



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

Civil Case 445 of 2006

REGINA WAMUYU GITHAIGA PLAINTIFF

VERSUS

FIRST LOTTO LIMITED DEFENDANT

R U L I N G

In a plaint filed on 7th August 2006, the plaintiff claims against the defendant Kshs.12,039,021.00 for specific performance of a contract. The contract in a nutshell arose as follows. The defendant runs a lottery known as TOTO 6/49. In the month of December 2005 the defendant advertised in the Electronic Print Media and outlets all over the country that anyone who played their game based on numbers between 1-49 and complied with the rules of the game had a chance to win certain cash prizes if their combinations were picked at a draw conducted every Sunday on NTV 6.50 p.m. The plaintiff purchased a ticket from the defendant being ticket No.003096663 for 65.00 on 3.12.2005 and played as instructed. She was given part “A” of the ticket (hereafter coupon) and the defendant’s sales agent retained part B and C of the coupon as per the rules. The draw was conducted on 4.12.2005 and the plaintiff’s combination won the jackpot of Kshs.12,039,021.00.

On 6.12.2005, the plaintiff went to the defendant’s offices to claim her prize and presented her part of the coupon where upon the defendant failed to honour its promise to pay the said prize hence the suit. The plaintiff avers *inter alia* that as a result of the defendant’s breach she had suffered loss and claims general damages for breach of contract. Interest on the sum of Kshs.12,039,021.00 is claimed at commercial rates from 6.12.2005 until payment in full.

On 17.8.2006 the defendant delivered its defence in which it substantially denied the plaintiff’s claim. It specifically denies that the plaintiff purchased the said coupon number 003096663 from the defendant and contends that the jackpot on offer has never been won; not even by the plaintiff. In a nutshell, the defendant denies the contract alleged by the plaintiff and specifically denies all the particulars of the plaintiff’s claim. There is even a challenge to the jurisdiction of the court.

The plaintiff has filed a reply in which there is a joinder of issues and the averments in the plaint are reiterated.

It is against the above background that the plaintiff by her Notice of Motion dated 19.9.2006 moves this court to strike out the defendant’s defence and seeks summary judgment against the defendant for Kshs.12,039,021.00. The primary grounds for the application are that the defence is a sham and a mere denial; that it does not raise any triable issues; that it is contradictory, baseless and frivolous; that it is based on a false premise and on flaws in the internal management of the defendant and that it is aimed at

delaying the plaintiff's right to the lottery she won. The Notice of Motion is supported by an affidavit sworn on 19.9.06 by the plaintiff in which the averments in the plaint and the grounds of application are elaborated. She also swore a further affidavit on 19.10.2006. The application is opposed and there is a replying affidavit sworn by one Daniel Masi, the defendant's Claims Manager. The application was canvassed before me on 6.2.2007 and 13.3.2007 by Mr. Kilonzo Junior, Learned Counsel for the plaintiff and Mr. Macharia, Learned Counsel for the defendant.

I have considered the pleadings, the application, the affidavits both for and in opposition to the application and the submissions of the counsels appearing. I have also carefully considered the authorities relied upon by counsel. Having done so, I take the following view of the matter. There are a few issues that have caused me anxiety in this application. The Rules and Regulations governing the lottery are annexed by the plaintiff to her affidavit as annexure "A". Rule/Regulation 10, 15 and 16 so far as relevant are in the following terms:-

"10. Winning claims will only be paid out upon comparison with and verification of slip "A" and slip "B" of this form.

"15. ... the purchaser agrees to be bound by these rules and regulations.

"16. Notwithstanding anything herein contained the verification of any winning number shall vest with First Lotto Ltd and such decision on verification shall be conclusive and final."

Based on the material availed to the court it cannot be said with any certainty at this stage that comparison with and verification of slip "A" and slip "B" has occurred. As to whether or not compliance with rule/regulation 10 is a mere internal management matter of the defendant is in my view an issue, that has to await a trial particularly as the plaintiff agreed to be bound by the same rules and regulations if indeed she entered a valid game. Further as to whether or not the defendant is entitled to rely upon rule/regulation 16 has to be investigated further and constitutes in my view a bona fide triable issue.

At the centre of this litigation is coupon No.003096663 which the plaintiff contends was purchased from one of the defendant's outlets then managed by one Sammy Kariuki Wambugu. The same Wambugu is alleged to have written the document annexed as DM 10 to the defendant's affidavit. The document appears to discredit the said coupon 003096663. Yet the plaintiff relies upon the same Wambugu's letter of termination to show that she indeed purchased the said coupon and parts "B" and "C" were retained by the defendant.

Mr. Wambugu has not sworn an affidavit to resolve the issue which now can only be determined at the trial. In my view therefore the plaintiff's case is not a plain and obvious one. In **Giciem Construction Company v. Amalgamated Traders & Services (1987-88) – Hancox's Court of Appeal Decisions Volume VI 140**, the Court of Appeal observed at page 146 as follows:-

"As a general principle where a defendant shows that he has a fair case for defence or reasonable grounds for setting up a defence or even a fair probability that he has a bona fide defence, he ought to have leave to defend. Leave to defend must be given unless it is clear that there is no real substantial question to be tried; that there is no dispute as to facts or law which raises a reasonable doubt that the plaintiff is entitled to judgment."

In the case at hand I have identified some issues that may only be resolved by a trial. There is also a serious dispute as to pertinent facts. The defendant need only show one bona fide triable issue which in my view it has done. I should not say more lest I prejudice the trial.

In the premises, I decline to grant the application dated 19.9.2006. The same is dismissed with costs to the defendant. It is so ordered.

DATED and DELIVERED at NAIROBI this 30th day of April 2007.

F. AZANGALALA

JUDGE

Read in the presence of:- Kilonzo Jnr. For the plaintiff and Kariuki holding brief for Singh for the defendant.

F. AZANGALALA

JUDGE

30/4/07