IN THE COURT OF APPEAL
AT NAIROBI
CORAM: OMOLO, TUNOI & KEIWUA, JJ.A.
CIVIL APPEAL NO. 217 OF 2000

BETWEEN

KENYA AIRFREIGHT HANDLING LIMITED ..... APPELLANT

AND

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA .....1ST RESPONDENT
PHOENIX ASSURANCE COMPANY OF NEW YORK .....2ND RESPONDENT
MARINE OFFICE OF AMERICA CORPORATION .....3RD RESPONDENT
SWISS AIR TRANSPORT COMPANY LIMITED ..... 4TH RESPONDENT

(Appeal from the ruling of the High Court of Kenya at
Milimani (Mbaluto J) dated 28th January, 2000

in

H.C.C.C. NO. 531 OF 1999)
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JUDGMENT OF THE COURT

This is an appeal from an order made by Mbaluto, J on 28th January, 2000, dismissing the appellant's application under Order 6 rule 13 of the Civil Procedure Rules seeking to strike out the plaint in the suit instituted by the respondents against the appellant and other defendants. The appellant was the first defendant in the suit.

The relevant facts were these. The 1st, 2nd and 3rd respondents were co-insurers of a consignment of currency notes amounting to US$ 1 million which was being transmitted by Swiss Air Transport Company Limited, the 4th respondent, to Citibank N.A., Nairobi, in two packages weighing 11 kg each.

The consignment arrived in Nairobi on 5th January, 1997, and was subsequently released by the 4th respondent into the custody of the appellant, a subsidiary of Kenya Airways. It is now common ground that while at the appellant's premises, the consignment either disappeared or was released to a person or persons unknown to the consignee and without the authorisation or knowledge of the consignee.

The respondents then commenced action against the appellant and the 4th respondent. This was done by a plaint dated 3rd May, 1999, wherein they claimed special damages being the amount of US$ 1 million comprised in the consignment; damages for negligence and general damages on the footing of aggravated damages.

By its defence, which was later amended, the appellant, apart from a general denial, raised three main issues. These were: first, that the claim has been extinguished and is timebarred, it not having been made within two years after the date of arrival within sections 3 and 7 of the Carriage by Air Act, 1993 (the Act) and Article 29 of the Warsaw Convention; second, it was contended that under the doctrine of subrogation and there being no indication that the respondents had taken a legal assignment of the claim from the insured the respondents are not entitled to sue in their own names since the consignor or the consignee were the only legitimate claimants; third and finally, that causes of action brought under the Warsaw Convention are limited to the conditions therein and claims in bailment and negligence are not included. These grounds were also relied upon by the appellant to prosecute its unsuccessful application to strike out the suit, the subject matter of the appeal before us.

In his ruling dated 28th January, 2000, the learned Judge said:-

> *"Indeed as both counsel made their submissions, a duty they discharged ably, it became abundantly clear that the issues arising in the suit were thoroughly arguable. The trial court will for instance have to determine whether the carriage By Air Act and the Warsaw Convention apply to the matter; it will also have to decide whether or not the applicant was an agent of Swiss Air Transport Company Limited or whether it was a bailee of the consignor. The issue of limitation will also have to be resolved. There are so many other issues which arise from the pleading that it woul d be wholly erroneous for any court to find that no reasonable cause of action is disclosed by the plaint."*

The learned Judge therefore found the application to be misconceived and dismissed it with costs. By doing this he drew heavily from the speech of Madan JA in **D.T. Dobie & Company (Kenya) Limited vs Joseph Mbaria Muchina & Another (unreported) Civil Appeal No. 37** of 1978 in which that sagacious judge had said:-

> *"A court of justice should aim at sustaining a suit rather than terminating it by summa ry dismissal. Normally a law suit is for pursuing it.*
>
> *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."*

Mr. Kiragu Kimani, for the appellant, submitted, as he did in the superior court that the learned Judge erred in holding that the grounds in the appellant's application could not be summarily resolved without the production of evidence. He contended that Article 29 of the First Schedule of the Carriage by Air Act provides that the right to damages shall be extinguished 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 carriage stopped which he put as on 5th January, 997 and as the suit was lodged on 4th May, 1999,

Mr. Kiragu Kimani averred, the claim was obviously time-barred. Mr. Regeru, for the respondents, vigorously countered these submissions. He argued that none of the provisions of the Carriage by Air Act applied to the appellant as the appellant is not a carrier as envisaged under the said Act and cannot therefore invoke those provisions in its defence. He contended that the appellant was a bailee for the purposes of the consignment, the subject matter of the claim. He submitted that the consignment was lost outside the period of consignment and due to the negligence of the appellant and/or its servants. The Act or the Convention do not therefore apply to the claim against the appellant. On the issue of subrogation,

Mr. Regeru submitted that the respondents were entitled to bring the action in their own names by virtue of a formal assignment from the insured in respect of the claim and having indemnified the consignees for the loss thereby occasioned, the respondents are entitled to subrogation of the insured rights in respect of the consignment.

From what we have set out above, it is manifestly clear that the plaint discloses a reasonable cause of action and the suit,as put by the learned Judge, is thoroughly arguable. Moreover, the rival submissions by counsel confirm that the parties are not **ad idem** on any aspect of the claim. It must follow, therefore, that the only means available for resolving the conflict is by holding a trial. In coming to this conclusion, we have given thoughtful consideration to the facts and circumstances disclosed by the pleadings as well as the submissions and the various authorities cited to us.However, we have refrained from expressing any concluded views in the matter since this is only an interlocutory appeal and many conflicting averments remain unresolved by the superior court. Suffice it to say, that the learned Judge, in our view, came to the correct conclusion in dismissing the application that fell for consideration before him. In our view, there are no reasonable grounds to fault him.

It is clear from the submissions of both counsel that the applicability and the interpretation of the Convention and the Act could not be resolved conclusively in the application before the learned Judge by merely looking at the pleadings. Far from it. The matter is complex. It is for trial. For example, did the Convention apply to the carriage? Also, what is the legal relations between the parties to the suit? This could not be clearly gleaned from the pleadings.

Bailment, an issue in the pleadings, is a subject which is difficult both to classify and to define. See **CHITTY ON CONTRACTS 28 Edn Vol 2 page 97**. As to whether the relationship between the parties fell under contract or not or is one of bailor and bailee is to our minds an arguable point which can only be resolved at the trial.

As to whether the action is extinguished or not we think that the learned Judge could only reach a decision after interpreting the date on which the carriage begun and stopped or the consignment ceased to be in the charge of the carrier.

Another issue to be determined is whether the insurers had taken a legal assignment of the cause of action from the assured. In **Smith (Plant Hire) vs Mainwaring {1986} 2 Lloyds Reports 244** it was held:

> *"It has long been the law, where insurers have paid a claim, that they stand in the shoes of the assured in order to recover anything which is relevant to that clai m. The law has long been that subrogation entitles the insurers to bring an action in the name of the assured against the wrongdoer to recover anything that is recoverable. The reason for that is that the right of action is vested in the assured. The c ases show that an action can be brought by the insurer in its own name where it has taken a legal assignment of the cause of action from the assured."*

The pleadings disclose that the doctrine of subrogation will have to be examined by the trial court. We have said enough to show that the respondents' suit is not hopeless, nor plainly and obviously without a reasonable cause. Whatever defects it may have, the respondents may apply to amend the plaint as indicated in the learned Judge's ruling and in this appeal.

We think that this appeal must fail and we accordingly dismiss it with costs.

Dated and delivered at Nairobi this 29th day of June, 2001.

R. S. C. OMOLO
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JUDGE OF APPEAL

P. K. TUNOI
.....

JUDGE OF APPEAL

M. OLE KEIWUA
.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR