



REPUBLIC OF KENYA



Wangai & 2 others v KLM Royal Dutch Airlines & another (Civil Case 12, 14 & 15 of 2019 & Civil Suit 13 of 2019 (Consolidated)) [2023] KEHC 17808 (KLR) (Civ) (18 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17808 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE 12, 14 & 15 OF 2019 & CIVIL SUIT 13 OF 2019 (CONSOLIDATED)

JN MULWA, J

MAY 18, 2023

BETWEEN

ERASTUS NDEGWA WANGAI PLAINTIFF

AND

KLM ROYAL DUTCH AIRLINES 1ST DEFENDANT

AIR FRANCE 2ND DEFENDANT

AS CONSOLIDATED WITH

CIVIL SUIT 13 OF 2019

IN THE MATTER OF

PAUL KINUTHIA KAGWE PLAINTIFF

AS CONSOLIDATED WITH

CIVIL CASE 14 OF 2019

IN THE MATTER OF

GRACE NGINA KINUTHIA PLAINTIFF

AS CONSOLIDATED WITH

CIVIL CASE 15 OF 2019

IN THE MATTER OF

PRISCILLA NDUKU WANGAI PLAINTIFF



JUDGMENT

1. The above suits were consolidated on November 24, 2020 by an order of Hon Justice Serگون with the consent of all the parties due to the common questions of law and fact and the similarity of the reliefs sought. The lead file is civil suit No 12 of 2019.
2. The plaintiffs *vide* plaints dated January 18, 2019 and filed in court on January 21, 2018 sued the defendants jointly and/or severally for: -
 - i. General damages.
 - ii. Special damages.
 - iii. Costs of the suit.
 - iv. Interest on (a) (b) and (c) at court rates.
3. The brief facts of the case are that on September 9, 2018, two couples who are the plaintiffs herein bought online multi-city return tickets from the 1st defendant's website. The itinerary issued on purchase of the tickets was Nairobi to Toronto departing on October 6, 2018 to arrive in Toronto on October 7, 2018 and the return, Montreal (YUL) to Nairobi departing from Montreal on October 15, 2018 transiting through Paris (Charles De Gaulle Airport) and Amsterdam (Schiphol Airport) for onward trip to Nairobi.
4. During the return trip, they departed from Montreal Canada aboard an Air France flight (AF0349) to whom the 1st defendant had off-loaded them. Upon arrival at terminal 2F Charles De Gaulle (CDG) Airport Paris France on 16/10/2018, they were stopped by the French Immigration officials on the basis that they were illegally in a domestic- terminal as opposed to an international terminal without a Schengen Visa. As a consequence, the plaintiffs were detained in holding cells where they claim to have suffered inhumane, humiliating, cruel, degrading and traumatizing treatment before being deported from France on October 17, 2018 aboard a Kenya Airways flight number 113.
5. They contended that the trauma worsened their pre-existing medical conditions that Dr Erastus and Mrs Grace Kinuthia had, leading to Dr Erastus to seek specialized treatment and medication at a cost Kshs 96,900/-. Further, Dr Erastus and his wife Priscilla suffered additional trauma of lost baggage and costly travel from Meru to Nairobi for a Week after their return in an attempt to retrieve the said bags. This led to loss of working hours and neglect of duties at their 44-bed private hospital in Meru leading to loss of income on an average of Kshs 816,000/- per day.
6. It was thus averred that the defendants illegally breached their contractual obligations to the plaintiffs under the contract of carriage and the said breach was particularized as follows:
 - i. Deviating the itinerary confirmed at the point of purchase of air tickets.
 - ii. Off-loading the plaintiffs to Air France contrary to earlier arrangements.
 - iii. Off-loading the plaintiffs at a domestic terminal in Paris France.
 - iv. Failing to ascertain that the plaintiffs had legal documents to land at the domestic terminal in Paris France.
 - v. Failure to inform the plaintiffs of his rights regarding landing at the domestic terminal in Paris France.



