REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Millimani Courts

Civil Suit 789 of 2010

ST. MARK FREIGHT SERVICES LIMITED ……..…..….. PLAINTIFF

VERSUS

SARAH WANGUI ……..…….. 1ST DEFENDANT

AVIATION CARGO SUPPORT LIMITED ……....…… 2ND DEFENDANT

J U D G E M E N T

1. The Plaintiff in this case is a limited liability company duly incorporated in the United Kingdom and carries on business in England as well as in Kenya. By its Plaint filed on 19th November 2010, it detailed that at all material times it was engaged in the business of procuring aircraft space aircraft for the freight of perishable goods by the second Defendant, through the first Defendant, in her capacity as the Managing Director of the second Defendant. In other words, the second Defendant was the Plaintiff\'s customer and the Plaintiff claimed that by virtue of purchasing aircraft space from time to time for the second Defendant, the latter maintained an account with the Plaintiff. The Plaint continued by detailing in paragraph 6 that the Plaintiff\'s principal claim against the Defendants was for the unpaid sum of US dollars 74,831.96. The Plaint contained details of how the claimed sum had been arrived at in terms of the second Defendant\'s account with the Plaintiff. Finally, the Plaintiff claimed interest at the prevailing commercial rate from what it referred to as "respective due dates" until payment in full. The Plaintiff also asked for costs of the suit.

2. A joint Defence was filed by the Defendants herein on 17 January 2011. The first point made by the Defence was that the first Defendant was wrongly enjoined in these proceedings as there is no cause of

action against her in her individual capacity. Thereafter, the Defendant denied that the Plaintiff procured any space on aircraft for the Defendants' goods. They further denied that they were a customer of the Plaintiff. The Defendants emphasised that they were neither a clearing and forwarding agent nor shippers. Having denied any sum owing, the Defence at paragraph 8 detailed that if any sum was outstanding the Plaintiff\'s claim was malicious and made as a result of business rivalry and in connection with the disengagement of the arrangement by the Defendants on 14 March 2010. The Particulars of Malice detailed that the Plaintiff had severally demanded that the Defendants do declare erroneous weights on flight documentation in order for the Plaintiff to claim on undue funds (presumably from its own customers). The Defendants also detailed that they started trading with third parties as a result of the Plaintiff\'s conduct. They went on to say that if any debt was due and outstanding to the Plaintiff, then it was due from its shippers and not the Defendants. It noted that the Defendants, with the Plaintiff\'s consent, had instructed a debt collection agency, being Collection Africa Limited, to collect debts from the Plaintiff\'s and the Defendants' mutual clients on a commission basis. The Defendants raised the point that as a result of the debt collection, they had paid to the Plaintiff a sum of US dollars 45,176.90. The said debt collector had also collected a further sum of US dollars 33,028.35 from the Plaintiff\'s debtors. It was not clear from the Defence whether the Defendants were requesting this court to allow them a credit against their account with the Plaintiff in respect of the above sums as the Defence went on to detail the fact that the amount claimed by the Plaintiff from the Defendants did not take into account a credit note for US dollars 917.25 issued on account of the claim by a client of the Plaintiff for missing boxes. Finally, the Defence insisted that the Defendants only assisted the Plaintiff in invoicing its shippers in Kenya. The Defendant asked the court to dismiss the Plaintiff\'s suit against them with costs.

3. In its Reply to the Defence, the Plaintiff maintained that the issue of malice was misplaced as the first Defendant, on behalf of the second Defendant, had already admitted the Plaintiff\'s claim. The Defendants had a joint and several collective responsibility to invoice and collect monies from third parties and to remit the same to the Plaintiff. The Plaintiff maintained that Collection Africa Limited was a stranger to it and that it was not privy to any debt collection arrangements entered into as between that company and the Defendants. The Plaintiff confirmed that it had received US dollars 45,276.90 from the Defendants from debts collected by the Defendant but denied receiving any other amount from the Defendants and if monies have been so received, then the same had never been remitted to the Plaintiff. The Plaintiff clarified that it was the agreement with the Defendants not only that they should invoice third party shippers but also that they were charged with the responsibility of collecting monies from the third parties, for onward transmission to the Plaintiff. The Plaintiff maintained that the Defendants were therefore estopped from denying the same, as from their conduct and actions, they acquiesced and acted in a fiduciary capacity in full knowledge of the transactions between the Plaintiff and the Defendants.

4. The case came up for hearing before court on 15 March 2012, the Plaintiff having made available the owner of the Plaintiff company from the United Kingdom one **Kamel Yousef Hana**. He confirmed his witness statement which he had signed on 21st of February 2011. He produced the Certificate of Incorporation of the Plaintiff company and detailed that the Plaintiff is a freight forwarder and also deals with chartering of cargo within the United Kingdom and other countries at-large including Kenya. He stated that he had come to know the first Defendant who introduced him to her company, the second Defendant, in August 2008. He confirmed that they had entered into a gentlemen\'s agreement governing both parties. Under the agreement, the first Defendant agreed to do a contra entry from the money owing to the Plaintiff and the Plaintiff in turn, invoiced the Defendants for the freight space sold. The Defendants enjoy your a fixed cost for handling aircraft flights. As regards the space in the aircraft, the Plaintiff would invoice the first Defendant the agreed costs and thereafter the first Defendant would add her profit to the cost of the freight and such she would keep as a bonus. PW1 detailed that he only knew reputable shippers in Kenya and those were the ones whom he introduced to the Defendants. However, not all the shippers taking aircraft cargo space were known to the Plaintiff. He noted that the Defendants\' role was to collect the money from the shippers for onward transmission to the Plaintiff. There was no particular timeframe within which the first Defendant made payments but it was understood that as soon as the shippers paid the first Defendant, she was required to transfer the money immediately to the Plaintiff. The witness stated that sometimes the first Defendant would cooperate but in early 2010, she started becoming uncooperative. The first Defendant started defaulting in remitting monies owed to the Plaintiff. It was at that stage in March 2010, that the first Defendant mentioned to the witness that she

would use a certain debt collection company to collect outstanding monies from the shippers for transfer to the Plaintiff. The witness stated that in mid April 2010, he had instructed the advocates\' firm on record for the Plaintiff, to take over and handle the matter of collections from the Defendants on its behalf in Kenya. PW1 referred the court to the initial demand letter to the Defendants written by the said advocates and dated 5th May 2010. The initial demand then was for the outstanding sum of US dollars 241,107.06. On 18th May 2010, the Defendants replied to the said letter and admitted that the amount owing to the Plaintiff was US dollars 115,904.86. Then on 15 June 2010, the first Defendant sent to the Plaintiff\'s said advocates an e-mail, copied to the witness amongst others, detailing that after transferring US dollars 45,176.90 to the Plaintiff, the outstanding amount that the Defendants owed was US dollars 74,831.96. The witness admitted that he had received the said US dollars 45,176.90. Later, the plaintiff\'s advocates issued a demand letter to the Defendants detailing the said amount of US dollars 74,831.96.

5. In court, Mr. Hana clarified that there were two kinds of customers – firstly the plaintiff\'s own customers which were accepted by the first Defendant and then secondly, other customers which the first Defendant brought in and she was fully responsible about their money. The witness stated that the first Defendant knew the customers, she billed them and collected the money and thereafter accounted to the Plaintiff for the costs of the freight space. For the Plaintiff\'s own clients, it would invoice direct and they would pay as direct except for one customer who used to pay the first Defendant so that she could pay costs to other airlines that she utilized in Kenya, on which she would buy space. The witness noted that the Plaintiff operated its own aircraft and was buying space on aircraft of other operators. The Plaintiff\'s clients included Freightwings, Airflow, Makindu Flowers and a few others. The witness said that the first Defendant\'s clients that he never wish to deal with included Summit Air and Greenland. He noted that one particular client of the first Defendant\'s was Westlands Stop Freight, which was a very bad payer. The witness noted that problems with late payment started cropping up in the late 2009 and by 2010 some payments came very late. His own clients had informed him that they had made payments to the Defendants but such monies were not being sent on. Thereafter, PW1 went through what he had detailed in his witness statement as regards collections being put in to the hands of the Plaintiff\'s advocates on record. The witness confirmed that he had not entered into any debt collection agreement with Collection Africa Limited and he referred court to the Defendants' witness statement dated 12 January 2012 paragraph 11 in which the first Defendant had stated that at one time some of the Plaintiff\'s shippers had not settled their invoices which the Plaintiff had blamed on the second Defendant as regards the outstanding payments. The witness maintained that such unpaid client invoices owed the Defendants money not the Plaintiff of the debtors listed, the Plaintiff\'s only client in default was Veg Centre/Top Freight. The witness stated that he was not aware of any collections that had been made by Collection Africa Limited. He had received no communication from anybody to that effect. Mr. Hana stated categorically that he denied that there was any suggestion made by him that he or the Plaintiff wanted the Defendants to declare erroneous weights on flight documentation. The Plaintiff agreed with its customers the guideline for freight rates and thereafter the Plaintiff informed the Defendants. It was the first Defendant\'s duty to go ahead and collect what the witness told her so to do. This was only applicable to the Plaintiff\'s clients. Finally, in his examination in chief, Mr. Hana was referred to page 6 of the Plaintiff\'s bundle of documents – the Statement of Account. He maintained that these were the details of the invoices that the Plaintiff had raised to the Defendants for the freight space utilised. The Statement of Account originated from the second Defendant and detailed the amounts that the Plaintiff owed for the services performed by the second Defendant. He noted that at page 8 of the Plaintiff\'s bundle of documents, the first Defendant had sent an e-mail dated 15 June 2010 at which she had detailed at page 8 A:

"Therefore after the transfer what is owed to St Mark will now stand at $74,831.96, as the balance of the debt is owed to Aviation Cargo by St Mark, that will be offset with the outstanding. Kindly confirm that you agree to this amount."

6. In cross-examination, Mr. Hana was asked to detail more clearly to the court what the Defendants responsibilities were under the gentleman\'s agreement. He detailed that the Defendants were supposed to handle the flights, take bookings, receive the crew, ensure proper loading at the ramp and filling the flight space. The first Defendant had been contracted by the Plaintiff to handle the flights and she was entitled to payment therefore. In explaining page 7 of the Plaintiff\'s bundle of documents, the witness noted that

as per the totals to that statement of account, the Defendants owed to the Plaintiff the sum of US dollars 440,566.16 while the Plaintiff owed to the Defendants the sum of US dollars 314,667.42 leading to a difference due to the Plaintiff of US dollars 125,898.74. The witness confirmed that that taking into account monies remitted to the Plaintiff the final figure owed to the Plaintiff by the Defendants as agreed by the first Defendant amounted to US dollars 74,831.96. He confirmed that all goods being shipped on aircraft belonged to the shipper and for the Plaintiff\'s customers, the witness would determine what the freight rate would be. For the first Defendant\'s customers, the witness gave to the first Defendant a guideline figure as to freight costs. On the airway bill, the customer\'s name would appear and that of the consignee in the United Kingdom. Neither the Defendants' nor the Plaintiff\'s name would appear on the airway bill.

