



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

Civil Case 550 of 2006

MERCANTILE LIFE & GENERAL

ASSURANCE COMPANY LTD. 1ST PLAINTIFF

MOHAMMAD HASSIM PONDOR

(Suing on behalf of The International

Air Transport Association – IATA)..... 2ND PLAINTIFF

VERSUS

DILIP M. SHAH 1ST DEFENDANT

PANKAJ MEGHJI SHAH 2ND DEFENDANT

KAMAL M. SHAH 3RD DEFENDANT

FIVE CONTINENTS TRAVEL LIMITED 4TH DEFENDANT

RULING

(1) By their Amended Plaint dated the 19th October 2006 and filed on the 23rd October 2006, the Plaintiffs claim from the Defendants the total sum of Kshs.4,408,407/85 and US\$443,462.35 together with interest. The first three Defendants were at the material time Directors of the fourth Defendant. The claim is based on air ticket sales alleged to have not been transmitted to the second Plaintiff.

(2) The first Plaintiff sued the fourth Defendant (“**the Agency**”) against all actions, proceedings, claims, demands, losses and default etc. arising from any default by the Agency. And the individual Defendants executed Deeds of Indemnity in favour of Mercantile Life & General Assurance Company Ltd. (“**Mercantile**”).

(3) In the joint Statement of Defence filed on the 3rd November 2006, liability is denied. And in paragraph 4, it is averred:-

“In response to paragraph 4 of the plaint the Defendants aver that the Plaintiff has not incurred any liability, damage or expense under the said clause 1 of the Deeds of Indemnity hence the Defendants deny that their liability has automatically crystallized as alleged.”

(4) In paragraph 5 of the Defence, the Defendants deny that the Plaintiff has *locus standi*. What they are saying, in effect, is that their liability has not crystallized.

(5) The application before me is the Chamber Summons dated and filed on the 5th April 2007, brought under Order VI rules 13(1)(b) and (d) and 16 of the Civil Procedure Rules. The orders sought are:-

“1. THAT the Defence of the 1st to 3rd Defendants herein be dismissed with costs.

2. THAT judgment be entered for the 1st Plaintiff herein as prayed in the Plaintiff.”

(6) It is alleged that the first to the third Defendants are contractually obligated to indemnify Mercantile from any default of the fourth Defendant. It is also alleged that the three individual Defendants were at all material times during the period of default aware of the fourth Defendant's default.

(7) Mr. Shem Nyamai, the General Manager of Mercantile swore the supporting affidavit on the 5th April 2007. He explained at length why he felt the Defendants' liability had crystallized. He says the fourth Defendant has failed to pay to the International Air Transport Association (“**IATA**”) proceeds of sales of tickets. He also says the first and second Defendants issued six cheques between the 17th and the 26th July 2006 amounting to the sum of US\$36,000 which were dishonoured upon presentation for payment.

(8) As liability is denied, the Plaintiffs must prove indebtedness before they can call in the indemnity. It is not enough merely to say that the fourth Defendant has defaulted. If they obtain a final decree against the fourth Defendant and it is not satisfied, the first to the third Defendants will have to pay up. The defence raised in paragraph 4 of the Defence is reasonable and not frivolous. It should be allowed to go to trial.

(9) The second reason why this application must fail is that there is no power to **dismiss** a pleading, in the present case a defence, under Order VI rule 13 of the Civil Procedure Rules. Under this Order, a court can only **strike out** a pleading. There is a world of difference between striking out a pleading and dismissing a suit or cause.

(10) In the result, the Chamber Summons filed on the 5th April 2007 fails and I accordingly order that it be and is hereby dismissed but with no order as to costs.

It is so ordered.

Dated and delivered at Nairobi this Thirteenth day of June 2008.

P. Kihara Kariuki

Judge