



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 584 of 2012

FIVEFORTY AVIATION LIMITED PLAINTIFF

VERSUS

LONZIM AIR (BVI) LIMITED DEFENDANT

RULING

1. The Plaintiff herein filed a Notice of Motion dated 31 August 2012, the substantial prayer of which was brought under **Order 40 Rules 1 (b) and 2** as well as under **Order 5 Rules 21, 22 and 23 Civil Procedure Rules**. That substantial prayer was that an interim injunction do issue restraining the Defendant, its servants, officers, directors, employees or agents from removing from Kenya or from Wilson Airport, Nairobi two aircraft being ATR 42-320 registered as 5Y BUN and F 27 registered as 5Y FNN. Such interim injunction was sought initially pending the hearing and determination of the said Application but also pending the hearing and determination of the suit. The Plaintiff had come by way of Certificate of Urgency and upon my being satisfied from the Affidavit in Support of the Application, that there were substantial monies owed to the Plaintiff by the Defendant, I granted the interim injunction so requested, pending the hearing and determination of the Application.
2. The Application was opposed by the Defendant by initially a Notice of Preliminary Objection dated and filed on 16 October 2012 but also a substantial Replying Affidavit dated 15 October 2012 filed herein on the 19 October 2012. The Plaintiff with the leave of the court put in a Supplementary Affidavit dated 21 November 2012 filed on 22 November 2012. It should be noted that the Defendant is a company registered in the British Virgin Islands but that company seems to have accepted service and acknowledged the jurisdiction of this court by filing Notice of Appointment of Advocates on 20 September 2012. While all this was going on, Messrs. Wilken Aviation Ltd came before court, again by way of Certificate of Urgency, making application to be joined into this suit as an interested party. Such was on the basis primarily, that it had purchased the said two aircraft being the subject matter of the suit. On 25 September 2012, I gave leave for the said Wilken Aviation Ltd to be enjoined as the second Defendant in the suit.
3. When all three counsel for the parties appeared before court on 22 November 2012 it was agreed that the Preliminary Objection filed on 16 October 2012 be heard first as it went to the jurisdiction of this court. Further, it was agreed, that the Plaintiff and both Defendants would put in written submissions as regards the same. Indeed, the first Defendant filed its submissions on 30 November 2012, the Plaintiff filed its submissions on 14 December 2012 and the second Defendant filed its submissions on the 20 December 2012. Principally the Preliminary Objection was founded that as a preliminary point of law, the entire suit was defective as it had been filed in the wrong forum given that the parties had agreed that all disputes should be determined in the courts of England in accordance with English law.

4. The first Defendant maintained that as per the Replying Affidavit of a Mr. Ian Perkins filed on 19 October 2012, he had annexed copies of the executed agreements as exhibits “I P-8” and “I P-9”. It was not in dispute that the agreements both stated clearly and in unambiguous terms, that the courts of England were vested with the exclusive jurisdiction to decide upon all disputes as between the parties in accordance with the laws of England. The first Defendant pointed out that all the agreements had been executed by Donald Earle Smith on behalf of the Plaintiff. It was further noted that Mr Smith had sworn the two Affidavits filed herein on behalf the Plaintiff. Thereafter, the first Defendant set out the brief facts in relation to this matter before moving onto the law. It referred me to the decision of the Court of Appeal in **Areva T & D India Ltd versus Priority Electrical Engineers & anor (2012) eKLR**. The first Defendant then quoted extensively from that authority first in connection with the finding of **Willmer J** in the case of **“The Fehmarn” (1957) Lloyd’s Law Reports 119** as follows:

“Where there is an express agreement to a foreign tribunal, clearly it requires a strong case to satisfy this court that that agreement should be overridden and that proceedings in this country should be allowed to continue”.

5. Further, the first Defendant quoted from the judgement of **Madan J A** (as he then was) in the case of **United India Insurance Company Ltd versus East African Underwriters (Kenya) Ltd (1985) KLR 898** in which the learned judge observed:

“The courts of this country have discretion to assume jurisdiction over an agreement which is made to be performed in Kenya notwithstanding a clause therein conferring jurisdiction upon the courts of some other country. This exclusive jurisdiction clause however should normally be respected because the parties themselves fixed the forums for the settlement of their disputes; the court should carry out the intention of the parties and enforce the agreement made by them in accordance with the principle that a contractual undertaking should be honoured unless there is strong reason for not keeping them bound by the agreement.”

“Everybody accepts that the general rule is that the jurisdiction clause must be obeyed. It must be something exceptional to justify departure from it and the exceptional circumstances must be such as to afford strong reasons for such departure. (per Cairns LJ in “the Makejfell” (1976) 2 Lloyd’s Reports 29.”

6. Similarly the finding of **Cairns LJ** in **“the Makejfell”** case was as follows:

“..... While no absolute rule can be laid down to this effect, the court should be very slow to refuse a stay if the claim is just the sort of claim to be rejected. When a clause of this kind is introduced into a contract, it must be supposed that the parties consider that, in general, trial in the place mentioned in the clause is more convenient than trial elsewhere. It does not lie in the mouth of one party to say when a claim arises; ‘Although this claim differs in no way from the generality of claims that might be made by me under the Bill of lading, I say that the specified place of trial is inconvenient.’

And Sir Gordon Willmer said at p. 38;

“Once the general rule is accepted that parties who have agreed to the exclusive jurisdiction of a foreign court should be held to their bargain, a departure from that rule must of necessity be regarded as to that extent exceptional, and the only question can be whether the case is so exceptional as to justify holding that there is strong reason for departing from the rule. In my judgement the learned judge made no more than this, as is, I think, made clear by the concluding words of the penultimate paragraph of his judgement, when he stated his conclusion in the following words: ‘The plaintiffs have failed to show sufficiently strong reason why they should not be held to contract’. In these circumstances, I can find no fault with the learned judge’s formulation of the principles on which his discretion should be exercised.”

7. Having quoted the law extensively as above, the first Defendant made an attempt to relate the law to

the facts of this matter. With respect, matters in relation to Preliminary Objections are raised on points of law only. Accordingly, I do not consider that this court is concerned as to the facts whether the aircraft Lease Agreements entered into between the Plaintiff and the first Defendant had been terminated or otherwise. These are all matters that may be brought in an argument with regard to the overall Application. The only facts that I consider relevant as raised by the first Defendant was in connection with the entering into of the aircraft Lease Agreements based on the fact that the first Defendant is a limited liability company incorporated in the British Virgin Islands. It normally transacts its business from London and although the aircraft were to be used in the East African region, the parties had agreed that the most convenient place to settle any disputes as between them would be in England under English law. I also considered relevant the fact that the aircraft Lease Agreements had an elaborate procedure when it came to the redelivery of the aircraft to the first Defendant. Obviously that redelivery never happened as the aircraft were detained by this court's injunction dated 6 September 2012 at Wilson Airport, Nairobi. The first Defendant maintained that as a result of the non-redelivery of the aircraft, the relationship between the Plaintiff and the first Defendant remained governed by the aircraft Lease Agreements including the jurisdiction clause relative to the courts in England.

8. The Plaintiff in response submitted that it was clear that the Preliminary Objection was based on the jurisdiction clause detailed in the aircraft Lease Agreements. However, the Plaintiff maintained that its claims as against the first Defendant were clearly claims made outside the aircraft Lease Agreements. They were debts owing. The Plaintiff also maintained that it had demonstrated through affidavit and documentary evidence that the aircraft Lease Agreements between it and the first Defendant had been terminated and with such termination went the jurisdiction clause. It was the Plaintiff's case that its present claims in respect of the aircraft related to matters that were requested by the first Defendant to be done to the two aircraft after the termination of the aircraft Lease Agreements. The Plaintiff also submitted that the first Defendant could not bring its application for basically what amounted to a stay of proceedings pending the matter being referred to the English courts, by way of preliminary objection. Thereafter in its submissions, the Plaintiff went into details as to whether the aircraft Lease Agreements had been terminated or otherwise, all of which matters, in my opinion, relate to the substantive Application not the preliminary objection. Having said that, the Plaintiff then submitted as to what it saw as the law and reiterated that preliminary objections should only be brought on questions of law. It maintained that all the issues raised by the first Defendant, save for the issues of jurisdiction, are issues of fact and should be disregarded. It reiterated (for the third time) that the issue of jurisdiction could only be taken into consideration if the claims made by the Plaintiff were under the aircraft Lease Agreements, which they were not. The Plaintiff then considered the law relating to powers of directors to bind companies quoting to court the established authority in this regard being the case of **Royal British Bank versus Turquand (1843 – 60) All ER 435**. As I have already stated above, whether the aircraft Lease Agreements had been properly terminated or otherwise is a matter of fact unsuitable for consideration in connection with the preliminary objection.

