



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Civil Suit 817 of 1995

RUTH MUTHOKI MUTISYA PLAINTIFF

Versus

1. EXPRESS (K) LIMITED

2. KENYA AIRWAYS LIMITED DEFENDANTS

RULING

The second defendants in the main suit took out a Chamber Summons under Order 6 Rule 13 Civil Procedure Rules on 27.2.1996.

They seek two prayers in that application but one was abandoned before the hearing of the application. That is the prayer seeking an order for striking out the plaint on the ground that it discloses no reasonable cause of action against the 2nd defendant. The prayer left for consideration is whether the plaint should be struck off for being

"frivolous, vexatious and otherwise an abuse of the process of court".

Briefly the background to the application is that the plaintiff on 20.10.93 delivered a consignment of assorted handcrafts to Express Kenya Limited (Express), the 1st defendant, who were the agents of Kenya Airways Limited (Kenya Airways) the 2nd defendant. The goods were to be carried by air from Mombasa to Tunis for an agreed fee which the plaintiff paid. An Airway Bill was prepared specifically indicating that the goods were to be sold at a Trade Fair in Tunis which was starting on 22.10.93 to 30.10.93. An endorsement was made on the Airway Bill to highlight that fact.

But the goods were not delivered to the appointed destination. Instead Kenya Airways took the goods up to Rome and abandoned them there on 26.10.93. The plaintiff had to travel to Rome after the Trade Fair to look for the goods and eventually cleared them out. That meant that the plaintiff could not participate in the Trade Fair and was put into considerable trouble, inconvenience and expense in excess of Kshs. 500,000/=. She lost anticipated profits. Try as she could, the plaintiff could not find a buyer for the goods at Rome and has suffered a total loss of Shs. 350,000/= the value of those goods.

She alleges various breaches of duty and contract against Express and Kenya Airways both of whom she holds responsible for her loss.

Express filed a defence denying all the allegations made by the plaintiff against it including any breach of any duty or contract. They say they did their part and if there was any breach it was by Kenya Airways who were the carriers. They are not a party to this application made by Kenya Airways.

On its part Kenya Airways denied that Express were their Agents. Kenya Airways also denied that it was a

common carrier. While it was admitted that the consignment was delivered to it to be delivered on terms appearing in a specified Airway Bill, it is denied in the same breath that Kenya Airways was informed that the goods would be sold in a Trade Fair in Tunis between 22nd October and 30th October 1993. They only delivered the goods to Rome for a connecting flight to Tunis. It is from that destination, Rome, that the plaintiff took possession of the goods in November 1993, and therefore the contract of carriage was terminated. This they say is a right of disposition available to a consignor under the carriage by Air Act 1993 Article 12. All allegations of loss and breach of duty or contract were also denied.

Two alternative defences were also made by Kenya Airways. They say liability does not lie because they were not notified of the loss within 21 days and secondly that the matter of non-delivery of the goods was not communicated to them within 120 days.

These were the points taken up in the Application before me to have the plaint struck out summarily.

In his submissions Mr. Kibaara, Advocate for the Applicant, relied on Act No. 2 of 1993, The Carriage By Air Act 1993 which was enacted to give effect to the convention concerning International Carriage By Air, known as the Warsaw Convention as amended by the Hague Protocol of 1955, to enable the rules contained in that convention to be applied to non-International Carriage by air. That Act was consented to on 25.3.93 but its commencement or operation was left undetermined. Section 1 left it to "such date as the Minister may by Notice in the Gazette appoint"

Mr. Kibaara did not site the Gazette Notice that brought the Act into operation or show that the actions of the defendant which took place about five months after the enactment of the Act are covered by the Act. Counsel then proceeded to cite Articles of the Warsaw Convention to show that the plaint disclosed no cause of action. Such submissions however were not available to Mr. Kibaara because he had abandoned the prayer asserting that the plaint had no reasonable cause of action. In the course of submissions I upheld an objection raised in that regard. He submitted however that the suit was frivolous and vexatious because it disclosed no reasonable cause of action and was incapable of amendment to cure the fundamental defects. For that proposition he cited the case of Attorney - General -Vs- Mitchell Cotts (K) Ltd. HCCC 568/83 in which Bhandari J, reiterated the words of Madan JA in D.T. Dobie & Co. Ltd. -Vs- Muchina & Another CA 37/78 (UR), to wit:

"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 semblance 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."

