REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 130 of 2006

MOHAMMAD HASSIM PONDOR (SUING ON BEHALF OF The International Air

Transport Association – IATA).....1ST PLAINTIFF

ABDULRAZAK KHALFAN (Suing on behalf of The International air Transport

Association – IATA) MERCANTILE LIFE & GENERAL

ASSURANCE CO. LTD.....2ND PLAINTIFF

VERSUS

DEBONAIR TRAVEL LIMITED ……..…….…..…….1ST DEFENDANT

KENNEDY GICHUHA CHEGE …….…….....……2ND DEFENDANT

BERITA KASWII GICHUHA ……..…...…….....3RD DEFENDANT

RULING

The application for my determination is the Chamber Summons dated 2nd February 2007 brought under Order VI rules 13(1) (b) (d) and 16 of the Civil Procedure Rules. The application is by the plaintiffs and seeks;

(1) That the defences herein be dismissed with costs.

(2) That judgement be entered for the plaintiffs herein as prayed in the plaint.

(3) That the defendants do pay the costs of this application in any event.

The grounds in support of the application are;

(1) The 1st defendant has unjustly enriched itself as it failed to account and pay for the sale of

airline tickets due to the 1st plaintiff despite its contractual obligations to do so.

(2) That the 2nd defendant is contractually obligated to indemnify the 2nd plaintiff for any default of the 1st defendant and is estopped from denying the existence of the contract of indemnity which she executed.

(3) The 2nd defendant was at all material times during the period of default, the managing director of the 1st defendant and was aware of the default of the 1st defendant.

(4) The defences are an abuse of the court process and are scandalous and frivolous as no proof of payment of the amounts demanded in the plaint has been shown.

The application is also supported by two affidavits sworn by **Mr. Mohamed Hassim Pondor** and **Mr. Shem Nyamai**. The contents f the two affidavits are that by an agreement in writing dated 6th June, 2001 between each International Air Transport Association member (hereinafter called the carrier) and the 1st defendant, the carrier appointed the 1st defendant as its travel agent for the sale of Airline tickets in Kenya. That the 1st defendant was authorized to sell air passenger transportation on the services of the carrier and on the services of other air carriers authorized by the Association.

Secondly by a deed of indemnity dated 3rd October 2002 between the 2nd plaintiff and the 2nd and 3rd defendants, it was mutually agreed that in consideration of the 2nd plaintiff effecting an insurance policy to the 1st defendant by virtue of the passenger sales agency rules of I.A.T.A. the 2nd and 3rd defendants would at all times keep the 2nd plaintiff fully indemnified against all actions, proceedings, claims, demands, losses and default arising from and out of and as a result of the default by the 1st defendant together with all costs and expenses arising therefrom and in the event that the 1st defendant defaulted inter alia in the remission of sales of Traffic documents or collects and retains monies admittedly and actually owing to the airlines.

Thirdly in breach of the agreement between each I.A.T.A. member and the 1st defendant herein, under which the 1st defendant was authorized to sell air passenger transportation on the services of I.A.T.A. and on the services of other air carriers as authorized by I.A.T.A., the 1st defendant has wrongfully failed, neglected and/or refused to pay to the 1st plaintiff the sum of Kshs.23,996,791/= and USD 2,8645.52 for the sales of tickets made by the 1st defendant for the period of 1st March 2005 to 31st March 2005. And that as a result of the defendants neglecting, refusing and/or ignoring to pay the sum demanded or any sum at all, the 1st plaintiff sought indemnification from the 2nd plaintiff herein, hence the 2nd plaintiff has paid the 1st plaintiff's claim as set out in the plaint. It is alleged that the 2nd plaintiff proceeded to file the present suit against the defendants under the doctrine of subrogation.

Lastly a breakdown of tickets sold to the various airlines as per the agent billing analysis and the tabulated breakdown in respect of the amounts due to various airlines has been produced and exhibited as M. P. 3. And as a result, it is contended that;

(1) The defence of the 1st defendant is scandalous, frivolous and vexatious and an abuse of the court process as the 1st defendant has breached the fundamental terms of the contract by failing to account for the sale of the tickets and

(2) The 1st defendant is in breach of trust and is jointly of unjust enrichment as it has not remitted the funds that it received from the sale of the tickets.

The 1st and 2nd defendant filed a joint defence and it contended that they are not aware of any written agreement dated 6th June 2001. And that by a letter dated 31st May 2001, the International Air Transport

Association approved an application by the 1st defendant to act as an agent with effect from 6th June 2001 and it was pursuant to the said letter that the 1st defendant commenced operations as an I.A.T.A. agent. It is also contended that neither of the plaintiffs was privy to the alleged agreement dated 6th June 2001, hence neither of them is entitled to make any claim against the 1st defendant.

It is also contended by the 1st and 2nd defendants that for every ticket issued by the 1st defendant as an agent of the 1st plaintiff, an insurance premium was paid to the 2nd plaintiff under the insurance cover issued by the 2nd plaintiff to the 1st defendant. A total premium of USD 91,875/= was paid to the 2nd plaintiff by the 1st defendant but the 2nd plaintiff has not accounted to the 1st defendant for the said amount.

It is also alleged that the 2nd defendant is not aware of the alleged deed of indemnity dated 3rd October 2002 and adds that if any such document exits, the same is unenforceable in law.

The defence of the 3rd defendant is as follows; that she ceased being a director of the 1st defendant in September 2004. And since September 2004 she has never had any dealings or authority to deal on behalf of the 1st defendant which is solely operated by the 2nd defendant. She also contends that she is not aware of the sums claimed in the plaint or any other transactions arising after September 2004 when she quit from the 1st defendant and left the entire management to the 2nd defendant. And in paragraph 6 of the amended defence, the 3rd defendant states;

"**the plaintiff denies being indebted to the plaintiffs in the sum of Kshs.23,996,791/= and USD 2864/52 as claimed in the plaint or if at all".**

Assuming that the sums are as a result of default by the 1st defendant, the 3rd defendant pleads that the non-payment is not an act of default but fraud, deceit and theft on the part of the 1st defendant. She then lists the particulars of fraud, deceit and theft as;

(a) By means of fraud, the 1st defendant failed to account for such monies and concealed such fact from the plaintiffs thereby converting the same for its own benefit and use.

(b) Deceiving the plaintiffs of payment when actually none was made in terms of paragraph 9 of the amended plaint.

(c) Taking and benefiting from the said sum with actual knowledge that the same did not belong to it (1st defendant). The 3rd defendant avers that no liability indemnity can therefore arise in the circumstances.

I have considered the pleadings filed by each side to assess and/or analyze the application filed by the plaintiffs. I have also carefully considered the submissions of the plaintiffs and defendants. The affidavits and annextures thereto have also not escaped my attention. I appreciate the jurisdiction subject of this application under my determination is one to be exercised in plain and obvious case. In particular I am aware that striking out a pleading is draconian one which ought to be exercised only in clear and most times obvious cases which the result would be the same even if a trial is to be conducted. The law is settled that where the court is convinced that the defence put forward by the defendants is a sham which raises no triable issues and is therefore scandalous and frivolous and merely intended to delay the fair trial of the case, then the court is empowered to resort to the summary procedure provided under Order 6 rules 13(1) (b) (c) and (d) of the Civil Procedure Rules and do the necessary to strike out the defences.

In an attempt to prove the claim against the defendants, the plaintiffs have produced a copy of an agreement dated 6th June, 2001 allegedly made between the 1st plaintiff and 1st defendant. The plaintiff has also produced as MP3 a breakdown of tickets allegedly sold to various airlines by the 1st defendant together with a bundle called an agent billing analysis. The 1st defendant has questioned the entries in the

billing analysis in the replying by one **Kennedy Gichuha Chege** that there are discrepancies which must be explained. The 1st defendant contends that it is not clear how the breakdown of alleged tickets sold was extracted from the agent billing analysis.

