



**ANDERS BRUEL T/A QUEENSCROSS AVIATION .....PETITIONER**  
**VERSUS**

**KENYA CIVIL AVIATION AUTHORITY .....1<sup>ST</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL .....2<sup>ND</sup> RESPONDENT**

## **JUDGMENT**

### **Introduction**

1. In the petition dated 7<sup>th</sup> June 2012, the petitioner alleges violation by the 1<sup>st</sup> respondent of his constitutional rights under Articles 27, 40, 47, and 50 of the Constitution. The alleged violations arise as a result of the cancellation of the registration of aircrafts numbers 5Y-EKO and 5Y-BMA which the petitioner avers he is the registered owner of.

2. In the petition dated the 7<sup>th</sup> of June 2012, the petitioner prays for:

- A. An order of certiorari to quash the letters by the 1<sup>st</sup> respondent dated 2<sup>nd</sup> march 2012 and 19<sup>th</sup> march 2012 that revoked the petitioner's certificates of registration of Aircraft of his aircrafts 5Y-EKO and 5Y-BMA and cancelling the lease with Capital Airlines Limited.**
- B. An order of mandamus directing the 1<sup>st</sup> Respondent to reinstate the petitioner as the owner of aircrafts 5Y-EKO and 5Y-BMA.**
- C. A permanent injunction preventing the 1<sup>st</sup> respondent by itself, agents, servants or employees from interfering with the property rights of the 21<sup>st</sup> petitioner over his aircrafts 5Y-EKO and 5Y-BMA**
- D. A declaration that the action by the 1<sup>st</sup> respondent in revoking the petitioner's Certificates of Registration of Aircraft of his aircrafts 5Y-EKO and 5Y-BMA and cancelling the lease with Capital Airlines Limited was unconstitutional and in breach of the rules of natural justice and fair administration action.**
- E. Exemplary and aggravated damages against the 1<sup>st</sup> respondent together with costs of the petition.**

3. The petition is supported by the affidavit of **Anders Bruel** sworn on the 9<sup>TH</sup> June 2012 and a further affidavit sworn by the petitioner's counsel, **Patrick Kahonge** on the 7<sup>th</sup> of June 2012.

4. The petition is opposed by the 1<sup>st</sup> respondent which filed a replying affidavit sworn by its Legal Officer, Mr. **Cyril Wayong'o** on the 11<sup>th</sup> of July 2012. The 2<sup>nd</sup> respondent did not file a response to the

petition, and when the matter came up for hearing on the 31<sup>st</sup> of July 2012, Mr. Wamotsa for the 2<sup>nd</sup> respondent applied for and was granted leave for the 2<sup>nd</sup> respondent to be excused from the proceedings as no constitutional issue had been raised against the state. Both the petitioner and the 1<sup>st</sup> respondent filed written submissions dated the 24<sup>th</sup> of July 2012 and 30<sup>th</sup> of July 2012 respectively.

### **The Petitioner's Case**

5. The petitioner, who is based in Copenhagen, Denmark, states that he is the registered owner of aircrafts numbers 5Y-EKO and 5Y-BMA which are both registered by the 1<sup>st</sup> respondent. He states that he obtained the registration in April, 2011, and that the 1<sup>st</sup> respondent then approved an Aircraft Lease Agreement dated 19<sup>th</sup> August 2011 between the petitioner and Capital Airlines Limited. However, in contravention of the rules of natural justice and without any legal basis, the 1<sup>st</sup> respondent, by a letter dated 2<sup>nd</sup> March 2012, unilaterally purported to revoke the Certificates of Registration of both aircrafts. The petitioner states that the revocation notice was sent to a third party called Air Traffic Limited. The petitioner therefore states that he was condemned unheard and was never given an opportunity to challenge the revocation.

6. According to the petitioner, the 1<sup>st</sup> respondent informed a company known as Capital Airlines Limited by a letter dated 19<sup>th</sup> March 2012, which was not copied to him, that the Dry Lease Agreement that it approved in August 2011 in respect of 5Y-EKO had been cancelled as a result of court orders which barred any transfer of the aircraft.

7. The petitioner states further that an application was filed on behalf of Capital Airlines Limited in Milimani **HCCC No. 16 of 2006 Moses Wachira –v- Niels Bruel & Others** seeking to confirm that the Order dated 8<sup>th</sup> February 2006 had lapsed on 30<sup>th</sup> March 2011. The petitioner avers that the application is still pending since an application for review of the judgment was pending before the Court of Appeal and was due for delivery on the 8<sup>th</sup> of June 2012. The petitioner therefore argues that there were no injunctive orders in force after 30<sup>th</sup> March 2011 that would justify the cancellation of the certificates of registration about a year after the petitioner was registered as the owner.

