



## **Editorial Note**

### **Contract Law**

- offer and acceptance
- party without capacity to be sued cannot be awarded costs even where successful because it is non existent in law.

## **REPUBLIC OF KENYA**

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

#### **CIVIL SUIT NO 97 OF 1999**

**CLASSICAL TRAVEL AND TOURS LTD ..... PLAINTIFF**

**VERSUS**

**NDUNGU KAHIHU ..... 1ST DEFENDANT**

**KENYA SCOUTS ASSOCIATION ..... 2ND DEFENDANT**

#### **JUDGMENT**

This is a claim for Kshs 899,351/- plus interest at the rate of 25%. It is the plaintiff's case that on or about July 1997 and in consideration of a journey to Norway the plaintiff agreed to allocate traveling Air Tickets to the defendants and that the defendants accepted the offer and agreed to pay in full the purchase price of the air tickets allocated as per the agreement. The air travel involved 33 adults and 39 children. They traveled in order to take part in a Jamboree in Norway on 22nd August 1997. All were scouts and members of various local Associations of the second defendant. The total value of the tickets after conversion into Kenya shillings was Kshs 4,426,000. The plaintiff claims to have been paid Kshs 3526,649/- in cash and by bankers cheques, leaving a balance of Kshs 899,351/- which is the subject matter of this suit.

The plaintiff claims that the liability of the 1st defendant is that of having been the Area commissioner and therefore an agent of the second defendant. The plaintiff claims that although there was no formal written contract concerning the sale of the air tickets the plaintiff made a quotation which was accepted orally and the contract performed by part payment as indicated above.

The defendants have claimed that there was no contract between them and the plaintiff. They say that the plaintiff only dealt with them after the event and after failing to secure payment directly from the parents.

The parties had framed, signed and filed nine issues:-

- (1) Whether there was a journey made and an agreement made with consideration to allocate air tickets to the defendants

- (2) Whether the plaintiff offered and the defendants accepted the offer to be allocated the air tickets by the plaintiff company
- (3) Whether the defendants are indebted to the plaintiff in the sum of Kshs 899,351/- with interest for Kshs 71,948/-
- (4) Whether the defendants issued two (2) cheques which were dishonoured by the bank for consideration of the above agreement.
- (5) Whether there was authority given by the defendants or any of them for the issuance of the two cheques to the signatures of the said cheques
- (6) Whether there was fraud on the part of the signatories of the two cheques issued to the plaintiff in purported payment of the sum claimed. If so what step did the defendants take and was the plaintiff informed.
- (7) Whether the plaintiff suffered loss and damages in view of the bounced cheque
- (8) Whether the plaintiff is entitled to damages and if so how is the plaintiff going to be compensated
- (9) Who is to bear the costs of this suit.

Although the issues have been framed they can be summarized into four crucial issues as under:-

- (a) Is there an agreement between the parties and who are the correct parties to the agreement if any
- (b) Was the agreement breached
- (c) What flows from the breach
- (d) Who pays the costs

The plaintiff called one witness Mr Michael Netia the Managing Director of the plaintiff and the defendant called one witness Mr Philip Kiprono Ngetich who is the Area Commissioner of the second defendant, based in the Head Office but who took over from the 1st defendant after he left for Canada.

From the evidence the plaintiff dealt with a Mr Pius G Mwemba who was the Area Commissioner – Langata Local Association. According to a letter dated 21st July 1997 the then Area Commissioner wrote to the Regional director concerning the scouts Norway Jamboree to be held between 29th July – 18th August 1997. The letter gives the names of the scouts expected to travel their schools, and their ages and the Area Commissioner at the same time sought the Regional office’s approval – see

PEX 1.

By a list on the plaintiff’s note paper dated 28th July 1997 a list with 81 names together with the ages was prepared based on a list entitled “Kenya Scouts Association Representatives to the Norwegian Jamboree starting on 2nd August 1997 7th 9th August 1997 in Oslo, Norway – see Ex PEXI.

By a letter dated 27th September 1997 Ex p 4 the plaintiff attached what appears to the court to have been an advertisement under the banner:-

**“Kenya Scouts Association 1997 Kenyan Representatives to the Norwegian Scouts**

## **Jamboree – Date 22nd August 1997:**

### **- Participating Units**

### **- Financial Data.”**

This list identifies each traveller, the school and the unpaid balance of the air ticket. The notice invites the traveller to pay to the travelling agent. However this advert was prepared after the travel and the total outstandings are indicated as Kshs 804,351/-.

It is clear that the Kenya Scouts Association did acknowledge its role in having the outstandings collected.

In addition two cheques of Kshs 700,000/- and Kshs 100,000/- were issued. The first was issued by the Langata Scouts Association PEx 3(a) and the second by a Mr Pius Ouma who was apparently doing so on behalf of another Local Association or because he had been paid by the parents or the travellers.

It is also not denied that the trip was made. It is also common ground that part payment of over 3.3 million was made.

To answer the first point for determination the court finds that there was a quotation for the air travel that was accepted by part payment and by the travelers using the tickets offered. The court finds that there was a contract between the parties in view of the documentary evidence as set out above and the payment. There was an offer and acceptance including partial payment. The journey having been undertaken this was sufficient consideration.

It is however necessary to identify and confirm the contracting parties. On this it is clear from the letter dated 24th October 1997 written by the first defendant in his capacity as National Executive Commissioner of the Kenya Scouts Association that the second defendant in answer to the plaintiff's letter of 23rd October 1997 demanding the outstanding amount, the second defendant indicated that it was taking "sufficient action" in order to resolve the matter amicably. The advertisement attached to P Ex 4 was done on behalf of the second defendant. The second defendant was clearly intervening by making an appeal to the travellers to pay.

The letter dated 12th March 1998 addressed to the plaintiff does acknowledge that it is possible that the Area Commissioner or his agents could have been paid by the parents/travellers and could have failed to account for the moneys received.

According to the Constitutional structure the Area Associations had some autonomy in opening of both accounts but the opening of the accounts had to have the Head Office approval according to the evidence of Mr Kiprono. The Local Associations were represented in the Scouts Council by the Area commissioner. The Area Commissioner for the Langata Association was Mr Mwemba who acted as the Coordinator of the Jamboree according to the evidence adduced. The plaintiff dealt with this Area Commissioner. The Kenya Scouts Association Constitution was produced in court by the consent of both parties and at the request of the court. It is clear from the oral evidence adduced and the correspondence that the second defendant though not directly involved had knowledge of the Jamboree and was aware of the role the Langata Local Association and the other local associations were playing in Nairobi. It was not a stranger to the goings on – In fact it is in evidence that a report on the Jamboree was submitted to it after the trip.

I therefore find that the second defendant was a contracting party. It was clearly constitutionally linked to the Langata Area Commissioner, Mr Mwemba the Coordinator.

As regards the first defendant the evidence reveals that he was not acting in his personal capacity but as official of the second defendant. He did not deal with the plaintiff and only dealt with the matter when the local Association failed to honour its pledge to pay the plaintiff.

On the evidence I find that the 1st defendant only dealt with the travellers/parents by way of correspondence in an attempt to recover the balance otherwise the responsibility for payment according to the evidence never left the second defendant through its local Association for Langata.

The answer to the second point concerning breach is that there is clear documentary evidence showing that the local Association of the second defendant did fail to pay the plaintiff even after the tickets availed to it had been used and inspite of several promises to pay. There is also evidence that other local associations Starehe, Parklands etc did fail to remit their collection and if the same were remitted to the coordinator they were not accounted for by the coordinator.

What flows from the above is that the plaintiff was never paid the amount claimed in the plaint. However in view of the fact that there was no formal agreement concerning the transaction I cannot find the legal basis for the interest component of the claim. Under common law which is applicable here, an agreement to pay interest must be in writing and no evidence was offered on this. The two cheques being bills of exchange do not require proof of consideration which is presumed. The second defendant is clearly liable on this as well to the extent of Kshs 700,000/- only.

I therefore find that there was an agreement between the plaintiff and the second defendant but I find that no liability attaches to the first defendant at all because he was not acting in his personal capacity but as an official of the second defendant. It seems strange to this court that he was sued at all when all he did was to assist in having the money recovered obviously to avoid the second defendant being embarrassed.

The second defendants defence to the claim was not convincing to the court in the face of the oral evidence given and the documentary evidence as identified above.

On the evidence the court finds that the second defendant is liable to the plaintiff in the sum of Kshs 899,351/- plus costs of the suit.

This court would for the reasons set out above have entered judgment for the plaintiff as against the second defendant. However the plaintiff alleges in para 3 of the plaint that the second defendant is an Association registered under the Societies Act Cap 105 of the Laws of Kenya. The question which arises is whether the plaintiff did sue the correct party.

The second defendant is established by S 2A of the Kenya Scouts Act Cap 219 of the Laws of Kenya. Under S 2B of the Act the Kenya Scouts Council has been established and it is the Council which has the statutory power to sue and be sued and not the Association. The section reads:-

**(1) 2B For the proper management and control of the Association there is hereby established a council to be known as the Kenya Scouts Council, which shall be a body corporate with a common seal, with power to sue and be sued and to purchase, hold manage and dispose of land and other property, to raise and administer funds and to enter into contracts for and on behalf of the Association and to exercise all the powers and perform all duties conferred or imposed on it in accordance with the Constitution.**

**(2) The council shall consist of**

**(a) the Chief Scout**

**(b) the Commissioner**

**(c) not more than fifty members, to be known as elected members, elected in accordance with the Constitution! And**

**(d) such other members as may be provided for by the Constitution.**

Having reached the above conclusion concerning the contractual relationship between the

plaintiff and the second defendant it is obviously agonizing for the court to hold that due to the above statutory provision it is clear to the court that the Langata Association had no legal capacity to enter into a contract or any valid agreement with the plaintiff because only the Scout Council had the capacity on behalf of the Association as per the Act. Similarly the Association itself has no legal capacity in the face of the above provision and only the Scouts Council has the capacity to sue and be sued. It follows that the Association has no capacity of being sued and that the plaintiff ought to have sued the Scouts Council as per S2B of the Scouts Act Cap 219 of the Laws of Kenya.

It is evident that this inescapable conclusion on the law is unpleasant, agonizing and also could be regarded as unfair taking into account the facts and the analysis of evidence as above, but it is the duty of the court to interpret the law, to declare the law and to apply the law.

Pursuit to this duty I hold that the plaintiff did not join the correct party or parties and the suit is therefore dismissed. I would have awarded costs to the first defendant but I decline to do so because he did not participate in the proceedings. As regards costs to the second defendant this court will depart from the usual rule that costs must follow the event. The Association being legally not competent to be sued is also not capable of receiving or being awarded costs. I make no order as to costs for this reason.

DATED and delivered in Nairobi this 7th day of May 2004.

**J G NYAMU**

**JUDGE**