



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL DIVISION – MILIMANI**

**Civil Case 214 of 2005**

**THOMPSON KENYA LTD ..... PLAINTIFF  
VERSUS**

**AIR KENYA AVIATION LIMITED T/A REGIONAL AIR ..... DEFENDANT**

**RULING**

This is an application of the Plaintiff for Summary Judgment in the terms prayed in the Plaintiff's plaint. In the alternative the Plaintiff seeks, judgment on the Defendant's admission of the Plaintiff's claim. The application is by way of motion on notice brought under Order XXXV Rule 1 and Order XII Rule 6 of the Civil Procedure Rules. The Plaintiff's claim is pleaded in a plaint filed on 21.4.2005. It is averred in paragraph 5, of the plaint that the Plaintiff's claim is for Kshs 7,485,568.90 for advertising work done performed and rendered by the Plaintiff to Defendant at its request and for monies paid out for expenses incurred to various third parties by the Plaintiff for the Defendant at its request in the course of providing the advertising and marketing services. Detailed particulars are given in this paragraph. In paragraph 6 the Plaintiff avers that its invoices are unpaid and as at 31st March 2005 the said sum of Ksh 7,485,568.90 was due and payable by the Defendant to the Plaintiff. In paragraph 7 it is averred that the Defendant has admitted its indebtedness to the Plaintiff in full. On 13.5.2005 the Defendant filed a written statement of defence In paragraph 2 thereof the Defendant avers that it ceased to carry on business under the name and style of "Regional Air" on or about 17.4.2002 when a Company called Regional Air Limited was incorporated. In paragraph 3, it is averred that the Plaintiff's suit against the Defendant is therefore misconceived. In paragraph 4 it is averred that in the alternative paragraph 5 of the Plaint does not disclose any or any reasonable cause of action in that the contents thereof do not specify whether the amount claimed therein is an agreed sum due or it is a reasonable sum due for services allegedly rendered. In paragraph 5 it is averred that according to clause 2 (g) of the agreement relied upon by the Plaintiff payment to the Plaintiff was due and payable thirty days after receipt of a monthly statement. In paragraph 6, it is averred that the Defendant submitted to "Regional Air" a statement of account dated 31.3.2005 claiming the amount specified in paragraph 5 of the plaint hence the suit is premature as such amount was in any event not payable to the Plaintiff when the suit was filed. In the alternative it is averred in paragraph 7 that no statement of account has been submitted by the Plaintiff in respect of the amount claimed and nothing is hence payable to the Plaintiff. Any statement of accounts submitted to "Regional Air" in years 2004 and 2005 is null void and of no effect.

On 13.9.2005, the Plaintiff filed a Reply in which it states that it is the Defendant which contracted it to undertake advertising and marketing work for the Defendant's Regional Air operations pursuant to an advertising agreement dated 1.4.2001 and all such services to Regional Air since then have been provided pursuant to the said agreement.

In paragraph 3 of the Reply the Plaintiff avers that it was not obliged to inquire into the ownership

structure of the Defendant which engaged the Plaintiff as a marketing and advertising consultant with regard to the Regional Air Services. Any provision of services has been pursuant to this agreement and the defendant is obliged to honour its obligations to render payment for services rendered pursuant to the agreement. In any case the Plaintiff has never agreed to an assignment or subrogation from the Defendant to Regional Air Ltd in respect of the agreement.

In paragraph 4 of the Reply the Plaintiff states that the Defendant has expressly admitted to owning and running the Regional air operations in an affidavit sworn by its director one Dino Bisletti on 28.4.2005 and in view of these express admissions the Defendant is estopped from denying it was running the said operations or that the advertising and marketing services were not provided to it.

The Plaintiff's motion for summary judgment or for judgment on admission is supported by an affidavit sworn by one Sunder Venkataraman the Managing Director of the Plaintiff. It is deponed that from correspondence and invoices raised the Defendant owes the liquidated sums claimed in the plaint to the Plaintiff and the Plaintiff is entitled to judgment in the said sum of Kshs 7,484,568.90 together with costs and interest. To the said affidavit are annexed numerous exhibits to support the Plaintiff's application. There is exhibited an affidavit of the said Dino Bisletti sworn on 28.4.2005 which makes it clear that it is the Defendant who has been conducting the Regional Air Operations and in fact was in the process of winding them down as at the time of the affidavit in April, 2005. Reliance is placed upon the deponents earlier affidavit sworn on 21.4.2005 to which was annexed an agreement between the Plaintiff and "Regional Air" which was at the time owned and operated by the Defendant. Reference in this affidavit is made to invoices and monthly statements rendered by the Plaintiff to the Defendant and exhibited in the deponents earlier affidavit aforesaid. It is further deponed in this affidavit that pursuant to repeated demands and requests for payments, an officer of the Defendant (Judy Gow) wrote an e-mail on 14.4.2005 confirming the indebtedness of the Defendant to the Plaintiff in the sum of Ksh s7.5. million. A true copy of the e-mail correspondence from Ms Gow on behalf of the Defendant containing express acknowledgment of the debt due from the Defendant to the Plaintiff is exhibited.

The Defendant chose to resist the Plaintiff's motion on notice on the basis of Grounds Objection filed on 9.11.2005. The grounds are:-

**1. The application for summary judgment has been made without any justification 4 months after the defence was filed.**

**2 The defence herein discloses bona fide triable issues;**

**3 The Defendant has not made any admissions which entitle the Plaintiff to judgment for the amount claimed;.**

**4 The affidavit in support of the Plaintiff's application is an abuse of the process of the Court, and it does not comply with the requirements of the Evidence Act and the Civil Procedure Rules and should be struck out.**

**5 One Judy Gow has no authority, implied or express to make any admissions on behalf of the Defendant.**

The application was canvassed before me on 30.11.2005 by Mr. Alibhai assisted by Githara Learned Counsels for the Plaintiff and Mr. Karanja, Learned Counsel for the Defendant. Mr. Alibhai took me through the pleadings, the application, the affidavit in support of the application and the numerous annexures. Counsel argued that the written statement of defence is a bare denial and the Defendant is merely looking for excuses which do not answer the Plaintiff's claim. In counsel's view the supporting affidavit had not been contradicted and the Grounds of Objection did not show any trial issue Reliance was placed upon the following cases.

**Zola -v- Ralli Brothers Ltd (1969) E.A. 691** which was cited for the proposition that a Defendant who wishes to resist the entry of summary judgment should place evidence before Court by way of affidavit

showing some reasonable ground of defence.

**2 KOBIL PETROLEUM LTD –V- KISSI PETROLEUM PRODUCTS LTD (2002) LLR 2680** which was cited for the proposition that once an application for summary judgment has satisfied the provisions of Order 35 Rule (1) the onus **shifts to the Defendant to show that he should have leave to defend.**

**3 GOHIL –V- WAMAI (1983) KLR 489** was cited for the proposition that Order XXXV Rule 2(1) requires the Defendant to show either by affidavit or by oral evidence that he should have leave to defend. The burden is on the Defendant to satisfy the Court that he is entitled to leave to defend.

Responding to the submissions made on behalf of the Plaintiff Counsel for the Defendant argued that the application for summary judgment or judgment on admission has been made too late and the delay has not been explained. For this proposition reliance was placed upon the case of **RICHARD H. PAGE AND ASSOCIATES LTD – Thompson Kenya Ltd v Air Kenya Aviation Limited t/a Regional Air [2006] eKLR**

According to Counsel for the Defendant, the triable issues raised are:

- 1. Whether or not the Plaintiff has sued the correct party.**
- 2 Whether or not by reason of No.1 above the Plaintiff’s suit is misconceived.**
- 3 Whether or not the Plaintiff may rely on documents in the name of Regional Air which ceased to exist in the year 2002.**
- 4 Whether or not the Plaintiff’s suit is premature.**

In the above premises, Counsel for the Defendant submitted that no case has been made for summary judgment or judgment on admission

I have now considered the pleadings, the affidavit and its annexures. I have also carefully considered the rival submissions of the Counsels appearing. I have also carefully perused the authorities cited. Having done so, I take the following view of the matter. It is settled that the procedure of summary judgment is to be resorted to in respect of liquidated demands only where it is plain and obvious that the Defendant is truly and justly indebted to the Plaintiff and there are no bona fide triable issues raised by the proposed defence or the defence already on record. It has also been settled that a defence based on a point of law which is plainly misconceived or which can be shown to be unsustainable on a short consideration of the matter will not do.

In this case the Defendant at paragraphs 2 and 3 of its defence avers that because it ceased to carry on business under the name and style of “Regional Air” on or about 17.4.2002, the plaintiffs claim against the Defendant is misconceived. The Plaintiff in its Notice of Motion under consideration has shown that the foundation of its claim is the agreement dated 1st April 2001 under which the Plaintiff rendered to the Defendant advertising and marketing services provided to the Defendant in relation to its “Regional Air” operations by the Plaintiff at the Defendant’s request. The Defendant does not deny that as at the time of the said agreement it owned and operated the “Regional Air” business. There is also the clear averment in the affidavit of Dino Bisletti the Defendant’s Director sworn on 28.4.2004 that the Defendant has been conducting the Regional Air operations even after the incorporation of Regional Air Limited. In my view the incorporation of Regional Air Limited did not affect the Defendant’s indebtedness to the Plaintiff. The Plaintiff is categorical that it contracted with the Defendant and not Regional Air Limited. The *Locas standi* of the Defendant is in my view not an issue that should go to trial. In the premises I find and hold that the plaintiff’s suit against the Defendant is not misconceived.

The Defendant avers in the alternative at paragraph 4 of its defence that because the Plaintiff at paragraph 5 does not specify whether the amount claimed is an agreed sum due or it is a reasonable sum due for

services allegedly rendered then the plaint for the said reason does not disclose any or any reasonable cause of action. My reading of paragraph 5 of the Plaint leaves me in no doubt as to the Plaintiff's claim. The Plaintiff at the said paragraph 5 of the plaint has particularized its claim in great detail. The supporting affidavit has further substantiated the claim with numerous documents. In my view paragraph 4 of the Defendants written statement of defence does not raise any triable issue.

At paragraph 5 and 6 of the said written statement of defence it is averred that the Plaintiff's claim is premature and was not payable at the time the suit was filed. This suit was filed on 21.4.2005. The Notice of Motion under consideration was filed on 13.9.2005. The Defendant has since the filing of this suit not made any payment to the Plaintiff. In the premises the purported issue raised in paragraph 5 and 6 of the written statement of defence is no longer alive. It is a sham issue.

In paragraph 7 of the said defence it is averred in the alternative that no statement of account has been submitted by the Plaintiff to the Defendant in respect of amount claimed and nothing hence is payable to the Plaintiffs. Any statement of accounts submitted to "Regional Air" in the years 2004 and 2005 is null and void and of no effect. This averment is sufficiently answered at paragraph 4 of the Plaintiff's Reply and at paragraph 12 of the supporting affidavit of Sunder Venkataraman sworn on 12.9.2005.

In my view, paragraph 7 of the written statement of defence does not raise any bona fide triable issue. Paragraphs 8 and 9 of the written statement of defence are bare denials and contain no bona fide triable issue.

From my above analysis of the written statement of defence it is clear that I detect no single triable issue in the same

. In GOHIL -V- WAMAI (SUPRA) the Court of Appeal held: "

1. The Civil Procedure Rules Order XXXV Rule 2(1) requires the Defendant to show either by affidavit or by oral evidence ***that he should have leave to defend. The burden is on the Defendant to satisfy the Court that he is entitled to leave to defend the suit. Leave to defend will not be granted if he merely states that he has a good defence on merit. He must go further and show that the defence is genuine or arguable or raises triable issues...***

" I have already found that the defence on record does not raise any bona fide triable issue.

The Defendant had another opportunity offered on the filing of this Notice of Motion to show that it should have leave to defend the suit. The Defendant did not seize the said opportunity to file a Replying Affidavit to illustrate its likely defence to the Plaintiffs suit. No representative of the Defendant attended at the hearing of this Motion to Show by oral evidence that it should have leave to defend the suit. In Zola and Another -v- Ralli Brothers Ltd and Another (supra) the Court of Appeal for East Africa observed at page 694 of the judgment that: "Normally a Defendant who wishes to resist the entry of judgment should place evidence by way of affidavit before the judge showing some reasonable ground of defence."

In the case at had the Defendant at the hearing of this motion did not place evidence of any kind showing that it has some reasonable ground of defence. The Plaintiff has satisfied the provisions of Order XXXV Rule 1 and in the language of Ringera J. as he then was in KOBIL PETROLEUM LTD -V- KISSI PETROLEUM PRODUCTS LTD (SUPRA) the onus shifted to the Defendant to show pursuant to the provisions of rule 2 that it should be given leave to defend. The Defendant has failed to discharge this honus.

In Summary I find that the defence on record is a sham and does not raise bona fide triable issues. The same is struck out. The Plaintiff has in the alternative sought judgment on admission. In support of this prayer the plaintiff relies upon e-mail correspondence from one Ms Judy Gow on behalf of the Defendant containing express acknowledgement of the Plaintiff's claim against the Defendant. A copy of the said e-mail correspondence is exhibited in the supporting affidavit.