8. The petitioner states that he attempted to resolve the issue with officials of the 1<sup>st</sup> respondent towards the end of April 2012 but they have refused to allow him to operate the aircrafts. He states that as a result, he has incurred massive loss in terms of lost income, aviation hull and liability insurance, and is likely to incur airport parking charges and rehabilitation expenses.

9. The crux of the petitioner's case is that his source of livelihood is leasing the aircrafts, **5Y-EKO** and **5Y-BMA**, which livelihood has been curtailed by the 1<sup>st</sup> respondent through the un-procedural, unfair, illegal, unreasonable and unlawful revocation of the Certificates of Registration of the two aircrafts through the letter dated the 2<sup>nd</sup> of March, 2012, which had been sent to a third party, Air Traffic Limited.

10. The petitioner submits that the 1<sup>st</sup> respondent as a public body is under a duty to act judiciously whenever it makes decisions that affect people's rights and interests; that the 1<sup>st</sup> respondent did not treat the petitioner with equity and it discriminated against the petitioner as it failed to accord him fair treatment in accordance with the tenets of natural justice.

11. The petitioner submits further that since the 1<sup>st</sup> respondent had been satisfied that the petitioner had satisfied all laid down conditions before it registered the petitioner's aircraft in April 2011, it was in breach of the national values and principles set out in Article 10 of the Constitution to revoke the registration without notice to the petitioner, and without according the petitioner an opportunity to participate in the process.

12. The petitioner questions the reason for the decision to revoke his licence as contained in the letter dated 2<sup>nd</sup> March 2012. He contends that the issue of the domicile or nationality of the owner is not

commonly followed by the 1<sup>st</sup> respondent as several of the airplanes registered in Kenya today are owned by foreign nationals but leased out to local entrepreneur. He argues that the respondent was fully aware of both his nationality and domicile when it issued him with the Certification of Registration of the airplanes.

13. The petitioner states that the likely reason for the cancellation was the existence of court orders issued in **Nairobi (Milimani Commercial Courts) HCCC No. 16 of 2006**, which case has already been concluded and where the petitioner was not a party. He therefore argues that the acts of the 1<sup>st</sup> respondent were unjust and infringed upon his right to fair administrative action contrary to Article 47 of the Constitution. The decision that the 1<sup>st</sup> respondent arrived at was manifestly unfair, unlawful, unreasonable and procedurally unfair. He relied on the case of ***Associated Provincial Picture Houses Ltd. v Wednesbury Corporation*** [1947] 1 KB 223 and submitted that the actions of the 1<sup>st</sup> respondent failed the test of reasonableness and fair procedure.

14. The petitioner also alleges that his right to non-discrimination under Article 27 of the Constitution was violated in that a different yardstick from that used in respect of other industry players was used to assess his worthiness and find him unworthy of continued registration.

15. He alleges, further, that he was denied a right to a fair hearing and relies on the provisions of Article 25 of the Constitution. He also contends that his right to own property as provided in Article 40 of the Constitution was infringed by the arbitrary acts of the respondent.

### **The 1<sup>st</sup> Respondent's Case**

16. The position taken by the 1<sup>st</sup> respondent is that it has never entered into any agreement or contract of any nature with the petitioner and so the petitioner is a stranger to it. It contends that from the documents annexed to the petitioner's application, the owner of the aircrafts the subject matter of this petition is Queenscross Aviation and not the petitioner. Consequently, the petitioner has no legal standing to institute the petition.

17. The 1<sup>st</sup> respondent contends that the revocation of the certificates and cancellation of the Dry lease agreement as explained in the letters dated 2<sup>nd</sup> March 2012 and 19<sup>th</sup> March 2012 respectively resulted from a finding that the applications contravened the **Civil Aviation (Aircraft Registration & Marketing) Regulation 2007** which, inter-alia, prohibit the registration of an aircraft owned by an individual citizen of a foreign state not officially admitted for residency in Kenya.

18. The 1<sup>st</sup> respondent argues further that at the time the applications for registration and leasing were made, there was a court order restraining any dealings with the aircrafts. This fact had not been disclosed to the 1<sup>st</sup> respondent by the applicants, Air Traffic Limited and Capital Air Limited. The 1<sup>st</sup> respondent submits therefore that it was only observing the court order then obtaining as they had not been set aside or vacated.

