E.M.S

(Suing as next friend of J.M.I, a Minor)…….....….PLAINTIFF

VERSUS

EMIRATES AIRLINES.……..……..……DEFENDANT

R U L I N G

In this suit, the plaintiff is claiming damages, both special and general arising from an alleged accident on 10th December 2007 aboard the defendant's aircraft resulting from the giving away of one of the luggage compartments in the said aircraft. It is alleged that the minor herein sustained injuries when the luggage slipped and fell from the said compartment onto the said minor. The giving away of the said compartment is alleged to have been occasioned by the negligence of the defendant herein. It is further alleged that the said occurrences also amounts to breach of contract to transport the passengers and cargo in safe and secure conditions. Further the said action is alleged to give rise to a common law liability as an occupier of the premises in question.

The defendant did file a defence in which it pleaded that the plaint is time barred pursuant to the Carriage by Air Act (hereinafter referred to as the Act) as well as the Convention for the Unification of Certain Rules for International Carriage by Air (also known as the Montreal Convention) (hereinafter referred to as the Convention). The defendant accordingly put the plaintiff on notice that it would on that ground apply for the dismissal of the suit with costs. While admitting that the plaintiff and her son were passengers aboard the said aircraft, the defendant denies that the accident was caused by its negligence and further denies knowledge of the serious injuries alleged in the plaint. However, the defendant avers the minor was given first aid and monitored until his safety was ensured before proceeding with the journey. According to the defendant the damage, if any, has been tremendously exaggerated.

Suffice to state that the plaintiff filed a reply to the said defence challenging the applicability of the said convention to the instant cause of action and maintained the case as pleaded in the plaint.

Having forewarned the plaintiff of its intentions, the defendant put the said threat into action when by a Notice of Motion dated 19th March 2012 expressed to be brought under Order 2 rule 15(1)(a), Order 51 rule 1 of the Civil Procedure Rules, section 7 of the said Act, Article 7 of the said Convention, section 3A as well as all other enabling provisions of the law, the defendant applied for the plaint herein to be struck out and the suit be dismissed with costs as well as the costs of the same application. The said application is based on the following grounds:

a) That the plaint herein discloses no reasonable cause of action;

b) That the plaint herein was filed after the Plaintiff's right to damages had been extinguished by virtue of Section 7 of the Carriage by Air Act No. 2 of 1993 and Article 35 of the Convention from the Unfication of certain rules for intentional carriage by Air (The Montreal Convention of the 28th May, 1999);

c) That the subject matter of this suit is exclusively governed by the provisions of the Carriage by Air Act No. 2 of 1993 under whose provisions this suit is time barred;

d) That the cause of action arose on the 10th December, 2007 and the suit ought to have been filed within two (2) years reckoned from that date.

In compliance with the provisions of Order 2 rule 15(2) of the Civil Procedure Rules,no affidavit was sworn in support of the said application.

In opposition to the said application, the defendant filed grounds of opposition dated 30th May 2012 which state as **follows:**

1. The plaintiff's suit as filed is not time-barred.

2. Having submitted to the jurisdiction of the Kenyan courts, the Applicant must *ipso facto* submit to the statutory restrictions on the exercise of that jurisdiction.

3. The application of the Judicature Act [Cap. 8] is paramount.

4. Questions of procedure to wit limitation of actions are governed by the law of the court seized of the matter.

5. The application lacks merits and ought to be dismissed with costs.

In its written submissions in support of the application, the defendant states that since the plaintiff's claim arose out of damages suffered during the carriage by air, the contract between the plaintiff and the defendant is a Carriage by Air Contract which is a special contract specifically governed by the Carriage by Air Act No. 2 of 1993. Accordingly, the general law of contract is inapplicable. That Act, it is submitted, gives effect to the Convention concerning International Carriage by Air known as Warsaw Convention as amended by the Hague protocol, 1995 to enable rules contained in that convention to be applied with or without modifications. While the Convention referred to in the Carriage by Air Act is Warsaw Convention, it is submitted that the same has since been replaced by the Convention for the Unification of Certain Rules for International Carriage by Air, the Montreal Convention, which was ratified by the Republic of Kenya on the 7th January 2002 and commenced on 4th November 2003. Relying on the **Principles of International Trade Law as a Monistic System**, it is submitted the coming into operation of the Montreal Convention replaces the Warsaw system and applies to all carriage or cargo performed for reward. Accordingly, by replacing the Warsaw Convention, the Montreal Convention has been incorporated into the Act and its ratification domesticated in making it part of the Laws of Kenya. Being the specific Act governing the Contract of Carriage by Air, the Act excludes the provisions of any other law inconsistent with its provisions from applicability and therefore it is the operational law as far as Carriage by Air is concerned. Accordingly, it is contended that the applicable laws are the Act and the said Montreal Convention.

On the issue whether the plaintiff's action is time barred, it is submitted that section 7(1) of the Act as read with Article 35 of the Montreal Convention provide that an action such as the present one should have been brought within two (2) years from the date of arrival at the destination or from the date on which the Aircraft ought to have arrived, or from the date on which the Carriage stopped. In this case it is submitted that since the plaintiff's cause of action arose on the 10th December 2007, the claim ought to have been brought on or before the 10th December 2009. However the same was not brought till 8th December 2010 nearly 3 years after the cause of action arose. As the plaintiff has not sought extension of time the suit is time barred.

According to the defendant, with the extinction of the plaintiff's cause of action resulting from the foregoing, the defect cannot be cured. The defendant further cites **Farida Abdullahi Ibrahim and 2 Others vs. Gulf Air Limited HCCA No. 95 of 2002** and **Alitalia Airlines vs. Skylink Air Services**

Limited HCCC No. 303 of 2001 in support of its position.

In her submissions, the plaintiff submits that under Article 29(2) of the Convention, the method of calculating the period of limitation shall be determined by the law of the court seized of the case. Since the accident occurred within the jurisdiction of Kenya, it is submitted that the provisions of the Limitation of Actions Act, apply with the result that the limitation period is three years. It is further submitted that under Article 28(2) of the Convention questions of procedure are governed by the law of the court seized of the case. Therefore as the accident in question took place at Jomo Kenyatta International Airport when the plane was on the ground and the defendant ordinarily has its principal place of business in Nairobi Kenya, questions of procedure would be governed by the statutory laws of Kenya where the claim was filed. With reference to the **Alitalia Airlines Case** it is submitted that a litigant who submits to the jurisdiction of the Kenya Courts must *ipso facto* submit to the statutory restrictions on the exercise of that jurisdiction. It is further submitted that the authorities cited by the defendant did not deal with Article 29(2) of the Convention. The Act, it is submitted has several sections where Kenyan Laws can be invoked. It is submitted that the Warsaw Convention did not oust the jurisdiction of Kenyan Court but simply blended into it while providing that questions of procedure would be governed by the law of the court seized of the case and **Halsbury's Laws of England 3rd Edn. Vol. 5 paragraph 548** is cited in support. The amendment of the Warsaw Convention, it is submitted, did not simultaneously lead to the amendment of the Act and there is no provision in either convention that oust the applicability of Kenyan Laws in determining cases of this nature. Relying on sections 1A, 1B and 3A of the Civil Procedure Act, it is submitted that the Court has the discretion and power to overlook the technical objection and breathe life into this suit by allowing the plaintiff, if at all the suit is found to have been filed out of time, to apply for enlargement of time. However, it is the plaintiff's position that the suit was filed within time under the provisions of the Limitation of Actions Act, Cap 22 Laws of Kenya.

As the title of this suit indicates the claimant the person who was allegedly injured is a minor. Order 32 rule 1(1) provides as follows:

Every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor.

However as can be seen from the plaint this is in fact instituted in the name of the next friend of the minor. In my view, the suit should be brought in the name of the minor suing through the next friend. However, as no issue arose from the title, I will say no more thereat.

