



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 623 of 2004

ABDUL RAZAK KHALFAN (suing on behalf of

The International Air Transport Association – IATA1ST
PLAINTIFF

MERCANTILE LIFE & GENERAL ASSURANCE

COMPANY LIMITED.....2ND
DEFENDANT

VERSUS

PINNACLE TOURS & TRAVEL LIMITED1ST
DEFENDANT

SUSAN WAMAE2ND DEFENDANT

RULING

This is the Application of the Plaintiffs to strike out the defences of the Defendants for being scandalous, frivolous or vexatious or for being otherwise an abuse of the process of the Court. It also seeks judgment for the sums claimed in the Plaint. The application is by Chamber Summons brought under Order VI Rule 13(1) (b) (d) and 16 of the Civil Procedure Rules and all other enabling Provisions of the Law. The reasons for the application are:-

- 1). That the 1st Defendant has unjustly enriched itself as it failed to account and pay for the sale of airline tickets due to the 1st Plaintiff despite its contractual obligations to do so.
- 2). That 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 she executed.
- 3). That the 2nd Defendant was at all material times during the period of default the managing direct of the 1st Defendant and was aware of the default of the 1st Defendant.
- 4). That the defences are an abuse of the Court process and are scandalous and frivolous as no proof of payment of the amounts demanded in the plaint has been shown.

The Application is supported by affidavits sworn by Abdulrazak Khalfan the 1st Plaintiff and Shem

Nyamai the Assistant General Manager of the 2nd Plaintiff. Annexed to the said affidavits are several exhibits.

The application is opposed and there are Replying Affidavits sworn by the 2nd Defendant and one Zepha Mbugua a director of the 1st Defendant. There are also Grounds of opposition filed by the 2nd Defendant.

The Application was canvassed before me on 4th July, 2005. The Plaintiffs' case was that each IATA member and the 1ST Defendant entered into an agreement on 27th September, 1995 whereby the 1st Defendant was appointed an agent for the sale of airline tickets in Kenya. By a deed of indemnity between the 2nd Defendant and the 2nd Plaintiff it was agreed that in consideration of the 2nd Plaintiff effecting an insurance policy to the 1st Defendant the 2nd Defendant would indemnify the 2nd Plaintiff against all actions proceedings, claims, demands, losses and default arising from the default by the 1st Defendant together with all costs and expenses arising and in the event that the 1st Defendant defaulted in the remission of sales of Traffic Documents or collects and retains monies admitted and actually owing to each IATA member. Between the months of December, 2003 and January 2004 the 1st Defendant wrongly failed, neglected or refused to pay to the 1st Plaintiff the proceeds of the sales of tickets. The 1st Plaintiff then sought indemnification from the 1st Plaintiff who paid the 1st Plaintiff and the Plaintiffs filed this suit under the doctrine of subrogation. It was the Plaintiffs' view that in the light of the evidence availed the Defendants had no defences to the Plaintiffs' claim and the filed defences being mere denials were a sham and judgment should be entered as prayed.

Reliance was placed upon the case of **ABDULRAZAK KHALFAN AND ANOTHER –V- SUPERSONIC TRAVEL AND TOURS LIMITED AND ANOTHER: NAIROBI HCCC NO.624 OF 2004** in which Njagi J. on similar facts struck out defences as sham defences and entered judgment for the Plaintiffs.

Further reliance was placed upon the case of **PHARMACEUTICAL MANUFACTURING CO. – V- NOVELTY MANUFACTURING LTD (2001) 2 E.A. 521** in which Ringera J. as he then was held that the Defendant had admitted the facts alleged by the Plaintiff because the Defendant had not sufficiently traversed the said facts.

Reliance was also placed on the case of **MAGUNGA GENERAL STORES –V- PEPCO DISTRIBUTORS LTD (1988 – 1992) 2 KAR 89** for the proposition that a mere denial is not enough. The Defendant should offer some explanation as to why the sum is not owed.

Reliance was also placed upon Halsbury's Laws of England, 4th Edition Vol.25 paragraphs 22 – 23 to demonstrate the deference between a contract of guarantee and indemnity.

Counsel for the 1st Defendant on her part argued that the 1st Defendant's defence raised the following issues:

- (a) whether there was a contract or valid contract between the 1st Plaintiff and the 1st Defendant.
- (b) Whether the 1st Plaintiff having been paid by the 2nd Plaintiff is entitled to bring the claim against the 1st Defendant.
- (c) Whether the doctrine of subrogation is application to the 2nd Plaintiff or either of the Plaintiffs against the 1st Defendant.
- (d) Whether the 2nd Plaintiff is entitled to bring a claim against the 1st Defendant.

- (e) Whether there is a reasonable cause of action by the 1st and 2nd Plaintiff or either of them against the 1st Defendant.
- (f) Whether the Plaintiffs are entitled to bring a joint action against the Defendants.
- (g) Whether there is a mis-joinder of causes of action in the suit.

Reliance was placed upon the cases of **D.T. DOBIE & CO. LTD –V- MUCHINA (1982) KLR 1; CONCORD INSURANCE CO. LTD –V- AMBAKA (1996) LLR 462 AND CALATEX OIL LTD – V- STADIUM SERVICE STATION & ANOTHER (1999) LLR 1266** for the proposition that striking out a pleading should only be ordered in plain and obvious cases and is not appropriate where the Court has to minutely examine documents.

The 2nd Defendant's case was that her defence raised the following issues:-

- (a) Whether there was any or any valid agreements between the 1st Plaintiff and the 1st Defendant
- (b) If there was a valid agreement whether any or any valid contract of indemnity could have been executed between the 2nd Defendant and the 2nd Plaintiff.
- (c) Whether indeed there was any insurance policy executed between the Plaintiffs and what were its terms including the effective dates.
- (d) Whether the 1st Plaintiff was paid the sum of shs 867,081.68 and USD 17373.23 and the particulars thereof
- (e) Whether the Plaintiffs ought to have pleaded the doctrine of abrogation *ab initio*.
- (f) Whether if that 1st Plaintiff was paid the sums aforesaid, it is entitled to second payment in this suit
- (g) Whether the Plaintiffs jointly and severally have a cause of action against the 2nd Defendant.

Reliance was placed upon the case of **D.T. DOBIE & COMPANY LTD –V- MUCHINA (1982) KLR 1** for the proposition that a suit should not be dismissed unless it appears so hopeless that it is plainly and obviously discloses no reasonable cause of action.

In his reply Counsel for the Plaintiffs submitted that there was no mis-joinder of parties or causes of action. He reiterated that the defences filed were sham defences in the light of the material availed to the court.

I have now considered the submissions of counsels appearing. I have carefully perused the pleadings, the Application, the Affidavits, the annexures and the Grounds of Opposition. I have finally given due consideration to the authorities cited. I am alive to the fact that striking out pleadings is only to be resorted to in respect of plain and obvious cases and that to strike out a pleading or part of a pleading should be the last resort of a Court of Law. I will therefore consider the Plaintiffs' Application with these principles in mind. The Plaintiffs' claim as pleaded in paragraphs 5, 6, 7 and 8 of the Plaint dated 16th November, 2004 is that by an agreement in writing dated 15th December, 1993 (this is in fact the agreement dated 27th September, 1995) each IATA member appointed the 1st Defendant as its travel agent for the sale of airline tickets in Kenya. Particulars of the contract are given in paragraph 6 of the Plaint. The sale proceeds of the tickets are given in paragraph 8.

In answer to these paragraphs the 1st Defendant merely denies the same in its paragraphs 2, 3, and 5 of the defence filed on 5th January 2005. Paragraph 4 admits the insurance contract between the 2nd Plaintiff and the 1st Plaintiff. Paragraph 6 refers to the payments made by the 2nd Plaintiff, to the 1st Plaintiff. The 1st Defendant's denial of the agreement is not tenable in view of annexure "AK2" exhibited on the supporting affidavit sworn by Abdul Razak Khaflan on 1.2.2005. The 1st Defendant says nothing about this agreement in the replying affidavit sworn by its director Zeph Mbugua on 18th March 2005. Yet the agreement was executed for the 1st Defendant by the 2nd Defendant. It is clear therefore that the denials of the 1st Defendant do not constitute an answer to the Plaintiffs' claim. There is support for this finding in the case of **Pharmaceutical Manufacturing Ltd –V- Novelty Manufacturing Ltd (2001) 2 E.A. 521** in which Ringera J. as he then was held:

“As the defence did not sufficiently traverse the allegations of fact made by the Plaintiff,.....by dint of Order VI Rule 9 (1) and (3) of the Civil Procedure Rules these allegations are deemed admitted.”

I am also of the view that a defence which merely denies averments in the Plaint is not a serious defence and a defence which is not serious is frivolous and a defence which is frivolous is annoying and therefore vexatious.

Turning now to the Plaintiffs' case against the 2nd Defendant, the same is pleaded at paragraphs 5,6,7 and 8 of the Plaint. Her answer to these paragraphs is found in paragraphs 4,5,6 and 7 of her defence filed on 9th December, 2005. She denies the agreement at paragraphs 4 of her defence. At paragraph 5 she denies that the agreement binds her. At paragraph 6 she denies having executed the indemnity or deed averred to in paragraph 7 of the plaint. At paragraph 7 she avers that she is a stranger to the contents of paragraphs 8 and 9 of the Plaintiff.

As stated above the relevant Agreement is annexure "AK 2" which was executed by the 2nd Defendant on behalf of the 1st Defendant. The Deed of Indemnity is exhibited on the supporting affidavit of Shem Nyamai sworn on 15.2.2005. It is annexure "SN2". The deed was executed by the 2nd Defendant.

In the light of the said agreement and the Deed of Indemnity it was not surprising that the 2nd Defendant does not deny the same in her Replying Affidavit sworn on 23rd September, 2005. Indeed it would not have been open to her to deny the said documents. So what is denied in her defence when no objection to the same documents is raised in her replying affidavit. The denial in the defence becomes hollow. In the premises the 2nd Defendant's defence is a sham. It is not an answer to the case made against her both in the plaint and in the supporting affidavits. As I have found above, a mere denial is a sham defence and a sham defence is not serious and defence which is not serious is frivolous. A frivolous defence is annoying and therefore vexatious.

The issues alleged in the replying affidavit of Zeph Mbugua and the 2nd Defendant are sham issues that the Court cannot give legitimacy to by allowing a trial on the same.

Before concluding this matter an issue has been raised as to whether the payment made by the 2nd Plaintiff to the 1st Plaintiff absolves the Defendants from liability. With respect this is a misapprehension of the Law. The 2nd Plaintiff was entitled to file suit against the Defendants under the doctrine of subrogation. The claim made by the Plaintiffs is one and as against the Defendants it is joint and several. The question of double enrichment does not therefore arise.

As regards the issue of alleged mis-joinder of parties and cause of action, I am afraid I have found none. There were two contracts. One between the 1st Plaintiff and the 1st Defendant. The 2nd Defendant

executed the contract on behalf of the 1st Defendant. The 2nd Plaintiff would pay the 1st Plaintiff in the event of default by the 1st Defendant. The 4 parties indeed have an interest in the contract.

The second contract was between the 2nd Defendant and the 2nd Plaintiff whereby the 2nd defendant would indemnify the 2nd Plaintiff in the event of default by the 1st Defendant. It is clear therefore that the two contracts are so intertwined that it is in the interests of justice that they be dealt with together. I therefore find that there has been no mis-joinder of parties or causes of action in this suit.

As regards the discrepancy in respect of dates stated in the Plaint and in annexure "AK 2" as to when the agreement between the 1st Plaintiff and the first Defendant was made, I find that the same was a typographical error and has not occasioned prejudice to the Defendants. The parties knew no other agreement save for the agreement exhibited by the 1st Plaintiff.

In the result I allow the Plaintiffs' application dated 15th February 2005. I order that the defences filed by the Defendants be and are hereby struck out. Judgment be and is hereby entered against the Defendants as prayed in the plaint.

The Defendants shall pay the costs of this Application.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF JULY, 2005.

F. AZANGALALA

JUDGE

Read in the presence of:

Wetende for the 1st Defendant,

Ngaah for the 2nd Defendant and Ojiambo for Gachuhi for the Plaintiff.

F. AZANGALALA

JUDGE

15.7.2005