9. The second Defendant in his submissions on the preliminary objection was more circumspect in view of the second Defendant being somewhat neutral in the matter. It summarised that the points of departure between the Plaintiff and the first Defendant appeared to be whether the aircraft Lease Agreements governing the relations between the parties were terminated or are still alive and if the latter, whether the provisions in those Agreements in respect of jurisdiction should apply or otherwise. It also pointed out that the Plaintiff and the first Defendant appeared to be at variance as to whether the claims made by the Plaintiff in this suit were based on the aircraft Lease Agreements or outside those Agreements. It went on to say that the examination and interrogation of the facts herein would itself amount to a hearing of this matter and would require some form of determination. In the second Defendant's opinion whichever way the determination went, the court will have heard the matter and rendered any ouster of jurisdiction contained in the aircraft Lease Agreements, a nullity. However, the second Defendant noted that both the Plaintiff and the first Defendant had exhibited the aircraft Lease Agreements together with the attachments thereto and had extensively referred to them which, to the second Defendant's way of thinking, those 2 parties (presumably) expected this court to look at them. The second Defendant was of the view that at the present time, it is convenient for the Plaintiff to litigate in Kenya but felt that once crucial references were going to be placed upon the aircraft Lease Agreements, the court would have no option but to have the issues determined in line with the contractual provisions. The second Defendant

noted that it was the Plaintiff's assertion that it had a lien over the aircraft as per paragraph 16 of the Plaintiff and paragraphs 18 and 19 of the Affidavit in support. If that was the case, the second Defendant believed that this necessarily meant reliance been placed on the aircraft Lease Agreements which was how the Plaintiff had obtained the aircraft in the first place. It came to the conclusion therefore and it was the second Defendant's opinion, that the dispute between the Plaintiff and the first Defendant could not possibly be determined without reference to the aircraft Lease Agreements. As those Agreements had expressly provided for the English courts and English law to deal with any disputes thereunder, the Kenya courts clearly lacked jurisdiction to entertain the suit.

10. In my commentary with regard to the first Defendant's submissions above, I have quoted at length particularly from the **Areva T & D India** case (supra) as regards to the proper jurisdiction for the determination of disputes under the aircraft Lease Agreements entered into between the Plaintiff and the first Defendant. I am fully conscious of the fact that that case was a Court of Appeal decision which is binding upon me. I take particular cognizance of two passages as contained in the Judgement of the said court firstly the commentary by **Visram JA** in concluding his judgement as follows:

"I fully agree that the rule that the parties should be held to their bargain should only be departed from in a special and exceptional case. Here, in the case before us, as I have pointed out, no such special and exceptional circumstances have been established to depart from the contract that the parties had freely and voluntarily agreed upon. The learned Judge's conclusion that his court 'would fail in its duty to do justice to the parties if it allowed an unjust clause in an agreement to be enforced by one party to the detriment of the other party where clearly there is no legal or logical justification' is based on no evidence that we can discern from the record, and the Judge's order that the arbitration be conducted by 'a single arbitrator to determine the dispute between them within fourteen (14) of today's date failing which the chairman of The Institution of Engineers of Kenya shall appoint a single arbitrator to the determine the dispute' is without jurisdiction."

Thereafter the Judgement of **Koome JA** detailed:

"I agree with the submissions by counsel for the appellants that when the parties signed the sub-contract agreement, they were aware that the contract was to be performed in Kenya, the payment was to be made in Kenya and the witnesses were located in Kenya. In my judgement, I find no exceptional circumstances that would support the learned Judge's findings that changed the terms of the sub - contract by changing the choice of law and jurisdiction. It is trite that a Court cannot re-write a contract for the parties."

Although the above case involved a referral to arbitration, to my mind, the same reasoning would apply to the choice of jurisdiction and of law.

11. In this matter, I find myself in agreement with the submissions of the second Defendant. The aircraft being the subject matter of this suit were in Kenya directly as a result of the aircraft Lease Agreements as between the Plaintiff and the first Defendant. Indeed, the Plaintiff, as per its Plaintiff and the Affidavit in support of its Application, is undoubtedly exercising its Lien over the aircraft arising out of the aircraft Lease Agreements. Those Agreements were annexed to both the Affidavit in support of the Application and the Replying Affidavit of the first Defendant. In my opinion, both parties were relying upon the provisions of the same despite the argument as to whether they had been terminated or otherwise. I uphold the first Defendant's Preliminary Objection dated and filed on the 16 October 2012. I find that the proper law and the jurisdiction to hear the dispute between the Plaintiff and the first Defendant are English law and the English courts. The role of this court has purely been to preserve the assets being the said aircraft until such time as the disputes between the Plaintiff and the first Defendant are adjudicated upon and determined by the English courts. In all the circumstances, I make no order as to costs.

DATED and delivered at Nairobi this 6th day of February 2013.

J. B.HAVELOCK

JUDGE