



**International Air Transport Association & another v Hubaal
Travel Agency Limited & 2 others (Civil Case E273 of 2020)
[2024] KEHC 13075 (KLR) (Commercial and Tax) (28 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13075 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E273 OF 2020
JWW MONG'ARE, J
OCTOBER 28, 2024**

BETWEEN

INTERNATIONAL AIR TRANSPORT ASSOCIATION 1ST PLAINTIFF

SAHAM ASSURANCE COMPANY KENYA LIMITED 2ND PLAINTIFF

AND

HUBAAL TRAVEL AGENCY LIMITED 1ST DEFENDANT

ABDULLAHI AHMED KANYARE 2ND DEFENDANT

MOHAMED ABDI OMAR 3RD DEFENDANT

JUDGMENT

Introduction and Background

1. The Plaintiffs filed this suit by way of a plaint dated 1st July 2020 claiming that the 1st Plaintiff (IATA) and the 1st Defendant (Hubaal) entered into a Passenger Sales Agreement (“the Agreement”) where Hubaal was appointed as IATA’s travel agent and it was authorized to sell air passenger transportation on the services of IATA as the carrier and on the services of other air carriers as authorized by IATA.
2. The Plaintiffs state that the Agreement provided inter alia that Hubaal would issue a Traffic Document immediately it received money for specified passenger air transportation sold under the Agreement and it would be responsible for the remittance to IATA of the amount payable in respect of such Traffic Document. That all services sold pursuant to the Agreement would be sold on behalf of IATA and in compliance with IATA’s Traffic Document and that all monies collected by Hubaal for transportation and ancillary services sold under the Agreement, including applicable remuneration which the Hubaal



- is entitled to claim thereunder, are the property of IATA and must be held by Hubaal in trust for IATA or on behalf of IATA until satisfactorily accounted for to IATA and settlement made.
3. The Plaintiff stated that the Agreement further provided that Hubaal would maintain adequate records and accounts, together with supporting documents, recording the details of all transactions effected under the Agreement and that such records were to be preserved for at least 2 years from the date of the transactions to which they relate and shall be available for inspection or for copying by IATA whose Traffic Documents had been issued.
 4. The Plaintiffs claim that in breach of the express terms and conditions of the Agreement, Hubaal failed, neglected and/or refused to pay to IATA, the sum of USD 471,022.40 from the airline ticket sales for the months of December 2018, January, February and March 2019. That by a letter 18th January, 2019, IATA issued a notice of default to the Hubaal for failing to make settlement of monies due in respect of sales made on the issue of Traffic Documents and that by subsequent letter dated 5th March 2019, IATA terminated the Agreement with Hubaal on account of failing to remit the airline ticket sales in accordance with Clause 13 of the Agreement.
 5. The 2nd Plaintiff (Saham) claims that it is IATA's insurer as IATA had taken a Default Insurance Policy (DIP) with Saham covering defaults in air ticket sales remittances by specified travel agents and that Hubaal was a specified agent under the policy running between 1st January 2018 to 31st December 2018 and 1st January 2019 to 31st December 2019. Upon the default of Hubaal, IATA lodged a claim with Saham for settlement of the defaulted amount which Saham settled at the admitted sum of USD 467,879.19.
 6. The 2nd Plaintiff pleaded that by a Letter of Subrogation dated 20th November 2019, IATA acknowledged receipt of USD 467,879.19 from Saham being settlement of default amount by Hubaal. That the 2nd and 3rd Defendants signed Deeds of Indemnity with Saham dated 14th August 2018 and 17th August 2018 in which it was agreed between them that in consideration of Saham effecting an insurance policy by virtue of the Passenger Sales Agency Rules of IATA, the 2nd and 3rd Defendants would at all material times keep Saham fully indemnified against all actions and proceedings, claims, demands losses and defaults arising howsoever from the default by Hubaal from failure to remit sales traffic documents or collects and retains monies together with incidental costs and expenses.
 7. The Plaintiffs aver that the 2nd and 3rd Defendants, upon written demand declaring Hubaal to be in default under the Agreement, agreed to pay all monies and discharge all liabilities, whether actual or contingent, owing or accrued or pay all commissions, fees and other charges and all legal and other costs and expenses incurred by Saham. That they undertook to indemnify and keep fully indemnified Saham against all actions, proceedings, claims, demands, losses and default arising howsoever from the Agreement.
 8. In sum, the Plaintiffs contend that the Defendants are jointly and severally indebted to Saham for the sum of USD 467,879.19 as at 4th March 2020 and therefore seek the same from them together with interest thereon at court rates until payment in full. They also seek costs of the suit on a full indemnity basis and interest thereon until payment in full.
 9. Whereas the Defendants filed a defence, the same was struck out on 21st October 2021 for non-compliance of the court's directions meaning the Plaintiffs' case proceeded unopposed. The Plaintiffs presented two witnesses; IATA's Country Manager, AGNES NJERI MUCUHA (PW 1) who adopted her witness statement dated 12th February 2024 and produced the Plaintiffs' List of Documents dated 1st June 2020 (PExhibit 1 -14). The documents include A Power of Attorney to Sidy Gueye to act on behalf of the 1st Plaintiff; A Power of Attorney to KAREN WAMBURA NJAGI to act on behalf of the



2nd Plaintiff; The Passenger Sales Agreement between Hubaal and IATA; Billing Analysis showing the proceeds of the ticket sales; Notice of Default dated 18th January 2019; Notice of Termination of the Passenger Sales Agreement dated 5th March 2019; The Agency Default Programme Application Form; The Default Claim Form; Letter of subrogation dated 20th November 2019; Deeds of Guarantee and Indemnity by the 2nd and 3rd Defendants and; The Demand Letters and Certificates of Postage.

