



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. 275 OF 2013

BETWEEN

NANCY MWANGI T/A

WORTHLINK MARKETERS..... PLAINTIFF

AND

AIRTEL NETWORKS KENYA LIMITED

(FORMERLY CELTEL KENYA LIMITED).....1ST DEFENDANT

G4S LIMITED.....2ND DEFENDANT

SMART PRINTERS LIMITED..... 3RD DEFENDANT

JUDGMENT

Introduction

1. At the time material to this suit, the plaintiff ran an event management firm. She has sued the 1st defendant (“Airtel”) for breach of a Sponsorship Agreement dated 2nd October 2008 (“the Agreement”) under which Airtel agreed to facilitate the plaintiff bring a famous reggae artist, *Luciano*, to perform at the concert in Nairobi scheduled for 3rd October 2008. The plaintiff seeks the following reliefs set out in the Amended plaint dated 3rd October 2018;

(a) A declaration that the Defendants were jointly and severally negligent in discharge of their respective duties in respect to the concert the subject matter of these proceedings.

(b) Special damages Kshs. 3,171,381.15.

(c) Damages for loss of anticipated profits Kshs. 10,568,000.00.

(cc) Consequential loss of Kshs. 6,512,400.00.

(d) General damages for breach of contract; and

(e) Costs and interest on (b), (c), (cc) and (d) at court rates from 3rd October 2008 or such other date as the court may deem fit and just.

Background and agreed facts

2. Prior to the hearing the parties set out uncontested facts which form the background of the case. In 2008 the plaintiff organized and arranged for a reggae artist known as *Luciano* to perform at a Zain Reggae concert scheduled to take place on 3rd October 2008. Before the

concert took place, she approached Airtel (previously known as Zain or Celtel), a telecommunication company, to provide financial assistance to facilitate the attendance of *Luciano* and Airtel agreed to do so.

3. On 2nd October 2008, the plaintiff and Airtel entered in a Sponsorship Agreement (“the Agreement”) under which Airtel undertook to pay the plaintiff Kshs. 2 million exclusive of all taxes towards financial assistance. 50% of the sum would be paid at execution of the Agreement and the balance after the press conference held upon arrival of *Luciano* and the band members. Under the Agreement, the proceeds from the sale of tickets would be shared between the plaintiff and Airtel in the ration 80:20.

4. The concert was held on 3rd October 2008 as agreed. The 2nd defendant (“G4S”), procured by Airtel, assisted in selling tickets, cashiering and providing temporary banking facilities at the concert. Airtel contracted the 3rd defendant (“Smart Printers”) to print 14,000 tickets as follows:

Type of ticket	Quantity	Value of ticket
General tickets	9,000	1,500
General Advance tickers	2,700	1,200
VIP tickets	200	2,000
Complimentary tickets	2,000	
VIP Complimentary tickets	100	

5. The parties cancelled the 2,700 general advance tickets owing to the limited time available for sale while the 9,200 ticket were offered for sale made up of 9,000 general tickets and 200 VIP tickets. After the concert, Airtel paid the plaintiff Kshs. 552,000/- which was 80% of the gate collections as provided in the Agreement based on the following returns:

Type of ticket	No. of sold tickets	No. of unsold tickets
General tickets (9,000)	424	8,576
VIP tickets (200)	27	173

The hearing

6. At the hearing the plaintiff (PW 1) testified and called one witness, Titus Injira (PW 2). Lilian Wanjira Mugo (DW 1) and Domtilla Mueni (DW 2) testified on behalf of Airtel and G4S respectively while Kishor Trambadia Bhagwanji (DW 3) testified on behalf of Smart Printers. After the hearing, the parties filed written submissions in support of their respective positions.

7. The crux of the issue was set out in the testimony of PW 1 who emphasized that it was her responsibility under the Agreement to print the tickets. She accused Airtel of breaching the Agreement by printing more tickets than were agreed upon and unilaterally contracting the services of Smart Printers and G4S. PW 1 complained that as a result of the defendants’ negligence, people with fake tickets were admitted into the concert, tickets with similar numbers were printed and tickets were sold below the market price causing her to suffer substantial loss.

8. PW 2 supported the plaintiff’s case. He recalled that he attended the concert after buying tickets from a Zain van. He witnessed tickets being sold for as low as Kshs. 500/- and Kshs. 350/-. He also stated that on the last day, Zain sales agents were accompanied by G4S personnel.

9. DW 1, a legal officer at the Airtel, informed the court that at the time material to this suit she was not working at the company but she had documentation available from the company files. She stated that the Agreement had clear responsibilities for each party. According to her, the plaintiff requested Airtel and it agreed to engage G4S to provide security and additional services. She also stated that the parties further agreed that Smart Printers would be appointed to print concert tickets. She disagreed with the plaintiff that Airtel sold any other tickets contrary to what was agreed upon.

10. DW 2 confirmed that G4S was contracted by Airtel by a Temporary Works Order No. 119337 to provide cashiering and temporary banking services at the concert venue. She told the court that G4S successfully carried out the services it was contracted to do and made its returns. She told the court that G4S was not party to any agreement between the plaintiff and Airtel.

11. DW 3 testified that Airtel issued LPO No. 62064 on 23rd September 2008 to Smart Printers to print tickets, A5 full colour fliers and posters. Smart Printers received approval of final artwork from Airtel on 30th September 2008. It printed the items and proceeded to deliver them on 2nd October 2008 when they were collected by Airtel’s agent. DW 3 was clear that Smart Printers only dealt with Airtel in terms of the LPO and was not involved in the sale of the tickets.

Breaches alleged by the Plaintiff

12. From the facts and evidence I have set out, it is readily apparent that the plaintiff’s cause of action hinges on the particulars of breach set

out in para. 17 of the Amended Plaintiff. The plaintiff has founded its case on both contract and in tort by alleging breach of duty of care.

13. The plaintiff alleged that Airtel had breached Clauses 2.14, 12.0 and 13.0 of the Agreement by instructing Smart Printers to print the tickets and releasing them to the public in contravention of Kenya Revenue Authority Rules and Regulations. The plaintiff also stated that even after unilaterally engaging Smart Printers, Airtel did not disclose its identity or mode of ensuring the tickets had security measures to guard against fake tickets. She also complained that the Airtel breached the Agreement by engaging G4S without her consent.

14. The plaintiff further claimed that Airtel breached its duty of care to the plaintiff by selling fake tickets at irregular prices way before the tickets were launched for official sale and despite intervention by the plaintiff urging it to stop the sales. She accused Airtel of printing fake tickets surreptitiously and selling at great loss to her.

15. The case against G4S was founded on breach of duty. The plaintiff alleged that G4S allowed persons with fake tickets to enter concert despite being responsible to verify genuine tickets. That it failed to account to the plaintiff and that it interfered with the only mode of accounting by dumping or destroying the counterfoils. The plaintiff also accused G4S of declaring that a lower number of tickets was actually sold.

16. As regards Smart Printers, the plaintiff claimed that it printed irregular tickets and interfered with the security measures of the tickets. The plaintiff further claimed that it printed tickets with the same serial numbers and with two different faces.

Agreed issues for determination

17. Prior to the hearing, the parties framed the following issues for determination:

- (1) Who instructed Smart Printers to print the tickets for the concert?
- (2) Whether G4S was engaged by consent of both the Plaintiff and Airtel.
- (3) How many tickets were sold?
- (4) Whether other tickets were printed besides the 14,000/- tickets agreed upon by the plaintiff and Airtel.
- (5) Were any such tickets as set out in para. 17 of the Amended Plaintiff recorded.
- (6) Did the Defendants commit the breaches particularized in para. 21 of the Amended plaintiff.
- (7) Whether the plaintiff is entitled to the prayers sought.
- (8) How many people attended the concert?

18. Despite the agreed issues, the dispute between the parties is captured in para. 17 of the Amended Plaintiff which sets out particulars of breach of contract against the Airtel and particulars of breach of duty against Airtel, G4S and Smart Printers.

Limitation of Actions

19. Although the parties did not agree whether the plaintiff's case was time barred as an issue for trial, it is a matter in issue as it was raised by Airtel and G4S. At para. 16 of the Re-amended Defence dated 15th October 2019, the Airtel pleaded that, *"To the extent that the Plaintiff has founded a claim in tort, the 1st Defendant will raise a preliminary objection to the proceedings for being barred by statute"*. On its part the 2nd defendant filed a Notice of Preliminary Objection dated 23rd September 2019 contending that, *"In so far as the claim against the 2nd Defendant is based on the tort of negligence, the suit is expressly barred by dint of Section 4(2) of the Limitation of Actions Act, Cap. 22 Laws of Kenya, and should be struck out with costs."*

20. As I stated before, the case against the defendant was grounded on contract and tort. The 1st and 2nd defendants submitted that the claim for breach of duty of care being a tortious claim was time barred under **section 4(2)** of the **Limitation of Actions Act (Chapter 22 of the Laws of Kenya)** which states, *"An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued"*.

21. The position taken by Airtel and G4S was that the claim for breach of duty of care was an action for the tort of negligence. Counsel for G4S referred to ***Kiamokama Tea Factory Company Ltd v Joshua Nyakoni KSI HCCA No. 169 of 2009 [2015] eKLR*** where the court cited with approval **Black's Law Dictionary (8th Ed)** which defines tort as, *"a civil wrong, other than a breach of contract, ... a breach of duty that the law imposes on persons who stand in a particular relationship to one another."* As the plaintiff alleged a breach of duty, the cause of action arose or accrued on 3rd October 2008 when the concert took place. The suit was filed on 1st July 2013, 4 ½ years after the cause of action accrued, hence it was time barred as it was filed outside the 3-year limitation period prescribed by **section 4(2)** of the **Limitation of Actions Act**.

22. At para. 42 of the written submissions, Counsel for the plaintiff stated that the, *"The claims against the Defendant are based on contract"*. He further submitted that although she was not privy to the contract between Airtel, G4S and Smart Printers, the plaintiff was entitled to relief since she was to derive benefit from the Agreement were it not for the negligent acts of the defendants which occasioned her

loss. Counsel cited that case of *Aineah Likuyani Njirah v Aga Khan Health Services NBI CA Civil App. No. 94 of 2009 [2013] eKLR* where the Court of Appeal held that where a contract expressly benefits the third party, there is a presumption that the contracting parties intended that the third party to have a right of enforcement.

23. In my view, the plaintiff's submission contradicts what is pleaded at para. 21 of the Amended Plaintiff against the 1st and 2nd defendants and which refers to "*Breach of Duty*" and prayer (a) in which she seeks, "*A Declaration that the Defendants were jointly and severally negligent in discharge of their respective duties in respect to the concert*" [Emphasis mine]. The plaintiff is bound by its pleadings and in this case, the plaintiff clearly pleaded the nature of her cause of action.

24. Since part of the claim against Airtel and the entire claim against G4s were based the tort of negligence and or breach of duty, the claims are time barred as they were filed beyond the 3 years permitted by **section 4(2)** of the **Limitation of Actions Act** and without leave of court. I would add the reason for failing to file the case within time was because the matter was the subject of arbitral proceedings but this does not affect the period of limitation calculated from the date the cause of action accrued (see *Jones M. Musau & Another v Kenya Hospital Association & Another NRB CA Civil Appeal No. 42 of 2016 [2017] eKLR*). Those claims are to that extent are dismissed. Although the claim against the Smart Printers falls in the same category, it did not plead the defence of limitation and cannot therefore benefit from it (see *Stephen Onyango Achola & Another v Edward Hongo Sule & Another NRB CA Civil Appeal No. 209 of 2004 [2004] eKLR*).

Breach of the Agreement

25. The remaining part of the plaintiff case is grounded on contract as the relationship between the plaintiff and Airtel is governed by the Agreement. The material terms of the Agreement were as follows:

2.0 DUTIES OF WORTHLINK

In consideration of this Agreement, WORTHLINK shall ensure that it:

2.1 Pays the Artiste's performance fees;

2.2 Pays the costs of the flight for the band members accompanying the Artiste;

2.3 Procures valid entry visas and valid work permits for the Artiste and the band members perform at the ceremonies and provide the Sponsor with evidence of the permits prior to the performances;

2.4 Procures valid authority from the Music Copyright Society of Kenya endorsing the concert;

2.5 Pay for the accommodation costs of the Artiste and the band members;

2.6 Procures adequate local transport for the Artiste and the band members;

2.7 Organize for the hire of equipment for the Artiste and the band members;

2.8 Ensure that the Artiste performs at the Concert;

2.9 Book and pay for the venue for the Concert;

2.10 Provide space at the SPLASH for the Sponsor to brand and display its products at the pre-Concert publicity events and at the Concert.

2.11 Ensure that the Artiste adherers to the Sponsor's itinerary for the duration of the Artiste's stay in Kenya;

2.12 Provide Three (3) local artistes to perform at the Concert;

2.13 Ensure that the necessary facilities required for the Concert, including adequate sound, lighting, service tent and toilet facilities are provided at SPLASH;

2.14 Distributes publicity material for the Concert including posters, fliers and tickets PROVIDED THAT WORTHLINK will at no additional cost to the SPONSOR be responsible for all licence/permit or authorization fees payable to any local authority;

2.15 Provide insurance cover for all people attending the concert.

3.0 PAYMENT TERMS

3.2 The proceeds of the ticket sales from the Concert shall be shared between the Sponsor and WORTHLINK as follows:

a) Eighty percent (80%) to WORTHLINK; and

b) Twenty percent (20%) to the Sponsor.

8.0 INDEMNITY

Notwithstanding the aforementioned, either party hereto indemnified and holds the other party (“the aggrieved party”), its affiliates and employees harmless from, and against any costs or damages that may be incurred by the aggrieved party as a result of claims of damages, demands and causes of action brought against the aggrieved party for infringement of any right, where the claim or action arises from tort or contract, or any infringement of whatever nature, arising out of or pursuant to the exercise by the aggrieved party of its rights or the fulfillment or breach by the other party of any of its obligations in terms of this Agreement and such indemnity shall extend to the reasonable cost that may be incurred by the aggrieved party in defending any action instituted against it. [Emphasis mine]

26. It is now apparent not only from the agreed issues and but also the particulars of breach alleged, that the dispute between the parties revolved around the printing and sale of the tickets which in turn had an impact on the final amount collected at the concert.

27. As regards issue No. 1, DW 1 admitted and DW 3 accepted that it is Airtel that instructed Smart Printers to print the tickets. Airtel issued an LPO No. 62064 dated 23rd September 2008 to Smart Printers to print tickets, fliers and A2 poster for the concert. Turning to Issue No. 2, the evidence is also clear Airtel contracted G4S under a Temporary Works Order No. 119337.

28. The plaintiff’s case is that under the Agreement it was her responsibility to procure the tickets and as such Airtel breached it. Whether there was a breach of the Agreement turns on the interpretation of Clause 2.0 and in particular 2.14 under which the plaintiff was to, “... distribute publicity material for the Concert including posters, fliers and tickets”

29. Counsel for the plaintiff submitted that she had taken steps towards discharging her duty under Clause 2.0 and that she had contracted a security firm before Airtel unilaterally took over the contracted G4S and Smart Printers. Counsel contended that the Agreement could only be varied under Clause 12.0 of the Agreement which provides, “... the provisions of the Agreement may only be added to, modified or varied by mutual consent of and the written agreement of the Parties.” Since the parties did not execute any further agreement, the plaintiff contended that the actions by Airtel breached the Agreement.

30. Counsel for Airtel countered that the issue of printing the tickets and providing security were not provided for and were therefore matters outside the purview of the Agreement. Counsel urged that by appointing G4S and Smart Printers, Airtel did not violate the Agreement.

31. The plaintiff’s obligations in the Agreement are set out in Clause 2.0 which, on a plain reading, do not deal with printing of tickets. Indeed, Clause 2.14 of the Agreement refers to “distribution of fliers and tickets...” Distribution assumes that tickets had already been printed. Likewise, the issue of security was not the subject of the contract. I therefore find and hold that Clause 2.14 requiring modification in writing could not apply in the circumstances. I also hold that the engagement by Airtel of G4S and Smart Printers was not in violation of the Agreement as these were not matters provided for. In other words, I find and hold that Airtel did not breach the Agreement by engaging G4S and Smart Printers.

The tickets and claim for loss of anticipated profits

32. Agreed issues No. 3, 4 and 5 deal with the tickets sold at the event and is directly related to the plaintiff’s claim for loss of anticipated profits occasioned by breach of the Agreement by Airtel and breach of duty of care by G4S and Smart Printers. The plaintiff’s case is that it lost substantial profit which would have accrued from the sale of 9,200 tickets less 20% due to Airtel amounting to Kshs. 10,568,000.00 made up as follows:

(a) 9000 general Tickets @ 1,500/= Kshs. 13,500,000.00

(b) 200 VIP tickets @Kshs. 2,000/= Kshs. 400,000.00

(c) Subtotal Kshs. 13,900,000.00

Less 20% Kshs. 2,780,000.00

Less paid by Airtel Kshs. 552,000.00

Total Kshs. 10,568,000.00

33. The complaint regarding breach of duty of care in relation to the Airtel and G4S is, as I have held, time barred. But for completeness of the record I shall deal with the issue from the premise that the plaintiff bears the burden of proving its case on a balance of probabilities.

34. Counsel for the plaintiff referred to the case of *Nakana Trading Co., Ltd v Coffee Marketing Board [1990 – 1994] EA 448* in which the court held that in a case of breach of a contract reduced into writing, the court's duty was to look at the document and determine whether it applies to existing facts. Counsel for the plaintiff pointed out that the defendants were guilty of failing to take proper precautions to prevent advance sale of tickets and admission of fake tickets at an irregular price. That Airtel failed to account for tickets printed by Smart Printers and for those sold and admitted into the concert by G4S. She also accused Airtel of failing to conduct investigations into the selling of fake tickets and those sold at irregular prices.

35. As a matter of fact, the parties agreed that 14,000/- tickets were printed by Smart Printers. DW 3 established Smart Printers received an order for the tickets on 29th September 2008. The artwork was approved by Airtel on 30th September 2008 and the tickets were then printed and collected on 2nd October 2008. Counsel pointed to an email dated 29th September 2008 to demonstrate that additional tickets were printed as the email stated that, "*Since we ordered for 14,000 tickets we have a remainder of 2,700 tickets. Please print the following*"

36. I have looked carefully at the emails produced by the plaintiff and on the material day, two emails were sent by Lilian Kanyi at Airtel. The first one sent at 4.55AM and copied to Smart Printers stated as follows:

Since we ordered for 14,000 tickets we have a remainder of 2,700 tickets. Please print the following.

Tickets

General – 9000

General Advance – 2700

Complimentary – 200

VIP Complimentary – 100

At 10.45 AM, she sent another email to Smart Printers stating as follows;

Hello,

This is a breakdown of the tickets:

Tickets

General – 9000

VIP – 200

Complimentary – 2000

VIP Complimentary – 100

Passes

Crew – 100

Security - 100

37. I do not think that the email alone shows that Airtel printed an additional 2700 tickets. In the first email, the total number of tickets is 14,000 while that in the latter 2700 tickets for General Advance Category was not included. The number of 14,000 tickets is the same number in the Part Delivery order dated 1st October 2008 and final delivery note dated 2nd October 2008 which was signed on 22nd October 2008. All the evidence is consistent that 14,000/- tickets were printed. In light of the testimony of DW 3 and the documentary evidence, I find that the 14,000 tickets were produced by Smart Printers.

38. Apart from the number of tickets, the plaintiff complained that the defendant printed and supplied fake tickets. I do not find any proof or evidence that the tickets were deficient in any manner. I say so because in a letter dated 27th March 2009 from Kenya Revenue Authority to the plaintiff, the Senior Assistant Commissioner noted that the tickets were brought to their offices on 2nd October 2008 by Lilian Kanyi of Airtel and the plaintiff. In that letter, he stated as follows:

They were stamped on 3rd October 2008 (Friday) except for the Advance Tickets which they two parties agreed they would not be sold. The tickets brought were as follow;

Advance – 2,700 Tickets

General – 9,000 Tickets

The same were handed back to the representatives immediately after stamping and sale that evening.

39. This letter is from an independent person and it confirms that the plaintiff and Lilian from Airtel took the tickets for stamping by KRA. It is difficult to believe that the plaintiff would have acceded to stamping of the tickets which would be deficient in any manner and allowed them to be used on the same evening without protest. The letter also confirms that the parties excluded the 2,700 advanced tickets and only stamped 9,200 tickets. This letter from the Senior Assistant Commissioner confirming that the plaintiff and Lilian went together to have the tickets stamped put to sleep the argument that the plaintiff did not acquiesce to Airtel printing the tickets.

40. Further and in light of the aforesaid evidence, I find that the tickets printed by Smart Printers were released to Airtel on 2nd October 2008 and on the day of the concert, the plaintiff and Lilian went to KRA to have them stamped. The implication of this is that there was no opportunity for Airtel and Smart Printers to not only print fake tickets but also distribute the same earlier than 2nd October 2008. It is on this account that the testimony of PW 2 that Airtel was selling tickets prior to the concert becomes doubtful.

41. The plaintiff pleaded at para. 17 of the plaint that, *“the Plaintiff recovered tickets for the value of Kshs. 1,200.00 counterfoils bearing the same serial numbers, tickets printed as complementary tickets on one side and the reverse printed with the value of 1,200/- or 1,500/-.”* While it is possible that fake tickets were being sold at the venue and elsewhere and some of those tickets recovered, the plaintiff has not proved that this fraudulent conduct was attributable to any of the defendants.

42. That leaves the question how many tickets were sold. In response to the question, *“How many tickets were sold?”* Counsel for the plaintiff submitted that, *“That there was no clear evidence to this question from the evidence given.”* The plaintiff complained that the Airtel unilaterally engaged G4S to sell the tickets and did not provide any reconciliation at the handover showing how many tickets were sold and how many were handed over to the Airtel. In her view, the reconciliation statement contained in the letter dated 9th October 2008 was not conclusive of the tickets sold. The plaintiff presented photographic and video evidence to show that more than 10,000 fans attended the concert.

43. The only indication of the tickets sold is the reconciliation presented by Airtel on 9th October 2019. It indicated the number of tickets sold and the unsold tickets were handed over to the plaintiff to follow up with Kenya Revenue Authority. In that letter Airtel acknowledged that there was a dispute but absent any other evidence to show that more tickets were sold, I am unable to find more tickets than those declared were sold hence the claim for consequential loss has not been established.

Special Damages

44. The plaintiff claimed special damages amounting to Kshs. 3,171,381.15 being specific costs incurred, *“in ensuring that the concert proceeded as per the agreement entered into.”* The amounts included the following; Down payment on value added tax, air fare for artiste and troupe, obtaining special passes for artiste, payment towards the venue for concert, rescheduling flights on delay, accommodation for the artiste, security at the venue, insurance cover, payment to Copyright Society of Kenya, Transport, Printing T-shirts, payment of local artiste, hiring sound equipment, food and refreshments, payment to city council, coordinators fee, media coverage (Metro FM) and banners and fliers.

45. Counsel for the plaintiff submitted that the under clause 8.0 of the Agreement, the plaintiff was entitled to be indemnified for reasonable costs it incurred under clause 2.0. He pointed out that these costs were not controverted. In response, counsel for Airtel submitted that the items particularized as damages were part of the plaintiff’s obligation under Clause 2.0 of the Agreement and that the amount claimed was not proved.

46. On this aspect of the claim I am inclined to agree with the position taken by the Airtel because the items particularized are within the province of Clause 2.0 which the plaintiff was bound to incur in order to mount the concert. There is no dispute that the concert took place and as I understand, the plaintiff’s complaint is that the concert did not make as much money as anticipated due to negligence and breach of contract.

47. Further, a reading of the indemnity clause at Clause 8.0 of the Agreement, shows it is not a general indemnity clause for any losses but for losses as a result of claims by third parties against any of the parties to the Agreement. What is clear is that the concert took place after the parties had fulfilled their respective obligations under the Agreement. The plaintiff’s claim for special damages does not amount to a loss contemplated by the Agreement and cannot be sustained.

Consequential loss

48. The plaintiff’s claim for consequential loss amounting to Kshs. 6,512,400.00 is based on costs owed to third parties as follows:

Promoters fee	Kshs.	2,000,000.00
Unpaid VAT due to KRA	Kshs.	2,142,400.00
USD 30,000 fee payable Ksh. 79 per USD	Kshs.	2,370,000.00

49. The claim for consequential loss cannot be sustained as the promoter’s and artiste’s fee were an obligation of the plaintiff under Clause 2.0 of the Agreement and were part of the necessary costs to ensure that the concert took place. Since the concert took place, it cannot be said

that payment of same constituted a loss contemplated under the agreement.

50. As regards VAT, the plaintiff has not shown any demand for VAT due from KRA. On the contrary the issue of VAT was explained by the plaintiff in her letter dated 20th November 2008 to the Commissioner of Domestic Taxes in which she confirmed that she had given a Bankers Cheques for Kshs. 600,000/- and drawn a cheque for Kshs. 2,142,400/- in favour KRA to cover VAT. Since the concert did not yield the expected returns, she explained to KRA the position and the claim was abandoned.

51. I therefore reject the plaintiff's claim for consequential loss as pleaded.

Conclusion

52. The parties entered into the Sponsorship Agreement believing that that they would both make a profit from ticket sales but that did not come to fruition. According to the statement by the plaintiff, when the tickets sales were presented, the Airtel Corporate Director was shocked to see collections reflected only 451 people! It is apparent that fake tickets were sold but neither party benefitted. The plaintiff, in her evidence, did not establish that the defendants or any of them were involved the alleged nefarious activities.

53. At the end of the day, the plaintiff must prove the case pleaded in the plaint on the balance of probabilities. For the reasons I have set out in the judgment, the plaintiff has not proved her case. It is therefore dismissed with costs to the defendants.

DATED and DELIVERED at NAIROBI this 19th day of DECEMBER 2019.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Thiga instructed by Waruhiu, Kowade and Nganga Advocates for the plaintiff

Mr Makambo instructed by Ojiambo and Company Advocates for the 1st defendant

Mr Mwihuri instructed by Hamilton Harrison and Mathews Advocates for the 2nd defendant

Mr Okoth instructed by Gilani and Company Advocates for the 3rd defendant