REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 624 of 2004

ABDULRAZAK KHAFAN ……..…..…1st PLAINTIFF

MERCANTILE & GENERAL ASSURANCE

COMPANY LIMITED……..……..…….2ND PLAINTIFF

-V E R S U S–

SUPERSONIC TRAVEL & TOURS LTD…….……1ST DEFENDANT

GEORGE KARIUKI……...…….……..2ND DEFENDANT

R U L I N G

This application is brought by a chamber summons dated 15th February, 2005. It is expressed to be made under O.VI Rules 13 (1), (b) and (d) and 16 of the Civil Procedure Rules, and all other enabling provisions of the law. The applicants seek the following orders-

1. THAT the defence herein be dismissed with costs

2. THAT judgment be entered for the plaintiffs herein as prayed in the plaint

3. THAT the defendants do pay the costs of this application in any event.

The application is premised on the grounds that-

(a) The 1st defendant has injustly enriched itself as it failed to account and pay for the sale of airlines tickets due to the 1st plaintiff despite the contractual obligation to do so.

(b) The 2nd defendant is contractually obligated to indemnify the 2nd plaintiff for any default of the 1st defendant and is estopped from denying the existence of the contract of indemnity which he executed

(c) The 2nd defendant was at all material times during the period of default, the managing director of the 1st defendant and was aware of the default of the 1st defendant.

(d) The defence is an abuse of the court process and is scandalous and frivolous as no proof of payment of the amounts demanded in the plaint has been shown.

The application is further supported by the annexed affidavits of ABDUL RAZAK KHAFLAN, the Distribution and Financial Services Regional Manager for Eastern Africa of the International Air Transport Association(IATA), and SHEM NYAMAI, the Assistant General Manager of the 2nd plaintiff.

The defendants/respondents have filed the following grounds of opposition-

(i) The suit by the plaintiffs is incurably defective and bad in law for misjoinder of parties and misjoinder of causes of action.

(ii) The defence by the defendants raises substantive issues of law and fact.

(iii) This is not a proper suit for determination through summary procedure.

At the hearing of the application, Mr. Gichuhi appeared for the plaintiffs/applicants while Mr. Mwaniki appeared for the defendants/respondents. Mr. Gichuhi argued that the 1st plaintiff and the 1st defendant entered into an agreement on or about the 15th day of December, 1993. By that agreement, the 1st defendant was appointed an agent of each IATA member, referred to as carrier, and the 1st defendant was thereby obligated to sell air tickets and keep a proper account of all tickets sold. The plaintiff's claim is that between the months of November and December, 2003, the 1st defendant wrongfully failed, neglected or refused to pay to the 1st plaintiff the proceeds of the sales of tickets during that period. The plaintiff had been advised by its clearing bank that remittances for the period in question due from the 1st defendant had been returned unpaid or not paid at all.

Mr. Gichuhi then submitted that the 1st and 2nd defendants were connected by the principle of subrogation. He further submitted that the defence consists of general denials which do not sufficiently traverse the issues raised in the plaint. In the defence, no issue of misjoinder has been raised, and therefore such allegations as are made in the grounds of opposition must fail. He finally submitted that the defence is a sham, and that judgment should be entered as prayed.

For his part, Mr. Mwaniki for the respondents relied on the grounds of opposition and submitted that the suit was defective for misjoinder of parties and misjoinder of causes of action, as the 1st plaintiff is suing the 1st defendant and the suit by the 2nd plaintiff is against the 2nd defendant. He further submitted that the two claims are completely separate and the legal basis for both of them totally different. Mr. Mwaniki also argued that it is not clear from the plaintiff whether the 2nd plaintiff insurance company had paid the 1st plaintiff pursuant to the terms of the insurance policy which is said to exist. Therefore we can only make an assumption that if no payment has been made by the 2nd plaintiff to the 1st plaintiff, then the 2nd plaintiff has no legal claim whatsoever in terms of the law of subrogation. For that, counsel submitted, the 2nd plaintiff's suit is bad in law. He then referred to O.I Rule 2 and O.II Rule 5 of the Civil Procedure Rules and submitted that the joinder of the two plaintiffs in this suit is embarrassing to the defendants as well as to the court, and that the two claims cannot conveniently be tried together.

Mr. Mwaniki finally submitted that this is not a proper suit for determination by way of summary procedure. He argued that the only evidence attached was a bundle of computer print outs, and that there was a need for further and better evidence before the court could conclude that summary procedure was

appropriate. He therefore urged the court to disallow the application.

In his reply, Mr. Gichuhi referred to OI Rule 9, and then to paragraph 13 of Abdul Razak Khaflan's affidavit which confirms that the 2nd plaintiff admitted and paid the 1st plaintiff's claim. He also reiterated that misjoinder is not raised in the defence and therefore cannot be raised in the grounds of opposition. He finally submitted that the respondents had not adduced any evidence to counter that which had been tendered by the applicants. He therefore asked for judgment jointly and severally.

After considering the pleadings and hearing the submissions of counsel, it seems to me that the main issues arising for determination are-

(a) whether the plaintiff's suit is incurably defective for misjoinder of parties and causes of action;

(b) whether the defence raises substantive issues of law and fact; and

(c) whether this is a proper suit for determination through summary procedure and, if so;

(d) whether judgment ought to be entered as prayed.

As I understand it, Mr. Mwaniki's argument is that the 1st plaintiff has sued the 1st defendant and the 2nd plaintiff has sued the 2nd defendant and therefore there is a misjoinder. In my view, that is a very simplistic way of looking at it. The truth of the matter is that there are two contracts. The first one is in respect of the agreement between the 1st plaintiff and the 1st defendant, which agreement is the main subject matter of this suit. The 2nd plaintiff has an interest in that contract because it is only in the event of a default by the 1st defendant in remission of sales of traffic documents, or where the 1st defendant collects and retains monies admittedly and actually owing to airlines under the agreement between the 1st plaintiff and the 1st defendant does the 2nd plaintiff become liable to pay. The 1st plaintiff, 2nd plaintiff and the 1st defendant therefore have an interest in that contract.

The second contract is enshrined in the deed of indemnity. The prelude to that deed is that the 2nd plaintiff agreed to effect an insurance policy to the 1st defendant by virtue of the passenger sales agency Rules of IATA. Through that contract of insurance, there is direct privity between the 2nd plaintiff and the 1st defendant. The 2nd defendant, who is a director of the 1st defendant, guarantees in his personal capacity, payment of the 2nd plaintiff in the case of any default of payment by the 1st defendant. The 2nd plaintiff, the 1st and 2nd defendants therefore have an interest in the 2nd contract. All these relations and interests sound confused and confusing, all because the interests of all the four parties are very closely intertwined through the two agreements. The two plaintiffs and the 1st defendant have an interest in the passenger sales agency agreement between the 1st plaintiff and the 1st defendant. The 2nd plaintiff and the two defendants have an interest in the deed of indemnity between the 2nd plaintiff and the defendants. I think that an attempt to separate the two contracts and insist on separate actions by separate parties would, at its best, cost time and money. At its worst, it may not work at all. In my view, the joinder both of parties and causes of action in this matter is fair and proper in order to allow for all questions in controversy between all the parties to be determined in one action.

Being of that persuasion, I don't think that O.I Rule 2 referred to by Mr. Mwaniki is applicable. On the contrary, Rule 9 of the same order seems to me more appropriate. It reads, so far as is relevant-

"**No suit shall be defeated by reason of the misjoinder… of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."**

The suit by the plaintiffs is not incurably defective for misjoinder of parties as alleged by the defendants' counsel. Indeed, by reason of the aforesaid rule, it is not defective at all. Similarly, by virtue of O.1 rule

5, if it appears to the court that any causes of action joined in one suit cannot be conveniently tried or disposed of together, the court has jurisdiction to order separate trials or make such order as may be expedient. That puts to rest any fears that a misjoinder or perceived misjoinder for causes of action renders a suit incurably defective as alleged or at all.

Coming to the merits of the pleadings, it is the defendant's case that the defence raises substantive issues of law and fact. The crux of the plaintiff's case is set out in paragraphs 5,6,7 and 8. Paragraph 5 states-

"**By an agreement in writing dated 15th December, 1993 between each IATA member (hereinafter called " carrier") and the 1st defendant, the carrier appointed the 1st defendant as its travel agent for the sale of airline tickets in Kenya. The 1st defendant was authorised to sell air passenger transportation on the services of the carrier and on the services of other air carriers as authorised by the carrier."**

Paragraph 6 of the plaint then proceeds to detail some of the most salient provisions of the passenger sales agency agreement between the 1st plaintiff and the 1st defendant. A copy of the agreement is exhibited as "AK 2". To these paragraphs, the defendants answer is crisp. They state in paragraph 3 of the statement of defence-

"**The 1st defendant denies the contents of paragraphs 5 and 6 of the plaint and the plaintiffs are put to strict proof thereof."**

I find it difficult to decipher from this statement what the defendants are denying. A copy of the agreement which is referred to in paragraph 5 is exhibited. The preamble thereof shows that the parties thereto are the 1st defendant, therein called "the agent", and each IATA member (thereinafter called "carrier") which appoints the agent, represented by the Director General of IATA acting for and on behalf of such IATA member. The agreement is executed by one R. Gesinus, the authorised representative of the Director General of IATA acting as agent for the carriers referred to in the preamble thereto. It is also executed by MR. GEORGE N. KARIUKI, CHAIRMAN of SUPERSONIC TRAVEL & TOURS LTD., the 2nd and 1st defendants, respectively. Paragraph 6 breaks down the most important clauses into four paragraphs-

Paragraph 6 (a) reproduces clause 7.I of the agreement; paragraph 6 (b) paraphrases clause 3.2. of the agreement without losing any meaning; and paragraphs 6 (c) and 6 (d) are reproductions of clauses 7.2 and 10 of the agreement, respectively. When paragraph 3 of the defence denies the contents of paragraphs 5 and 6 of the plaint, a copy of which agreement is adduced in evidence. I find that it is a mere denial of the obvious and does not even attempt to traverse the allegations of fact set out in those two paragraphs, which allegations have the full backing of the agreement referred to in paragraph 5 of the plaint, a copy of which agreement is adduced in evidence. In the case of **PHARMACEUTICAL MANUFACTURING CO.** v. **NOVELITY MANUFACTURING LTD.** [2001]2 E.A. 521, it was held that where a defence does not sufficiently traverse the allegations of fact made by the plaintiff, the latter allegations are deemed admitted by reason of O.VI rule 9 (1) of the Civil Procedure Rules. I am constrained to follow that decision and hold that as the allegations of fact contained in paragraphs 5 and 6 of the plaint are not sufficiently traversed, they are deemed to be admitted.

This argument stretches to paragraphs 7 and 8 of the plaint. Paragraph 7 refers to the deed of indemnity between the 2nd plaintiff and the 2nd defendant. A copy thereof is duly exhibited as "SN 1", and it shows that the document was signed by MR. GEORGE N. KARIUKI, the 2nd defendant and a director of the 1st defendant, in the presence of one MURIUKI NJAGAGUA, a Commissioner for oaths. The defendants' response in answer to that paragraph is found in paragraph 4 of their defence where it is stated-

"**The 2nd defendant denies the contents of paragraph 7 of the plaint in toto and shall at the hearing**

hereof put the plaintiff to strict proof thereof."

In my view, this is another mere denial which does not sufficiently traverse paragraph 7 of the plaint. Paragraph 5 of the defence then adds-

"**Further and in the alternative and without prejudice to the foregoing the 2nd defendant avers that the plaintiffs have altered the initial agreement between the plaintiffs and the 1st defendant herein and as such the 2nd defendant is not bound to indemnify the plaintiffs on the alleged indemnity dated 4/10/02."**

At this juncture, one would have expected the defendants to demonstrate the manner and extent to which the initial agreement was altered. This would have best been done by affidavit evidence, preferably exhibiting copies of the two agreements in a bid to show the alterations. Sadly, this was not done. Failure to do so confines paragraphs 4 and 5 of the defence to the lot of mere denials, without any explanation.

Lastly, paragraph 8 of the plaint states:-

"**In breach of the agreement dated 15th December, 1993, the 1st defendant has wrongfully failed, neglected and/or refused to pay to the 1st plaintiff the sum of Ksh.4,578,199.05 and USD$ 20,837.78 for the sales of tickets on diverse dates between the months of November and December, 2003. By reason of the aforesaid breach the plaintiffs have suffered the above loss."**

The defendant's answer to this statement is found in paragraph 6 of their defence wherein it is provided-

"**The defendant deny (*sic*) the contents of paragraph 8 of the plaint and in particular deny owing the plaintiffs the sum of Ksh.4,578,199.05 and USD$ 20,837.78 as alleged or at all and the defendants will put the plaintiffs to strict proof at the hearing hereof."**

Granted, the plaintiffs have computer generated copies of an agent billing analyses and a summary of the moneys owed. However, the defendants do not indicate the ground(s) upon which they deny owing the money. Could it be that they did not receive any money during the period in question, or is it that they paid over to the plaintiffs all the moneys received? Whichever it may be, why not say so expressly? In paragraph 11 of his affidavit in support of the application, ABDUL RAZAK KHAFLAN states-

"**<u>THAT</u> by a letter dated 19th December, 2003 the 1st plaintiff formally demanded the sums set out in paragraph 9 above after being advised by the clearing bank of the plaintiff that the remittances for the periods of November and December 2003 due from the 1st defendant had been returned unpaid and/or the sums had not been paid."**

The paragraph 9 referred to in the affidavit is to the same effect as paragraph 8 of the plaint. Again, the defendants did not find it fit to respond to this allegation. They were contented with their general denial, as set out in the defence, that they did not owe any money. And this is not done by way of affidavit evidence.

In his submissions for the respondents, Mr. Mwaniki argued that it is not clear from the plaint whether the 2nd plaintiff insurance company has paid the 1st plaintiff pursuant to the terms of the insurance policy which is said to exist. Therefore, he further argued, we can only make an assumption that if no payment has been made by the 2nd plaintiff to the 1st plaintiff, then the 2nd plaintiff has no legal claim whatsoever in terms of the law of subrogation. These concerns find a ready answer in paragraphs 12, 13, and 14 of Mr. Khaflan's affidavit wherein the deponent avers-

"**12. <u>THAT</u> as a result of the foregoing the 1st plaintiff sought indemnification from the 2nd plaintiff for moneys payable under the policy.**

13. <u>THAT</u> the 2nd plaintiff admitted and paid to the 1st plaintiff.

14. <u>THAT</u> consequently the 1st plaintiff assigned its right to recover monies due and owing to them from the defendants to the 2nd plaintiff."

I don't find it necessary to elaborate on these paragraphs. Suffice it to say that the 2nd plaintiff has a perfect legal claim in terms of the law of subrogation.

Given my findings herein above that the defence consists of mere denials I am minded in conclusion to resort to the words of Platt, J.A. in **<u>MAGUNGA GENERAL STORES v. PEPCO DISTRIBUTORS LTD.</u>** (1988-1992)2 KAR 89, in which the defendants' defence contained statements of defence in exactly the same words as those used in paragraphs 3, 4 and 6 of the defence filed in this case. Dealing with that aspect of the matter before him, the learned Justice of Appeal said at p.91-

"**First of all a mere denial is not a sufficient defence in this type of case. There must be some reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason given."**

Gauged against this backdrop, I find that the defence put forward by the defendants in this matter does not raise any bona fide and genuinely triable issues. It is a mere sham, which is therefore scandalous, frivolous, and merely intended to delay the fair trial of this case. By reason thereof, the powers of the court under O.VI rule 13(1), (b), (c) and (d) are justifiably invoked.

In sum, I hereby strike out the defence filed herein and enter judgment, jointly and severally, against the defendants as prayed in the plaint. The defendants will also, jointly and severally, bear the plaintiffs' costs of the suit as well as the costs of this application. It is so ordered.

Dated and delivered at Nairobi this 5th day of May 2005

L. NJAGI

<u>JUDGE</u>