As already indicated the application was primarily under Order 2 rule 15 of the Civil Procedure Rules. In the exercise of its powers under the said provision there are certain well established principles that a court of law must adhere to. Whereas the essence of the said provisions is the striking out of a suit, that is a jurisdiction that must be exercised sparingly and in clear and obvious cases and unless the matter is plain and obvious, a party to civil litigation is not to be deprived of his right to have his suit tried by a proper trial. 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. The power to strike out pleadings must be sparingly exercised and it can only be exercised in clearest of cases. If a pleading raises a triable issue even if at the end of the day it may not succeed then the suit ought to go to trial. However where the suit is without substance or groundless or fanciful and or is brought or is instituted with some ulterior motive or for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process, the court will not allow its process to be as a forum for such ventures. To do this would amount to opening a front for parties to ventilate vexatious litigation which lack bona fides with the sole intention of causing the opposite party unnecessary anxiety, trouble and expense at the expense of deserving cases contrary to the spirit of the overriding objective which requires the court to allot appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

In the celebrated case of **D T Dobie & Company (Kenya) Ltd. vs. Joseph Mbaria Muchina & Another [1982] KLR** 1the Court of Appeal held:

"Reasonable cause of action" means a cause of action with some chance of success when (as required by paragraph 2 of the Order 6 rule 1) only the allegations in the plaint are considered. A cause of action is an act on the part of the defendant, which gives the plaintiff his cause of complaint...A pleading will not be struck out unless it is *demurrable* and something worse than *demurrable* and the rule is only acted upon in plain and obvious cases and the jurisdiction should be exercised with extreme caution. The Court must see that the plaintiff has got no case at all, either as disclosed in the statement of claim, or in such affidavits as he may file with a view to amendments and must not dismiss an action merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved".

In this case it is contended that since the accident took place before the plane took of the law applicable is

the Law of Kenya with respect to limitation. In **Kihungi & Another vs. Iberia Airlines of Spain SA [1991] KLR 1** the Court of Appeal expressed itself as follows:

"The boarding ticket or card is issued only after a passenger is accepted for the flight. So the issuing of the boarding card to the deceased was evidence that he had been accepted for the flight. Death took place after the decease had come under the control and direction of the Airlines and was engaged actively in operation of embarking...Requirements of Article 17 of the Warsaw Convention having thus been satisfied the carrier, that is the respondent, is liable for damages sustained by the appellants (plaintiffs) on account of the death of the deceased unless the carrier can show that at the time the deceased met his death he was engaged in operations other than those of embarking. So long as a passenger is on board the aircraft or during the time when his movements are under the control of the carrier, then if an accident occurs during that time, the burden of proof shifts from the plaintiff to the defendant, when it is the latter's turn to prove that the injury or death consequent upon the accident did not occur as a result of a breach of duty by the carrier".

In other words what the Court was saying was that once a passenger is aboard an aircraft and his movements are under the control of the airline, he is covered by the Convention. Accordingly, I do not buy into the submission that the minor was not covered under the Act simply because the plane was aground rather than airborne.

The other issue raised was whether Article 29 of the Convention ousts the jurisdiction of the Kenyan Courts with respect to limitation. It was argued that since Article 29 (2) provides that questions of procedure shall be governed by the law of the court seized of the case, then Limitation of Actions Act, Cap 22 applies. In my view, limitation statute is not a procedural law. Rather it is a substantive law. 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. In my view the procedure contemplated under Article 29(2) encompases the existence of the right to claim damages and only relates to the process to be followed which is the procedural law applicable to the court seised of the case which in our case would be the Civil Procedure Act. However, the Civil Procedure Act is not the law that provides for limitation.

It follows that having found that the Convention applies, by virtue of the provisions of section 7 of the Act no action can be brought after more than two years.

A distinction must, however, be made between the Limitation of Actions Act and the Convention. The Limitation of Actions Act provides that certain causes of action may not be brought after the expiry of a particular period of time. In other words the Act bars the bringing of particular actions after the specified periods of limitation. The Act does not extinguish causes of action. In **Rawal vs. Rawal [1990] KLR 275,Bosire, J** (as he then was) stated:

"The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a defendant after he had lost evidence for his defence from being disturbed after along lapse of time. It is not to extinguish claims".

This decision cited Dhanesvar V Mehta vs. Manilal M Shah [1965] EA 321 where it was stated:

"The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand to protect a defendant after he had lost the evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case".

