



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

Civil Suit 200 of 2008

FLEX AIR CARGO LIMITED.....PLAINTIFF

VERSUS

DELTA CONNECTIONS LIMITED.....RESPONDENT

R U L I N G

The application is a notice of motion dated 8th October, 2008 brought by the Plaintiff. It has been brought under Order XXXV rule 1 and Order XII rule 6 of the Civil Procedure Rules. It seeks orders: -

1. THAT summary Judgment be and is hereby entered in favour of the Plaintiff against the Defendant for the sum of United States Dollars 73,503.00 together with interest at Court rates or its equivalent in Kenya shillings at the time of judgment, in the alternative,
2. THAT judgment be and is hereby entered in favour of Plaintiff against the Defendant for the sum of United States Dollars 42,815.50 together with interest at Court rates or its equivalent in Kenya Shillings upon the admission by the Defendant.

The grounds for the application are given on the face of the application namely:

- (a) The Defendants are justly indebted to the Plaintiff in the liquidated sum of United States Dollars 73,503.00.
- (b) The Defendants have no defence to the claim by the Plaintiffs.
- (c) The Defendants have already admitted owing the Plaintiff's sum of United States Dollars 42,815.50 (which is part of the claim) and were willing to pay the Plaintiff's this sum.
- (d) The defence fled by the defendants raises no triable issue and is only intended to delay the quick determination of this suit.
- (e) It is in the interest of justice that this application be allowed.

The application is further supported by an affidavit sworn by Bootsy Mutiso, a Director of the Plaintiff company of even date.

The application is opposed. The Respondent has through Sally Ndegwa. Its General Manager swore a

replying affidavit dated 30th October, 2008.

The brief facts of this case are that the Plaintiff and the Defendant entered into an agreement to lease of aircrafts from the Plaintiff to the Defendant, on 1st April 2007. The Plaintiff claims US\$73,803 being the money due and owing to it from the Defendant on the said Lease Agreement. The Defendant has denied owing any sums on the basis that the sum claimed was not supported by consideration and for the reason that the Plaintiff breached the terms of the contract. The particulars of the breach are provided at paragraph 9 of the defence.

Order XXXV rule 1 stipulates:

“1.(1) In all suits where a plaintiff seeks judgment for –

(a) a liquidated demand with or without interest; or

(b) the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser.

where the defendant has appeared the Plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.”

The rule gives the court power to enter summary judgment against the Defendant on application by the Plaintiff. Summary judgment can only be entered where the court is satisfied that there is no reasonable plausible and bona fide triable issue raised in the defence. In Kenya Horticultural Exporters [1977] Limited vs. Pape [1986] KLR 705, Kneller, Nyarangi and Gachuhi JJA held:

“As a general rule, in order for a defendant to be granted leave to defend, all that he has to show is that there is a triable issue of fact or of law and leave to defend will normally be given unconditionally except where a judge considers that there is ground for believing that the defence is a sham in which case he may exercise his discretion to impose conditions.”

As evidenced in the case of Kenya Horticultural, supra, the burden lies on the Defendant to demonstrate that it should have leave to defend the suit by showing, *prima facie*, the existence of a *bona fide* triable issue or that he has an arguable case or a reasonable ground of defence or facts which constitute a plausible defence.

I have considered submissions by both counsel in regard to the prayer for summary judgment. Mr. Wangila for the Plaintiff urged the court to find that the sum claimed of US\$73,503 was for services rendered to the Defendant in form of actual hours flown and that the sum claimed remained outstanding despite demand as per ‘BM2’ in supporting affidavit.

Mr. Mushweshwe for the Defendant submitted that the Defendant has established that it had a triable issue and that therefore it should be given leave to defend. Counsel referred to paragraphs 7 to 11 of the defence and urged the court to find that relying on the Lease Agreement, ‘BM1’ to Applicant’s affidavit, the Defendant’s contention that the Plaintiff did not put it into possession of the aircraft as it was obligated under the contract was a triable issue.

I have considered the Defendant’s defence. In paragraph 4, the Defendant avers that the sum claimed is not supported by any consideration. The Plaintiff has relied on the demand letter and invoices it issued to the Defendant to support the claim. In light of the breach of contract alleged in paragraph 9 and 10 of the defence, and terms and conditions of the Agreement relied upon for the alleged breach in paragraph 8 of the defence, the demand letter and invoices are insufficient answer to the Defendant’s defence aforesaid. I do find that it is a triable issue whether there was any breach of contract by the Plaintiff.

Mr. Wangila trashed the particulars of breach alleged quoting clause 8(3) of the Agreement where, Mr. Wangila urged, the contract provided that the Plaintiff would not be responsible for any loss suffered by the Defendant due to grounding or lack of availability or un serviceability of the aircraft no matter what the cause.

Clause 8(3) of the Agreement will need to be scrutinized by the court during trial to determine, *inter alia*, whether the breach complained of by the Defendant was excluded by that clause. The issue still needs to go to trial. I do find that the Defendant's defence raises issues which the Defendants should have leave to defend.

In regard to the prayer for judgment on admission the principle rule is that the court should examine the pleadings carefully in order to establish whether there is no specific denials and no definite refusals to admit allegations of fact, in exercise of the court's unfettered discretion to enter judgment on admission. Choitram vs. Nazari [1984] KLR 327 Madan, Kneller, JJA and Chesoni Ag. JA held:

"Admissions of fact under order XII rule 6 need not be on the pleadings; they may be in correspondence or documents which are admitted or they may even be oral as the rule uses the words "or otherwise" which are the words of general application and are wide enough to include such other admission.

An order for judgment on admission under the Civil Procedure Rules order XII rule 6 should only be made if it is plain that there are either clear express, or clear implied, admissions."

The Plaintiff's contends that the Defendant admitted owing US\$ 42815.50 in a letter written by its General Manager, Sally Ndegwa, to the Managing Director of the Plaintiff Company. The letter is annexure 'BM3A' to the Plaintiff's affidavit. It is dated February, 14, 2008. I have read the letter. It is rather long but there are two paragraphs of interest in regard to the question of admission at hand. These two paragraphs are as follows:

"On 4th of February 2008 we received a letter of Termination of the contract with no due notice (Copy attached), which also demanded full payment of invoices due to Flex Air Cargo amounting to US\$73,505.50 within seven days of receipt of letter. In response to this letter; on Feb 8th 2008 we prepared our Cheque No. 1097 for US\$42,815.50 which we delivered to your office accompanied by a covering letter (Copy attached) summarizing what Invoices we were paying for as well as the credit notes we required and seeking clarification on a verbal agreement as pertains one of the invoices on the list. It was received by your Mr. Augustine. However, the cheque and covering letter were sent back to us without any explanation. On receipt I called Capt. Mutuku to clarify Flex's position on the matter, who let me know that Flex Air Cargo was not in agreement on the clarification sort regarding Invoice No. 501 in our letter sent and will only accept our Cheque No. 1097 of US\$42,815.50 if we acknowledge we owe Flex Air Cargo US\$ 73,505.50 as per letter dated 4th Feb 2008 without dispute and the payment we are making is only a deposit towards that amount, to which we are not in agreement as they are clear credit notes required on that amount."

"As a way forward we have since received our books and our findings are as follows;

Invoices from Flex to Delta:

Invoices from Delta to Flex:

Invoice No.	Amount (US\$)
0501	29,477.50
0502	10,562.00
0582	28,691.00

0583	4,770.00
0575	5,825.00
Total	79,325.50

Invoices from Delta to Flex

Invoice No.	Amount (US\$)
In 100403	3,233.00
In 100407	2,958.00
Total	6,191.00

For the amount owed we are also requesting for credit to our account for the allowing:

1. *US\$2,452.50 being overpayment for MGH in the month of October 2007 whereby we paid for 80 block hrs yet the aircraft was only available for 76.73 block hours, thus we require a credit of 3.27 block hours.*

2. *US\$866.02 being fuel refund as per DFR No. 007.*

Attached herewith is our Cheque No. 1097 for US\$42,815.50, being payment as per the below schedule,

Invoice No.	Amount (US\$)	Amount paid (US\$)	Credit Requested (US\$)
0502	10,565.00	9,765.00	800.00
0582	28,691.00	28,606.50	84.50
0583	4,770.00	4,770.00	0.00
Total (US\$)	44,026.00	43,141.50	884.50*
Less landing fees	(326.00)**		
Total payable	42,815.50		

* Please provide us with the credit notes

** Landing and parking fees (US\$326.00) paid in

* *Please provide us with the credit notes*

** *Landing and parking fees (US\$326.00) paid in November, 2007 by Delta Connection on behalf of FlexAir while aircraft was on ground copy attached."*

Mr. Mushweshwe in response to the letter by his client, 'BM3A', submitted that under Order XII rule 6, for admissions to form a basis of summary judgment they must be made in the pleadings. Counsel submitted that there were no such admissions in the case. Counsel also argued that alleged admission resulted in payment cheques being raised by the Defendant which the Plaintiff rejected and that the Plaintiff cannot now turn around and rely on what he rejected earlier.

The letter 'BM3A' contains clear admissions of the debt owed to the Plaintiff by the Defendant. It was made by a Chief Officer of the Defendant Company and therefore by one who had authority to commit

and bind the Defendant Company. The admission is plain and clear. The Defendant is saying that it admits US\$42,815.50 is owed to the Plaintiff. From the letter, the Defendant has set out the basis upon which it arrived at the figure admitted. The Defendant has demonstrated its determination to pay the debt by issuing cheques in the said sum on three occasions, only for the Plaintiff to reject them.

Regarding whether admissions must only be in the pleadings, Mr. Mushweshwe did not cite any authority to support his proposition. I have quoted from Choitram case, supra, a Court of Appeal decision which is binding on this court and is proof that admissions, to form the basis of a judgment on admission, can be in correspondences or documents which are admitted.

The letter 'BM3A' was not challenged by the Defendant. In fact the Defendant had no opposition to it forming part of the Plaintiff's bundle of annexures to its supporting affidavit. The letter itself was written prior to the suit being filed and is not on a "without prejudice" basis. It is admissible in evidence.

Having carefully considered the application, the pleadings and submissions by counsel, I am satisfied that there is a clear and plain admission to part of the Plaintiff's claim in the sum of US\$42,815.50.

Accordingly the application dated 8th October, 2008 is allowed as follows:

1. Judgment on admission be and is hereby entered in favour of Plaintiff against the Defendant for the sum of United States Dollars 42,815.50 together with interest at Court rates or its equivalent in Kenya Shillings.
2. The costs of this application be borne by the Defendants.

Dated at Nairobi this 5th day of December, 2008.

LESIIT, J.

JUDGE

Read, signed and delivered, in the presence of:

Mr. Wangila for the Plaintiff

Mr. Aduda holding brief Mr. Mushweshwe for the Defendant

LESIIT, J.

JUDGE