REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 253 OF 2011

FIVE FORTY AVIATION LTD …….....…….....PLAINTIFF

- VERSUS -

LUFTHANSA TECHNIK AERO ALZEY Gmbh …….....……...DEFENDANT

RULING

1. I have before me a notice of preliminary objection by the defendant dated 6th July 2011. It raises, in the main, an objection to the jurisdiction of the court on the basis of a private repair agreement dated 1st July 2010 and engine lease agreement dated 9th August 2010 ousting the courts' jurisdiction. The defendant also avers that service of summons to enter appearance was done in contravention of order 5 rule 29 of the Civil Procedure Rules 2010. To the defendant, the plaintiff's suit is thus bad in law and should be dismissed *in limine*.

2. There is also an affidavit in protest sworn by Milly Jalega Odari advocate on even date annexing the two agreements and accusing the plaintiff of failing to make full and frank disclosure of those agreements and correspondence ousting the court's jurisdiction. The defendant avers that were the court to have been fully briefed of those matters at the *exparte* stage, perhaps the order for injunction or leave for service abroad would have been denied. I must state at the outset that the affidavit of Milly Jalega Odari, being an advocate acting for the defendant, consists of hearsay statements and I have found it of little probative value. What I have found useful for the defendants are the legal objections set out in the notice of preliminary objection.

3. Briefly, the plaintiff is a Kenyan company carrying on an airline business while the defendant is a company domiciled in Germany in the business of leasing airline engines and their maintenance. In the month of July 2010 the two entered into two agreements, one for repair of the plaintiff's engine serial number ESN 121241 at an estimated total cost of US $ 310,518.29. Clause 12.1 provided as follows;

"The parties agree that all contractual and non-contractual disputes shall be settled before the courts of law which have sole national and international jurisdiction at Frankfurt/Main, Germany. In individual cases, however, LTAA shall be entitled to file an action at the purchaser's domicile or before other courts of law which have jurisdiction owing to domestic or foreign law".

As the period of repairs would inconvenience the plaintiff, the defendant by a second engine lease agreement, leased to the plaintiff PW 121-8 engine serial number S/N 120799 for use without charge save for US $ 130 usage fees per engine per flight hour. Clause 18.3 and 18.4 in the agreement provided as follows;

18.3 Governing law

"This Agreement and any legal matters that may arise out of or in connection with this Agreement shall be subject to the laws of and construed in accordance with the interpretation principles of the Federal Republic of Germany excluding German conflict or law rules and the United Nations Convention on the International Sale of Goods (CISG)".

18.4 Jurisdiction
"The courts of Frankfurt am Main, Germany, shall have jurisdiction. In case of any claims against Lessor, this jurisdiction shall be exclusive.

Lessee has named the following person which has to have an address in Germany (e.g. Lessee's German branch office, lawyer or other representative) as its authorized representative to accept service of documents requiring formal service according to German law. Lessee may replace such person only after having obtained Lessor's written consent to such replacement".

These are the agreements the defendant alleges were not disclosed to the court at the *exparte* stage. And those agreements in short provide that the applicable jurisdiction for any claims by the plaintiff would be German courts with a rider that the defendant itself could sue anywhere. While the defendant could sue in Kenya, the plaintiff was expressly barred and could only sue in Germany. This then is the basis of the principal objection on jurisdiction and for the prayer for dismissal of suit. I have already stated that the defendant also challenges the service on it of the summons out of jurisdiction.

4. The preliminary objection is contested. On the issue of non-disclosure, counsel for the plaintiff submitted that the plaintiff had annexed the two material agreements to the affidavit in support of its motion and it cannot therefore be accused of deception. On the question of leave to serve the summons out of jurisdiction, counsel contended that it was granted such leave on 23rd June 2011 by court to serve the summons by courier mail to the defendants in Germany and as part of its prayers in the motion.

5. On the matter of jurisdiction of this court, it was submitted by the plaintiff that it would be against public policy to oust the jurisdiction only in respect of the plaintiff and leave the other party the freedom to choose any forum. This would destroy equality of parties and would amount to requiring the plaintiff to fight with its hands tied at the back. Counsel for the plaintiff also submitted that the defendant by filing pleadings and an affidavit and the preliminary objection, it, the defendant, has taken steps waiving its right to question jurisdiction of the court.

6. Lastly counsel drew the attention of the court to a matter between the same parties over the same subject matter being HCCC 287 of 2011 *Lufthansa Technik Aero Alzey Gmbh Vs Five Forty Aviation Ltd.*

where the current defendant is the plaintiff. Counsel for the plaintiff submitted that the defendant cannot in one breath submit to jurisdiction and in the next hide behind the jurisdiction clause.

7. In the interests of justice and as per powers of the court at order 14 rule 6(1) I did order on my own motion that the record in HCCC 287 of 2011 aforesaid be placed before me. I have perused that record which relates to the same parties before me in this suit over the same subject matter. The defendant, in urging the court to uphold its preliminary objection relies on a number of decided cases including;

Raytheon Aircraft Credit Corporation & Another Vs. Air Al-Faruj Limited, Civil Appeal No.29 of 1999, *Friendship Container Manufacturers Ltd. Vs. Mitchell Cotts (K) Ltd*. [2001] 2EA 338, *Owners of Motor Vessel Lillian S vs. Caltex Oil (Kenya) Ltd* (1989) KLR 1, *United India Insurance Co. Ltd., Kenindia Insurance Co. Ltd. & Oriental Fire & General Insurance Co. Ltd. Vs. East African Underwriters (Kenya) Ltd*. Civil Appeal No.36 of 1983, *Fonville v Kelly III & Others* [2002] 1 EA 72, *Morris & Co. Ltd v Kenya Commercial Bank Ltd & Others* [2003] 2 EA 605, *Hillas & Co. Ltd v Arcos Ltd* [1982] ALL ER 494, *Attorney General of Belize & Others v Belize Telekom Ltd & Another* [2009] 1 WLR 1988, and *Kenya Airports Parking Services Ltd & another V Municipal Council of Mombasa* HCCC No.439 of 2009.

8. After hearing all the parties, their submissions and perusing the pleadings and depositions, I have taken the following view of the matter. In view of the annextures to the plaintiff's application dated 6th July 2011 containing the two principal agreements that are the subject matter, I would find it difficult to say the plaintiff is guilty of non-disclosure. That limb of the preliminary objection is thus without foundation.

I am satisfied that the parties in this suit are the same parties in HCCC 287 of 2011 and that both suits relate to the two agreements for repair and lease of engine here. The present suit was commenced by a plaint dated 22nd June 2011 and filed in this court on 22nd June 2011. The only difference is that the plaintiff here is the defendant in the other suit commenced by plaint dated 4th July 2011 and filed in this court on 5th July 2011.

9. The filing of the latter suit would obviously offend section 6 of the Civil Procedure Act. But I am mindful that perhaps at the time it was filed, the plaintiff therein may as well have been unaware of the present suit. The only remedy going forward would be to consolidate the two suits or to stay the latter suit. I am alive that no such prayer is before the court now. What is clear to me is that in HCCC 287 of 2011 over the same subject matter between the same parties, the defendant herein has submitted to jurisdiction of the court. Its argument is that in doing so there, it has relied on its right in the jurisdiction clause but which clause bars the plaintiff here from suing in this court. Equality of parties in a contract cannot be more elusive. And that is why the plaintiff here cries foul and looks to public policy to impeach this jurisdiction clause. I will come back to this point later.

10. I am satisfied from the court record of 23rd June 2011 that counsel for the plaintiff sought and was granted leave to "effect service on the respondent through courier service in terms of prayer 3". The formal order extracted on 24th June 2011 does not detail that order of court and is to that extent misleading. The defendant's submission however is that irrespective of that leave, service was effected by courier in contravention of order 5 rule 29. The decision in *Fonville V Kelly and others* [2002] 1 EA 71 is an all fours in this respect.

There the High Court had granted leave for service by Courier. The court, Githinji J, held at pg 78

"Notwithstanding the order for leave to serve out of jurisdiction, a foreign defendant who is served has a right to contest the jurisdiction of the court by entering a conditional appearance and thereafter making an application to set aside the order giving leave, or to set aside the service or to strike out the suit for want of jurisdiction."

The court was emphatic that the form of procedure of service out of jurisdiction set out at order II rule 27 (the predecessor to order 5 rule 29) was a "fundamental omission and not merely an irregularity which divests the court of jurisdiction over them (the defendants)". See *Fonville V Kelly* Supra at 78.

11. That view is not binding on me. I am of the view that when the Honourable Mr. Justice Apondi granted leave for service in a specific manner outside the elaborate procedures of order 5 rule 29, he was properly exercising his wide discretion and it does not fall upon me to reverse him. That limb of the preliminary objection fails.

12. That said, I am of the considered view that it is not the business of the courts to rewrite contracts for the parties. It makes perfect business sense. A court should only intervene if the terms are so unconscionable or against public policy as to invalidate the contract. This is not a novel proposition. It was so held by Ringera J, as he then was, in *Morris & Company Ltd Vs Kenya Commercial Bank Ltd* [2003] 2 E.A. 605 when he stated

"I have always understood that it is the duty of any person entering into a commercial transaction particularly one in which a large amount of money is involved to obtain the best possible legal advice so that he can better understand his obligations under the documents to which he appends his signature or seal"

13. The court then must not be the destroyer of commercial bargains. See *Hillas & Company Ltd Vs Arcos Ltd* [1932] ALL ER 494 at 499. If further authority for that proposition is required, then it is found in *Attorney General of Belize et al Vs Belize Telecom Ltd and another* [2009] 1 WLR 1980 at 1993 citing Lord Pearson, with whom Lord Diplock agreed, in *Trollope & Colls Ltd Vs North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601 at 609

"the court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves, however desirable the improvement might be. The court'sfunction is to interpret and apply the contract whichthe parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been more suitable"

And the Court of Appeal here has taken a similar position of non-intervention in contracts in *Anne Mumbi Hinga Vs Victoria Njoki Gathora* [2009] eKLR, a matter that dealt with a parties choice in the agreement to proceed to arbitration.

14. In the present case, the plaintiff is not claiming that it was coerced into executing the two material agreements. It is only later that it has found, that the jurisdiction clause therein is oppressive. Having executed the instrument with its eyes open, I would hold it to its bargain however poor that bargain has turned out to be.

15. But going back to the root of the matter, the courts have rendered many decisions on exclusive jurisdiction clauses or ouster clauses in conflict of law situations. The jurisdiction of the High Court over foreign defendants in a contractual dispute has been correctly stated in *Karachi bus Company Ltd Vs Issaq* [1965] EA 42. Since there is no evidence that the defendant is trading in Kenya through a subsidiary, the court cannot assume jurisdiction unless the contract is either made in Kenya, or is governed by the laws of Kenya or the breach occurred in Kenya.

16. Where parties have bound themselves by an exclusive jurisdiction clause the general rule is to give effect to that clause "unless the party suing in the non-contractual forum discharges the burden cast on him of showing strong reasons for suing in that forum". See *Donohue V Armo Inc* [2002] 4 LRC 478 H.L. *United India Insurance Company Ltd V East African Underwriters (K) Ltd* [1985] KLR 898 and *Raytheon Aircraft Credit Corporation & another Vs Air Al-Faraj Limited* [2005] eKLR.

17. In *United India Insurance* case above, the court stated
"All the decided authorities showed that the parties should be held to their agreement as regards a jurisdiction clause"

The court went further to state that "a heavy burden of showing strong cause for departing from the exclusive jurisdiction clause lay on the party wishing to do so".

18. The plaintiff's motion shows the main grievance is on the price, the fear that the aircraft may be grounded and damage to its business. The plaintiff, other than stating that the exclusive jurisdiction clause has left him holding the short end of the stick has not persuaded me that the clause, which it voluntarily adopted, is so oppressive or repugnant as to be against public policy. It is true that the equality of parties in a contract is elusive as I have said earlier but I have already held that the court will hold parties to commercial contracts to their bargain. In those circumstances, I am unable to say that the plaintiff has shown a strong cause for departure from the jurisdiction clause. Having failed to discharge that burden, the court upholds the jurisdiction clause.

19. It must then follow that the preliminary objection on jurisdiction is upheld. Having then found that the court is not properly seized of jurisdiction under the repair agreement dated 1st July 2010 and the engine lease agreement dated 9th August 2010 that are the pith and marrow of the dispute between the parties here, the suit becomes fatally defective.

20. For all of those reasons, I dismiss the motion and the suit. Costs normally follow the event. But I shall not order costs for the following reasons. I have already held that I could not place reliance on the affidavit by Milly Jalega Odari sworn on behalf of the defendant because as a lawyer for the defendant, her evidence in that affidavit was hearsay and of no probative value. The matter was thus largely defended on points of law. But the other key reason is that the defendant herein has sued the plaintiff herein in our jurisdiction in HCCC 287 of 2011 over the same subject matter between the same parties. Its *bona fides* in challenging jurisdiction here and the fact that the present plaintiff has to defend that other suit prejudiced my discretion to grant it any costs.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 10th day of November. 2011.

G.K. KIMONDO
JUDGE

Ruling read in open court in the presence of
Mr. Mungu for the Plaintiff.
Ms Odari for Kamau for the Defendant.