



**Gossamer Crossing Inc v Simon & 4 others (Civil Case E865 of 2021)
[2022] KEHC 300 (KLR) (Commercial and Tax) (28 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 300 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E865 OF 2021
DAS MAJANJA, J
APRIL 28, 2022**

BETWEEN

GOSSAMER CROSSING INC PLAINTIFF

AND

ADRIAN TIWARI SIMON 1ST DEFENDANT

ITHVENRAM LIMITED 2ND DEFENDANT

KASAS KENYA LIMITED 3RD DEFENDANT

ORLY AIRPARK LIMITED 4TH DEFENDANT

KENYA CIVIL AVIATION AUTHORITY 5TH DEFENDANT

RULING

Introduction and Background

1. What is before the court for determination is the Plaintiff's Notice of Motion dated 14th October 2021 made under Order 39 Rule 1 and Order 40 of the *Civil Procedure Rules* ("the Rules") where it seeks injunctions restraining the Defendants from in any way interfering with including removing from this jurisdiction Cessna Grand Caravan 208B-2300 Aircraft Registration number N9017M ("the Aircraft").
2. The application is supported by the grounds set out on its face together with the supporting affidavit of the Plaintiff's sole director and President, Benjamin Charles Folger, sworn on 14th October 2021. It is opposed by the 1st and 2nd Defendants through the replying affidavit of the 1st Defendant sworn on 26th January 2022 together with a Notice of Preliminary Objection dated 2nd November 2021. It is also opposed by the 3rd Defendant through the replying affidavit of its director, Timothy Walsh sworn on



21st January 2022 and by the 5th Defendant through the replying affidavit of its Corporation Secretary, George O. Mogaka sworn on 14th December 2021. The parties have also filed written submissions anchoring their respective positions.

3. The facts giving rise to this application can be gleaned from the Plaintiff and the parties' respective depositions. The Plaintiff is a limited liability company incorporated in Florida, USA. The 1st Defendant is a British national and the sole director of the 2nd Defendant, a limited liability company incorporated in Mauritius. By an Aircraft Purchase Agreement dated 21st December 2020, the Plaintiff ("GCI") and the 2nd Defendant ("Ithvenram") entered into an Aircraft Purchase Agreement in which Ithvenram agreed to purchase and GCI agreed to sell the Aircraft ("the Aircraft"). GCI and Ithvenram also entered into an Aircraft Lease Agreement dated 21st December 2020 ("the Lease") in which Ithvenram agreed to lease the Aircraft back to GCI for a period of 12 months. During the period of the Lease, GCI operated as an air operator and service provider for passenger, cargo, freight services, airport & aviation development, aeromedical evacuations, mobile medical clinics, civil infrastructure development and administrative assistance services in Kenya and across Africa.
4. A dispute arose between the parties in respect of performance of the Lease which led to the 2nd Defendant terminating the Lease and repossessing the Aircraft on 12th August 2021. In the meantime, GCI paid USD 483,645.00 being monies owed to Ithvenram into an Escrow account held by McAfee and Taft, a law firm in the US. Between the period within which the dispute arose and the Lease was terminated, Ithvenram contracted the 3rd Defendant, an air charter and aircraft maintenance company operating out of Wilson Airport, Nairobi, to carry out an end of lease inspection on the Aircraft, which was done and the Aircraft released back to Ithvenram.
5. On 15th October 2021, GCI filed this suit claiming it is the sole legal and registered owner of the Aircraft and that the 1st, 2nd and 3rd Defendants, with the assistance and support of the 5th Defendant ("KCAA"), a state corporation established under the Civil Aviation Act, 2013 have moved the Aircraft from Wilson Airport to the 4th Defendant's premises with the sole purpose of unlawfully flying it out of jurisdiction and for the purpose of sale and the evasion of tax upon the success of any such sale. It is because of this apprehension that GCI now seeks the injunctive relief. But determination of the Plaintiff's application, must give way to the 1st, 2nd and 3rd Defendants' preliminary objection which goes to the issue of jurisdiction.

Whether the Court has Jurisdiction

6. The 1st and 2nd Defendants have impugned the jurisdiction of this court through their Notice of Preliminary Objection. They claim that the agreements between the parties have exclusive jurisdiction clauses which vest jurisdiction to adjudicate disputes in relation thereto between GCI and Ithvenram in the courts sitting in the United States of America.
7. It is trite law that a preliminary objection is grounded on uncontested facts or a pure question of law which if successful would dispose of the suit. In this instance, the issue of jurisdiction is based on agreements between the parties which are not contested. As the jurisdiction is based on the undisputed contractual relationship between the parties, it is thus a proper subject of a preliminary objection.
8. In summary, there are three agreements between the GCI and Ithvenram. The first is the Aircraft Purchase Agreement where GCI was the seller and Ithvenram, the purchaser and which at Clause 11.2 provides:

112. Jurisdiction of New York Courts



The courts of New York sitting in or otherwise having jurisdiction over New York County, New York will have non-exclusive jurisdiction to settle any dispute arising out of or in connection with this Agreement (including a dispute relating to the existence, validity or termination of this Agreement or any non-contractual obligation arising out of or in connection with this Agreement) (a “Dispute”). Seller hereby agrees to the jurisdiction and venue noted herein and that Seller will not invoke the doctrine of forum non conveniens or other similar defence.

This clause 11.2 is for the benefit of the Purchaser only. As a result, the Purchaser will not be prevented from taking proceedings relating to a Dispute in any other courts which have jurisdiction. To the extent allowed by law, the Purchaser may take concurrent proceedings in any number of jurisdictions.

9. Contemporaneous with entering into the Aircraft Purchase Agreement, the parties also entered into an Aircraft Lease Agreement. GCI was the Lessee while Ithvenram was the Lessor. Clause 26.2 and 26.3 provides as follows:

26.2 Jurisdiction of New York Courts

The courts of New York sitting in or otherwise having jurisdiction over New York County, New York will have non-exclusive jurisdiction to settle any dispute arising out of or in connection with this Agreement (including a dispute relating to the existence, validity or termination of this Agreement or any non-contractual obligation arising out of or in connection with this Agreement) (a “Dispute”). Lessee hereby agrees to the jurisdiction and venue noted herein and that Seller will not invoke the doctrine of forum non conveniens or other similar defence.

26.3 This clause 26.3 is for the benefit of the Lessor only. As a result, the Lessor will not be prevented from taking proceedings relating to a Dispute in any other courts which have jurisdiction. To the extent allowed by law, the Lessor may take concurrent proceedings in any number of jurisdictions.

10. Finally, and following a dispute between GCI and Ithvenram, the parties entered into the Escrow Agreement pursuant to which USD 483,644.52 was deposited into the Escrow Account. A further dispute also arose regarding utilization of the funds therein by the Escrow Agent. In that regard, part of Clause 5 of the Escrow Agreement reads as follows:

[5] [F]urther, in the event of any such dispute or controversy, the Escrow Agent may, in its sole discretion, institute any interpleader action, a declaratory judgment (sic) or other appropriate legal action in the District Court of Oklahoma County, Oklahoma to determine the rights of the Parties involved. The Parties agree and consent to the jurisdiction of the District Court of Oklahoma, Oklahoma County, State of Oklahoma or the United States District Court of the Western District of Oklahoma, which shall have exclusive jurisdiction to hear all disputes against the Escrow Agent and no other courts shall have any jurisdiction whatsoever in respect to such disputes against the Escrow Agent.

11. Each of the Agreements governing the parties’ relationship, as I have set out above, has a jurisdiction where the parties have selected the jurisdiction they wish to have their dispute settled. In *United India Insurance Company Limited v East African Underwriters (Kenya) Limited* [1985] KLR 898 the Court of Appeal observed that exclusive jurisdiction clauses ought to be respected because the parties have fixed the forum for settlement of such disputes themselves and that there must be exceptional



circumstances to justify departure from them. In *Raytheon Aircraft Credit Corporation and Another v Air Al-Faraj* [2005] eKLR the Court of Appeal further summarized this position as follows:

The general rule is that where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation unless the party suing in the non contractual forum discharges the burden cast on him of showing strong reasons for suing in that forum (see *Donohue v Armo Inc.* [2002] 4 LRC 478, H.L.; *The Elephtheria* [1969] 2 All ER 641, *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] KLR 898.

12. Under the Aircraft Purchase Agreement, GCI as the Seller, agreed to the court of New York as the jurisdiction for resolving disputes. Likewise, under the Aircraft Lease Agreement, the GCI as the Lessee agreed to the courts of New York as the jurisdiction of choice. The net effect of those clauses is to preclude GCI from filing suit in any other fora other than the New York courts. Further, under the Escrow Agreement, the courts in Oklahoma have jurisdiction to resolve disputes under it. It is not disputed that there is a suit regarding the Escrow Account pending in that court.
13. The effect of the three agreements between the GCI and Ithvenram is this dispute, regarding the ownership of the aircraft, can only be litigated in the courts in the United States of America. By agreement of the parties, this court lacks jurisdiction to hear and determine GCI's suit. The consequence of this finding is that the application and suit must be struck out.
14. Before I conclude this matter, I note that the parties have addressed the court at length on the issue whether the court should grant an interlocutory injunction. The parties are agreed that the guiding principles are those set out in the seminal case of the *Giella v Cassman Brown and Company Limited* [1973] EA 358. The parties though overlooked the fact that under Clause 11.1 of the Aircraft Purchase Agreement and Clause 21 of the Aircraft Lease Agreement, the choice of law by the parties is New York law while under Clause 5 of the Escrow Agreement, the law of choice is Oklahoma law. This means that even if the court in Kenya assumed jurisdiction, it would have to apply the law chosen by the parties. The parties would have to address the court on the applicable law of injunctions in order to obtain relief.
15. Finally, the fact that the suit includes other defendants who are not parties to the subject agreements does not affect the application of the choice of jurisdiction clause. The reliefs sought by the Plaintiff against the 4th and 5th Defendants are consequential upon determination of the contractual issues between the GCI and Ithvenram.

Disposition

16. Having reached the conclusion that this court lacks jurisdiction under the agreements between the Plaintiff and the 2nd Defendant, the only order that commends itself to the court is to strike out the suit.
17. This suit be and is hereby struck out with costs to the Defendants save for the 4th Defendant who did not participate in these proceedings. The 1st, 2nd and 3rd Defendants shall however have one-quarter of the costs as their counsel specifically did not heed the court's directions limiting the number of pages in their written submissions which I found rather prolix and could have been accommodated in the number of pages I had directed.
18. The interim orders in force are hereby discharged forthwith.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL 2022.

D. S. MAJANJA



JUDGE

Court Assistant: Mr M. Onyango.

Mr Otieno instructed by LJA Associates LLP Advocates for the Plaintiff.

Mr Mwangi instructed by Daly and Inamdar Advocates LLP for the 1st, 2nd and 3rd Defendants.

Mr Odoyo instructed by Kipkenda and Company Advocates for the 5th Defendants.

