REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

MISC. COMM. APPL. NO. E521 OF 2021

BETWEEN

JETWAYS AIRLINES LIMITED.....APPLICANT

AND

OCEAN AIRLINES LIMITED..... DEFENDANT

RULING

Introduction and Background

1. The Applicant has approached the court by way of the Chamber Summons dated 12th July 2021 made, inter alia, under **sections 6** and **7** of the ***Arbitration Act, 1995***; and **Order 40 Rules 1, 8** and **10** of the ***Civil Procedure Rules*** seeking the following orders:

*1) Spent**

*2) Spent**

*3) Spent**

4) THAT pending the hearing and determination of the Arbitral proceedings between the parties herein, this Honourable Court do issue a freezing order restraining the Respondent either by itself, its agents, employees or assigns from selling, disposing of, exchanging, mortgaging, transferring or in any other way dealing with any properties, equity and/or assets owned by the Respondent and/or monies held to the Respondent's credit including those held by banks, the Respondent's debtors and in safe/locker boxes and including any shares held in any company in accordance with the records of the Central Depository and Settlement Corporation in any CDSC accounts.

5) THAT pending the inter partes hearing and determination of the Arbitral proceedings between the parties herein, this Honourable Court do issue a freezing order restraining the Respondent either by itself, its agents, employees or assigns from selling, disposing of, exchanging, mortgaging, transferring or in any other way dealing with its aircraft described as MSN 21200 Fokker 27 MK 50 (Fokker 50) of current registration 5Y-FAD(Previous Registration 5Y-FJE), and that the said aircraft be held at a secure hangar at the Wilson International Airport under the Applicant's control and security.

6) THAT this Honourable Court do issue an order directing the Respondent to provide security for the sum of USD. 569,995.57 (five hundred sixty-nine thousand nine hundred ninety-five dollars and fifty-seven cents) claimed by the Applicant, pending hearing and determination of the arbitral proceedings between the parties herein.

7) THAT in the alternative and without prejudice to prayer 6 above, this Honourable Court do issue an order directing the Respondent's directors to attend court and show cause why they cannot be compelled to provide security for the sum of USD. 569,995.57 (five hundred sixty nine thousand nine hundred ninety-five dollars and fifty-seven cents) claimed by the Applicant.

8) Any other relief that the court deems fit in the interest of justice.

9) THAT the Defendant/Respondent bears the costs of this Application.

2. The application is supported by the affidavit of Mohamed Muhumed Abdi, a director of the Applicant sworn on 12th July 2021. Despite service of the court process on the Respondent, it has not responded by filing any affidavit in response. Despite the fact that the application is not opposed, I have to satisfy myself that the Applicant has established the threshold for grant of the orders sought.

3. The facts giving rise to the dispute between the parties are as follows. By a Lease Agreement dated 24th October 2016, the parties entered into a contract whereby the Applicant leased an aircraft, *Fokker 100, Registration 5Y — SIA* on Aircraft, Crew, Maintenance and Insurance (ACMI) terms to the Respondent for a period of one year and by another Lease Agreement dated 5th May 2017, the Applicant similarly agreed to lease another aircraft, *Fokker 50 Registration 5Y — JWZ* on AMCI terms to the Respondent for a period of one year ("the Agreements")

4. Pursuant to Clause 2.1, clause 2.1.2 of the Agreements, the Respondent was required to pay the Applicant on a monthly basis at the agreed rate of USD 2200 per block hour with a minimum guarantee of 80 hours per month. The Applicant claims that as at 23rd February 2021, the Respondent owed the Applicant the amount of USD 569,995.57 which sums the Respondent has declined to settle despite several demands being made to it. The Applicant issued a formal demand on 29th January 2019 which was responded to by the Respondent in a letter dated 18th February 2019 where the Respondent denies any liability. The Applicant has declared a dispute pursuant to Clause 13 of the Agreement, with the dispute being formally referred to Arbitration for hearing and final resolution.

5. The Applicant is apprehensive that in the event the arbitration proceedings are determined in its favour, it will be unable to recover the sums awarded for the reasons that the Respondent's physical address cannot be traced and attempts to reach the Respondent through email or on phone have been unsuccessful and that the Respondent owns an aircraft described as *MSN 21200 Fokker 27 MK 50 (Fokker 50) of current registration 5Y-FAD(Previous Registration 5Y-FJE),* which is the only physical asset owned by the Respondent that the Applicant is aware of. The Applicant depones that the Respondent in the process of liquidating its assets in Kenya, including the said aircraft, all with the aim of defeating justice and rendering any claim filed against it by creditors redundant, on the basis that there would be no asset to attach at the end of such arbitral or litigious proceedings.

6. The Applicant further states that since a dispute has been declared by it, there is a real risk that the Respondent will attempt to dispose off the said aircraft with the aim of defeating any award made against it. The Applicant submits that unless this Court intervenes and grants the prayers sought herein, the ends of justice will be defeated as it will be denied the fruits of any successful arbitration proceedings

Analysis and Determination

7. The Applicant's mainly seeking orders in the nature of interim measures of protection and security under **section 7** of the ***Arbitration Act*** which provides as follows:

7. Interim measures by court

(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.

(2) Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.

8. The principles governing the grant of interim orders of protection under the ***Arbitration Act*** were outlined by the Court of Appeal in ***Safaricom Limited v Ocean View Beach Hotel Limited & 2 others*** **Civil Application No. NAI 327 of 2009 [2010] eKLR** where Nyamu JA., observed as follows;

By determining the matters on the basis of the [GIELLA] principles the superior court failed to appreciate what interim measures of protection entail in terms of arbitration law, during or before the commencement of an arbitration. It may be necessary for an arbitral tribunal or a national court to issue orders intended to preserve evidence, to protect assets, or in some other way to maintain the status quo pending the outcome of the arbitration proceedings themselves. Such orders take different forms and go under different names. In the case of Kenya, the Arbitration Act is modeled on the Model Law and the UNCITRAL Rules and this is the reason they are known as "interim measures of protection" under section 7 of the Arbitration Act. On the other hand, in the English version of the ICC Rules for example, they are known as "interim conservatory measures". Whatever their description however, they are intended in principle to operate as "holding" orders, pending the outcome of the arbitral proceedings. The making of interim measures was never intended to anticipate litigation.

. . . . . .

An interim measure of protection such as that sought in the matter before us is supposed to be issued by the court under section 7 in support of the arbitral process not because it satisfies the civil procedure requirements for the grant of injunctions as the High Court purported to do in this matter.

To illustrate the point Article 26-3 of the UNICTRAL Arbitration rules states:-

"A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the

agreement to arbitrate, or as a waiver of the agreement."

Section 7 of the Arbitration Act is modeled on this. However, in the matter before us and with due respect, the Commercial Court (Koome, J.) contravened the above principles by firstly either declining to issue any measure of protection or granting such a measure. The Court also failed to correctly address the principles for the issue of any such measures and worse still, the supreme court took over the subject matter altogether and ruled on the merits of the subject matter of the arbitration thereby prejudicing the outcome of the arbitration. This explains why in the special circumstances of this matter, this Court must take extraordinary measures to rectify an extraordinary illegality. Interim measures of protection in arbitration take different forms and it would be unwise to regard the categories of interim measures as being in any sense closed (say restricted to injunctions for example) and what is suitable must turn or depend on the facts of each case before the Court or the tribunal – such interim measures include, measures relating to preservation of evidence, measures aimed at preserving the status quo measures intended to provide security for costs and injunctions. Under our system of the law on arbitration the essentials which the court must take into account before issuing the interim measures of protection are:-

1. The existence of an arbitration agreement.

2. Whether the subject matter of arbitration is under threat.

3. In the special circumstances which is the appropriate measure of protection after an assessment of the merits of the application.

4. For what period must the measure be given especially if requested for before the commencement of the arbitration so as to avoid encroaching on the tribunal's decision making power as intended by the parties. [Emphasis mine]

9. Apart from the well-known injunctive reliefs which are commonplace, I must decide whether such an order falls within the rubric of interim measure of protection. As the court in ***Safaricom Limited v Ocean View Beach Hotel Limited & 2 others*** **(Supra)** stated, interim orders of protection may take many forms necessary to preserve the status quo or preserve the subject matter of the arbitration. In a case decided before the aforesaid decision, ***Carzan Flowers (Kenya) Ltd & Others v Tarsal Koos Minck B V & Others*** **ML HCCC No. 514 of 2009 (UR) Kimaru J.,** observed as follows:

There are different types of interim measures which are available and which are applied differently by courts of various countries. The analytical commentary nevertheless gives clues as to which kinds of interim measures are deemed to be included: steps by the parties to conserve the subject-matter or to secure the evidence, measures required from a third party and their enforcement (i.e. pre-award attachments). Some courts have held that such pre-award attachments were not consistent with the arbitration agreements and the purpose of the 1958 Convention because they would in fact impede expeditious arbitration proceedings. Yet, discourage resort to arbitration or obstruct the course of arbitral proceedings but would rather make the later award meaningful by preserving the subject-matter or assets intact within jurisdictions…In England it has been held that the English Court can support an ICC arbitration by granting interim measures (a) which ordered purely procedural steps which the arbitrators either could not order or could not enforce such as requiring an inspection of the subject matter immediately the dispute arose or compelling attendance of an unwilling witness, (b) which maintained the status quo pending the making of an award e.g. by an interlocutory injunction, so as to prevent one party from bringing about a change of circumstances adverse to the other which the arbitrators could not remedy and (c) which afforded remedies such as mareva injunction designed to ensure that the award had the intended practical effect by causing one party to provide a fund to which recourse could be had by the other party if the first party failed to honour an adverse award spontaneously. However, in determining whether to grant an interim measure in support of the agreement to arbitrate under the ICC rules, the English Court, as the local court, should have regard to (a) the fact that the arbitration was a consensual process and that the court should strive to make the consensus effective by identifying, so far as possible, the kind of arbitrational process that the parties either expressly or impliedly indicated that they were contemplating when they entered into the arbitration agreement (b) the fact that the choice of an ICCC arbitration indicated that the parties intended that the arbitration should, as far as possible, be independent of the national legal system of the country in which the arbitration was to take place, and (c) the degree to which any interim measures would encroach on the arbitrator's function. There is plainly a tension here. On the one hand the concept of arbitration as a consensual process, reinforced by the ideal of transnationalism, leans always against the involvement of the mechanisms of state through the medium of a municipal court. On the other side there is the plain fact palatable or not, that, it is only a court possessing coercive powers which can rescue the arbitration if it is in danger of floundering, and that the only which possesses these powers is the municipal court of an individual state. Whatever extreme positions may have been taken in the past, there is a broad consensus acknowledging that the local court can have a proper and beneficial part to play in the grant of supportive measures. Total consistency cannot be expected and each domestic court has its own practical methods, developed in the context of litigation, which it will instinctively tend to bring to bear when similar questions arise in the context of arbitration; each country will have its own traditions of arbitration and its own traditions of the relationship between arbitration and the courts… In the case of COPPEE-LEVALIN SA/NV VS. KEN-REN CHEMICALS AND FERTILIZERS LTD (IN LIQ) [1994] 2 ALL ER 449, the courts of justice in England accepted as a principle that even in international arbitrations, it may be necessary in certain instances for domestic courts to issue interim measures of protection to secure the substratum of the arbitration process…The court has the jurisdiction to grant the injunction since the whole purpose of giving the court power to take such orders is to assist the arbitral process in cases of urgency before there is an arbitration on foot. Otherwise it is all too easy for a party who is bent on a policy of non-cooperation to frustrate the arbitral process. Of course, in any case where the court is called upon to exercise the power, it must take great care not to usurp the arbitral process and to ensure, by exacting appropriate undertakings from the claimant, that the substantive questions are reserved for the arbitrator or arbitrators…As is evident, in considering whether or not to grant an interim measure of protection pending resolution of a dispute by arbitration, the courts have been cautious not to render determination on the merits of the issues in dispute lest it interferes with the jurisdiction of the arbitrator to whom the parties have granted exclusive jurisdiction to determine their dispute. The courts are not oblivious of the fact that there are times when the courts will be called upon to issue interlocutory orders in order to preserve the subject matter of the dispute pending hearing of the dispute by arbitration…It is clear that in granting an interim measure of protection the court is not rendering any opinion in regard to the matters in dispute between the parties: the court is issuing orders which would in effect assist the arbitral

tribunal discharge its mandate by preserving the subject matter of the dispute. Whereas the court is mindful that the decisions cited above were made after the courts interpreted an English statute, however, the general principle set out in the said cases in regard to when a court can intervene in arbitration proceedings to grant appropriate orders with a view to rendering justice to the parties are applicable with equal force in Kenya…In considering an application under section 7(1) of the Arbitration Act, the court is not being called upon to determine the merits of the matters in dispute but rather it is being called upon to aid the arbitration process by putting the disputing parties at a footing that will ensure none of the parties would be prejudiced during the hearing of the dispute by the arbitral tribunal. Of course, as is apparent from some arbitral proceedings, a party to such proceedings who considers himself to have been put at a position of disadvantage and therefore likely to be prejudiced, prior to or during the arbitral proceedings, may have no option but to seek the coercive jurisdiction of the court in order to protect the essence of the arbitral proceedings…The position in Kenya is that for a party to succeed in an application under section 7 of the Arbitration Act, 1995 for interim measure of protection pending hearing of the dispute by arbitration, he must firstly establish that there exists an arbitration clause in the agreement between the parties that is capable of being invoked to have the dispute referred for determination by arbitration. Secondly, such a party must establish that it would suffer irreparable damage or loss that by the time the arbitration is heard; such a party may not be able to obtain an appropriate remedy. Generally the courts have accepted that for interim measure of protection to be granted, the applicant must establish a case broadly under the established principles for the grant of interlocutory injunction…A court hearing an application for the grant of interim measures of protection must always act cautiously and must put in mind the fact that, in considering the application, it should not exceed its jurisdiction and make a determination that is clearly within the province of the arbitrator. The court should not lose sight of the fact that a grant of any interim measure of relief is meant to preserve or conserve the subject matter of the arbitration pending hearing and determination of the dispute by arbitration. The interim measure granted should aid but not impede the realisation of the resolution of the dispute between the parties by arbitration. The court is therefore expected to tread on the thin line that separates the making of the decision in respect of a matter that is actually in dispute (and which the parties have by consensus granted exclusive jurisdiction to the arbitrator) and granting orders that will put the parties in such a position that when the arbitrator makes his award, the same would be of benefit to the successful party…

10. It is clear therefore that the court may issue any form of interim order of protection to protect the subject matter of the arbitration. However, in issuing any order, the court must exercise circumspection so as not to interfere with the Arbitral Tribunal's jurisdiction to determine the merits of the matter. I hold that as long as an applicant establishes a basis for the grant for an order for furnishing security that may protect or preserve the substance of the arbitral proceedings or prevent such proceedings from being rendered useless, then a court may make such an order under **section 7** of the ***Arbitration Act***.

11. From the Applicant's pleadings and annexures, more so the correspondence between the parties' counsel preceding the filing of the instant application, the Agreements together with Arbitration clauses therein are admitted. Further, there is a dispute as to whether the Respondent is liable for the sums claimed by the Applicant, which dispute has since been referred to arbitration. I also note that through previous applications, the Applicant has been unable to trace the Respondent and has even sought substituted service. Further, I can understand the Applicant's apprehension that chances of the Respondent disposing or concealing his assets are quite high as can be seen with the Respondent having changed the registration details of its aircraft. Such action by the Respondent may undermine any recovery or execution efforts by the Applicant and it will be proper if the said aircraft is persevered in its current state pending hearing and determination of the arbitral proceedings.

12. The evidence in this case is that apart from the aircraft whose registration has been changed, there is no other assets the Applicant may have recourse to if it is successful. I find that the Applicant has satisfied the conditions necessary for the grant of an order of interim measure of protection of the Respondent's assets pending hearing and determination of the arbitration proceedings. Having made the orders in respect of the aircraft and the freezing orders, I do not think an additional order for security is merited at this stage unless, the Applicant moves the court further.

13. For the reasons stated above, the Applicant's Chamber Summons dated 12th July 2021 partly succeeds to the extent that the court issues the following orders:

1) THAT pending the hearing and determination of the Arbitral proceedings between the parties herein or further orders of the Arbitral Tribunal, a freezing order be and is hereby issued restraining the Respondent either by itself, its agents, employees or assigns from selling, disposing of, exchanging, mortgaging, transferring or in any other way dealing with any properties, equity and/or assets owned by the Respondent and/or monies held to the Respondent's credit including those held by banks, the Respondent's debtors and in safe/locker boxes and including any shares held in any company in accordance with the records of the Central Depository and Settlement Corporation in any CDSC accounts.

2) THAT pending hearing and determination of the Arbitral proceedings between the parties herein or pending further orders of the Arbitral Tribunal, a freezing order be and is hereby issued restraining the Respondent either by itself, its agents, employees or assigns from selling, disposing of, exchanging, mortgaging, transferring or in any other way dealing with its aircraft described as MSN 21200 Fokker 27 MK 50 (Fokker 50) of current registration 5Y-FAD(Previous Registration 5Y-FJE), and that the said aircraft be held at a secure hangar at the Wilson International Airport under the Applicant's control and security.

3) The costs of this application shall be borne by the Respondent

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF AUGUST 2021.

D. S. MAJANJA

JUDGE

Ms Ndirangu instructed by Igeria and Ngugi Advocates for the Applicant.

No Appearance for the Respondent