



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 2157 of 1999

SKYLINK AEROMANAGEMENT K. LTDPLAINTIFF

VERSUS

AVIATREND LTD.....DEFENDANT

J U D G E M E N T

The Plaintiff claims from the Defendant special damages of US Dollars 186,000/00, general damages, costs and interest on account of two aircraft leased by the letter to the former. It is the Plaintiff's case in respect to the first aircraft, as set out in the plaint, that the Defendant was in breach of the lease agreement in that it failed or neglected to service the aircraft or to provide necessary spare parts, as a consequence of which the aircraft was grounded for a period of over two months resulting in substantial loss and damage to the Plaintiff.

In respect to the second aircraft, it is the Plaintiff's case that the Defendant unilaterally and without notice terminated the lease agreement, and without lawful cause took possession of the aircraft. The Defendant was also in breach of the lease agreement by refusing or neglecting to service the aircraft, thus occasioning the Plaintiff loss and damage.

The Defendant field defence denying liability. It also counter-claimed against the Plaintiff the sum of US Dollars 154,800/00, the same being rent for the aircraft and *per diem* payment for the crew. The Plaintiff denied the counterclaim.

The Defendant is a foreign company registered in Russia as pleaded in the plaint. At some point the Plaintiff was unable to serve upon it process in the manner set out in Order V, rule 2 of the Civil Procedure Rules (the Rules). The Plaintiff therefore sought and obtained leave of the court to serve the Defendant by substituted service.

When the suit came up for hearing 8th April 2008 there was no appearance for the Defendant despite service of hearing notice. The Plaintiff therefore proceeded *ex-parte*.

As Defendant did not prosecute its counterclaim, it is hereby dismissed with cost to the Plaintiff.

The Plaintiff called one witness, JOHN ALLAN OKEMWA (PW1). He is its managing director. In the course of his testimony he produced various documents, including two lease contracts dated 8th April, 1999 and 17th January, 1999 (exhibits P2 and P3 respectively). By these contracts the Defendant leased to the Plaintiff Aircraft AN-26, Registration No. ER-AEK and Aircraft AN-32, 4k-644-52 respectively under the terms and conditions contained in the contract. The two contracts are virtually identical.

Clause 2.3 of the contracts provides, *inter alia*, that the rental aircraft “at the moment of being had on lease shall be prepared for flights and set with all kits of board and ground equipment, spare parts as necessary for the proper maintenance of the aircraft...”. And clause 2.7 provides –

”2.7 Legal responsibility for the maintenance, airworthiness and flying safety, the licenses, clearances, visas for the crew, etc will be borne by the Lessee”.

Clause 2.9 provides –

”2.9 In the event the rental aircraft becomes unserviceable due to technical problems, the Lessor is obliged to repair the aircraft within 96 hours. Cost of purchase, freight and clearance of the spare parts will be borne by the Lessor and clearance carried out by the Lessee provided shipment of spares is done in accordance with instructions from the Lessor”.

One of the obligations of the Lessor as provided in clause 8.3 is to ”provide the rental aircraft with the necessary spare parts and materials for its maintenance”.

I have considered the testimony of PW1 and the submissions of the Plaintiff’s learned counsel in light of the two contracts, and especially the provisions quoted above. Despite the apparent conflict between clauses 2.7 and 2.9 of the contracts, I am satisfied from the entire contract documents that it was the responsibility of the Defendant to keep the aircrafts serviceable and airworthy at all times, including supplying all necessary spare parts. From the uncontroverted testimony of PW1, I am satisfied on a balance of probabilities that the Defendant failed to meet this obligation in respect to both aircraft. As a result, the same were grounded for varying periods of time, and the Plaintiff suffered the special damages pleaded and particularized in the plaint. The Defendant also unilaterally and without notice, and without justifiable cause, terminated the lease contract in respect to the second aircraft, thus occasioning the Plaintiff the pleaded loss.

From the testimony of PW1 and the documents he produced, I am satisfied that the Plaintiff has proved its case on a balance of probabilities. I will therefore enter judgment for the Plaintiff in the sum of US Dollars 186,000/00 or its equivalent in Kenya shillings, the rate of conversion being the exchange rate applicable at the time of payment. Regarding interest, I will award the same from the date of filing suit at 3% per annum if the principal sum shall be paid in US Dollars and at court rates if it shall be paid in Kenya shillings. The claim for general damages is dismissed for want of proof.

The Plaintiff shall have costs of its suit and interest thereon at court rates. As already stated the Defendant’s counter-claim is dismissed with costs. There will be orders accordingly.

DATE, SIGNED AND PRONOUNCED IN OPEN COURT THIS 30TH DAY OF MAY 2008.

H.P.G. WAWERU

JUDGE