



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO 550 OF 2006

MERCANTILE LIFE & GENERAL

ASSURANCE COMPANY LIMITED.....1ST PLAINTIFF

MOHAMMED HASSIM PONDOR

(Suing on behalf of The International

Air Transport Association (IATA).....2ND PLAINTIFF

VERSUS

DILIP M. SHAH.....1ST DEFENDANT

PANKAJ MEGHJI SHAH.....2ND DEFENDANT

KAMAL M. SHAH.....3RD DEFENDANT

FIVE CONTINENTS TRAVEL LTD.....4TH DEFENDANT

JUDGMENT

INTRODUCTION

1. The original file herein had gone missing several times leading to the reconstruction of the same. Once reconstructed, it came to the attention of the court that several handwritten proceedings were plucked out. Fortunately, the relevant proceedings where evidence was taken were left intact. Hence, the integrity of the court file to that extent was not compromised. The judgment herein was therefore delivered based on the documents in the reconstructed file.
2. On 13th June 2008, Kihara Kariuki J (as he then was) dismissed the Plaintiff's Chamber Summons application that was filed on 5th April 2007 in which the Plaintiffs had sought to have the 1st – 3rd Defendants' Defence dismissed with costs and judgment entered in favour of the 1st Plaintiff as had been prayed in the Plaint.
3. Subsequently, on 27th January 2010, Kimaru J declined to grant the Plaintiff's application seeking to have the 4th Defendant ordered to furnish security for the sums of Kshs 4,408,407.85 and \$ 443,462.35 as pleaded in the Plaint on the ground that the Plaintiff was abusing the court process. The said learned judge opined that the course of action to be taken by the Plaintiff was either to

refer the dispute to arbitration and/or alternatively to have the same determined by this court.

4. The Plaintiff's Complaint dated 3rd October 2006 was amended on 19th October 2006. It sought judgment against the Defendant for:-
 - a. **Kshs 4,408,407.85 and USD \$ 443.462.35 together with interest thereon at Court rates from 25th September 2006 until payment in full.**
 - b. **Costs of the suit on a full indemnity basis and interest thereon at court rates.**
5. Shem Nyamai, the 1st Plaintiff's General Manager (hereinafter referred to as "PW 1") recorded a Witness Statement that was dated 24th February 2011 and filed on 25th March 2011. On 12th May 2010, the Plaintiff filed an Agreed Bundle of Documents of even date. The same was not signed by the Defendants' advocates. The Plaintiffs' Written Submissions were dated and filed on 5th November 2014.
6. The Defendants' Statement of Defence that was dated 1st November 2006. The 1st – 3rd Defendants' Statement of Issues was dated 15th September 2014 and filed on 16th September 2014. The 1st -3rd Defendants' Written Statements were dated 24th November 2014 and filed on 25th November 2014. They did not call any witnesses and thus filed no Witness Statements. Their List and Bundle of Documents was dated 29th October 2013 (sic) and filed on 24th October 2013.
7. Parties informed the court that they did not wish to highlight their respective written submissions. The judgment herein is therefore based on the said written submissions.

THE PLAINTIFF'S CASE

1. By an agreement in writing dated 12th July 1995, the International Air Transport Association (IATA) (hereinafter referred to as "the Carrier") appointed the 4th Defendant as its authorised travel agent for the sale of airline tickets in Kenya.
2. By Deeds of Indemnity executed between the 1st Plaintiff and the 1st – 3rd Defendants on 22nd October 2002, it was agreed that the said 1st -3rd Defendants would indemnify the 1st Plaintiff against all actions, proceedings, claims, demands, losses and default arising out of and as a result of the 4th Defendant's default.
3. The 4th Defendant was required to remit the monies it received after such sale. Despite notice having been given, the 4th Defendant had refused, failed and/or neglected to pay to IATA the said sum of Kshs 4,408,407.85 and USD \$ 443.462.35. The 1st Plaintiff contended that the 1st and 2nd Defendants issued it with cheques that were returned unpaid.
4. The Plaintiffs therefore sought for judgment against the 1st- 3rd Defendants as had prayed for in the Plaintiff that was amended on 19th October 2006.

THE DEFENDANT'S CASE

5. The 1st- 3rd Defendants' case was that the 1st Plaintiff had not incurred any liability, damage or expense under Clause 1 of the Deeds of Indemnity as a result of which their liability had not automatically crystallised. They therefore urged the court to dismiss the Plaintiff's suit with costs to them.

LEGAL ANALYSIS

6. The 2nd Plaintiff was said to have filed its Issues on 10th September 2014. The same were neither on the court record nor in the Schedule of Documents the Plaintiffs had attached in their Notice of Motion application dated 3rd October 2006 and filed on 5th October 2014. In their Written Submissions, however, the Plaintiffs identified the following as the issues for determination:-
 - a. **Did the 1st to 3rd Defendants individually execute Deeds of Indemnity dated 22nd October**

2002 between themselves and the 1st Plaintiff to fully indemnify the 1st Plaintiff in default of the 4th Defendant?

- b. Are the 1st to 3rd Defendants liable to pay the amount pleaded in the Plaint on a full indemnity basis?
- c. Is the Defence a bare denial?
- d. Should the 1st to 3rd Defendants bear the costs of the suit on a full indemnity basis?

7. The 1st -3rd Defendants identified the following as issues for determination by the court in their Statement of Issues:-

- a. Has a final decree been obtained against the 4th Defendant?
- b. Is so, has the decree been satisfied?

8. Notably, there was no convergence of what was really before the court for determination. The court will, however, address all the issues as they were inter-related. Before delving into the issues at hand, the court found it necessary to look at PW 1's evidence to the effect that the 4th Defendant failed to advise the 1st Plaintiff when it applied for a change of name on 26th May 2006 contrary to the provisions of Agency Default Program, a copy which was attached in the Plaintiffs' Bundle of Documents.

9. This issue was not raised in the Amended Plaint and only appeared for the first time in the Plaintiff's Written Submissions. However, the Plaintiffs did not show the nexus between their averments and the failure by the 4th Defendant to pay the sums they claimed from the 4th Defendant. The court did not therefore see the need to consider this submission any further as it did not appear to have any relevance to the circumstances of the case herein.

10. It is the responsibility of an applicant to be diligent in making out its case and not leave it to the imagination of the court. Appreciably, a court must be very careful not to wade into and/or descend into the arena of a dispute between parties as it must always remain a neutral arbiter.

11. Turning to the substantive issues at hand, the court noted the Plaintiffs' submissions and the case law that the Defence was a bare denial. The court was wholly in agreement with the holdings in the cases the Plaintiffs relied upon where the common thread was that a court will strike out a defence which contains mere denials-See Pharmaceutical Manufacturing & Co vs Novelty Manufacturing Ltd (2001) 2E.A. 521, Abdulrazak Khalfan & Mercantile & General Assurance vs Pinnacle Tours & Travel Ltd & Another [2005] eKLR, HCCC No 130 of 2006 Abdulrazak Khalfan & Another vs Debonair Travel Ltd & Another (unreported).

12. The court noted the Plaintiffs' submissions that the 1st and 2nd Defendants did not call any evidence to rebut their evidence that the said Defendants issued cheques that were eventually dishonoured as they. However, bearing in mind the circumstances of this case, that in itself would not and was not conclusive of the 1st- 3rd Defendants liability as they were merely Guarantors and could only be called upon to indemnify the 1st Plaintiff if there was default of payment by the 4th Defendant.

13. It will be noted that in Clause 2 of the Deed of Indemnity dated 22nd October 2002, it was specifically stated as follows:-

“The director herein aforesaid in his/her personal capacity hereby guarantees payment of to the insurance in the case of any default of payment by FIVE CONTINENTS TRAVEL LIMITED (Agency) upon written notification to him/her such director.”

14. The Plaintiffs placed before the court copies of formal demand dated 25th September 2006 and 26th September 2006 to the 1st – 3rd Defendants and the 4th Defendant demanding the settlement of the sum of Kshs 4,366,617.00 and \$ 431,459.

15. The 4th Defendant did not appear to have settled the said sums which culminated in the institution of this suit by the Plaintiffs. The parties herein informed the court that the matter between the 2nd Plaintiff and the 4th Defendant was referred to arbitration which meant that the Plaintiffs could

only pursue the 1st – 3rd Defendants after the dispute between the 2nd Plaintiff and the 4th Defendant was determined.

16. A perusal of Clause 14 of the Passenger Sales Agency Agreement made on 12th July 1995 shows that the responsibility of referring any dispute did not lie with the Defendants only. The same provided as follows:-

“If any matter is reviewed by arbitration pursuant to the Sales Agency Rules, the Agency hereby submits to arbitration in accordance with such Rules and agrees to observe the procedures therein provided and to abide by any arbitration award made thereunder.”

17. Notably, either party could refer the dispute to arbitration. The court was unable to accept the Plaintiffs’ argument that the 4th Defendant had not referred the dispute to arbitration as it was insolvent for the reason that they could also have initiated the arbitral process. Evidently, the privity of contract in respect of the Passenger Sales Agency Agreement dated 12th July 1995 was between the 2nd Plaintiff and the 4th Defendant. The 1st- 3rd Defendants could only be called to meet their obligations to the 1st Plaintiff if the 4th Defendant had paid to indemnify the 1st Plaintiff and/or failed to fulfil its obligations under the Deed of Indemnity.

18. The court observed that whereas the Deeds of Indemnity were executed by the 1st – 3rd Defendants, the same were incomplete. The name of the guarantor in the part stating **“IN CONSIDERATION of the agreement aforesaid MR/MRS.....Covenants with the insurance company”** was blank. There was no explanation why all the three (3) Deeds of Indemnity had the 1st – 3rd Defendants’ names missing. However, since this was not an issue for determination, the court will say no more of it.

19. What was of concern to this court was that the onus lay on the Plaintiffs to prove their case to the required standard, which was to demonstrate that the 4th Defendant was indebted to the Plaintiff and that it had failed to abide by the provisions of Clause 2 of the Deed of Indemnity. The case is yet to be referred to arbitration. This ousts the jurisdiction of this court and bars it from making any determination as to whether or not the 4th Defendant owed the 1st Plaintiff the sums it was demanding from the 1st – 3rd Defendants.

20. In this regard, this court found itself in agreement with the holding of Kihara Kariuki J (as he then was) when he dismissed the Plaintiffs’ Chamber Summons application that was filed on 5th April 2007. He stated as follows:-

“As liability is denied, the Plaintiffs must prove indebtedness before they can call on the indemnity. It is not enough merely to say that the fourth defendant has defaulted. If they obtain a final decree against the fourth defendant and it is not satisfied, the first to third defendants will have to pay up. The defence raised in paragraph 4 of the defence is reasonable and not frivolous. It should be allowed to go to trial.”

21. As was rightly submitted by the 1st -3rd Defendants, no indebtedness had been proved against the 4th Defendant as it was not party to the proceedings herein. The Plaintiffs were required to show the privity of contract between the 2nd Plaintiff and the 1st- 3rd Defendants as relating to the issuance of the cheques that were said to have been returned unpaid. Despite having relied on several documents, the Plaintiffs failed to show how the 4th Defendant was indebted to the Plaintiffs.

22. Indeed, making a determination of whether or not the Plaintiffs had proven the debt against the 4th Defendant would be pre-empting the decision that would ordinarily have to be made by the arbitral tribunal. Suffice it to state that the court did not find evidence of any decree to have been made or issued against the 4th Defendant or that the 4th Defendant had satisfied any decree herein that would have then necessitated the calling in of the indemnity that had been executed by the 1st -3rd Defendants.

23. Turning to the Letter of Subrogation that was executed by Hassam Pondor (Country Manager-Eastern Africa) that could be found on page 124 of the Plaintiffs’ Bundle of Documents, it the

same stated in part:-

“We acknowledge the sum of..... from Mercantile Life and General Assurance Company Limited...

I/We record that they have authority to use my/our name to the extent necessary effectively to exercise all or any of such rights and remedies that I/We will furnish them with any assistance...”

24. With regard to the party that ought to sue under its subrogation rights, this court was in agreement with the holding of Seron J in the case of **Monica M. Musyimi vs Richard Macheru Irungu [2014] Eklr** where he referred to the treatise by **K.I. Laibuta; Principles of Commercial Law at pg 254** where the author stated as follows:-

“Having compensated the insured, the insurer is entitled to take advantage of and enforce any legal and equitable rights and remedies that the insured has or might have enforced against such third party whether in contract or in tort. To enforce such rights, the insurer brings the action IN THE NAME OF THE INSURED who must lend his name in return of an undertaking that he will not be personally liable for the costs in the action. The insurer is said to “step into the shoes” (stands in the place of the insured) and is subrogated to his rights. Subrogation is the substitution of one person for another so that the person substituted succeeds to and assumes the rights of the other.”

25. However, it was not clear to the court if the 1st Plaintiff had filed the suit herein under its rights of subrogation as it only referred to the aforesaid Letter of Subrogation and failed to advance its arguments on subrogation. If that was the case, then the 1st Plaintiff ought not to have filed the suit herein in its own name as it could not purport to sue in its name to prove that it had paid the 2nd Plaintiff the aforesaid monies. On the other hand, it was the 2nd Plaintiff that ought to have filed suit and adduced evidence to demonstrate that it had been paid the sum of Kshs 4,408,407.85 and USD \$ 443,462.35 to enable the 1st Plaintiff recover the same from the Defendants as stipulated in the Deeds of Indemnity.

26. While the court could not strike out the entire suit as the 2nd Plaintiff was also a party to the suit herein and the fact that no suit shall be defeated by reason of the misjoinder of parties and the court may deal with the matter in controversy as far as regards the rights and interests of the parties before it in line with the provisions of Order 1 Rule 9 of the Civil Procedure rules, 2010, the court found the evidence that was adduced by the 1st Plaintiff to have fallen short of what was required in matters where an insurance company files a suit under its subrogation rights.

27. It was in fact not clear how the sums of Kshs 4,417,722.30 and \$ 448,550.61 claimed in the Amended Plaint were computed and which Plaintiff, if at all was entitled to what part of the said claim. There was also no evidence that was led by the Plaintiffs to justify why interest rates were to be payable from 25th September 2006 until payment in full.

28. That notwithstanding, even if one was to assume that the suit was not filed under the 1st Plaintiff's subrogation rights, the extent and level of proof by the Plaintiffs remained the same. In other words, whichever way one looked at it, the Plaintiffs failed to set out their claim clearly and/or to prove the same.

29. Accordingly, having considered the pleadings, the evidence, the written submissions and the case law, the court came to the firm conclusion that the Plaintiffs had not demonstrated that the 1st - 3rd Defendants were liable to pay the amount pleaded in the Plaint on a full indemnity basis as they had contended.

30. Of utmost importance was that the Plaintiffs' case fell short of the required standard of proof as the 4th Defendant who was a necessary party in these proceedings was not a party herein. In the absence of a determination confirming the 4th Defendant's indebtedness and its failure to pay any debt that would have been found due from it to the Plaintiff, the 1st- 3rd Defendants' obligation as

- guarantors had not crystallised.
31. The finding by Kihara Kariuki J (as he then was) to the effect that if the Plaintiffs obtained a final decree against the 4th Defendant and it was not satisfied, the 1st – 3rd Defendants would have to pay up still obtained in this case. This court found that it could not set aside or overturn the finding by the said learned judge for two (2) reasons. Firstly, this court was not sitting on appeal as the finding was made by a court of equal, concurrent and competent jurisdiction. Secondly, this court wholly concurred with the said learned judge's finding and could have not found in any other way.
32. The court was thus more persuaded by the 1st- 3rd Defendants' submissions that the Plaintiffs could not demand payment of the sum claimed in the Amended Plaint until the claim against the 4th Defendant had been heard and determined on merit in arbitral proceedings that the 2nd Plaintiff and the 4th Defendant had voluntarily subjected themselves to.
33. It was irrespective that the 1st -3rd Defendants did not call any evidence. In any event, they were under no obligation to call any witnesses to disprove the Plaintiffs' case. On the other hand, the onus was on the Plaintiffs to prove their case which they failed to do.

DISPOSITION

34. For the foregoing reasons, it was the finding of this court that the Plaintiffs' Plaint amended on 19th October 2006 and filed on 23rd October 2006 was not merited and the same is hereby dismissed with costs to the 1st – 3rd Defendants.
35. It is so ordered.

DATED at **NAIROBI** this **14th** day of **May** 2015

J. KAMAU

JUDGE

READ, DATED and **DELIVERED** at **NAIROBI** this **14th** day of **May** 2015

E.K.O OGOLA

JUDGE