



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**

**Civil Case 584 of 2006**

**MOHAMED HASSIM PONDOR**

(suing for and on behalf of The

International Air Transport Association (I.A.T.A.) ..... **1<sup>ST</sup> PLAINTIFF**

**MERCANTILE INSURANCE COMPANY LIMITED**

Mercantile Life & General

Assurance Company Limited ..... **2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**TOPDECK TRAVEL AND TOURS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**KIZITO CHARLES MACHANI ..... 2<sup>ND</sup> DEFENDANT**

**MONICAH AKINYI SEWE MACHANI ..... 3<sup>RD</sup> DEFENDANT**

**R U L I N G**

1. What is before this Court is a Notice of Motion dated 17 May 2011 brought by the Plaintiff under **Order 2 Rule 15** and **Order 51 Rule 1** of the *Civil Procedure Rules 2010* seeking Summary Judgement to be entered herein. It is based on the following grounds:

**“(i) The Defendants are truly indebted to the Plaintiffs in the sum claimed in the Amended Plaint and was so indebted from the commencement of this suit.**

**(ii) The Amended Defence as filed, is a mere denial and is meant to embarrass and/or prejudice the fair and expeditious trial of this suit.**

**(iii) The Second Defendant in his Supporting Affidavit sworn on 28<sup>th</sup> February, 2011 to the Defendants' ex-parte Chamber Summons application of similar date has admitted the debt owing and would have settled had the intended Third parties settled.**

**(iv) The Judgement sought by the Plaintiffs/ Applicants herein is for a straight forward liquidated sum and it should not be withheld on account of some other parties owing the Defendants.**

**(v) From the outset, the Defendants would have pleaded the amount owed by other third parties in their Defence.**

**(vi) It is the Plaintiffs contention that the Defendants settle the amount claimed in the Amended Plaintiff and pursue its debts through the many channels at its disposal without involving the Plaintiffs".**

2. The Application is supported by the annexed Affidavit of **M. BILLING** Advocate for the Plaintiff sworn on 17 May 2011. The Application is opposed and a Replying Affidavit filed, sworn by one **CHARLES K. MACHANI** the 2<sup>nd</sup> Defendant herein dated 8 December 2011. The Plaintiffs' written submissions were filed herein on 14 February 2012 and the Defendants' written submissions on 17 February 2012 as directed by the Court on 8 February 2012.

3. Mr. Billing, in his said Affidavit, took the Court through the history of the matter touching upon the Defendant's successful Application to set aside the interlocutory judgement entered herein. He detailed that in paragraph 3 of the Defence, the Defendants detailed that the Plaintiff's claim had been paid in full. However, the Defendant had filed a Chamber Summons on 28 February 2011 to enjoin 3<sup>rd</sup> parties who owed the Defendants Shs.10,375,416/20. I was referred to paragraphs 5 and 6 of the Affidavit sworn by the 2<sup>nd</sup> Defendant in support of the said Chamber Summons. Mr. Billing then outlined how the 1<sup>st</sup> Plaintiff, in view of the failure of the Defendants to settle the outstanding amount, had lodged a claim with the 2<sup>nd</sup> Plaintiff who had settled the claim. As a consequent, Mr. Billing deponed, the 2<sup>nd</sup> Plaintiff filed this suit together with the 1<sup>st</sup> Plaintiff under the doctrine of subrogation. Mr. Billing maintained that the Defence was a sham and did not disclose any triable issues.

4. The Replying Affidavit of Charles Machani, the 2<sup>nd</sup> Defendant herein denied that there had been any admission of the sum claimed. He confirmed the supporting Affidavit to the Defendants' Application of 28 February 2011 to the extent that 3<sup>rd</sup> parties owed the Defendants the aforesaid sum and that they had taken steps to enjoin the 3<sup>rd</sup> parties to the suit.

5. The Plaintiffs' submissions rather surprisingly asked for the Court's leave to amend the Notice of Motion so that it was brought under **Order 2 Rule 15 (1) b, c and d** of the *Civil Procedure Rules 2010* and not the whole of **Rule 15**. The Plaintiffs regretted their mistake in not quoting in the Motion's heading, the specific sub-rule under which the Application is brought. The Plaintiffs maintained that the Defendants would suffer no prejudice by my allowing the amendment sought. The Defendant's submissions made no mention of the Plaintiffs' application to amend their Notice of Motion. I would presume that the Defendant's silence in this regard means acquiescence to the same. Bearing in mind the provisions of **Order 51 Rule 10 (2)** that no application shall be defeated on a technicality or for want of form that does not affect the substance of the application, I am inclined to allow the Plaintiffs' application to amend.

6. Turning to the Application proper, the Plaintiffs detailed the prayers and grounds of the same and stated that they were seeking judgement against the Defendants on the grounds that the Defence dated 26 September 2007 is frivolous and vexatious and raises no triable issues. They maintained that every paragraph save for express admissions are bare denials and that the Defendants have not placed any document before Court to prove that they do not owe the Plaintiffs any of the amounts claimed as per the amended Plaintiff or that they fully remitted to the **International Air Transport Association (I.A.T.A.)** all the monies received as regards the airline tickets that were sold. The Plaintiffs maintained that the 2<sup>nd</sup> Defendant at paragraph 5 of his supporting Affidavit to the Defendants Application of 28 February 2011

had admitted.

7. Thereafter, the Plaintiffs referred me to 4 authorities which they maintained supported their Application herein:

- (a) **Thompson Kenya Ltd. vs. Air Kenya Aviation Ltd t/a Regional Air** – HCCC No. 214 of 2005 reported at [2006] eKLR.
- (b) **Plantation Fertilizers Ltd. vs. Rioki Coffee** (1971) Co. Ltd. – HCCC No. 58 of 2006 reported at [2006] eKLR.
- (c) HCCC No. 1064 of 1999 **National Industrial Credit Bank Ltd. vs. Banks Express & 2 Others** (unreported).
- (d) **Kenya Airports Authority vs. Queen Insurance Agency** (2001) KLR 441.

All these authorities were High Court decisions of persuasive value to this Court.

Finally, the Plaintiffs submitted that the overriding objective of the *Civil Procedure Act* under **Section 1A** as read with **Section 1B** tilted in favour of the Plaintiffs being granted the orders sought.

8. The Defendants submitted that the Plaintiff's Application was unsustainable on the facts pleaded. They drew the attention of the Court that the Amended Plaintiff sought interest at commercial rates of interest which is an issue of fact to be proved by evidence. The Defendants pointed at paragraph 5 of the said Affidavit of 28 February 2011 and maintained that such was not an unequivocal admission. The Statement does not say that the monies due from 3<sup>rd</sup> parties are necessarily related to the Plaintiff and further it does not say what portion from the 3<sup>rd</sup> parties would compensate the Plaintiff. The Defendants were actually asserting by their application to court to join the 3<sup>rd</sup> parties, that they may be the ones liable to the Plaintiff, not the Defendants.

9. The Defendants then referred me to **Choitram vs. Nazari** [1982-88] KLR 438 in which the Court of Appeal had held that an admission must be plain and obvious to entitle a plaintiff to judgement. The Defendants maintained that the Defence filed herein is not a general traverse and that paragraphs 4, 5, 6 and 7 thereof raised serious triable issues of fact and law including whether the 1<sup>st</sup> Plaintiff has legal status to sue and whether the 2<sup>nd</sup> Plaintiff has the capacity so to do. These issues, maintained the Defendants, were serious and sufficient enough that the court cannot summarily decide upon and the case should be allowed to go to full trial. Finally, the Defendants referred me to 3 authorities being **ICDC vs. Daba Enterprise Ltd.** [2005] 1EA 75, **Osodo vs. Barclays Bank International Ltd.** [1981] KLR 30 and **Postal Corporation of Kenya vs. I. T. Inamdar & Others** – *Civil Appeal No. 189 of 2011* without attaching copies of the cases cited for this Court's benefit.

10. As detailed earlier, I do not think that the Defendants herein address the reasoning behind why the Plaintiffs applied to this Court for the amendment of their Notice of Motion dated 17 May 2011. The reason for the amendment, as far as I can see, was to focus on the provisions of **Order 2 Rule 15 (1) (b) (c) and (d)** of the *Civil Procedure Rules 2010*. Such reads as follows:

**“15. (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that –**

- (a) .....
- (b)
- (c) **it may prejudice, embarrass or delay the fair trial of the action; or**

(d) it is otherwise an abuse of the process of the court,

and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be”.

This then is an Application based on the paucity of the Defence not an application for judgement based on admission. In my view, the Plaintiffs’ reference to paragraphs 5 and 6 of the 2<sup>nd</sup> Defendants said Affidavit of 28 February 2012 is to bolster and bring their argument in line with the reasoning of my learned brother Azangalala J. in the **Thompson Kenya** case (supra) where he detailed at page 6:

**“I take the following view of the matter. It is settled that the procedure of summary judgment is to be resorted to in respect of liquidated demands only where it is plain and obvious that the Defendant is truly and justly indebted to the Plaintiff and there are no *bona fide* triable issues raised by the proposed defence or the defence already on record”.**

11. Although we are not dealing here with an application for summary judgement under **Order 36**, I do consider that the considerations under both applications or procedure are very similar and accordingly, I find considerable guidance from the Court of Appeal’s dictum in **Gohil vs. Wamai** [1983] KLR 489 as follows:

**“1. The Civil Procedure rules Order XXXV Rule 2 (1) requires the Defendant to show either by affidavit or by oral evidence that he should have leave to defend. The burden is on the Defendant to satisfy the Court that he is entitled to leave to defend the suit. Leave to defend will not be granted if he merely states that he has a good defence on merit. He must go further and show that the defence is genuine or arguable or raises triable issues ...”.**

12. I have perused at length the Affidavit of the 2<sup>nd</sup> Defendant dated 28 February 2011 which was sworn in support of the Defendant’s Application to enjoin the third Parties detailed therein to the suit by the issuance of Third Party Notices. According to this Court’s record, that Application has never been determined and is still pending before Court. The deponent does not actually state that the Defendants owe to the Plaintiffs the sum claimed of Shs.14,055,341.00. What he does say is that the sum of Shs.10,375,416/20 owed by the 3<sup>rd</sup> parties to the 1<sup>st</sup> Defendant would go a long way towards substantially off-setting the amount that the 1<sup>st</sup> Defendant owes to the Plaintiffs. To my mind, the fact that the Defendants are trying to enjoin the 3<sup>rd</sup> parties to the suit clearly indicates that sums are owing by the 1<sup>st</sup> Defendant to the Plaintiffs.

