REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NUMBER 442 OF 2014

PEER CORET. ……. PLAINTIFF

VERSUS

KENYA AIRWAYS LIMITED. …. DEFENDANT

R U L I N G

The application for determination by the court is the Notice of Motion dated the 28th May, 2015 by the Defendant/Applicant. It is expressed to be brought under Order 2 Rule 15(1) (a) of the Civil Procedure Rules and it seeks for the following orders: -

1) The plaint filed on the 6th December, 2014 be struck out.

2) The Plaintiff does pay the defendant the costs of this application and of the suit.

It is based on the grounds that: -

1) The plaint does not disclose a reasonable cause of action against the defendant.

2) The claim against the defendant has been extinguished by virtue of Section 7 of the Carriage by Air Act, 1993 as read together with Article 29 of the Warsaw Convention and Article 35 of the Montreal Convention, 1999 having been brought more than two years from the date when the cause of action arose.

3) The Plaintiff's claim for punitive and exemplary damages is not sustainable in view of Article 29 of the Montreal Convention, 1999.

The Respondent has opposed the application vide a replying affidavit sworn on 9th November, 2015 by Peer Coretta, the Plaintiff, wherein he avers that his claim is founded on tort which, in his view, is sustainable within a period of three (3) years from the date of the cause of action.

He further depones that his claim is founded on the law of Contract as the Defendant's Airline breached the contract with him to ferry him to his destination safely and as scheduled. He avers that his claim discloses a sustainable cause of action which the Defendant wishes to remove from him citing inapplicable provisions of statutes that do not defend his entitlement to fairness and substantive justice as envisaged under Article 159(2) of the Kenyan Constitution. He has urged the court to dismiss the application and proceed to hear the matter on merits.

The brief facts of the case as captured in the pleadings are that the Plaintiff herein moved this Honourable

Court by way a plaint dated 6th December, 2014 and filed on the same date seeking the following orders: -

a) General damages for mental anguish and breach of contractual obligations by the defendant.

b) Punitive/Exemplary damages.

c) Costs and interests.

In the plaint, the Plaintiff pleads that on or about the 10th day of December, 2011 he was a confirmed passenger on flight No. KQ 508 vide Ticket No. 7062999310572 from Nairobi to Dakar Senegal. It is further alleged that the Defendant in breach of the said Contract of Carriage overbooked the said flight which led to the Plaintiff being off loaded from the flight No. KQ 508 and booked onto KQ 510 for travel on the 11th day of December, 2011.

The Plaintiff avers that in further breach of its carriage duties and obligations, the defendant misplaced the Plaintiffs luggage tagged as KQ 934919 for a period of 4 days causing the Plaintiff great inconvenience, mental anguish and financial embarrassment for a period of 26 hours. The particulars of breach are set out in paragraph 7 of the plaint which is: -

a) Failing to provide the flight on time or at all until after a period of over 26 hours.

b) Failing to provide any or sufficient information of the delay of the flight.

c) Failing to provide alternative arrangement or accommodation for hours.

d) Abandoning the Plaintiff at the airport without any explanation.

e) Misplacing the Plaintiff's luggage for 4 days without any explanation

In its defence filed on the 11th May, 2015, the Defendant admitted having offloaded the Plaintiff from flight No. KQ 508 and booking him on flight No. KQ 510 but denies that this was in breach of the contract of carriage. It has also denied the particulars of breach attributed to it. The Defendant further avers that the Plaintiff's claims have been extinguished having been brought more than two years after the date when the cause of action arose and had in its defence put the Plaintiff on notice that it shall apply to strike out the suit and hence the application dated the 28th May, 2015.

The application was canvassed by way of written submissions which the respective parties filed.

After summarizing the case by each party, and in my view, the following are the issues for determination: -

1) Whether the Plaintiff's claims have been extinguished.

2) Does the limitation of actions act apply to claims that arise from a carriage by air contract?

3) Who should bear the costs of the suit?

I have carefully considered the application, the replying affidavit and the submissions made by the learned counsels. The application for consideration has been brought under Order 2 Rule 15 inter alia, which provides: -

"At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that: -

a) It discloses no reasonable cause of action or defence in law or

b) It is scandalous, frivolous or vexatious, or

c) It may prejudice, embarrass or delay the fair trial of the action, or

d) It is otherwise an abuse of the process of the court."

But even in light of the above clear legal provision, the power to strike out a pleading has been held over the years to be a draconian measure which ought to be employed only as the last resort or even then, only in the clearest of the cases. This was the holding in the case of **D.T. Dobie Company Limited Vs Muchina (1982) KLR** at page 9 where the court expressed itself as follows: -

"No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere resemblance of a cause of action provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it."

In the case of **D.T. Dobie** (supra) and in espousing the above principle, Madan J. A. (as he then was) adopted the finding of sellers L. J in the case of **Wedlock Maloney & Others (1965) I W.L.R. 1238** where the learned judge had this to say while setting out the principles to be considered by a court in striking out a pleading: -

"This summary jurisdiction of the court was never intended to be exercised by a minute and a protracted examination of documents and the facts of the case in order to see whether the Plaintiff really has a cause of action. To do that is to usurp the provision of the trial judge and to produce a trial of the case in Chambers on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power."

Further and in the same case Danck Werts L. J detailed: -

"the power to strike out any pleading or any part of a pleading under this rule is not mandatory but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading."

