



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & TAX DIVISION
CIVIL CASE NO 16 OF 2006

MOSES WACHIRA.....PLAINTIFF

VERSUS

NIELS BRUEL.....1ST DEFENDANT

HELMUTH RAME.....2ND DEFENDANT

AIRTRAFFIC LIMITED.....3RD DEFENDANT

CAPITAL AIRLINES LIMITED.....PROPOSED INTERESTED PARTY

RULING

INTRODUCTION

1. The matter herein has had a chequered history since it was filed as is evident from the lengthy proceedings herein. Okwengu J (as she then was) heard the matter and delivered her judgment on 30th March 2011. She granted several reliefs which were set out in greater detail in the Proposed Interested Party's written submissions dated 14th January 2014 and filed on 17th January 2014. Her findings could be summarised as follows:-
 - a. **The Plaintiff suffered loss of user of the 1st Aircraft.**
 - b. **The Plaintiff's claim for travel expenses was rejected.**
 - c. **The Plaintiff was to be refunded a sum of USD 110,000.00.**
 - d. **The 3rd Defendant's Counter-claim failed and was dismissed with costs.**
 - e. **Costs were awarded to the Plaintiff.**
 - f. **The 3rd Defendant was ordered to return all spare parts to the Plaintiff within thirty (30) days from the date of judgment.**
2. The 1st Defendant filed an application to review the said judgment on the ground that there had been an error on the face of the court record but Okwengu J (as she then was) dismissed the said application with costs on the basis that the said 1st Defendant had not established a simple error on the face of the court.
3. Thereafter, a person known as Anders Bruel filed an application to be enjoined in the matter as an Interested Party on 2nd November 2012. The said Anders Bruel, who said he was trading in the name of Queenscross Aviation, had initially filed a Petition in the High Court of Kenya

Constitutional Division. However, Ngugi J delivered a judgment on 12th October 2012 in which she held that the said Anders Bruel was neither the registered owner nor lessor of the aircraft. The said learned judge observed that his only connection with the aircraft was that he had provided a mailing address for the owner of the aircraft, Queenscross Aviation.

4. He sought to be enjoined as an Interested Party herein so as to save judicial time in the determination of the matter regarding the ownership of the said aircraft. However, Havelock J pointed out that having failed before Ngugi J in the Petition in the Constitutional Division, the said Anders Bruel was trying his luck in filing the said application. Havelock J came to the conclusion that his hands were tied by the judgment of Ngugi J and therefore dismissed the said application for having been *res judicata* on 9th October 2013.
5. In between the time the judgment was delivered and the ruling by Havelock J, several applications seeking various prayers were filed by the parties herein. As counsel for all the parties were completely unable to agree on the order in which the said applications were to be heard, this court directed that a Notice of Motion application dated and filed on 22nd March 2013 seeking to enjoin M/S Capital Airlines Limited as an Interested Party in this matter would be heard first.
6. The said application was brought under the provisions of Sections 1 A & 1B of the Civil Procedure Act and all other enabling provisions of the law. Prayer No (1) of the said application was spent. It sought the following remaining prayers:-

- a. **Spent.**
 - b. **THAT Capital Airlines Limited be enjoined as an Interested Party.**
 - c. **THAT the court do confirm and direct the Kenya Civil Aviation Authority that the order dated 8th February 2006 lapsed on 30th March 2013 and was no longer in force from that date.**
 - d. **THAT the costs of this application be provided for.**
7. The grounds under which the said application was premised were that:-
 - a. **The injunctive orders that had been granted on 8th February 2006 and extended from time to time lapsed on 30th March 2011 when judgment was entered.**
 - b. **The court did not grant injunctive orders on 30th March 2011.**
 - c. **The Plaintiff's advocates had abused the court process by misleading a government body that expired injunctive orders were in force which was contemptuous of the court process.**