13. That aside, clearly this Court needs to determine the Application before it as to what is contained in the Defence filed herein on 26 September 2007. Paragraphs 1, 2 and 3 of the Defence are clearly statements of general denial. Paragraph 4 thereof addresses the Agreement dated 13 January 2000 as between the 1<sup>st</sup> Defendant and the first Plaintiff as to the former being licensed as an I.A.T.A. agent under a Passenger Sales Agency Agreement. The Defendants merely deny that they were in breach of the Agreement by stating that the 1<sup>st</sup> Plaintiff in cancelling the 1<sup>st</sup> Defendant’s Licence, the latter’s business operations were paralyzed. However, there is no Counterclaim made as against the 1<sup>st</sup> Plaintiff.

14. Paragraphs 5 of the Defence has the Defendants denying the existence of any Deed of Indemnity as between the 1<sup>st</sup> Plaintiff and the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. Again, this is a general denial and the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants offer no specifics in relation to the Deed of Indemnity, except to say that it is invalid and unenforceable at law. Such view is expressed at paragraph 6 of the Defence. That paragraph also details that the 2<sup>nd</sup> Plaintiff is a stranger to the Defendants and has no capacity to sue them as it is not a party either to the said Agreement of 13 January 2000 with the 1<sup>st</sup> Defendant or the Deeds of Indemnity as between the 1<sup>st</sup> Plaintiff and the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

15. To my mind, it is paragraph 7 of the Defence which may be deemed to set up the first triable issue. Therein the Defendants maintain that the suit is defective based on the facts that the 1<sup>st</sup> Plaintiff is

not a legal person or entity capable of suing or being sued in its own name. Secondly, the Defendants maintain that the 1<sup>st</sup> Plaintiff has not sought leave of the Court to sue on behalf of IATA. Thirdly, that the Plaintiff does not comply with the provisions of **Order VII Rule (2)** of the old *Civil Procedure Rules* (now **Order 4 Rule 1**) and that no notice of institution of this suit has been given as required since the 1<sup>st</sup> Plaintiff purports to be suing on behalf of an association of persons who are not before the Court.

16. Paragraphs 8 and 9 of the Defence claims that there exist no privity of contract between all the parties and as such the 2<sup>nd</sup> Plaintiff cannot bring suit against any of the Defendants and that no right or favour has arisen out of the subrogation in its favour against the Defendants. Finally, at paragraph 10 of the Defence, the Defendants point out that under the said Agreement dated 13 January 2000, there is a provision for arbitration of disputes which has not been invoked by the parties thereto.

17. I did not glean much assistance from the authority cited to me by the Defendants being **Choitram vs. Nazari** (supra). That case dwelt upon the principles to be taken into account by the courts relating to admissions. It was the Plaintiffs' cited authority of **Kenya Airports Authority vs. Queen Insurance Agency** (supra) which gave me the most assistance in my deliberations on the matter. Otieno J (as he then was) adopted the criteria laid out in the 12<sup>th</sup> Edition of *Bullen & Leak's, Precedents on Pleadings* in the chapter therein dealing with the striking out of pleadings as follows:

**“A pleading or an action is frivolous where it is without substance or groundless or fanciful and it is vexatious where it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense.**

**And a pleading tending to embarrass or delay fair trial is described as a pleading which is ambiguous or unintelligible or which states immaterial matter and so raises irrelevant issue which may involve expenses, trouble and delay and that will prejudice the fair trial of the action and so is the pleading which contains unnecessary or irrelevant allegations. Abuse of the process of the Court means in brief, misuse of the court machinery or process”.**

18. In my view, the Defendants herein have not convinced this Court that they do not owe the Plaintiffs claimed amounts of Shs.14,055,341 and US\$ 300.80. The question for determination and therefore the one triable issue is to whom? I remain unconvinced that either the 1<sup>st</sup> Plaintiff or the 2<sup>nd</sup> Plaintiff, as totally different legal entities, (putting aside the principle of derogation for a moment) have correctly sued the Defendants in the capacities that they have. That will no doubt emerge at the hearing of this suit in due course. I dismiss the Plaintiffs' Notice of Motion dated 17 May 2011 but bearing in mind the reasons that I have detailed above, I make no order as to costs.

**DATED and DELIVERED at NAIROBI this 26<sup>th</sup> day of March, 2012.**

**J. B. HAVELOCK  
JUDGE**