IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, KOOME & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO. 281 OF 2009

BETWEEN

JETLINK EXPRESS LIMITED …………………….. APPELLANT

AND

EAST AFRICAN SAFARI AIR EXPRESS LTD. ….. RESPONDENT

(An appeal from the Ruling and Orders of the High Court of Kenya at Nairobi (Luka Kimaru, J.) dated 2nd day of October 2009 in ***HCCC NO. 73 OF 2007)***

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JUDGMENT OF THE COURT

0. By a further amended plaint dated 23rd November 2007, Jetlink Express Limited (appellant) sued East African Safari Air Express Ltd (respondent) for a sum of USD 4,068,091.86 being in respect of a bilateral interline traffic agreement whereby the appellant claimed to have sold or booked transportation tickets and chartered aircrafts to fly on the respondents routes and on its behalf and as a result the aforesaid sum of money was allegedly incurred.
0. The respondent denied owing the appellant the sums claimed and filed an amended defence and counterclaim against the appellant for a sum of USD 902,142 with interest and costs. The aforesaid sum was in respect of moneys received by the appellant from the sale of tickets on the respondents' flights. The appellant applied for interim orders of injunction to restrain the respondent from filing, advertising or presenting a winding up petition against it through an application dated 15th February 2007. An order of injunction was issued on 10th July 2007 restraining the respondent, its directors, agents and others claiming through it from instituting, filing, lodging, commencing, advertising or otherwise prosecuting any winding up petition or cause against the appellant in relation to the disputed debt of USD 902,143 forming the basis of the respondent's winding up order dated and served on the appellant on 31st January 2007 or any other sum based on the appellant's business relationship with the respondent until the hearing and final determination of the suit.

[3] On 10th November, 2008, the respondent filed an application under the old **Order 6 Rule 13 (1) (b)** and **(d)** of the Civil Procedure Rules seeking orders that: the appellant's suit be struck out and the interlocutory injunction issued on 10th July 2007 be set aside. That application was heard by Kimaru, J. and by a ruling, the subject matter of this appeal dated 2nd day of October 2009, the appellant's suit was struck out with costs for the part of the suit that was struck out. The judge however declined to grant the

prayer that the interlocutory injunction issued on 10th July 2007 be set aside. Aggrieved by the aforesaid orders, the appellants filed the instant appeal which is predicated on the following grounds of appeal:

> **"1. The Honourable Judge entertained and decided the application to strike out the plaintiff's suit under Order VI Rule 13 (1) (b) and (d) when he had no jurisdiction donated under the cited provision as the jurisdiction dated under Order VI rule 13 (1) and (d) is limited to striking out of pleadings and not suits.**

2. **The Honourable Judge erred in failing to appreciate that the further amended plaint was filed by the consent of the parties which consent also granted leave to the defendant to file the defence to the further amended plaint and counter-claim and that he therefore lacked jurisdiction to strike out the further amended plaint or the plaintiff's suit.**

3. **The learned judge was biased against the plaintiff and reached the conclusion that the plaintiff was guilty of tax evasion which in itself is an offence under the Income Tax Act, and when the plaintiff faced no charges or accusation under the said Act and notwithstanding the defendant's tax compliance certificate filed with the further replying affidavit of KIRAN CHANDUBHAI PATEL sworn on 28th November, 2008.**

4. **The learned judge failed to appreciate that the plaintiff's claim and the defendant's counter claim were based entirely on the Bilateral Interline Traffic Agreement signed between the parties and not on the services facilitation agreement or on the settlement agreement and therefore failed to make any finding thereon.**

5. **The learned judge erred in not appreciating that the plaintiff's financial statements for the year 2006 were signed on 4th March 2008 long after the plaintiff's case had been filed.**

6. **The learned judge erred in finding that "even if there was probability that the plaintiff's claim was owed, in view of the plaintiff's failure to disclose the said sum as revenue, the court cannot allow the plaintiff to assert such a claim in court", in the absence of any statutory or legal justification or support for that finding and thereby clearly denied the plaintiff the full right of being heard and calling witnesses in support of its case.**

7. **The learned judge erred in deciding the plaintiff's claim on affidavit evidence and ignored the plaintiff's averment that it was in possession of vouchers and ticket coupons evidencing its debt as set out in the plaintiff's list of documents and that he failed to appreciate that the appropriate forum for deciding on weighty and contentious issues such as were raised in the pleadings was in a trial and not in an interlocutory application.**

8. **The learned judge erred in disregarding the expert opinion evidence of the prominent auditors, Deloitte & Touche and Sulsha & Associates in preference to that of SANJAY SHAH without having the benefit of cross-examination and when it was abundantly clear that Sanjay Shah is not impartial in the dispute between the plaintiff and the defendant and that his opinion was directly in conflict with International Accounting Standard 37 which relates to provisions of contingent liabilities and contingent Assets and which are explicitly set out at P. 1837 thereof.**

9. **The learned judge was biased against the plaintiff and ignored the submission that although the defendant was taking issue with the plaintiff's statements, it had not availed its own financial statements for 2006 for purposes of comparison and for fairness.**

10. **The learned judge erred and misapprehended the facts of the case in deciding that he was not persuaded that the detailed accounts of the plaintiff could have been concealed by Mr. Thota Venkata Chellarao as alleged by the plaintiff even without evidence from Mr. Thota Venkata Chellarao himself, and thereby decided the issue on conjecture and on what he perceived to be the normal course of events and when in fact each case should be decided on**

its own facts and not on the "normal course of events."

11. **The learned judge misapprehended the facts of the case and erred in finding as a fact that the plaintiff's claim was contrived in a bid to defeat the winding up proceedings that had been commenced by the defendant because the invoices supporting the claim were serially numbered and thereby failed to appreciate that:**

   i. **ELKANA MUGALAVI ALUVALE had stated in his affidavit that the invoices were raised when the plaintiff realized that Thota Venkata Chellarao had failed to raise the same as clearly provided for in the Bilateral Interim Agreement.**

   ii. **No winding up proceedings had been commenced as stated but were only threatened.**

   iii. **There was an obvious need for oral evidence to show where how and when the invoices were raised.**

   iv. **The Honourable Justice Azangalala had already ruled that the plaintiff had established a *prima facie* case against the defendant.**

12. **The learned judge failed to appreciate that even the defendant's invoices numbers N111050, N111051 and N111055 were also raised on sequentially and well after the settlement agreement and were clearly an afterthought.**

13. **The learned judge took almost 8 months to deliver a 14 page ruling – a delay, which was inordinate, unexplained and contrary to the spirit of the law. As a consequence, justice was not seen to be done while speculation was enhanced."**

[4] During the hearing of this appeal, Mr. Lubulellah, learned counsel for the appellant submitted that the prayer to strike out the suit was not pleaded in the respondent's defence and counterclaim. **Order VI Rule 13 (1) (a) (b) (d)** does not provide for striking out a suit but pleadings; the Judge took a drastic step and struck out the suit that was the further amended plaint that gave the particulars of the appellant's claim arising from the Bilateral Interline Agreement; it was the agreement that regulated the business dealings between the appellant and respondent. The judge was also faulted for overlooking the fact that the further amended plaint was filed with the consent of the respondent; the respondent too filed an amended counterclaim thus it was illogical for the respondent to apply to strike out the same pleading that was filed by consent. Further the judge considered tax evasion which is an offence under the Income Tax Act; despite the fact that the appellant had exhibited a tax compliance certificate in one of the replying affidavits; the judge took into consideration an irrelevant matter as the dispute before the court was who owed who as per the claim and counter claim and not whether the appellant had failed to pay income tax.

[5] The issue of appellants' statement of audited accounts was also highly contested as evidenced in the affidavits of one Sargan Shah who denied that he had advised the appellant against including an unsubstantiated debt in the audited accounts. The appellant requested for him to be cross-examined, regarding the matters he deponed to in his affidavit; however this request was not successful.

Another contested issue as per counsel for the appellant, was how Adam Craig Ogden came to be in possession of the appellant's audited accounts. It was plausible that the appellants' accounts were irregularly given to the respondent by Sanjah Shah who used to audit the accounts of the appellant; if that was the case, there was a betrayal of his professional ethics

[6] The judge is also faulted by the appellant for failure to consider that the appellant had sought advice from Delloitte & Touche who gave an opinion that income tax based on a debt owed is recognized as money received; a debt owed to the company is a contingent asset that could be recognized when it was received; nonetheless the appellant's suit was struck out and the judge concluded that the appellant was trying to evade tax before the issue was tried and determined as there were two sets of opinion. The appellant's counsel further submitted that in view of the contradictory affidavit evidence it was not

possible for the judge to come to a conclusion on what constituted a fair view of the accounts without conducting a trial, that the appellant had particularized its claim, indicated the invoices that gave rise to the claim, they were not given an opportunity to explain why the invoices were numbered sequentially, that moreover, the appellant indicated they had copies of receipts vouchers and coupons of receipts which they intended to use during trial, they were denied the opportunity and that even the invoices in support of the counterclaim were numbered sequentially.

[7] Additionally, counsel for the appellant pointed out that although the judge struck out the appellant's claim on the grounds that it was not supported by a financial statement, he nonetheless failed to consider that even the respondent's claim was not supported by a financial statement which clearly demonstrated the judge was biased against the appellant. The judge ignored the critical evidence that both appellant and respondent shared facilities, premises and services, thus a dispute arising from their intricate relationship and dealings could not be determined summarily at an interlocutory stage. The judge also ignored a ruling by a judge of co-ordinate jurisdiction which was made on an interlocutory application and had found that the appellant had demonstrated a *prima facie* case; the respondent filed a Notice of Appeal but never pursued an appeal. Counsel urged us to allow the appeal as the counterclaim is still pending in court and the judge declined to discharge the order of injunction thus it will be in the interest of justice to allow the appeal so the appellant may have its day in court. Counsel relied on the following authorities:

i) **Kutima Investments Ltd vs. Muthoni Kihara & An.** Civil Appeal No. 117 of 2005 (2015) eKLR.

ii. **DT Dobie & Company (Kenya) Ltd Vs. Muchia [1982] KLR 1**

iii. **Yaya Towers Limited vs. Trade Bank Limited (in liquidation) [2000] eKLR**

v) Coast Projects vs. Mr. Shah Construction (K) Ltd [2004] 2KLR

vi. **Transcend Media Group Limited vs. Independent Electoral & Boundaries Commission (IEBC) [2015] eKLR.**

vii. **Samson Munikah Practicing As Munikah & Co. Advocates vs. Wedube Estates Limited [2007] e KLR.**

viii. **Wamboko [1982-88] 1 KAR 266**

In opposition to this appeal, Mr. Kiragu Kimani learned counsel for the respondent referred us to the respondent's amended defence and counterclaim, the application that sought an order striking out the appellant's suit, the affidavits of Graig Ogden the managing director of the respondent and Kiran Patel. Based on the aforesaid evidence, Mr. Kiragu submitted that the learned judge was satisfied that the appellant's suit was frivolous and vexatious. According to him, the law provides for striking out of suits and an application can be made at any time of the pleadings.

[9] Mr. Kiragu further submitted that the respondent was able to demonstrate that the appellant's claim was not reflected in their financial statements at December 2006, despite the fact that the alleged debt is said to have been incurred between March and December 2006. The debt was not brought to the attention of the respondents during the alleged period and the appellants audited accounts did not show the claim of USD 4,068,091,86 allegedly owed by the respondent. The invoices purportedly supporting the appellant's claim were first mentioned in their application for injunction, where the appellant merely annexed invoices to support the claim, the respondent never received the said invoices and was not informed of the existence of the debt prior to the filing of the suit.

[10] Mr. Kiragu argued that there was no need of allowing the appellant's claim to proceed for trial, the claim had no substance, the claim was merely contrived to wade off the winding up petition that was served upon the appellants on 31st January, 2007; the fact that there was no mention of this claim to the respondents before and the fact that it was not even disclosed in their financial statements of the year

2006 and the invoices were all sequentially numbered which is logically unlikely, if the debt was incurred at different dates for a period of 10 months, the judge was satisfied that the claim had no substance and therefore proceeded to strike the suit. According to counsel, the opinion of Delloitte and Touche on the accounts had no evidential value. Although there were two conflicting opinions by experts in accounts, the court was not bound to follow any of the opinions. Moreover, there is no requirement in law that where experts give an opinion that is at variance it should be tested by evidence. The appellant admitted that the financial statement was theirs. They indicated the respondent's claim of USD 902,000 as a contingency debt. The Judge construed the totality of the evidence before court especially the fact that the appellant had not included the claim as a contingency debt. The affidavit of Sanjary Shah who was the auditor of both parties clearly stated in his affidavit that he was asked to include the claim in the audited accounts of the appellant but he declined to do so because there was no supporting evidence.

[11] Mr. Shah further stated in his affidavit, that if he had included the unsubstantiated debt in the accounts, he would have put a note of disclaimer, thus the judge rightly declined to allow the appellant's request for cross examination of

Mr. Shah whose evidence was credible. A contingent asset is one that is pursued through a legal process and where the outcome is uncertain - tax compliance certificate that was produced by the appellant was irrelevant. Mr. Kiragu urged us to dismiss the appeal while relying on several excerpts from leading text books as well as the following decided cases:-

1. **<u>Mary Wangari Mwangi vs. Peter Ngugi Mwangi Trading as Mangu Builders Ltd & 3 Others</u> [2013] e KLR.**

2. **<u>Peter Whitton & Another V. Kenya Educational Trust Limited,</u> High Court Civil Case No. 56 and 57 of 2005.**

3. **<u>Time Magazine International Limtied & Ano. vs. Rotich & Ano.</u> [2000] LLR 2244 CCK.**

[12] In a brief rejoinder, Mr. Lubulellah emphasized that the suit that was struck out and the defence and counterclaim was left hanging perilously as a suit includes a counterclaim. Further, contentious issues regarding the report by Delloitte &

Touche and Sanjah Shah's conflict of interest in choosing to testify on the part of the respondents when he rendered professional services to both parties were never properly resolved in an application to strike out the suit. Also the issue of inclusion of contingency liability in the audited account was not resolved whether it must be indicated when it is an outflow and not an inflow.

[13] Arising from the foregoing summary of submissions, the ruling of the High Court, grounds of appeal set out above, the authorities cited (we will refer to some of them in the course of the analysis here below) and the record of appeal before us, the sole issue for determination is whether the appellant's suit was frivolous, vexatious and an abuse of the court process.

[14] Order VI. Rule 13 of the old Civil Procedure Rules provided as follows:-

> **"13. (1) 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 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, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be."**

In the case of **Muchangi Industries Limited vs. Safaris Unlimited** (Africa) Limited and 2 others (supra), a bench of this Court, **Bosire, Onyango Otieno** and **Nyamu,** JJ.A discussed at length what constitutes abuse of the court process as defined in Wikipedia the free encyclopedia:-

> **"The person who abuses process is interested only in accomplishing some improper purpose that is collateral to the proper object of the process and that offends justice.**
>
> **In Beinosi vs. Wiyley [1973] SA 721 (SCA) at page 734 F-G a South African case heard by the Appeal Court of South Africa, Mohamad CJ set out the applicable legal principle as follows:-**
>
> **'What does constitute an abuse of process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all encompassing definition of the concept of 'abuse of process.' It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective.'**

Again, the Court of Appeal in Abuja, Nigeria in the case of Attahiro vs. Bagudo 1998 3 NWLL pt 545 page 656, stated that the term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it.

In Nigerian Case of Karibu – Whytie J Sc in Sarak v. Kotoye [1992] 9 NWLR 9pt 264) 156 at 188-189 (e) the concept of abuse of judicial process was defined:-

> **'The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice…'**

The same Court went on to give the understated circumstances, as examples or illustrations of the abuse of the judicial process:-

> **"a) Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.**

b. **Instituting different actins between the same parties simultaneously in different courts even though on different grounds.**

c. **Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent's notice.**

d. **(sic) meaning not clear**

e. **Where there is no loti of law supporting a court process or where it is premised on frivolity or recklessness."**

It is necessary to state that the facts in the above case are different from what we have before us. The dispute in the aforesaid case was about the registration of a caveat and whether the removal of a caveat as contemplated under Section 57 of the Registration of Titles Act envisaged a summary procedure. The issue before us was whether the appellant's suit was plainly frivolous and an abuse of the court process. In answering this question we have also to take note that the appellant had made an interlocutory application for injunction which was allowed after inter parties hearing by a different judge albeit of coordinate jurisdiction who held in a pertinent paragraph of his ruling as follows;-

> **"According to Jetlink a debt of the magnitude involved in this case could only be acknowledged after a resolution of the company which has not been exhibited. Jetlink further contends that in the face of its challenge against the acknowledgement of the debt particulars of the claim should have been furnished. These contentions may or may not be true but in my view are not frivolous contentions in view of the previous intertwined relationship between Jetlink and EASA – evidenced by the fact that the accounting functions of both companies were operated by the same staff who now exclusively are answerable to EASA. Besides Jetlink now discredits those accounts. As to whether it will eventually discharge, that burden can only be resolved in a trial. It is also illustrative that the winding up notice was served a mere 11 days after execution of the Settlement Agreement. One would have expected that Siamese twins recently separated would resolve their disputes in a more cordial manner because a winding up notice has obvious far reaching consequences and if a petition were to be published it is doubtful that the weaker twin would survive the inevitable run against it.**
>
> **The claim for USD 4,033,701.70 by Jetlink illustrates how far each of the parties to this litigation is prepared to go at each other's throat. Obviously, there is now no love lost between Jetlink and EASA. Whether or not Jetlink will succeed to establish its claim cannot be resolved at this stage.**
>
> **In all the above premises, I am not persuaded *prima facie* that EASA's winding up notice was served with a genuine purpose of presenting a legitimate petition but was in my view intended to achieve a collateral purpose. That would eventually be an abuse of the process of the court and Jetlink was entitled to challenge the winding up notice in its Chamber Summons. In other words, I am satisfied on a *prima facie* basis that the debt claimed by EASA is disputed *bona fide* by Jetlink. A *prima facie* case with a probability of success has therefore been established. On the 2nd condition for the grant of an interim injunction, I am persuaded that the plaintiff will suffer irreparable injury which cannot be compensated in damages. If the defendant were to proceed with its winding up process, the plaintiff would be unable to survive having recently lost its senior twin. Even the balance of convenience tilts in favour of granting the injunction. The defendant has supported the plaintiff all along. It can afford to be out of pocket for some time. The same may not be said of the plaintiff."**

