



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Case 169 of 2005

MOHAMMED HASSIM PONDOR

SUING ON BEHALF OF THE INTERNATIONAL

AIR TRANSPORT ASSOCIATION (I.A.T.A.) 1ST PLAINTIFF

MERCANTILE LIFE

MERCANTILE INSURANCE CO. LTD.(FORMERLY

& GENERAL CO. LTD.2ND PLAINTIFF

V

RESIDENT TRAVEL LIMITED 1ST DEFENDANT

JIMMY RAYANI 2ND DEFENDANT

MRS. PARVEZ JIMMY RAYANI 3RD DEFENDANT

R U L I N G

1. This is a Ruling on a **Preliminary Objection** dated **26th January 2011** and filed in court on 27th January 2011. It is brought by the Defendants Numbers 2, 3 and 4, and raises the following Objections:-

1) That the suit is bad in law in that the Power of Attorney of a disclosed principal I.A.T.A. held by the Plaintiff, Mohammed Hassim Pondor does not authorize him to institute the proceedings in his own name and his doing so has rendered these proceedings fundamentally and incurably irregular and as such the same should be dismissed with costs.

2. The brief history of the application is that by an application dated **12th August 2008** and filed in court on 13th August 2008, the Plaintiff applied to amend its Plaint to bring on board MOHAMMED HASSIM PONDOR (*suing for and on behalf of I.A.T.A.*) in the place of ABDUL RAZAK KHALFAN. Attached to the supporting affidavit was the Power of Attorney issued by I.A.T.A. to Mohammed Hassim Ponder marked “**MBI**” on the strength of which he claims to have filed the suit. The Preliminary point before the court was first taken in paragraph 2 of the Amended Defence on behalf of the 2nd, 3rd and 4th Defendants on 17th November 2008. The said paragraph reads:-

2. “The Defendants will challenge the right of the 1st Plaintiff, Mohammed Hassim Ponder to sue on behalf of The International Air Transport Association (I.A.T.A.). In particular these Defendants state that an employee or agent of I.A.T.A. cannot sue for I.A.T.A. in his own name.”

3. The Defendants submit that the powers and authority of the donee of a Power of Attorney are strictly as defined by the donor in the document itself. The donee can do no more than he is allowed to do by the Power of Attorney. The Defendants submit that the authority provided under Clause (1) of the Power of Attorney reads:-

“act on behalf of I.A.T.A. in all legal proceedings and matters arising from Kenya . . . and Reunion in Co-ordination and consultation with I.A.T.A. Legal Services, accept on behalf of I.A.T.A. services of process in these countries and/or commence, continue or defend proceedings in any court, arbitration, and or other authority either personally or through another person.”

The Defendants submit that the donee may commence such action, either personally or through another person, such as an advocate. This does not mean, however, that he may commence such action in his own name, which is what he has done here. The Defendant contend that by such action the said Mohamed Hassim Ponder has exceeded the powers and authority donated to him by the donor of the Power of Attorney – the said I.A.T.A. In exceeding his power and authority by filing the suit in his own name the said Mohamed Hassim Ponder has filed a suit which is fatally defective.

4. The Defendants have relied on the cases of **ANTHONY MAINA NJIRI – VS – NATIONAL BANK OF KENYA LTD.** where the point in issue was raised. In that case the Power of Attorney contained a proviso as follows:-

“PROVIDED: However, that all business transacted hereunder for me . . . shall contain my name, followed by that of my ATTORNEY – in – Fact and the designation “Attorney – in – Fact (“Agent”).”

Justice Njagi in that matter had this to say:-

“The wording in this proviso is clear that the person who should be named as Plaintiff is the donor himself followed by the words in the proviso. But this is not what happened. The Plaintiff as appearing on the Plaint is not the donor but the donee. This is a contravention of the express mandate given to the donee as stated in the Power of Attorney. The proper Plaintiff in this matter ought to be the donor by name, followed by the words which he has prescribed. As it stands, however, the Plaintiff as of now is the donee and not the donor as intended by the Power of Attorney. There is no privity of contract between the donee, as Plaintiff, and the Defendant.”

The Judge then struck out the case.

5. The Defendants in this case have asked me to adopt the same case and strike out the Plaint. However, the Plaintiff submitted that the above case is distinguishable in that whereas the Plaintiff in the above case sued as Attorney of the donor, in the case at hand the Plaintiff has sued for and on behalf of the donor.

6. What one notes immediately, however, is that in the I.A.T.A. Power of Attorney we do not have equivalent proviso that was expressly given in the ANTHONY MAINA NJIRI case. That notwithstanding the Defendant also cited a Ugandan case of **KAJUBI – VS – KAYANJA [1967] E.A. 301** in which the court held *inter-a-alia* that:-

(i) the Power of Attorney held by the Respondent did not authorize him to institute the proceedings in his personal name and capacity; and his doing so made the proceedings fundamentally and incurably irregular.”

In that case the court was of the view that the suit ought to have been instituted in the name of the donor company as the real Plaintiff, and the nominal Plaintiff, armed with the Power of Attorney, would have been entitled to conduct the proceedings, before the court.

7. The Plaintiffs have dismissed the **KAJUBI case** (*ibid*) as not binding but only having persuasive force being a Ugandan case law. However, for the Defendants the impeccable logic of the learned Chief Justice Udo Udomo in that case in coming to his Judgement is more than persuasive. It is compelling.

8. The Defendants also dismissed other authorities cited by the Plaintiff e.g. **HCCC NO. 130 of 2006 MOHAMMED HASSIM** (*suing on behalf of I.A.T.A.*) – **VS – DEBONAIR TRAVEL LIMTIED & 2 OTEHRS**. The Defendants state that in that case the authority of the Plaintiff to file the suit in his name was not challenged by anybody and so the court did not have to address its mind on the issue.

9. I have carefully considered the Preliminary Objection by the Defendants. I have considered the said Power of Attorney, the submissions of the parties and the case law. It is clear to me that by filing the suit in his own name the Plaintiff exceeded the power and authority ceded to him in that Power of attorney. The Power of Attorney is replete with clauses restricting the powers of the donee. Clauses 1 (e), (g), (i) and Section B (1) required the donee to act “in the name of, and on behalf of the donor.”

10. Mr. Billing for the Respondent has submitted that the court should be guided by the values and principles of the new Constitution especially Article 159 (2) (d) and (e) which require this court to administer justice without reliance on procedural technicalities. In my view, however, the point raised by the Defendants is not a procedural technicality but a point of substantive law. The right party should sue as the Plaintiff. The objection is substantive and goes to the root of the case.

11. For the foregoing reasons I find that the suit as it is discloses no contractual nexus between the Plaintiff and the Defendants, as it is not filed in the name of the donor as envisaged under the Power of Attorney.

12. I therefore make the following orders:-

a. *The preliminary Objection dated 26th January 2011 and filed in court on 27th January 2011 is herewith upheld.*

b. *Pursuant to the dictates of justice, and the inherent powers and discretionary powers of this court, I allow the Plaintiff to bring a fresh suit on the same facts notwithstanding statutory and contractual limitation periods provided for the filing of the claim may have lapsed. Such a suit must be filed within 14 days from the date hereof without failure.*

c. *The costs of the preliminary Objection shall be for the 2nd, 3rd and 4th Defendants.*

d. *Parties shall bear own costs for the suit.*

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI THIS 30TH DAY OF MAY 2013

E. K. O. OGOLA

JUDGE

PRESENT:

M/s Thuo for the Plaintiffs

No appearance for the Defendants

Teresia – Court Clerk