



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
HCCC NO. 258 OF 2016

JOHN MUTURI NYAGA.....APPLICANT

VERSUS

GRAHAM ALEXANDER WALSH.....1ST RESPONDENT

MARK RENE MESDAG2ND RESPONDENT

ERIC SCOTT EDGAR3RD RESPONDENT

AVRO LEASING LIMITED.....4TH RESPONDENT

RULING

1. On 6th July 2016, this Court granted the following Interim Relief to the Plaintiff:-

(i) THAT the Respondents are hereby granted 10 days to file and serve their responses.

(ii) THAT since the Court is assured by the 4 Respondents that they cannot dispose any assets within 10 days hereof, an order be and is hereby granted restraining the 4 Defendants from disposing off any of the Company's assets pending the hearing of the matter interpartes on 19th July, 2016.

(iii) THAT all other issues shall wait the interpartes hearing.

2. The Interpartes Hearing has not happened and is scheduled for 27th September, 2016. The Interim Orders granted on 6th July, 2016 are in force until that day.

3. On 15th August 2016, the Plaintiff approached Court under Certificate of Urgency with a Notice of Motion of even date complaining that the Court's Order of 6th July 2016 had been disobeyed by the 1st, 2nd and 3rd Defendants. In that Motion the Plaintiff seeks two substantive Prayers as follows:-

- THAT this Honourable Court be pleased to detain GRAHAM ALEXANDER WASH, MARK RENE MESDANG and ERICK SCOTT EDGAR to Civil Jail for a period not exceeding six (6) months and /or attach their properties for a period not exceeding one (1)

year for disobeying or breaching the order of this Honourable Court made on 6th July and extended on the 21st July 2016 maintaining the status quo of the assets of the 4th Defendant/Respondent company.

- THAT pending the hearing and determination of this Application, the said GRAHAM ALEXANDER WASH, MARK RENE MESDANG and ERIC SCOTT EDGAR being foreigners, be ordered to surrender and deposit their respective passports in this Honourable Court.

4. In an Affidavit sworn on 15th August 2016, the Plaintiff sets out the reasons why he takes the position that the Court Order has been breached. The disobedience is said to be in the manner in which the alleged Contemnors have dealt with Aircraft Registration Number 5YCBI (the Aircraft). The Plaintiff depones that as at 6th July 2016 when the Interim Order was granted, the said Aircraft was parked at a hanger at Jomo Kenyatta International Airport (JKIA) and no activity was taking place on the said Aircraft.

5. That since that date the alleged Contemnors repaired and carried out major mechanical repairs on the Aircraft. The Plaintiff has given some details on the nature of the repairs. For the purpose of the matter at hand it is not necessary for the Court to set them out. Anyhow, the Plaintiff complains that the repairs were carried out fraudulently by use of the Plaintiff's Civil Aviation Licence No. KCRA/LAS/1318. In a Supplementary Affidavit filed on 17th August 2016, the Plaintiff stated that the Aircraft had been flown out of Nairobi to Entebe.

6. Although the 3 Respondents did not file a Replying Affidavit to the contempt Application, their Counsel relied on the Affidavit of the 4th Respondent which had been sworn on 16th August 2016 in response to the Plaintiffs main Motion for Injunction. The highlight of the Affidavit in respect to the matter before Court is that the Aircraft belongs to Nemesis GMBH who recalled it through a letter of 30th June 2016. That short letter reads as follows:-

NEMESIS Vermögensverwaltungs GMBH

RontgenstraBe 15

97295 Wakdbrunn

Avro Leasing Limited

P.O. Box 15604-00509

Office 1

C/o Aero Club of East Africa, Wilson Airport

Nairobi

KENYA

Gentlemen,

Regarding default on payments due to the Loan Agreement between Nemesis GmbH and Avro Leasing Limited in respect of

- *5 x Hawker Siddeley HS748 s/n 1784,1701,1687,1687,1689,1697 and*
- *1 x Nihon Aircraft Manufacturing Corporation YS11 s/n 2051 dated 23.September 2015. We inform you herewith that we terminate the loan agreement and ask for the return of the loan items.*

Best regards,

Signed

Michael Muhleck

7. Mr. Onduso appearing for the Plaintiff argued that the alleged contemnors had disobeyed the Court Order and were bent on disposing off all assets of the Company before the conclusion of this suit. Counsel saw a collusion between Nemesis GMBIt and the Respondents. The Court was also asked to consider that the Respondents are foreigners whose status both here and Uganda (where the Aircraft was flown) was unknown. For this reason they were a real flight risk.

8. For the Respondents, it was argued that the Aircraft does not belong to the Company as it was recalled by Nemesis GMBIt. That the only assets held by the Company are office furniture which have not been disposed off in any way. As to whether the Respondents are a flight risk, Counsel stated that all the Respondents have their houses and families in Kenya. And that as they earn their livelihood through travels it would be unfair to confiscate their passports.

9. The Court Order of 6th July, 2016 and which is said to have been breached brooks of no ambiguity, or so I think. It was an Order restraining the Defendants from disposing off any of the Company Assets. To prove disobedience, the Applicant needed to prove that the alleged contemnors are guilty of disposing off Company assets.

10. What the Plaintiff alleged and attempted to prove was that the Respondents had repainted and carried out extensive repairs on the Aircraft and subsequently flown it out of the Country to Entebbe. What has not been demonstrated to Court is that repainting and repairing the Aircraft is an act of disposal. Repaint and repair do not seem to the Court to be disposals. As to the flight of the Aircraft to Entebbe, the Applicant has not proved that it amounts to disposal. Is the Aircraft in Entebbe on routine business or is it because it has been disposed off in any way? The Applicant has not sought to provide evidence that would answer this question.

11. The Applicant seems to have assigned a meaning to the Court Order of 6th July 2011 that differs from its plain reading. This is what the Applicant says in paragraph 8 of his Affidavit:

“THAT I am aware that when the said Application came up for hearing before the Hon. Mr. Justice Tuiyott on the 6th July, 2016, the learned Judge directed that the status quo at the time be maintained pending the hearing and determination of this suit. *Produced and marked “JMN I” is a copy of the said Order*”.

12. The Order made by Court was not a general Status Quo Order. It was specific and pointed. It was an order restraining the Defendant from disposing off any of the Company assets. Having assigned his own meaning to the Order, the Applicant saw its disobedience because repairs and repaints could amount to change of character of the Aircraft. However, on a correct reading of the Order the acts complained of cannot amount to its disobedience because they do not involve disposal.

13. A charge of Civil contempt is akin to a Criminal Offence. If found guilty, a Contemnor may be punished by imprisonment. A Contemnor may lose his liberty. This would be one reason why the standard of proof in contempt proceedings is higher than in purely Civil Matters. The standard of proof is higher than a balance of probabilities and almost, but not exactly, beyond reasonable doubt. The Applicant has failed to discharge this onus of proof placed on him by the law.

14. Parties will have noticed that the Court has determined the Application for contempt without considering whether or not the Aircraft was still an asset of the Company as at the date the Court granted the Interim Orders. That is an issue for another day.

15. The result, the Notice of Motion of 15th August 2016 is hereby dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 27th day of September ,2016.

F. TUIYOTT

JUDGE

PRESENT;

Alenya h/b Onduso for Plaintiff

Wairimu for Defendant/Respondent

Alex - Court Clerk