10. PW 1 further produced the Supplementary List of Documents dated 9th March 2021 (PExhibit 15 and 16). The Plaintiffs also called its Company Secretary, Sarah Weru (PW 2) who relied on her witness statements dated 26th June 2020 and 9th March 2021. After the hearing, the court directed the parties to file written submissions which are on record.

Analysis and Determination

11. In making this determination, I am guided by the fact that the standard of proof in civil cases is on a balance of probability and that the burden of proof is on the party alleging the existence of a fact which he wants the Court to believe. This is anchored in section 107 (1) and (2) of the *Evidence Act* (Chapter 80 of the Laws of Kenya) which provides that “whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist” and that “When a person is bound to prove the existence of any fact it is said that he burden of proof lies on that person”. In *Miller .V. Minister Of Pensions 1947 ALL E.R 372*, Lord Denning aptly summarised the application of the standard in the following terms:

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in criminal cases. If the evidence is such that the tribunal can say: We think it more probable than not; the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un)convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

12. The Court of Appeal in *James Muniu Mucheru v National Bank of Kenya Limited [2019] KECA 1058 (KLR)* simply put it that ‘Courts will make a finding based on which party’s version of the story is more believable.’ As stated, the Defendants filed a defence but the same was struck out and they did not call any witness or produce any evidence. I am in agreement with the Plaintiffs’ submission that this means that their case is unchallenged (See *AVTAR SINGH BAHRA & AMARJIT KAUR BAHRA vs RAJU GOVINDJI GANATRA T/A SWEETBITE MANUFACTURERS [2001] KEHC 375 (KLR)*] and *MOTEX KNITWEAR LIMITED v GOPITEX KNITWEAR MILLS LIMITED [2009] KEHC 4017 (KLR)*]. However, even though the Defendants failed to challenge the Plaintiffs’ case, the latter still have a duty to prove their case on a balance of probabilities as is required by law. This was held by the Court of Appeal in *Karugi & another v Kabiya & 3 others [1983] KECA 38 (KLR)* where it was stated that, “The burden was always on the Plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof”. Likewise, failure by a defendant to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard hence in *Gichinga Kibutha v Caroline Nduku [2018] KEELC 3981 (KLR)* the Court held that, “It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest.”



13. With the above in hindsight, I will now proceed to determine this matter which from the Plaintiffs' submissions, the court is being called to deal the following issues:
- a. Whether there is a cause of action between the Plaintiffs and the Defendants
 - b. Does the doctrine of subrogation apply?
 - c. Whether the Plaintiffs are entitled to the prayers sought
 - d. Who should bear the costs of the suit

Cause of Action between the parties

14. As stated, there was no dispute that the IATA and Hubaal entered into an agreement where Hubaal was IATA's agent for the sale of airline tickets in Kenya. Hubaal was then supposed to account for the monies received by issuing a Traffic Document and it would be responsible for the remittance to IATA of the amount payable in respect of such Traffic Documents. The Plaintiffs claimed that Defendants breached the Agreement by failing to account for the monies held and failing to furnish an account of payments and that the 2nd and 3rd Defendants failed to indemnify Saham for Hubaal's default. The Plaintiffs produced the Billing Analysis showing the proceeds of the ticket sales which Hubaal failed to account for and the Notice of Hubaal's default. As this evidence was not controverted, it follows that the Plaintiffs had a cause of action against the Defendants for breach of the Agreement and the Indemnities.

Application of the Doctrine of Subrogation

15. The doctrine of subrogation allows an insurer after compensating an insured for any loss under the insurance contract to step into the shoes of the insured. In that, the insurer is entitled to all the rights and remedies the insured might have against a third party in respect of the loss compensated (see *Africa Merchant Assurance Company v Kenya Power & Lighting Company Limited* [2018] KECA 112 (KLR)). It is not in dispute that Saham insured IATA for the subject period and that the insurance extended to defaults of specified agents including Hubaal. It is also not controverted that Saham has already paid IATA the defaulted sum of USD 467,879.19 and therefore as the insurer, it is entitled to file suit against Hubaal under the doctrine of subrogation and as per the Deeds of Indemnity by the 2nd and 3rd Defendants indemnifying Saham against Hubaal's defaults. As such, I find and hold that the doctrine of subrogation applies in this case and that the same accrued once Saham paid IATA for the claim under the insurance policy.

Whether the Plaintiffs are entitled to the prayers sought

16. As stated, the Plaintiffs seek the sum of USD 467,879.19 at 4th March 2020 together with interest thereon at court rates until payment in full and costs of the suit on a full indemnity basis and interest thereon until payment in full. I have already found that the Plaintiffs have demonstrated and it has not been disputed that the Defendants were in breach of the Agreement and Deeds of Indemnity for failing to account to IATA for the tickets sold and failing to indemnify Saham for Hubaal's default. The Defendants did not dispute that they failed to account and remit the sum of USD 467,879.19. I find therefore that the Plaintiffs have proved that the Defendants are liable to pay them a sum USD 467,879.19. Under the doctrine of subrogation, this sum is payable to Saham since IATA has already been paid the same by Saham.



Conclusion and Disposition

17. In conclusion, it is my finding that the Plaintiffs' suit as set out in the Plaint dated 1st July 2020 is merited and is hereby allowed with the court making the following dispositive orders:
- a. Judgment be and is hereby entered for the Plaintiffs against the Defendants for the sum of USD 467,879.19.
 - b. The Plaintiffs are awarded costs of the suit together with interest. at court rates from the date of judgment until payment in full.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF OCTOBER 2024

J.W.W. MONG'ARE

JUDGE

In the Presence of:-

Mr. Ongeru for the Plaintiff.

Mr. Onderi holding brief for Mr. Omwenga for the Defendants.

Godfrey - Court Assistant

