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 abuseof 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 soldat 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 highlightthat fact.

But the goods were not delivered to the appointed destination.Instead Kenya Airways took the goods upto Rome and abandoned themthere on 26.10.93. The plaintiff had to travel to Rome after theTrade Fair to look for the goods and eventually cleared them out.That meant that the plaintiff could not participate in the TradeFair and was put into considerable trouble, inconvenience andexpense in excess of Kshs. 500,000/=. She lost anticipatedprofits. Try as she could, the plaintiff could not find a buyerfor 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 againstExpress and Kenya Airways both of whom she holds responsible forher loss.

Express filed a defence denying all the allegations made bythe plaintiff against it including any breach of any duty orcontract. They say they did their part and if there was any breachit was by Kenya Airways

who were the carriers. They are not aparty to this application made by Kenya Airways.

On its part Kenya Airways denied that Express were theirAgents. 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 isdenied in the same breath that Kenya Airways was informed that thegoods would be sold in a Trade Fair in Tunis between 22nd Octoberand 30th October 1993. They only delivered the goods to Rome fora 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 theysay is a right of disposition available to a consignor under thecarriage by Air Act 1993 Article 12. All allegations of loss andbreach 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 ofthe 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 tohave 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 wasenacted to give effect to the convention concerning InternationalCarriage By Air, known as the Warsaw Convention as amended by theHague Protocol of 1955, to enable the rules contained in thatconvention to be applied to non-International Carriage by air.That Act was consented to on 25.3.93 but its commencement oroperation was, left undetermined. Section 1 left it to "such dateas 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 dismissedunless it appears so hopeless that it plainlyand obviously discloses no reasonable cause ofaction and is so weak as to be beyond redemption and incurrable by amendment. If asuit shows a mere semblance of a cause ofaction, provided it can be injected with reallife by amendment, it ought to be allowed togo forward for a court of justice ought not toact in darkness without the full facts of acase before it."

Bhandari J. then stated:

"Life perhaps could have been injected in this suit if the plaintiff had taken advantage ofthe opportunity to amend his plaint, but it isno part of the courts functions to force aparty 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 0l Kalau -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 MadanJA. Cases ought to go on when they have acause of action as the learned Judge put andso long as "real life" can be injected intothem by amendment. The question is: who is toinject "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: whilstconsidering Order 6 Rule 13(1) applicationsthe court has . a discretion to order anamendment in proper cases rather than strikeout 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 wasnothing to show that the plaint did not constitute any reasonablecause of action since that ground had been abandoned. There was nomaterial either placed before the court to enable it to decidewhether the plaint was frivolous, vexatious or an abuse of theprocess of court. It was clear he submitted, that he Airway Billwhich 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 uponarrival. That was on 19.10.93. Despite that clear handlinginformation, the 2nd defendant did not airlift the goods until26.10.93. The excuse given by the 2nd defendant is that there wasno connecting flight from Rome to Tunis. That is a triable issue.It is, also a triable issue whether there was a breach of duty orcontract 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 thoseauthorities and on the authority of the D.T. Dobie Case (above),which he also relied upon, he submitted that this was not anexceptional case to attract the draconian measure of striking out.

Even if it was accepted that Article 12 of the WarsawConvention applied, Mr. Musinga submitted that it was the 2nddefendant/applicant who was in breach of Article 12(2) in failingto inform the consignor forthwith. There was correspondence andother communication also to satisfy the requirements as to noticebefore filing suit and the Application was therefore notmeritorious.

I am largely in agreement with the submissions of Mr. Musingaand with the authority of the D.T. Dobie Case. I am not inclinedto apply the draconian measure of striking out a matter that is notplain and obvious as the one before me. In the first' place it isnot averred that the plaint does not disclose a reasonable cause ofaction and if it was I would have found that it does. In thesecond place the reasons advanced to show that the suit isfrivolous and vexatious are mere contentions which require evidencebefore they are upheld. It may well turn out in the end, onevidence that some legal provisions were not complied with. It maywell turn out that the 2nd defendant complied with the terms of thecontract and that it is not a common carrier as it pleads. But theplaintiff contends otherwise and, introduces contentions factualmatters. It is clearly a matter that ought to go for trial forevidence to be tested in crossexamination; not for decision onAffidavits.

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