



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
(MILIMANI COMMERCIAL COURTS)

CIVIL SUIT NO 143 OF 2010

INCENTIVE TRAVEL LTD .....PLAINTIFF

Versus

THE COVENANT FOUNDATION .....1ST DEFENDANT

DAVID GITHUGU .....2ND DEFENDANT

**RULING**

**Summary judgment or judgment on admission:**

[1] The Plaintiff has applied for summary judgment or in the alternative, judgment on admission to be entered against the Defendant. This suit is against the Defendants and in the Plaintiff dated 11<sup>th</sup> March 2010, the Plaintiff is seeking for judgment against the Defendants jointly and severally in the sum of Kshs. 4,355,566/=, plus interests and costs of the suit.

[2] The Applicant gave brief facts of the case to be as follows;

- i. That the 1<sup>st</sup> Defendant contracted the Plaintiff to procure return airline tickets for 11 members of the Blackman Band performing at a concert in Nairobi. The band was travelling from Trinidad, through Latin America, South America and up to Kenya.
- ii. The cost of acquiring the said tickets was Kshs. 3,276,915/=. The tickets were procured by the Plaintiff on behalf of the 1<sup>st</sup> Defendant, on a Seven (7) days credit arrangement with the concerned airline.
- iii. After the concert, the 1<sup>st</sup> Defendant failed or refused to settle the monies owed to the Plaintiff despite several demands by the Plaintiff.
- iv. The sum owed remains unpaid to date, and has accrued interest which stood at Kshs. 1,078,651/= as at the time of filing suit. The amount claimed for in the Plaintiff is in the sum of Kshs. 4,355,566/=, which the Plaintiff seeks to recover through this Honourable Court.

[3] The Defendants in their defence states that indeed the tickets were obtained from the Plaintiff, but deny that they undertook to pay for them. They aver that the Plaintiff was to be paid from the concert gate collections, and due to inadequate attendance at the said concert, the money for the tickets could not be raised. They also aver that they only acted as agents for Badilika DJs, and as such should not be held responsible for payment of the tickets. They blame the Plaintiff for not being diligent enough in demanding for its pay, and deny liability as a result.

[4] The Plaintiff thereafter filed an application in court seeking summary judgment and alternatively, judgment on admission against the Defendants. The Defendants in turn filed a Repling Affidavit and Grounds of opposition challenging the Plaintiff's application.

[5] According to the Applicant, the following are the issues for determination by the court;

- i. ***Was there an agreement between the Plaintiff and Defendants?***
- ii. ***What undertakings, if any, were made by the Defendants to the Plaintiff?***
- iii. ***How much is owed by the Defendants to the Plaintiff?***
- iv. ***Do the Defendants have a valid defence to the Plaintiff's claim?***
- v. ***Who should bear the costs of this application and suit?***

[6] The Applicant submitted that the Defendants contracted the Plaintiff to procure air tickets for 11 members of the "Blackman Band" performing at a concert in Nairobi, and this fact is uncontroverted. They annexed exhibit "***KM 1***"- a copy of a letter dated 8<sup>th</sup> April 2009 drawn by the 2<sup>nd</sup> Defendant and addressed to the Plaintiff- wherein the 2<sup>ND</sup> Defendant requests for the said tickets, and further makes an undertaking to pay for the same. In addition, the Defendants in their defence confirm the existence of the agreement between them and the Plaintiff. In view of the foregoing, the Applicant submitted that there was an agreement for the supply of air tickets between the Plaintiff and Defendants.

[7] The Applicant contended further that the Defendants acknowledged and made several undertakings to settle the subject matter debt. In the letter dated 8<sup>th</sup> April 2009 (*Annexure KM 1*): - the 2<sup>nd</sup> Defendant acknowledges that the Plaintiff had obtained tickets on the Defendants' behalf, and further undertook to pay for the same out of gate collections. The Defendants committed to pay the said fees "***as a matter of first priority***". Pursuant to the above undertaking, the Defendants made 2 payments of Kshs. 100,000/= each on 17<sup>th</sup> April 2009 and 11<sup>th</sup> May 2009. Copies of payments receipts are annexed to the application and marked "***KM 2***". In the letter dated 29<sup>th</sup> May 2009: - (marked "***KM 3***"), the Defendants wrote to their former advocate, Mr. Kamotho Waiganjo where they confirm that they indeed procured the tickets from the Plaintiff, which tickets they would ensure have been paid for. The Defendants further indicate that they are entering into a debt settlement arrangement with the Plaintiff for settlement of the sums due, "in good faith", and further directed their advocate to act on behalf of both parties to draw the necessary documents. And, on the instructions M/s Kamotho Maiyo & Mbatia Advocates prepared a Deed of Settlement dated 1<sup>st</sup> July 2009, (marked "***KM 4***") which the Defendants and the Plaintiff executed. **Paragraph (c)** of the agreement clearly stipulates that the 1<sup>st</sup> Defendant is indebted to the Plaintiff in the sum of Kshs. 3,276,915/= for supply of air tickets. **Paragraph (d)** stipulates that,

***"the debtor (1<sup>st</sup> Defendant) acknowledges that over and above the principal debt, the Creditor (Plaintiff) has between the 7<sup>th</sup> and 13<sup>th</sup> days of May 2009 borrowed Kshs. 3,200,000/= to finance payment of the Principal Debt and consequently incurred further costs in the form of interest which accrues at the rate of 3.5% in the first month and thereafter at the rate of 5% per month. The Debtor acknowledges that the said interest is payable by the Debtor over and above the principal debt."***

In Paragraph (e) and (f):- the 2<sup>nd</sup> Defendant, in his capacity as the trustee of the 1<sup>st</sup> Defendant, undertook to take over the obligations of the latter in the event of default in payments. It is further stated that the 1<sup>st</sup> Defendant having already defaulted, the 2<sup>nd</sup> Defendant has agreed to settle the debt on the former's behalf. In the **Deed of Guarantee dated 1<sup>st</sup> July 2009**: - the 2<sup>nd</sup> Defendant not only acknowledges the existence of the Principal debt, but also unconditionally and irrevocably undertakes and guarantees to pay the Plaintiff on demand in writing all the monies owed, and further discharge the Covenant Foundation's (1<sup>st</sup> Defendant) obligations. The Deed specifically provides that the amount recoverable under this Guarantee shall be limited to the principal sum plus

all costs and interests charged thereto. The deed is marked as “KM 5” in the application.

[8] In the Supporting Affidavit by Andrew Muchigi Advocate dated 3<sup>rd</sup> July 2009, it is averred that the 2<sup>nd</sup> Defendant indicated to the Plaintiff that he was in a position to settle the debt by way of disposing a property, Title No. NYANDARUA/MAWINGO SALIENT/715, which property he had inherited. This was supported by the affidavit of one Andrew Muchigi Advocate, who acted on the behalf of the 2<sup>nd</sup> Defendant’s family in Succession Cause No. 507 of 1994, Estate of Samuel Mukuru Githugu (the 2<sup>nd</sup> Defendant’s deceased father). In the affidavit, marked as “**KM 6**”, the 2<sup>nd</sup> Defendant’s advocate clearly avers in paragraphs 5 and 6 that the 2<sup>nd</sup> Defendant is indebted to the Plaintiff, and further wishes to transfer his share in the above property to the latter in settlement of the debt. The said affidavit is annexed to the application and marked “**KM 6**”.

[9] From all the above, and the documents produced, the Principal debt owed by the Defendants is Kshs. 3,276,915/=. The Plaintiff had procured the subject-matter tickets on credit from the airline, and upon failure by the Defendants to pay for them, the Plaintiff was forced to borrow KShs. 3,200,000/= to pay the airline. The Plaintiff was charged 3.5% interest for the first month, and thereafter 5% for every subsequent month until payment in full. The interest accumulated and the amount paid by the Plaintiff was Kshs. 1,078,651/=. The total sums owed by the Defendants to the Plaintiff thus amounts to Kshs. 4,355,566/=. All these facts have not been controverted by the Defendants in any of their pleadings before this court. Therefore, the Plaintiff concludes that the Defendants do not have a valid defence to the Plaintiff’s claim. The defences have not raised any triable issues warranting a full trial in this matter. Defences raised in the Defence and Replying Affidavit by the Defendants are mere sham. Consider the following defences;

- a. That the Defendants were at all times acting as agents of Badilika DJs, and as such should not be held responsible for the payment of the tickets. This is misplaced because the Defendants signed and executed deeds of payment and guarantee with the Plaintiff. Despite that averment, the Defendants have not sought to implead the said Badilika DJs as a party to this suit. The said defence is a mere excuse by the Defendants in an attempt to pass blame to another party.
- b. That the Defendant did not at any time make undertakings to settle the debt: - this is not true at all as the Defendants executed various deeds binding them to the debt and also wrote various correspondences not only admitting the debt, but also promising to settle the same. The Defendants are seeking to disown their own documents.
- c. That the Defendants were forced/coerced into executing the deeds of settlement: - the averments that the Plaintiff forced the Defendants, and/or coerced them by way of threats and harassment, to execute the various documents outlined above are absurd. First, the firm of advocates that drew all these documents were instructed by the Defendants and not the Plaintiff. Secondly, the 2<sup>nd</sup> Defendant’s allegations that he and his family/congregants were continuously and viciously harassed by the Plaintiff’s agents, even to the point of his life being threatened by a Mr. Bill Oloo, are not supported by any report to the relevant authorities/police or any evidence whatsoever. These allegations therefore lack credence and ought to be disregarded. In fact, the said allegations only came to light in the year 2012, when the application for Summary Judgment was coming up for hearing. Those allegations are not only defamatory, but also mere afterthought and an excuse to derail the course of justice. The same should be ignored by this court.

[10] From the foregoing, the Plaintiff concluded that the Defendants do not have any defence,; the Defendants have failed to make payment for the tickets as promised yet they have unequivocally admitted responsibility for the payment of the said air tickets, and have further executed various deeds of settlement undertaking to pay the Plaintiff his full costs for obtaining and paying for the tickets. Accordingly, the defence filed by the Defendants does not raise any triable issues, is a mere sham and should forthwith be struck off by this Honourable court and

judgement in the sum of Kshs. 4,355,566/=, plus costs and interest be entered. In the alternative, judgment on Admission to be entered against the Defendants.

### **The Defendants resisted entry of judgment**

[11] The Defendants started by quoting a powerful judicial quote in the case of **Baldev Raj versus Kamel Kishore Aggarwal (Nairobi Civil Appeal No. 48 of 1985 (UR))** that:-

***“It is our view that it is more unjust to shut out a defendant with a good defence than to require a Plaintiff to wait a little longer to prove his claim against such a defendant on the merits.”***

[12] The Defendants then submitted that in the Statement of Defence dated 28<sup>th</sup> April 2010 they denied existence of any contract between themselves and the Plaintiff herein. They also referred to the Second Defendant’s Grounds of Opposition dated 3<sup>rd</sup> November, 2011 and Affidavit in opposition to the Application dated 17<sup>th</sup> August, 2011. They submitted that the Second Defendant admitted having known the Managing Director of the Plaintiff personally and having an informal discussion with him in early April 2009 to discuss an event which was already well within the media limelight concerning the tour by Blackman Band which was being promoted by Bandilika Dee Jays, TV and other promoters. The Managing Director of the Plaintiff’s Travel Agency sought to know whether there was any business venture that would be available to the Plaintiff to which the Second Defendant informed him that he should contact the Badilika Dee Jays who were in a better position to inform him about the plans and other arrangements concerning the Blackman Band Tours. The Second Defendant informed the Managing Director of the Plaintiff that the First Defendant herein, The Covenant Foundation, was merely a sponsor in regard to matters of generating and developing themes for the Blackman Band Tours and that the Second Defendant could not in any way influence the Badilika Dee Jays to grant the Plaintiff the business opportunity sought by its director being to facilitate travel arrangements for the members of the band. On 8<sup>th</sup> April, 2009, the Managing Director of the Plaintiff, Mr. Mahiaini informed the Second Defendant *vide* a telephone conversation that he would be able to supply the Blackman Band Dee Jays members with air tickets at a fair market price. Mr. Mahiaini however expressed his fears over the payment by the promoter and persuaded me to put something in writing with respect to the said supply of air tickets but assured me that neither I nor the Covenant Foundation would suffer any prejudice from such writing. Having known Mr. Mahiani personally, the Second Defendant did not suspect any malice or mischief on his part especially when he dictated the terms to be contained in the letter dated 8<sup>th</sup> April 2009 annexed and marked “**KM-1**”.

