



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA**

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 11 of 2007

ULL 13 (DREIZEHN BETEILIGUNGS-UND

MANAGEMENT GMBH & CO. KEG PLAINTIFF/APPLICANT

VERSUS

KNIGHT AVIATION LIMITED.....DEFENDANT/RESPONDENT

R U L I N G

On 8th May 2008, the plaintiff and the defendant recorded the following consent;

“a) the interlocutory judgment entered herein be set aside.

b) The defendants do release the two aircraft that (is) S/No.UC-069 and S/No.UC-192 to the plaintiff.

c) The defendant shall return the Hot Section S/No. UC-172 from Dubai on or before 30th May 2008.

d) The defendant shall return the carriage for S/No. UC-069 from USA on or before 30th May 2008.

e) The plaintiff will be at liberty to start the repair immediately and may use the defendant’s hanger for that purpose.

f) The defendants shall provide personnel assistance but the defendants shall meet the costs of repair except labour (manpower).

g) The matter shall be mentioned on 26th June 2008 for further orders.”

The consent of the parties was adopted as the order of the court on 3rd June 2008. It is apparent that the defendant did not abide by the terms of the consent. On 11th July 2008, the defendant moved the court pursuant to the provisions of Section 5 of the Judicature Act seeking the citing of Mahamood Jama Guled, the Managing Director of Knight Aviation for contempt of court for disobeying the consent of the parties which was adopted as the order of the court. The plaintiff sought the defendant and its directors be punished by having their properties sequestered or alternatively having the managing director of the defendant, Mohammed Jama Guled, committed to civil jail for such a period that the court may deem fit to grant. The plaintiff complained that the defendant had failed to abide by the terms of the consent order by failing to bring back to the country the Hot Section of UC-172 and the undercarriage of UC-1069 despite the variation of the consent order giving more time to the defendant to avail the said parts on or

before the 30th May 2008. The application is supported by the annexed affidavit of Lawrence Macharia Karanja, the advocate for the plaintiff. A further affidavit was sworn by Peter Trost, the special projects director of the plaintiff.

The application is opposed. Mohamood Jama Guled, a director of the defendant swore a replying affidavit in opposition to the application. In the said replying affidavit, he explained his difficulty in securing the return of the said aircraft parts from the USA and from the UK. He deponed that the terms of the consent had been varied when the plaintiff indicated that it would obtain the said aircraft parts from the UK at its own costs. The said director deponed that he had not personally been served with any order emanating from the court on his own behalf or on behalf of the company to entitle the plaintiff seek the intervention from the court to cite him for being allegedly in contempt of the orders of the court. He swore that he had not personally breached nor was he liable to be cited for contempt of court for breach of any orders of the court.

At the hearing of the application, I heard rival submissions made by Mr. Karanja for the plaintiff and by Mrs. Onyango for the defendant. I have carefully considered the said submissions. I have also read the pleadings filed by the parties, including the authorities cited by each party in support of their respective opposing positions. The issue for determination by this court is whether the plaintiff established basis upon which this court can cite the defendant and its directors for being in contempt of the orders of the court. As stated earlier in this ruling, the plaintiff and the defendant entered into a consent which in effect settled the dispute between the plaintiff and the defendant regarding the delivery of certain parts of the two aircraft.

The defendant undertook to deliver the said parts on or before the 30th May 2008. Later, the defendant sought extension of time in regard to the date which it was required to comply with the said order of the court. The plaintiff agreed for an extension to be granted to the defendant. The defendant was required to deliver the said aircraft parts by 30th June 2008. The defendant did not abide by its promise to deliver the said parts necessitating the plaintiff to seek the court's intervention to enforce the said consent of the parties that was adopted as an order of the court.

When the defendant was confronted with the application, it sought to rely on legal technicalities to avoid being held responsible for its failure to comply with the said order of the court. The defendant explained that neither itself nor its directors were served with the order which the plaintiff was seeking to enforce by citing the defendant for contempt of the court. I think the argument present by the defendant is a red herring meant to divert the court's attention from the actual matters in dispute. The plaintiff was not required to serve the order upon the defendant and its director on account of the fact that the plaintiff and the defendant entered into a consent which was adopted as the order of the court. The defendant was therefore aware or expected to be aware of the contents of the said consent order. As was held by Kwach JA in Comercial Bank of Africa Ltd – vs – Isaac Kamau Ndirangu CA Civil Appeal No. 157 of 1991 (unreported), it is not necessary where parties enter into a consent order for the party seeking the enforcement of the order to serve the other party with the particular order before commencing contempt of court proceedings.

It is clear that the defendant was expected to comply with the order of the court by delivering the said aircraft parts to the plaintiff. The defendant was therefore in contempt of the orders of the court when it failed to deliver the said aircraft parts within the period specified in the said consent order. The defendant cannot escape liability by shifting goal posts. It was not provided in the consent order that the plaintiff was required to shoulder the costs of repatriating back to the country the said aircraft parts. The directors of the defendant are equally liable to be punished for being in contempt of the orders of the court. The directors of the defendant are liable since the company (*defendant*) lacks the will to act. The defendant acts through its directors. As stated in Halsbury's Laws of England, 4th Edition, Volume 7 at page 285 under the heading "*power and duties of directors*":

"496. The true position of directors is that of agents of the company. As such they are clothed with the powers and duties of carrying on the whole of its business, subject, however, to the restrictions imposed by the articles and any statutory provisions. The intention of the company may be established by its

directors, even acting informally, depending upon the nature of the matter under consideration, the relative positions of the directors in the company, and generally all the circumstances of the case.”

From the correspondence exchanged between the plaintiff and the defendant, it was evident that Mohammed Jama Guled, the managing director of the defendant is responsible for the day to the day management of the defendant company. He was expected to comply with the order of the court. He did not. I therefore hold that the plaintiff established, to the required standard, that the defendant and its managing director are in flagrant contempt of the order of this court issued on 3rd June 2008. The defendant and its managing director deliberately failed to comply with the order of the court requiring them to avail to the plaintiff the aircraft parts listed in the said order.

I will however withhold to impose sanction upon the defendant and its managing director at this stage. The court is giving the two an opportunity to purge their contempt by delivering the said aircraft parts to the plaintiff. The defendant and its managing director, Mohammed Jama Guled are hereby granted until 15th December 2008 to deliver to the plaintiff, the hot Section S/No. UC-172 and the carriage S/No.UC-069. If the defendant, and its managing director shall fail to deliver the said aircraft parts to the plaintiff, the managing director of the defendant shall appear before this court to show cause why he should not be punished for being in contempt of the orders of the court. The court shall also make appropriate coercive orders by sequestering the properties of the defendant.

The plaintiff shall be at liberty to move the court if the defendant fails to deliver the said aircraft parts. This order is issued without prejudice to the plaintiff's right to seek appropriate compensation in damages for the defendant's failure to deliver the said aircraft parts within the material period. The plaintiff shall have the costs of the application.

DATED at NAIROBI this 7th day of NOVEMBER, 2008.

L. KIMARU

JUDGE