In the 4th Edition, volume 36 of Halsbury's Laws of England at Paragraph 73 the writer has this to say on striking out the pleadings: -

"In judging the sufficiency of a pleading for this purpose, the court will assume all the allegations in it to be true and to have been admitted by the other party. If the statement of claim then shows on the face of it that the action is not maintainable or that the absolute defence exists, the court will strike it out. A pleading will not, however, be struck out if it is merely demurrable, it must be so bad that no legitimate amendment could cure the defect. The jurisdiction to strike out a pleading ought to be exercised with extreme caution and only in obvious cases."

Back to our case, the Defendant/Applicant has argued that the Plaintiff's claim for the delay in travelling and misplacement of the luggage are extinguished having regard to the Carriage by Air Act (the act) and the convention for the unification of certain rules for international carriage by air (the Montreal Convention).

Section 3 of the Act provides as follows: -

"the provisions of the convention shall so far as they relate of the carriers, carrier's servants

and/or agents, passengers, consignors, consignees and other persons, and subject to the provisions of this Act, have force of law in Kenya in relation to any carriage by air to which the convention applies, irrespective of the nationality of the aircraft performing that carriage."

The convention referred to in the Act is the Convention set out in the first schedule of the Act, that is, the convention for the unification of certain Rules relating to International Carriage by Air, signed at Warsaw which has now been replaced by the Montreal Convention. The Montreal Convention was ratified in Kenya on the 7th January, 2002 and has been in operation since November, 2003 and is applicable in Kenya by Virtue of Article 2(5) of the Constitution which provides: -

"The general rules of international Law shall form part of the law of Kenya".

While article 2(6) provides: -

"Any treaty or convention ratified by Kenya shall form part of the law of Kenya under the Constitution.

This position was affirmed by the Court of Appeal in Civil Appeal No. 20 of 2013 (**Karen Njeri Kandie Vs Alssan Ba & Another (Unreported**).

"The applicability of the Montreal Convention in Kenya was also affirmed by the High Court in Civil Case Number 39 of 2006 (Hon. Ahmed Mohammed Khalif & another Vs Mia International Limited & Another) where the learned Judge held that a claim for damages based on a contract of carriage by air is governed by the Act and the Montreal Convention."

A similar conclusion was arrived at by Justice Odunga in the case of **E. M. S. Vs Emirates Airlines (2012).**

On his part, the plaintiff argues that his claim is based on the Law of Contract and not under the tort of negligence and for that reason, he contends that the claim was filed within time. This argument, however, does not hold in the face of the clear provision of Article 35(1) of the Montreal Convention which provides as follows: -

"The right of damages in a contract for carriage by air shall be extinguished if the action is not brought within a period of two years, reckoned from the date of the arrival at the destination or from the date on which the aircraft ought to have arrived or from the date on which the carriage is stopped."

It is important at this stage to examine the meaning of the word "***extinguished"***.

According to Concise Oxford English Dictionary: it means ***"put an end to".***

The Defendant has referred to **Contracts of Carriage by Air** by Malcolm Clarke for the definition and the same is defined as hereunder: -

Extinguished means more than merely unenforceable, MC Article 35 is headed ***"Limitation of Actions"*** however, in each convention the two year period is not a mere period of limitation operating at its expiration to bar a remedy. It is an integral part of a right. *"if a person's right has been extinguished, it is non-existent…. Finished gone forever; whether invoked as a cause of action or as a defence; and a rule of the lex fori which "authorizes the extension of the time prescribed for the institution of proceedings cannot operate to revive a right which has been extinguished.*

The Plaintiff's contention that his cause of action is based on the law of contract seems to suggest that under the Kenyan Law and considering the Limitation of Actions Act (Cap 22) Laws of Kenya, his cause of action is validly before the court. This then brings me to the other issue of which law is applicable in this case; is it the Carriage by Air Act, 1993 as read together with the Montreal Convention 1999 or is it

the Law of Limitation Act? Simply put, does the said Act and the convention oust the jurisdiction of the Kenya Courts?

The issue was well argued out by Justice Odunga in the case of **E. M. S. Vs Emirates Airline (2012) eKLR** where he argued that Article 29(2) of the Convention provides that questions of procedure shall be governed by the law of the court seized of the case in which case, the Limitation of Actions Act, Cap 22 would apply but since Limitation Statute is not a procedural law, but rather a substantive law, then it cannot apply. Accordingly, the provisions of the Limitation of Actions Act cannot be invoked to supplement the provisions of Article 29(2) of the Convention in order to disregard the provisions of Article 29 (1) thereof.

I am persuaded by the finding of Justice Odunga that the applicable law herein is the Carriage by Air Act and the Montreal Convention and not the Limitation of Actions Act.

Having made that finding, is the Plaintiff's cause of action time barred? Section 7 of the said Act and Article 29 of the Montreal Convention requires that any claim arising under the Act should be brought within 2 years of the act or breach complained of. This being the case, and the Plaintiff's case having been filed outside the statutory limit under the Act, the same is, therefore, extinguished.

I do not agree with the Plaintiff that the court can invoke the provisions of Article 159(2) of the Constitution to revive a claim that has been extinguished by a statute.

In the upshot, the application dated 28th May, 2015 has merits.

The plaint herein is struck out with no orders as to costs.

Dated, signed and delivered at Nairobi this 14th day of July, 2016.

…….

L NJUGUNA

JUDGE

In the presence of

…… ***for the Plaintiff***

…….. ***for the Defendant.***