



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 302 of 2003

STEPHEN MURIUKI GACHENGO PLAINTIFF

V E R S U S

AVIATION ASSISTANCE INTERNATIONAL

KENYA LIMITED (In liquidation)1ST DEFENDANT

MOSES MWANGI2ND DEFENDANT

CAPTAIN HELMUTH RAME3RD DEFENDANT

R U L I N G

The Plaintiff has applied, under Order X, rule 13 of the Civil Procedure Rules (the Rules) for two main orders rendered as follows:-

” 1...

2....

3. The Defendants be compelled to produce in court and to supply the Plaintiffs with all documents stated in the schedule attached hereto.

4. The said documents, or those among them contained in the Plaintiff’s list and bundle of documents dated 14th, July, 2005 and filed in court on 15th July, 2005, be admitted in evidence”.

The application is by chamber summons dated 2nd May, 2008. The documents listed in the schedule to the application are an insurance policy; “records relating to the flight times and block flight hours flown between 1st February, 2001 and 31st December, 2002”; and over 240 “original aircraft technical log records”.

The grounds for the application are that the Defendants are in the sole and exclusive possession, control and custody of the documents; that the makers of those documents are employees and servants of the Defendants; and that the Plaintiff served the Defendants with a notice to produce dated 29th September, 2005 to which the Defendants have not responded. There is a supporting affidavit sworn by the Plaintiff. The main thrust of the affidavit is that the Plaintiff requires the documents in order to prove his claims as pleaded in paragraphs 9A, 9B, 9C, 5 and 6 of the amended plaint.

The Defendants have opposed the application. There is a replying affidavit sworn by the 2nd Defendant filed on 8th May, 2008. The 1st Defendant has relied on that affidavit. There are grounds of opposition dated 7th and filed on 8th May, 2008 on behalf of the 3rd Defendant. Some of the grounds of opposition emerging from the two documents are:-

1. That it has not been shown that the documents set out in the schedule of documents in the application are in the possession or power of the Defendants.
2. That in any event, following service of notice to produce, the Plaintiff is entitled to produce secondary evidence of documents.
3. That the application is an attack on our adversarial system of justice in as much as it seeks to compel the Defendants to “prop up the Plaintiff’s case”.
4. That the existence of the original documents sought to be produced has not been proved.
5. That regarding the original records relating to flight times and block flight hours, copies of which the Plaintiff has availed in his bundle of documents, there is nothing to show that they were made by the 1st Defendant.
6. That in any event, as the authenticity of those documents is disputed, the Plaintiff must call the makers of the documents.
7. That the existence of original aircraft technical logs has not been proved, and the Defendants cannot thus be compelled to produce the same.

I have considered the submissions of the learned counsels appearing, including the one case cited. In that case, **NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES –VS – DR. SALLY KOSGEI & ANOTHER, MILIMANI HCCC NO. 714 OF 2003 (unreported)**, the court was considering an application for an order of inspection under rule 17 of Order X of the Rules. As already observed, the present application is for an order for production of documents under rule 13 of the same Order. That case is thus not directly germane.

Rule 13 aforesaid provides:-

“13. It shall be lawful for the court, at anytime during the pendency of any suit, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such suit, as the court shall think right; and the court may deal with such documents, when produced, in such manner as appears just”.

This rule 13, coming as it does in the middle of Order X that deals with interrogations, discovery and inspection, must be looked at in light of the entire Order. The court will make orders for interrogations, discovery or inspection only as the dictates of justice and the need for expeditious disposal of the suit may demand, bearing in mind that ours is an adversarial system of justice. The court will not make orders whose effect will be to compel one party unfairly to assist the opposite party in proof of its case. And even where an order of production under rule 13 has been made, the court will deal with the documents, when produced, in such manner as appears just.

In paragraph 9A of the amended plaint dated 23rd February, 2005 the Plaintiff has pleaded as follows:-

”9A. The Plaintiff further states that it was the responsibility of the Defendants to rate or record all the hours that the Plaintiff flew when he was in the First Defendant’s employment, which hours would have counted towards meeting the flying experience requirements of the Airline Transport Pilot’s Licence or ATPL (A) of 1,500 hours as per the Directorate of Civil Aviation requirements under Chapter 54 (sic) of the Laws of Kenya.”

In paragraph 9B he has pleaded that there was breach of that responsibility resulting in failure, neglect or refusal to record or rate a total flying time of 1,379.7 hours undertaken by the Plaintiff. Detailed particulars of those hours are given. In paragraph 9C damages for those omitted hours are claimed at the rate of US \$ 35.00 per hour. Those three paragraphs of the amended plaint are denied by the Defendants.

To particularize the claim set out in paragraph 9A, 9B and 9C of the amended plaint, as he has done, the Plaintiff must have had at his disposal the relevant flight logs. Indeed there are copies of such flight logs set out in the Plaintiff’s list of documents dated 14th July, 2005. It will be noted that the Plaintiff was required to keep his own **personal flying log-book** by Regulation 21 of the **Air Navigation Regulations** made under the **Civil Aviation Act, Cap. 394**. Some of the particulars required to be recorded in such personal flying log-book are particulars of all flights made as a member of the flight crew of the aircraft, including the date, time, duration and places of arrival and departure of each flight. So, the Plaintiff ought to have his own documents to prove his claim set out in paragraphs 9A, 9B and 9C of the amended plaint. He does not need the assistance of the Defendants in this regard.

It will also be noted that the log required to be kept by an aircraft operator and carried in the aircraft under Regulation 9(8) is a **technical** log, which is different from a **flight** log. Under subregulation (6) of that regulation, what will be entered in the technical log will be the times when the aircraft took off and landed, and particulars of any defect in any part of the aircraft or its equipment.

The insurance policy or scheme pleaded in paragraphs 5 and 5A of the amended plaint has been denied by the Defendants. The insurance policy or scheme is said to be required under a contract between the 1st Defendant and the **European Community**. That contract is said to be exhibited at page 128 of **Exhibit "A"**. Exhibit "A" was admitted in evidence by consent. It is the Plaintiff's list and bundle of documents except some documents that were specifically excluded.

The said contract, as exhibited, is between the European Community and **AVIATION ASSISTANCE A/S – DK**. The 1st Defendant herein is **AVIATION ASSISTANCE INTERNATIONAL LIMITED**. There is nothing to show that these two are one and the same person. The 2nd and 3rd Defendant also are not, on the face of the document, parties thereto. So, where is the evidence that an insurance policy or scheme such as is pleaded exists and that the same is in the possession or power of the Defendants? The insurance policy or scheme is also not contained in the Plaintiff's list of documents.

Finally, it will be noted that the present application is premised upon a **notice to produce** dated 29th September, 2005. That notice is said to be issued under **sections 68 and 69** of the **Evidence Act, Cap. 80**. In that case, the Plaintiffs will be entitled to produce in evidence secondary evidence of all the documents listed in the notice in the event that the Defendants fail to produce the originals thereof at the hearing of the action. There is thus no compelling need for an order of production under rule 13 of Order X.

For the above reasons, I find no merit in this application. It is hereby dismissed with costs to the Defendants. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 13TH DAY OF JUNE 2008.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 13TH DAY OF JUNE 2008