7. When asked as to the different persons of the first and second Defendants, Mr. Hana stated that he could not see the difference between the first Defendant and the second Defendant Company. The first Defendant is the owner of the second Defendant Company just as the witness was the owner of the Plaintiff company. He noted that the Plaintiff company charters its own aircraft or it bought space on other airlines. The first Defendant would contact the Plaintiff\'s customers in Kenya and she would also contract with her customers to sell the space. She would be looking for customers locally on her own behalf. This relationship was orally agreed. The witness was then taken to the accounts statements but was not shaken by cross-examination as regards the same. He agreed that the first Statement of Account showed a balance owing of US dollars 241,107.60 and that sum included invoices owed by the Plaintiff. He confirmed that taking into account the Contra amounts, the balance due was US dollars 115,904.86. The first amount was erroneous because the Plaintiff had not done the Contra by then. After the Plaintiff had received some monies from the Defendants, the amount owing was reduced to US dollars 74,831.96. The witness considered that the first Defendant\'s said e-mail indicated that this amount was admitted. Finally under cross-examination, Mr. Hana stated that he did not deal with all the shippers from Kenya direct. He did not continue trading with the first Defendant or her shippers after he had fallen out with her.

8. In a brief re-examination, Mr. Hana detailed that the second Defendant was being run by the first Defendant. When the witness was first dealing with her, she was trading under the name of "Aviation Cargo". He confirmed that the Plaintiff did not owe either the first or second Defendant for services rendered to the Plaintiff. He confirmed that there was no counterclaim made for any suggested outstanding amounts due. He confirmed that as per the oral agreement between them, the first Defendant\'s role was to try to fill the flights. Once she had collected the money from the shippers, she was supposed to transfer the same to the Plaintiff. The debt collector was engaged at the first Defendant\'s own volition. Finally he stated that the Plaintiff had no control over to whom the clients were who bought space from it; the first Defendant bought the space and sold it on. The witness emphasised that he was not dealing directly with any of the first Defendant\'s clients/customers.

9. The matter next came before court on 28 June 2012 when the first Defendant was called to the witness stand. She confirmed that she was a director of the second Defendant company. She further confirmed that he had been approached by Mr. Hana, the managing director of the Plaintiff company to deal with general handling on behalf of the Plaintiff. At that time, in August 2008, she was doing facilitation and logistics. The Defendants would receive the documentation from the Plaintiff, would identify the goods to be shipped and arrange for the same to be loaded. Initially all the shippers or customers belonged to the Plaintiff. The list of such customers was at page 57 of the Defendant\'s bundle of documents.

10. In her witness statement dated 12th of January 2011, the first Defendant spelt out details of the gentleman\'s agreement between the Plaintiff and the second Defendant as she undertook it as follows:

(a) the second Defendant was to provide logistical control on the Plaintiff\'s flights (Egypt Air) for the Plaintiff\'s shipments whereby the Plaintiff\'s shippers would be introduced to the second Defendant by the Plaintiff who would give the second Defendant the shippers' contacts including the contact person. For each and every flight, the second Defendant handled the booking sheet which would be sent to the Plaintiff for approval (as the final say thereon lay with the Plaintiff) to whom the flight belonged. If the

second Defendant had any issue with the Plaintiff\'s shippers (who were on a pre-paid basis), for not having settled freight charges with the second Defendant, the latter would inform the Plaintiff of the same to enable the Plaintiff to talk to its shippers to settle the invoices due.

(b) The second Defendant was also responsible for operations control whereby its personnel would meet the aircraft on arrival in Nairobi, coordinate with the ramp cargo handler on the movements and set the departure time, further communicating with the Plaintiff on the running and operation of the flight. Once the flight had left Nairobi, the second Defendant would scan the documents and forwarded them to the Plaintiff and its shippers to facilitate pre-clearance in the United Kingdom before the flight arrived there. Once the cargo had arrived in the United Kingdom, the Plaintiff would prepare the invoice and send it to the second Defendant to facilitate the collection and transfer of the freight cost to the Plaintiff\'s bank account in the United Kingdom. If any shipper defaulted, the second Defendant would notify the Plaintiff in order for it to follow up with its shippers (as they were its clients) for the payment. The contract of carriage was between the shippers in Kenya and the Plaintiff in the United Kingdom as per the shipping documents and supporting documents for the carriage including the shippers details, the shipping invoice, the packing list, Euro 1, the Conformity Certificate and the Airway Bill.

(c) The first Defendant noted that all rates and contracts on the flights were discussed and agreed as between the Plaintiff and its shippers; the second Defendant was not involved in these discussions nor in the contracts and, the first Defendant maintained, the second Defendant never bought any space from the Plaintiff.

(d) The first Defendant had requested the Plaintiff for a formal contract to cover the business dealings as between the two parties but Mr. Hana was reluctant in that regard as he claimed all the shippers were his and that the second Defendant was just a facilitator, as he was the one who outsourced the business, and chartered the aircraft. As the Plaintiff was based in the United Kingdom, it needed a facilitator only, in Nairobi.

(e)The first Defendant noted that the money collections made by the second Defendant on behalf of the Plaintiff never incurred any charge by way of disbursement or Administration fee. The second Defendant transferred what had been received and bore the bank charges.

(f) The second Defendant sent invoices to the Plaintiff at the end of each month covering the flights/shipments handled by the second Defendant. Such invoices were never settled by the Plaintiff to the second Defendant outright, the first Defendant maintained that she had to beg for payment. In the end, the first Defendant stated, it was agreed by both parties that the second Defendant would offset what was owed for services that it rendered to the Plaintiff, from the money that it had collected from the Plaintiff\'s shippers, before transferring to the Plaintiff, the balance.

(g) The first Defendant maintained that the relationship was a very difficult one but nevertheless the business was handled. She noted that, at one time, some of the Plaintiff\'s shippers did not settle invoices and that the Plaintiff "blamed" the second Defendant for the outstanding payments. The first Defendant maintained that due to this, the second Defendant stopped handling the Plaintiff\'s flights and shipments with effect from 14 March 2010; this was on the basis that the second Defendant was not a debt collection agency for the Plaintiff\'s shippers\' debts. Thereafter, the first Defendant listed various shippers who she maintained owed monies to the Plaintiff at the time of the stoppage totalling US dollars 72,889.46.

11. When she took the witness stand, the first Defendant detailed that the accounting arrangement between the parties was that the Plaintiff would send an invoice to the Defendants in the name of the second Defendant company and thereafter the second Defendant company would bill the shipper in its name. Prior to that, the Plaintiff would give the Defendants details of the shipper, the rate and amount of goods uplifted and the amount to be collected. Thereafter the second Defendant would issue a similar invoice raised to the shipper. It was all part of the same transaction. The Defendants would send their invoice to the shipper demanding payment. The first Defendant noted that it had been agreed that they would have to send an invoice because the Plaintiff did not have a bank account in Kenya. The witness admitted that it was her responsibility to collect the debt and she gave an example as per page 77 of the

Defendants\' bundle of documents. Indeed, the witness went on to point out to court the e-mail correspondence had with the Plaintiff\'s advocates in Kenya who were urging her to continue with the debt collection exercise. She reiterated that the Defendants did not negotiate rates with the shippers, the Plaintiff did that. Further, the Defendants did not buy space on the aircraft as the second Defendant is neither a clearing nor forwarding agent nor a shipper, it is a service provider. She stated that it only charged for the operation of ground handling at US dollars 650 per turnaround. The second Defendant did a billing at the end of each month but it never charged for debt collection services. In that regard, the first Defendant maintained that the Plaintiff was well aware that the second Defendant was engaging the services of the debt collection agency, Collection Africa Limited. She stated that the second Defendant involved the collecting agency as the Plaintiff was uncooperative in the collection of debts. She stated that the Defendants had no option but to go to Collection Africa Limited which collected a total of US dollars 45,176.90 upon which payment was made to the Plaintiff.

12. Later in her evidence in chief on the witness stand, the first Defendant, Sarah Wangui, reiterated that she had a disagreement with Mr. Hana as he wanted the Defendants to cheat on the weights loaded onto the aircraft. The Defendants did not comply with the request as they knew that they would be held responsible if such was revealed. In this regard, the first Defendant pointed to page 71 of the Defendants\' bundle of documents being an e-mail from her to Mr.Hana dated 20 October 2008 which she read out as follows:

"I want to clear the situation with reference to you instructing me to put extra weights on the flight without declaring. You know very well what you are asking me to do is something wrong, which can result in numerous adverse and serious consequences going as high as the act being criminal. I want to state and make it known to you that <u>we are not in any way going to overload the aircraft beyond the limits we have been given by any flight plans and the crew</u>. If the gross payload for the AB 300-600 is 46t and for the ABB4-43. 7t, please let\'s respect each other\'s boundaries, thus kindly do not expect anything more from us as we are tied by our professional ethics."

13. Thereafter, counsel for the Defendants referred Ms. Wangui to the correspondence passing between the Defendants and the Plaintiff\'s said advocates, which led to this litigation. More particularly she was referred to her own letter of 18 May 2010 addressed to the Plaintiff\'s said advocates. She noted that the amount of dollars 115,904.86 was owed to the Plaintiff by the second Defendant made up of payments not settled to the second Defendant by the Plaintiff\'s shippers. He also noted that the amount of US dollars 125,202.74 was owed to the second Defendant by the Plaintiff. She maintained that these were sums paid by and on behalf of the Plaintiff to its creditors being Freightwings, Etihad Airways and Global Aviation. It was in this letter that the first Defendant notified the Plaintiff through its said advocates that it had outsourced the debt collection of invoices to Collection Africa Limited. In evidence, the first Defendant stated that as per their statement, the amount of US dollars 74,831.96 was due from the Plaintiff\'s shippers. She then stated that the amount received was around US dollars 30,000 and the amount owed was US dollars 40,000 which had not been paid by the Plaintiff\'s shippers. She stated that the Defendants did not have any contracts with the Plaintiff\'s shippers. All contracts and accounts were discussed between the Plaintiffs directly with its shippers.

