REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 577 of 2009

TRADEWINDS AVIATION SERVICE LIMITED…...…… PLAINTIFF

VERSUS

FIVE FORTY AVIATION LIMITED……..…..……..……..….DEFENDANT

R U L I N G

This ruling relates to an application brought through notice of motion under Order XXXV rules 1 (1) (a) & (2), 9 and Order VI Rules 3 (1) (b), (c) and (d) of the Civil Procedure Rules. The said application seeks the following orders.

1. THAT judgment be entered against the defendant in the sum of USD 275,264.77 together with interest at court rates from the date of filing suit as prayed.

2. (a) THAT in the alternative the defendant's statement of defence and counterclaim dated 28th August, 2009 be struck out for being:

(i) scandalous, frivolous and vexatious.

(ii) meant to embarrass, prejudice or delay the fair trial of transaction.

(iii) otherwise an abuse of the process of court.

(b) that once struck out, judgment be entered for the plaintiff as prayed.

(c) that the costs of this application, the main suit and the counter claim be awarded to the plaintiff.

During the hearing of the application Mr. Mungla, the applicant's counsel submitted that the application is supported by the affidavit of Barry Tomlison. According to the learned counsel, the plaintiff and defendant had executed a ground handling agreement pursuant to which the former provided the latter with Passenger and Cargo Flight Services. He referred to the agreement as Ex. BT 1. Further to the above, the learned counsel also referred to the statement of defence and was of the considered opinion that the same was not a proper defence to the liquidated claim in the plaint. In addition to the above, he referred to the same as evasive, embarrassing and devoid of any candid and positive averment for any trial. Apart from the above he also submitted that the defence is in breach of the fundamental rules as set out under Order 6 rule 9(3) of the Civil Procedure Rules. The learned counsel emphasized that it is contradictory for

the defendant to say that it did not enjoy the services and later on, state that the said services are unsatisfactory. He described that kind of pleading to be evasive. Further to the above, the learned counsel also submitted that for the defendant to state that the charges are exorbitant or fraudulent is scandalous. In support of his submissions, the learned counsel quoted the case of RAGHBIR SINGH CHATTE vs. NATIONAL BANK OF KENYA.

Secondly, the applicant's counsel has referred the court to the pleading by the respondent that the charges were exorbitant, erroneous, not agreed upon and therefore fraudulent. He described the above as bad pleading, evasive, equally ambiguous and therefore embarrassing to the plaintiff. Mr. Mungla is of the considered opinion that the defendant has to state positively what it objects to in the plaint, so that the plaintiff can meet it squarely. The learned counsel stated that the account runs from 30th June, 2007 up to 7th July, 2009. In addition to the above, the learned counsel referred the court to page 46 of the agreement that provides for exterior cleaning. He pointed out that the above was an agreed item contrary to the claim by the respondent. To support the above submissions he quoted the case of LYNETTE OYIER & OTHERS vs. SAVINGS & LOANS (K) LTD. page 36. In the alternative the learned counsel submitted that if I exercise my discretion in favour of the defendant by declining the application, then he urged me to do so on the following terms.

a) That the amount in dispute be deposited in an interest earning account in the names of the advocates in this case.

b) That the same argument should also apply to the defendants counterclaim.

The learned counsel also took issue with the fact that special damages have not been pleaded and strictly put. In the absence of the above, the learned counsel urged me to strike it out. In conclusion, the learned counsel quoted the case of STANDARD CHARTERED BANK VS. SHAMJI KARSANI ARJAN HCCC No. 1511 of 2000.

On the other hand, the application has been opposed by Ms. Wambua while relying on the replying affidavit of Nixon Ooko. According to the learned counsel, the parties had not agreed on exterior cleaning. Apart from the above, Ms. Wambua urged this court to refer to the 4th invoice onwards. In her submissions she stated that the plaintiff/applicant had charged the defendant/respondent for services that had not been agreed upon. Besides the above, the learned counsel claimed that there was a contradiction on the amount that the applicant has claimed. Whereas the applicant is now claiming USD 275,264.75, on 15th July 2009 they actually demanded USD 264,758.27. It was her opinion that since the above figures are contradictory, evidence must be adduced in court. To support her submissions, she quoted the case of ORIENTAL COMMERCIAL BANK LTD. VS. BUBACON AGENCIES LIMITED & ANOTHER HCCC No. 891 OF 1996. She pointed out that in the above case, the plaintiff gave different figures and the claim was rejected. Since it is not clear what is being claimed in this case, Ms. Wambua submitted that the same is a triable issue that cannot be determined at this stage. In addition to the above, she also submitted that there was need for cross-examination to determine whether these are charges for interior or exterior cleaning. According to Ms. Wambua the defendant's plane got damaged and had to be repaired. As a result of the above, the defendant incurred losses and the plaintiff/applicant issued a credit note of USD 25,000. It was her opinion that, that kind of issue should be fully canvassed during a full hearing. She also denied the fact that the agreement was terminated unilaterally since they had previously always complained about unsatisfactory services. She concluded her submissions by stating that they did not pay because they were charged for external cleaning. It was due to the above reason that they opposed the application and claimed that the same be dismissed.

In reply to the above submission, Mr. Mungla stated that as far as external cleaning was concerned, the same was covered by paragraph 3.2 of the agreement that stated as follows:
"All items not covered by this agreement will be charged as per the published scale of charges applicable at that time."

That means that the issue of external clearing was covered by the above provision. In addition to the above, the learned counsel also took issue with the fact that Ms. Wambua never showed that the rate charged for external clearing was not correct. Besides the above, the learned counsel also distinguished the Oriental case from the present one. In that case, the amount pleaded in the body was different from the amount claimed. On the contrary, in this case, the amount that they are now claiming is the same as the one shown in the plaint. As far as the credit note for the damage of the plane is concerned, the learned

counsel referred the court to page 34 of the supporting affidavit. In addition to the above he also referred the court to paragraph 12 & 13 of the affidavit which clearly show how the credit note was given. Significantly, it was given subject to proof of the claim.

From the above detailed submissions, it is crystal clear that the parties had entered a valid agreement on 7th November, 2006 to provide ground handling services which included both cargo and passenger service. Consequently, the agreement subsisted and included up to 7th July, 2009. From the document availed to the court, I am satisfied that the applicant raised a charge note for every service rendered to the defendant. It is actually ironical and contradictory for the respondent to claim on one hand that the services were not rendered and on the other to state that the same were unsatisfactory. That defeats all logic. Secondly, this court is also satisfied that the applicant has claimed USD 275,264/77 in the plaint. The applicant has also claimed the same amount in the application. Therefore, the claim that the figures are different does not hold any water. In any event the parties were operating a running account during the subsistence of the agreement. Lastly, the court concurs with the applicant's counsel that though the respondent has claimed special damages the amounts claimed have not been specified. It is trite law that special damages must specifically be pleaded before they are proved specifically.

It has been stated in the Halsbury's Laws of England as follows:
"General denial is insufficient. It is not sufficient for a defendant in his defence to deny generally the grounds alleged by the Statement of claim, or for a plaintiff in his reply to deny generally the grounds alleged in a defence by way of counterclaim: each party must deal specifically with each allegation of fact of which he does not admit the truth, except damages. When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party he must not do so evasively, but must answer the point of substance. However, it has become common practice to use in a defence a traverse in a general form, this merely puts the opponent to proof."

In the case of Standard Chartered Bank Limited vs. Shamji Karsan Arjan, Civil Case No. 1511 of 2000 (Milimani), Ringera, J. stated:
"The first legal submission made on behalf of the defendant is that since it has a counterclaim it is entitled to leave to defend. The plaintiff's submission on this point is that the defendant must show the counterclaim raises triable issues in order to prevent the plaintiff from obtaining summary judgment on the main suit. The plaintiff also contends that entry of judgment will not prevent prosecution of the counterclaim. I agree with counsel for the plaintiff that the mere pleading of a counterclaim does not ipso facto entitle a defendant to leave to defend. Subrule (2) is in permissible terms. The matter is one for discretion by the court. One consideration which may weigh with the court is whether or not the counterclaim discloses a bona fide trial issue."

In this case I am satisfied that there are no triable issues and that the counterclaim does not disclose any bona fide triable issue.
In view of the above analysis, I hereby concede to the application in terms of prayer No. 1. In pursuance of the above, I hereby enter judgment in favour of the plaintiff/applicant in the sum of USD 275,264/77 together with interest at court rates from the date of filing suit up to the date of payment. Those are the orders of the court.

MUGA APONDI
JUDGE

Ruling read signed and delivered in open court in the presence of Mungla - Applicant's Counsel
Wahome - Respondent's Counsel

MUGA APONDI
JUDGE
28TH JANUARY 2010

Wahome: I pray for stay of execution.

Mungla: I object to the stay of execution on an oral application. Such application must be brought through a formal application that should be heard on merits. If you are inclined to grant an application, I pray that you grant them 7 days pending the making of their application.

Wahome: 30 days is a reasonable time. I pray for stay of execution.

Court: In exercise of my discretion, I hereby grant the defendant/respondent a stay of 21 days. Those are the orders of the court.

MUGA APONDI
JUDGE
28TH JANUARY 2010