IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CIVIL APPEAL NO. 106 OF 2014

AKARIM AGENCIES COMPANY LTD.....1ST APPELLANT

AHMED SHEIKH ISSACK.....2ND APPELLANT

IBRAHIM S. I. KHANYARE.....3RD APPELLANT

AND

INTERNATIONAL AIR TRANSPORT ASSOCIATION...…1ST RESPONDENT

MERCANTILE INSURANCE COMPANY LTD…….....2ND RESPONDENT

***(Appeal from the ruling and order of the High Court of Kenya at Nairobi, (Gikonyo, J.) dated 11th March 2014* in HCCC NO. 15 OF 2014)**

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JUDGMENT OF THE COURT

In this interlocutory appeal, the ***1st appellant, Akarim Agencies Company Ltd*** and its two directors, the 2nd and the 3rd appellants, are aggrieved by the order of the High Court ***(Gikonyo, J.)*** dated 11th March 2014 by which the learned judge directed them to disclose within 14 days from the date of the order the details and location of their assets to the value of Kshs 350 million. The court further issued a freezing order restraining the appellants, until the determination of the suit, from selling, disposing, transferring, or in any other way dealing with their properties to the value of Kshs 350 million, within the Republic of Kenya, for purposes of satisfying any judgment that may be obtained against them. As for the respondents, the court directed them to give an undertaking on damages, in the event that upon determination of the suit, it was established that the freezing order ought not to have been given.

The above orders were issued after the ***International Air Transport Association (1st respondent),*** a trade association of the world's airlines, and ***Mercantile Insurance Company Ltd*** (***the 2nd respondent)***, an insurance company, filed a suit on 20th January 2014 against the appellants for recovery of ***Kshs 115,633.360.60*** and ***US$ 1,446,906.06,*** allegedly due to the 1st respondent from the appellants for breach of contract and fraud. In their pleadings, the respondents averred that on 30th March 1994, the 1st respondent entered into an agreement with the 1st appellant whereby the former appointed the latter its travel agent, on commission, to sell airline tickets to passengers in Kenya. Under the agreement, it was

pleaded, the 1st appellant was responsible for collecting, keeping proper and accurate accounts, and remitting to the 1st respondent all moneys payable for tickets sold to passengers or for others services rendered on behalf of the 1st respondent. Such moneys received by the 1st appellant, including the commission payable to it, was the property of the 1st respondent to be held in trust until accounted for and paid to the 1st respondent. It was further pleaded that in breach of the agreement, the 1st appellant failed or refused to account for or remit the moneys due for the remittance period from 1st September 2013, totalling Kshs 115,633.360.60 and US$ 1,446,906.06, which was due in October 2013.

The respondents further averred that to induce the 2nd respondent to renew the 1st appellant's Agency Default Program Insurance Policy, the appellants, on 6th August 2013, presented the 1st appellant's audited financial statements, which purported to show its creditworthiness.

Acting on the representations in the statement, the 2nd respondent renewed the policy, but it soon transpired that the representations were false and fraudulent and that the 1st appellant's true financial position was utterly precarious and it failed or neglected to pay to the 1st respondent the sums aforesaid. The particulars of fraud were duly pleaded in paragraph 13 of the plaint and the respondents prayed for an order for payment of the above sums with interest from 18th October 2013 until payment in full; all necessary accounts to enable them trace and transfer to themselves the appellants' assets sufficient to satisfy the claimed amount; and a permanent injunction to restrain the appellants from removing or transferring from jurisdiction or otherwise disposing, charging or dealing with their assets amounting to the sums claimed by the respondents.

On 24th February 2014 the 1st and 3rd appellant each filed a defence and counterclaim, in which they denied being in breach of the contract or guilty of fraud or inducement. They pleaded that they had made full remittances to the 1st respondent, which was wrongfully laying claim to proceeds of tickets sold on behalf of other airlines and carriers outside the agreement with the 1st respondent. Further the two appellants pleaded that it was the 1st respondent, which arbitrarily withdrew the 1st appellant's ticketing facilities thus denying it access to tickets and record, and that in any event the 1st respondent had access to all the accounts and records in the system. As regards the insurance policy, the appellants pleaded that it was procured by misrepresentation, economic duress, was monopolistic, contrary to public policy and statute; and was therefore null and void. By way of counterclaim, they prayed for judgment against the respondents for an order restoring the 1st appellant to the 1st respondent's records system, delivery of an up to date statement of the respondents' indebtedness, if any; a declaration that the insurance cover was null and void; and special and general damages. The respondents delivered their reply to defence and defence to counterclaim on 5h March 2014. From the record, the 2nd appellant did not file any defence.

Pending the hearing and determination of the suit, the respondents took out a motion on notice seeking interlocutory reliefs for account and delivery of the proceeds of sale of tickets in the sum of Kshs 115,633.360.60 and US$ 1,446,906.06; delivery up of all records and details of transactions relating to the ticket sales for the above amount; list and contacts of all debtors to whom the tickets amounting to the above sums were sold; warrants of arrest for the 2nd and 3rd appellants to show cause why they should not furnish security for the above amount; an injunction restraining the appellants from selling, transferring or dealing with any of their shares in any companies listed in the Nairobi Stock Exchange and the freezing of their accounts; and an injunction restraining the appellants from removing or transferring their assets out of jurisdiction.

The 1st appellant opposed the application vide an affidavit sworn by ***Ibrahim Adam Mohammed,*** its chief accountant, on 29th January 2014, while the 2nd and 3rd appellant swore replying affidavits, respectively on 3rd February 2014 and 29th January 2014, also opposing the application. Those affidavits echoed what the appellants had averred in their defences and counterclaim, in addition to the assertion that the application was frivolous, scandalous and unmerited.

After hearing the parties, Gikonyo, J. was persuaded that the application was deserved and issued the orders we have set out at the beginning of this judgment, which have aggrieved the appellants, leading to this appeal. In their written submissions, which were orally highlighted by their learned counsel, ***Mr. Ngaca***, the appellants have gone to great length, as though presenting the main appeal from a judgment of the trial court. They have presented 36 pages of written submissions, which go beyond the basic questions that ought to be considered in an interlocutory appeal arising from a decision on orders 39 and 40 of the Civil Procedure Rules. We must reiterate that the trial court was not required to hold a mini trial and determine the issues in dispute with finality before granting the interlocutory orders, as the appellants erroneously appear to assume (See ***Nguruman Ltd v. Jan Bonde Nielsen & 2 Others CA. No. 77 of 2012).***

For our part, since the dispute is yet to be heard on merit by the trial court, we are obliged not to make any final determination, or to have any concluded view on the issues in dispute, because that is exclusively the province of the trial court after hearing evidence tested by cross-examination. (See ***BP (Kenya) Ltd v. Kisumu Market Service Station, CA. No. 25 of 1992*** and ***David Kamau Gakuru v. National Industrial Credit Bank Ltd, CA. No. 84 of 2001)***.

As far as is relevant to this appeal, the appellants submitted that the learned judge exercised his discretion wrongly when he granted the impugned orders and for that reason we should interfere with the exercise of discretion. It was contended that the learned judge misapprehended the nature of the case before him and erroneously concluded that a trust existed between the 1st appellant and the 1st respondent. The appellant contended that beyond the use of the term "trust", the relationship between the 1st appellant and the 1st respondent was not one of trust but one of a creditor and debtor because the 1st appellant was required to remit money to the 1st respondent whether it collected the money or not and that the 1st appellant was not required to keep that collected money in a separate account. By practice, it was urged, that money was comingled with the 1st appellant's funds. Relying on the decision of the US Court of Appeal for the First Circuit in ***Re Morales Travel Agency (Bankrupt) v Eastern Airlines Inc. (667 F.2d 1069***), and that of the US Court of Appeal for the Tenth Circuit in ***Carlson Inc. v. Commercial Discount Corporation (382 F. 2d 903),*** it was submitted that the actual relationship between the parties was that of a debtor and creditor and completely rebutted the possibility of existence of a of trust relationship between the 1st appellant and the 1st respondent.

The appellants also submitted that the learned judge erred by holding that the claims by the respondents were not incompatible, while the 1st respondent was obliged to pursue compensation from the 2nd respondent as the insurer before filing any claim against the 1st appellant as the insured. In the circumstances it was urged that neither respondent established a *prima facie* case because the 1st respondent did not establish any loss that it had suffered while the 2nd respondent did not establish that it had paid any insurance claim under the policy.

Lastly the appellants submitted that the trial judge erred by granting the order for tracing and disclosure of the appellant's assets when it was neither prayed for nor justified in the circumstances.

The respondents opposed the appeal through their learned counsel, ***Mr. Gichuhi,*** who submitted that in the circumstances of this case, the orders granted by the learned judge were fully justified. It was submitted that the appellants did not controvert the 1st respondent's case that they had, in breach of contract and trust, failed to remit to the 1st appellant the proceeds of sale of air tickets. Relying on the ruling of the High Court in ***Mohammad Hassim Pondor & 2 Another v. Debonair Travel Ltd & 2 Others, HCCC No. 130 of 2006*** and the judgement of this Court in ***Debonair Travel Ltd & Another v. Mohammad Hassim Pondor & 2 Others, CA No. 88 of 2008***, it was submitted that proceeds of ticket sales were trust funds.

