



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION

HCC. CASE NO. 605 OF 2015

SHAFI GREWAL KAKA (CHAIRPERSON)

JULIE DABALY SCORR (VICE CHAIRPERSON)

MOHAMED WANYOIKE (TREASURER)

FEMINA DAWOODIA (HONORARY SECRETARY)

(SUING AS THE OFFICIALS AND TRUSTEES OF

KENYA ASSOCIATION OF TRAVEL AGENTS (KAKA).....PLAINTIFF

VERSUS

INTERNATIONAL AIR TRANSPORT ASSOCIATION (IATA)....DEFENDANT

RULING

1. Before the court are 2 applications namely; Notice of Motion dated 3.12.2015 lodged by the Plaintiffs and the second one dated 8.12.2015 lodged by the Defendant.
2. The 2 motions were canvassed together. The Notice of Motion dated 3.12.2015 is brought under S.7 of the Arbitration Act and seeks the following Orders;

1. **Dispensed with**

2.

3.

4. **An Order for temporary injunction to restrain Respondent, its agents or assigns from varying the passenger Sales Agency Agreement (PSAA) between it and Applicant's members pending the hearing of the suit and the intended reference to arbitration.**

5. **A temporary injunction to restrain the Respondent whether by its agents or assigns from implementing the proposed variation to the PSAA between it and the Applicant members as communicated via an Email of 22.10.2015 pending hearing of the suit and the intended reference to arbitration.**

3. The application is predicated on the grounds that the Plaintiff is an association that represents travel agents in Kenya as regards this matter and the intended arbitration between the parties. The Respondent and Travel agents are governed by PSAA in their engagement which can only be

- varied in accordance with the laid down procedure.
4. The Applicant avers that the Respondent unilaterally varied PSAA between itself and the travel agents with effect that remittances to the Respondent would be changed from monthly to fortnightly frequency with effect from 1.1.2016. In further breach of the said PSAA the Respondent issued notification on 22.1.2015 instead of the agency Administrator. Thus a dispute has ensued and the Applicant intends to refer dispute to the arbitration in accordance with the provisions of Resolution 820e of the agreement.
 5. The Applicants members are apprehensive that the Defendant aforesaid breaches will cause them substantial loss causing a large part of them to stand risk of losing their business and exit from the market.
 6. The application is supported by the Affidavit sworn by **SHAFI GREWAL KAKA** sworn on 3.12.2015. The Respondent rejoinder is contained in the grounds on the face of the application dated 8.12.2015, grounds of opposition dated 8.12.2015 and an Affidavit sworn by **SALOME OSURE** on 16.12.2015.
 7. The summary of the Respondent objection to the application by the Plaintiff is that, there is no prima facie case disclosed as the PSAA is between travel agents and the Respondent and the Applicant is not a party and thus locus standi wanting. The Applicant cannot thus be a party to the arbitral proceedings. In the premise, the Applicant cannot declare dispute to enable it seek the Orders set out in the application dated 3.12.2015 .Under section 1.2 of the Resolution 820e in Travel Agent's Handbook, the only party with locus to request for review is either an agent or an Applicant (being a party who has applied to become an accredited agent).
 8. There was no such request made by said stated parties to the Travel Agency Commissioner. Thus no cause of action disclosed against Defendant accrues to the Plaintiff. There is thus no arbitrable dispute. There is no notice declaring a dispute or referring any dispute to the arbitration.
 9. The rights under PSAA attaches to the individual agents. The Plaintiff has not demonstrated if any injury it is at risk of suffering given that;
 - *It has no right under PSAA.*
 - *There is no provision in PSAA for issuance of tickets to passengers on credit.*
 - *The travel agents are agents of carriers and hold proceeds of ticket sale in trust for such carriers.*
 10. The balance of convenience tilts in carrier/Defendant favour as Orders will delay implementation of the impugned resolution on the basis of a complaint by a non party to PSAA. The Respondent thus seeks the dismissal of the application and striking out of the plaint.

The Plaintiff responded to the application by the Respondent via a replying affidavit sworn by SHAFI CREWAL KAKA on 11.12.2015

11. The matter was canvassed via oral submissions.

Plaintiff/Applicant Submissions

12. The plaintiff submits that, the dispute emanates from the Respondent decision to change of mode of the remittance frequency from monthly to fortnight. The same change was effected without notice to the Applicant. They have to adjust and take care of funds and guarantee to fit within the new arrangements.
13. The Applicant wrote to the Respondent making enquiries about the changes vide a letter dated 22.1.1995 on page 42 of the Plaintiffs Replying Affidavit. The response thereto is dated 3.3.2015. There was indication that the issues raised would be subject in a meeting of 19.3.2015. On 22.10.2015 the Applicant on behalf of its members wrote to the Respondent enquiring about the resolution which had not been discussed though sought same to be set aside to allow parties to negotiate.
14. By a letter date 15.10.2015 the Respondent replied thereto. The letter of 22.10.2015 gave formal notice of effecting changes as from 1.1.2016 and the respondent advised Applicant if dissatisfied it could seek review from the travel Agency Commissioner (T.A.C).
15. Subsequently the applicant made a request for review to the TAC dated 19.11.2015. The TAC

reply thereto was that ;

“he has no mandate to review complaints by applicant Agencies. This prompted the Applicant move to Court to seek interim measures of protection pending resolution of dispute via arbitral proceedings.

16.The applicant contends that, the matter is not in court for determination on merit but for interim orders aforesaid pending arbitration. On Courts mandate in granting the reliefs sought the Applicant cited the case of **STOIC CO. Ltd Vs. Sales Ltd & another HCMisc.115/2015.**

17.On page 4 paragraph 24 of the cited case, the court held;

“on account of the foregoing, it is plain that the Applicant is entitled to reliefs pending arbitration before this court under Section 7 of the Arbitration Act”.

On page 23 paragraph 34 citing the case of **SAFARICOM LTD Vs. OCEAN VIEW BEACH HOTEL LTD & 2 OTHERS (2010)** the Court held;

“...it may be necessary for an arbitral tribunal or the court to issue orders intended to preserve evidence, to protect assets, or in some other way to maintain the status quo pending the outcome of arbitral proceedings themselves...”.

18.The Applicant submits that the Principles in **GIELLA AND MRAO** cases cited by the Respondent do not apply in the instant matter as the Court is moved under **Section 7 of the arbitration Act.** The Applicant also relied on the case of **LAGOON DEVELOPMENT LTD Vs. BEIJING INDUSTRIAL DESIGNING AND RESEARCH INSTITUTE** land case **No.2/2014.**

19.On page 4 paragraph 24 the court held;

“...the principles enunciated in the ..GIELLA Vs. CASSMAN BROWN (1973) EA 358 should not be the basis while granting the interim measures of protection pursuant to provisions of Section 7 of the Arbitration Act”.

20.On the issue of striking out of Applicant plaint, the Applicant relied on the case of **LEASE CO. LTD & ANOTHER Vs. ADC** land Case **No.95/2014** page 4 paragraph 3, where the court held;

“...Order 1 Rule 9 of the CPR 2010, provides that a suit cannot be defeated by reason of misjoinder or non-joinder of persons. At page 32 the Court continued;

“the suit ,, cannot be defeated merely because the 2nd Plaintiff does not have any interest in suit. At worst, the plaint may be amended by deleting the name of the 2nd Plaintiff and the suit proceed in the name of the 1st Plaintiff”.

21.The Applicant also relied on the Indian case of **TRAVEL AGENTS OF INDIA VS. UNION OF INDIA & 2 OTHERS** petition **NO.38249/2013** (GM-REg) where in a suit by Agency organization court granted interim measure of protection in similar circumstances as in the instant case. Also the applicant cited is the case of **PULTE HOME CORP. VS. VERMILLION HOME OWNERS ASSOCIATION** in **C 109 s0.3rd 233 (FLA .2ND DCA 2013)** where Association of Home owners was allowed in the case to proceed with matter and court held the dispute was bound by Arbitral clause.

22.Also the applicant relied on the case **AFC Ltd Vs. LENGETIA LTD (1985) KLR 705** in submitting that the Principle of privity of contract has exceptions. The Plaintiff submits that the Applicant attended meeting on behalf of the Travel Agents and thus represents them. The Applicant thus prayed for orders.

THE RESPONDENTS SUBMISSIONS

23. The Respondent submit that for temporary injunction to issued, the Applicant must meet the thresh hold of granting the same.

a) First according to the Plaintiff's constitution the office bearers can only institute or defend suit on behalf of the Association. The PSAA is between Respondent and Travel Agents.

b) The review sought by the Applicant was outside TAC mandate.

c) There is no dispute to enable court be moved under Section 7 of Arbitration Act.

24. The issues of frequency of remittances was under discussion since 2011 and the applicant members sent their proposals to APTC. The Plaintiff had knowledge of the resolution as of January 2015. The resolution passed is binding and same cannot be stopped from being implemented. Same is now applying and in force in other countries.

25. The Orders sought if granted will create anomalies thus same not justified. For one to invoke provisions of Section 7 of Arbitration Act it must be a party to the Agreement. For an Association to lodge a case, there must be contract between parties.

26. The conditions for grant of interim measures are that;

1. There must be arbitral clause.
2. There has to be a dispute.

27. The above 2 conditions have not been established.

In the case of **AFC VS. LENGETIA** case Supra page 770 paragraph 40 the court held;

“As a general rule a contract only affects parties to it, and cannot be enforced by and against a person who is not a party, even if the contract is made for his benefit and purports to give him right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract”.

28. On locus standi, the Respondent submit that the Applicant has not established same to justify lodging of the suit. It is not the proper party to lodge suit but 142 agents. It seeks dismissal of the application.

29. After going through the pleadings, affidavits and the parties advocates submissions, I find the principle issues are;

- i. **Whether the Applicant/Plaintiff has locus to lodge instant suit and arbitral proceedings thereof?**
- ii. **If (i) above in affirmative, whether the Applicant/Plaintiff has met the thresh hold of grant of interim protective measures under S.7 of the Arbitration Act 1995?**

30. The Respondent /Defendant submit that the Plaintiff has no locus standi to institute instant suit as it is not a party to the PSAA nor does it have mandate under its constitution to institute suit like the instant one. It can only institute suit on its own or defend the association.

31. The PSAA are travel agents agreements between the travel agents and the Respondent. The review process under Resolution 818g stipulates that, the party who can seek a renew from Travel Agency Commissioner (TAC). It does not have provision for request for review by an association.

32. The TAC in an email of 24.11.2015 indicated that resolution 820e does not cover disputes by the associations of travel agents and thus dispute does not arise.

33. The Plaintiff response is that the court has no jurisdiction to determine whether there was dispute between parties which raises reasonable cause of action as this is within arbitrator's mandate. In any event the striking out of suit is draconian and should only be granted in exceptional cases

- where the suit cannot be salvaged through amendment.
34. In any event the Plaintiff being an association of the Travel agent which represents them in the market, it can present any dispute between collective agent community in Kenya and the Defendant.

DETERMINATION

35. The Plaintiff is an association of the Travel Agents (TA) and is governed by its constitution availed to court via supporting Affidavit by the Plaintiff. The powers of the office bearers is stipulated under clause 4.6 and specifically clause 4.6.2 to wit;

‘institute or defend all legal proceedings by or on behalf of KATA (itself)’.

No where is it mandated to institute or defend suit on behalf of its members jointly or severally.

36. The availed PSAA copy is shown to be between the T.A and IATA. No provisions for KATA to sign. The terms and conditions governing the relationship between the carriers and the agent are set forth in the resolutions in Travel Agency Handbook (TAH) under Resolution 820e. The processing of the review requests from an agent or Applicant are set out.
37. Under clause 1.2.1 Review is initiated by a person authorized to make the request. There is no evidence the Plaintiff was authorized to make the request made to the T.A.C. Thus on 24.11.2015 TAC via email stated that;

“The office has no mandate to review complaints by Travel Agents Associations in line with resolution 820e”

38. This was a clear intimation that the Plaintiff was not the appropriate party to seek the review and thus want of the locus standi.

In the treatise of **SETTLING DISPUTES THROUGH ARBITRATION IN KENYA BY DR. KARIUKI MUIGUA** page 46 the author opines that;

“Applicant must be a party to an arbitration agreement or at least a person claiming through is a personal representative or trustee in bankruptcy. This requirement is in view of the doctrine of privity of a contract which is to the effect that only parties to a contract can enforce it and a stranger to a contract cannot enforce it”

39. The same opinion was upheld in **CHEVRON KENYA LTD VS. TAMOIL KENYA LTD HCC MILIMANI 155/2007**.
40. The Plaintiff is thus disabled by the lack of mandate in its constitution to institute or defend suit on behalf of the members and the lack of capacity to enforce the agreement (PSAA) in which it is not a party to. The applicant has failed in view of the foregoing to put itself within the exceptions to the general rule on privity of contract. The plaintiff thus lacks locus standi to proceed with the instant matter and thus the reliefs sought cannot be granted.

MOTION DATED 8TH DECEMBER 2015

41. The defendant motion dated 8/12/20015 seeks to strike out the plaint dated 3/12/2015. It is predicated on the ground that, it does not disclose a reasonable cause of action, there is no contract between the plaintiff and the defendant as PSAA is between plaintiff's members and the defendant, thus the plaintiff lacks locus standi inter alia.
42. **Order 15(1)** provides as follows;

At any stage of proceedings the court may order to be struck out or amended any pleadings on the grounds set out .

In the case of **RAMJI MEGJI GUDKA VS ALFRED M O MORFAT AND OTHERS (2005) e KLR** the court held as follows;

"in our view,, the power to strike out pleadings must be sparingly exercised. it can only be exercised in the clearest of cases".

43. In the case of **DT DOBIE AND COMPANY LTD VS MUCHINA (1982) KLR** the court held,

"the court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being an abuse of court process. At this stage court ought not to deal with any merits of the case for that is function solely reserved for a judge at the trial as the court itself is not fully informed so as to deal with merits...."

44.The court is alive to the fact that the matter is to be tried by the arbitrator and He is the only one who can delve into the merits of the case but not this court at this stage. The applicant can still amend the pleadings at this stage .The arbitrator may be moved under section 18 of Arbitration Act for interim protection upon institution of the arbitral proceedings once appropriate parties are enjoined. In the premises the court declines to strike out the plaint herein.

46..In conclusion, the court finds that the plaintiff lacks the appropriate capacity to lodge instant suit for failure to establish mandate to represent travel agents in litigation and for lack of privity of contract with the defendant.

45. The Court thus makes the following Orders.

Application dated 3.12.2015 is dismissed.

1. Application dated 8.12.2015 is dismissed.
2. The status quo Orders issued herein are vacated.
3. Costs in the cause.

Dated, Signed and Delivered in Court at Nairobi this 29th day of January, 2016.

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C. KARIUKI

JUDGE