



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 511 OF 2008

**MOHAMMAD HASSIM PONDOR (Suing on behalf of1ST PLAINTIFF
The International Air Transport Association IATA)
MERCANTILE INSURANCE COMPANY LIMITED2ND PLAINTIFF**

- VERSUS -

**SUMMIT TRAVEL SERVICES LIMITED1ST DEFENDANT
TANNYA RANGUMA 2ND DEFENDANT
OLIVIA A. RANGUMA3RD DEFENDANT
JACK N. RANGUMA4TH DEFENDANT
DR. ONDIEK OKELO5TH DEFENDANT**

RULING

1. I have before me the plaintiffs' chamber summons dated 30th June 2010. It is expressed to be brought under Order V1 rules 13 (1) (b) and (d) and 16 of the old Civil Procedure Rules as well as sections 1A, 1B and 3A of the Civil Procedure Act. Its main foundation and as buttressed in the two affidavits of Shem Nyamai and Mohammad Pondor is that the statement of defence by the 1st defendant is scandalous and frivolous. The applicants say that by an agreement dated 15th December 1993 the International Air Transport Association (IATA) appointed the 1st defendant as its travel agent in Kenya. The contract authorized the 1st defendant to sell air tickets. IATA is the 1st plaintiff herein through Mohammad Pondor. The 2nd plaintiff, an insurance company had insured or indemnified the 1st plaintiff against all actions, proceedings, claims, demands or losses as a result of default by the 1st defendant. In breach of the agreement of 15th December 1993, it is averred that the 1st defendant failed to pay to the 1st plaintiff the sum of Kshs 4,779,329.70 and US \$ 48,881.10. The 2nd plaintiff paid the 1st plaintiff. In exercise of its subrogation rights, the 2nd plaintiff now claims those sums from all the defendants by virtue of a further deed of indemnity dated 7th October 2002 between the 2nd plaintiff and the 2nd, 3rd 4th and 5th defendants. The plaintiffs aver that the 1st defendant has admitted its indebtedness. The plaintiffs thus pray that the statement of defence of the 1st defendant be struck out and judgment entered for the sums above.

2. Interlocutory judgment has already been entered against the 2nd, 3rd 4th and 5th defendants for the above sums. The application is thus directed at the 1st defendant's defence dated 13th October 2008. In

that defence, the 1st defendant denies ever entering into the agreement with IATA dated 15th December 1993 or the deed of indemnity dated 7th October 2002. It denies that the 2nd plaintiff has reimbursed those sums to the 1st plaintiff. In particular, it denies breaching any contract with the plaintiffs and accordingly does not owe the sums claimed. It denies the plaintiffs here suffered any loss or damage and puts them to strict proof thereof. The only matter admitted by the 1st defendant in that defence is its description at paragraph 3 of the claim.

3. The 1st defendant has also filed grounds of opposition dated 15th February 2011. In those grounds, the present application is attacked for failing to meet the threshold for grant of the prayers sought. In addition the 1st respondent has filed a Replying Affidavit sworn by Jackton Ranguma. There is also a further affidavit of the same deponent sworn on 6th December 2011. The latter affidavit was filed pursuant to leave of court granted on 2nd November 2011. It was to be filed within 14 days but was filed out of time on 5th December 2011. The applicant asked the court to disregard the latter affidavit as the applicant had then not been afforded adequate time to respond to it and that it was irregularly on record. In view of the overriding objective of the court to do substantial justice to the parties as spelt out in article 159 of the constitution as well as sections 1A and 1B of the Civil Procedure Act, I shall in the interests of justice consider the averments in that affidavit. One key defence in the replying affidavits is that the IATA agreement as well as the deed of indemnity aforementioned are void for want of valid company resolutions or seal of the 1st defendant.

4. It is also averred that the agreements were varied from time to time allowing the 1st defendant to collect directly service fees and a US \$ 3 premium from customers. The defendant's position is that it paid insurance premiums and any settlement between the plaintiffs was for the benefit of the 1st defendant. At paragraph 10 of the further affidavit, the 1st defendant states that the dispute arose in 2007 – 2008 during the post-election violence which excludes it from liability under clause D paragraph 6(1) of the deed of indemnity.

5. I take the following view of the matter. The 1st defendant is a limited liability company. That would seem clear from the depositions and the annexed memorandum and articles of association of the company. It may well be true that the IATA agreement of 15th December 1993 and the deed of indemnity of 7th October 2002 required certain internal requirements or resolutions of the company needed to be carried. However, internal management rules cannot bind a third party unless they are brought to its notice. I think that was well settled in the rule in *Torquands* case.

6. I have perused those two agreements. On the face of them they are executed for and on behalf of the 1st defendant by its director William O. Okello and attested by an advocate F.O. Okello of P. o. Box 49988 Nairobi. I have no cause to doubt the attestation. I have also noted that the said William Odhiambo Okello is listed as a subscriber to the memorandum and articles of association of the company. I have not seen the original agreements and I cannot tell from the copies whether or not the company seal of the 1st defendant was affixed. But I am also alive to the view that not all agreements must be under seal to be binding on the company. What I have found is that the company through the mind and will of its director entered into the two agreements. The statement of defence denying the agreement is not *bona fide* and I find it flippant for the following reasons. First, the 1st defendant at paragraph 4 and 5 of the further affidavit admits to those agreement by inference save that it says they are void for want of a seal or resolutions. At paragraph 9 of the further affidavit, it says “the agreement has been varied over time to allow agents to recover service fees directly from the customers including the US \$ 3 premium” That is a further admission of the existence of the passenger sales agency agreement with IATA. Lastly on that point, it has been averred at paragraph 10 of the same affidavit of the 1st defendant that due to the post-election violence of 2007 – 2008 when the dispute arose, liability is excluded “by clause D paragraph 6 (i) of the said deed of indemnity”. There again, the 1st defendant acknowledges the existence of the deed of indemnity and seeks to benefit from its exclusion clauses.

7. There is a cardinal precept of pleadings that a party should not make an allegation of fact or raise a

new ground inconsistent with a previous pleading. When one mirrors the statement of defence against the above deposition, the contradictions are glaring and the *bona fides* of the defence are brought into question.

8. I have also perused the letter of subrogation dated 20th June 2008 between the 1st and 2nd plaintiffs. I am satisfied that the 2nd plaintiff paid the sum of Kshs 4,779,329.70 and US \$ 48,881.10 to the 1st plaintiff as indemnity for the losses occasioned by default of the 1st defendant. This is again clear from the statements of account annexed as “SM 1” to the affidavit of Shem Nyamai of 30th June 2010. Those net sums due from the 1st defendant Summit Travel to the 1st plaintiff in the total sum of Kshs 4,779,329.66 and US \$ 48,881.10 are well tabulated. I have not seen any or sufficient evidence from the 1st defendant in rebuttal of its indebtedness beyond mere denials. I have not heard the 1st defendant to say it never received air tickets for sale from the 1st plaintiff.

9. Clause 7.2 of the passenger Sales Agency agreement with IATA of 15th December 1993 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”. From the statements I have referred to, the 1st defendant as agent collected those sums and became liable to the 1st plaintiff.

10. Although the 1st defendant avers that it paid insurance premiums and that settlement of the claim by the 2nd plaintiff to the 1st plaintiff was for the account of the 1st defendant, it has not placed material evidence to show such payment. The insurance policy is exhibited in the affidavit of Shem Nyamai and under clause 8, it is express that insurance premiums were to be paid by the 1st plaintiff to the 2nd plaintiff. It was meant to cover any default by the 1st defendant. It would turn logic on its head to contemplate a situation where the 1st defendant, who was the risk being covered, being the one to meet the premiums. Fundamentally, the beneficiary of the insurance policy was the 1st plaintiff and this explains why the 2nd plaintiff paid the 1st plaintiff when default occurred.

11. Striking out a pleading is a draconian measure and one of last resort. In the instant case, the court must be persuaded that the statement of defence dated 13th October 2008 by the 1st defendant is scandalous, frivolous or vexatious. In sum, does the plaintiff’s notice of motion rise to the threshold set by the law and decisions of the court in view of the analysis of the facts above? Striking out a pleading should be employed in the clearest of cases. See Wambua Vs Wathome [1968] E.A. 40. See also Musa Misango Vs Eria Musigire and others [1966] E.A. 390 at 395.

12. The court has power to strike out a pleading under order V1 rule 13 (1) (b) and (d) of the old Civil Procedure Rules, the precursor to the present order 2 rule 15. The applicant would then need to demonstrate the suit is scandalous, frivolous, vexatious or an abuse of court process. A frivolous suit must be plainly so on its face. It is one that is so baseless as to have no legs to stand on and to that extent it can be said to vex the defendant. For example in Silvanus Tubei Vs Kenya Commercial Bank [2006] e KLR Justice Ransley found that where a party, against clear evidence of a registered charge, continued to insist there was no such charge was then frivolous in its pleadings. So that a matter is frivolous if it carries no weight or importance or when on its face it does not answer the claim of the other party. See Brite Print (K) Ltd Vs Attorney General Nairobi HCCC No 1096 of 2000 (unreported). Justice A. Visram, as he then was, held in the same decision, and citing with approval the case of Fischer Vs Owen (1878) 8 C.D 645 that a matter can only be said to be scandalous if it is irrelevant. Cotton L.J. in the Fischer case at page 653 said “nothing can be scandalous which is relevant”. A pleading is only said to be vexatious when it is baseless and its only intention is to vex or harass the other party. Again a pleading is embarrassing “if it is so drawn that it is not clear what case the opposite party has to meet at trial”. See Brite Print (K) Ltd Vs Attorney General (Supra). See also British Land Association Vs Foster (1888) 4 TLR 574.

13. Again, an application to strike out a pleading must be brought with expedition. Where there has been inordinate delay in bringing it, the court will frown upon it and will not exercise its discretion in favour of

the applicant. See Meru Farmers Co-operative Union Vs Abdul Aziz Suleman (No 1) [1966] E.A. 436 for the proposition that an application to strike out a plaint on ground it discloses no cause of action should be made promptly.

14. The bottom line cannot be better set than in the words of Sir Udo Udoma C.J. in Musa Misango Vs Eria Musigire (Supra) at 395 when he delivered himself thus;

“To my mind, it is evident that our judicial system would never permit a plaintiff to be driven from the judgment seat in this way without any court having considered his right to be heard except in cases where the cause of action was obviously and almost incontestably bad”

15. Mirrored against the law then, the defence set up by the 1st defendant is not a genuine or *bona fide* defence. It is a red herring and a sham. It can only delay justice. It is for all the above reasons a scandalous, frivolous and vexatious defence.

16. I thus allow the plaintiffs chamber summons dated 30th June 2010. I order that the statement of defence of the 1st defendant herein be and is hereby struck out. In the result, I enter judgment in favour of the plaintiffs against the 1st defendant in the sum of Kshs 4,779,329.70 and US \$ 48,881.10. Interest shall apply from the date of the decree till payment in full. I also award the plaintiffs costs of the application and of the suit against the 1st defendant.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 27th day of January 2012.

G.K. KIMONDO
JUDGE

Judgment read in open court in the presence of

Mr. Kiprono for Karungo for the plaintiffs.

Mr. Billing for Wasonna for the 1st Defendant.