



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

Civil Suit 347 of 2005

SOUTH AFRICAN AIRWAYS PROPRIETY LIMITED.....PLAINTIFF

VERSUS

AIR KENYA AVIATION LIMITED.....DEFENDANT

JUDGEMENT

The plaintiff has brought this action against the defendant and has pleaded in the plaint that the defendant in the month of January 2005 intimated its desire to hire an aircraft engine form the plaintiff. The defendant indicated that the engine it required was a Prat and Whitney JT 8D – 17A to be fitted in its aircraft registration no. 5Y BPP. After that oral agreement the plaintiff pleaded that it delivered the said engine and fitted the same in the defendant’s aircraft 5Y BPP on 20th January 2005. It was agreed that the defendant would pay the plaintiff the agreed rental charge of US\$ 600 per day payable monthly in advance and restoration charges of US\$ 120 per flight hour. The plaintiff averred in the plaint that the rental and restoration charges became payable with the effect from 20th January 2005 when the engine was duly delivered by the plaintiff and fixed on the defendants aircraft. It is further pleaded that that oral agreement was reduced into writing in an agreement dated 20th January 2005. That the defendant accepted the terms of that agreement when it executed the agreement on the 20th January 2005. The plaintiff further pleaded that it issued the defendant with invoices for the afore stated charges but the defendant failed or omitted or refused to settle those invoices. The plaintiff pleaded that the total charges for the period 21st February 2005 to 20th April 2005 was US\$ 56,040.00. That the charges in respect of flight hours for the period 20th January 2005 to 21st February 2005 was US\$ 26, 953. 20. The plaintiff total claim was therefore US\$ 82, 993. 20. The plaintiff pleaded that sum remains due and payable. That it was a term of the agreement that any amount remaining unpaid outside the time allowed in the agreement would attract interest at the rate of 6% above one month dollar Libor. At the hearing the plaintiff’s evidence was given by Mr Terence Naiker. He said that he is employed by South African Airways in the Technical Division as a Senior Manager sales and marketing. His duties are to sell and to maintain services. The plaintiff runs an aircraft and also maintains their current fleet and third parties aircraft. He said that third parties means other than South African Airways. That the defendant operates as Regional Air under the franchise of British Airways. That it was agreed that the plaintiffs were to enter with the defendant into a thirty six months agreement. That the defendant approached the plaintiff in January 2005 with engine problems of one of their aircraft which was in Lilongwe, Malawi. P W 1 was approached by John Hirst who was the defendant’s maintenance Manager. He requested the plaintiff to give the defendant services of lease of an engine because their engine had been damaged. That they required an engine for aircraft registration No. 5Y BPZ. The witness said that that the plaintiff did not have an engine which was available for that aircraft but they had an engine available for aircraft Reg. No.

5Y BPP. For that reason it was agreed that they could do what the witness called an engine swap. He explained that it meant the removal of an engine from 5Y BPP and put it to 5Y BPZ. He said that plaintiff's engine was fitted into 5 YBPP which met that aircraft specification. He said that this suggestion of engine swap was made because in the industry a quick turn round was vital to the business. As the engine was being shipped to be fitted onto 5Y-BPP the witness instructed the plaintiffs lawyer to draft a lease agreement which was forwarded to Mr Hirst by e-mail. He also telephoned Mr Hirst. The witness produced the e-mails copies that were sent to Mr Hirst. Before the engine was fitted Mr Hirt sent another e-mail of 18th January 2005 making a request for the engine. Another e-mail dated 19th January 2005 was sent by Mr Hirst confirming faxing the Insurance Certificate of the engine. By an e-mail dated 21st January 2005 Mr Hirst confirmed receipt of the engine. The witness also produced a document he also described as TL/36. He said that this is an aircraft log- book it is used in all aircrafts whilst they are in service and it is recorded thereon the changes that are made to an aircraft during service. He produced the TL/36 showing the changes. He stated that the original copy of the TL/36 was held by the defendant. The witness said that he received a telephone call and e-mail from Mr Hirst thanking the plaintiff for its speedy response to their request. The e-mail sent by Mr Hirst dated 24th January 2005 is worthy to be quoted in this judgment as follows: -

“Hi Steve,

Can you pass on our thanks to all the people that assisted with the organization and engine changes on BPP and BPZ last week. The speedy response has minimized RA.'s operational problems and is much appreciated by all at Regional Air.

Best regards John Hirst.

Engineering Manager Regional Air”

The witness said that a written agreement was forwarded to the defendant but on being returned to the plaintiff he noticed that the signature had only been appended by the defendant on the last page. He H further stated that it was a term of that agreement that the monthly rental charge for the engine was US\$ 600 per day and the restoration charges was US\$ 120 per flight hour. He said that the latter is calculated on aircraft use that is the flight hours. The witness contacted Mr Hirst and Mr Nigel Strong with regards to the defendant's failure to append their signature on every page of the Lease Agreement. The witness subsequently instructed the plaintiff's financial department to raise invoices to be forwarded to the defendant. He confirmed that this was done and the invoices were sent by DHL and that they were also stamped for e-mailing to Mr Hirst. He produced the invoices before court. The e-mail forwarding the invoices was exhibited before court and is in the following terms.

“Hi John,

Please find attached the invoices and statements for the monthly advance payments and the hourly payments respectively, order for the lease Engine on 5Y – BPP.

Many thank and kindest regards”.

In a subsequent meeting between the witness Mr Nigel Strong and Neal Stephane. Mr Strong informed the witness that the defendant had no intention of paying the outstaying invoices but that the defendant desired that the plaintiff would continue to offer services to the defendant. This was not acceptable to the plaintiff and on the 7th of April 2005 a Notice of Termination of the engine Lease Agreement was forwarded to the defendants CEO. The reasons given for the termination was the defendant failure to make payment that had been demanded by the plaintiff. That the plaintiff's attorney further wrote to the defendant terminating the Agreement.

It would to be noted that the defendant did not cross-examine the plaintiff witness nor did the defendant tender any evidence in support of its defence. The defendant relied on the submissions filed before court.

In those submissions the defendant stated that the plaintiffs verifying affidavits which verified the plaintiff did not comply with order VII rule I [2] of the Civil Procedure Rules. That rule provides as follows:

“The Plaintiff shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaintiff.”

In its submissions the defendant argues that the said affidavit was sworn on the 14th of June 2005 which was long before the case was filed. It is important to note that the plaintiff is dated 14th June 2005. The affidavit verified that the plaintiff is dated the 14th of June 2005. The plaintiff was filed in court on 24th June 2005. I must state that I have found it extremely difficult to follow the defendant's argument in respect of the plaintiff verifying affidavit. There is nothing that I can find that can show fault with the plaintiff verifying affidavit and accordingly the defendant's argument is rejected. The defendant at the hearing of this matter when PW 1 gave evidence did object to the production in evidence of the aircraft engine lease agreement. The basis of the defendant's objection was that the same could not be tendered in evidence because the same was not stamped as required by the Stamp Duty Act. The defendant was overruled and the agreement was tendered as an exhibit of the plaintiff. The court in so ruling gave the defendant liberty to raise an objection it may have in its submission before court. In those submissions the defendant repeated the objection and sought that the court will find the agreement to be null and void for lack of stamping as afore said. I resist that request to find the agreement to be null and void but I do agree with the defendant that the plaintiff, even after the objection was raised, have failed to have the document stamped as required under the Stamp Duty Act, the court cannot place reliance on the same. What then is the effect of the court not placing reliance on that document? Looking at the amended plaintiff one finds that the plaintiff's claim is that the parties entered into an oral agreement and having so agreed the plaintiff delivered the aircraft engine and fitted the same to the defendant aircraft number 5Y – BPP. It does become clear that the agreement between the parties was oral which later the plaintiff reduced into writing in the form of Aircraft Engine Lease Agreement. The defendant was alleged to have signed only one page of that Agreement and had failed to sign all pages as the plaintiff required. What however remains to be in the agreement between the parties was an oral agreement whose terms were enumerated by PW 1. To further support this finding by the court the invoices produced on behalf of the plaintiff, plaintiff's exhibit no. 5 (A) – (D) clearly show under reference that the invoices related to 'verbal' agreement. In the end therefore the court's refusal to rely on the Lease Agreement does not in any way weaken the plaintiff's case in respect of the existence of an agreement between the parties.

In view of that finding, the defendant's submission that the defendant's alleged signature, on the lease agreement had not been proved as required by Section 70 of the Evidence Act, cannot stand.

Defendant further submitted that the invoices produced by PW 1 did not emanate from the plaintiff and accordingly the plaintiff cannot rely on the same as proof of defendant's debt. Plaintiff's exhibit No. 5 (a) to (d) is the invoices that P W 1 produced as evidence of defendant's indebtedness. The said invoices, at the top show that they have been produced by “**South African Technical**” and were addressed to the defendant. P W 1 described himself as an employee of “**South African Airways in the Technical division as senior manager sales and marketing**”. What one gets from that evidence is that South African Airways has a technical division. That being so the invoices having emanated from “**South African Technical**” would mean that the invoices came from the plaintiff's technical division. There being no contrary evidence submitted by the defendant, since the defendant chose to keep silent and not offer evidence, the court find that the invoices belong to the plaintiff but were sent by its technical division. PW 1 gave uncontroverted evidence and stated the invoices were sent to the defendant by “DHL” and by E-mail the defendant via Email dated 8.4.2005 did propose payment of the debt owed to the plaintiff. There is no suggestion there that defendant did not receive the invoices and it is pertinent to note that the defendant entitled that E-mail as Air Kenya/SAT account. It is very conceivable that SAT stands for South African Technical.

Plaintiff produced exhibit No. 2 TL/36. Defendant in regard to that exhibit stated that it related to the aircraft NO. 5Y – BPZ, whereas the defendant's aircraft is NO. 5Y – BPP, as pleaded in the plaintiff, as the recipient of the plaintiff's engine. The P W 1's uncontroverted evidence was thus; that the defendant required an engine for aircraft NO. 5Y – BPZ which the plaintiff was unable to supply to the defendant.

That the plaintiff, had however, an engine for aircraft No. 5Y – BPP. P W 1 said that in view of the unavailability of the engine required by the defendant it was agreed that the defendant do an engine swap and accordingly the plaintiff supplied an engine for defendant aircraft No. 5Y – BPP. The court finds that the evidence of PW 1 is consistent with the plaint. Defendant’s email dated 24.1.2005 shows that the defendant acknowledged receipt of “*engine changes on BPP and BPZ*”. The defendant in view of that email is estopped from denying receiving that engine as per section 24 of the Evidence Act.

Defendant further submitted that the court ought to reject the evidence produced by exhibits of emails. That submission is rejected as correctly stated by the plaintiff computer generated document are now allowed under section 65 (5) to (9) of the Evidence Act.

As stated before defendant did not cross examine the plaintiff’s witness and did not offer any evidence in support of the defence. Having failed to offer evidence the court is not obliged to consider the defence filed herein. The court finds that the plaintiff has on a balance of probability proved that it entered into an oral agreement and in that regard supplied the defendant with an engine to their aircraft No. 5Y-BPP. The defendant acknowledge receipt of the engine. The plaintiff proved that the defendant did not pay for that engine as agreed. PW 1 gave evidence of how the total charge was arrived at and in evidence produced invoices. The court finds that the plaintiff’s claim against the defendant is proved and accordingly the court entered judgment for the plaintiff as follows:-

- 1) Judgment for US\$ 82, 933. 20 together with interest at court rate from the date of filing suit until payment in full.**
- 2) The court also grants costs of the suit to the plaintiff plus interest on those costs at 6% per annum from the date of judgment to payment in full.**

Dated and delivered this 29th day of January 2007.

MARY KASANGO

JUDGE