- vi. Neglecting and abandoning the plaintiffs at unintended destination and failure to follow up and provide remedial measures.
7. In HCCC No 12 of 2019, it was further pleaded that the fact of deportation and imprintation of that fact on Dr Erastus' passport has defamed him directly and/or by innuendo by giving the impression that he is a criminal, a fugitive unworthy of international travel, having sought illegal immigration to a foreign country, and is unworthy of practise as a doctor or belonging to National and/or International professional societies.
8. The plaintiffs claimed that upon demand and notice of intention to sue, the defendants admitted liability and wrongdoing but only offered a pittance of 200 Euros for suffering and 100 Euros for the lost baggage to each one of them.
9. The defendants denied the claim through a joint statement of defence. They asserted that the plaintiffs have not demonstrated that the defendants' actions or omissions were the direct cause of their misfortune. They contended that they had no control over the requirements and actions of the French immigration authority hence they are not liable for the misdeeds of the French officials.

The Plaintiffs Evidence

10. Priscilla Nduku Wangai, the plaintiff in HCCC No 15 of 2019 and Dr Erastus Ndegwa Wangai, the plaintiff in HCCC No 12 of 2019 testified on behalf of the plaintiffs.
11. PW1, Priscilla Nduku Wangai adopted her witness statement dated January 18, 2019 as her evidence in chief and adduced her list of documents filed on January 21, 2019 in support. It was her testimony that she was the one who booked four return tickets from the KLM website for the four plaintiffs; that for the Outward trip, the original flight number departing from Montreal was Air France Flight KL2441 but was changed to Air France Flight AF 0349 a short while before boarding.
12. She testified that they obtained the requisite visas for Canada prior to purchasing the tickets, and there was no mention of a Schengen Visa requirement for any layovers in France at the time of purchase. During the outward trip, they had a layover of 6 hours 15 minutes at terminal 2E CDG Airport in Paris and no airline official brought up the need for a Schengen visa as they transited to Toronto, Canada.
13. On the return trip, it was her evidence that they departed Montreal Canada on Monday October 15, 2018 aboard an Air France Flight (AF 0349) to CDG Airport where they arrived on October 16, 2018 at 11:30 hrs at terminal 2F as indicated in their boarding passes and tickets; that they had 2hrs 30min lay over before the boarding time for Amsterdam but the boarding passes did not show the boarding gate for that next flight.
14. It was her further testimony that there were no digital electronic monitors at terminal 2F to check the gate number for the next flight, but upon enquiry from a security officer the boarding passes were scanned and directed them to gate F33; that when they presented their passports, French Immigration Officials terminated their trip on the basis that they were not in possession of a Schengen Visa. She further testified that it was the first time in their entire trip that the requirement for a Schengen Visa was brought up and their efforts to go back to Air France desk for assistance were blocked, and their passports were confiscated and made to wait in the police post at terminal 2F from 11:50 to 15:00 without any explanation. Their efforts to know what crime they had committed was met with arrogance and simple answer "No crime, its Air France". She further stated that upon thorough searching of their luggage, they were then detained in a holding cell at the airport for over 8 hours without food, water or toilet facilities upon which they phoned the KLM office in Paris to resolve