AFFIDAVIT EVIDENCE AND GROUNDS OF OPPOSITION

8. In support of the present application, the proposed Interested Party relied on the affidavit of Captain Himat Vaghela who was its director. He swore the same on 22nd March 2013. He stated that the Proposed Interested Party entered into a lease agreement with Queenscross Aviation on 19th August 2011. He exhibited a copy of the Lease Agreement showing that Queenscross Aviation was the owner of the said aircraft.
9. He contended that he had craved leave to be enjoined in these proceedings as its business of flying aircraft 5Y-EKO had been grounded to a halt. He said that by a letter of 9th March 2012, he had been informed by the 1st Defendant's lawyers that judgment had been delivered and the injunctive orders had lapsed. He contended that the Proposed Interested Party had been paying airport landing and parking fees to the Kenya Civil Aviation Authority in respect of the said aircraft. He said that Kenya Civil Aviation Authority had cancelled the lease on information it had been given by the Plaintiff's advocates that the injunctive orders were still in force.
10. The Plaintiff filed his Grounds of Opposition dated 22nd January 2013 on 23rd January 2013. The same were as shown hereunder:-
 - a. **THAT the application was barred by issue of estoppel and/or was *res judicata*.**
 - b. **THAT the application was an abuse of the court process.**
 - c. **THAT the application was premature as it sought to enjoin an objector to execution before attachment for execution.**

- d. **THAT the application sought to enjoin an objector claiming under purported lease from a fraudulent transfer by the Judgment Debtor to defeat execution and as such it could not have a greater interest.**
- e. **THAT the applicant had not demonstrated what substantial loss would result if the orders sought were denied.**
- f. **THAT the application was mischievous and brought in bad faith to delay the Decree-Holder from recovering its fruits of judgment.**

LEGAL SUBMISSIONS BY THE PROPOSED INTERESTED PARTY

11. The Proposed Interested Party's written submissions were dated 14th January 2014 and filed on 17th January 2014. It argued that despite the court not having granted injunctive orders on 30th May 2011, the Plaintiff's advocates had nonetheless written to the Kenya Civil Aviation Authority on 8th March 2012 purporting to represent the position that the injunctive orders issued on 8th March 2006 were still in force and that no transfer of ownership could be effected. The contents of the said letter were as follows:-

“Kindly note that the above aircrafts are subject matter in the High Court Civil Case No 16 of 2006. We enclose herewith an injunction issued in 2006.

Kindly note that the suit between Niels Bruel and Aircraft Co. Limited is still in the hands of the High Court and no transfer of ownership on lease should be effected. Any such acts amount to interference with the court process and contempt of court.”

12. It submitted that there were no injunctive orders in force after 30th March 2011 that would have justified the cancellation of the Certificate of Registration about a year after the Queenscross Aviation Limited had been registered as an owner and that the letter of 2nd March 2012 by Kenya Civil Aviation Authority which purported to unilaterally revoke the Certificate of Registration was in contravention of the rules of natural justice and without legal basis.
13. It relied on the Constitution of Kenya, 2010 to buttress its argument that it had a right to be enjoined in the proceedings herein as it had an interest in the subject matter. It said that its rights were enshrined under Articles 40, 47 and 50 of the Constitution of Kenya and that the court was enjoined under Article 159 (2)(e) of the Constitution of Kenya to ensure that the purpose and principles of the Constitution were promoted and protected.
14. It said that Rule 2 of the Constitution of Kenya (Protection of Fundamental Rights and Fundamental Freedoms) Practise and Procedure Rules, 2013 (Legal Notice 117 of 2013 defined an interested party as:-

“a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation.”

15. It averred that for an interested party to invoke the provisions of Article 40 of the Constitution of Kenya, it had to demonstrate that it was the owner of the property or demonstrate that it had some interest in the property that would enable it maintain an action in respect thereof.
16. It stated that Kenya Civil Aviation Authority approved the Lease Agreement dated 19th August 2011. It submitted that it therefore had a legitimate interest in the aircraft as the cancellation of its lease with Queenscross Aviation by Kenya Civil Aviation Authority had occasioned it huge losses in terms of loss of business, insurance costs, parking fees and “so on.”
17. It contended that Order 1 Rule 10 of the Civil Procedure Rules, 2010 permitted an intervener whose proprietary rights could be affected to be enjoined in a proceeding at any stage of the proceedings to enable the court effectively and completely adjudicate and settle all questions involved in the suit. It referred the court to the cases of **Meme vs Republic [2004] 1 EA at page 124** and **Miscellaneous Criminal Application No 185 of 2012 Samuel Muriithi Watatua vs Republic** (unreported) in this regard.

