



**Roskar Travels Ltd v Basic Needs Kenya (Civil Case 154 of 2017)
[2021] KEHC 425 (KLR) (Commercial and Tax) (17 December 2021) (Judgment)**

Neutral citation: [2021] KEHC 425 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 154 OF 2017
MW MUIGAI, J
DECEMBER 17, 2021**

BETWEEN

ROSKAR TRAVELS LTD PLAINTIFF

AND

BASIC NEEDS KENYA DEFENDANT

JUDGMENT

BACKGROUND

1. The Plaintiff filed a Plaint dated 7th April 2017 and stated that it had a contract for services with the Defendant for the provision of Travel Agency services. The Plaintiff is a member of the said International Air Transport Association (IATA) which has limited credit facilities for its members who do ticketing on behalf of airlines registered with the said IATA. The Defendant had an account with the Plaintiff which only required the defendant to give instructions for themselves or other people connected to the defendant's business for tickets to be booked.
2. It was the Plaintiff's averment that on or about the 27th April 2016, one Joyce Arita, an accountant and administrator of the Defendant organization, who was well known to the plaintiff as aforesaid, called one Michael Mwangi, a member of staff at the Plaintiff's company and requested for a profile to be sent to Basic Needs UK as Basic Needs UK who urgently required a travel agent to book for and to issue them air tickets.
3. Further, the said Michael Mwangi noted that the e-mail address was slightly different from the usual emails with Plaintiff's e-mail from the Plaintiff, this email lacked "s" as was usual with Basic Needs email address, but the said administrator insisted that the UK e-mail does not have an "s" after Basic Needs.



4. The correspondences with the client from the UK head office were duly copied to the defendant as requested by them. On 6th May 2016, the Defendant's **CPD** sent the Plaintiff an email indicating that the bookings were fraudulent.
5. Pursuant to the above occurrence, the Plaintiff had issued air tickets totaling \$ 90,066, money which was due to IATA. All monies for ticket sales is held in trust for IATA and on strict scheduled terms for remission. The Plaintiff had to pay \$90,066 to avoid loss of IATA accreditation and to avail the money the Plaintiff had to procure a loan facility. The Plaintiff therefore suffered financial loss and damages.
6. The Plaintiff prayed for judgment against the Defendant as follows;
 - a. Cost of air ticket USD 90, 066 plus interest thereon from the time payment became due until payment in full.
 - b. Loan processing expenses Kshs. 380, 745 plus interest.
 - c. Interest on the two loans taken to pay IATA.
 - d. Costs and interest.
7. The Plaintiff PW1, Rose Wanjugu Kareithi testified that as Managing Director of Roskar Travel Agency she enjoyed credit facilities with IATA an Airline Accrediting Agency. She ran an agency that had both corporate and individual clients. Among the corporate clients was Basic Needs Kenya, the Defendant who she provided air tickets to since 2011 and they had a running account with the Plaintiff. The Defendant would email or call the Plaintiff to issue air tickets on account. They contacted the Defendant through their Administrator Ms Joyce Arita of Ms Joyce Kingori the Country Head of Basic Needs Kenya. The Defendant would request air travel information and staff and the Plaintiff would send email /call and give air travel options and prices which the Defendant confirmed and gave the bio data.
8. On 27th April 2016, Joyce Arita of the Defendant Company called Michael Mwangi of the Plaintiff Company and requested the Plaintiff Company to send its profile to Basic Needs UK who urgently required a travel agent to book and issue air tickets. Michael Mwangi noted the e-mail from Basic Needs lacked an 's' the Administrator confirmed that the Basic Needs UK address did not have an 's'. After an hour the Defendant called Lydiah Njau the Plaintiff's Travel Manager and insisted the matter was urgent. The Country Program Director (CPD) Joyce Kingori also called and sought that the profile was to be sent to Basic Needs UK promptly. They sent the Profile and response was from one who claimed to be from Basic Needs UK who made travel arrangements. The Country Program Director was in meetings and did not confirm. The Plaintiff sent all the request details for airline tickets to the Defendant via e- mail.
9. On 5th May 2016, the plaintiff noted that the amount so far committed was very high and it was imperative to consult the Country Program Director on the account limits as the air tickets were of US 90,066. When the CPD was reached on phone in the evening, wondered why the Defendant was worried yet the request was from their head office.
10. On 6th May 2016, the Defendant CPD, she sent an email to the Plaintiff confirming that the bookings were fraudulent. The Plaintiff stated that they issued 73 air tickets within 6 days from 27th April 2016 – 2nd May 2016. They issued the tickets and issued Invoices for the cost of the tickets. The copies of air tickets, Invoices and emails were produced as exhibits in Court.

DEFENDANT'S CASE



11. The Defendant contended that it was never privy to the Plaintiff's internal business operations and it never gave any instructions to the Plaintiff to "extend credit booking" for any head office booker. It admits to alerting the Plaintiff that the Plaintiff was probably dealing with a fraudster and promising to carry out further investigations.
12. Further, the Defendant stated that it is unclear which sister office or organizational headquarters the Plaintiff was referring to. That the Defendant is not an international operator nor does it engage in the business of travel ticketing services. The Defendant while admitting to an existing business relationship with the Plaintiff, denies any liability for the claims in this suit as the Defendant never sought nor obtained any air ticket services from the Plaintiff and the previous transactions with the Plaintiff were well known to both sides.
13. The Defendant averred that the Plaintiff's suit is misconceived as there is no cause of action against the Defendant whether under the law of agency or guarantee.
14. DW 1 Joyce Kamanu Kingori stated that she was Team leader charged with advancing medical services in Kenya South Sudan & Zimbabwe through Basic Needs Kenya registered in 2005. DW1 worked for Basic needs as CEO and Secretary to the Board and retired in 2018 on medical grounds.
15. Roskar Travels was one of their vendors for air tickets, and consulted them for air travel best services and retail purchase of tickets from time to time. They had no written contract but any air travel, she wrote emails to enquire and there would be back and forth until they agreed as shown by emails produced by the Plaintiff at Pg -49-58 of the Plaintiff's bundle.
16. In April 2016, while the organization was undergoing audits, she was in and out of the office. Joyce Arita called her and informed her that she received a call from Mr Willis who inquired of a Travel agency, she told him that they used Roskar Travel Agency and gave their number for them to communicate directly.
17. DW1 denied that she called Roskar at all and /or that she made reference to a Profile. Later Lydiah called her and asked about the air tickets that she had issued and she wrote an email. Later on, PW1 called her very distressed. She stated that it is Roskar Travel Agency who wrote to her on the fraudulent procurement of air tickets and loss of US 90,000 on the basis of issuance of air tickets to Basic Needs UK. The Plaintiff's bundle Pg 15-43 confirmed the Invoices directed to Basic Needs UK. Pg -61-139 are the electronic airtickets 73 air tickets in 6 days.
18. DW1 stated that there was no request for air tickets from Basic Need Kenya from Roskar Travels. There was no direction or approval from DW1 on the said tickets.
19. Basic Needs UK engaged in mental health services in Kenya, Uganda and Srilanka and they only shared methodologies.
20. The Defendant emphasized that Basic Needs Kenya was autonomous from Basic Needs UK as shown by registration documents produced in Court by the Defendant.

PLAINTIFF'S SUBMISSIONS

21. It was the Plaintiff's submission that the Basic Need in Kenya and Basic Needs UK were affiliated and the same was confirmed by the Defendant's testimony. Basic Needs was registered as an International organization until Basic Rights was added in 2016. In addition, the two organizations used the same email accounts, same website and the same promotional information.
22. On whether the call to the Plaintiff was in the usual course of dealings between the parties; the Plaintiff submitted that the usual course of dealings is determined by evidence, operative circumstances,



applicable laws and etiquette. The operative circumstances include both what the Defendant had presented to the Plaintiff regarding who the Defendant was and what was represented at the time of the incident.

23. The Plaintiff further submitted that the Defendant is liable for misrepresentation for negligent misstatement. In the absence of fraud by the maker of the acted upon representation and on analyzing the principle in *Derry v Peek* [1989]. Liability in this case ensues although the Defendant may not have actuated any bad motive. The Plaintiff relied on the case of *Capero Industries P. C vs Dickman* [1990] 2AC 605 where the House Lords stated;

“Liability for economic loss should be limited to situations where the statement was made to a known recipient for a specific purpose of which the maker was aware and upon which the recipient had relied and acted upon to his detriment.”

