



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 585 OF 2008**

**SAFARILINK AVIATION LIMITED.....PLAINTIFF**

**VERSUS**

**1. TRIDENT AVIATION KENYA LIMITED**

**2. TRIDENT ENTERPRISES**

**LIMITED.....DEFENDANTS**

**JUDGMENT**

1. The Plaintiff commenced this suit by a plaint dated 15<sup>th</sup> December, 2008 and amended on 23<sup>rd</sup> June, 2014. The Plaintiff sued as the owner of aircraft Cessna Caravan aircraft registration 5Y-SLA ("*the Caravan*"). The 1<sup>st</sup> Defendant was sued as the operator of aircraft Buffalo DHC5 aircraft registration 5Y-MEG ("*the Buffalo*") and the 2<sup>nd</sup> Defendant as the owner of the Buffalo.
2. The cause of action was pleaded at paragraphs 5,6 and 8 of the Amended Plaint. It was pleaded that on or about 12<sup>th</sup> December, 2007 at Wilson Airport, Nairobi, the Defendants' servant or agent was taxiing the Buffalo when it collided with the Caravan that was stationary at its parking bay. The Plaintiff asserted that the said accident occurred as a result of the Defendants' servant's or agent's negligence particulars of which were given and can be summarised as failure to exercise due care while taxiing the Buffalo and failure to heed the presence of the Caravan.
3. The 1<sup>st</sup> Defendant filed a statement of defence in which it admitted being the operator and the 2<sup>nd</sup> Defendant the owner of the Buffalo. It was however denied that the accident was caused by the 1<sup>st</sup> Defendant's negligence. It was particularly denied that the caravan was at the parking bay. The 1<sup>st</sup> Defendant contended that the material day was a public holiday and there was no Marshaller to give instructions; that the pilot of the Buffalo was a very experienced pilot rated only on the Buffalo and he taxied the Buffalo with the expected skill and standard; that the pilot saw the caravan parked outside the parking bay at the customs area parallel to the said area and partially on the parking and not in the bay facing the customs area as required and that the Buffalo did not taxi too fast. That any accident, if it occurred, was during parking. It was pleaded that the accident was wholly by or substantially contributed to by the Plaintiff's negligence by failure and or neglect to park the Caravan in a non congested area; failure and or neglect to maintain proper look out for other aircraft and failure and or neglect to take cautionary measure to avoid being hit by other aircraft.
4. The 2<sup>nd</sup> Defendant in its amended defence admitted ownership of the Buffalo and stated that it was at the material time in the sole possession and control of the 1<sup>st</sup> Defendant. It was particularly denied that its servant or agent had control of the Buffalo at the material time and therefore had no vicarious liability of the Buffalo. It was alleged further that if at all the accident occurred as pleaded, the same was as a result of the Plaintiff's negligence. The 2<sup>nd</sup> Defendant too denied the

- particulars of loss and damage as pleaded by the Plaintiff.
5. The issues that arise from the pleadings are as follows:-
    - a. From whose negligence did the accident result.
    - b. If the 1<sup>st</sup> Defendant is found liable, is the 2<sup>nd</sup> Defendant vicariously liable.
    - c. Whether or not the Plaintiff suffered loss and damage.
    - d. If (c) is answered in the affirmative, what extent of damages is the Plaintiff entitled to.
  6. The Plaintiff called five (5) witnesses at the trial, while the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' cases were closed without calling any witness. The 1<sup>st</sup> Defendant further failed to appear at the trial. According to John Buckley (PW1) and Shaun W. Barretto (PW2), the figure of USD 20,044/44 added in the amended plaint was Value Added Tax ("V.A.T.") payable on labour and items purchased. Mr. Barretto stated that the total sum that was paid to Phoenix Aviation was USD 687,585/11 inclusive of V.A.T. Captain Ben Murugi (PW3) recounted that on the material date at about 12:15, he landed the Caravan from the Mara Game Reserve at the Wilson Airport. He stated that he had parked the Caravan at the customs bay No. 2 and proceeded to shut down the engine. He then noticed the Buffalo taxiing into the adjacent bay No. 3 as directed by the Marshaller. That one of the Buffalo's engine was shut down and it appeared to be experiencing difficulty in turning to the right so as to completely align with the parking bay. That the Buffalo continued taxiing but suddenly turned towards where the Caravan had parked and it collided with the Caravan. He stated that the propeller shredded the wing spewing debris all over the parking bay. That the accident was reported to Kenya Civil Aviation Authority and investigations commenced. Captain Ben stated that the Caravan had been parked and was not in motion at the time of the accident.
  7. Wilson Kitur (PW4) who is an apron controller with Kenya Airports Authority stated that he on the material day marshalled the Buffalo into parking bay No. 3. That the Buffalo was taxiing into the apron when he noticed that the Buffalo's port side engine had shut down and that it seemed to have difficulty in turning to the right side where he was leading it to turn. He stated that he signalled the pilot but the plane did not stop and instead continued to roll forward towards the caravan. That suddenly, the Buffalo's starboard engine sounded like it was accelerated markedly and the propeller of the right side engine collided with the starboard wing of the parked caravan and extensively damaged the wing. He stated that it is that impact that stopped the Buffalo.
  8. According to Vyvyan Hodges (PW5) who is a consultant and an assessor in the aviation industry, he was instructed in December, 2007 by the Plaintiff to carry out a forensic assessment in respect of the damage on the Caravan that occurred as a result of the material accident. He stated that part of the duties he carried out was to examine the two aircraft, the scene of the accident and interviewed eye witnesses, particularly the captain and the ground assistant of the Caravan and the Marshaller to the Buffalo. He stated that he also contacted the Plaintiff's Aircraft Maintenance Organisation, Phoenix Aviation Limited as well as the Plaintiff's insurance brokers, Willis Limited. He thereafter prepared a report based on his survey and assessment. His comments in the report was that the airport was very congested and it was hard to taxi a large aircraft such as the Buffalo on one engine only. She held the opinion that the Buffalo's pilot ought to be held responsible for the accident. She estimated the cost of repairs to be USD 650,000.
  9. The Plaintiff and the 2<sup>nd</sup> Defendant filed written submissions which were ably highlighted by their Counsel. The uncontroverted facts that emerge from the evidence on record are that the Buffalo collided with the Caravan on the material date and that the Buffalo's engine encountered a mechanical hitch that made it lose control and hit the Caravan which was stationary. It is noteworthy that while the Plaintiff furnished evidence that the Buffalo lost control and hit the Caravan which was stationary in its parking bay, the Defendants failed to tender evidence to the contrary or to prove the particulars of negligence they alleged against the Plaintiff. Further, the 1<sup>st</sup> Defendant who was operating the Buffalo at the material time failed to avail any witness, specifically the pilot who was in control of the Buffalo to explain his part of the story to give light on how exactly the accident occurred.
  10. It has been held severally by this court that failure to rebut evidence tendered by one party leaves the court with no option but to draw an inference that the facts as presented are true. See **Karuru Munyoro v. Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988** where Makhandia J. discussed the effect of failure to rebut evidence as follows:-

***“The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff’s evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon.”***

In the absence of evidence in rebuttal from the Defendants, I find that the Plaintiff has proved his case against the Defendants on a balance of probability. I therefore find and hold that the accident occurred as a result of the 1<sup>st</sup> Defendant's negligence.

11. Issue (b) and (c) shall be discussed together. It was submitted that in a dispute between the Defendants, i.e. Nairobi HCCC No. 206 of 2012, the 2<sup>nd</sup> Defendant asserted its ownership of the Buffalo and relied on an operator’s agreement between the Defendants. It was contended that the 2<sup>nd</sup> Defendant agreed to indemnify the 1<sup>st</sup> Defendant against any claims losses, expenses and costs from damage at paragraph 8 of that agreement therefore the 2<sup>nd</sup> Defendant is liable. The Plaintiff also cited Section 14 of the Civil Aviation Act (Cap 394) and stated that the proviso imposes liability in the nature of an offence including an owner of an aircraft if the same causes damage.
12. The 2<sup>nd</sup> Defendant on the other hand contended that ownership of a motor vehicle or aircraft does not make a person liable for the negligence of the person in control of the vehicle or aircraft. That it must be shown that the driver or pilot was at the material time acting on the owner's behalf as his agent. The 2<sup>nd</sup> Defendant relied on **Anyanzwa v. Gasperis [1981] KLR 10** and **Bachu v. Wainaina [1976-1985] EA 29**. It was contended that the Plaintiff did not establish that the Caravan was being operated for the benefit of the 2<sup>nd</sup> Defendant. It was submitted that although the Plaintiff stated that it would rely on the Aviation Regulations, there was no allegation in the amended plaint that there was any statutory duty imposed on the owner. That whether reliance was being placed on negligence or statutory duty, a contract between the Defendants does not create any enforceable right to the Plaintiff who is not privy to it. It was contended that the Plaintiff’s case is to be assessed on the basis of negligence or statutory duty. It was further contended that the Civil Aviation Act is applicable where an aircraft is flown in a dangerous manner. That the definition of owner under Section 2 of the said Act as read together with Section 14 will not include a registered owner. It was submitted that under Section 2 of the Civil Aviation Act an owner is the person in whose name the aircraft is registered or the person by whom the aircraft is hired at the time but not both. That at the material time the owner was the 1<sup>st</sup> Defendant and not the 2<sup>nd</sup> Defendant.
13. It was submitted that while some statutory duties and criminal offences may give rise to civil liability, not every statutory duty or criminal offence does so. The 2<sup>nd</sup> Defendant relied on **Kigika Developers Ltd v. Nairobi City Commission [1986] KLR 731** and submitted that, Section 14 of the Civil Aviation Act does not confer any cause of action on the Plaintiff against the 2<sup>nd</sup> Defendant.
14. It is not in dispute that the Buffalo was at the material time owned by the 2<sup>nd</sup> Defendant. It is also not in dispute that it was at that time leased or hired to the 1<sup>st</sup> Defendant. This is borne by the pleadings as amended. I note that from the Amended Plaint the Plaintiff pleaded that it was to rely on the Air Navigation Rules and Regulations under the Civil Aviation Act Cap 394 Laws of Kenya. In this regard, I am unable to agree with the submissions of the 2<sup>nd</sup> Defendant that the Plaintiff did not plead statutory liability. The pleading in paragraph 7 of the Amended plaint comes immediately after the pleading of the particulars of negligence in paragraph 6. In my view, that was adequate notice that in addition to the particulars of negligence, the Plaintiff was to rely on the law to prove liability of the Defendants.
15. It was contended that on the authority of the cases of **Anyanzwa Vs Gasperis (1981) KLR 10 and Bachu Vs Wainaina (1976 – 1985) EA 29** the 2<sup>nd</sup> Defendant could not be vicariously liable to the Plaintiff unless it was shown that the subject object (aircraft) was being used at the instance of or with the consent and authority of the 2<sup>nd</sup> Defendant.
16. Section 14 of the Civil Aviation Act, Cap 394 provides:-

**“14. Where an aircraft is flown in such a manner as to cause unnecessary danger to any person or property on land or water, the pilot or the person in charge of the aircraft and the owner thereof, unless he proves that the aircraft was so flown without his knowledge or consent, shall be guilty of an offence and liable to a fine .....**”

17. That provision creates criminal liability. Can it also be said to create civil liability? The intention of the legislature was to hold the persons set out therein liable for wrongful use of aircraft that causes danger to 3<sup>rd</sup> parties. Since the aircraft is used for flying, it cannot be argued that when it is wrongly used during taxing on the ground, liability does not attach. In my view, it attaches at all times when the aircraft is made to be in motion.

18. In this case, the 2<sup>nd</sup> Defendant hired out the aircraft to the 1<sup>st</sup> Defendant, of course not for free. The documents under which the aircraft was operated by the 1<sup>st</sup> Defendant contained the following stipulation in paragraph 8.

***"The owner shall release the operator from and shall indemnify and hold it harmless against any and all claims, losses, expenses and any costs related thereto of any person in respect of personal injury or death, or loss of or damage to property of any kind, or otherwise howsoever in connection with the operation of the aircraft or the carriage of persons or goods therein, or otherwise in connection with the performance or non-performance by the operator or its servants of agents of its obligations hereunder:-"***

19. Considering the wordings of this paragraph and Section 14 aforesaid, the 2<sup>nd</sup> Defendant's contention that the Plaintiff cannot find a claim against the 2<sup>nd</sup> Defendant since it is not privy to the contract cannot stand. In the agreement, the 2<sup>nd</sup> Defendant had agreed to indemnify the 1<sup>st</sup> Defendant from losses and damages such as the one at hand. The question that arises is why was the 2<sup>nd</sup> Defendant agreeing to indemnify the operator to whom it had surrendered possession of the aircraft to, if the 2<sup>nd</sup> Defendant never intended to be liable for claims arising out of its use by the operator? I think and I find that, on the basis of paragraph 8 of the agreement between the 1<sup>st</sup> and 2<sup>nd</sup> Defendant as read together with Section 14 of the Aviation Act, Cap 394 Laws of Kenya, the 2<sup>nd</sup> Defendant is likewise liable to the Plaintiff.

20. It is clear from the evidence on record, which evidence has not been controverted, that the Plaintiff incurred a cost of USD 687,585/11. It is entitled to the said amount.

21. In view of the foregoing, I find that the Plaintiff has proved its case on a balance of probability and judgment is accordingly entered in its favour as prayed for in the Amended Plaintiff.

It is so decreed.

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**A. MABEYA**

**JUDGE**

Dated, Signed and Delivered at Nairobi this 21<sup>st</sup> day of September, 2015.

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**JUDGE**