This appeal turns on whether the learned judge exercised his discretion judiciously when he granted the impugned orders. As has been stated time and again, this Court will not interfere with exercise of discretion by the trial court unless it is satisfied either that the trial court misdirected itself; it took into

account irrelevant considerations; or it failed to take in to account relevant considerations and thereby arrived at the wrong conclusion. (See ***United India Insurance Co. Ltd v. East African Underwriters (Kenya) Ltd [1985] E.A 898).***

The trial court was required only to satisfy itself that the appellant had made out a *prima facie* case with a probability of success at trial, and that absent an order of injunction, the appellant would suffer irreparable injury. If in doubt about those two issues, the court would determine the application on a balance of convenience. (See ***Nguruman Ltd v. Jan Bonde Nielsen & 2 Others, (supra).*** In ***Mrao Ltd. v. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125*** this Court stated thus, as regards what constitutes a *prima facie* case:

> ***"In civil cases, a prima facie case 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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial."***

There was before the learned judge the agreement dated 30th March 1994 under which the 1st appellant was obliged to remit to the 1st respondent the proceeds of sale of tickets. That agreement was not challenged. There was also *prima facie* evidence of non-remittance, and in their replying affidavits, the appellants did not seriously dispute non-remittance. Indeed by the affidavits sworn by the 1st and 3rd appellants on 29th January 2014, it was deposed that the 1st appellant's clients were the ones occasioning delay in payments, compelling the 1st appellant to incur a huge overdraft and therefore delay in remittances to the 1st respondent. There was evidence of demand for remittance, which the respondents did not dispute, or respond to when the 1st respondent issued it. Accordingly, we would not find any fault with the order by the learned judge restraining the appellants from selling, disposing or transferring their properties to the value of Kshs 350 million within the Republic of Kenya of Kenya pending the hearing and determination of the suit.

As regards the order for disclosure of assets, we are persuaded that there was really no basis for that order, if for nothing else, because the respondents did not pray for that order in their motion. As was stated in ***Chalicha FCS Ltd v. Odhiambo & 9 Others [1987] KLR 182***

> ***"Cases must be decided on the issues on the record. The court has no power to make an order, unless by consent, which is outside the pleadings. In this instance, the issues raised by the Judge and the order thereon, was a nullity."***

(See also ***Gandy v. Caspar Air Charters Ltd (1956) 23 EACA, 139*** and ***Mapis Investment (K) Ltd v. Kenya Railways Corporation (2005) 2 KLR 410).***

Accordingly, this appeal succeeds partly. We hereby set aside the order on the disclosure of assets. However, it is important to point out, as regards the freezing order that restrained the appellants from selling, disposing or transferring their properties pending the hearing and determination of the suit, the occurrence of some fundamental intervening circumstances, between the date of the impugned orders and the hearing of this appeal, which, as a Court that is obliged not to act or issue orders in vain, we cannot ignore. In ***Hitenkumar Amritlal v. City Council of Nairobi, CA No. 47 of 1981***, ***Madan, JA*** (as he then was) stated that courts should not make useless injunctive orders which are ineffective or serve no practical purpose and in ***Makokha & 4 Others v. Sagini & 2 Others [1994] KLR 46,*** the Court reiterated that a court should not stultify itself by making orders, which it cannot enforce, or grant an injunction, which will be ineffective.

By a ruling dated 27th June 2014, this Court stayed execution of the orders of the High Court with the effect that to date the orders by the High Court requiring the appellants to disclose the details and location of their assets, and the freezing order restraining them from selling, transferring or disposing of their

properties within the jurisdiction, have not taken effect. In addition, counsel for the appellant informs us, which is neither contested nor disputed by the respondents, that the 2nd respondent, in its capacity as the insurer has already settled in full the 1st respondent's claim of Kshs. Kshs 115,633.360.60 and US$ 1,446,906.06.

As of today, we are persuaded that it will not serve any useful purpose to restore the orders of the High Court two years after they were stayed by this Court, and also on account of the intervening developments which have seen the 1st respondent's claim, on the basis of which the disclosure and freezing orders were issued, fully settled. In view of the changed circumstances, it will amount to issuing orders, which will not only be oppressive to the appellants, but will not serve any useful purpose for the 1st respondent in particular. Accordingly, the order that commends itself to us is to dismiss this appeal, and decline to restore the freezing orders granted by the trial court on 11th March 2014.

In the circumstances of this appeal, we direct each party to bear its own costs.

Dated and delivered at Nairobi this 25th day of November, 2016

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR