



**Finejet Limited v DAC Aviation EA Limited (Commercial Civil Case E435 of 2020)
[2022] KEHC 109 (KLR) (Commercial and Tax) (18 February 2022) (Ruling)**

Neutral citation: [2022] KEHC 109 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CIVIL CASE E435 OF 2020
DAS MAJANJA, J
FEBRUARY 18, 2022**

BETWEEN

FINEJET LIMITED PLAINTIFF

AND

DAC AVIATION EA LIMITED DEFENDANT

RULING

1. The Plaintiff is a limited liability company in the business of buying and selling jet fuel. According to the Plaintiff dated 26th October 2020, the Plaintiff sold to the Defendant fuel in several stations including Juba, South Sudan and Wilson Airport, Nairobi. The Plaintiff's claim against the Defendant is for the sum of USD 369,497.34 on account of fuel supplied to the Defendant being USD 214,207.10 supplied in Juba and USD 155,290.24 supplied at Wilson Airport.
2. Together with the Plaintiff, the Plaintiff filed a Notice of Motion dated 13th August 2022 made, inter alia, under Order 40 Rules 1 and 2 of the Civil Procedure Rules seeking the following orders:
 - (1) Spent
 - (2) Pending the hearing and determination of this application inter parties, this Honourable Court be pleased to issue a temporary order of injunction against the Respondent restraining them from disposing off whether by sale, lease or otherwise the aircraft 5Y-HPY and the hanger at Wilson Airport on Langata Road within Nairobi County known as Dac Aviation Hanger.
 - (3) THAT an order for contempt of court be issued against the Respondent for failure to defend this suit and any and all attempts it may take to dispose of the assets that are aircraft 5Y-HPY and the hanger known as Dac Aviation Hanger.



- (4) THAT pending the hearing and determination of the suit herein this court be pleased to order that status quo be maintained.
- (5) THAT the costs of this Application follow the cause.
3. The application is supported by the affidavit and supplementary affidavit of its director, John Kinyi Kimani, sworn on 13th December 2021 and 2nd December 2021 respectively. The Defendant opposes the application through the replying affidavit of its General Manager, Peter Muga, sworn on 18th November 2021. Both parties filed written submissions in support of their respective positions.
 4. The Plaintiff's case is that it supplied jet fuel to the Defendant and that it has failed to pay yet it is now in the process of selling off its assets in Kenya. It contends that the Defendant has sold off two aircraft; 5Y-DAC and 5Y-GPS to Skyward Express Kenya and aircraft 5Y-TMP to a buyer it is yet to establish. It states that it is apprehensive that unless the court intervenes it will suffer irreparable damage.
 5. In response to the allegations against it, the Defendant states that it is a going concern and has a right to sell its aircraft in the ordinary course of business including disposing of aircraft it does not need. It also denies that it is closing shop and shows evidence that it has running contracts with other businesses. As evidence of the position, it states that it has procured receivables amounting to at least USD 607,601.54 from its debtors and has a substantial judgment from the County Court of the City of Juba, South Sudan amounting to USD 709,793.17 from one of its Creditors. The Defendant also states that the aircraft that the Plaintiff seeks to attach is charged to Kenya Commercial Bank which has prior rights to the Plaintiff.
 6. As I stated elsewhere, the parties filed extensive written submissions on the application but I think resolving this matter is straightforward particularly in view of prayers sought in the application I have set out in para. 2 above.
 7. As regards the prayer for injunction, the Plaintiff's plea is for an injunction, "pending the hearing and determination of this application inter parties". When the matter was placed before me on 16th August 2021, I granted it in terms of prayer No. 2 in the application dated 13th August 2021. This means that the prayer is exhausted once this application is determined.
 8. Prayer No. 3 is for contempt for failure to defend this suit. The basis of this plea is not clear and the Plaintiff's submissions do not provide any clarity on the matter. Since the issue concerns failure to defend, I note that this suit was filed on 28th October 2020. It appears that the Plaintiff was concerned that the Defendant had not filed the defence when the application was filed. The Plaintiff, on its part, did not apply for default judgment under Order 10 of the Civil Procedure Rules. In any case, the Defendant ultimately filed the Statement of Defence dated 18th November 2021 obviating any orders in regard to Prayer No. 3.
 9. Prayer No. 4 seeks an order that *status quo* be maintained. In The Chairman Business Premises Rent Tribunal at Mombasa Exparte Baobab Beach Resort (Mbsa) Ltd MSA HC Misc. Application (JR) No. 26 of 2010 (UR), Muriithi J., explained the meaning of status quo as follows:

In my view, an order for status quo to be maintained is different from an order of injunction both in terms of the principles for grant and the practical effect of each. While the latter is a substantive equitable remedy granted upon establishment of right, or, at interlocutory stage, a prima facie case, among other principles to be considered, the former is simply an ancillary order for the preservation of the situation as it exists in relation to pending proceedings before the hearing and determination thereof. It does not depend on proof of



right or prima facie case. In its effect, an injunction may compel the doing or restrain the doing of a certain act, such as, respectively, the reinstatement of an evicted tenant or the eviction of the tenant in possession. An order for status quo merely leaves the situation or things as they stand pending the hearing of the reference or complaint. In its negative form, however, an injunction may have the same effect as an order for status quo.

10. It is not clear from the application and deposition what status quo the Plaintiff wants to maintain. The Defendant is correct to point out that the Plaintiff seeks a liquidated claim. It does not seek any relief in respect of any property: moveable or immovable hence it is not possible for the court to grant an order of status quo without reference to any property or state of affairs which the Plaintiff seeks to protect in relation to the suit.
11. It must now be clear that the prayers in the application standing alone without more cannot be granted. No purpose will be served by consideration of whether or not the court can grant an injunction pending the hearing and determination of the suit. However, and for completeness, let me touch on the plea for injunction as outlined in the submissions.
12. In essence, the Plaintiff is apprehensive that the Defendant may dispose of its property to the Plaintiff's detriment. Order 40 rule 1(b) of the Civil Procedure Rules states as follows:
 1. Where in any suit it is proved by affidavit or otherwise -
 - (a) -----
 - (b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders. [Emphasis mine]
13. The Plaintiff must demonstrate on a prima facie basis that the Defendant "threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit." Looking at the facts deposed to by the Plaintiff, the allegations of disposing property are bare and are not supported by any evidence demonstrating the Defendant is disposing of property with the intent of obstructing or delaying execution of any decree that may ultimately be passed against the Defendant.
14. The injunction order sought is similar to attachment before judgment and the principle governing the grant of such orders was stated by the Court of Appeal in *Kuria Kanyoko t/a Amigos Bar and Restaurant vs. Francis Kinuthia Nderu, Helen Njeru Nderu and Andrew Kinuthia Nderu [1982-88] KAR 1287-1334* as follows:

The power to attach before judgement must not be exercised lightly and only upon clear proof of the mischief aimed at by order 38, Rule 5, namely that the Defendant was about to dispose of his property or to remove it from the jurisdiction with intent to obstruct or delay any decree that may be passed against him.



15. The law sets a high bar before the court can proceed to restrain a person from disposing of its property. Intent to defeat justice must be established.
16. It must be clear that the Notice of Motion dated 13th August 2021 lacks merit. It is now dismissed with costs to the Defendant. The interim orders in force are hereby discharged forthwith.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF FEBRUARY 2022.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Mr Githire instructed by Ogle and Associates Advocates for the Plaintiff.

Mr Muhuyu instructed by Litoro and Omwebu Advocates for the Defendant.