Bhandari J. then stated:

"Life perhaps could have been injected in this suit if the plaintiff had taken advantage of the opportunity to amend his plaint, but it is no part of the courts functions to force a party to amend his pleadings if he refuses to do so".

In passing I may observe that this was a reasoning similar to one adopted by Omolo, JA in The Town Council of Ol Kalou -Vs- Nganga General Hardware CA 269/97 decided in March 1998. Said he after citing the same passage from the D.T. Dobie Case:

"I would myself not be so mannerless as to challenge the wisdom and experience of Madan JA. Cases ought to go on when they have a cause of action as the learned Judge put and so long as "real life" can be injected into them by amendment. The question is: who is to inject "real life" in pleading by amendment? Is it the parties themselves or the courts?"

He answered that it was the parties who in an adversarial system should know best what their respective cases are. But in this view Omolo JA was alone. The majority (Gicheru and Shah JJA) held that it is part of the provisions of Order 6 Rule 13 Civil Procedure Rules for a court in its discretion to either strike out

or order to be amended any pleading. Said Shah JA after reviewing relevant authorities:

"What it boils down to is this: whilst considering Order 6 Rule 13(1) application the court has a discretion to order an amendment in proper cases rather than strike out a pleading as striking out is normally a drastic remedy". To revert to the submissions of counsel in this application, Mr. Musinga for the plaintiff/respondent submitted that there was nothing to show that the plaint did not constitute any reasonable cause of action since that ground had been abandoned. There was no material either placed before the court to enable it to decide whether the plaint was frivolous, vexatious or an abuse of the process of court. It was clear he submitted, that the Airway Bill which is admitted to have been the basis of the carriage contract was endorsed with instructions that the consignment should be rushed to the final destination since it was for an exhibition on 22.10.93 and the consignee was supposed to be informed upon arrival. That was on 19.10.93. Despite that clear handling information, the 2nd defendant did not airlift the goods until 26.10.93. The excuse given by the 2nd defendant is that there was no connecting flight from Rome to Tunis. That is a triable issue. It is, also a triable issue whether there was a breach of duty or contract and the claim cannot be said to be frivolous or vexatious. He cited two cases decided by me on what amounts to frivolous, vexatious or an abuse of the court process. That is to say K. Dada & 4 others -Vs- S. Dada HCCC 118/96 (UR) and Jubilee Hardwares Ltd.-Vs- Magic. Rhythm Management Ltd.. HCCC 301/96. On those authorities and on the authority of the D.T. Dobie Case (above), which he also relied upon, he submitted that this was not an exceptional case to attract the draconian measure of striking out.

Even if it was accepted that Article 12 of the Warsaw Convention applied, Mr. Musinga submitted that it was the 2nd defendant/applicant who was in breach of Article 12(2) in failing to inform the consignor forthwith. There was correspondence and other communication also to satisfy the requirements as to notice before filing suit and the Application was therefore not meritorious.

I am largely in agreement with the submissions of Mr. Musinga and with the authority of the D.T. Dobie Case. I am not inclined to apply the draconian measure of striking out a matter that is not plain and obvious as the one before me. In the first place it is not averred that the plaint does not disclose a reasonable cause of action and if it was I would have found that it does. In the second place the reasons advanced to show that the suit is frivolous and vexatious are mere contentions which require evidence before they are upheld. It may well turn out in the end, one evidence that some legal provisions were not complied with. It may well turn out that the 2nd defendant complied with the terms of the contract and that it is not a common carrier as it pleads. But the plaintiff contends otherwise and, introduces contentions factual matters. It is clearly a matter that ought to go for trial for evidence to be tested in cross examination; not for decision on Affidavits.

I decline to strike out the suit at this stage. The application is dismissed with costs.

Dated at Mombasa this 23rd day of Aug 1998.

P.N. Waki

JUDGE