19. The 1<sup>st</sup> respondent states that prior to the revocation of the licences, it had been brought to its attention that the two aircrafts were the subject of **Milimani HCCC Number 16 of 2006** in which two orders issued on 9<sup>th</sup> February 2006 and 14<sup>th</sup> March 2012 were in place. According to the 1<sup>st</sup> respondent, the two orders had the effect of barring any transfer, sale or in any way the alienation of the aircrafts. The respondent states that at the time of the issuance of the order of 9<sup>th</sup> February 2006, the two aircrafts were registered in the name of one **Niels Bruel** and were leased to Air Traffic Limited. The 1<sup>st</sup> respondent notes that coincidentally, on the 30<sup>th</sup> of March, 2011, the date that judgment in Milimani HCCC Number 16 of 2006 was delivered, Mr. Niels Bruel purported to sell the aircrafts the subject of the suit to Queenscross Aviation, a company incorporated in Denmark, and applied to the 1<sup>st</sup> respondent for registration; that on the same day the buyer, Queenscross Aviation entered into an aircraft lease agreement with Airtraffic Limited without disclosing to the 1<sup>st</sup> respondent the fact that there was an order

prohibiting such a transaction. The 1<sup>st</sup> respondent submits further that no order was served upon it vacating the earlier orders of the 9<sup>th</sup> February 2006 and 14<sup>th</sup> March 2012

20. With regard to the allegation by the petitioner that the letters of revocation of the certificates of registration of aircrafts registration numbers **5Y-EKO & 5Y-BMA** were not copied to him but were sent to third parties, the 1<sup>st</sup> respondent submits that the letters were sent to the correct person namely Air Traffic Limited and Capital Air Limited since the two were the applicants in respect of the registration of the aircrafts.

21. The 1<sup>st</sup> respondent argues further that given the security situation in the country, the 1<sup>st</sup> respondent cannot, in the greater national interest, allow aircrafts whose ownership is not clear into Kenyan airspace. The events surrounding the registration of the aircrafts, particular the fact that the sale and transfer were conducted on the same day, were matters of concern.

### **Undisputed Facts**

22. From the averments and submissions of the parties, certain facts emerge as undisputed. First, the owner of the aircrafts the subject matter of this petition is **Queenscross Aviation**, whose address is given in the certificates of registration as being ‘**C/O Anders Wilhem Bruel Dronningens Tvargarde 44, 4<sup>th</sup> DK -1302 Kobenhain K Denmark.**’ The certificates are annexed to the affidavit of the petitioner sworn on 9<sup>th</sup> June 2012.

23. The petitioner has not disputed the averment contained in the 1<sup>st</sup> respondent’s replying affidavit that the application for registration of the aircrafts had been made by Airtraffic Limited and Capital Air Limited.

24. The aircrafts were the subject matter of **Milimani HCCC No. 16 of 2006 Moses Wachira v Niels Bruel & Others** in which interim orders prohibiting the sale, transfer or leasing of the aircrafts had been issued in February, 2006 by Waweru, J and confirmed in 2007 by Warsame, J pending the determination of the dispute. The matter was determined on 30<sup>th</sup> March 2011 and a money decree issued in favour of the plaintiff in the suit.

25. The 1<sup>st</sup> respondent depones, and this has not been disputed by the petitioner, that Mr. Niels Bruel, the 1<sup>st</sup> defendant in the case, sold the aircrafts to Queenscross Aviation on 30<sup>th</sup> March 2011, the date of judgment in the suit, and that the application for review lodged by the 1<sup>st</sup> defendant was dismissed by the Court of Appeal.

### **Determination**

26. The petitioner has filed this petition alleging violation of his rights under Articles 27, 40, 47, and 50 of the Constitution. The alleged violations occurred in relation to the cancellation of the registration of aircrafts numbers **5Y-EKO and 5Y-BMA.**

27. As this is a petition alleging violation of constitutional rights, the petitioner must demonstrate how the Articles of the Constitution that he alleges have been infringed have been violated with respect to him. See **Anarita Karimi Njeru (1976-80) 1 KLR 1272** and **Trusted Society of Human Rights Alliance-v-Attorney General & Others High Court Petition No. 229 of 2012** In this case, the violations arise with regard to the ownership of the two aircrafts.

28. Article 40 of the Constitution protects the rights of an owner of property not to be deprived of that property arbitrarily. For the petitioner to invoke the provisions of Article 40, and for the acts of the 1<sup>st</sup> respondent to be considered as infringing on the rights of the constitutional rights of the petitioner under the cited provisions of the Constitution, he must be the registered owner of the aircrafts or demonstrate some interest in the aircrafts that would enable him to maintain an action in respect thereof.

