



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**MISC. APPLICATION NO. E1136 OF 2020**

**PRATT & WHITNEY CANADA CUSTOMER**

**CARE SERVICE CENTRE EUROPE GmbH.....APPLICANT**

**VERSUS**

**BUSH AIR SAFARIS LIMITED.....RESPONDENT**

**PRELIMINARY OBJECTION**

**RULING**

**BACKGROUND**

1. The Applicant filed a Notice of Motion Application dated 13<sup>th</sup> October 2020 for the following orders that; -

a) A temporary order of injunction be issued restraining the respondent from transferring, selling, leasing, mortgaging, charging, alienating or otherwise dealing with the engine type **PT6A-114A serial no. PC1278** installed on the Respondents aircraft registration number **5Y-BMZ** (Cessna 208B Grand caravan).

b) A temporary order of injunction be issued restraining the respondent from continuing to use, exposing to wear and tear or otherwise dealing with the engine type **PT6A-114A serial no. PC1278** installed on the Respondents aircraft registration number **5Y-BMZ** (Cessna 208B Grand caravan).

2. This Court on 5<sup>th</sup> November 2020 granted interim order in terms of Order/Prayer 2 of Notice of Motion of 13<sup>th</sup> October 2020 to preserve the subject matter, the Applicant's engine registration number **5Y-BMZ** shall not be sold, transferred, disposed, mortgaged, leased or charged or in any way interfered with pending hearing of the instant application. On 27<sup>th</sup> January 2021, these orders were extended until hearing and determination of the application.

**NOTICE OF PRELIMINARY OBJECTION**

3. The Defendant raised a Preliminary Objection on 25th January 2021, that the entire suit filed herein be struck out on the ground that; -

a) The Court lacks jurisdiction by law to hear and determine this matter by dint of express provisions of the subject contract.

**APPLICANT'S SUBMISSIONS**

4. The Applicant submitted that the P/O herein is without basis and is an attempt by the Respondent to further delay the hearing and determination of the application herein while the respondent continues to enjoy the use of the Applicant's engine in violation of the Courts orders.

5. Further, the Applicant submits that the application herein does not seek substantive orders for recovery of the rental charges as that is the subject of the complaint before the German courts. The orders sought in the present application are orders for injunction pending the hearing and determination of the German proceedings. The Court is clothed with jurisdiction to issue the orders sought in the application. In the case of ***Tononoka steels limited -versus- Eastern and Southern Africa Trade and Development Bank [1999] eKLR*** Kwach JA held as follows; -

**“While the jurisdiction to deal with substantive disputes and differences is given to the international chambers of commerce in London, the Kenyan courts retain residual jurisdiction to deal with peripheral matters and see to it that any disputes or differences dealt in the manner agreed between the parties under the agreement. It would be absurd to suggest that a borrower, whose security is being sold in Nairobi illegally by PTA Bank cannot approach the High Court for a temporary injunction, because I cannot see how in those circumstances the International Chamber of Commerce in London can be of any assistance to him. The Kenya courts must retain the power to look at the securities and instruments be in a position to tell PTA Bank in an appropriate case, that while the dispute is being referred to London for arbitration and final determination, it cannot realise its security in the meantime. That in my judgment must be what the officious bystander would have said he understood the parties to those agreements had in mind when they opted for arbitration in London.”**

6. The Applicant submits that the Respondent should have no audience before the court since it has not complied with the court orders issued on 5<sup>th</sup> November 2020 and 5<sup>th</sup> January 2021 neither has it explained the reasons for such non-compliance as directed by the court on 10<sup>th</sup> February 2021.

#### **RESPONDENT’S SUBMISSIONS (LIST OF AUTHORITIES)**

7. The Respondent relied on the following list of authorities;

**Raytheon Aircraft Credit Corporation & Another vs Air Al-Faraj Limited [2005]eKLR; Areva T. & D India Limited vs Priority Electrical Engineers & Another [2012] eKLR and Grohe Dawn Watertech Fitting Division PTY Ltd vs Ideal Ceramics [2019]eKLR.**

#### **DETERMINATION**

8. The Preliminary Objection was raised on the ground that the Court lacks jurisdiction by law to hear and determine this matter by dint of express provisions of the subject contract.

9. According to the **Black’s Law Dictionary 9<sup>th</sup> Edition** (page 938), an interim measure of protection is defined as follows: -

**“An international tribunal’s order to prevent a litigant from prejudicing the final outcome of a lawsuit by arbitrary action before a judgment has been reached. This measure is comparable to a temporary injunction in national law.”**

10. In **Civil Case 752 of 2012 CMC Holdings Ltd & Another vs Jaguar Land Rover Exports Limited [2013] eKLR Kamau J** held as follows: -

**“...The purpose of an interim measure of protection is to ensure that the subject matter will be in the same state as it was at the commencement or during the arbitral proceedings. The court must be satisfied that that the subject matter of the arbitral proceedings will not be in the same state at the time the arbitral reference is concluded before it can grant an interim measure of protection.”**

11. In the instant case, the court has been called upon to issue interim measure of protection. The purpose of an interim measure of protection is to ensure that the subject matter will be in the same state as it was at the commencement or during the court proceedings. This Court has jurisdiction to hear and determine the application herein.

The substantive suit is currently being determined before the Courts in Berlin, Germany.

12. This Court is satisfied that the engine type **PT6A-114A serial no. PC1278** installed on the Respondents aircraft registration number **5Y-BMZ** (Cessna 208B Grand caravan) will not be in the same state at the time the suit before the Courts in Berlin is determined and it is within the jurisdiction of this Court. Consequently, by dint of **Section 7 of Arbitration Act**,

**“(1) It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.”**

13. This Court may issue and has issued interim orders based on Applicant’s application of 13<sup>th</sup> October 2020, to preserve the subject matter pending the dispute being heard and determined at the Parties Choice of Forum Germany as stipulated in Clause 23.0 of Engine Lease Agreement of 30<sup>th</sup> March 2016.

**14. In light of the above the Preliminary Objection fails and is hereby dismissed.**

**DELIVERED SIGNED & DATED IN OPEN COURT on 31<sup>st</sup> MAY 2021 (VIRTUAL CONFERENCE)**

**M.W. MUIGAI**

**JUDGE**

**IN THE PRESENCE OF:**

**MR. OYOO FOR THE APPLICANT**

**MR. MBICHIRE & CO. ADVOCATES FOR RESPONDENT – N/A**

**COURT ASSISTANT- TUPET**

**MR. OYOO:** We sought to address the court on recent development and the subject engine has been returned to the Applicant. The outstanding issues are Travel logs to be delivered to the Applicant.

**COURT:** The Court Interim Orders to remain in force until the issue of the engine is settled in Germany.

**M.W. MUIGAI**

**JUDGE**