[13] The Second Defendant continued to state that, he asked Mr. Mahiaini why the Defendants’ names had been used in the invoice dated 8<sup>th</sup> April 2009 for the airline tickets. He however reassured them that all was well and no claim would lie against the Defendants. The Blackburn Tour took place between the 10<sup>th</sup> and the 15<sup>th</sup> April 2009. Subsequently the Plaintiff and his agents, servants, employees started using unorthodox methods against the Second Defendant and his family in an attempt to compel the Defendants to settle the outstanding bill flowing from the travel services the Blackburn tour had already utilized. Mr. Mahiaini later on introduced his business partner to the Second Defendant Bill Oloo who consequently made threats to the Second Defendant alluding that if I did not pay the Plaintiff back his money something mysterious would befall the 2<sup>nd</sup> Defendant. Further to the above, the Plaintiff through his agents, servants, staff and or other employees acting on its behalf caused mayhem at the office of the Second Defendant’s wife situate off Ng’ong Road at Faulu Kenya DTM Ltd and further made several calls to the Second Defendant’s relations urging them to advise the Second Defendant to make payments to the Plaintiff. Since these antics were causing the Second Defendant, his family and church congregation great embarrassment the Second Defendant was coerced and made a cheque deposit of Kshs 200,000/= on 17<sup>th</sup> April 2009 and 11<sup>th</sup> May 2009 which did not stop the malicious and frustrating acts of the Plaintiff and its agents. The Plaintiff through his agents, staff, and servants continued to pressurize and take advantage of the Second Defendant to the extent that they

coerced him into signing a Deed of Settlement and Deed of Guarantee. The Defendants stated that payments made to the tune of Kshs. 200,000 by the Second Defendant were as a result of direct and indirect coercion and/or pressure exerted by the Plaintiff's agents. Therefore, the Defendants humbly invited the Honourable Court to be guided by the principle set in **Mapis Investment (K) Ltd vs. KRC** where Lady Justice Mary Kasango AG J (as she then was) relied on the cases of **Mistry Amar Singh vs Serwano Wofunira Kulubya** and the case of **Scott vs Brown** and held that:

*No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality.*

That from the foregoing it is the Defendants' submission that this suit is riddled with issues which ought to be determined at the trial. Also, the reliefs sought by the current application can only be determined at a trial. In addition, the current Application contradicts and/or conflicts with the averments contained in the Complaint contrary to the provisions of the Civil Procedure Rules, 2010. They were, therefore, of the view that the application is fatally incompetent on the basis of the rule against Departure in Order 2 Rule 6 which provides that;

***“No party may in any pleading make an allegation of fact, or raise any new ground of a claim inconsistent with previous pleadings in the same suit.”***

Paragraph 6 of the Affidavit of Kiiru Mahiani furnishes instances of payments which is not captured in the Complaint and contrary to the averments in the Complaint which seeks alleged figure of Kshs. 3,276,915 plus a purported accumulated interest. Paragraph 16 of the Affidavit of Kiiru Mahiani purports to add a new ground in the case without the same being grounded in the Complaint.

[14] Further submissions were made by the Defendants that, whereas the Plaintiff has sought strict proof on a number of issues contained in the Statement of Defence in the Plaintiff's Reply to Defence dated 7<sup>th</sup> May 2010 which means the matter ought to proceed to trial, it has blatantly and in disregard of the Rules proceeded to file the current application to contradict the averments in the Complaint and Reply to Defence. The Defendants doubted the admissibility of Guarantee and Deed of Settlement on the basis that these documents have not been stamped as required under the Stamp Duty Act. The Plaintiff by relying on the above said documents contravenes Sections 5 and 19(1) (a) of the Stamp Duty Act Cap 480, since no stamp duty was paid on these documents which are ordinarily liable for stamp duty and hence these documents are **inadmissible** in evidence before this Honourable Court. Consequently, the Defendant humbly submitted that the Replying Affidavit of Mr. Kiiru Mahiani be struck out since it materially contains depositions based on the impugned Deed of Guarantee and Settlement. In the event that said Affidavit is retained then the Defendant humbly submits that the Honourable Court be inclined to expunge paragraphs 7-15 of the Replying Affidavit as they are founded on the said impugned Deed of Settlement and Agreement. The Defendant further submits that the Honourable Court be guided by principles in **Surgipharm Ltd-v-Aksher Pharmacy Ltd & Another [2004]**. The Defendants further submit that the incompetence of the application is glaring on the face of the Replying and Further Affidavits sworn by Mr. Mahiaini without any authority from the Company, nor the Board thereof.

[15] The Defendants did not stop. They argued that the purported contract that the Second Defendant is alleged to have entered into with the Plaintiff is impugned and further that the interest rates claimed on the same are unfounded and unenforceable in light of the illegalities that surround the said contract. Also, the question whether there was a contract or not is not a matter which should be tried summarily but at the trial. The contractual terms are not disclosed neither is the offer, acceptance, consideration nor intention to enter into legal relations claimed. It is evident from the allegations in the Complaint and the Application that there was no *consensus ad idem* and hence the absence of mutual agreement on the subject matter. The Defendants submit that the letter dated 8/04/2009 cannot be alleged to have been the contract founding this suit as the same was obtained by misrepresentation and coercion, which factors can only be demonstrated and the

extent to which they affect the purported contract be determined at the trial. This matter cannot be decided summarily and should be determined and tried by this Honourable Court. The Defendants are guided by the principles set in *Giciem Construction Company Versus Amalgamated Trade*, which supports the point that summary judgment cannot be granted where:-

***“...there is variance in the versions of the parties...but where there is no reasonable doubt that the Plaintiff is entitled...there must not be dispute as to the facts.***

Also in the decision by Madan J (as he then was) in **Shah vs. Padamshi** at page 535 that

***“Except in the clearest of cases, which this one was not it is inadvisable for the court to prefer one affidavit to another in order to enter summary judgment.”***

Also, the decision of Ringera J (as he then was) in *Orbit Chemical Industries Ltd versus Mytrade Ltd* stated that summary judgment is akin to immediate trial and must be founded on liquidated amount. They also referred to the decision by Mugo J in *Wedube Estate limited versus Sarah Mbithe Kivuva* that such judgment is intended to be a full judgment and hence the Court must examine the Plaintiff carefully. To them, the issues raised hereinabove are triable issues and form a good defence hence the Honourable Court ought to order the trial of the matters raised. Therefore, the current application should be dismissed with costs for being an abuse of the Court process in light of the principle in *Mitchell & Ors vs D.P.P & Anor[1987] LRC*. In the case of *Vaiwan Ltd versus Rasikbaai Manibhai Patel*:

***“... a triable issue is an issue which raises a prima facie defence and which should be subject to a full trial for adjudication purposes...if a triable issue is found to exist on one which is arguable the court should avoid the temptation to anticipate the ultimate result of the trial.***

## **THE DETERMINATION**

[17] The Application herein is made under Order XXXV rules 1 and Order XII rule 6 of the now repealed Civil Procedure Rules. But, looking at the entire application and the arguments presented by parties, the application is essentially for striking out of the defence herein and entry of judgment thereto. It also carries an alternative prayer for judgment on admission. The test to be used in determining whether to strike or sustain a defence is as enunciated in the case of **Saudi Arabian Airlines Corporation vs. Sean Express Services Ltd [2014] eKLR** in the following long but useful rendition:

***I need not re-invent the wheel on the subject of striking out a defence. A great number of judicial decisions have now settled the legal principles which should guide the Court in determining whether to strike out a pleading. Except, I can state comfortably that these principles now draw, not only from judicial precedent, but from the principles of justice enshrined in the Constitution especially in Article 47, 50 and 159. The first guiding principle is that, every Court of law should pay homage to its core duty of serving substantive justice in the judicial proceeding before it, which explains the reasoning by Madan JA in the famous DT DOBIE case that the Court should aim at sustaining rather than terminating suit. That position applies mutatis mutandis to a statement of defence and counter-claim. Secondly, and directly related to the foregoing constitutional principle and policy, is that courts should recognize the act of striking out a pleading (plaint or defence) completely divests a party of a hearing, thus, driving such party away from the judgment seat; which is a draconian act comparable only to the proverbial drawing of the “Sword of the Damocles”. Therefore, the power to strike out a suit or defence should be used sparingly and only on the clearest of cases where the impugned pleading is ‘demurer or something worse than a demurer’ beyond redemption and not curable by even an amendment. Thirdly, in case of a defence, the court must be convinced upon looking at the defence, that it is a sham; it raises no bona fide triable issue worth a trial by the court. And a triable issue need not be one which will succeed***

***but one that passes the SHERIDAN J Test in PATEL v E.A. CARGO HANDLING SERVICES LTD. [1974] E.A. 75 at P. 76 (Duffus P.) that "...a triable issue ...is an issue which raises a prima facie defence and which should go to trial for adjudication." Therefore, on applying the test, a defence which is a sham should be struck out straight away.***

[18] Without anticipating the prospects of the case, the court is supposed to carefully examine the pleadings; plaint and the defence; and all material presented before court in order to determine whether summary judgement should be entered as requested for by the Applicant. In this case, the defence is said to be a sham and an abuse of the court process. The Defendants are of a different view and prays for rejection of the application. After considering all the arguments, material placed before the court and the pleadings filed, I take the following view of the matter. The Plaintiff has sued on a Deed of Settlement and Deed of Guarantee both dated 1<sup>st</sup> July 2009. The Deed of Settlement was registered on 8<sup>th</sup> August 2012 and that of Guarantee is booked for registration. The said Deeds have not been denied except the Defendants especially the 2<sup>nd</sup> Defendant alleges that they were obtained through concision and threats. In law, these two documents constitute an agreement between the parties and in the circumstances of the case, they can only be undone if fraud or coercion or threats have been established. From the record, there is absolutely nothing which show that threats were issued against or coercion exerted on the 2<sup>nd</sup> Defendant in the execution of the Deeds in question. Threat to life and the kind of coercion alleged by the 2<sup>nd</sup> Defendant are very serious matters which should have some basis in say, reports to the relevant authorities. None has been availed to court. It should not be lost that Courts of law act only on evidence and not on mere accusation of coercion or threats to life however strongly they may be urged or repeated in a proceeding. And on that basis, the court cannot allow such serious allegations to be made by parties without proof as a basis to rebuff judgment or to guarantee a trial. such allegations without proof will never constitute a triable issue. I should state that a triable issue should be bona fide and worth of trial. One other thing; the 2<sup>nd</sup> Defendant made some part payment in the sum of Kshs. 200,000 but which he claims was obtained through coercion. Again, the allegation is bare and is not supported by some evidence whatsoever. See the submissions by the 2<sup>nd</sup> Defendants as captured by the court:

***Subsequently the Plaintiff and his agents, servants, employees started using unorthodox methods against the Second Defendant and his family in an attempt to compel the Defendants to settle the outstanding bill flowing from the travel services the Blackburn tour had already utilized. Mr. Mahiaini later on introduced his business partner to the Second Defendant one Bill Oloo who consequently made threats to the Second Defendant alluding that if I did not pay the Plaintiff back his money something mysterious would befall the 2<sup>nd</sup> Defendant. Further to the above, the Plaintiff through his agents, servants, staff and or other employees acting on its behalf caused mayhem at the office of the Second Defendant's wife situate off Ng'ong Road at Faulu Kenya DTM Ltd and further made several calls to the Second Defendant's relations urging them to advice the Second Defendant to make payments to the Plaintiff. Since these antics were causing the Second Defendant, his family and church congregation great embarrassment the Second Defendant was coerced and made a cheque deposit of Kshs 200,000/= on 17<sup>th</sup> April 2009 and 11<sup>th</sup> May 2009 which did not stop the malicious and frustrating acts of the Plaintiff and its agents. The Plaintiff through his agents, staff, and servants continued to pressurize and take advantage of the Second Defendant to the extent that they coerced him into signing a Deed of Settlement and Deed of Guarantee. The Defendants stated that payments made to the tune of Kshs. 200,000 by the Second Defendant were as a result of direct and indirect coercion and/or pressure exerted by the Plaintiff's agents.***

These are matters for the police and should have been reported. Telephone communication was involved. Altercation at the offices of Faulu Kenya DTM Ltd must have been overt. Instead of taking the appropriate legal measures, the 2<sup>nd</sup> Defendant alleges that he chose to pay Kshs.

200,000 in the hope that the Plaintiff will stop the malicious and unorthodox demands with menaces of the debt herein. the payment were made on 17<sup>th</sup> April, 2009 and 11<sup>th</sup> May 2009. But even after all these alleged torment, the 2<sup>nd</sup> Defendant executed the Deeds herein- again he alleges ignorance and coercion in the execution of the Deeds in question. The Deeds are clear on the liability between the Plaintiff and the 2<sup>nd</sup> Defendant. The Deeds were drawn by the advocates for the 2<sup>nd</sup> Defendant and upon the instructions by the 2<sup>nd</sup> Defendant. Therefore, to feign ignorance is a comedy of extravagant humour. There is no bona fide triable issue here. But this will be clear after what I shall say next.

[19] The 2<sup>nd</sup> Defendant seems to place a lot of emphasis on the allegation that the contract for purchase of the tickets in question was between the Plaintiff and another party called Bandilika Dee Jays. This party is not a party in these proceedings and is not a party in the Deed of Settlement and Deed of Guarantee. There is not even an application to join them as parties. In any event, even if they were parties, liability between the Defendants and the said Bandilika Dee Jays would be a triable issue between the two. The law on trial between such third parties and the Defendant is separate and is determined between the Defendant and the Third party only even if the trial is within the main trial. Given the documentary evidence before the court and the law I have stated, the allegations that the contract herein was between the Plaintiff and the Bandilika Dee Jays, and that the latter are the one responsible, cannot be a bona fide triable issue. There are other correspondences which constitute admission of the debt which were written by the 2<sup>nd</sup> Defendant.

[20] The Defendants also pleaded that the Application contradicts and/or conflicts with the averments contained in the Plaint contrary to the provisions of the Civil Procedure Rules, 2010. They were, therefore, of the view that the application is fatally incompetent on the basis of the rule against Departure in Order 2 Rule 6 which provides that;

***“ No party may in any pleading make an allegation of fact, or raise any new ground of a claim inconsistent with previous pleadings in the same suit.”***

I have perused the plaint, Paragraph 6 and 16 of the Affidavit of Kiiru Mahiani and they are not in any conflict. The fact of payments made, the principal sum, the fact of loan taken to pay for the cost of tickets and the interest thereto stated in the Plaint, the application and the affidavit in support are in total harmony with each other. There is no contradiction whatsoever. The application does not introduce any new ground or make an averment of a claim inconsistent with the pleadings filed previously in court. All these things tell one story; that the allegations by the Defendants albeit so powerful in appearance are feeble in real worth and cannot pass for bona fide triable issue which should go to go to trial. The defence put forth by the Defendants is mere sham and it should be struck off. Accordingly, I strike out the defence herein and enter judgment in favour of the Plaintiff and against the Defendants as prayed for in the plaint. It is so ordered.

**Dated, signed and delivered in court at Nairobi this 17<sup>th</sup> day of February 2015**

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**F. GIKONYO**

**JUDGE**

