



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL CASE NO. 496 OF 2003

INTERNATIONAL AIR TRANSPORT

ASSOCIATION (Suing through)

MOHAMMED HASSIM PONDOR.....1ST PLAINTIFF

MERCANTILE LIFE & GENERAL

ASSURANCE COMPANY LIMITED.....2ND PLAINTIFF

VERSUS

SURE CONNECTIONS LIMITED1ST DEFENDANT

SHAMILA KALISA.....2ND DEFENDANT

J U D G M E N T

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1. The Plaintiffs claim against the Defendants is for the sum of Kshs.2,949,560/= and US\$ 30,904.56 being monies received by the 1st Defendant as a result of an agency relationship between the 1st Defendant and the 1st Plaintiff. The admitted facts of the case are that by an Agreement dated 7th November 2001, the International Air Transport Association (IATA), the 1st Plaintiff appointed the 1st Defendant as its Travel Agent in Kenya. The Contract authorized the 1st Defendant to sell on behalf of IATA air tickets for IATA carrier member airlines. By a Credit Insurance Cover issued in October, 2002, the 2nd Plaintiff, an insurance company, insured or indemnified the 1st Plaintiff against net ascertained financial loss arising from the default of the 1st Defendant in making payment to the 1st Plaintiff of air ticketing proceeds. It was contended that in breach of the agreement dated 7th November 2001, the 1st Defendant failed to pay the 1st Plaintiff the sum of Kshs. 2,949,560/= and US\$30,904.56 being proceeds from ticketing sales for the period October and November, 2002. The 2nd Plaintiff in turn paid the 1st Plaintiff the said sums owed by the 1st Defendant in terms the policy of insurance issued by the 2nd Plaintiff. In exercise of its subrogation rights, the 2nd Plaintiff now claims those sums from the 2nd Defendant by virtue of a Deed of Indemnity dated 23rd October, 2002 between the 2nd Plaintiff and the 2nd Defendant. The

Plaintiff therefore sought various reliefs and remedies as set out in the Amended Plaintiff dated 12th March, 2008.

2. In their Statement of Defence dated 6th October, 2003, the Defendants denied that they were indebted to the Plaintiffs as claimed. They contended that the Deed of Guarantee and Indemnity relied upon by the 2nd Plaintiff was null and void and in their view unenforceable for want of consideration, unilateral variation, illegality and form. The Defendants therefore contended that the Plaintiffs' suit was incompetent as it did not disclose any reasonable cause of action against the Defendants. They prayed that the claim be dismissed with costs.
3. Three witnesses testified in support of the Plaintiffs' claim whilst the Defendants elected not to call any witness. PW1, Anthony Amulele, the Sales Agency Coordinator of the 1st Plaintiff within the East African Region testified that he had been authorized vide a special Power of Attorney dated 24th June, 2006 to represent IATA in these proceedings. That the 1st Defendant was an accredited travel agent of IATA and had been authorized to sell IATA tickets on behalf of various airlines and make remittances of the proceeds therefrom to IATA. He said that the said arrangement was captured in a Passenger Sales Agency Agreement dated 7th November 2001 between IATA and the 1st Defendant (hereinafter "the Said Agreement") which he produced as PExh3. He contended that according to the said agreement, the 1st Defendant was to remit payment for the various transactions involving the sale of IATA tickets for the different airlines into a designated Bank Account in the name of IATA on the fifteenth day of each month. He further testified that the 1st Defendant failed to remit the proceeds for sale of tickets for the months of October and November of 2002, totaling Kshs.2,949,560/= and USD\$30,904.56, respectively. He informed the Court that IATA had a computerized processing and dispatch system that was able to generate billing reports of every transaction that involved ticket sales from their various Travel Agents. The system was therefore able to track down any outstanding payments through the billing reports. He produced as PExh4 the billing analysis to establish the amount outstanding.
4. The court was told that when the 1st Defendant failed to make the said payments, the 1st Plaintiff sent out various letters of demand which the 1st Defendant failed to respond to prompting the 1st Plaintiff to withdraw the 1st Defendant's accreditation. After the withdrawal of accreditation, the 1st Defendant could no longer effect any ticket sales for and on behalf of IATA. The matter was then referred to the 2nd Plaintiff who was the 1st Plaintiff's Insurer for the payment of the outstanding amounts by virtue of Indemnity Policy with the 2nd Plaintiff. That cover indemnified the 1st plaintiff from the default and losses that would be occasioned from all accredited IATA agencies, including the 1st Defendant. PW1 further testified that the 2nd Plaintiff had a right of subrogation under the cover and there was an agreement to that effect dated 27th January, 2003. On cross examination, he observed that the Passenger Sales Agreement was between IATA and the 1st Defendant. He admitted that the 1st Plaintiff had been compensated in the amount claimed in the Plaintiff by the 2nd Plaintiff.
5. PW2 was Mohammed Hassim Pondor who described himself as the Head of IATA, East Africa. He told the Court that the 1st Defendant was an IATA agent as from November, 2001 until it defaulted on the payment of the proceeds of ticket sales for the months of October and November, 2002 amounting to Kshs.2,949,560/= and USD\$30,904.56. He requested that Judgment be entered in favour of the Plaintiffs for the aforesaid amounts together with interest and the Costs of the suit. On Cross examination, PW2 confirmed that the 1st Plaintiff had been fully indemnified by the 2nd Plaintiff on the counterclaim. He also stated that the principle of subrogation entailed that the amounts claimed would go to the 2nd Plaintiff and not the 1st Plaintiff, and if that were to happen, the 1st Plaintiff would be required to indemnify the 2nd Plaintiff.
6. PW3 was Shem Nyamai the General Manager of the 2nd Plaintiff. He told the Court that the 2nd Plaintiff issued a Credit Risk Insurance Policy to the 1st Plaintiff. He admitted that the 2nd Plaintiff had no relationship with the 1st Defendant save that the latter was covered in the Credit Risk Insurance Policy issued to IATA in the event of any default on its part. It was his testimony that the 2nd Defendant, who was a director in the 1st Defendant Company, had executed a deed of

indemnity and guarantee on behalf of the 1st Defendant binding her to indemnify the 2nd Plaintiff in the event that the former defaulted in remitting the proceeds of the IATA ticket sales. That upon default of the 1st Defendant, the 2nd Plaintiff had paid the 1st Plaintiff the amount of the claim and thereupon a demand made on the 2nd Defendant who admitted the claim and promised to settle after some internal restructuring of the 1st Defendant in about three months. He also confirmed that the 1st Plaintiff had been fully compensated in terms of the defaulted amounts and was therefore seeking the payment of the outstanding amounts under the principle of subrogation. PW3 was also firm that should IATA receive the outstanding sums by the 1st Defendant, it would compensate the 2nd Plaintiff under the principle of subrogation as it was not allowed to benefit twice. He also asserted that the 2nd Defendant was personally liable to pay the amount outstanding by virtue of a deed of guarantee and indemnity she executed with the 2nd Plaintiff.

7. I have considered evidence on record. I have also considered the submission of counsel. The Defendants did not call any evidence. The Plaintiffs filed their own issues while the Defendants filed none. Having reviewed the pleadings and evidence on record, the issues for determination are; whether there was any contract between the 1st Plaintiff and the 1st Defendant which the 1st Defendant was in breach of; whether the 1st Defendant was indebted to the 1st Plaintiff for Kshs.2,949,560/- and US\$30,904/56 as claimed; whether the Deed of Indemnity and Guarantee between the 2nd Plaintiff and the 2nd Defendant was null and void as contended by the Defendants; whether the Plaintiffs are non-suited as against the Defendants; whether the transactions between the Plaintiffs and the Defendants were tainted with illegality and therefore void ab initio; whether the claim as against the Defendant is valid and what order is to be made as to costs.
8. The Plaintiffs' claim as pleaded in the Amended Plaint dated 12th March, 2008 was that by an agreement dated 7th November, 2001, IATA appointed the 1st Defendant as its travel Agent for the sale of air tickets of IATA members in Kenya. PW1 testified that an Agency Agreement was executed between the 1st Plaintiff and the 1st Defendant. The particulars of the contract produced as PExh3 reveal at Clause 7.2 that the sale proceeds were to be held in trust by the 1st Defendant for onward transmission to the 1st Plaintiff. PW1 and PW2 that the 1st Defendant issued IATA member tickers but failed to make the required remittances between the months of October and November, 2002. According to PW2 and the billing reports he produced as PExh4, the outstanding payments amounted to Kshs.2,949,560/- and USD\$30,904.56 for that period. The 1st Defendant did not tender any evidence to rebut this evidence. Although the 1st Defendant denied the Agency Agreement with the 1st Plaintiff in its defence, PExh3 was not challenged. Further, the 1st Defendant did not challenge PExh4 which was the billing reports or invoices for October-November, 2002.
9. Clause 7.2 of the said Agreement dated provided that:-

“All monies collected by the agent for transportation and ancillary services sold under this agreement including applicable remuneration which the agent is entitled to claim are the property of the carrier.....”

In my view, from this clause, when the 1st Defendant as the 1st Plaintiff's agent collected any sums of money from the sale of any IATA air tickets, it became liable to the 1st Plaintiff as such proceeds of sale were the property of the carrier. Failure to remit such payments in terms of the said Agreement therefore constituted a breach of contract. As indicated earlier, the 1st Defendant did not produce any evidence to rebut the 1st Plaintiff's claim that it failed to remit the outstanding amounts. In any event, the Plaintiffs produced PExh10 which was a letter dated 6th February, 2003 by the 1st Defendant responding to a demand by the 2nd Plaintiff. In that letter, the 1st Defendant did not deny the debt, it only prayed for three (3) months to settle the same. To my mind that was but a clear admission of the debt. Accordingly, I find that there was a contract between the 1st Plaintiff and the 1st Defendant which the 1st Defendant breached. I also find that the 1st Defendant owed the 1st Plaintiff the sum of Kshs.2,949,560/- and USD\$ 30,904.56.

10. This leads me to the issue of the status of 2nd Plaintiff in these proceedings. PW1 and PW3 testified that upon the 1st Defendant's default, the 1st Plaintiff made a demand on the policy of insurance issued to it by the 2nd Plaintiff. That policy was produced as PExh6. Upon such demand the 2nd Plaintiff paid to the 1st Plaintiff the total amounts due from the 1st Defendant to the 1st Plaintiff. I have seen the policy document. The risk insured was any loss of monies in respect of all accountable air ticket transactions due or overdue from agents at the time the agent was declared in default. One of the agents set out in the schedule to the policy at number 77 was the 1st Defendant. Upon settlement by the 2nd Plaintiff of the amount due under the policy the 1st Plaintiff subrogated all its rights and remedies under the claim to the Plaintiff. A letter of subrogation dated 27th January, 2003 was produced as PExh 7. From the contents of that letter, I am satisfied that the 2nd Plaintiff paid to the 1st Plaintiff the amount outstanding from the 1st Defendant as indemnity for the loss occasioned by the latter's default. Such payment did not absolve the 1st Defendant from liability. In this regard, as the 2nd Plaintiff was entitled to file the suit against the Defendants under the doctrine of subrogation. The question of double benefit cannot arise as the claim is for the benefit of the 2nd Plaintiff who is entitled to restitution on what it had expended. In this regard, I am satisfied that the Plaintiffs are properly suited and I reject the Defendant's contention that the suit is bad in law.
11. This now leads me to the issue of the Guarantee and Indemnity between the 2nd Plaintiff and the 2nd Defendant. PW3 testified that the 1st Defendant had executed a form for Agency Default programme (PExh8) pursuant to which it was registered as one of the IATA Participating Travel Agents. It is on this basis that the 1st Defendant was included in the policy held by IATA with the 2nd Defendant. Pursuant to this, the 2nd Defendant executed a Deed of Indemnity on 23rd October, 2002 which was produced as PExh9. Under that Deed, the 2nd Defendant bound herself to indemnify the 2nd Plaintiff for all claims or losses arising from the 1st Defendant's default in its agency by virtue of its agreement with the 1st Plaintiff. By such execution, the 2nd Defendant bound herself to the 2nd Plaintiff in the event of the default by the 1st Defendant. In my view, both the Deed of Guarantee dated 23rd October, 2002 and the Passenger Sales Agency Agreement dated 7th November, 2001 are intertwined. The fact that there may have been no privity of contract between the 1st Defendant and the 2nd Plaintiff does not exonerate the 2nd Defendant from her liability to the 2nd Plaintiff. Further, the 2nd Defendant cannot hide behind the cloak of directorship which would under normal circumstances shield her from the liabilities of the 1st Defendant Company. She in essence waived such immunity when she executed the Deed of Indemnity dated 23rd October, 2002 wherein she undertook personal responsibility for the liability of the 1st Defendant. I therefore hold that the 2nd Defendant is liable for the payment of the outstanding amounts under the Deed of Indemnity to the 2nd Plaintiff.
12. In the premises, I am satisfied that the Plaintiffs have proved their claim against the Defendants. The claim by the 1st Plaintiff against the 1st Defendant is proved as is the claim by the 2nd Plaintiff against the 2nd Defendant. I will therefore enter judgment for the Plaintiffs against the Defendants, jointly and severally, for:-
- a. ***Kenya Shillings Two Million Nine Hundred and Forty Nine Thousand Five Hundred and Sixty (Kshs.2,949,560/=) and USD \$ 30, 904.56***
 - b. ***Interest at court rate shall apply from the date of the decree until payment is made in full.***
 - c. ***The Plaintiffs shall also have Costs of this suit together with interest thereon.***

DATED and DELIVERED at Nairobi this 14th day of June, 2013.

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A. MABEYA

JUDGE