29. From the evidence before me, the aircrafts were initially owned by one **Niels Bruel**, one of the defendants in **Milimani HCCC No. 16 of 2006**. On 30<sup>th</sup> March 2011, the aircrafts were transferred by the said **Niels Bruel** to Queenscross Aviation. The petitioner has filed this application as **Anders Bruel T/A Queenscross Aviation**. The application for registration of the aircrafts annexed to the affidavit of Cyril Wanyonga as CW2 indicates that the owner of the aircrafts is Queenscross Aviation. At line 10 of the application form with regard to the ownership and operation of the aircraft, it is indicated that the aircrafts are operated by a limited liability company.

30. Further, both Certificates of registration in respect of the two aircrafts indicate the owner of the aircrafts as **Queenscross Aviation**, while **Airtraffic Limited** is indicated as the lessee. The petitioner appears in the certificates in the column for the address of owner, where the address of the owner is shown as '**C/O Anders Vilhem Bruel Dronningens Tvargade 44, 4<sup>th</sup> DK-1302 Kobenhain K Denmark**'. It is apparent therefore, that the petitioner is neither the registered owner of the aircrafts, nor is he the lessee. He has not demonstrated any right or interest in the two aircrafts on the basis of which he can make a claim for alleged violation of constitutional rights. His only connection to the aircrafts appears to be that he has provided a mailing address for the owner of the aircrafts, Queenscross Aviation. Without having demonstrated any right or interest in the aircrafts on the basis of which he can then demonstrate the alleged infringement of his constitutional rights, it is difficult for this Court to find any merit in this application.

31. However, had the petitioner been the registered owner of the aircrafts or demonstrated some right or interest recognised in law, do the facts relied on demonstrate a violation of the constitutional rights under Article 27, 47, and 50 of the Constitution? The petitioner alleges that there was discrimination against him in violation of the provisions of Article 27 because the 1<sup>st</sup> respondent cancelled the registration on the basis that the **Civil Aviation (Aircraft Registration and Marking) Regulations 2007** prohibit registration of an aircraft owned by a foreign national yet there are several aircrafts owned by foreign nationals which are registered and operated locally.

32. The 1<sup>st</sup> respondent is established under the provisions of the Civil Aviation Act, Cap 394 Laws of Kenya. It is required to register aircrafts in accordance with the regulations made under the Act. Regulation 4(1) (a) of the **Civil Aviation (Aircraft Registration and Marking) Regulations 2007** provides that an aircraft is eligible for registration in Kenya if it is owned by a citizen of Kenya, a national of a foreign state who is lawfully admitted to residency in Kenya, or a corporation lawfully organised and doing business in Kenya. The petitioner is a national of Denmark, and from the evidence before the Court, has not been admitted to residency in Kenya so as to meet the requirements of Regulation 4(1) (a) of the **Civil Aviation (Aircraft Registration and Marking) Regulations 2007**.

33. The 1<sup>st</sup> respondent explains its decision to deregister the aircrafts on the basis that it was against the public interest for the aircraft to remain registered given the uncertainty surrounding its ownership and the rush with which it had been transferred to the petitioner. It justifies this on the basis that it has a mandate to ensure air safety in Kenya given the security situation.

34. I am unable to find, on the evidence before me, that there has been any discrimination against the petitioner. The fact that the 1<sup>st</sup> respondent has properly exercised its legal mandate in this instance with regard to registration of the aircrafts cannot be faulted on the basis that in other instances, the 1<sup>st</sup> respondent has acted in violation of the law by registering aircraft belonging to foreign individuals, who, presumably like the petitioner, have not been admitted to residency in Kenya. I do not think that an allegation of violation of a constitutional right can be founded on and supported by a failure by a public body to properly exercise its statutory mandate in enforcing the law in all instances.

35. The petitioner also alleges that there was violation of its rights under Article 47 in that he was not given a hearing before the cancellation of the registration of the aircraft. As I have indicated above, a violation of this right would arise if he was the owner or had some other interest in the aircrafts. The evidence does not disclose any such interest. Further, the application for registration was made by Air Traffic Limited and Capital Air Limited to which the 1<sup>st</sup> respondent wrote indicating its intention to

cancel the registration. In the circumstances, I find no violation of the petitioner's rights under Article 47. With regard to alleged violation of the provisions of Article 50, this Article pertains to rights in the course of a hearing before a court or other tribunal and have no application in the present circumstances.

36. The upshot of my findings above is that this petition has no merit and is therefore dismissed with costs to the respondent.

**Dated Delivered and Signed at Nairobi this 12<sup>th</sup> day of October 2012**

**MUMBI NGUGI**

**JUDGE**

**Judgment delivered in open Court in the presence of**

**Court Clerk – Kazungu**

**Mr. Ogutu for the 1<sup>st</sup> Respondent**

**No appearance for the Petitioner**

**MUMBI NGUGI**

**JUDGE**

**12/10/2012**