



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**HCCC NO. 609 OF 2014**

**EUROCRAFT AGENCIES LIMITED.....PLAINTIFF**

**VERSUS**

**EAST AFRICAN SAFARI AIR EXPRESS LIMITED.....DEFENDANT**

**JUDGMENT**

1. The plaintiff herein, **Eurocraft Agencies Limited**, sued the defendant, **East African Safari Air Express Limited** through the plaint dated 19<sup>th</sup> December 2014 seeking the following orders: -

- a) *The sum of US\$ 72,947.80 (United States Dollars Seventy-Two thousand, Nine Hundred and Forty-Seven; cents Eighty); as pleaded in this plaint.*
- b) *The sum of Kshs 414,423.35 (Kenya Shillings Four Hundred and Fourteen Thousand, Four Hundred and Twenty and Thirty-Five Cents) as pleaded in this plaint.*
- c) *Interest on (a) and (b) above at court rates from the date the same fell due until payment in full.*
- d) *The costs of this suit.*
- e) *Such other relief as the honourable court may deem mete and just to grant in the circumstances of this suit.*

2. The plaintiff’s case is that the defendant engaged its services vide an agreement executed in December 2008 (hereinafter “**the Initial Agreement**”), which agreement was amended and replaced by a subsequent agreement that became effective on 16<sup>th</sup> November 2010 (hereinafter “**the Agreement**”). The plaintiff states that the Agreement incorporated the terms of prevailing Standard Ground Handling Agreement (SGHA) and International Air Transport Association (IATA) which Agreement referred to the plaintiff as “**the Handling Company**” while the defendant was referred to as “**the Carrier**.”

3. The plaintiff’s case is that pursuant to the Agreement, the defendant Bound itself to make good and duly pay the plaintiff in regard to charges incurred and services provided by the plaintiff to wit; Passengers Services, Baggage handling and Ramp, Aircraft servicing, Additional Charges, Extra flights, Emergency assistance, Additional Services and necessary services on other locations.

4. The plaintiff further states that the defendant bound itself to reimburse any disbursement made by the plaintiff on its behalf at cost price plus an accounting surcharge of 10% (ten percent). It was the plaintiff’s case that the agreement further provided, *inter alia*, that the defendant would settle the plaintiff’s account on a monthly basis against invoices presented at Nairobi within 30 days from the date of invoicing and that such settlement would be in United States Dollars (hereinafter “USD”).

5. It was the plaintiff’s case that it rendered services to the defendant pursuant to the Agreement and duly raised invoices in accordance with the terms of the said Agreement but that in breach of its obligations under the Agreement, the defendant failed and/or neglected to settle the plaintiff’s invoices and additional expenses when they fell due. It listed the particulars of unpaid invoices as follows: -

No.	Invoice No.	Date	Particulars	Amount

			Balance brought forward	US\$ 3,013.30
1	4619	30.06.2010	Basic charge – January 2011	US\$ 680.00
2	4745	31.10.2010	Basis charge– October 2010	US\$ 8,000.00
3	4791	30.11.2010	Basic charge–November 2010	US\$ 4,000.00
4	4865	30.11.2010	Tarmac Trip-November 2010	US\$ 50.00
5	4866	30.11.2010	Tarmac Trip-November 2010	US\$ 75.00
6	4867	30.11.2010	Tarmac Trip-November 2010	US\$ 25.00
7	4914	01.01.2011	Basic Charge, Towing - January 2011	US\$ 445.00
8	4915	31.12.2010	Basic Charge ,Extra GPU, Towing, ASU, Interior Cleaning- December 2010	US\$ 2,060.00
9	4916	31.01.2011	Basic Charge ,Extra GPU – January 2011	US\$ 2,562.00
10	4958	28.02.2011	Basic Charge ,Extra GPU, Towing, ASU, Forklift – February 2011	US\$ 3,636.00
11	4974	31.03.2011	Basic Charge, Extra GPU, Forklift Tarmac Trip – March, 2011	US\$ 3,736.00
12	5037	30.04.2011	Basic Charge, Extra GPU, ASU, Superstep – April, 2011	US\$ 3,528.00
13	5071	31.05.2011	Basic Charge, Extra GPU, Towing Tarmac Trip – March, 2011	US\$ 3,280.00
15	5107	30.06.2011	Basic Charge, Extra GPU, Towing – June, 2011	US\$ 3,857.00
16	5226	30.09.2011	Basic Charge, – September, 2011	US\$ 3,200.00
17	5314	30.11.2011	Basic Charge, – November, 2011	US\$ 200.00
18	5556	30.04.2012	Extra GPU – April, 2011	US\$ 972.00
19	5581	31.5.2012	Extra GPU – May, 2011	US\$ 729.00
20	5637	30.06.2012	Basic Charge, Extra GPU, Towing, Interior cleaning, Extra tractor Extra trolley, Tarmac Trip, GPU or maintenance, Deepcleaning - June 2012	US\$ 2,943.00
21	5684	31.07.2012	Extra GPU – July,2012	US\$ 1,296.00
22	5737	31.08.2012	Extra GPU – August,2012	US\$ 243.00
23	5789	30.09.2012	Extra GPU – September,2012	US\$ 1,134.00
24	5846	31.10.2012	Extra GPU – October,2012	US\$ 81.00
25	6099	31.03.2013	Basic Charge, Extra GPU, Towing, Interior cleaning, Tarmac Trip- March 2012	US\$ 4,764.00
26	6233	31.03.2013	Extra GPU – March ,2013	US\$ 162.00
27	6132	30.04.2013	Basic Charge, Extra GPU, Towing, Tarmac Trip - April 2013	US\$ 5,772.00

28	6234	30.04.2013	Extra GPU – April ,2013	US\$ 810.00
29	6209	31.05.2013	Basic Charge, Extra GPU, Towing, Water service, Extra Manpower - May, 2013	US\$ 4, 972.00
30	6235	31.05.2013	Extra GPU – May,2013	US\$ 1, 377.00
31	6244	30.06.2013	Extra GPU – June ,2013	US\$ 1, 376.00
32	6245	30.06.2013	Basic Charge, Extra GPU, Towing, Extra Manpower, Tarmac Trip - June, 2013	US\$ 3,734.00
33	6321	31.07.2013	Basic Charge,Towing,Extra Tractor, Extra Trolley, service, Extra Manpower - July, 2013	US\$ 2, 225.00
			TOTAL	US\$ 72, 937.00

6. It lists the particulars of additional expenses as follows: -

No.	Invoice No.	Date	Particulars	Amount
1	4533	30.04.2010	Additional services –April 2010	Kshs 63,090.06
2	4576	30.05.2010	Additional services –May 2010	Kshs 70,994.22
3	4562	30.6.2010	Additional services –June 2010	Kshs 60,497.14
4	4651	31.07.2010	Additional services –July 2010	Kshs 55,328.25
5	4698	31.08.2010	Additional services –August 2010	Kshs 56,469.71
6	4742	31.09.2010	Additional service–September 2010	Kshs 57,669.37
7	4788	31.10.2010	Additional services –October 2010	Kshs 31,916.50
8	4850	31.12.2010	Additional services–December 2010	Kshs 18,458.00
			TOTAL	Kshs 414,423.35

7. The plaintiff's case was that sometime in July 2013, the defendant attempted to partly settle the debt owed to it vide cheques Nos. 102178 and 001310 for USD 3,630 and 2,947.50 respectively but that the cheques were not honoured upon presentation.

8. The defendant opposed the plaintiff's suit through the defence filed on 5<sup>th</sup> February 2015 wherein it admits paragraphs 1, 2, 3, and 4 of the plaint and paragraph 5(a) and (b) but denies part (c) thereof wherein it is averred that the parties executed Standard Ground Handling Agreement upon which the suit is based.

9. The defendant denied the claim that the parties executed an agreement in December 2008 and states that there is no existing agreement between the parties herein capable of being breached. The defendant further stated that the alleged dishonoured cheques were not issued pursuant to any agreement and/or authenticated invoices.

#### Oral evidence- plaintiff's case.

10. At the hearing of the case, the plaintiff's Managing Manager **Mr. Benard Mweu** adopted his witness statement dated 22<sup>nd</sup> September

2016 and the plaintiffs list of bundle of documents in 19<sup>th</sup> December 2016 as his evidence in chief.

11. On cross examination he highlighted the invoices that were not settled by the defendant.

#### **Defendants case.**

12. The defendant presented the testimony of its Managing Director **Mr. George Kivindyo** who similarly relied on his witness statement and adopted the defendant's bundle of documents dated 4<sup>th</sup> February 2019. His testimony was that the defendant did not owe the plaintiff the alleged sums of money and that the invoices presented by the plaintiff lacked supporting documents such as the forms requesting for the services.

13. He highlighted some of the invoices that lacked supporting documents as Nos. 4533, 4974, 5071, 4745, 5846, and 4791. He also highlighted some the invoices that were addressed to other companies as Invoices Nos. 4958, 5037, 5974, 5071, 5107, 6099 and 6132. He stated that some of the invoices were not signed by the defendant's representative.

14. On cross examination, he confirmed that the defendant has no dispute over the existence of a contract between it and the plaintiff. He however stated that as at 2010, there was no contract between the parties but that there were specific agreements between the parties as per the International Air Transport Association Agreement.

15. He stated that before services were rendered by a Group Handling Company, there was a form to be signed by representative of both parties present and by the ground handling agencies. He added that most of the invoices were not signed by the ground handling agents.

16. He confirmed that the invoices referred to at pages 122 and 123 are not disputed. He also confirmed that the invoices at pages 109-120,126, 127 are in respect to services rendered to the defendant and that it is only the disputed invoices that have not been paid.

17. On further cross examination, the witness conceded that the plaintiff entered into an agreement with the defendant wherein the outstanding bills were to be settled on monthly basis on presentation of invoices that had supporting documents. He confirmed that several invoices that were sent to the defendant were supported by billing sheets. He testified that some ground handling forms were addressed to different companies and not the defendant.

18. On re-examination, he stated that the defendant was not obligated to pay invoices that had no supporting documents and that all their attempts to reconcile the accounts with the plaintiff were unsuccessful.

19. Parties filed written submissions, in support of their respective positions.

#### **Analysis and determination.**

20. I have considered the pleadings filed herein, the oral and documentary evidence presented by the parties together with their written submissions.

21. The main issue for determination is whether the plaintiff has made out a case for the granting of the prayers sought in the plaint. I note that even though the defendant had in its defence denied having entered into any agreement with the plaintiff, at the hearing of the case however, the defendant's witness (DW1) confirmed the existence of an agreement between the parties herein. DW1 testified as follows on the issue of the agreement.

***“I do not dispute that we had an agreement with Eurocraft. I am aware of the document at page 2 of the plaintiff's bundle of documents. This is what created the relationship between the parties. At page 3 on settlement, I was expected to settle the outstanding amount on a monthly basis on the invoices presented within 30 days.”***

22. From the above extract of the testimony of DW1, it is clear that the parties herein had a contract in which invoices were to be settled within 30 days.

23. I have perused the documents listed on page 2 and 41 of the plaintiff's list and bundle of documents filed on 19<sup>th</sup> December 2014 and I note that they are duly executed International Air Transport Association Standard Ground Handling Agreements. It was not disputed that the plaintiff offered services to the defendant for which it raised invoices requesting for payments. The defendant conceded that while some of the invoices were settled, other invoices remained unsettled for various reasons such as lack of supporting documents and that some invoices related to services offered to other companies and not the defendant. In this regard DW1 testified as follows: -

***“Some ground handling forms are addressed to a different company. We addressed this with the plaintiff several times and requested them for a reconciliation. We stopped payments of some invoices. For invoices where we had no dispute, we paid.”***

24. The plaintiff's case is a straightforward claim is for the liquidated sum of USD 72,947.80 and Kshs 414,432.35 together with costs and interest for services that it rendered to the defendant under the Agreement. It is trite law that a claim for special damages must not only be pleaded but must also be specifically proved. (See ***Provincial Insurance Co East Africa Ltd v Nandwa (1995-1998) 2EA 288***)

25. The burden of proof therefore rested on the plaintiff to specifically prove its claim against the defendant. In establishing its case, the plaintiff relied on several invoices and other documents contained in its bundle of documents that I have already referred to in this judgment.

26. This court will scrutinize each of the invoices presented by the plaintiff as evidence in determining if they meet the threshold of proof expected in the claim for a liquidated sum of money.

27. At the hearing of the suit, DW1 confirmed that the following invoices were addressed to the defendant and were duly accompanied by billing sheets setting out the services rendered: -

- Invoice No. 5071 for USD 3280
- Invoice No. 5107 for USD 2857
- Invoice No. 5226 for USD 2200
- Invoice No. 5581 for USD 729
- Invoice No. 5637 for USD 2943
- Invoice No. 5684 for USD 296
- Invoice No. 5789 for USD 1134
- Invoice at page 464(plaintiff's bundle) USD 81
- Invoice No. 6099 for USD 4,764
- Invoice No. 5382 for USD 162
- Invoice No. 6230 for USD 972
- Invoice No. 6245 for USD 3,734
- Invoice No. 6209 for USD 4,972
- Invoice No. 6235 at page 541 (plaintiff's documents) USD 1,377
- Invoice No. 6244 for USD 1,376.

28. I have perused the Ground Handling Forms attached to respective invoices that the defendant admitted were addressed to it as against the claim that some of the forms referred to another company known as East African who is not the defendant herein. This court takes judicial notice of the fact that E. African is the short form of East African. My finding is that the name East African or E. African, as contained in the said forms, refer to the defendant herein as the defendant did not establish that the plaintiff offered services to another company known as East African other than the defendant. A perusal of the said forms also shows that the space provided for the name of the airline is quite limited and could not accommodate the defendant's full names thus explaining the use of the short form E. African. I am satisfied that the plaintiff established, on a balance of probabilities, that it duly issued the said invoices to the defendant which invoices were properly accompanied by the necessary supporting documents.

29. A further perusal of the plaintiff's list of documents shows that while invoices Nos. 4619, 4745,4791, 6132, 4533 and 4742 were not accompanied by the requisite Billing Sheets and Grounds of Handling Forms. The said Billing Sheets and Ground Handling Forms were however attached for the rest of the remaining invoices listed therein which were as follows:

- Invoice No. 4865 for USD 50
- Invoice No. 4866 for USD 75
- Invoice No. 4867 for USD 25
- Invoice No.4914 for USD 445
- Invoice No. 4915 for USD 2060
- Invoice No. 4916 for USD 2562
- Invoice No. 4958 for USD 3636
- Invoice No. 4974 for USD 3736
- Invoice No. 5314 for USD 200
- Invoice No. 5556 for USD 972
- Invoice No. 5737 for USD 243
- Invoice No. 5846 for USD 81
- Invoice No. 6233 for USD 162
- Invoice No. 6234 for USD 810
- Invoice No. 6321 for USD 2225
- Invoice No. 4576 for kshs 70,994
- Invoice No. 4562 for kshs 60,497
- Invoice No. 4651 for kshs 55,328.35
- Invoice No. 4698 for kshs 56,469
- Invoice No. 4788 for kshs 31,916

30. The admitted unpaid cheques were Nos. 102178 and 001310 for USD 3630 and 2947.50 respectively.

31. From the above foregoing lists I find that the sum due to the plaintiff is as follows: -

- Grand Total in USD 54,736.50
- Grand Total in Kshs 275,204.35

32. Having regard to the above tabulation and the findings that I have made in this judgment, I find that the plaintiff proved its case against the defendant to the required standards. I further find that the defendant owes the defendant the sum of USD 54,736.50 and Kshs 275,204.35.

33. Consequently, I enter judgment for the plaintiff against the defendant for USD 54,736.50 and Kshs 275,204.35 together with interest, at court rates, from the date of filing this suit till payment in full.

34. I also award the plaintiff the costs of the suit.

35. It is so ordered.

**Dated, signed and delivered via Microsoft Teams at Nairobi this 17<sup>th</sup> day of December 2020 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17<sup>th</sup> April 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Kiprotich for Ratemo for the Plaintiff

Mr. Mungu for Defendant

Court Assistant: Sylvia