It was submitted on behalf of the 1st and 2nd defendants that the documents relied on by the plaintiffs require a minute and protracted examination in order to understand how the sums demanded in the plaint are arrived at. And such action cannot be done on an application seeking the summary dismissal of the defences filed by the defendants.

It is further contended that the said documents are generated by the 1st plaintiff and that there are no documents from the various airlines confirming the alleged sale of tickets shown in the said breakdown or even copies of the alleged tickets.

No doubt that the 1st plaintiff is a duly authorized to file suit on behalf of the International Air Transport Association. It is essential to note in paragraph 4 of the joint defence of the 1st and 2nd defendants, it is stated;

"**In reply to paragraph 6 of the plaint the 1st defendant avers that it is not aware of any written agreement dated 6th June 2001 and puts the plaintiffs to strict proof of the same. The 1st defendant further avers that by a letter dated 31st May, 2001, the International air Transport Association approved an application by the 1st defendant to act as an agent with effect from 6th June 2001 and it was pursuant to the said letter that the 1st defendant commenced operations as an agent I.A.T.A. agent to date".**

In my understanding the 1st and 2nd defendant say that they are not aware of the agreement dated 6th June, 2001 but contends that it is the duty of the plaintiffs to prove the existence of the said document. However on the same breadth they confirm and/or acknowledge that the 1st defendant was appointed as an agent of the International Air Transport Association in a specific designation to do;

(1) To sell air passenger transportation or the services of other air carriers as authorized by the carrier.

(2) The 1st defendant would provide a valid contract of carriage and would collect the monies from the passenger(s).

(3) All monies collected by the 1st defendant in respect of the sale of passenger tickets remained the property of the carrier through the 1st plaintiff and must be held in trust by the 1st defendant on demand.

(4) The carrier would transport passengers ticketed by the 1st defendant on the strength of producing valid tickets from the 1st defendant.

(5) The 1st defendant would keep all records relating to all transactions involving passengers ticketed to board a particular carrier authorized in the agreement.

The case of the 1st plaintiff is that by an agreement dated 6th June, 2001 between each International Air Transport Association member appointed the 1st defendant as its travel agent for the sale of airline tickets in Kenya. And as a result the 1st defendant received monies for specified passenger Air transportation sold under the agreement but failed to remit to the specific carrier of the amount payable of each passenger ticketed on board for transportation.

And that it was pre-requisite for the directors of the 1st defendant to obtain a mandatory insurance policy by virtue of the passenger sales agency rules of the International Air Transportation Association. By a

deed of indemnity dated 3rd October, 2002 between the 2nd plaintiff and the 2nd and 3rd defendants, both defendants agreed to indemnify the 2nd plaintiff against all actions, proceedings, claims, demands, losses and default arising from and out of and as a result of the 1st defendant failing to remit monies owing to the airlines.

It is clear that tickets were sold in respect of 14 different airlines and the 1st plaintiff exhibited documents showing the amount owing to each particular carrier in respect of tickets sold by the 1st defendant. It is not the case of the 1st defendant that it did not sell the tickets enumerated in billing analysis attached to the affidavit of **Mr. Pondor**. No attempt has been made to deny that the accounts do not relate to the transaction between the 1st defendant and the 14 carrier mentioned in the statement. In my view the billing analysis shows the complete transaction of all tickets sold by the 1st defendant on behalf of the principals of the 1st plaintiff. There is no indication that the said tickets were paid for by the 1st defendant. Even if payment was effected, no attempt has been made to adduce any documentary evidence to rebut the position taken by the plaintiffs.

I agree with the Advocate for the plaintiffs that a mere denial of the obvious does not attempt to traverse the allegations of facts set out in the plaint. The defence of the 1st and 2nd defendants did not sufficiently and appropriately traverse the specific allegations of fact made by the plaintiffs. The Advocate for the 1st and 2nd defendants posed a question for my determination which is; ***"Has the 1st defendant unjustly enriched itself in failing to account and pay for the sale of airline tickets due to the 1st plaintiff despite its contractual obligations to do so".***

The answer has been adequately provided in paragraph 6 of the joint defence where it is stated;

"**In reply to paragraph 8 of the plaint, the defendants aver that for every ticket issued by the 1st defendant as agent of the 1st plaintiff, an insurance premium was paid to the 2nd plaintiff under the insurance cover issued by the 2nd plaintiff to the 1st defendant".**

The above contention is a clear manifestation that the 1st defendant was appointed an agent of the 1st plaintiff to transact businesses on behalf of various carriers who form members of the 1st plaintiff. It is also clear that the 1st defendant issued tickets on the strength of obtaining permission and/or authority from the 1st plaintiff to various passengers who were carried on board by the mentioned carriers. The carriers allowed passengers to be carried on transportation to various destinations on the basis and by virtue of the agreement dated 6th June, 2001. The said agreement accrued interests and/or benefits to the 1st defendant by issuing tickets to passengers having not paid the carrier before the departure of the particular ticketed passenger. It is also allowed the 1st defendant to retain commission after paying the carrier for the amount due.

The fallacy that comes out in paragraph 6 is that an insurance premium paid to the 2nd plaintiff is not payment for the tickets issued on behalf of the carriers. In any case the 2nd plaintiff is entitled to obtain insurance premiums for providing its service to the 1st defendant. It is clear in my mind that the 1st defendant could not obtain and/or be allowed to issue tickets on behalf of the principals of the 1st plaintiff unless there was in place a requisite insurance and/or indemnity cover from a reputable insurance company. The 1st defendant says that for every ticket issued there was a commensurate insurance premium paid to the 2nd plaintiff but it does not say that it paid the 1st plaintiff for every ticket purchased on the strength of the agreement dated 6th June, 2001. and in so far as the evidence of the 1st plaintiff has not been discounted in respect of payments for each tickets issued by the 1st defendant, I think the straight answer to the question posed by the Advocate is that the 1st defendant has unjustly and wrongfully enriched itself in failing to account and pay for the tickets sold on behalf of the 1st plaintiff.

Having considered paragraph 4 and 6 of the joint defence of the 1st and 2nd defendant against the replying

affidavit filed on behalf of the 1st defendant and the written submission by their advocate, it is difficult for me to understand the nature of the opposition to the application under my determination. The import of paragraph 4 and 6 is that the averments in the replying affidavit amounts to nothing but a frivolous attempt to salvage what is not within the reach of the defendants.

The position as contained in the defence of the 1st and 2nd defendants is that the allegations contained therein is composed of general denials and at times admission of facts alleged in the plaint. The 1st defendant did not find prudent to respond to the specific allegations on the sale of tickets and the amounts due to each particular carrier mentioned. It appears the 1st defendant is happy with the general and somewhat flimsy denial as set out in the joint defence. There is no evidence of any payments made for the tickets issued on behalf of the 1st plaintiff. Again there is no evidence of denying the elaborate and detailed transactions contained in the billing analysis. It is not just enough to say that we do not owe any money but it is incumbent upon the 1st defendant to show by way of empirical evidence as to how the tickets sold were paid for, regrettably that was not done and I think that is fatal to the case of 1st defendant.

In **Magunga General Stores vs Pepco Distributors Limited (1988 – 1992) 2 KAR 89** it was held;

"**First of all a mere denial is not a sufficient defence in this type of case. There must be some reason why the defendants does not owe the money. Either there was no contract or it was not carried out land failed. It could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason given".**

The plaintiffs exhibited the agreement dated 6th June, 2001, the deed of indemnity dated 3rd October 2002 and the billing analysis in support and/or furtherance of its claim but the defendants opted not to question the signatures on the 1st two agreements and whether any tickets depicted in the billing analysis was paid for, therefore in my judgement bare or mere denials do not and cannot amount to an answer to the clear and plain case of the plaintiffs. It is my decision that the defences put forward by the 1st and 2nd defendants does not sufficiently traverse the allegations of fact made by the plaintiffs. It means the said defence is not serious to counter the express issues raised by the plaintiff in support of this application. I do not think a trial would change the frivolous and vexatious allegations put forward by the defendants against a case which is obvious and plain to defeat.

The other issue is the deed of indemnity signed by the 2nd and 3rd defendants as directors of the 1st defendant. Both defendants have not contested the signatures appended on the said documents. And the indemnity was made in favour of the 2nd plaintiff who is entitled to subrogation by virtue of having paid the 1st plaintiff for the sums claimed against the defendants. The purpose of an indemnity is meant to make good loss incurred by an independent party and the right to enforce the same depends on the terms of the contract. One of the conditions is that the right can be enforced in law before payment is made and as soon as liability has arisen. Through the deed of indemnity dated 3rd October 2002, the 2nd and 3rd defendants as directors of the 1st defendant agreed and/or guaranteed in their personal and individual capacity to indemnify the 2nd plaintiff incase of any default of payment by the 1st defendant. The 1st defendant has collected but failed to remit monies owing to 14 airlines under the agreement dated 6th June, 2001, therefore the two directors are liable to shoulder the debt incurred as a result of them appending their signatures to the documents dated 6th June, 2001 and 3rd October, 2002.

The main contract that gave the 1st defendant the agency rights had a clause for an indemnity to be provided by the directors of the company. The two directors in satisfaction of obtaining the contract on behalf of the 1st defendant gave a deed of indemnity by obtaining an insurance cover to cover any debt incurred by the company. In essence the two directors agreed to effect an insurance policy in favour of the 1st defendant by virtue of the passenger sales Agency rules of the International air Transport Association. That insurance cover obtained from the 2nd plaintiff for the benefit of the 1st defendant has a

direct bearing to the relationship between the directors, the company and the 1st plaintiff in securing the right to sell tickets for the principal airlines of the 1st plaintiff. The indemnity was made in their personal capacity in furtherance of the 1st defendant's interests in the passenger sales agency agreement between the 1st plaintiff and 1st defendant.

The only other issue that remains is whether the 3rd defendant's resignation as a director would be able to absolve her of any liability. The 3rd defendant exhibited a letter of resignation as director dated 30th September 2004. She also exhibited a notification of change of directors showing she ceased to be a director on 30th September 2004. She further contends that no contractual relationship exists between her and the 1st plaintiff hence no cause of action has been revealed in the amended plaint against her.

In my humble view the case of the 3rd defendant fails on two grounds namely;

(1) There is no evidence to show that she notified her resignation as a director to the plaintiffs. It is clear that the deed of indemnity was personal to her and not transferable to any other person who takes her position in the company. It was therefore mandatory for her to inform and/or notify the plaintiffs of her intention to cease as director of the 1st defendant to enable them take the next necessary cause of action. She failed to notify the parties who would be adversely affected by her decision, making the resignation void *abinitio* as far as it concerns her personal liability. It is my firm decision that a resignation or ceasing as a director by the 3rd defendant amounts to nothing in so far as the rights of the plaintiff is concerned.

(2) The other point is that there is no evidence from the Registrar of Companies showing the resignation of the 3rd defendant was acted upon. In the premises the allegation of resignation and notification of change of directors as exhibited by the 3rd defendant is in contravention of the law.

In conclusion it is my decision that the defences as drafted and put forward by the defendants does not raise one triable and/or bonafide issues that must await a full trial. I agree with the Advocate for the plaintiffs that the defences by the defendants is scandalous, frivolous and merely intended to delay the rights and interests of the plaintiffs. I refuse to allow the defendants to play with the genuine rights of the plaintiffs in a manner to abuse the court process. In short the application has succeeded against the defendants jointly and severally as prayed in the application under my determination. The plaintiffs shall have the costs of this application and that of the main suit.

Order: Judgement be and is hereby entered for the plaintiffs as prayed in the plaint, plus costs.

Dated, signed and delivered at Nairobi this 12th day of March, 2008.

M. A. WARSAME

JUDGE