani & 3 Others, Civil Application No. 23 of 2014, [2014] eKLR; and in *Aviation & Allied Workers Union Kenya v Kenya Airways Ltd & 3 Others, Application No. 50 of 2014, [2015] eKLR, in which the Court further stated:**

“Thus a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.” ”

24. From the foregoing, it can be said that a preliminary point of law consists of a legal point which, if resolved, can easily lead to the disposal of a suit without necessarily going ahead to address other aspects of the case. It also goes to show that the facts as presented by the applicant are not disputed. Circumstances under which a preliminary point of law can be raised include the statute of limitations or issues to do with jurisdiction.

25. In the present instance, the parties are conflicted as to the applicable law between the Montreal Convention and the Warsaw Convention specifically. On the one hand, it is clear from the various complaints filed that the applicants (plaintiffs) are seeking damages under the Montreal Convention and Carriage by Air Act, 1993 among others. On the other hand, the respondent maintains that an agreement was entered into between itself and the respective plaintiffs to the effect that the carriage would be subject to the Warsaw Convention and the Carriage by Air Act.

26. It is thus evident from the above that whereas the parties are in agreement as to the fact that the dispute involves a domestic flight and that the Montreal Convention has been ratified by Kenya, there are contradictory views as to which Convention is applicable. It is thus clear that the facts in the present application are contested.

27. It therefore follows that in order to adequately address my mind on the issue of the applicable law, I would be required to go into the merits of the case by looking at the facts in keen detail and evaluating the evidence to be tendered at the trial. This task is better suited for a later date after the witnesses have been heard and the evidence considered.

28. I also noted that the applicant had sought for orders relating to liability and negligence in line with the Montreal Convention. Without regurgitating my views laid out hereinabove, I will state that not only is the applicable law in dispute, but the issue of liability and negligence can only be adequately considered once the parties have been heard on their respective cases and submissions filed. I am also certain that the issue of the applicable law/Convention coupled with the issues of liability and/or negligence can be addressed in the final submissions and

this court can have the opportunity of having a clearer picture of the dispute.

29. In the premises, I am not convinced that the points raised in the application must be determined at this preliminary stage. The same can exhaustively be determined at the conclusion of the hearing.

30. The upshot is that the application lacks merit and stands dismissed on that basis. However, given the nature of the application, I will make no order on costs.

Dated, signed and delivered at Nairobi this **9th** day of **October, 2019**.

L. NJUGUNA

JUDGE

In the presence of:

..... for the Plaintiff/Applicant

..... for the Defendant/Respondent