



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: BOSIRE, WAKI & ONYANGO OTIENO JJ.A)
CIVIL APPLICATION NO. NAI. 106 OF 2008

BETWEEN

DEBONAIR TRAVEL LTD.....1ST
APPLICANT
KENNEDY GICHUHA CHEGE.....2ND
APPLICANT

AND

**MOHAMMMAD HASSIM PONDOR (Suing on behalf of The Internation Air
Transport Association: IATA)**

**ABDULRAZA KHALFAN (Suing on behalf of The International AirTransport
Association: IATA)**

MERCANTILE LIFE & GENERALASSURANCE CO. LTD.....1ST
RESPONDENT
BERITA KASWII GICHUHA.....2ND
RESPONDENT

**(An application from the Ruling and Decree of the High Court of Kenya at Nairobi (Warsame, J.)
dated 12th March, 2008**

in
H.C.C. NO. 130 OF 2006

RULING OF THE COURT

Before us is an application under **rule 5(2)(b)** of the Court of Appeal Rules brought by **Debonair Travel Limited** (the 1st applicant) and its Managing Director one **Kennedy Gichuha Chege** (2nd applicant). **Mohammad Hassim Pondor** and **Abdulrazak Khalifan** (described as suing on behalf of The International Air Transport Association – IATA) have been named as the 1st respondents with Mercantile Life and General Assurance Company Ltd as the 2nd respondent and **Berita Kaswii Gichuha** as the 3rd respondent.

The applicants are praying for an order of stay of the decision of the High Court which was given on 12th March 2008, pursuant to an application under **O.6 rule 13 (1)(b)(d)** and **16** of the Civil Procedure

Rules. In that application the 1st and 2nd respondents as the plaintiffs in **Nairobi High Court Civil Case No. 130 of 2006** had prayed for an order striking out the joint defence of the applicants allegedly for disclosing no reasonable defence and additionally the 1st and 2nd respondents prayed for summary judgment against the applicants in the sums of **Kshs.23,996,791** and **US\$2,864.52**, both of which amounts were the subject matter of their suit. The High Court (Warsame J.) obliged and entered judgment as prayed and thus provoked the application before us.

Rule 5(2)(b), aforesaid, provides that the Court may:

“In any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, (the court may) order a stay of execution, an injunction or a stay of any further proceedings on such terms as the court may think just.”

We have no evidence on record as to whether such a notice was filed. What we have though is an averment in the 2nd applicant’s affidavit that both applicants have already filed an appeal to wit Civil Appeal No. 88 of 2008, challenging the High Court decision on about ten grounds. Ordinarily the lodging of a notice of appeal sets in motion the appellate process in this Court. We suppose that as the appeal has been filed it may be assumed that the appeal was properly commenced by lodging a notice of appeal as required under **rule 75** of the Court of Appeal Rules.

The relationship between the parties started when on 6th June 2001, IATA, through its Director Distribution Services Europe, Middle East & Africa, one R. Gesinus, entered into a Passenger Sales Agency Agreement on behalf of Air Carriers, with Debonair Travel Ltd, through its Managing Director Kennedy Gichuha Chege as agent of the carriers in accordance with the Sales Agency Rules, in effect in the countries of the agent’s location(s). By that agreement the agent was authorized to sell air passenger tickets on behalf of the carriers in compliance with the carrier’s tariffs, conditions of carriage and written instructions of the carrier as would be provided to the agent.

By clause 7:1 the agent agreed to remit to the carrier all the amounts payable to the carrier in respect of any travel document it issued on behalf of the carrier. And by clause 7:2 all monies collected by the agent for transportation and ancillary services sold are the property of the carrier and would be held by the agent in trust for the carrier or on behalf of the carrier until satisfactorily accounted for by the carrier and settlement made.

By a Deed of Indemnity executed on 3rd October 2002 made between Mercantile & Life Assurance Company Ltd, the 1st applicant, the former agreed to insure the latter by virtue of the Passenger Sales Agency Rules of IATA, to which the agency is a member, to all times keep the Insurance Company fully indemnified against all actions, proceedings, claims, demands, losses and default arising howsoever in the event of the occurrence of:

- (1) Where the agency had defaulted in remitting sale of Traffic documents.
- (2) Where the agency collects and retains monies admittedly and actually owing to airlines.
- (3) ...
- (4) ...

The respondents by their amended plaint filed in the High Court on 9th January 2007 averred, *inter alia*, that the 1st applicant wrongfully failed, neglected and or refused to remit **Kshs.23,996,791** and **US\$2,864.52** in accordance with the above agreement. The amounts are the subjectmatter of **High Court Civil Case No. 130 of 2006**.

In their joint defence filed on 4th May 2006 the applicants, on the main, denied the claim and denied

knowledge of the agreement of 6th June 2001. They also averred that neither plaintiff was privy to the alleged agreement of 6th June 2001, and therefore, neither of them was entitled to make any claim against the 1st applicant. The 1st applicant also denied owing any money to either plaintiff and averred that for every ticket issued by it as agent of IATA, an insurance premium was paid to the insurance company under the insurance cover issued by it. According to records held by it, the total premium which had been paid by the date of the written statement of defence totaled to US\$91,875., for which according to the 1st applicant, the Insurance Company had not accounted to it. Both applicants denied any knowledge of the Deed of Indemnity dated 3rd October, 2002.

In his ruling Warsame J. after analyzing the affidavit evidence before him rendered himself, *inter alia*, thus:

“The plaintiff exhibited the agreement dated 6th June 2001, the deed of indemnity dated 3rd October, 2002 and the billing analysis in support and/or furtherance of its claim but the defendants opted not to question the signatures on the 1st two agreements and whether any tickets depicted in the billing analysis was paid for, therefore in my judgment bare or mere denials do not and cannot amount to an answer to the clear and plain case of the plaintiffs. It is my decision that the defences put forward by the 1st and 2nd defendants does (sic) not sufficiently traverse the allegations of fact made by the plaintiffs. I mean the said defence is not serious to counter the express issues raised by the plaintiffs in support of this application. I do not think a trial would change the frivolous and vexatious allegations put forward by the defendants against a case which is obvious and plain to defeat.”

The learned Judge then proceeded to strike out the defence and accordingly entered judgment as prayed in the amended plaint.

In the application before us Mr. A.B. Shah leading Miss Njeri Mucheru, submitted that under the Passenger Agency Sales Agreement, the 1st applicant had bound itself to remit money to the carrier and not the 1st respondent. For that reason, he said, there was no obligation on the part of the 1st applicant to remit money to IATA. Besides, he said, the 1st respondent could not in reliance over a power of attorney properly file suit on behalf of IATA; which is a body corporate. In his view parties who sue under attorneys must sue in the name of the principal. He cited the case of **Kajabi v. Kayanja** [1967] EA 301.

Related to the foregoing issue is the issue whether the 1st applicant having been appointed by the Carriers, and IATA being agents of a disclosed principal, whether IATA was properly made the claimant.

Regarding indemnity, Mr. Shah submitted that the policy of Insurance issued by the 2nd plaintiff having, by the deed of indemnity, been intended to cover non-remittance it was doubtful whether liability had arisen in absence of either clear evidence of default or of payment by the Insurance Company. In answer Mr. Gichuhi for both respondents referred us to the Passenger Sales Agency Agreement which on its cover page has an endorsement as follows:-

“An Agreement made this 06 June 2001. Between

DEBONAIR. TRAVEL LTD

.....

.....

(herein after called “the Agent”)

AND

Each IATA member (hereinafter called “the carrier”)which appoints the Agent, represented by the Director General of IATA acting for and on behalf of such IATA member.”

Mr. Gichuhi then submitted that the above arrangement was adopted to obviate a multiplicity of suits and to ensure effectiveness. The 1st applicant executed the agreement, he said, and should not make an aboutface and deny its existence.

Mr. Gichuhi pointed out that the respondents already have judgment against Berita Kaswii Gichuha, formerly, the 2nd applicant's wife and who earlier swore an affidavit to acknowledge receipt of money, from sale of air tickets which money the 2nd applicant used to purchase immovable property, which he later transferred to his father. Mr. Gichuhi, also stated from the bar that the respondent had entered into a consent with the 2nd applicant's father to pay to them a sum of Kshs. 4 Million in part settlement of the applicants' indebtedness to the respondents.

In reply, Mr. Shah conceded the 2nd applicant had purchased some property which he later transferred to his father, but added that the property was charged to Equity Bank to secure a loan of Kshs.9 million.

In an application under **rule 5(2)(b)** the court is guided by two broad principles, the first being that for an applicant to succeed he must show that his appeal or intended appeal is arguable or differently stated, that it is not frivolous. The second principle, is that the applicant must show that unless he is granted a stay or an injunction as the case may be the success of his appeal or intended appeal will be rendered nugatory.

It is trite practice that the applicant need not show a multiplicity of arguable points. One arguable point is sufficient to satisfy the first principle. It is also trite law that for an applicant to succeed he must satisfy both conditions.

From the background facts as summarized above, it is quite clear that there are issues which need to be ventilated on appeal. As this application is not the appeal itself we abstain from commenting on the merits or otherwise of the submissions made in support thereof. Suffice it to say that we are satisfied the applicants have satisfied the first principle.

Regarding the second principle, however the decree is for a liquidated sum. It has not been alleged or shown that the respondents will be unable to refund the whole decretal sum if execution were to issue in their favour. The 1st respondent represent several Carriers and the 2nd is an Insurance Company. In view of the foregoing, notwithstanding that the amounts involved are large, we are unable to say that the success of the applicants' appeal will be rendered nugatory unless we grant a stay.

Having come to the above conclusion we think that no useful purpose will be served by discussing the cases cited to us. The principles are quite clear and the case fairly straight forward.

In the result, we dismiss the application dated 22nd May 2008 and filed in court on 23rd May 2008. The respondents shall have the costs of the motion to be borne by the applicants.

Dated and delivered at Nairobi this 7th day of October 2011.

S.E.O. BOSIRE

.....
JUDGE OF APPEAL

P.N. WAKI

.....
JUDGE OF APPEAL

J.W. ONYANGO OTIENO

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR