



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 246 & 249 OF 2015**

**FLY AVIATION SERVICES.....PLAINTIFF/DECREEHOLDER**

**VERSUS**

**BRAVO CARGO AIR DWC LLC..... 1<sup>ST</sup> DEFENDANT**

**FREDRICK URURUKA ..... 2<sup>ND</sup> DEFENDANT**

**CFS LOGISTICS SERVICES LTD.....OBJECTOR**

**R U L I N G**

1. This matter first came before the Court under a Certificate of Urgency dated 22<sup>nd</sup> May 2015, on the Application of the Plaintiff. The Plaintiff is also a Decree Holder. The Judgment Debtors are the First Defendant Company and its Director, namely, Bravo Cargo Air and Captain Fredrick Ururuka. The dispute and Decree relates to a lease for an aircraft. The Lease Agreement between the Parties was dated 11<sup>th</sup> November 2014, pursuant to which **US\$ 178,450.00** was paid by the Plaintiff to the Defendants.

2. Previously, in the course of hearing this Application, the Parties had entered into and recorded a consent in settlement of their dispute. Unfortunately, that did not end the matter. The dispute arose after the Plaintiff leased one of the Defendants’ aircraft. The Plaintiff paid the fee agreed, however, the aircraft was not made available to the Plaintiff lessee. The Defendant’s Director thereafter became elusive and there was no prospect of the matter being resolved without litigation. Subsequent to issue, the Parties informed the court the matter was resolved by consent. The Consent as entered provided for the payment and/or refund of the sum of **US\$ 269,377.73**. It was dated 30<sup>th</sup> June 2015. Under the Consent, the ex parte Orders of 24<sup>th</sup> May 2015 were discharged.

3. The Defendant defaulted on the terms agreed and the Director again became difficult to contact. Prior to the Consent, and possibly the reason it being given, the Plaintiff brought an application for the arrest of the aircraft; a DC8 -73-5 Registration: TT –DBC, 4 Engine CFM 56-2 M, which was then at Jomo Kenyatta International Airport (JKIA). The Application was filed on 22<sup>nd</sup> May 2015, under **High Court Civil Case Number; 249 of 2015**. The Plaintiffs sought a temporary injunction preventing the removal of said aircraft from the jurisdiction.

4. The Application sought the following Orders:

- (1) For reasons to be recorded, this Application be certified as urgent and the same be heard ex-

parte in the first instance for purposes of prayers 2, 3, 4 and 5.

(2) The Honorable Court be pleased to grant leave of service of this Application, the Supporting documents, Notice of Summons and the Plaint in Dubai, United Arab Emirates where the Respondents ordinarily conduct business.

(3) Alternatively this Honorable as to meet the ends of Justice be pleased to order service of this Application, Supporting documents and any consequential orders through email address of the Respondents due to the urgency of this matter

(4) The Honorable Court be pleased to grant a temporary injunction restraining the Respondents from acting in any manner as to induce breach of the Wet-Lease Agreement between the and the Applicant pending the hearing and determination of this Application inter-partes.

(5) The Honorable Court be pleased to grant a temporary injunction restraining the Respondents whether by themselves, their Servants, Agents, employees, assigns or otherwise from flying, repositioning, Removing, transferring or disposing of **Aircraft: DC-8-73F; registration TT-DBC; 4 engines: CFM 56-2C** pending the hearing and determination of this suit.

(6) That alternatively the court does issue an order as it deems just and convenient in the circumstances pending the hearig and determination of this Application inter-partes.....”

The Supporting Affidavit was sworn by a Emadeldeen Osmain of Al Khobaisi-Dubai

5. In fact the Orders sought in the Application brought by the Plaintiff were not appropriate to the circumstances of this case. The Plaintiff’s Application was properly to be made under the Cape Town Convention. It was subsequently made in the correct way on the basis of monies had and received and non-delivery of the aircraft, the subject of the lease. The Application prayed for the relevant order to be “*pending the hearing and determination of the suit.*”. However, to allow for service of the Application, the Order in terms of Prayer 5 was made for a limited period of 7 days. Service proved difficult and the Court Ordered alternatively service.

6. The Defendants were served and on 23<sup>rd</sup> June 2015 they filed a Memorandum of Appearance together with a Notice of Preliminary Objection and a Defence. The Preliminary Objection sought to challenge the Court’s jurisdiction. Clearly, the Advocates were not aware of the Cape Town Convention or were misdirected as to the facts. In the circumstances the Preliminary Objection was heard and dismissed and each of the Parties’ Advocates were provided with copies of the Convention. The Court took the view that it is in the interests of justice for Advocates to be well prepared and up to date with the law when they appear in Court to argue a matter. The aircraft was still at JKIA and The Order under the Cape Town Convention was granted in the terms, that “the Judgment Debtor and the Objector were prevented from removing the aircraft Mc Donnell Douglas DC8-7-5 Registration Number; TT-DBC, 4 Engine CF 56-2M, out of the jurisdiction and the Kenya Civil Aviation Authority (“KCAA”) was to facilitate that Order

7. As stated above, shortly after that decision, the Parties entered into “**a consent**” whereby they agreed that the Defendants would pay to the Plaintiff the sum of **US\$ 269,377.73** in relation to both suits **HCC. 249 of 2015** and **HCC 246 of 2015.** The said sum was to be paid in seven (7) monthly instalments. Further, the Parties agreed the ex-parte orders were to be discharged forthwith. The sums were not paid and the Plaintiff obtained a decree which it sought to enforce through its Auctioneers Dalali Traders Auctioneers. Between 30<sup>th</sup> June and 12<sup>th</sup> August 2015 no payment was received and a warrant of sale was issued by a Deputy Registrar of this Court. The sum to be realised was said to be **Kshs 18,095,328.20/=**. The property against which it was to be executed was not identified.

8. On 19<sup>th</sup> August 2015 ( that is one week after the threat of execution), an entity calling itself CFS Logistics Services Limited appointed a firm of Advocates to act for it. The Notice of Appointment

was filed calling itself an Objector. At the same time a Certificate of Urgency was also filed stating that the aircraft DC8-73F & DC 8 -735 Registration number; TT BC Mc Donnell Douglas was going to be wrongfully auctioned. It was said that the Auctioneer had proclaimed it on 13th August 2015 and would proceed to Auction on 20<sup>th</sup> August 2015 (the following week and a day later). The Chamber Summons of same date sought leave for matter to be heard in the vacation. In the Supporting Affidavit sworn by the Advocate with conduct of the matter, he states that the aircraft would be auctioned on 20<sup>th</sup> August 2015. He says the Objector was the legal and beneficial owner of the aircraft having purchased the same in July 2015. That is when, albeit the injunction had been discharged, the Defendant was in breach of its obligations under the Consent entered on 30<sup>th</sup> June 2015. The same Advocates (J.S.Khakula) also filed a Notice of Objection to attachment in the Chief Magistrate's Court. A second Certificate of Urgency also asserted that the aircraft would be auctioned on 20<sup>th</sup> August 2015. In fact the proclamation dated 12<sup>th</sup> August 2015, states;

*“you are hereby notified that the moveable property etc, left in your custody for 7 days. At expiry of 7 days the same will be removed to auctioneers premises and sale by public auction.”*

Therefore there is no evidence before the Court to say that;

- (i) There would be any auction on 20<sup>th</sup> August 2015 and
- (ii) That any aircraft would be auctioned on that day, or the Aircraft was located at premises of the Defendant.

9. The Notice of Motion also filed on behalf of the Objector at the same time seeks the following orders:-

- (i) Stay of Execution, of the Decree and Warrants.
- (ii) Lift or/ set aside warrants of attachment against aircraft.

The grounds are set out in the Application. It is notable that Ground 2 states that the proclamation was issued on 13<sup>th</sup> August 2015. That means it would expire on 21st August 2015. The Objector claims it will suffer irreparable loss and damages unless warrants are lifted. That is not explained further. On 7<sup>th</sup> September, Mr. Onduso for the Plaintiff gave an undertaking that the aircraft would not be sold pursuant to the attachment until after this Ruling was delivered.

10. The Supporting Affidavit is sworn by one Vincent Amayer from Lagos State in Nigeria. He says he is Managing Director of the Objector. He says the Objector acquired the aircraft on 20<sup>th</sup> July 2015 and has been using it since 25<sup>th</sup> July 2015. He does not state its whereabouts. At paragraph 5 he says the Auction will be on 26<sup>th</sup> August 2015 as that is when the Proclamation /Notice lapses. He says the aircraft does not belong to Bravo Cargo. He also states that the objector will suffer irreparable loss and damage. He does not say what that loss or damage would be. Save for loss of revenue, the case on loss is not clear. He does not tell the Court whether negotiations for the Sale were undertaken before or after 30<sup>th</sup> June 2015. However, given the proximity of the purported sale to the consent order, it raises concerns as to timing. These no doubt can be tested under cross-examination.

11. Clause 31 of Sale and Purchase Agreement dated 20<sup>th</sup> July 2015, provides that the Delivery date shall be five (5) days after receipt of payment. There is no evidence of proof of payment and therefore no proof of delivery.

12. On 24<sup>th</sup> August 2015 the Objector filed a second application identical to the one filed 19<sup>th</sup> August 2015 except that the Supporting Affidavit was sworn by the Advocate. In it he notes that

the Court declined to make interim orders and the Objector has not provided further proof of ownership. He states that there is a need to preserve the status quo to prevent the Objection being rendered nugatory. That Application demonstrated the aircraft was not sold on whether 20<sup>th</sup> or 21st August as alleged.

13. The Plaintiff filed Grounds of Opposition to the Objector's Application on the basis that it is an attempt to review the order. On 1<sup>st</sup> September 2015 it filed an application seeking an order restraining the Objector from removing the aircraft from the jurisdiction.

14. In the meantime, the Judgment Debtor continued in default. The Affidavit of Chief Executive Officer of the Plaintiff Company filed on 1<sup>st</sup> September 2015 states at Paragraphs 9 to 16:

*9. THAT it is clear from the foregoing that the Judgment Debtor and the Objector are colluding to frustrate the Attachment and sale of the aircraft.*

*10. THAT I have shown legitimate reasons on why this application should be allowed and I pray that the same be allowed as prayed.*

*11. THAT as can be seen from the Objectors documents and the sequence of events, the Objector and the Judgment Debtor have conspired to defeat the claim of the Decree Holder.*

*12. THAT the Judgment Debtor purposely and without informing the Decree holder entered into a sale agreement with the Objector knowing very well he had a judgment to settle with the Decree holder and did not even bother to notify the Decree Holder of his intentions and see how the Decree would be settled.*

*13. THAT the Judgment Debtor had a duty to disclose his intentions to the Decree Holder and also inform the Objector but he failed to do so and this was to ambush the Decree holder and deny him an opportunity to satisfy his claim against the Judgment Debtor out of the intended sale of the aircraft herein.*

*14. THAT I am advised by our Advocates on record which advise I verily believe to be true that the purported transfer of the aircraft to the Objector is fraudulent and calculated to defeat or frustrate the lawful orders of this Honourable Court.*

*15. THAT I am informed by one Denis Kimani of Kenya Civil Aviation Authority, telephone number +254 723 309 209 which information I verily believe to be true that the Objector has received the Certificate of change of ownership from Chad and the same is undergoing verification upon which they are bond to issue the Air Operator's licence that will facilitate the relocation of the aircraft out of the jurisdiction of this Honourable Court anytime from now and defeat or frustrate the proclamation and attachment of the aircraft following the lawful orders of this Honourable Court.*

*16. THAT the applications by the Judgment Debtor are thus an abuse of the court process and should not be entertained."*

15. The Parties have filed Written Submissions and highlighted them on 10<sup>th</sup> February 2016. The Court has read and considered both the Written Submissions and the arguments raised in highlighting.

16. The underlying issue here is onward payment of monies received by the Defendant. The Defendant was in default. The Defendant was enjoined from disposing of the aircraft. Suddenly, the Defendant was willing to consent to generous repayment terms. Again, there was repeated default. At the same time, the aircraft is purportedly transferred. Amazingly that is said to have been done without payment nor appropriate registration. Even after the sale of the aircraft, it is found in the Defendant's

possession. Was the supposed buyer not keen on taking possession?

17. There is no cogent evidence that the aircraft was in fact disposed of at the time of the first application. In fact, Kenya Civil Aviation Authority (“KCAA”) reports attempts at disposal were ongoing on 24<sup>th</sup> August 2015. It could also be the case that the negotiations were taking place during the currency of the Court’s order of 22 May 2015 prohibiting attempts at disposal. Again, that is a matter for Trial.

18. The order sought by the Objector is for equitable relief. The Defendant owner/previous owner is in default of an agreement and a consent order. The Objector obtains title through that Defendant. Therefore, apart from the absence of any cogent believable evidence of purchase, the Objector is tainted by Defendant’s unclean hands in relation to its conduct regarding failure to supply the aircraft and then default in refund/payment. Through its Application the Objector demonstrates knowledge of the facts. The timing suggests the consent and purported sale was merely a device to evade payment. That is supported by fact that, payment was forthcoming only after an interim stay was declined.

19. Further the application is defective. The evidence is inconsistent, incomplete and contradictory. For these reasons the Objector’s application is dismissed with costs.

Order accordingly

**FARAH S.M. AMIN**

**JUDGE**

**SIGNED AND DELIVERED AT NAIROBI THIS 17<sup>th</sup> DAY OF October 2016.**

In the Presence of:

Clerk: Isaiah Otieno

No Appearance for Applicant

No Appearance for Respondent

Mr Ombwayo Holding brief for Mr Khakula for the Objector.