



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, MUSINGA & J. MOHAMMED, JJ.A.)

CIVIL APPEAL NO. 88 OF 2008

BETWEEN

DEBONAIR TRAVEL LIMITED.....1ST APPELLANT

KENNEDY GICHUHA CHEGE.....2ND APPELLANT

AND

MOHAMMAD HASSIM PONDOR

ABDULRAZAK KHALFAN (*Both suing on behalf of the*

International Air Transport Association – IATA.....1ST RESPONDENT

MERCANTILE LIFE & GENERAL ASSURANCE CO. LTD.....2ND RESPONDENT

BERITA KASWII GICHUHA.....3RD RESPONDENT

(An appeal from the Ruling and Decree of the High Court of Kenya at Nairobi (M. A. Warsame, J.) dated the 12th day of March 2008

in

H.C.C.C. No. 130 of 2006)

JUDGEMENT OF THE COURT

This is an appeal from the Ruling of the High Court (**Warsame, J.** – [as he then was]) whereby the High Court struck out the appellants’ defence and entered judgment for the respondents for Kshs. 23,996,591.00 and USD 2,864.52 together with interest and costs.

By an amended plaint filed on 9th January 2007, **Mohammad Hassim Pondor**, the 1st respondent herein, an attorney of International Air Transport Association (IATA) and the 2nd respondent, an insurance

company claimed from the 1st appellant, an agent of IATA, and from 2nd appellant as Managing Director of the 1st appellant, and from one Berita Kaswii Gichura, a Director of the 1st respondent, Kshs. 23,996,791.00 and USD 2,684.52 which the 1st respondent as agent of IATA had allegedly failed to pay to the 1st respondent in breach of Passenger Sales Agency Agreement dated 6th June 2001.

The respondents averred *inter alia*, that by the agreement of 6th June 2001 between each IATA member and the 1st appellant, IATA appointed the 1st appellant as its travel agent for the sale of airline ticket in Kenya whereby the 1st appellant was authorized to sell air passenger transportation on the services of IATA and on the services of other air carriers as authorised by IATA.

The particulars of the contract were pleaded in paragraph 7 thus:

“(a) The 1st defendant would issue a Traffic Document immediately it received money for specified passenger air transportation sold under the agreement and it would be responsible for the remittance to the Carrier of the amount payable in respect of such Traffic Document.

1. All services sold pursuant to the Agreement would be sold on behalf of the Carrier and in compliance with the Carrier’s tariffs, conditions of carriage and the written instructions of the Carrier as provided to the Agent.

2. All monies collected by the 1st Defendant for transportation and ancillary services sold under the Agreement, including applicable remuneration which the Agent is entitled to claim there under, are the property of the Carrier and must be held by the 1st defendant in trust for the Carrier or on behalf of the Carrier until satisfactorily accounted for to the Carrier and settlement made.

(d) The 1st defendant would maintain adequate records and accounts, together with supporting documents, recording the details of all transactions affected under the Agreement. Such records to be preserved for at least 2 years from the date of the transactions to which they relate and shall be available for inspection or for copying by the Carrier whose Traffic Documents had been issued.”

The respondents further pleaded that, by a Deed of Indemnity dated 3rd October 2002 between the 2nd respondent (Insurance Company) and 2nd appellant and Berita Kaswii Gichuha, it was agreed that by the 2nd respondent effecting an insurance policy to the 1st appellant, the two would keep the 2nd respondent indemnified against *inter alia* claims and defaults arising out of and as a result of default by the 1st appellant. The respondents pleaded that in breach of the agreement dated 6th June 2001, the 1st appellant has wrongfully failed to pay Kshs.23,496,791.00 and USD 2,864.52.

The two appellants filed a joint defence. They averred in paragraph 4 thereof

thus:

“In reply to paragraph 6 of the plaint, the 1st defendant avers that it is not aware of any written agreement dated 6th June 2001 and puts plaintiffs to strict proof of the same. The 1st defendant further avers that by a letter dated 31st May 2001, the International Air Transport Association approved an application by the 1st defendant to act as an agent with effect from 6th June 2001 and it was pursuant to the said letter that the 1st Defendant commenced operations as an IATA agent to date.”

The 1st appellant denied the particulars of the contract and averred that as neither respondent were privy to the alleged agreement dated 6th June, 2001 neither respondents is entitled to make a claim under the alleged agreement.

Regarding the Deed of Indemnity, the appellants averred that for every ticket issued by the 1st appellant, as agent of the 1st respondent, an insurance premium was paid to the 2nd respondent under the insurance cover – a total of USD 9,187.00 which the 2nd respondent has not accounted for. The appellants further averred that they were not aware of the alleged Deed of Indemnity and of the sums claimed.

Berita Kaswii Gichuha the 3rd defendant in the suit and who has not appealed, filed a separate defence which was later amended. In the amended defence, she denied having agreed to indemnify the 2nd respondent and averred that she ceased from being a director of the 1st appellant in September 2004, and informed the 1st respondent, that she is not aware of the sum claimed; that she is not indebted as claimed; that the non payment was not an act of default but fraud by the 1st appellant. She gave the particulars of fraud committed by the 1st appellant.

The application to strike out the defence was brought under **Order VI Rule 13(1)(b) and (c) and 16 of Civil Procedure Rules** and was based on the grounds that the defences were an abuse of the process of the court, scandalous and frivolous as no proof of payment of the demanded amounts had been shown. A copy of the Power of Attorney by which IATA gave authority to the 1st respondent to act on its behalf; the passenger sales agency agreement dated 6th June 2001, the Deed of Indemnity dated 3rd October, 2002 a breakdown of tickets sold to various airlines as per agents, billing analysis and the tabulated breakdown in respect of the amounts due from various airlines were annexed to the supporting affidavit sworn by the 1st respondent.

The 2nd appellant filed a replying affidavit in which he deposes *inter alia*, that he has no records of the Deed of Indemnity and the agreement dated 6th June 2007 as they were not availed to him after signing; that his advocates served a notice to produce the said documents for inspection but the notice was not complied with; that he does not recall signing the documents; that the 2nd respondent has not disclosed a valid claim; that the amounts in the plaint, demand letter and in the agents billing analysis do not tally and that the amounts claimed cannot be identified from the agent's billing analysis. He deposed further that the defence of the appellant raises triable issues as regards the execution of the Deeds of Indemnity and the alleged agreement and also as regards the amounts claimed. The 3rd defendants in the suit – Berita Kaswii Gichuha also filed a replying affidavit to which she annexed a letter of resignation and notice of change of Directors. She stated in the affidavit, amongst other things, that there was no contractual relationship between her and the 1st respondent; that the 1st respondent was indemnified by the 2nd respondent and has no claim of its own to enforce against her, that the 2nd respondent had not disclosed a claim against her and that she signed the Deed of Indemnity as a director of 1st respondent and not in her personal capacity.

The learned judge considered the pleadings, the respective affidavits and the respective submissions and made findings in essence *inter alia*, that:

- (i) The 1st defendant (1st appellant) was appointed as agent of the 1st plaintiff (1st respondent) to transact business on behalf of various carriers who form members of the first defendant.
- (ii) The first defendant issued tickets to various passengers who were carried on board by 14 different airlines. It is not the case for the 1st defendant that it did not sell the tickets enumerated in the billing analysis.
- (iii) Carriers allowed passengers to be carried on transportation to various destinations on the basis of and by virtue of the agreement dated 6th June 2007.
- (iv) The billing analysis shows the complete transaction of all tickets sold by the 1st defendant on behalf of the principals of the 1st plaintiff. No attempt has been made to deny that the accounts do not relate to the transactions between the 1st defendant and the 14 carriers mentioned in the statement.

- (v) There is no indication that the said tickets were paid for by 1st defendant
- (vi) The defendants opted not to question on the Agreement, Deed of Indemnity and whether any of the tickets depicted on the billing analysis was paid for.
- (vii) The allegations contained in the defences of the 1st and 2nd defendants were general denials and at times admissions of facts alleged in the plaint. The 1st defendant did not respond to the specific allegations on the sale of tickets and the amount due to each particular carrier mentioned.
- (viii) There is no evidence that the 2nd defendant notified her resignation to 2nd defendant or that the resignation was acted upon by the Registrar of Companies. The indemnity was personal to her and not transferrable to any other person who takes her position in the company.
- (ix) The defences put forward by the defendants do not raise one triable issue or *bona fide* issues that must await a full trial.

The first four grounds of appeal relate to failure by the respondent to comply with a notice to produce documents for inspection. The first ground states that the judge erred in law in failing to consider the respondent's failure to comply with the notice to produce documents. This is the only ground which was argued in the written submissions of the appellant. In the other grounds which were not argued the appellants contend, in essence that, non-compliance with the notice to produce rendered the documents inadmissible and hence the court erred in law in accepting the documents in evidence.

It is true that the appellants' advocates had issued a notice to produce dated 5th May 2006 to the respondents' advocates to produce for inspection the agreement dated 6th June 2001 and the Deed of Indemnity dated 3rd October 2002. The 1st appellant pleaded in the defence that he was not aware of the agreement while the 2nd appellant also pleaded that he was not aware of the Deed of Indemnity. The 2nd appellant had further deposed in his affidavit in reply to the application that he does not recall signing the two documents.

By section 68 (1) (iii) of the Evidence Act, secondary evidence may be given of the existence, condition or content of a document if the person legally bound to produce it fails or refuse to produce it after he has been given a notice to produce it. Thus, as correctly submitted by the respondents' counsel, non-compliance with notice to produce does not necessarily render the documents inadmissible but only entitles the party who has issued the notice to give secondary evidence of the existence condition or content of such document.

The remaining eight grounds of appeal relate to the merit of the respondent's case. The appellants' counsel only argued ground 5 which states:

“The learned judge erred in law and in fact by expecting the appellants to precisely defend a claim by 1st and 2nd respondents which was inadequately pleaded and insufficiently proved.”

The appellants specifically took issue with the agents' billing analysis and faulted the learned judge for failing to evaluate them in view of the inconsistencies and inaccuracies pointed out by the appellants in their replying affidavit.

The learned judge relied on **Muguga General Stores v Pepco Distributors Limited (1988-1992) 2 KAR 89** where the Court said:

“First all a mere denial is not a sufficient defence in this type of case. There must be some reasons why the defendant does not owe the money, either there was no contract or it was not carried out or 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.”

By s. 108 of the Evidence Act, the burden of proof in a suit or proceedings lies on the person who would fail if no evidence at all was given on either side. Further, by s. 112 of the Evidence Act, in Civil Proceedings the burden of proving or disproving a fact within the special knowledge of a party is upon that party.

This was a case dependent on documents. The respondents pleaded that the 1st appellant was appointed as agent of IATA by virtue of a Passenger Sales Agency Agreement dated 6th June 2001 to sell air passenger transportation and that the 1st appellant was required, among other things, to issue a traffic document immediately it received money for a specified passenger. The 1st respondent was also required to keep adequate records, accounts and supporting documents which were to be preserved for a period of two years. The 1st appellant while pleading that it was not aware of the specific agreement stated that it was appointed as agent of IATA with effect from 6th June 2011 by virtue of a letter dated 31st May 2001. Nevertheless, the 1st appellant did not produce the letter or plead the terms of that contract. The 1st appellant did not deny that it sold the air tickets nor produce the records of transactions and accounts in question. It did not also claim to have paid the sums claimed or any part of it. The appellants pointed out to inconsistencies of the sum claimed in various documents and alleged that there were triable issues relating to the execution of Deed of Indemnity, the agreement dated 6th June 2001 and as regards the amount claimed. In the absence of the appellant's own documents such as the billing analysis and accounts, the claim that there were inconsistencies and inaccuracies was unsubstantiated. As the learned judge correctly found, the 1st appellant did not rebut in the defence or in the replying affidavit the specific allegations on the sale of tickets and the account due to each particular carrier. All the facts relating to the sale of tickets, the accounts and the records were within the special knowledge of the 1st appellant as the agent handling the transactions.

The appellants dismally failed to discharge the burden of disproving the respondents' affidavit evidence and documents.

In conclusion, the defence of the appellants did not raise any positive or genuine defence to the claim and was evidently evasive. We are satisfied that the learned judges reached the correct decision. For these reasons, the appeal is dismissed with costs to the respondents.

Dated and delivered at Nairobi this 16th day of October, 2015.

E.M. GITHINJI

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is

a true copy of the original

DEPUTY REGISTRAR