DEFENDANT’S SUBMISSIONS

24. The Defendant submitted that the relationship between the Kenyan NGO and the organization Basic Needs UK was purely programmatic and the Kenyan outfit was neither a branch nor an agent of the UK charity organization. That the sharing of the domain name or internet protocol basicneeds.org was merely for coordination of the charitable work that both the Kenyan and UK organizations were involved in.
25. The Defendant argued that the Plaintiff’s claim as contained in the Plaintiff is bereft of any legal basis as no cause of action is alleged and none was proved. The Plaintiff never claimed nor proved that it reported the alleged fraud to the police for investigations and that if indeed the alleged fraud occurred, the Plaintiff was the author of its own misfortune through gross negligence in its business operations. It was incumbent upon the Plaintiff to carry out due diligence in its operations.
26. It was the Defendant’s submission that no instructions were issued by it for any bookings and no evidence was adduced to show otherwise. The Plaintiff seeks special damages and the basic legal principles governing claims for special damages are now well settled namely; they must be specifically pleaded and strictly proved.

DETERMINATION

27. The Court considered the pleadings, testimonies and submissions filed by both parties and the issues for determination are;
- a. Whether the Defendant had a sister company?
 - b. Whether there was fraud?
 - c. Whether the Plaintiff has a cause of action against the Defendant?
 - d. Whether the Plaintiff should be granted the prayers prayed?
28. Pw1 testified that they had the defendant as one of their corporate clients and sold them air tickets on a running account with the Plaintiff Company.
29. It is not in contention that the Plaintiff was in a contract for services with the Defendant for the provision of Travel Agency services. The issue in contention is whether the Defendant gave instructions to the Plaintiff on 27th April 2016 to book the flight tickets.
30. On whether the Defendant had a sister company, this can be easily inferred from the documents produced by the Plaintiff. For instance, in the email addressed to the Plaintiff dated 21st November



2011 the Defendant's signed off as "BasicNeeds UK in Kenya" amongst other emails. The Defendant also produced documents in support of its case and the same showed its affiliation with the BasicNeeds UK. On this it is well settled that the Defendant had a sister company BasicNeeds UK. It is on this basis that the Plaintiff issued the said air tickets on credit after which the Defendant indicated to the Plaintiff on 6th May 2016.

31. DW1 categorically denied any connection with Basic Needs UK and produced Certificate of Registration as Exhibit to confirm registration in Kenya as NGO.
32. DW1 also denied any involvement by the Defendant in introduction or reference to Willis Jason of Basic NeedUK and held the view that the Plaintiff ought to have conducted due diligence and engaged in data protection and after issuance of air tickets on discovery of being swindled should have engaged airlines to stop usage of the air tickets. The Invoices for the said airtickets were to Basic Needs UK.
33. This Court found at Pg 22 & 40 of Plaintiff's bundle, the e-mail by Joyce Kingori Basic NeedsKenya NGO registration OP218/051/2005/0419/3833. Charity Registration No 1079599 UK.
34. In the Defendant's bundle at Pg 12 DW1 wrote email to the Plaintiff PW1 which read in part;

Dear Rose, this is to bring to your attention fraudulent bookings that have been made to your agency by people fronting as staff of Basic Needs UK. The call on our office line +020 2426606 and subsequent e-mail to Joyce Arita (Admin-Accountant) request for bookings. The e-mail was not copied to me so it did not get my attention immediately as we were also busy with audit work that is ongoing. Joyce Arita called your office immediately and forwarded the e-mail to your staff member (Lydia Njau) who must have proceeded to ticket on the assumption that the bookings were genuinely from Basic Needs UK.....
35. This communication confirms that the genesis of the transactions to issue air tickets was jumpstarted by the e-mail from the Defendant to the Plaintiff.

FRAUDULENT /NEGLIGENT MISREPRESENTATION

Was there fraud as alleged by the Defendant?

36. Sections 109 and 112 of the *Evidence Act* provide that:

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

...

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

37. The Plaintiff detailed in her statement the circumstances that led to the loss of US 90,066 as follows;
 - a) Joyce Arita, the Defendant's administrator received the request for bookings from their UK office.
 - b) Joyce Arita, of Basic Needs Called the Plaintiff's offices immediately she received the e-mail and sent the said e-mail to the Plaintiff for immediate action
 - c) DW1 CPD/CEO of the Defendant although she denied the claim, PW1 said she called the Defendant's office and urged that the Plaintiff's profile be sent to Basic Needs UK and they did.



- d) The Defendant availed the contact e-mail of the client (fraudster)- Jasonwillis@ukbasicneed.org to the Plaintiff staff and gave the Plaintiff's contact to the client (fraudster) simultaneously to enable staff get the necessary details for bookings and issue the air tickets.
- e) The Plaintiff took details specifications from the said person referred and introduced by the Defendant and the Plaintiff relied on the weight of representations made by the Defendant that the client was booking on behalf on Basic needs Head Office Basic Needs Uk.
38. It was the Defendant's contention that it never gave any instructions to the Plaintiff to "extend credit booking" for any head office booker. It admits to alerting the Plaintiff that the Plaintiff was probably dealing with a fraudster and promising to carry out further investigations.
39. In *Jennifer Nyambura Kamau VS Humphrey Nandi (2013) eKLR*, the Court of Appeal sitting at Nyeri emphasized that fraud must be proved as a fact by evidence, and, more importantly that the standard of proof is beyond a balance of probabilities.
40. The question then is, has the Plaintiff proved the case on a balance of probability? The law has been clear all along. In *RG Patel Vs Lalji Makanji (1957) EA 314* the court expressed itself as follows:
- "Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require prove beyond reasonable doubt, something more than a mere balance of probabilities is required"
41. The Defendant did not adduce any evidence to show that the Plaintiff itself was responsible or contributed towards the alleged fraud.
42. The Plaintiff's evidence establishes they took the call from the Defendant in the usual course of dealings between Plaintiff and Defendant. The Defendant both by conduct and express communication assumed responsibility providing confirmation that it was reasonable for the Defendant to act on the representation.
43. The plaintiff relied on the continuous commercial relationship between the Plaintiff and Defendant and upon introduction and reference to Basic Needs UK, the Plaintiff had no way of ascertaining the identity of the Booker/Client except through the Defendant who was affiliated with/to Basic Needs UK.
44. From the facts outlined above, the Defendant introduced the said Jason Willis believing he was genuinely interested in legally procuring air tickets and it was good for Basic Needs Kenya to extend goodwill and reciprocate with Basic Needs UK. Therefore, that it turned out to be heist, there is no evidence to confirm that the Defendant was part of a fraudulent enterprise. Therefore, fraud is not specifically pleaded nor proved in the circumstances.

Whether the Plaintiff has a cause of action against the Defendant? __

45. A careful look at the evidence before the court indicates that it was the Defendant who received a call from the alleged fraudster who indicated that he was calling from BasicNeeds UK and being that it was a sister company the Defendant that informed the Plaintiff through Lydia Njau about the call from the alleged fraudster Jason Willis and it is based on this information that the rest of transactions emanated.
46. It is in my view that the Plaintiff issued the said air tickets based on good faith, business practice and longstanding business relationship it had with the Defendant. Given that the alleged fraudster was calling (allegedly) from BasicNeeds UK, the Plaintiff did not have any reason to investigate to doubt or



even the need to investigate further. The Plaintiff acted knowing that the BasicNeeds UK was affiliated to the Defendant who was a longstanding client.

47. In General Principles of the law of Contract by K.I.Laibuta at Pg 81 on Misrepresentation , negligent misrepresentation is founded on equity;

Where a representation has been made which binds the conscience of the party and estops and obliges him to make it good. In this Case, the representation in equity is equivalent to a contract and very nearly coincides with a warranty in law. In order that a person may avail himself or relief founded on it, he must show that there was such proximate relation between himself and the person making the representation as to bring them virtually into the position of parties contracting with each other.

48. This Court takes the view, although the issue of fraud is immaterial with regard to this issue. The matter is clear that the Plaintiff provided services to the client introduced by the Defendant and who claimed to be from Basic Needs UK affiliated to Basic Needs Kenya who had longstanding business relationship with the Plaintiff and had running account with the Plaintiff. The said client procured 73 air tickets in 6-7 days and failed to pay for the same and the Plaintiff now claims the amount owed to it. The only party that ought to have conducted due diligence should have been the Defendant as the Plaintiff relied on the Defendant's introduction and reference.

1. DISPOSITION In light of the above judgment is entered for the Plaintiff against the Defendant for US90,066. The Plaintiff is awarded the Cost of air ticket USD 90, 066 plus interest thereon from the time payment became due until payment in full.
2. The Claim for loan repayments and Loan Fees was not proved as it was not a matter directly arising from the Defendant's involvement.

DELIVERED SIGNED & DATED IN OPEN COURT ON 17TH DECEMBER 2021(VIRTUALLY)

M.W.MUIGAI

JUDGE

