REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Suit 360 of 2004

INTERNATIONAL AIRCRAFT GROUP S. A. …..…… PLAINTIFF

VERSUS

AIR KENYA AVIATION LTD …..…..…… DEFENDANT

RULING

This is an application for summary judgement or in the alternative for judgement on admission.

It is the plaintiff's case that the parties herein signed a Sale Agreement on 30th January 2001. Pursuant to that agreement, the defendant was to purchase one aircraft De Havilland DHC-7-102. It is said that in Kenya, that aircraft is known as 5Y BPD.

The purchase price was USD 850,000, out of which the defendant first paid the deposit of USD 200,000.

It was a term of the agreement that the balance of USD 650,000, would be payable in 24 monthly installments. Meanwhile, interest was to accrue at 11% per annum, calculated at monthly breaks, from 1st March 2001, until payment in full.

The plaintiff asserts that the defendant did default in remitting the monthly installments, so that as at 31st January 2005, the balance due from the defendant was USD 523,787.

Meanwhile, on 5th January 2004, the plaintiff brought an application for the repossession of the aircraft. On 29th September 2004, the Hon. Kasango J. gave a ruling on that application, in which she dismissed the application for repossession, but ordered the defendant not to part with possession of the aircraft until the suit is heard and determined. In arriving at that decision, the learned Judge made a finding that the defendant had a good title to the aircraft. However, she also did find that the defendant's action of not registering the aircraft in the joint names of the plaintiff and of the defendant, was a breach of contract, for which the plaintiff could be compensated in damages.

As regards the plaintiff's claim for the balance of the purchase price, the defence, as I understand it is stated at paragraph 8 of the Amended Defence, which reads as follows;

"In further answer to paragraphs 7 and 7a of the Amended Plaint and without prejudice to the contents of paragraph 7 above, the amounts claimed by the Plaintiff are far in excess of the amount actually due, if at all."

The main reason advanced by the defendant for the contention that the sums demanded are not due is that the plaintiff had given to the defendant a notice of termination of the agreement; and that that therefore meant that the plaintiff had no further claims against the defendant, under the Agreement.

To my mind, if the defendant meant that it could keep the aircraft and own it, without paying the balance of the purchase price, simply because the plaintiff had terminated the contract pursuant to which the defendant was purchasing the aircraft, that would constitute serious injustice.

Surely, the termination of the agreement, which was done after title passed onto the defendant, could only mean that the parties were no longer obliged to such terms as payments by installments.

As the Hon. Kasango J. has already found, in her ruling dated 29th September 2004, the defendant was in breach of the agreement, by registering the aircraft in its own name, to the exclusion of the plaintiff.

Similarly, if the defendant has not paid the balance of the purchase price, it is in further breach of the agreement. That being the position, I cannot fathom how a party who is in breach of the terms of an agreement can seek to benefit from its said breaches.

If the defendant were to be permitted to keep the aircraft without paying the balance of the purchase price, this court would have facilitated the unjust enrichment of a party who was in breach of an agreement. And I believe that this court cannot sanction a wrongdoing.

That is even more so when Mr. John Porte, who is an officer of the defendant did acknowledge, in his affidavit sworn on 12th July 2004, that;

"THAT I am further advised by the Defendant's Advocates on record and which advice I verily believe to be true that in the circumstances of this case, an injunction is not the proper remedy as the Applicant is simply an unpaid seller of goods with no beneficial or legal rights in the goods."

That sounds like a back-handed admission, by the defendant, that it had not paid the plaintiff for the aircraft which the plaintiff had sold and delivered to it. Of course, the sum due was not specified by the defendant then, or elsewhere. But that does not negate the admission of non-payment. The only issue left hanging is as relates to the quantum of the sums not yet paid by the defendant.

When it is borne in mind that the plaintiff has specified the sums said to be due, I hold the considered view that the burden was then on the defendant to prove that it had paid that sum, or such other sum as they believed to be outstanding. The defendant did not discharge the onus on it, by simply asserting that the plaintiff was asking for a sum **"in excess of the amount actually due, if at all."**

In the circumstances, should I proceed to grant judgment on admission or summary judgement?

If I were to grant judgement on admission, the inevitable question would be as to the sum which the defendant had admitted. As that is not specific, I am unable to grant judgement on admission.

But what about summary judgement? The defendant has submitted that the very foundation of this case is non-existent. Therefore, even if the plaintiff appears to have a reasonable case, the defendant contends that the plaintiff's castle could not be built in the air.

It is said that the suit itself was a nullity, on the grounds that there was no verifying affidavit which was filed with the suit herein.

The suit was filed on 5th July 2004, whilst the verifying affidavit was allegedly sworn on 11th June 2004. Therefore, the defendant contends that when deponent deposed that he was the president of the plaintiff, that was false, because there could not have been a plaintiff whereas no suit had been instituted.

The plaintiff countered that submission by pointing out that the deponent was resident outside Kenya.

Therefore, after the affidavit was prepared by the firm of Raffman Dhanji Elms & Virdee Advocates, in Nairobi, it was dispatched to America for swearing. Thereafter, it was returned to Nairobi for filing in court.

The question is whether the fact that the affidavit was sworn some 24 days before the suit was filed rendered it false, insofar as there was no suit for that period of time, yet the deponent had suggested that a suit had been filed.

First, by virtue of the provisions of Order 18 rule 9 of the Civil Procedure Rules;

"…..an affidavit shall not be rejected solely because it was sworn before the filing of the suit concerned."

If that be the case, and if Mr. Yaron Degani was the president of the plaintiff, I see no reason why he should not have so described himself, whilst he was well aware that the plaintiff was to file a suit.

In any event, I believe that in real terms, all verifying affidavits are sworn before suits are filed. I say so because I cannot otherwise visualize how a verifying affidavit which is to be filed together with the Plaint can otherwise be sworn

after the said plaint had been filed.

Also, I think that the deponent could only be accused of stating a falsehood if the defendant were to demonstrate that Mr. Degani was indeed not the President of the plaintiff. But, the defendant has not as much as suggested that the deponent was not the President of the plaintiff. Therefore, for now, I will assume that Mr. Degani is the President of the Plaintiff, and that therefore by so stating in the verifying affidavit, he was not stating a falsehood, as suggested by the defendant.

The next question relates to the swearing of the verifying affidavit. It is the defendant's contention that the Notary Public only verified the signature of the deponent. Therefore, the defendant submits that the verifying affidavit was not sworn at all. In effect, there is no verifying affidavit, asserts the defendant.

Pursuant to the provisions of Section 88 of the Evidence Act;

"When a document is produced before any court, purporting to be a document which, by the law in force for the time being in England, would be admissible in proof of any particular (thing) in any Court of Justice in England, without proof of the seal or stamp or signature authenticating it, or of the judicial or official character claimed by the person whom it purports to be signed –

(a) a court shall presume that such seal, stamp or signature is genuine, and that the person signing it held, at the time when he signed it, the judicial or official character which he claims in such document; and

(b) the document shall be admissible for the same purpose for which it would be admissible in England."

For that reason, the defendant submitted that in the absence of authentication, the verifying affidavit herein, which was allegedly sworn in El Salvador, was not admissible in evidence. I note from the record that on 17th January 2006, the Hon. Azangalala J. gave a ruling on a preliminary objection which had been raised by the defendant. The said preliminary objection was in relation to an affidavit sworn by Yaron Degani on 6th July 2005. That affidavit was also sworn in El Salvador.

I have compared that affidavit and the verifying affidavit, and found that they were sworn before the same "Notario", who goes by the name of Ernesto Villalabos Ayala.

Inasmuch as my learned brother, the Hon. Azangalala J., already made a ruling on exactly the same point, although on a different affidavit, I hold that it was not open to the defendant to re-agitate the same issue. If the defendant was dissatisfied with the ruling on that issue, it ought to have preferred an appeal.

For that reason, I decline to entertain the defendant's submissions in that regard.

But, as the plaintiff's claims are for much more than the liquidated claim of USD 523,787 together with interest thereon at 11%, the suit goes beyond the scope of Order 35 rule 1(a) of the Civil Procedure Rules.

Indeed, one of the claims is for repossession, in respect to which the Hon. Kasango J. has already made an interlocutory decision. In other words, insofar as the said learned judge did find that title to the aircraft had already passed to the defendant, there arises a triable issue as to whether or not this court could still grant the prayers for the repossession of the same.

In my considered opinion justice in this case can only be done if, whilst the other issues proceed to trial, the defendant is nonetheless compelled to pay into a joint account, to be held by the advocates for the plaintiff jointly with the advocates for the defendant, the sum of USD 523,787. Accordingly, the defendant is granted conditional leave to defend the suit.

By so doing, whereas I did find one triable issue, I am fully conscious of the possibility that I may have laid myself open to some criticism. I therefore find it necessary to explain that, a close scrutiny of the earlier part of this ruling should make it abundantly clear that in my considered view, there was no defence to the claims for the balance of the purchase price. Therefore, I found no justifiable reason to enable the defendant to continue enjoying the possession and usage of the aircraft, for which it concedes having not paid the seller thereof.

Therefore, the triable issue was only in relation to other claims, to which the defendant shall have unconditional leave to defend.

The plaintiff has thus succeeded partially, as has the defendant. Therefore, I do order that each party will bear its own costs, on the application dated 26th July 2005.

Dated and Delivered at Nairobi this 23rd day of January 2007.

FRED A. OCHIENG

JUDGE