The same position was taken in Iga vs. Makerere University [1972] EA 65 in which it was held:

"A plaint which is barred by limitation is a plaint "barred by law". A reading of the provisions of sections 3 and 4 of the Limitation Act (Cap 70) together with Order 7 rule 6 of the Civil Procedure Rules seems clear that unless the appellant in this case had put himself within the limitation period

by showing the grounds upon which he could claim exemption the court "shall reject" his claim...The Limitation Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for, and when a suit is time-barred, the court cannot grant the remedy or relief".

Article 29(1) of the Convention, on the other hand extinguishes the right to damages if an action is not brought within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft stopped.

It is clear therefore the two legal regimes (the limitation statute and the Convention) do not apply interchangeably. Whereas one only bars the bringing of a claim after expiry of a certain period of time without necessarily extinguishing the claim, the other regime expressly extinguishes the claim.

In **Alitalia Airlines Vs. Skylink Air Services Limited Nairobi (Milimani) HCCC No. 303 of** 2001 **Mbaluto, J** stated that under the Convention for the Unification of Certain Rules Relating to International Carriage by Air as Amended by the Hague Protocol of 1995, claims lodged after more than 2 years are extinguished. The matter went to the Court of Appeal and that part of the decision was not interfered with. See **Alitalia Airlines vs. Assegai Civil Appeal No. 29 of 1989 [1989] KLR 548**

Following in the footsteps of the said decisions as well as **Sitati, J's** decision in **Farida Abdullahi Ibrahim & 2 Others vs. Gulf Air Limited Nairobi HCCA No. 95 of 2002,** I hold that this suit should have been brought within 2 years as provided under Article 29(1) of the Convention.

The plaintiff has, however, urged the Court that instead of striking out the suit, the Court should give the plaintiff an opportunity to remedy the position by applying for extension of time. No provision has, however, been cited under which the said extension may validly be sought. I presume the plaintiff is alluding to the provisions of section 27 of the Limitation of Actions Act. As already indicated above, that Act does not extinguish a claim but only bars the bringing of the same. Accordingly where the barrier is lifted by extension of time the claim may still be sustained. It is, however, a totally different ball-game where the claim is expressly extinguished by operation of law. Here, it must be mentioned that under Article 2 clause 5 of the Constitution the general rules of international law shall form part of the law of Kenya. This position is also replicated in section 3 of the Act which incorporates the provisions of the Convention to our domestic or municipal law. It follows that the Convention forms part of the law of Kenya. Confronted with the question whether the Court can extend time in cases where a cause of action is extinguished the Court of Appeal in **Transworld Safari (K) Ltd. vs. Somak Travel Ltd. Civil Appeal No. 261 of 1996** expressed itself as follows:

"The course of action based on negligence of the pilot of an aircraft (a balloon in this case) in the employment of the appellant (if there be such cause of action as pleaded) is not time-barred in the sense of the words "time barred". Under the relevant legislation applicable to Kenya, the 1953 Carriage by Air Act (Application of Provisions) (Colonies, Protectorates & Trust Territories Order), the right to claim damages is extinguished (not time-barred) as per article 29 of that order. Extending time under the Act can apply to ordinary negligence, which results in death or causes bodily injury to the claimant. But once a cause of action is extinguished it cannot be revived".

I do not agree with the plaintiff that the Court can invoke the provisions of sections 1A, 1B of the Civil Procedure Act or Article 159(2)(d) of the Constitution to revive a claim which is expressly extinguished by statute. In my view the advent of the said provisions are not meant to destroy the law but to fulfil them. The said provisions are meant to ensure that the path of justice is not clogged or littered with technicalities. Where, however, a certain cause of action is disallowed by the law, the issues of the path of justice being clogged does not arise since in that case justice demands that that claim should not be brought. Justice, it has been said time without a number, must be done in accordance with the law.

It follows that the Notice of Motion dated 19th March 2012 succeeds with the result that the plaint herein is struck out with no order as to costs. The defendant also sought an order for dismissal of the suit. Although the provisions of Order 2 rule 15 seems to provide for striking out of a pleading and dismissal of the suit, I highly doubt the wisdom behind that course.

Ruling read, signed and delivered in court this 11th day of July 2012.

G.V. ODUNGA
JUDGE
In the presence of:

Mr Kariuki for Mr Owang for Plaintiff

Mr Sumba for the defendant