14. In cross-examination, Ms. Wangui rather abruptly answered a question from the Plaintiff\'s counsel that she was not a sales agent but a service agent. She did not admit that any of the shippers who were owing money were clients of hers. She then went into details of individual shippers and amounts owed by them, which evidence I found to be somewhat confusing. She summed up by saying that she was collecting amounts due from the shippers but that it was the Plaintiff who had agreed all other terms with them. She also stated that the Plaintiff was collecting some monies due from the shippers directly in the United Kingdom. She was collecting only in Kenya. She then admitted that US dollars 45,000 had been paid to the Plaintiff and that the amount left was around about US dollars 72,000. She stated that he had not introduced any of her shippers to the Plaintiff including Husaki, who were shipping miraa. Only ones that she knew were not miraa shippers. She instructed the debt collection agents on behalf of the Plaintiff. She maintained that he had obtained the consent of the Plaintiff to the appointment of the debt collecting agency. She then stated that she had instructed the debt collection agency after pressure was exerted upon her by the Plaintiff. She said that he had informed Mr. Hana of the appointment by e-mail. Thereafter,

there being no re-examination, the first Defendant clarified to court with reference to page 8A of the Defendants\' bundle of documents that it was not correct that the amount of US dollars 74,831.96 was owed by her to the Plaintiff. She maintained that the said amount alluded to was to collected from the shippers. She confirmed to court that she did not owe any money to the Plaintiff.

15. Thereafter, after the close of the hearing, the parties put in written submissions. The Plaintiff\'s submissions commenced by detailing the prayers in the Plaint followed by a summary of the Plaintiff\'s evidence before court by PW1. The Plaintiff then detailed what it considered to be the issues for determination, as follows:

“(a) Did the Defendants owe the Plaintiff US$74,831.96

(b) What was the nature of the relationship/ contract between the Plaintiff and the Defendants?

(c) Whose customers were the shippers who made up the debt?

(d) Did the Plaintiff instruct and/or give instructions to the Defendants to instruct the debt collector?

Its submissions thereafter explored the relationship/contract as between the parties in terms of issue (b) as above. In this regard, the Plaintiff referred to the evidence a given by the first Defendant in that there was an oral contract as between the second Defendant and the Plaintiff. The first Defendant had indicated that she was a facilitator of logistical control and operational supervision. The Plaintiff submitted that it was clear from the evidence as to what was the relationship between the Plaintiff and the Defendants. It maintained that the Defendants had their own relationship with customers to fill up the aircraft space for which they were charged by the Defendants. The Plaintiff maintained that the Defendants had not shown any direct link between the Plaintiff and the shippers to prove that at any point, the Plaintiff collected money direct from the shippers. The first Defendant had alleged that the Plaintiff had, on several occasions, collected money from shippers directly but she conceded that she had not tabled any proof to indicate such. The Plaintiff also stated that the first Defendant had not produced any documentation before court to confirm the allegation that the reason that the Plaintiff did not invoice the shippers directly, was because it did not open or have a bank account in Kenya.

16. As regards issue (c) above, the Plaintiff submitted that the first Defendant had detailed in her evidence that all the shippers were customers of the Plaintiff and that none of them were the customers of the second Defendant. The Plaintiff noted that on cross examination, the first Defendant had denied that Husaki and Topfreight, who were in the list of debtors, were her shippers. Thereafter, the Plaintiff in its submissions, pointed at various names of shippers as regards non-payment and stated that a comparison of the debtors listed on the Defendant\'s letter dated 18 May 2010, with the list of customers introduced to the first Defendant by the Plaintiff as per the latter\'s e-mail dated 13 August 2008, showed that only DHL Global was amongst the debtors introduced to the Defendants by the Plaintiff. DHL Global only owed US dollars 198.92. It was the Plaintiff\'s conclusion as to this issue that the debtors which the Defendants were chasing were, with the one exception, all customers of the second Defendant. Turning to the first issue (a), the Plaintiff noted that it had made an initial demand on the Defendants for US dollars 241,107.06. The Defendants had responded to that initial demand (by letter dated 5 May 2010) by its letter dated 18 May 2010. That letter had detailed that the amount actually owing was US dollars 115,904.86. The attachment to that letter indicated how the Defendants had offset amounts owed by the Plaintiff to Aviation Cargo Limited of US dollars 125,202.74. Thereafter, the Plaintiff noted that, through its advocates, a further demand had been made by the advocates\' letter dated 25th of August 2010 for the amount of US dollars 74,831.96. The Plaintiff pointed out that this figure had been arrived at by the first Defendant stating in her e-mail of 15 June 2010 that the said amount of US dollars 115,904.86 was to be reduced by the Defendants making a transfer of US dollars 45,176.90 for payments made by various shippers (presumably through the debt collection agency). The Plaintiff pointed out that the first Defendant stated in the last paragraph of her said E-mail that after the transfer had been effected what is owed to the Plaintiff is US dollars 74,831.96. This was the amount given by the first Defendant which has been claimed in the Plaint. It was the Plaintiff\'s submission that the Defendant indeed owed the Plaintiff

the said amount of US dollar 74,831.96 as evidenced by the documents submitted by the first Defendant herself.

17. The Plaintiff then referred the court to the case of **Jetha Esmail Limited v Somani Brothers,** *Civil Appeal No. Is 82 of 1959* **(1960) EALR 26** in which it quoted from the judgement therein of **Forbes VP** as follows:

"1) There must be a representation by a person or his authorized agent to another in any form-a declaration, act or omission.

2) The representation must have been of the existence of a fact and not of promises of future intention which might or might not be enforceable in contract.

3) The representation must have been meant to be relied on i.e. it must have been made under circumstances which amounted to an intentional causing or permitting belief in another ….

4) There must have been a belief on the part of the other party in its truth.

5) There must have been action on the faith of that declaration, act or omission, that is to say, the declaration, act or omission must have actually caused another to act on the faith of it and to alter his former position to his prejudice or detriment".

It was the Plaintiff\'s further submission that in the present case before court, the first Defendant had made a written representation that she owed the Plaintiff US dollars 74,831.96. It maintained that the statement by its nature was a representation of fact that was made with the intention that the Plaintiff would rely upon it. The plaintiff had believed and relied on its truth, which is why it changed its demand from the initial amount of US dollars 231,107.06 to a fresh demand for the amount of US dollar 74,831.96. The Plaintiff stated that it was also clear from PW 1\'s testimony that this outstanding balance precipitated an end to the parties\' business relationship. Finally, the Plaintiff submitted as to whether it had given instructions to the Defendants to instruct the debt collection agency, Collections Africa Limited, to collect in debts on its behalf. PW1 had testified that he was informed of the appointment of the debt collection agency only after the appointment thereof. He maintained that it was the first Defendant\'s idea to appoint the debt collection agency and he had no knowledge of that company. He also stated that he had never received any moneys collected by the said debt collection agency. To this end, the Plaintiff relied on the first Defendant\'s letter dated 18 May 2010 to prove that the debt collection agency was instructed unilaterally. The Plaintiff then made a point that as the debt collection agency was appointed unilaterally by the Defendant, any fees on the collection of debts by the agency should be charged on the Defendants not on the Plaintiff. I do not really see the relevance of this submission when taking into account that there is no prayer in the Plaint as regards a claim for reimbursement on the debt collection agency's fees.

18. The Defendants opened their submissions with reference to the Pleadings herein. They noted that the Plaintiff had averred in paragraph 6 of the Plaint, that the claimed sum of US dollars 74,831.96 is on account of the "balance of the price of goods delivered to the defendants ". The Plaintiff\'s claim was further based on the alleged admission by the first Defendant vide an electronic mail dated 15 June 2010 that the sum of US dollars 74,831.96 was due and outstanding. The Defence detailed that the Defendants were not liable for that sum nor indeed any other amount. Further, the Defendants noted that so far as the first Defendant was concerned, the Plaint revealed no cause of action as against her, in her individual capacity. The Defendants also noted that in the Defence they had denied that there existed any contract or agreement or engagement for them to purchase any aircraft space for their goods. The second Defendant had denied being a customer of the Plaintiff as it was neither a clearing and forwarding agent nor a shipper. The Defendants noted in their submissions that as per paragraph 8 of the Defence, the Defendants had stated that if any sums were due and owing to the Plaintiff then the same were payable by the Plaintiff\'s shippers. The Defendants noted that they had participated in collecting debts from the Plaintiff\'s shippers. To this end the pleadings indicated that they had appointed a debt collection firm to undertake the said exercise. Thereafter, the Defendants noted that separate Statements of Issues had been

filed by the Plaintiff and the Defendants but that the issues which cut across the two separate statements could be summarized as follows:

2.2.1 Whether there is a cause of action against the 1st Defendant.

2.2.2 Whether there was a contractual relationship between the Plaintiff and the Defendant and if so what were the terms and conditions thereof.

2.2.3 Whether the Defendants admitted the sum of USD 74,831.96.

2.2.4 Whether the Defendants were liable to pay to the Plaintiff the sum of USD 74,831.96.

19. Thereafter, the Defendants\', referred to the evidence of the two witnesses that appeared at the Hearing. They highlighted that at paragraph 7 of PW 1's witness statement he had admitted that:

"the defendants role was to collect the money from the shippers for onward transmission to the Plaintiff".

The Defendants admitted that in view of that admission, the Defendants could only be liable to pay the claimed sum if the Plaintiff was able to tender evidence that indeed the Defendant had collected the sum of US dollars 74,831.96 from the shippers but had failed to transmit the same to the Plaintiff. As regards the alleged admission by the first Defendant as per her electronic mail dated 15 June 2010, the Defendants invited the court to read the entire text of the electronic mail to confirm whether it was indeed an admission of monies owed. The Defendants then went on to detail what they saw as their role so far as the agreement with the Plaintiff was concerned. They maintained that the Plaintiff was liable to pay the first Defendant for ground handling services. The Defendants maintained further, that due to default in settlement of the first Defendant\'s fees by the Plaintiff, it was agreed that the first Defendant would deduct her fees from the collection of fees from shippers and thereafter remit the balance to the Plaintiff. The Defendants detailed and at paragraph 11 of the witness statement of the first Defendant, she had shown particularized those shippers who owed the Plaintiff the total sum of US dollars 74,831.96. Turning to the oral evidence, the Defendants noted that PW1 stated that there was an oral arrangement for the Defendants to take care of the Plaintiff\'s ground operations in Nairobi. He had said that there were his shippers (customers) and those of the Defendants. In contrast, DW 1 had relied upon documentary evidence as per the list of Defendants\' documents filed. The Defendants asked the court to peruse such documents in arriving at its decision herein. They particularly referred to page 4 of the Defendants\' list of documents being the letter dated 18 May 2010. They noted that in that same letter, the Defendants had tabulated a schedule of the debtors (shippers). Further on page 21 there was an e-mail from the first Defendants to the Plaintiff\'s advocates dated 15th of June 2010. They noted that the two documents were not similar. At page 8A of the Plaintiff\'s list of documents there was a window (which is not open) between the second last and the last paragraph. When you look at page 22 of the Defendants' list of documents (which is the same document) it shows the window having been opened with a schedule of the debtors detailing each amount owed. The Defendants maintained that this schedule was important for it showed the e-mail in its entirety. It indicated the names of the debtors. The first Defendant had attached the breakdown of debt and detailed as to how the debt collector was progressing with it. It was the Defendants\' submission that this did not amount to admission that the debt over US dollars 74,831.96 is owed by the Defendants. Finally, in summary, the Defendants submitted that it was clear from the evidence that the relationship between the Plaintiff and the second Defendant was based on an oral agreement for the second Defendant to handle ground operations in Nairobi on behalf of the Plaintiff at an agreed fee. The Defendants further submitted that, at the same time, there was an oral arrangement for the Defendants to collect the monies owed from the Plaintiff\'s shippers on behalf of the Plaintiff. They emphasised that there was no contract or agreement, capable of attaching liability to the Defendants, either as a shipper or as a clearing agent which would entitle the Plaintiff to invoice the Defendants.

20. It seems to me that the first issue to be dealt with in this matter is whether or not the first Defendant was properly joined in this suit. I have perused the Plaint more particularly paragraph 5 thereof. The second sentence thereof is significant:

"the second Defendant was the Plaintiff\'s customer by virtue of purchasing the Aircraft space procured by the plaintiff from time to time for which purpose, the second Defendant maintained an Account with the Plaintiff."

It is only when one comes to paragraph 6 of the Plaint that the Plaintiff starts talking about **"the Defendants"**. Similarly, in the prayers to the Plaint the Plaintiff looks for judgement to be entered against the Defendants. Try as I may, I do not see what the cause of action is as against the first Defendant. The Plaintiff quite clearly entered into an (albeit) oral contract with the second Defendant, such contract being verbally expressed as between PW 1 and the first Defendant. In both cases PW 1 and the first Defendant were directors of the Plaintiff Company on the one hand and the second Defendant company on the other. There is no doubt in my mind that the oral contract was entered into between the Plaintiff and the second Defendant. Unfortunately in the evidence of both PW1 and the first Defendant, there were many references to "my company" as if both witnesses did not appreciate that the individual companies were separate legal entities. In other words in their own minds, the witnesses seem to be unable to distinguish between the persons and companies. As a result, I hold that there is no cause of action brought by the Plaintiff as against the first Defendant and I dismiss the Plaintiff\'s claim against the first Defendant with costs.

21. The oral agreement between the Plaintiff and the second Defendant would seem to have been in two parts. The first part involved the second Defendant providing ground handling services to each flight from Nairobi to the United Kingdom, upon which the Plaintiff had booked space. For such services the second Defendant received a fee based on each flight handled. The second part covered invoicing the shippers for the space taken up on flights, through invoices raised by the second Defendant. In turn, the Plaintiff would invoice the second Defendant again for the space taken up on flights. The reason, given for this arrangement was that the Plaintiff did not have a bank account in Kenya. It was the second Defendant\'s responsibility, having raised invoices to the shippers, to collect the monies payable thereon. Both witnesses indicated that this arrangement had worked well for 15 months or so as between August 2008 and November 2009. PW 1 stated that towards the end of 2009 payments being received from the second Defendant became less regular and reliable. It does seem that one of the reasons for this is that space was being taken up on flights for shippers who were the customers of the second Defendant as distinct from being the customers of the Plaintiff. PW 1 intimated to court in his evidence that a whole lot of debts were accumulated, all of which related to the customers on the second Defendant. The first Defendant, on the other hand, maintained that the shippers who the Plaintiff claimed were the customers of the second Defendant, were in fact contacts given to her by the Plaintiff and she went so far as to deny that the second Defendant had any customers of its own taking space on flights.

22. By May 2010, matters as between the Plaintiff and the second Defendant as regards late payments, had come to a head. The Plaintiff\'s advocates issued a letter of demand to the directors of the second Defendant in which a sum of a US dollars 241,107.06 was demanded. That letter elicited a strong response from the second Defendant being a letter dated 18 May 2010, which detailed clearly in the second paragraph:

"Firstly to clear the record the amount owed to St Mark by Aviation Cargo Support Limited is $115,904.86 which is made up of payments not settled to Aviation Cargo by St Mark shippers, as we only acted on behalf of St Mark and on his instructions."

Thereafter, the second Defendant gave details of the debtors and the amounts owed by them, including therein a figure of US dollars 125,202.74 which the second Defendant detailed was owed by the Plaintiff to it, presumably for ground handling services rendered on the one hand and, on the other as detailed in the third paragraph of the said letter, there were amounts settled by the second Defendant in respect of the Plaintiff\'s creditors being Freightwings, Etihad Airways and Global Aviation. On the second page of that letter, the first Defendant who was the signatory thereof, indicated that most of the shippers who were owing the second Defendant were the Plaintiff\'s clients. The last sentence of that paragraph is pertinent:

"we only acted on his instructions who to invoice and what to collect from the shippers, with no written formal document that in case his shippers do not settle, that Aviation Cargo Support

Limited was to settle directly to St Mark."

Thereafter the second Defendant notified the Plaintiff\'s advocates that it had outsourced the debt collection of the various invoices to Collections Africa Limited. The last sentence of that penultimate paragraph in the said letter is again of interest in this matter:

"of importance is that any client who fails to settle us will be blacklisted by CAL for a period of 7 years and this will put the shippers into problems because they will not be able to access any credit from any financial institution countrywide thus they have no other option than to settle us in a bid for us to settle with St Mark." (Underlining mine).

23. It seems that an exchange of correspondence then followed as between the second Defendant, under the first Defendant\'s signature, with the Plaintiff\'s advocates in relation to various debtors and sums outstanding. Significant in that regard was the e-mail from the first Defendant to Mrs. Shabana Osman-Padamshi (Vayani) of the Plaintiff\'s advocates' office dated 18 June 2010 which read as follows in response to a query as to progress in relation to the debt collection exercise:

"On the debt collection process we are working day and night on this and it is not our pleasure to see the process dragging we want to have it solved and finish off with your client as quick as possible as we being tormented emotionally and psychologically by his threats. And as you can testify so far what has been collected is being settled to him as we do not want to hold his money."

To my mind, this statement seems to confirm that the second Defendant had the responsibility of collecting monies from the shippers which it had invoiced, whether or not those shippers were customers of the Plaintiff or the second Defendant. We then come to the controversial e-mail of 15 June 2010 sent by the first Defendant to "Shabana" at the Plaintiff\'s advocates\' office. The third paragraph on page 22 of the Defendants\' bundle of documents, refers to the transfer to the Plaintiff of the sum of US dollars 45,176.90 by the second Defendant as regards payments received from for shippers and a credit note issued by another shipper, Global Aviation. This payment was the subject of a later e-mail from the said advocates to the first Defendant wishing to know whether the said sum had in fact been transferred to London. However, the significant paragraph is paragraph 4 on the same page which reads:

"therefore after the transfer what is owed to St Mark will now stand at $74,831.96, as the balance of the debt is owed to Aviation Cargo by St Mark, that will be offset with the outstanding kindly confirm that you agree to this amount."

It is the Plaintiff\'s contention that the said paragraph amounts to an admission by the second Defendant that the sum of US dollars 74,831.96 was due and owing by the second Defendant to the Plaintiff as at the date of the e-mail – 15 June 2010. In contrast, this court has been asked by the Defendants to look at the "Summary of Outstanding Debt to St Mark" which followed that particular paragraph in the e-mail. Looking at that summary, and ignoring the last 2 entries thereof being an amount of US dollars 121.098.74 said to be owed by St Mark to the second Defendant and the amount of US dollars 45,176.90 such having been or about to be transferred to St Mark, the list detailed six shipper names with a comment annexed reading "bad debt". The shipper names were DHL Global, Greenlands, Husaki, Murasa, Veg Centre/Top Freight and Summit Air. The debt total as per the six shippers came to the said amount of US dollars 74,831.96.

24. The defence raised by the Defendants as regards this said amount owing was that the six shippers were customers of the Plaintiff and thus debtors of the Plaintiff not of the second Defendant. Whether that is so or not, I do not consider to be of importance. The fact of the matter is that the invoices to those shippers were raised by the second Defendant and were thus monies to be collected by the second Defendant. There is no doubt that it was the second Defendant that instructed the debt collection agency, Collections Africa Limited and to my mind that agency was instructed to collect debts owed to the second Defendant not the Plaintiff. In fact, I see no reason why the Plaintiff needs have been informed of what process the second Defendant was utilizing as regards the collection of debts. I say this because it would have been the second Defendant who was billed by the Plaintiff for the freight space booked on aircraft. It

was the understanding as between the Plaintiff and the second Defendant that the latter, in billing the shippers, would add its "profit" to the amount it had been billed by the Plaintiff. Thus to my mind, what the first Defendant was seeking in her e-mail of 15 June 2010 was confirmation from the Plaintiff as to just how much was still owed to it by the second Defendant. I accept therefore the Plaintiff\'s contention that this e-mail did contain an admission of debt owed, which is the amount as claimed in the Plaint. To this end, I would concur with the principle as expounded by **Forbes VP** in the **Jetha Ismail** case (supra) and would agree that there was a representation made by the first Defendant in such e-mail, that representation confirmed the existence of a fact being the outstanding amount owed by the second Defendant to the Plaintiff and that the same was thereafter relied upon by the Plaintiff.

25. The up-shot of the above is that I enter judgement for the Plaintiff against the second Defendant in the amount of US dollars 74,831.96. I have been asked to grant interest on that amount at the prevailing commercial rate. As this is a US dollar judgement, I direct that the interest rate applicable will be the **LIBOR** dollar rate prevailing as at the date hereof. Such interest will run from the date of filing suit until payment in full. I also award the costs of the action against the second Defendant to the Plaintiff.

DATED and delivered at Nairobi this 26th day of September, 2012.

J. B. HAVELOCK
JUDGE