- the apparent detention but were merely instructed to obtain visas from the Kenyan Embassy with no further explanation.
15. It was her further testimony that Dr Erastus and Mrs Grace who have serious health conditions were denied access to their medications, which were in the confiscated luggage, but at some point, they managed to contact their family and friends who in turn contacted the Kenyan Embassy in France. A Kenyan Embassy official attempted to assist them and even made arrangements with Air France to move them to a hotel nearby where they could spend the night but the French Immigration officials instead transferred them to a holding cell at a corner of the airport, where they spent the night, and about midday on Wednesday October 17, 2018, they were deported to Nairobi aboard Kenya Airways flight number 113. She averred that the entire ordeal was exceedingly cruel, horrible, degrading and inhumane and violated their human rights and in addition, that the four of them have now been declared persona non grata and are banned from travelling to France and possibly all other Schengen countries.
 16. Further, PW1 asserted that all the four plaintiffs are well travelled and command high respect in the local communities where they live and with the Kenya government. In this regard, she stated that she and Dr Erastus are medical professionals and successful business people who not only own and operate a 44-bed capacity private hospital but are also involved in the real estate industry. On the other hand, Mr Paul Kinuthia, the plaintiff in HCCC No 13 of 2019 and his wife Grace are professional teachers who own a chain of private schools in Machakos county and are also involved in the real estate industry with several rental houses.
 17. During cross-examination, PW1 stated that she is well versed in visa requirement as she has travelled by air severally to different international destinations prior to the ordeal subject of this suit. She confirmed that she read the legal notice on the air ticket but stated that they did not have visas for France because they had never intended to go to France. On their return trip on October 15, 2019, they were expecting to board KLM flight No 2241 from Montreal Canada to Nairobi but before checking in time, they got an alert that their flight had been changed to Air France and that there would be a 45 minutes' delay. She further stated that upon getting to Paris, they needed to connect to Amsterdam with a KLM flight operated by Air France. They were to transit through international terminal but were taken through a domestic terminal and no airline official came to their rescue. Lastly, PW1 admitted that they had not provided any proof of the hospital they run in Meru with her husband Dr Erastus.
 18. PW2 was Dr Erastus Ndegwa. He also adopted his witness statement dated January 18, 2019 as his evidence in chief and adduced his list of documents filed on January 21, 2019 in support. PW2 wholly reiterated PW1's testimony and reiterated that he is a medical doctor by profession specializing in obstetrics and gynecology. He averred that Priscilla Wangai is his wife, Paul Kinuthia is his brother in law and Grace Kinuthia is a sister to his wife. It was his testimony that he has a heart condition with an inserted pacemaker and a coronary stent and is also on treatment for diabetes, high blood pressure and anticoagulant therapy. He stated that when they were detained at CDG Airport in France, he was denied access to his regular medication which was in his luggage. It was his testimony that on realizing that they were going to spend the night at the detention cell, they requested the French Immigration officials to help him and Grace, who suffers from deep vein thrombosis, get their medication and provide the four of them with some food and water. Each one of us was given a small packet of highly salted potato crisp and bottled mineral water but no medication was provided to them the entire time, which made their health to deteriorate.
 19. PW2 further testified that he is a member of several international professional bodies such as Societè Internationale de Chirurgie Orthopédique (Sicot), International Federation of Gynecologist and Obstetricians (FIGO), Association of Surgeons of East Africa (ASEA), East Central and Southern



Africa College of Obstetrics and Gynecology (ECSACOG). He contended that due to the deportation ban, he cannot attend international scientific conferences which is a great loss to his future career and income and a block to his continuous medical education outside Kenya. He also asserted that the worst part of the ordeal was that they had chosen this trip to celebrate his 70th birthday starting in Canada and hoping to climax it at home on 17th October but this was never to be because he spent his birthday being 16th October in police custody.

20. It was also PW2's testimony that their 44-bed capacity private hospital in Meru has 43 employees and over 25 corroborations and the news that they were incarcerated in France severely dented their image, credibility, dignity and working relationships. Further, PW2 averred that he was greatly inconvenienced as he had to spend 5 more days moving between Nairobi and Meru to track his lost luggage and his life was put at risk because of driving at the time under high stress caused by the ordeal in France. In addition, PW2 stated that the France Immigration stamp on his passport banning him from transiting through Schengen countries means he may no longer be able to visit his children who are studying overseas in Vancouver Canada.
21. On cross-examination, PW2 stated that he could not take his medication regularly as required while held by the Immigration in France and this put his health at a great risk.

The Defendant's Evidence

22. The defendant called one witness DW1, Hildabeta Amiani who relied on her witness statement dated September 20, 2021 and the defendant's list of documents filed on even date. She testified that she works as a sales manager for the 2nd defendant and has been in the said position for 22 years. It was her testimony that the plaintiffs did not require a Schengen visa for their outbound flight but needed it for the return leg. Further she averred that upon booking their flights, the plaintiffs accepted KLM's general conditions of carriage for passengers and baggage as indicated on the legal notice that appears in the air tickets they purchased. She stated that under article 18.1 (a) of those conditions, the obligation was on the plaintiffs to procure all necessary visas and travel documents and the defendants are not liable for the consequences suffered by the plaintiffs for failing to comply with their obligations.
23. During cross-examination, DW1 stated that she was neither at the airport nor personally involved in the travelling of the plaintiffs or the checking procedures at the Airport. She stated that KLM's general conditions of carriage can be accessed by clicking a link on their website. She averred that a visa is required at every point of travel and noted that if a passenger does not have the requisite travel documents, immigration gets involved and then instructs them on whether to allow the passenger to proceed or not. However, DW1 could not tell whether their representatives in Canada had checked the plaintiffs documents on their outward destination to France. She confirmed that the plaintiffs herein were not required to obtain Schengen visas as they were not entering France but would simply remain at the international terminal. She also admitted that upon landing at the CDG Airport in France, the passengers needed to board the next flight to Amsterdam but had to go through the Schengen Area. It was also her testimony that since the plaintiffs were travelling through two transits in Schengen states, they were required to have transit visas. However, she stated that a passenger cannot be arrested at an international terminal hub.
24. In addition, DW1 stated that the problem arose due to France Airline offloading the passengers in a domestic terminal rather than an international one. DW1 however insisted that according to the original tickets, the plaintiff Flight No 0349 - France Air landed at an international terminal 2E not 2F. She averred that they got to know of the plaintiffs problems after the passengers arrived in Nairobi and that they send an offer to compensate the passengers for the problems they underwent, but the plaintiffs rejected the same.



Analysis and Determination

25. The court has carefully considered the parties' pleadings, evidence, documentation adduced in court as well as the submissions and numerous authorities cited by the parties. The court flags two issues as falling for determination: -
- a. Whether the defendants breached their contractual obligations to the plaintiffs.
 - b. Whether the defendants defamed Dr Erastus Ndegwa Wangai through his deportation and the imprintation of the deportation stamp on his passport.
 - c. Whether the plaintiffs are deserving of the reliefs sought?

Whether The Defendants Breached Their Contractual Obligations To The Plaintiffs.

26. There is no doubt that the plaintiffs entered into contracts of carriage by air with the defendants herein by virtue of article 3(2) of the [*Convention for The Unification of Certain Rules Relating to International Carriage By Air \(Warsaw Convention\)*](#) as amended at The Hague 1955 which provides *inter alia* that:

“The passenger ticket shall constitute prima facie evidence of the conclusion and conditions of the contract of carriage...”

27. The contract is evidenced by the four flight tickets numbers 07xxxx5 (Dr Erastus), 07xxxxx1 (Grace Ngina), 07xxxx9 (Paul Kinuthia) & 07xxxxx7 (Priscilla) adduced by the plaintiffs. The 1st defendant does not deny that it issued the four tickets, which fact is clear from the face of the tickets. The plaintiffs claim that the breach arose on their return trip which according to the flight tickets was supposed to be a two days trip beginning at Montreal (YUL) with two lay overs in Paris (CDG) and Amsterdam (Schiphol) and ending in Nairobi. From the return flight schedule on the tickets, it is indicated that the plaintiffs were to depart from Montreal on October 15, 2018 at 22:15 aboard flight number KL-2441 operated by Air France (the 2nd defendant herein) and arriving in CDG Airport in France on October 16, 2018 at 10:50.
28. The plaintiffs witnesses testified that on the return leg, the defendants changed their flight from Montreal and they ended up at a domestic terminal at CDG Paris which led to their detention and deportation by French Immigration for lack of a Schengen visa.
29. As a general proposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107(1) of the [*Evidence Act*](#) (chapter 80 of the Laws of Kenya), which provides:
- “107.(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
30. The law is also clear that the evidential burden of proving any particular fact rests on the party who desires the court to believe in its existence (See [*Isca Adhiambo Okayo v Kenya Women's Finance Trust*](#) [2016] eKLR). That is captured in sections 109 and 112 of the [*Evidence Act*](#) as follows:
- “109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.



