THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA.

COMMERCIAL DIVISION

HCT – 00 – CC – CS - 151 - 2009

1. **SHAY CAMEO**
2. **MRS SHARON CAMEO**
3. **ALMOG CAMEO**
4. **KEIR CAMEO**
5. **NITZAN CAMEO…………………………………………………………….….PLAINTIFFS**

VERSUS

KENYA AIRWAYS LIMITED……………………………….....................................DEFENDANT

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE

J u d g m e n t

The plaintiffs filed this suit against the defendant Kenya Airways Limited for recovery of special damages of the sum of USD 10,787, general damages, aggravated damages, interest and costs arising from the defendant's failure to carry the plaintiffs to their holiday destination.

The case for the plaintiffs is that in September 2008, the 1st plaintiff contacted Intek Travel Ltd, a travel agent to arrange a new years holiday for his family at a five star resort in Zanzibar, for the period of 27th December 2008 to 3rd January 2009. The plaintiffs aver that the travel agent made the relevant bookings with both the defendant an air carrier and the Zamani Kempinski Hotel by 15th September 2008, over three months before the expected travel date. The plaintiffs aver that the bookings indicated that the 5th plaintiff was an infant of only six months and would require an infant seat belt in the course of the flight.

The plaintiffs aver that on 27th December 2008, the defendant's flight no. KQ 413, scheduled to depart from Entebbe at 3.05pm as indicated on the tickets had not departed by 6.00 pm and no explanation was given by the defendant for this delay. Furthermore, that the connecting flight from Nairobi to Zanzibar was scheduled to depart from Nairobi at 6.40 pm. The plaintiffs further aver that on failure of the defendant's bound flight to depart on time, the plaintiffs were transferred by the defendant onto a Nairobi bound Air Uganda flight to enable them reach Nairobi in time for the connecting flight operated by the defendant, scheduled to reach Zanzibar at 9.00 pm that evening.

The plaintiffs aver that having arrived in Nairobi; they boarded the defendant's flight no. KQ/PW0712 scheduled to depart at 9.00 pm for Zanzibar, and the 1st and 2nd plaintiffs requested for an infant seat belt for the 5th plaintiff, but the air hostess indicated that there were no infant seat belts available but asked them to sit down and be patient. The plane then started to leave the parked position and tax. The

plaintiff aver that they protested this and the pilot stopped the flight and offloaded the plaintiffs after notifying them that they were 'blacklisted', hence abandoning the plaintiffs 10.00 pm without any arrangements for accommodation and transport to the nearest hotel.

The plaintiffs aver that upon failure to get accommodation, the 1st plaintiff contacted the Israeli embassy, which found them accommodation. The plaintiffs further aver that the 1st plaintiff together with the Israeli ambassador to Kenya met the 2nd defendant's duty manager of Nairobi, who confirmed that the plaintiffs would be removed from the black list and also made arrangements for the plaintiffs to travel to Zanzibar on the 6.45 pm flight PW714 on 28th December 2008. Furthermore, that the plaintiffs were issued with boarding passes, but when they attempted to board in on 28th December 2008, they were informed that they had been blacklisted by Precision Airways and were abandoned at the airport. The plaintiffs abandoned their holiday and returned to Uganda.

The plaintiffs aver that the failure by the defendant to transport them to Zanzibar and the failure to provide an infant seat belt amounted to fundamental breach of contract.

On the other hand, the defendant denied the allegations in the plaint and contended that the suit is misconceived, frivolous and vexatious, bad in law and does not disclose a cause of action against the defendant. The defendant denied breach of contract. In the alternative, the defendant contended that on 27th December 2008, flight No. KQ 413 on which the plaintiffs were supposed to travel from Entebbe to Nairobi was delayed for 6 hours due to technical problems and this was communicated to the plaintiffs. The defendant contends that an alternative service was arranged for all the passengers including the plaintiffs, on Air Uganda Flight No. U7 204, which arrived in Nairobi on time to enable the plaintiffs connect to Flight No. PW 712 which was ready to depart to Zanzibar at 9.20 pm and all the plaintiffs were accepted on the said flight. Furthermore, that the plaintiffs were assisted by loading agents of the defendant to transfer their luggage to the said flight.

The defendants contends that everything went well until the plaintiffs on the flight to Zanzibar asked for an infant seat belt for the 5th plaintiff, but were told by the defendant's agent to wait. The defendant contends that the plaintiffs behaved in a manner that compromised the safety of the flight by shouting and acting in a hysterical manner, prompting the defendant's employees to offload the plaintiffs with the help of the Kenyan Police. Furthermore, that the plaintiffs' allegations that the defendant failed to provide an infant safety seat belt are baseless because Precision Air had infant seat belts.

The defendant contended that on 28th December, the plaintiffs' language was off loaded from flight No PW 714, because the said flight was full. Furthermore, that the defendant out of courtesy authorized Intek Travel Agent to refund the sum of the unused tickets for the Nairobi- Zanzibar-Nairobi booking amounting to USD 1307, but the plaintiffs are not entitled to any other reliefs.

At the hearing, the plaintiff was represented by Mr. Sembatya, while the defendant was represented by Mr. Busingye. The parties filed written submissions.

The nature of this trial requires a more detailed review than usual of the pre-trial hearing for reasons I shall give a later in my Judgment.

Scheduling Conference/Preliminary Hearing

The parties filed a joint scheduling memorandum (herein referred to as "the JSM") signed by the lawyers of both parties dated 18th May 2011. The parties in the JSM agreed to the following issues for determination by Court:

1. Whether the plaintiff performed the contract and if not whether it's non performance was justified.

2. Remedies available to the parties.

The issues as framed presented a challenge as they were framed too widely. Order 15 Rule 1 provides

*"…**Framing of Issues***

(1) Issues arise when a material proposition of law or fact is affirmed by the one party and denied by the other

(2) Material propositions are those of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute a defence

(3) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issues

(4) ……

(5) At the hearing of the suit the court shall, after reading the pleadings, if any and after such examination of the parties or their advocates as may appear necessary, ascertain upon what material propositions of law or fact the parties are at variance and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend…"

It was the finding of the Court after reading the pleadings and on examination of the parties and in particular the plaintiffs that the material proposition of fact and law at variance between the parties related to whether a baby seat should have been provided by the defendants to the plaintiffs. The Court then framed the issues

1. Whether a baby seat belt should have been provided?

2. Remedies

The Court then reviewed the JSM and the items related to agreed facts and those not agreed; and the agreed documents attached to the JSM bundle. The Court then decided that the parties be given time to address their minds to the revised issues themselves failing which the Court would take submissions on the evidence before it and determine the suit under Order 17 rule 4 as the documentation provided in the JSM seemed to speak for itself.

In his submissions to Court counsel for the defendant stated that the procedure adopted in this case was unusual since no evidence was adduced by the plaintiff or the defendant. Counsel for the plaintiff elaborated this by stating that the pleadings on which parties are proceeding themselves are not made

under oath and are therefore there is no obligation to tell the truth. In his view the plaintiff is supposed to prove their case by evidence and the defendant feels this procedure is unfair on them as they would not have had an opportunity to be heard which is a constitutional right. This according to counsel for the plaintiff this procedure also violates the Audi Alteram Partem rule. He points out that the plaintiff and the defendant are relying on certain documents which have not been challenged. He further states that the documents are not originals thus may not be genuine. Counsel for the plaintiff submits that this case will create a precedent of cases being determined without evidence being adduced. He further submits that this case involves the power of a pilot to remove an unruly passenger and who next time this may be a terrorist.

Counsel for the plaintiff does not submit much on this point save to say that procedure applied by the court equally affected them so there is no prejudice and that by filing submissions the defendant was given an opportunity to be heard. Counsel for the defendant submits that Court should disregard this attack on the procedure.

I shall take this submission as an objection as to procedure by the defendant. I shall further take this opportunity to discuss the procedure of case management at the Commercial Court Division (hereinafter referred to as "the Commercial Court") which to mind seems to be at the heart of the objection. Indeed many times there appears to be lack of clarity as the procedure at the Commercial Court. I find few cases where this is discussed in detail. Perhaps the time is now to provide clarity on some of these procedures and grow the jurisprudence on the matter.

Counsel for the defendant referred to the procedure adopted by Court in this case as unusual. Indeed the procedure at the Commercial Court in some respects is unique. For civil cases the procedure is largely determined by the Civil Procedure Act (CPA) and the Civil Procedure Rules (CPR). For the commercial Court regard must in addition be made to The Constitution (Commercial Court) (Practice) Directions S I Constitutional No 6 (herein after referred to as the "Commercial Court Directions"). Many times these rules are not referred to but they are very relevant.

The Commercial Court Directions in Para 2 (1) state clearly the mandate of the Commercial Court as follows

> "…*In the furtherance of the work of the commercial division, it has been decided to establish a commercial court capable of delivering to the commercial community an efficient, expeditious and cost-effective mode of adjudicating disputes that affect directly and significantly the economic, commercial and financial life of Uganda…*"

The Directions clearly require an efficient and cost effective mode of adjudicating disputes.

Furthermore the said Commercial Court Directions places this requirement of ensuring an efficient and cost effective adjudication squarely on the hands of the trial Judge. Paragraph 5 (2) in this regard provides

> "… *(2) The procedure in and progress of a commercial action shall be*

under the direct control of the commercial judge who will, to the extent possible, be proactive..."

Indeed this is a character found in commercial courts in other jurisdictions. The leading decision that I can find on the procedure and practice at commercial courts is the House of Lord decision in England in the case of

Ashmore V Corporation of Lloyds [1992] 2 All ER 486.

Lord Roskill in that case held that

> **"…***In the Commercial Court and indeed in any trial court it is the Trial Judge who has control of the proceedings It is part of his duty to identity the crucial issues and to see they are tried as expeditiously and as inexpensively as possible…"*

In this case it was quite evident that the crucial issue related to whether or not the defendant airline should have provided the plaintiff with a child seat belt. That was the crucial issue and therefore the widening the trial beyond this would clearly be inefficient.

In addition to this Order 12 rule 1 of the CPR provides

"… 1. Scheduling Conference.

(1) The court shall hold a scheduling conference to sort out points of agreement and disagreement, the possibility of mediation, arbitration and any other form of settlement…"

In the Supreme Court decision of **Tororo Cement co Ltd V Frokina International** C A No 2 of 2001 Tsekooko JSC (as he then was) held that the holding of a scheduling conference was mandatory.

Justice Christopher Madrama of this Court in the case of **Bokomo U Ltd & V Rand t/a Momentum Feeds** CA 22 of 2011 also held that a scheduling conference is mandatory and that the intention of the rules is to expedite proceedings.

Parties are therefore expected to cooperate with the Court to sort out points of agreement and disagreement, the possibility of mediation, arbitration and any other form of settlement. The practice in this Court and indeed in other jurisdictions is for the parties and their counsel to work together before they come to the scheduling conference and prepare agreed trial bundles which in this Court we call Joint Scheduling Memorandum (JSM) or sometimes joint memorandums. It is in the JSM inter alia where points of agreement and disagreement are set out; issues for trial listed; documents agreed and not agreed; witnesses listed and the estimated trial time put. There is a tendency at times because of the adversarial nature of our practice for parties not to follow through with the preparation of a JSM. There was such difficulty in this case but to the credit of the parties eventually a JSM was prepared.

The rules as to the use of JSMs are not expressly provided for but a legal practice involving trial bundles is evolving as can be seen in several practice directions in several jurisdictions around the

world. Agreed facts may not constitute an area for trial. Proof agreed of facts at trial is certainly unnecessary. As to documents guidance as to the practice in England can be obtained from the WHITE BOOK (Civil Procedure Vol 1 2002). At para 32.2.4 it is written

> "… ***Documents in agreed bundles as evidence of their contents***
>
> *The general rule is that, where a bundle of documents for use at any hearing has been agreed, the documents contained therein shall be admissible at hearing as evidence of their contents (see practice direction (written Evidence paras 27.1 and 27.2) The Court may give directions requiring the parties to use their best endeavours to agree a bundle of documents…"*

This I must say is very much the practice too at the Commercial Court with regard to JSM and therefore amounts to a best practice for Scheduling.

In addition to Order 12 of the CPR regard must also be made to the Commercial Court Rules (Supra). Paragraph 5 (1) thereof provides

> ***"…5. Procedure and practice of the commercial court.***
>
> *(1) The ordinary rules of the High Court will apply to all commercial*
>
> *actions, subject to the clarifications set forth in this Practice Direction..."*

This to my mind means that the CPR is to be applied to all Commercial actions subject to the Commercial Court Directions.

I really find not much conflict with the two. However the Commercial Court Directions also provide that there shall be held a preliminary hearing.

> ***"…6. Preliminary hearing.***
>
> *(1) At the discretion of the commercial judge a preliminary hearing*
>
> *may be held.*
>
> *(2) The preliminary hearing will aim at achieving a serious*
>
> *discussion of the issues in the cause and the steps necessary to resolve them.*
>
> *(3) Counsel appearing at the hearing will be expected to be aware of*
>
> *the issues and the principal contentions on each side and to be in a position*
>
> *to inform the court of them. In that event, the court may direct that no f*urther pleading is required…"

The purpose of a preliminary hearing is to achieve a serious discussion of the issues in the cause and the steps necessary to resolve them. There is not much difference between the purpose of a scheduling conference and a preliminary hearing which is to expedite trial and these two in practice take place

simultaneously. The difference with a preliminary hearing and a full hearing is that it is not the classic adversarial hearing but rather a more informal hearing that decides what needs to go for a full hearing.

The above procedure is what happened in this case. The crucial issue was isolated and directions made by Court to the parties to address it at the next hearing. This expedited procedure is certainly different from the traditional adversarial method but cannot be said to a denial of the defendant's right to be heard. The right to be heard does not in all cases mean the right to oral evidence. There are other cases where parties also agree that the Court only rely on the submissions of the parties. None compliance with the above rules which regulate procedure at this Court would have been a denial of the right to be heard but the defendant and its counsel did fully participate in the scheduling conference/preliminary hearing in which case the objection is misconceived.

Whether a baby seat belt should have been provided?

This is the only issue in contention. The plaintiff say that they notified the defendants that they had an infant (said to be about 6 months at the time) and so required a baby seat belt but this was not given to them. For the defendant it is stated that such a belt was available and would be provided to the plaintiffs after its use during a demonstration but the plaintiffs were not patient and instead became unruly hence the need to off load them from the plane as they had become a security risk.

At the scheduling conference / preliminary hearing the defendant airline as part of their agreed documents provided a document marked DEX 2 (at page 15 of the JSM) from Precision Airlines the carrier the defendants put the plaintiffs on having bought a Kenya Airways tickets. The document therein has a hand written General Flight Report which reads

> *"… we had unruly passengers out of Nairobi…it was one family travelling together. A father mother with 3 kids but one kid was an infant. During boarding the lady asked for a baby loop, we told her we will give you the belt madam. But the belt we have is not a baby loop but it can do. She was like what? I told her I'll give you the belt after demonstration I even explain to her that the belt which I'll give you is the one am using for demonstration first. Immediately we started our briefing they starting shouting her, the husband and two kids, we had to stop and come to them to them to find out what was wrong. They shouted you crazy people how can you start taxing without giving me a baby loop you are not going anywhere even the other two kids started shouting. So we had to advise to demonstrate to her on how we will put on the belt to secure the baby. she refused I went and advised the captain…captain told me to tell them if they were not comfortable to fly without that belt to say so as we can go back and off load them… After I told the lady she really got onto me I was holding the belt she took it and threw it at my legs and said STUPID ALL OF YOU…and other words I did not understand. I went back to the captain and they decided to go back we offloaded them the (sic) all family…"*

The voyager Report in the same report which captures the comments/delays to be completed by captain on termination of duty reads

> *"… 30 min Delay PW 712 NBO-ZNZ DUE A (sic) GROUP OF PAX (A FAMILY) MISBEHAVING AND USING ABUSIVE LANUAGE WHILE TAXING OUT SO RETURNED TO RAMP TO OFFLOAD THEM..*

This is an agreed document and to my mind it tells the whole story as far as the issue for trial is concerned. The problem is how to interpret it as the defendant takes the position that a belt was

available but the plaintiffs refused it. Counsel for the plaintiff submitted that he sought to rely on 5 witnesses. Actually the scheduling memorandum shows 8. I really cannot understand what the 5 or 8 witnesses would have added to this document.

There was no baby loop however airline crew stated that a belt that would be made available to the plaintiffs after its use during demonstration whiles the aircraft was taxing. This is evidence that was already available in the agreed documentation at the preliminary trial stage.

I have not found many cases on this sort of matter. In the US Federal decision **Abdullah V American Airlines Inc**. 181 F.3d 363 (3rd Cir. 1999) where a passenger was injured during turbulence when not wearing a seat belt and yet the "fasten seat belt" sign was illuminated; Circuit Judge Roth held

"in determining the standards of care in an aviation negligence action, a court must refer not only specific regulations but also to the overall concept that aircraft may not be operated in a careless manner. The applicable standard of care is not limited to a particular regulation of a specific area; it expands to encompass the issue of whether the overall operation or conduct in question was careless or reckless…"

It appears to me that the overall conduct of the operation of an aircraft, and not just regulations they abide by, also comes into issue in a matter like this and in that regard I do agree with Judge Roth whether that be in negligence or contract.

When it comes to the transport of passengers Halsbury's Laws of England 4th Ed para 1449 the editors write

> *"…the commander must also take all reasonable steps to ensure that, before the aircraft takes off and before it lands, the crew and other persons carried to assist passengers are properly secured in their seats; that passengers are properly secured in their seats by safety harness from the moment when, after the embarkation of its passengers for the purposes of taking off, the aircraft first moves until after it has taken off, and before it lands until it comes to rest for the purpose of disembarkation of its passengers, and whenever by reason of turbulent air or any emergency landing … "*

I agree with this exposition to say otherwise would be to sanction carelessness or recklessness in this all important airline industry. Actually the editors of Halsbury's in note 5 to that paragraph (supra) point out that in England *"…children under the age of two must be secured by means of a child restraint device…"* I do not see how this cannot also be the correct standard for our region as well. If such a device does not exist it is safer not to embark the said passengers until the right device can be found.

In this case the aircraft report indicates that a baby loop was not available but a seat belt to be used during demonstration would be given to the plaintiffs after the said demonstration. It is also clear that this took place on the aircraft after it had already left the ramp and was taxing. There is no doubt that the plaintiffs based on the report did act unruly but can be said that notwithstanding the airline also acted properly? I cannot say so. I think the defence put too much emphasis on the conduct of the plaintiffs. They do not however have a counterclaim in this regard and they just view the plaintiff's conduct as sufficient justification to offload them. What the defendants have failed to address is the particular standard of care to provide an infant child an appropriate child restraint device. It is even

amazing that the plane had even started to taxi from the ramp before this device was provided yet the plaintiffs had made this requirement known at the time of embarkation and also at the time of purchase of their tickets and it was indeed endorsed on the ticket itself. I am sure the fasten seat belt sign was already on at the time of taxing. Supposing an incident occurred before the said demonstration seat belt was provided? The defendants would have found themselves in the situation of the **American Airlines case** (supra) where the plaintiff who had not secured himself by his seat belt was found to have been contributory negligent.
In answer to the issue therefore I find that the defendant should have provided the plaintiff's with a baby seat belt or device.

Remedies

From my finding above it is clear that the defendant airline did breach their contract of carriage by failing to provide a baby seat belt and therefore occasioned loss to the plaintiffs.

This occurred on the Nairobi to Zanzibar sector which was a code share with Precision Airlines (KQ 6714). The whole journey none the less for all intents and purposes is one. However because of the incident at Nairobi the whole journey failed and the holiday was abandoned.

The plaintiff sought special damages of USD $ 10,787. This included the sum of USD 3852 being the cost of five business class tickets to Zanzibar, USD $ 100 for visa fees to Kenya, and the sum of USD $ 6270.69 being the amount paid at Zamani Kaminski hotel which the Hotel refused to refund when the plaintiffs abandoned their holiday trip. The defendant in para 7 (q) to their defence state that, out of courtesy, have authorized a refund of the ticket coupons for the Nairobi-Zanzibar-Nairobi sector that were unused worth USD $ 1,307. The JSM shows that the booking itinerary PEX 1 and Hotel Vouchers PEX 2 are listed as agreed documents. I find that the documentation is sufficient to support the claim to tickets and accommodation in Zanzibar. The fact that the plaintiffs were offloaded in Nairobi would also support a justification for a refund of visa fees the plaintiff being non East Africans. All in all I find that the entire claim for USD $ 10,787 is payable less the refund of USD $ 1,307 if it has been realized.

The Plaintiffs also claim general damages worth Ug shs 50,000,000/= and for breach of contract, humiliation and injury to the plaintiff's feelings and reputation. He also prays for a further Ug shs 50,000,000/= as punitive damages to the children and aggravated damages of Ug shs 25,000,000/= for the disappointment of mind suffered as a result of the humiliating way the plaintiffs were handled. A total of Ug shs 125,000,000=.

The scope of this trial was limited by the issue that was framed. There was no evidence that court could rely on as to humiliation that the plaintiff suffered save for the issue of the baby seat. An issue in this regard would have to be framed and tried in the normal way but documentation alone would not suffice for this purpose. That being the case I would award the infant plaintiff general damages of US $ 5,000 for failure to be provided with an infant seat belt.

I award the plaintiff interest at 8%p.a. as special damages from the date of filing the suit until payment in full and 4%p.a. on general damages from the date of Judgment until payment in full.

I also award the plaintiffs the costs of the suit.

……………………..…………….

Justice Geoffrey Kiryabwire

JUDGE

Date: 09/07/12

09/06/12

9:55am

Judgment read and signed in open court in the presence of;

- E. Sembatya for Plaintiff
- F. Busingye for Defendant
- Y. Kanyeihe for Defendant

In Court

- None of the parties

- Rose Emeru – Court Clerk

……………………………….

Geoffrey Kiryabwire

JUDGE

Date: 09/07/2012