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

Civil Case 271 of 2004

STRAL AVIATION LIMITED …….. PLAINTIFF

VERSUS

TADIS TRAVEL & TOURS LIMITED

ERITREA AIRLINES LIMITED …….DEFENDANTS

J U D G M E N T

In an amended plaint filed on 17.6.2004, the plaintiff claimed against the defendants the sum of USD 125,178.86 which the plaintiff alleged was due from the defendants in respect of loss under Warsaw Convention and general damages for loss of business. The plaintiff pleaded that in or about the month of April 2003 the 1st defendant offered the plaintiff cargo space on an "ad hoc" basis to freight goods as and when the plaintiff required on the 2nd defendant's aeroplanes. The plaintiff accepted the offer and sourced clients whose cargo would be loaded with the 2nd defendant at the behest of the plaintiff at agreed rates. The plaintiff further averred that under the contract the 2nd defendant was liable for the said goods during the period they were in the defendant's charge. It was further pleaded that in breach of the agreed terms the defendants did on various occasions shortfreight and/or shortland the plaintiff's perishable cargo at Asmara Eritrea thereby occasioning loss to the plaintiff and/or the plaintiff's clients. The loss involved Airway Bill numbers 637-00000486 (hereafter AWB 486) dated 28.5.2003, 637,00000276 (hereafter AWB 276) dated 28.5.2003 and 637 00000490 (hereafter AWB 490) dated 1.6.2003. The total loss was stated to be USD 86,576. It was then pleaded that as a result of the said breach one of the plaintiff's clients (MS W.S. Fish International Amsterdam) had continued to withhold USD38,602.86 from the plaintiff at the tacit instructions of the defendants. It was next pleaded without prejudice that as a result the defendants have caused the plaintiff's clients to discontinue to engage in business with the plaintiff. The value of the loss of business is given as USD 444,515.16 particularized as follows:-

CLIENT	**VALUE OF BUSINES**
	USD
W.S. Fish International ……..	353,917.60
Coast Air ……	50,208.46
East African Growers ……..	10,875.45
Total ……. 444,515.16	

On 22.3.2005, the defendants filed their joint defence and also raised a counter-claim. They admitted that the plaintiff sourced for clients for the defendants and acted as their agent. With regard to liability for the plaintiff's client's cargo during the period the defendants were in charge, the 2nd defendant admitted same save that liability would be to the clients and not the plaintiff. With regard to alleged short freight the defendants averred that the same was compensated by the defendants through alternative carriage to the satisfaction of the said clients. In the premises according to the defendants the plaintiff lacks locus standi. With regard to the withholding of USD 38,602.86, the defendants averred that the same was due to the plaintiff's failure to discharge its duty as the defendants' agent by failing to surrender monies paid to it by the said M/S W.S. Fish International Amsterdam. With regard to alleged loss of business, the defendants averred that if such loss occurred it was because of the fraud committed by the plaintiff against the said clients and against the defendants. It was further pleaded that as there was no guaranteed capacity agreement between the plaintiff and the defendants no liability could accrue for any loss of business to the plaintiff as alleged and further that the plaintiff had the liberty to use other international air carriers since the defendants had no monopoly of air carriage.

By way of counter claim the defendants averred that during the currency of the business relationship with the plaintiff the plaintiff as an agent of the defendants used to receive various payments from various clients on behalf of the defendant which amount the plaintiff was bound to remit to the defendants upon receipt of the same. It is then averred that during the said period the plaintiff received USD 220,087.60 from the said clients which sum the plaintiff has failed to pay to the defendants despite demand being made. It is further pleaded that on various dates to wit 6.6.2003, 13.6.2003, 16.6.2003 and 18.6.2003 the plaintiff issued cheques to the 1st defendant for a total of USD 77,259.90 which cheques upon presentation to their banker were returned with remarks "payment stopped by the drawer". It is also pleaded that on various dates the plaintiff booked and confirmed various air cargo space which were unutilized after the plaintiff failed to make a representation the cost of such unutilized space being USD75,000.

In the premises, the defendants claimed a total sum of USD 295,087.60 being the amount due and owing to the defendants by the plaintiff in respect of professional services rendered and/or goods sold and delivered and/or money had and received by the plaintiff for use by the defendants.

In the alternative the defendants jointly and severally claimed against the plaintiff USD 77,259.90 being the value of the cheques countermanded upon presentation. In the further alternative the defendants jointly and severally claimed against the plaintiff USD 75,000 being the value of the air cargo space booked and confirmed by the plaintiff but unutilized.

On 20.4.2005, the plaintiff filed defence to counterclaim in which it denied the defendants' claim. With regard to the cheques the plaintiff pleaded that the same were stopped or countermanded in view of the defendants non-payment of claims for lost/damaged goods, money withheld by consignees at the behest of the defendants and the loss of business as a result of the defendant's conduct. The plaintiff further pleaded that it was entitled to withhold the said sum of USD 77,259.90 as a set off in view of the defendants' breach of terms and conditions of respective freight contracts. The plaintiff further denied not utilizing booked space valued at USD 7,5000. In the premises the plaintiff denied owing the defendants the sum of Kshs.295,087.60 for professional services rendered and/or goods delivered and contended that the services were in fact unprofessional and the plaintiff's goods were never delivered on time or at all.

That appears to be the state of the pleadings when this case came up before me for hearing on 28.10.2005. On that day only the defendants were represented and attended with their witnesses. The plaintiff was not represented nor was its counsel present. I dismissed the plaintiff's case for non-attendance and took the evidence of the 1st defendants witness. The dismissal was however, subsequently set aside but the evidence of the 1st defendants' witness remained on record. He gave his name as Tewelden Edhin Welde Slassie Gaebremedhin and testified as follows:- He was the sales and traffic co-ordinator of the 2nd defendant and co-ordinated cargo for the plaintiffs who dealt mostly in fish which belonged to a company called W.S. Fish International in Amsterdam. The plaintiff was the agent of the

exporters. He explained that a document called airway bill was used in the transportation of the cargo. The document provided for the shipper consignee type of goods, pieces or lots and weight. The airway bill would be signed by the agent or a person designated by him and on completion it would be returned to the defendants for shipping. He produced 35 such bills upon which the defendants based their claim. Three of those airway bills formed the basis of the plaintiff's claim. They were AWB 486, which was produced as DEX 37, and AWB 276 produced as DEX 40.

AWB 486 indicated cargo weight to be 16278 kgs, when it should have been 9768 kgs, which anomaly was rectified by one Kivuvani, an employee of the plaintiff. AWB 276, indicated cargo weight as 12500 kgs. but at Asmara 2835 kgs of the cargo were off-loaded and the plaintiff's logistics manager, one Qureshi authorized re-routing of the off-loaded cargo to Frankfurt. AWB 545 was used for the re-routing. AWB 490 indicated cargo weight as 21015 kgs of which 1104 kgs were off-loaded at Asmara. The off-loaded cargo was rejected by the consignee and the same was destroyed at Asmara. DW1 freely admitted that with respect to that off-loaded cargo the 2nd defendant was liable and the 2nd defendant was prepared to settle the claim based thereon on condition that all IATA claim regulations were complied with. He identified the following prerequisites:-

1. Immediate notification of rejecting by consignee of goods.

2. A Certificate by the consignees' country showing that the consignment was not accepted (Quarantine Certificate)

3. A certificate of damage by Custom's Authority

4. Transport costs from Airport to Gabbage Area

5. Certificate of Gabbage services.

6. Expenses incurred in destroying the goods.

DW1 concluded that the defendants demanded the sums indicated in

the counterclaim from the plaintiff but the plaintiff had not paid. At the time of making the demand the plaintiff did not present the claim now made in the plaint.

Before DW2 Taddesech Yohanwa testified on 5.12.2005, counsel for the plaintiff sought leave to cross-examine the defendants' first witness who was not in court. The cross-examination of DW1 was reserved and DW2 then testified as follows:-

She was the 1st defendant's Managing Director and the 1st defendant was the general sales agent of the 2nd defendant. In 2003, the plaintiff approached the defendants to carry cargo to different destinations at varying rates. They did so but later the plaintiff failed to pay USD 220,098 for documentation. The plaintiff issued cheques for USD 77,259 but the cheques were stopped by the plaintiff. The plaintiff also booked and confirmed space valued at UDS 75,000 but failed to utilize the space resulting in the loss of the said USD 75,000. DW2 produced the said cheques as DEX 41-50.

On cross-examination DW2 stated that all the airway bills indicated that freight charges were pre-paid. She admitted that there were alterations on some airway bills. She explained that although some airway bills indicated different agents, the same were signed for in their register by the plaintiff's representative. She also admitted that the plaintiff's claim had been submitted earlier but the same lacked proper documentation as required by IATA regulations. She further admitted that interest rate was not agreed.

On re-examination DW2 explained that although different freighters had been indicated on some of the airway bills, payment for services offered by the defendant was effected by the plaintiff who indeed had issued cheques for the same airway bills some of which had been countermanded.

The defendants then closed their case subject to the cross-examination of DW1 which cross-examination had been reserved by the plaintiff. In the end the plaintiff appears to have abandoned its desire to cross-examine DW1, PW1, James Onyancha Masese, the plaintiff's senior accountant then took the stand and testified as follows:-

The 1st defendant approached the plaintiff for business (cargo freight) using the 2nd defendant's aircraft. The business was on "ad hoc" basis and the main consignees were M/S W.S. Fish International in Amsterdam. The primary cargo was fresh fish. Ordinarily, the 2nd defendant would prepare an airway bill in which weight and space would be stated. The plaintiff was expected to pay freight charges at negotiated rates. On agreement on charges payment would be on account and only outstanding amount was payable. Payment itself would be on request or without request. In the year 2003 April the 2nd defendant started off-loading the plaintiff's cargo on the instructions of the 1st defendant and without the plaintiff's authority. The plaintiff lodged a claim for cargo that had been off-loaded in the sum of USD86,576 but the defendants failed to pay. The plaintiff had issued cheques for USD 77,259.90 and as the defendant's persisted in the failure to pay, the plaintiff stopped the said cheques. In turn the 1st defendant instructed M/S W.S. Fish not to pay the plaintiff sums due to it amounting to USD54,000, In due course, the plaintiff started loosing business. It had booked business worth USD353,917.60 with the said W.S. Fish International, business worth USD 50,208.46 with Coast Air and business worth USD 10,875.45 with East African Growers. In total the plaintiff lost business worth USD 444,515.16.

On cross-examination PW1 stated that he would not know if the off-loaded cargo had been otherwise transported. The value of the same was USD 86,576. The witness admitted that no payment had been made to the customers and no instructions had been received from customers to make the claim. He admitted that the plaintiff had been paid by M/S W.S. Fish International a sum that he could not remember but the same customer did not know that the plaintiff had lodged a claim against the defendants. PW1 stated that he had no documentary evidence of loss and that the rates applied to compute the loss had not been given.

In re-examination PW1 stated that the plaintiff has made a claim for itself and that M/S W.S. Fish International, Coast Air and East African Growers had not made any claims.

PW2 was one ANJIV GADHIA, the plaintiff's Commercial Director. He testified as follows:- By an AWB 486 the plaintiff booked and confirmed space with the defendants to transship fish weighing 16278 kgs to W.S. Fish International in Amsterdam. The 2nd defendants' captain off-loaded 2000 kgs. The 1st defendant could not assist in transshipping the off-loaded fish and the plaintiff transported the same on Emirates Airlines at a higher rate. There was a difference of USD 6533 which according to PW2 the defendants should pay. PW2 produced another airway bill no.486 which had no alterations. The same was similar to PEX 26 save that the latter had alterations.

Referring to AWB 276, PW2 stated that the same was for fish weighing kgs 12,5000 and was destined for Amsterdam. At Asmara the 2nd defendant's captain off-loaded 2700 kgs. As a result the consignee could not be allowed to take delivery of the cargo that went to Amsterdam as the same was seized because the manifest weight did not tally with the cargo. The witness produced an E-mail (PEX 4) from the consignee warning that the cargo would be destroyed unless the correct documentation would be availed. In the premises, the full value of the cargo of USD 54000 was being claimed. PW2 admitted that AWB 490 was a repeat of an earlier AWB and was for 4100 boxes of fish weighing 25015 kgs of which 507 boxes were left in Nairobi and 193 boxes were off-loaded in Asmara. The plaintiff complained vide a letter dated 3.6.2003 which was produced as PEX6. Alternative arrangements were made to transship the 500 boxes left in Nairobi but the 193 boxes were not accepted in Amsterdam and for that loss the plaintiff claimed USD 26,043. The plaintiff also blamed the defendants for instructing W.S. Fish International not to deal with the plaintiff and to withhold a payment of USD38000. PW2 denied the defendant's claim and testified that the cheques for USD 77259 were stopped to protect the plaintiff's interests in a claim involving USD 86576. The plaintiff further lost business with the clients stated in the plaint. On unutilized space PW2 cited 5 cases where the plaintiff's clients decided to use other airlines. According to PW2 the dispute between the plaintiff and the defendants was one of

accounts and with regard to interest rate claimed by the defendants, the same was not provided for.

On cross-examination, PW2 stated as follows:- There was no evidence of payment of USD 6503.10 allegedly made to Emirates Airline in respect of the cargo transshipped by them. Indeed, no invoice had been delivered by Emirates Airlines. With regard to AWB 276, PW2 admitted that there was no evidence of destruction of the cargo off-loaded in Asmara and destroyed in Amsterdam. With regard to the cargo that was transported to Frankfurt of 449 boxes, PW2 stated that the full value of the cargo of USD54000 was being claimed but he did not know what transpired in Frankfurt. There was also no evidence of claim by the client and no valuation of the loss had been made.

With regard to AWB 490 PW2 did not know how the figure claimed in respect of the AWB had been arrived at. With regard to the claim for USD38602.86, PW2 stated that only 5% of the same belonged to the plaintiff while 95% belonged to the defendants and the same formula would be used for the claim to lost business. PW2 further stated that even after AWB 486 business between W.S. Fish International and the plaintiff continued.

PW3 – Wilson Bakari was a Chief Inspector of Police and investigated a complaint by the 2nd defendant against the plaint and established that there were payment disputes between the plaintiff and the 1st defendant. On cross-examination PW3 stated that the investigation file on the complaint was closed as no crime was disclosed.

The plaintiff then closed its case. The defendants applied to recall DW2 and as there was no objection from the plaintiff, I allowed the recall. She testified a second time as follows:- She had received correspondence from W.S. Fish International which contained all the airway bills of the 2nd defendant issued by the plaintiff to W.S. Fish International. She produced the said correspondence, invoices, bank transfers and a summary of an account between the said W.S. Fish International and the plaintiff on the basis of the above documents. The documents showed that the plaintiff was paid USD 290,969.49. PW2 also produced a statement she had prepared of transactions between the plaintiff and the 2nd defendant showing that the total sum due to the 2nd defendant was USD215,707.35.

On cross-examination DW2 stated as follows:- The money transfers between the W.S. Fish International and the plaintiff constituted inter bank transactions and W.S. Fish International confirmed payment of the cargo carried by the 2nd defendant. She admitted that the sum of USD215 707 in her statement differed from the sum claimed in the counterclaim but explained that the difference represented lost business when confirmed bookings remained unutilized.

On re-examination DW2 stated that the plaintiffs would be entitled to a small fraction of the unit price on every invoice.

On conclusion of the evidence, the parties agreed to file written submissions which were finally in place by 27.11.2006. The parties did not frame the issues for determination. The plaintiff's case however was that the defendants were in breach of terms of three consignments of cargo (fish) carried under AWB 486, AWB 276 and AWB 490. With respect to AWB 486 the plaintiff alleged that two tons of the cargo were off-loaded by the 2nd defendant at Nairobi and the plaintiff had to convey the same by Emirates Airlines at higher rates which were given as USD 6533.10. The defendants denied that allegation and DW1 Tewelden Edhin Welde Slassie testified that there was no cargo that was off-loaded in Nairobi by the 2nd defendant but the weight of the cargo was adjusted from 16278 kgs to 9768 by the plaintiff's representative one Kennedy Kivuvani who was the plaintiff's Commercial Manager. That evidence was not challenged by cross-examination and I accept it as true. Besides, the plaintiff did not adduce evidence of actual cargo conveyance by M/S Emirates Airlines. It also did not demonstrate by acceptable and credible evidence that M/S Emirates Airlines had been paid the higher rates of USD 6533.10.

With respect to AWB 276, the plaintiff contended that 450 boxes (2700 kgs) were off-loaded by the 2nd defendant at Asmara and when the off-loaded cargo was finally transshipped to Amsterdam, the same was detained by customs and health officials. The consignee therefore did not take delivery and the

cargo was destroyed. The plaintiff did not however adduce evidence of the actual destruction of the cargo. The defendant's position on the other hand was that the off-loaded cargo was on the plaintiff's advise transshipped to Frankfurt under a new AWB No.545 which was produced as DEX. 39. Their contention was that the re-routed cargo was duly delivered to the consignee and no claim was made or could be made as the defendants fulfilled their part of the bargain. The plaintiff relied upon PEX.4 to support its allegation that the said cargo was destroyed. However, that exhibit sought fulfillment of certain conditions in default of which the cargo would be destroyed. In my view that was not evidence of destruction of the cargo. The plaintiff read more than was in the exhibit.

With regard to AWB 490, the evidence adduced by both parties showed that a certain amount of cargo was off-loaded before reaching its destination. The plaintiff contended that space for Kshs.125015 kgs was booked with the defendants. They off-loaded 507 boxes in Nairobi and 193 boxes at Asmara. The plaintiff made alternative arrangements to transship 500 boxes left in Nairobi but the boxes off-loaded at Asmara were finally rejected by the consignee when they reached Amsterdam and were destroyed on return at Asmara. In support of that testimony the plaintiff produced PEX 6, the original AWB No.490. The weight given therein was 25015 kgs. One Okello signed the AWB. The plaintiffs also produced PEX 5 which was a letter from the 2nd defendant stating that only 20 tons of cargo had been confirmed but not 25015 kgms. The letter also makes reference an AWB showing cargo weighing 21,015 kgs and not 20 tons. The defendants' DEX.40 is in line with the said complaint. The exhibit has the same number of the AWB i.e. 490. But the weight of the cargo is indicated to be 21015 kgs. The AWB was signed by the same Okello. The defendant admitted off-loading 1104 kgs. of cargo. The evidence in my view does not support the off-loading of 2 tons as pleaded at paragraph 9 of the amended plaint. The plaintiff did not therefore specifically plead the loss at AWB 490 nor did it strictly prove the same. However, as the defendants freely admitted off-loading 1104 kgs. I accept the same as the weight of the cargo that was off-loaded at Asmara and subsequently destroyed. DW1 testified that the damage suffered by the plaintiff because of the defendants default would be payable to the plaintiff by the 2nd defendant on condition that the plaintiffs complies with the International Air Transport Association Regulations which he listed as follows:-

1) Immediate notification of rejection of the goods by the consignee.

2) Certificate by consignee's country that the consignment was not accepted in that country (Quarantine Certificate).

3) Certificate of Damage by Customs Authority.

4) Transport cost from Airport to Gabbage Area.

5) Certificate of Gabbage Services.

6) Expenses incurred in destroying the goods.

DW1 testified that the plaintiff had not complied with those conditions. As I have already stated above, DW1's evidence remained unchallenged by cross examination. I had no reason to doubt his testimony. In the end I find and hold that the plaintiff did not prove on a balance of probabilities the breach of the terms of carriage of cargo pleaded in paragraph 9 of the Amended Plaint.

The plaintiff further claimed USD 38602.86 being amount withheld by M/s W. S. Fish International at the tacit instructions of the defendants. I see no reason why the plaintiff cannot recover this sum from M/s W. S. Fish International as no evidence was adduced to prove that the sum had been paid to the defendants.

The plaintiff's final claim was for damages for loss of business , the basis being that its clients discontinued to engage in business with it as a result of pilferation and/or shortlanding by the 2nd defendant. There was no evidence of pilferation. With regard to short landing the only AWB shown to my satisfaction to have had its cargo off loaded was AWB 490 and involved 1104 Kg and the plaintiff's

claim under that AWB, will be subject to compliance with IATA regulations. Apart from that value of that cargo the figure of USD 444,515.16 given at paragraph 11 of the Amended plaint was not strictly proved. Indeed the figure was only used, as a basis for the plaintiff's claim of general damages. However, general damages are rarely allowed in claims based on breach of contract. No special circumstances were demonstrated to enable me depart from that normal rule.

In the end, the plaintiff's entire claim is dismissed with costs.

I turn now to the counterclaim made by the defendants against the plaintiff. The defendants primarily prayed for USD 295,087.60 together with interest thereon at 30% per annum until payment in full. The foundation of the claim was pleaded in paragraphs 18, 19 and 20 of the Amended Defence and Counterclaim. In paragraph 18, the defendants averred that on various dates during the currency of their relationship with the plaintiff the plaintiff received USD 220,087.60 from various clients which amount the plaintiff failed to pay the defendant. In support of that averment the defendant's 1st witness produced 35 AWBs and testified that their charges for documentation amounted to USD 349,753.9 of which the plaintiff paid USD 145,160.15 leaving a balance of USD 220,009.8. The rate applied was 15 dollars for documentation on each AWB and varying rates in respect of other charges. DW2 Taddesech Yohannas on her part testified that the plaintiff was paid USD 290,969.49. She produced a letter from W.S. Fish International dated 12.7.2006 forwarding various invoices from the plaintiff. The letter further forwarded Interbank payment transfers in favour of the plaintiff from the same W.S. Fish International. The payments involved AWB Nos.33,70,81,92,140,125,173,184,210,221,324,361,486,534,941,582,604,630 and 641. The total amount paid by W.S. Fish International to the plaintiff according to DW2 was USD 353,342.24 of which a payment of USD 145,170.20 was made by the plaintiff. According to DW2, the total sum due to the 2nd defendant was USD 215,707.35. It is evident that there was no agreement even as between the defendant's witnesses on the amount due to the defendants from the plaintiff.

The discrepancies in the figures allegedly received by the plaintiff for and on behalf of the defendants and taking into account the fact that there seems not to have been any agreement on the rates applicable for the defendants' services, I find and hold that the claim for USD220,087.60 alleged to have been received by the plaintiff from various clients was not proved on a balance of probabilities. In any event the same was not specifically pleaded as by Law required.

With regard to the claim for USD 75000 being costs of booked air Cargo space which was not utilized, I am afraid that claim was not particularized and sufficient evidence was not adduced to establish the same. Matters were not helped when there was no agreement of the rates applied. There is however no doubt that certain sums were due from the plaintiff to the defendants in respect of professional services rendered and/or money had and received by the plaintiff for use by the defendants. In part settlement of the defendant's claim, the plaintiff issued cheques for a total sum of USD 77,259.90 which cheques it countermanded. The defendants produced the said cheques as "**PEX41 to 50".** The reason for stopping the said cheques was stated to be the defendants' refusal to entertain the plaintiff's claims. In the light of my findings on the plaintiff's claims, I find and hold that the plaintiff had no basis for issuing the stop payment advice to its bank. The sum of USD 77,259.90 is clearly payable to the defendants by the plaintiff. The defendants' claim for interest on that sum at 30% p.a. was clearly without basis and cannot be allowed.

In the result, I enter judgment for the defendants against the plaintiff for the said sum of USD 77,259.90 together with interest thereon at court rates from the date of filing this suit until payment in full. The defendants will also have the costs on the said sum.

Those then are the orders of the court.

DATED AND **DELIVERED** AT **NAIROBI** THIS **12TH** DAY OF **MARCH, 2007.**

F. AZANGALALA

JUDGE

12/3/2007

Read in the presence of: