



REPUBLIC OF KENYA



KENYA LAW
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**Dac Aviation (EA) Limited v Saic Q400 Limited (Commercial Case E003 of 2023)
[2023] KEHC 2673 (KLR) (Commercial and Tax) (28 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2673 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E003 OF 2023
DAS MAJANJA, J
MARCH 28, 2023**

BETWEEN

DAC AVIATION (EA) LIMITED PLAINTIFF

AND

SAIC Q400 LIMITED DEFENDANT

RULING

1. The plaintiff has filed the notice of motion under section 5 of the [Judicature Act](#) and sections 1A, 1B, 3A of the [Civil Procedure Act](#) seeking the following orders:
 1. Spent*
 2. Spent*
 3. Spent*
 4. That this honorable Court be pleased to issue a Notice to Show Cause against Victor Njenga, Eugene O'reilly, Alonna Goldfarb, Phoenix Aviation General Manager, Phoenix Aviation Security Officer In-Charge and Kaplan and Straton Advocates on record to show cause why they should not be committed to civil jail for disobedience of this court's orders to allow the plaintiff repossession of the aircraft Bombardier DHC 8 400 serial number 4162 in accordance with the court's orders of the a day of February, 2023.
 5. That Victor Njenga, Eugene O'reilly, Alonna Goldfarb, Phoenix Aviation General Manager, Phoenix Aviation Security Officer In-Charge and Kapian and Straton Advocate on record in this matter only, be committed to jail for a term of six months or penalized accordingly on such terms as the Honourable



Court may determine, for contempt of court for having deliberately disobeyed orders of this court issued on the 7th February, 2023

6. That an order do issue directing the Officer Commanding Station (OCS) in Charge of Wilson Airport Police Station or any relevant Police Station as may be appropriate to effect an arrest of the said Victor Njenga, Eugene O'reilly, Alonna Goldfarb, Phoenix Aviation General Manager, Phoenix Aviation Security Officer In-Charge and Kaplan and Straton Advocate on record in this matter only in execution of the Order of the Honourable Court in prayers 4 and 5 above and arraign the said persons before the Honourable Court on a date to be determined by the Court.
 7. That an Order do issue restraining the respondents from seeking audience with the court until and unless they comply with the said court orders.
 8. That any other or further orders of the court geared towards protecting the dignity and authority of the court.
 9. That the costs of the application be borne by the Respondents.
2. The application is supported by the grounds on the face of it and the supporting affidavit and supplementary affidavit of Peter Muga sworn on February 27, 2023 and March 15, 2023 respectively. It is opposed by the Defendant through the replying affidavit of its director, Eugene O'Reilly sworn on March 8, 2023 and the further affidavit of Alonna Goldfarb, a director of its owner, Almanda Inc., sworn on March 16, 2023. The parties, through their counsel, made oral representations to the court in support of their respective positions.
3. From the prayers sought, the Plaintiff seeks to enforce the orders issued on February 7, 2023 ("the orders") on the following terms:
1. That pending the hearing and determination of the suit herein, the Defendant is hereby restrained either by itself, agents, servants, employees, assigns, or any other person claiming to act under its instructions from effecting the termination notices dated January 6, 2023 or any termination notice purporting to purported to be in force or alienating, advertising for sale, offering for sale, selling taking possession of, grounding, offering for lease, transferring, charging, auctioning towing or in any other manner interfering with the Plaintiff's peaceful Possession and use of two aircrafts to wit: Bombardier DHC-8-400(Q400) serial number 41 62 and Bombardier DEHC-8-400(0400) serial number 4159
 2. The temporary injunction in order (a) above is granted on condition that the Plaintiff shall continue paying rent in terms of the two Aircraft Lease Agreement and Promptly comply with the terms therein. Failure to which the Defendant shall be at liberty to enforce any remedy available to it in the event of default .
4. I have considered the depositions alongside the submissions and the basic facts are not in issue. The main issue for the court's determination is whether the Defendant is in contempt of the Orders. The principles guiding the court in resolving this issue are not in doubt. It is general and trite that once a court issues an order, it binds all and sundry, the mighty and the lowly equally without exception. It is meant to be obeyed and not otherwise. In *Attorney General v Times Newspapers Ltd and another* (1991)



- 2 All ER 398, it was held that it is immaterial whether one is a party to a suit or not and that anyone who knowingly impedes or interferes with the administration of justice is guilty of contempt irrespective of whether he is named in the order or not (see also *Econet Wireless Kenya Limited v Minister for Information and Communications of Kenya and another* [2005] KLR 828).
5. On the ingredients required to be proved for a successful contempt prosecution, the Court of Appeal in *Ochino & another v Okombo & 4 others* [1989] KLR 165 cited its own decision in *Mwangi Mangondu v Nairobi City Council* (Civil Appeal No 95 of 1988) where it held that,

“[T]he court will only punish as a contempt breach of injunction if satisfied that the terms of the injunction are clear and unambiguous, that the defendant has proper notice of the terms and that breach of the injunction has been proved beyond reasonable doubt.” The position on the applicable standard of proof was later finessed in *Gatharia K Mutitika v Baharini Farm Limited* [1985] KLR 227 where the Court of Appeal considered the fact that contempt of court was criminal in character hence the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt. It added that, “the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge.”
 6. On the issue of knowledge of the Orders, the Defendant and its agents do not deny knowledge of the Orders. In any case, it is clear from the face of the formal order, that it was made in the presence of the advocates on record following a ruling delivered on February 7, 2023. In *Shimmers Plaza Limited v National Bank of Kenya* NRB CA Civil Appeal No 33 of 2012 [2015] eKLR, the Court of Appeal accepted that where a party is represented by an advocate, it is deemed to have knowledge of orders issued by the court in presence of the advocate. The Defendant and its agents cannot therefore deny its knowledge of its contents. Further, there is sufficient communication on record between the Plaintiff and the Defendant’s counsel on the purport and import of the Orders hence the issue of knowledge is not disputed.
 7. Turning to the issue whether the Defendant deliberately or otherwise disobeyed the Orders, the question turns on the nature of the order. Again, the parties do not dispute that the Orders were conditional. A reading of the order shows that it in effect stayed termination of the Aircraft Lease Agreements (“the Agreements”) pursuant to notices dated January 6, 2023 issued by the Defendant on condition that the Plaintiff continued to pay rent and comply with the terms therein. In my view, the termination or rather the termination notices were only suspended to enable the Plaintiff comply with the terms of the Agreements including paying the sums due under the lease. In the event of default, then the Defendant was entitled to exercise its contractual remedies including repossession.
 8. The Defendant does not deny that it has taken possession of the aircraft subject of this application and or prevented the Plaintiff from it. The question is whether the Plaintiff has complied with the terms of the Agreement to enable it take advantage of the conditions in the Agreement. If the Plaintiff has complied with the terms of the Agreement, then Defendant would be clearly in contempt of court if it proceeds to exercise its rights thereunder.
 9. At the time the Defendant issued termination notices dated January 6, 2023, the Plaintiff was already indebted to the Defendant. In respect of the Bombardier DHC-8-400(Q400) serial number 4162 and serial number 4159 it owed USD 3,7,763,097.68 and USD 3,662,057.00 respectively. The Plaintiff’s obligation then, was to tender the outstanding sum and to continue paying the periodical rentals under the Agreements. I reject the Plaintiff’s argument suggesting that the conditions were prospective and that the termination was of no effect as this was an issue reserved for trial.



10. The Defendant contends that the Plaintiff has not paid rent for the aircraft and that it has breached the terms of the Agreements including not being licensed to operate an aircraft. I have read and re-read the Plaintiff's supporting and supplementary affidavit and I do not see any evidence of payment of the outstanding amount. The charge of contempt is serious in view of the nature of the order, the court would have to be satisfied that the conditions of the Agreements have been complied with before it can punish the Defendant and its agents. Nothing would have been easier than for the Plaintiff to put before the court the payments it made in accordance with the Agreement. In effect, the Plaintiff's has not rebutted the Defendant's argument by presenting any evidence to demonstrate that it has been paid outstanding all rentals or otherwise complied with the Agreements.
11. I therefore agree with the Defendant that its action of repossession of the aircraft was well within the Orders issued by the court and the Defendant was not in contempt of the same.
12. Since the Plaintiff has failed to prove that the Defendant and its agents have disobeyed the orders issued by the court on February 7, 2023, the Notice of Motion dated February 27, 2023 is dismissed with costs to the defendant.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF MARCH 2023.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Mr Oduol instructed by Oduol Achar and Company Advocates for the Plaintiff.

Mr Kemboy with Mr Kahora instructed by Kaplan and Stratton Advocates for the Defendant.

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