18. It was its submission that the court does not dispense justice in a vacuum but rather in the context of the reality of the issues raised before. It stated that the question for determination by the court was whether or not the interested party had satisfied the court that it ought to be enjoined for the interests of justice to be served.
19. It argued that the application herein was not *res judicata* as the Proposed Interested Party herein had not been a party to the proceedings herein and that in any event, the principle only applied where a matter had been determined on merit and not where a matter had been disposed of by the court due to want of competence. It relied on the cases of **Lotta vs Tanaki [2003] 2EA 556**, **The Tee Gee Electrics & Plastics Co Limited vs Kenya Industrial Estates Limited [2005] 2 KLR 97** and **Civil Appeal No 216 of 1999 Jairo Angote Okonda vs Kenya Commercial Bank Limited** (unreported).
20. It urged this court to allow its application as the Plaintiff had abused the court process by using a legal means to accomplish an unlawful purpose by misleading Kenya Civil Aviation Authority that the expired injunctive orders were still in force, which had not been intended by the court.

LEGAL SUBMISSIONS BY THE PLAINTIFF

21. The Plaintiff's written submissions were dated and filed on 7th February 2014. He submitted that the Proposed Interested Party's application was *res judicata* on the ground that the present application was similar to the application that had been filed by Anders Bruel and heard by JJ Ngugi and Havelock as the same raised no new grounds. He argued that the dismissal of a similar application by Havelock J was final and the only option that the said Ander Bruel had was to appeal against the same.
22. He was categorical that the Proposed Interested Party was litigating under the same title as Anders Bruel who, having no ownership rights whatsoever over the aircraft, could not transfer any legal interest in the same to the Proposed Interested Party. He submitted that a party should not be allowed to litigate in instalments. He argued that the doctrine of *res judicata* was based on three (3) maxims which were *inter alia* that firstly, no man should be vexed twice over the same cause, secondly, there should be an end to litigation and thirdly, a judicial decision must be accepted as correct. It was his argument that the present application was the Proposed Interested Party's way of seeking a different ruling from a court of equal jurisdiction and avoiding the mechanism of an appeal.
23. He relied on the cases of **Mburu Kinyua vs Gachini Tuti [1978] KLR, Civil Appeal No 36 of 1996 Uhuru Highway Development Limited vs Central Bank of Kenya** (unreported), **Henderson vs Henderson (1843-60) ALL ER 378**, **Benson Ngugi vs Kabui Kinyanjui & Others [1989] KLR 146** to support its argument that the present application was *res judicata*.
24. He also referred the court to several other cases to buttress his argument that the Proposed Interested Party could not be enjoined in the proceedings herein other than as an objector to the attachment of the aircraft under Order 22 Rule 51 of the Civil Procedure Rules, 2010. He argued that there had been no attachment and consequently, the Proposed Interested Party's application was premature and speculative.
25. He submitted that the Proposed Interested Party's application to be enjoined under a purported lease from a fraudulent transfer was intended to defeat his interests and that the Proposed Interested Party could not have a greater title than the purported lessor whose application to be enjoined in the proceedings herein had already been dismissed. He therefore prayed for the dismissal of the Proposed Interested Party's application for being incompetent, frivolous, vexatious and an abuse of the court process.

LEGAL ANALYSIS

26. Both parties orally highlighted their respective submissions when they appeared before the court on 20th March 2013.
27. The court has found it necessary to address the issue of *res judicata* as a preliminary issue as it goes into the root of the Proposed Interested Party's present application. If the court was to find that the same was *res judicata*, it would not be necessary to consider the merits of the said application for the reason that the court would not have jurisdiction to determine the same, the

matter having been heard and determined by a court of competent and equal jurisdiction. If it is in the negative, the court would need to consider the said application with a view to making a determination as to whether indeed the Proposed Interested Party could be enjoined in the proceedings herein so as to assist the court in arriving at a just and fair determination of the dispute herein.

28. The court has considered the Plaintiff's submissions that the application herein is *res judicata* against the backdrop of the Notice of Motion application dated 2nd November 2012 by Anders Bruel to establish whether indeed the issues in the present application had been heard by a court of competent jurisdiction which would then in effect make the present application *res judicata*.
29. Section 7 of the Civil Procedure Act that had been relied upon by the Plaintiff stipulates as follows:-

“No court shall try any suit or issue in which the matter directly or substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim; litigating under the same title, in a court competent to try such subsequent suit of the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

30. The Plaintiff had argued that the present application was *res judicata* for the reason that Anders Bruel had previously applied to be enjoined in the proceedings herein as an Interested Party as the registered owner and lessor of the subject aircraft while the Proposed Interested Party herein had applied to be enjoined as such an interested party in his capacity as a lessee of the said aircraft.
31. Both Anders Bruel and the Proposed Interested Party had different causes of action. The latter's interest appears to have been the losses that it was incurring as a result of the aircraft being grounded at Wilson Airport having leased the said aircraft from Queenscross Aviation.
32. A strict reading of Section 7 of the Civil Procedure Act shows the Proposed Interested Party filed the application to be enjoined as an interested party in his capacity as a lessee, an issue that this court finds has never been considered or litigated upon by a court of competent and equal jurisdiction. This would essentially mean that the application herein would not fall within the confines of the principle of *res judicata*.
33. By dint of Article 50 of the Constitution of Kenya, the Proposed Interested Party was therefore within its right and mandate to file the present application for determination by the court. Any question of whether or not there was fair administrative action or whether Kenya Civil Aviation Authority afforded it a fair hearing before the Certificate of Registration was cancelled would not be within the jurisdiction of this commercial court to determine. The issue would best be heard and determined at the High Court of Kenya Judicial Review Division.
34. The question of whether or not the Proposed Interested Party's application was meritorious or would find favour with this court is a different matter altogether.
35. As was seen in Paragraph 3 hereinabove, on 12th October 2012, Ngugi J held that the said Anders Bruel was neither the registered owner nor lessee of the aircraft. Her justification of this conclusion can be found in the same paragraph. It does appear to this court that Anders Bruel was not the registered owner of the said aircraft.
36. While dismissing the application of Anders Bruel vide a ruling dated 9th October 2013, Havelock J had the following to say:-

“It seems to me that the Proposed Interested Party having failed to convince Ngugi J as to his status before the Constitutional Court, he now wants to try his luck before this court. Unfortunately, for the intended Interested Party, I find that my hands are tied by the judgment and ruling of Ngugi J in Petition No 243 of 2012 and I consider the Interested Party's application before this court as *res judicata*. Despite there being no objection to the Application by the Defendants, I dismiss the Intended Interested Party's application dated 2nd November 2012 with costs to the Plaintiff.”

37. In Paragraph 17 of its submissions, the Proposed Interested Party's written submissions contended that its Lease Agreement dated 19th August 2011 between Queenscross Aviation Limited through

- its Managing Director, Anders Bruel was approved by Kenya Civil Aviation Authority. There is no indication that the Court of Appeal has overturned the judgment of Ngugi J and for all purposes and intent, the conclusion on the ownership of the said aircraft is unshakable until so overturned.
38. Whilst it is correct as the Proposed Interested Party has argued that Article 40 of the Constitution of Kenya protects every person's right to property, such right cannot be enforced unless it can be shown that such person is the legal owner of such property. If that were not so, it would be a recipe of chaos as any Tom, Dick and Harry would invoke the said Article to enforce a right that he would not be entitled to. Title to the property is therefore of paramount importance in that regard.
39. Just as Havelock J observed in the ruling aforesaid, this court's hands are tied as far as the issue of ownership of the said aircraft. It is irrespective that his ruling was not binding on this court on the ground that both courts were of equal jurisdiction as was orally argued by the Proposed Interested Party's counsel because the judgment by Mumbi J had not been overturned. This court therefore finds itself in agreement with the Plaintiff's submissions that the Proposed Interested Party could not have a greater title than that of Anders Bruel to entitle him to be enjoined in the proceedings herein as a court of competent jurisdiction had found that he was not a registered owner of the said aircraft.
40. As at the time Ngugi J and Havelock J delivered their judgment and ruling respectively, the said Lease Agreement could not have been deemed to have been valid to have conferred a proper title to the Proposed Interested Party herein. Its argument that it has incurred losses as its license was cancelled by Kenya Civil Aviation Authority would not be a sufficient reason to persuade this court to find that it ought to be enjoined in the proceedings herein. The Proposed Interested Party's application would thus fail purely on this ground.
41. However, assuming that the Proposed Interest Party had a good title, the question that arises is whether or not it would have successfully applied to be enjoined as an interested party in the proceedings herein. Notably, the final judgment was delivered herein by Okwengu J on 30th March 2011. That meant that all the issues that had been placed before the court had been determined as a finality. Any other issue touching on the said aircraft could only now be brought under a fresh cause of action and this is of course provided that the same did not touch on the issues that had been placed before the court or those that were substantially in issue and finally determined. Essentially, all doors were closed to any other parties who would have wished to be enjoined in the proceedings herein after the judgment was delivered by Okwengu J.
42. The Plaintiff was correct in stating that the only window for the Proposed Interested Party or other third parties would be through objection proceedings after attachment. From the facts of this case, it does appear to the court that the Proposed Interested Party was not claiming ownership of the said aircraft. This was a fact that was admitted by its counsel when he was orally highlighting the submissions when he said, "**Capital Hill is joining the proceedings as an Interested Party and not as an objector.**" Rather it was claiming its interest in the aircraft as a lessee, who this court has found could not have obtained a good and valid lease as the Lessor, Anders Bruel was found by a court of equal and competent jurisdiction, not to have been the registered owner of the said aircraft.
43. Without pre-empting the Proposed Interested Party's case, this court has come to the conclusion that enjoining it in the proceedings herein would not only be lacking in any no legal basis but it would cause delay and embarrass the proceedings herein. It would be effectively distracting the parties herein from having the real issues between them from being heard and determined once and for all. The suit herein was filed in 2006 and judgment delivered in 2011. It is time that the pending substantive issues between the parties to the suit are heard and determined to bring this matter to a logical conclusion.
44. The issue of whether or not the injunction issued on 8th February 2006 is still in existence herein is a matter to be ventilated by the parties to the suit herein and would not concern the Proposed Interested Party. The court does not therefore deem it necessary to make a finding on this issue as the Proposed Interested Party is not a party to the suit herein. The court has, however, noted its written submissions on this issue. Suffice it to state that a status quo order was issued by Musinga J to preserve the aircraft pending the hearing and determination of the Plaintiff's Notice of Motion application dated 9th March 2013. That position has not changed to date.
45. Accordingly, having considered the parties' pleadings, oral and written submissions and the case

law they have relied upon, this court has come to the conclusion that the Proposed Interested Party was not able to satisfy the court that it had a good title to enable it be enjoined in the proceedings herein or that its participation in the proceedings herein would add value to the matter. The court in fact that finds that its joinder herein would only cloud the real issues for determination by this court and delay this very old matter.

DISPOSITION

46. For the reasons foregoing, the court finds that the Proposed Interested Party's Notice of Motion application dated and filed on 22nd March 2012 is not merited and in the circumstances, the same is hereby dismissed with costs to the Plaintiff herein.

47. It is so ordered.

DATED and DELIVERED at NAIROBI this 26th day of June 2014

J. KAMAU

JUDGE