[17] Regarding the instant case, we wish to throw a caution that a finding of a *prima facie* case at an interlocutory stage does not at all guarantee that the successful applicant will succeed after trial. This case was however not subjected to a full trial. The judge relied on affidavit evidence and the documents annexed thereto to arrive at the conclusion that the appellant's case was frivolous. None of the deponents of the affidavits was called for cross examination even where there was conflicting evidence. For example the evidence of Delloite and Touche and that of Sanjay Shah was at variance on whether failure by the appellant to include the claim in their audited accounts for the year 2006, which is subject matter of their suit was fatal. We are also not certain whether the question of the nature of a claim that becomes a contingency asset that must be disclosed in the financial statement was answered; so is the question of whether there was conflict of interest in the duo role played by Sanjay Shah who was acting as joint auditors of both the appellant and respondent.

[18] When dealing with the interlocutory application for injunction, the judge also posed the question whether the bankruptcy notice issued to the appellant following in hot pursuit the separation of the merged facilities was meant to cripple the appellant as a competitor in business. Or was the appellant filing a suit merely to avoid payment of a debt that was due and owing. We find these questions were not sufficiently answered by the ruling of the learned Judge. Since the respondent's counterclaim is still pending, it may be able to prove its part of the claim but the applicant cannot prove theirs as its suit was struck out. It has been restated by courts severally especially the case of;- **<u>Yaya Towers Ltd v Trade Bank Limited</u>**

(Supra) that;

"A plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiffs claim is bound to fail or is otherwise objectionable as an abuse of the process of the court it must be allowed to proceed to trial."

[19] We find ourselves asking those questions because Mr. Kiragu Kimani, learned counsel for the respondent, put up a formidable argument that the Civil Procedure provides for a summary procedure to strike out hopeless suits and the courts should utilize it to get rid of undeserving cases that clog the system and consume judicial time. We note from the records that counsel relied on International Accounting Standard Guidelines which describe what constitutes a contingency asset. However our own perusal of the said guidelines especially at page 1837 it is provided thus;

"An entity shall not recognize a contingent liability… unless there are the possibility of an outflow or resources embodying economic benefits is remote… contingency assets are not recognized in financial statements since this may result in the recognition of income that may never be realized. However when the realization of income is virtually certain, then the related asset is not a contingent asset is recognition is appropriate."

20. We think the criteria the judge used to arrive at the conclusion that failure by the appellant to include the claim in their audited account when there were unproved allegations was rather subjective and required to be subjected to court room processes before arriving at a definitive conclusion on the validity of the claim. In making those conclusions the judge relied on decided cases such as **DT Dobie & Co. Ltd Vs Muchina** (Supra) but he misapprehended the fact that in striking out a suit in *limine*; the court ought not to deal with merits, which is a function of the trial court. If a matter for striking out a suit involves the determination of the merit of a suit through intensive interrogation of the allegations; such a matter should solely be reserved for the trial court. There were protracted issues raised by both parties as demonstrated by the affidavits and documents attached thereto whose veracity could not be determined otherwise than a full hearing.

For the aforesaid reasons, we are satisfied that this appeal has merit. We allow the appeal with the result that the ruling of Kimaru J. dated 2nd October 2009, is hereby set aside and substituted with an order that the suit by the appellant is reinstated. The suit be set down for hearing before another Judge on priority basis.

Costs of this appeal shall abide the outcome of the suit.

Dated and delivered at Nairobi this 18th day of December, 2015.

E.M. GITHINJI

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR