



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 356 OF 2013

MOHAMMAD HASSIM PONDOR (Suing on behalf of

The International Air Transport Association – IATA)1ST PLAINTIFF

MERCANTILE LIFE AND GENERAL ASSURANCE COMPANY LIMITED.....2ND PLAINTIFF

VERSUS

AMAZING TOURS & TRAVEL LIMITED.....1ST DEFENDANT

RHODA WAMBUI NDEKELE.....2ND DEFENDANT

ESTHER WANGUI.....3RD DEFENDANT

ERUSTUS KIMANI4TH DEFENDANT

RULING

1. The plaintiffs have asked this court to strike out the Defences of the four (4) Defendants and to thereafter proceed to grant judgment as prayed in the plaint.
2. The defences are described as untenable and unattainable as they constitute bare denials.
3. The plaintiffs also hold the view that the defences were an attempt to delay or to obstruct the plaintiffs from recovering the money which the defendants owe to the plaintiffs.
4. The 1st defendant is said to have admitted owing the sums claimed. And the other three (3) defendants were said to be liable to indemnify the 2nd plaintiff following the default of the 1st defendant to settle the debt.
5. The law governing applications for striking out pleadings is well settled. The court should exercise that jurisdiction sparingly, and only in plain and obvious cases.

6. Thus if the defence was arguable, the court should allow the case to proceed to trial.
7. Even if the story told by the defence appeared to be highly improbable and was therefore difficult to believe that it could be proved by the defendant, the court should not be in a hurry to strike it out. The reason for that is that at that stage, the court was not being called upon to determine the merits of the defence.
8. If a defence was explainable as a likely happening, which was not plainly and obviously impossible; the court should not strike it out summarily.
9. In this case, the defendants did not file any response to the application. Therefore, the application was uncontroverted.
10. However, the fact that the defendants did not respond to the application cannot, of itself, guarantee the success of the said application. I say so because the court was still obliged to give due consideration to the Defence, and to determine whether or not it raised any triable issues.
11. The starting point is a perusal of the various assertions contained in the Defence.
12. At paragraph 7 of the defence, it is admitted that there was a contract dated 26th April 2006 between each **IATA** member and the 1st defendant, **AMAZING TOURS & TRAVEL LIMITED**.
13. The **IATA** member was ordinarily called the “Carrier”. The said Carrier appointed the 1st defendant as its travel agent, for the sale of airline tickets in Kenya.
14. The defendants also admitted the particulars of the contract, as enumerated in the plaint. The following are the particulars of the contract.
 - a) *The 1st Defendant would issue a Traffic Document immediately it received money for specified passenger air transportation sold under the agreement and it would be responsible for the remittance to the Carrier of the amount payable in respect of such Traffic Document.*
 - b) *All services sold pursuant to the Agreement would be sold on behalf of the carrier and in compliance with the carrier’s tariffs, conditions of carriage and the written instructions of the carrier as provided to the Agent.*
 - c) *All monies collected by the 1st Defendant for transportation and ancillary services sold under the Agreement; including applicable remuneration which the Agent is entitled to claim there under, are the property of the Carrier and must be held by the 1st Defendant in trust for the carrier or on behalf of the carrier until satisfactorily accounted for to the Carrier and settlement made.*
 - d) *The 1st Defendant would maintain adequate records and accounts, together with supporting documents, recording the details of all the transactions effected under the Agreement such records to be preserved for at least 2 years from the date of the transactions to which they relate and shall be available for inspection or for copying by the carrier whose Traffic Documents had been issued”.*
15. The defendants added a rider to their admission, saying that the Agreement related to a general or standard agreement in the industry, and their interpretation was within the norms of the users.
16. The 2nd, 3rd and 4th defendants also admitted having executed Deeds of Indemnity dated 15th May 2006. Pursuant to the said Deeds of Indemnity;

“... it was agreed between them that in consideration of the 2nd plaintiff effecting an insurance

policy to the 1st Defendant, by virtue of the Passenger Sales Agency Rules of IATA, the defendants would at all material times hereinafter keep the 2nd plaintiff fully indemnified against all actions and proceedings, claims, demands, losses and default arising however from and out of and as a result of the default by the 1st defendant, together with all costs and expenses arising there from and in the event that the 1st Defendant defaulted inter alia, in the remission of sales of Traffic Documents or collects and retains monies admittedly and actually owing to the airlines”.

17. It was plaintiff’s claim that the 1st defendant breached the Agreement dated 26th April 2006, by failing, neglecting or refusing to pay to the 1st plaintiff the sum of Kshs. 8,308,716.16 and USD \$ 5,644.98.

18. In answer to that claim, the defendants said that they honoured the Indemnity.

19. I think that it is prudent to set out herein the contents of paragraphs 4 to 9 of the Defence. They read as follows:

“4. The contents of paragraph 10 of the Plaintiff are denied in as far and as much as they condole that the Defendants breached the said indemnity. The Defendants aver that the same (indemnity) was honored contrary to the interpretation implied therein.

5. The Defendants deny the contents of paragraph 10 of the plaintiff on the basis that in as far as the agreement quoted therein exists, the parties herein had multiple transactions which overlap and which payments for the various transactions all dovetail into the relationship between the parties.

6. In addition to paragraph 5 above, the Defendants state that if the alleged breaches occurred, then, they are ready to make good any discrepancy that may be or is there.

7. And in addition to paragraphs 5 and 6, the Defendants will demand an entire evaluation of the business relationship between the parties herein to establish the correct state of affairs as claimed in the plaintiff.

8. The Defendants state that they do not have any knowledge of the contents of paragraph 11 and 12 of the plaintiff.

9. The contents of paragraphs 13, 14 and 15 of the plaintiff are true to the extent that what was being demanded from the Defendants was an amount which the Defendants deny owing and if owing ought to be reconciled as stated in paragraph 7 above”.

19. From the said Defence, it is clear that the 2nd, 3rd and 4th Defendants admit having signed Deeds of Indemnity with the 2nd plaintiff.

20. But they insist that they had honoured the said Deeds of Indemnity.

21. In my understanding, the indemnity only kicked – in when there had been a default on the part of Amazing Tours and Travel Limited. Therefore, the 2nd, 3rd and 4th Defendants must be deemed to have acknowledged that the 1st Defendant had defaulted in either the remission of sales of Traffic Documents or in collecting and retaining monies which were admittedly and actually owing to airlines.

22. In any event, the plaintiff’s advocates did issue Notices to all the four (4) Defendants through a letter dated 14th May 2013.

23. And the plaintiffs have provided all the documentation particularizing the details of the two sums claimed, being Kshs. 8,315,617.81 and USD \$ 5,644.98, respectively.

24. If the defendants had paid the said sums or any part thereof, it was incumbent upon them to demonstrate to this court how and when they did so.

25. It is not good enough to make a generalized statement, that the 2nd, 3rd and 4th Defendants had met their obligations under the respective Deeds of Indemnity.

26. Such an assertion is so bear as to constitute no defence at all. The defence did not give rise to any triable issue. It is a sham. It cannot therefore stand in the face of the plaintiffs claim, which is so well supported by documentary evidence. To allow the defence to remain on record, in the face of such an obvious and plain case as the one which the plaintiffs have made out would constitute an abuse of the process of the court.

27. In the result, I do now strike out the Defence. Having struck out the said Defence I now enter judgment in favour of the plaintiffs' as prayed in the plaint.

28. The costs of the application are also awarded to the plaintiffs.

DATED, SIGNED and DELIVERED at NAIROBI this 18th day of September 2014.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Marigi for Wabwire for the 1st Plaintiff.

..... for the 2nd Plaintiff.

..... for the 1st Defendant.

Begisen for Agina for the 2nd Defendant.

..... for the 3rd Defendant.

Mr. C. Odhiambo, Court clerk.