112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

31. Indeed, the Air France Boarding Tickets adduced by the plaintiffs show that instead of flight number KL-2441 which was indicated in their flight tickets at the point of booking, the plaintiffs left Montreal on October 15, 2018 at 22:20 aboard flight number AF0349 operated by Air France and they were to land at Paris (CDG) terminal 2F.

32. However, nothing has been placed before this court to prove that terminal 2F at CDG Airport in Paris was a domestic one. It is noteworthy that in a letter dated November 16, 2018 from Priscilla (PW2) to the defendants which was tendered in evidence, she acknowledges at line 13 thereof that their research revealed that terminal 2F was for flights to Schengen States. In the court’s view, that alone is proof that the terminal is a domestic one meant for flights within the boundaries of France.

33. The plaintiffs also claimed that the defendants admitted liability. However, from the series of email correspondence from the defendants’ representative named Ms M. Aguib, the court is unable to see any admission of liability. What is evident from the same is that the defendant apologized for the unfortunate events that the plaintiffs underwent but reminded them that they should have acquired transit visas to facilitate their travel through the Schengen states. This is in tandem with the testimony of DW2 during cross where she confirmed that the plaintiffs did not require Schengen visas as they were not entering France but needed transit visas because they were transiting through two Schengen countries.

34. What then is the difference between a Schengen Visa and a Transit Visa? According to wikipedia:

“The Schengen Visa is a visa for the Schengen Area, which consists of most of the European Economic Area, plus several other adjacent countries. The visa allows visitors to stay in the Schengen Area for up to 90 days within a 180-day period. The visa is valid for tourism, family visits, and business.”

35. A transit visa on the other hand, according to wikipedia, is used for:

“Passing through the country of issue to a destination outside that country.”

36. From the France Visas website (<https://france-visas.gouv.fr/airport-transit-visa>), an Airport Transit Visa allows one to remain in the airport’s international zone while waiting for the transfer flight to their final destination, if the final destination is located outside the Schengen area. The website further provides that nationals from particular states requires an Air Transit Visa if they:

“ 1) ... are travelling from an airport in a country located outside the Schengen Area and staying in the international zone of an airport located in metropolitan France while waiting for your connection to your final destination, which is also located outside the Schengen Area.

2) ... are travelling from an airport in a third country (not a member of the European Union or does not enjoy the European Union right to free movement) and you will remain in the international zone of an airport located in a French overseas department, community or territory while waiting for



your connection to your final destination, which is also located in a third country.”

37. From the foregoing, there is no doubt that the plaintiffs having travelled from Canada were required to have Air Transit Visas in order to remain in the international zone at the CDG Airport in Paris. In their submissions, the plaintiffs blame the defendants for failing to fulfill their obligation to ensure the travelers had proper travel documents. As earlier stated, the flight tickets purchased from the defendants was the basis of the contract between the plaintiffs and the defendants. The ticket embodies a legal notice which clearly states that:

“Upon booking your ticket, you accepted KLMs General Conditions of Carriage for passengers and baggage (“General Conditions of Carriage”) and you indicated that you have taken notice of the provisions as contained in the document entitled “Important Travel Information.” The legal provisions pertaining to your carriage can be viewed online at www.kim.com.”

38. PW2 admitted that she was aware of the said legal notice which this court finds that sufficiently incorporated the 1st defendant’s General Conditions of Carriage for passengers and baggage (“General Conditions of Carriage. During cross examination, DW1 testified that the said conditions can be accessed by clicking a link on the website where the tickets were purchased from. The court has had an opportunity to access the link and article 18.1 of the conditions states that:

- “(a) Passengers are required, under their own responsibility, to procure all the specific documents, visas and permits required for their journey... and must also comply with all provisions of law (laws, regulations, decisions, requirements and provisions) of the departure, arrival and transit states, as well as with the carrier’s regulations and the instructions relating thereto.
- (b) The carrier shall not be liable for the consequences suffered by passengers in the event of failure to comply with the obligations referred to in article 18.1 (a).”

39. Article 18.2 further provides that:

“Passengers are required to present entry, exit and transit documents, as well as health and other documents required by the applicable regulations (laws, regulations, decisions, requirements and provisions) in the departure, arrival and transit States. Passengers are moreover required to hand over to the carrier and/or allow the carrier to make a copy of said documents, if required, or to record information contained therein.”

40. The moment the plaintiffs purchased their four tickets from the 1st defendant’s website, they accepted those conditions and the obligation to procure all the necessary visas and travel documents rested on them. Indeed, it suffices to point out that the plaintiffs in their pleadings and their testimonies boast of being well travelled to various international destinations and well informed hence should have been in a position to know better.

41. Consequently, the court finds that the defendant cannot be held liable for the consequences suffered by the plaintiffs due to their failure and negligence to fulfill their own obligations under their respective contracts of carriage.

42. Lastly, the court notes that whereas the plaintiffs claim that they were deported back to Nairobi on October 17, 2018, none of them adduced anything in evidence to prove that. The passport pages



contained in their respective bundles of documents do not contain any deportation stamp and neither was the court referred to any during the hearing of the case. The plaintiffs have not therefore proved that they were deported from France. Deportation of a person from a country to another is a very serious action, and so are the consequences. Strict proof of such deportation ought to have been proved to the required standards of a civil suit. It is not enough to just state; sufficient evidence to the satisfaction of the court is necessary. The plaintiffs failure to tender to the court the stamped passports with the said deportation stamp of the defendant and or any other endorsement to that effect cannot be ignored. Without the said endorsement stamp on the passports, the plaintiffs claim that they were deported, and all the innuendo testified in respect of the plaintiffs cannot attract any compensation; it remains as hearsay and pigmentation of their imaginations.

Whether The Defendants Defamed Dr. Erastus Ndegwa Wangai Through His Deportation And The Imprintation Of The Deportation Stamp On His Passport.

43. The defamation claim only arose in HCCC 12 of 2019 but the plaintiffs did not tender any submissions on this issue. To that end, the court notes that the said plaintiffs did not plead in their plaint the actual defamatory publication by the defendants. In *Veronica Wambui v Michael Wanjohi Mathenge* [2015] eKLR, Mativo J. cited the case of *Wright v Clements* (1802)3 in which it was held that held that:

“The law requires the very words of the libel to be put out in the declaration in order that the court may judge whether they constitute a ground for action.”

44. Indeed, it suffices to reiterate that the court has not even been shown the passport containing a deportation stamp imprinted by the defendants herein or at all. Further and in any event, Dr Ndegwa did not place anything before this court to show that the purported deportation stamp was defamatory to him. Save for the oral testimony of his wife PW2, there is no other evidence to show his professional standing which may have been ruined as a result of the alleged deportation.

45. In the premises, the court finds that Dr Erastus’ claim for defamation has also not been proven to the required standard and thus must fail.

Whether The Plaintiffs Are Deserving Of The Reliefs Sought

46. Having found as above, it follows that the plaintiffs have not proved their cases to the standard required in civil cases. in the circumstances, the court finds that none of the plaintiffs are entitled to any of the reliefs sought in their respective plaints.

Disposition

47. Consequently, this suit is hereby dismissed.

48. Each party shall bear own costs of the suit.

49. This order shall apply to the other three consolidated suits namely HCCC No 13 of 2019, HCCC No 14 of 2019 and HCCC No 15 of 2019.

Orders accordingly.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 18TH DAY OF MAY, 2023.

JANET MULWA

JUDGE.

