REPUBLICOF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 168 OF 2015

SAGAL TRAVEL AGENCY LIMITED…….…….....…...PLAINTIFF

-VERSUS-

SAHAM ASSURANCE COMPANY KENYA LIMITED.....DEFENDANT

RULING

[1] The Notice of Motion that is the subject of this Ruling is the one dated **28 October 2015.** It was filed herein by the Defendant, **Saham Assurance Company Kenya Limited,** pursuant to **Order 26 Rules 1, 5** and **6(1)**, as well as **Order 51 Rule 1** of the **Civil Procedure Rules**, **2010** for orders that:

> [a] The Plaintiff/Respondent be ordered to deposit security for the Defendant/Applicant's costs in the sum of **Kshs. 19,558,341/-** or any amount as the Court shall consider appropriate;
>
> [b] That the Plaintiff/Respondent do deposit the amount found to be proper and sufficient security for the Defendant/Applicant's costs in a joint account in the name of its advocates, **M/s Issa& Company** and that of the Defendant's advocates, **M/s Kaplan & Stratton**, within 30 (30) days of the date of the order;
>
> [c] That the suit be stayed pending the deposit by the Plaintiff/Respondent of the amount due as security for costs;
>
> [d] That in default of the Plaintiff/Respondent furnishing security for costs within the time specified by the Court, the Plaintiff/Respondent's claim against the Defendant/Applicant be dismissed with costs;
>
> [e] That the costs of this application be provided for.

[2] The application was premised on the grounds that the Plaintiff's claim herein against the Defendant is for, inter alia, damages in the sum of **Kshs. 964,583,776.80**; and that the Plaintiff having pleaded in the Plaint that it is currently out of business and is no longer a going concern, the Defendant has sufficient cause to be apprehensive that if successful it will be unable to recover from the Plaintiff costs incurred in defending this suit. The grounds have been augmented by the affidavit of **Caroline Laichena** annexed thereto. In the Defendant's estimation, the costs of defending this action, in which, as pleaded in the Plaint dated **1 April 2015**, the Plaintiff is seeking, *inter alia*, damages of **Kshs. 964,583,776.80** is at least **Kshs. 19,558,341;** yet the Plaintiff has expressly stated at paragraph 43 of the Plaint that it effectively collapsed

and ceased being a going concern as of **19 September 2014.** It was thus the case of the Defendant that justification has been made as to why the Plaintiff should be required to furnish security for costs.

[3] The Plaintiff's response to the application was by way of the Replying Affidavit sworn by its Managing Director, **Abdiqani Ali**, sworn on **17 November 2015**. According to the Plaintiff, it has a bona fide claim against the Defendant that has high chances of success and therefore ought to be allowed to pursue the same to conclusion. The Plaintiff further averred that it had traded with the **International Air Transport Association (IATA)** for 7 years from **March 2007** to **19 September 2014** when, as a result of the Defendant's unjustified refusal to renew the Default Insurance Programme (DIP) Cover, the agency status with **IATA** was terminated.

[4] According to the Plaintiff, it was a very profitable company at the time, with a turnover of about **Kshs**. **1,160,779,859.12** as at **31 December 2013**; and that the Defendant was aware that its refusal to renew the DIP Cover would have the effect of withdrawal by **IATA** of the Plaintiff's access and authorization to **IATA's** ticketing facility thus rendering the Plaintiff unable to issue tickets to its clients,and thereby adversely affecting the Plaintiff's business. It was therefore urged, on behalf of the Plaintiff, that the Defendant should not be allowed to benefit from its wrongdoing; and that granting the orders sought by the Defendant would not enhance the course of justice but would only serve to further punish the Plaintiff by condemning it to pay anticipatory costs before the hearing and determination of the case on its merits. The Plaintiff therefore urged the Court to exercise its discretion in its favour by dismissing the application with costs.

[5] Having carefully considered the application, the response thereto as well as the submissions made herein by Learned Counsel, it is evident that most of the facts are not in dispute. It is not in dispute that at the material time, the Defendant was the only insurer contracted by **IATA** to provide the DIP Cover, a pre-requisite by **IATA** for travel agents; or that the Plaintiff was one such travel agent. It is the Plaintiff's case that up to **September 2014** the Plaintiff was covered under the Defendant's DIP Programme, but that its request for extension of the cover for the year **2015/2016** was declined by the Defendant. The Plaintiff has accordingly sued the Defendant claiming, inter alia, damages for loss of business in the sum of **Kshs. 964,583,776.80,** on the ground that the refusal by the Defendant to renew its DIP Cover for **2014/2015** was directly responsible for the disintegration of its business. It was thus on the basis of the aforesaid sum that the Defendant now seeks that security for costs be provided by the Plaintiff, in the light of its admission that its business has since crumbled.

[6] Order 26 Rules 1 and 5(1) of the Civil Procedure Rules, under which the application has been filed provides that:

> **"In any suit the court may order that security for the whole or any part of the costs of any defendant or third or subsequent party to be given by any other party; ... If security for costs is not given within the time ordered and if the plaintiff is not permitted to withdraw the suit, the court shall, upon application, dismiss the suit."**

[6] In addition to the foregoing, **Section 401** of the C**ompanies Act, Chapter 486 of the Laws of Kenya** (now repealed but applicable herein by dint of **Section 74** of the Sixth Schedule to the Companies Act, 2015) it is the law that:

> **"Where a limited company is a Plaintiff in any suit or other legal proceedings any judge having jurisdiction in the matter may if it appears by credible testimony that there is reason to believe the company will be unable to pay the costs of the Defendant, if successful in his defence require sufficient security to be given for the costs and may stay the proceedings until the security is given."**

[7] the premises, it is in the discretion of the Court to grant or refuse to grant an order compelling the Plaintiff to furnish security for costs, and, as is the case in such situations, there are settled principles to guide the Court in the exercise of its discretion, which principles were well articulated by the Court of Appeal in **Messina & Another vs. Stallion Insurance Co. Ltd [2005] 264** as hereunder:

[a] the Court has a complete discretion whether to order security, and accordingly, it will act in the light of all the relevant circumstances;

[b] the possibility or probability that the Plaintiff Company will be **deterred** from pursuing its claim by an order for security is not, without more, a sufficient reason for not ordering security;

[c] The Court must carry out **a balancing exercise**. On the one hand it must weigh the injustice to the Plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim;

[d] In considering all the circumstances, the Court will have regard to the Plaintiff company's **prospects of success**. But it should not go into the merits in detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure;

[e] The Court in considering **the amount** of security that might be ordered will bear in mind that it can order any amount up to the full amount claimed by way of security, provided that it is more than a simply nominal amount; it is not bound to make an order of a substantial amount;

[f] Before the Court refuses to order security on the ground that it would **unfairly stifle** a valid claim, the Court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled;

[g] The **lateness** of the application for security is a circumstance which can properly be taken into account.

[8] Applying the foregoing principles to the instant matter, the record does show that the application was promptly filed by the Defendant, granted that it filed its Reply to Defence in respect of the Counterclaim on **9 September 2015**. Indeed, it was not the Plaintiff's case that there was delay in the filing of the instant application. Thus the only two issues to consider are the Plaintiff's prospects of success and whether by allowing the application, the Plaintiff's case would be thereby stifled.

[9] The Defendant's contention that the Plaintiff had not pleaded a cause of action against it that is known to law, and that the Plaintiff had neither established a contract with the Defendant nor shown that the Defendant owed it a duty of care. It did posit that it was the Plaintiff's failure to meet **IATA** requirements that led to the collapse of its business, and not the Defendant's refusal to renew its insurance with **IATA** on behalf of the Plaintiff. It was thus the argument of the Defendant that it has a *prima facie* case against the Plaintiff. Indeed the Defendant did file an elaborate Defence and Counterclaim to the Plaintiff's claim herein.

[10] The case of **Mrao Limited vs. First American Bank Limited & 2 Others [2003] KLR 125** is an authority on point in ascertaining whether or not a *prima facie* case has been made out by the Plaintiff. In that case **Bosire, JA** had the following to say in answer to the question of what amounts to a prima facie case:

> **"...I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."**

[11] The Plaint does show that there existed an agreement between the Plaintiff and **IATA**, and that to carry on business as a travel agent, it had to be a member of **IATA** and obtain the requisite approvals and licences. The Plaintiff further averred that prior to **2000**, to obtain and maintain an **IATA** licence, travel agents had to obtain security by way of a bank guarantee of up to **USD 1,500,000,000**; but that after **2000**, an alternative security in the form of Credit/Liability Insurance, named the Default Insurance Programme

Cover, was introduced. It was in that connection that the Plaintiff averred that it did not have an option as to the insurance service provider as the Defendant was the sole insurer appointed by **IATA** for the provision of DIP Cover and therefore the Defendant had been insurer since the year **2007** for the provision of the DIP Cover; and that during the aforesaid period, the Plaintiff had been remitting its Billing and Settlement Plan (BSP), including the Defendant's premiums on time without default. In the premises, it cannot be said that the Plaintiff has no cause of action against the Defendant.

[12] The Plaintiff further averred that the Defendant, in abuse of its dominant position, arbitrarily declined to renew its DIP Cover for the year **2014/2015**, thereby leading to a dip in the Plaintiff's business by **Kshs. 964,583,776.80**. It was thus the Plaintiff's contention that the Defendant thereby breached its statutory duty under **Section 23** of the **Competition Act, Chapter 504 of the Laws of Kenya**. The Defendant on its part, conceded that it had been providing the Plaintiff with annual DIP Cover; but added that the Plaintiff was at all material times required to demonstrate its financial soundness and ability to meet its obligations to IATA to be eligible for DIP Cover renewal. It was thus the Defendant's posturing that it conducted an evaluation of the Plaintiff's accounts for the purposes of considering whether the Plaintiff qualified for renew of the DIP Cover for 2014/2015; and that on **18 September 2014,** IATA served it with a Notice of Default and Notice of Irregularity demanding settlement of all outstanding dues, failure to which the Plaintiff's access to BSP would be denied. That since the Plaintiff failed to remedy its default, it was ineligible for DIP Cover renewal.

[13] In addition to the foregoing, the Defendant also laid a claim against the Plaintiff by way of Counterclaim for **Kshs. 1,019,344.10** and **USD 1,452,192.11**, contending that on or about **21 December 2014**, it received a claim from IATA to the effect that the Plaintiff had defaulted in making remittances as required under the Passenger Sales Agency Agreement to the tune of the sums aforestated. That on **31 March 2015**, the Defendant, by reason of the Plaintiff's default, settled the aforesaid claim by making payments in the sums of **Kshs. 1,019,344.10** and **USD 1,452,192.11**, thereby acquiring full legal subrogation rights in accordance with the terms and conditions of the DIP Cover. It was on that basis that the Defendant counter-claimed for the aforesaid amounts. together with interest and costs.

[14] Thus, having balanced the rights of the parties, as I am required to do, I am satisfied that the Plaintiff has evinced a triable grievance which calls for rebuttal by the Defendant, and that the Defendant also has good cause for complaint against the Plaintiff as set out in its Defence and Counter-claim. As to the merits or otherwise of each party's case, that remains to be proved at the hearing.

[15] As to whether the making of an order for security would have the effect of stifling the Plaintiff's cause of action, reliance was placed on Paragraph 43 of the Plaint as the paragraph evidencing the Plaintiff's impecuniousity, wherein the Plaintiff pleaded thus:

> **"The Plaintiff's business, after having successfully operated as an IATA agency for seven (7) yearssince March 2007, effectively collapsed and ceased to be a going concern on 19th September 2014, due the Defendant's actions that led to the termination of the Plaintiff's agency status with IATA."**

[16] That having been stated, it is pertinent to restate that the onus shifted to the Plaintiff to demonstrate, as per its contention, that an order for security would have the effect of stifling its claim against the Defendant. In **Keary Developments Limited vs Tarmac Construction**, the court, citing the case of **Kloeckner & Co. AG vs Gatoil Overseas Inc [1990] CA** stated thus:

> **"...The approach, in my view, should be that the onus is on the appellant to satisfy the Court of Appeal that the award of security for costs would prevent the appeal from being pursued, and that it is not sufficient for an appellant to show that he does not have the assets in his personal resources...the appellant must, in my view, show not only that he does not have the money himself, but that he is unable to raise money from anywhere else..."**

[17] The Plaintiff posited that were it not for the Defendant's actions, it would not be in the current predicament; and therefore submitted that the Defendant should not be allowed to clog its right to

ventilate its cause of action herein by the imposition of onerous terms as to security for costs. In this respect the Plaintiff relied on the case of **Concord Insurance Co. Ltd vs NIC Bank Ltd** and urged the Court to find that the instant application is an abuse of the court process and ought to be dismissed with costs.

[18] Thus, balancing the interests of the parties herein, it is manifest that, whereas the Plaintiff has a constitutional right to have his case heard and determined on the merits without undue hindrances, it has admitted that it has ceased business. There was no assurance given in the Replying Affidavit as to how any costs arising herein would be paid by the Plaintiff. It was not specifically stated that it is in funds or has assets to cater for the Defendant's costs, should it be called upon to pay such costs. In **the Keary Development Case** (supra) it was held that:

> **"The court must carry out a balancing exercise. On the one hand it must weigh the injustice to the Plaintiff, if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the Defendant, if no security is ordered and at the trial the Plaintiff's claim fails and the Defendant finds himself unable to recover from the Plaintiff the costs which have been incurred by him in his defence of the claim."**

[19] Accordingly, I am satisfied that sufficient cause has been shown by the Defendant to warrant the issuance of the orders sought in the Notice of Motion dated **28 October 2015**. I would however reduce the amount from **Kshs. 19,558,341** to **Kshs. 2,000,000,000** so as not to stifle the Plaintiff's cause of action. It is further directed that the amount be deposited in an interest earning bank account in the joint names of Counsel on record herein for the parties within a period of 45 days from the date hereof.

Costs of the application to be in the cause.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF FEBRUARY, 2017

OLGA SEWE

JUDGE