



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO 79 OF 2008

EXECUTIVE TURBINE KENYA LTD:.....PLAINTIFF

VERSUS

PASSWORD TRANSPORT & LOGISTIC LTD.....DEFENDANT

RULING

The parties herein entered into an Aircraft Utilization agreement on the 23rd and 24th day of August 2007 establishing the relationship between the parties as to the lease of an aircraft known as Beech craft 1990C registration number 57-BTY. In the said Agreement and more particularly in clause 10 titled Disputes is explained the methodology of resolving disputes. The relevant part is 10.1 which reads:-

“In the event of a dispute between the parties relating to the existence or interpretation of this agreement or in relation to any proposed increase in rent which the parties are unable to agree on such dispute shall be resolved in as informal a manner as possible, by arbitration, by a single arbitrator in this case the Kenya Arbitration Association.”

In disregard of the above provision the Plaintiff herein filed a plaint on the 31st day of January, 2008 claiming a sum of us\$154, 805, interest thereon and costs of the suit. I shall revert to this point later in this Ruling.

The Defendant subsequently entered Appearance through its appointed Advocates on the 14th March, 2008. The Defendant then took out a Notice of Motion on the 27th March, 2008 under Sections 6 and 12(4) of the Arbitration Act 1995, Order XLV Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, cap 21 of the Laws of Kenya and all other enabling provisions of the law praying that the proceedings in the suit be stayed forthwith and the parties submit themselves to Arbitration in accordance with clause 10 of the Aircraft utilization Agreement signed between the parties. It is based on the grounds that:-

- a) **The Aircraft utilization Agreement between the parties signed on 24th August 2007 that is the basis of this suit provides under clause 10 that any dispute between the parties is referred to an Arbitrator.**
- b) **The said Agreement under clause 10.2 further provides that the award of the Arbitrator shall be final and binding between the parties indeed a dispute has arisen between the parties wherein the Plaintiff herein has repossessed without notice Aircraft 5Y-BTY and is claiming us dollars 154,805/= from the Defendant which the Defendant denies owing.**
- c) **The plaintiff is not seeking any preservation orders and ought to have proceeded with**

appointment of Arbitrator as is provided under the Agreement.

d) The Plaintiff shall not suffer any prejudice of (if?) this application as (is?) granted

The Affidavit filed in support merely repeats the above adding and explaining how an amount of US Dollars 19,692.60 arose and which the deponent claims to be the amount being claimed from the Respondent by the Defendant/Applicant.

At the hearing of the Application learned counsel for the Defendant/Applicant stated that a dispute as to what is owed has arisen and the same is for determination as well as the issue as to the circumstances of default. Counsel hence urged the court to stay proceedings and refer the matter to Arbitration.

In rebuttal and opposition to the application learned counsel for the Respondent submitted that all that was in issue was the amount the Defendant/Respondent was in default of paying and that did not fall under the ambit of clause 10 of the Agreement hereunder.

It is now an opportune time to give consideration to the Application herein. On the onset it is important to ascertain the nature of dispute anticipated by clause 10 of the Agreement between the parties herein. And to my mind the same is put in simple terms thus.....

“.....a dispute between the parties relating to the existence or interpretation of this agreement (emphasis mine) or in relation to any proposed increase in rent.....”

That clearly settles the matter herein. In the suit the plaintiff claims an amount of money in respect of rent fees. The Respondent states that he is claiming its different amount from the plaintiff. It is to be noted that as at the hearing the Defendant was yet to file a Defence and possibly a counterclaim for the amount it seeks from the plaintiff. What therefore is in issue herein is neither an interpretation of any clause of the Agreement nor the existence of the Agreement between the parties or a proposed increase in rent that the parties are unable to agree on. What is in issue is simply amounts not paid for the rent of the aircraft. That is not the dispute envisaged by clause 10 of the Agreement between the parties.

And now I revert to the issue of filing the suit. Did the plaintiff disregard the Agreement herein more particularly clause 10 thereof in filing the suit? The answer is clearly in the negative. The plaintiff was right, in my considered view, in instituting the suit as it did as the dispute in issue is not one as to be referred to Arbitration

For the reasons given above the Defendant/Applicant’s Application must fail and the same is accordingly dismissed with costs.

Those are the orders of the court.

DATED AT ELDORET THIS 18TH DAY OF FEBRUARY, 2009

P.M.MWILU

JUDGE

DELIVERED IN OPEN COURT IN NAIROBI THIS 6TH DAY OF MARCH 2009

J.W.LESIIT

JUDGE

IN THE PRESENCE OF:-

.....**Advocate for the Plaintiff/Respondent**

.....**Advocate for the Defendant/Applicant**