



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

Civil Case 73 of 2007

JETLINK EXPRESS LIMITED.....PLAINTIFF

VERSUS

EAST AFRICAN SAFARI AIR EXPRESS LIMITED.DEFENDANT

RULING

This is an application by the plaintiff, Jetlink Express Limited (hereinafter called “Jetlink”) for one principal order that East African Safari Air Express Limited the defendant (hereinafter called “EASA”) be restrained by injunction from instituting, filing, lodging, advertising or otherwise prosecuting any winding up petition or cause against Jetlink in relation to the disputed business debt of USD 902143 forming the basis of EASA’s Winding Up Notice dated and served upon Jetlink on 31.1.2007 or any other sum based on the parties’ business relationship until the hearing and determination of this case. The application is expressed to be made under Order XXXIX Rule 2 of the Civil Procedure Rules Sections 3A, 63 (c) and (e) of the Civil Procedure Act and all other enabling provisions of the Law.

The application is made on the following main grounds:

- (a) That the plaintiff claims against the defendant USD 4,033,701.70 while the defendant claims against the plaintiff USD 902,143 all pursuant and under the same Bilateral Interline Traffic Agreement (hereinafter called “**BITA**”) dated 15.11.2005 and business relationship between the two parties.
- (b) That the defendant’s claim against the plaintiff is disputed and denied bona fide by the plaintiff and no account in support thereof has been supplied by the defendant.
- (c) That the defendant’s winding up Notice is issued and served for the collateral purpose of coercing the plaintiff to settle a bona fide disputed debt when in fact the defendant owes the plaintiff more than is claimed by it, and the plaintiff is not insolvent.
- (d) That the defendant’s claim is fraudulent and malicious.
- (e) That the defendant has threatened to petition for winding up of the plaintiff which if filed and advertised in accordance with the Companies’ Winding Up Rules will have a devastating effect on the plaintiff’s business which will be damaged beyond repair and compensation in damages would not be a sufficient remedy.

The plaintiff has filed a supporting affidavit by one Captain Elkana Mugalavai Aluvale its Managing Director. The court allowed the plaintiff to file one further affidavit which was sworn on 5.4.2007 by the

same Managing Director. The affidavits elaborate the plaintiff's basis for the application.

The application is opposed and there are four replying affidavits of one Edward Makori an accountant, one George Kivindy the defendant's General Manager one Kieran Day an accountant and Director of Business Advisory Group Limited and one Adan Ogden the defendant's Managing Director. All the affidavits substantiate the defendant's opposition to the application.

The application was argued before me at length on 7.6.2007 and 8.7.2007 by Mr. Lubulellah Learned counsel for the plaintiff and Mr. Kimani Learned counsel for the defendant. That was despite the fact that both counsels had filed written submissions with the Leave of the Court. Counsels have cited several authorities all of which I have considered. I will not refer to all of them as in many of them the points of Law considered and enunciated therein are repeated and in others are not relevant to the issues at hand.

I will consider the application in the light of the applicable legal principles set in the case of **Giella – vs – Cassman Brown & Company Limited [1973] EA 358**. But first the background of the litigation. Initially Jetlink and EASA operated together from the same building. They were more than twin sisters. Indeed, they operated as Siamese twins sharing staff and services. Their operations do not seem to have been reduced to a written agreement. However in due course the twins started rejecting each other and by 20.1.2007, their relationship was at rock bottom. They could not do business together and they agreed to part ways. A settlement agreement was executed on 20.1.2007 under which the operations of Jetlink and EASA were delinked. Both parties exhibited the Settlement Agreement. At Clause 2.8 of the said Agreement the parties agreed as follows:- **“Continuing Liabilities**

“2.8. For the avoidance of doubt, nothing in this Agreement shall prejudice or affect in any way whatsoever the rights and obligations of any Party in respect of the “Continuing Liabilities.”

And continuing liabilities are defined as follows:-

- (a) any inter-company debt due from Jetlink to Express or vice versa as at the date of this Agreement;
- (b) any inter-company debt due from United to Express or vice versa as exists at the date of this Agreement
- (c) each parties respective entitlements to BSP payments and
- (d) any future liabilities which may be incurred between Express and Jetlink in the course of business whether under the Short-Term Agreement, the continuing Agreements or otherwise.

On the basis that Jetlink owed EASA USD 902,143 as a continuing liability, EASA through its advocates issued a Winding up Notice dated 31.1.2007. It is that notice that prompted the filing of this suit and application. In my view, this application stands or falls on the determination as to whether or not EASA was entitled to serve that Winding Up Notice. The circumstances under which such a notice may be served are now well settled. They are that there must be a debt due to EASA by Jetlink. That debt must not be disputed on bona fide grounds. Jetlink must have refused to pay the same. In other words, EASA had to show that it is a creditor within the meaning of the Law to entitle it to serve the Winding Up Notice. The foundation of EASA's Notice is claimed to be in the following documents: The letter written by George Kivindy and T. V. Chellarao dated 15.1.2007 and addressed to Captain Adam C. Ogden EASA's Managing Director. That letter is as follows:-

“We refer to the review of our accounts and write to confirm we agree the amount owned by Jetlink Express Limited to East African Safari Air Express Limited as at 31st December, 2006 is US Dollars \$1,,041,372 (US Dollars One million forty one thousand three hundred and seventy two only.”

In view of the heading of the letter which refers to outstanding payment due to EASA as at 31.12.2006, I am persuaded prima facie that the word **“owned”** in the letter is a typographical error and should have

been “**owed.**” Being of that persuasion that letter is a clear admission of a debt of USD 1,041,372.

The second set of documents relied upon by the EASA is referred to as the plaintiff’s management accounts which reflect Jetlink’s indebtedness to EASA. EASA further contends that the plaintiff’s Managing Director on several occasions acknowledged the existence of the said debt to EASA’s staff. Indeed George Kivindyo depones to that fact in his affidavit sworn on 12.3.2007.

Notwithstanding what appears a water light basis for serving a Winding Up Notice, the following facts have also emerged. Before the settlement Agreement of 20.1.2007, Jetlink relied upon EASA for support in its operations and its accounting functions were handled by one Thoto Venkata Chellarao who also handled EASA’s accounts. EASA contends that Chellarao Co-signed the letter of 15.1.2007 in which the said debt was acknowledged. However, certain aspects of this issue have caused me anxiety. The said Chellarao has not given his side of the matter by way of affidavit evidence. Secondly it is surprising that such an acknowledged debt could escape the attention of EASA at the time the settlement Agreement was executed on 20.1.2007. Although it fits the description of a continuing liability due from Jetlink to EASA and was therefore provided for in Clause 2.6 of the settlement Agreement one would have expected such a definite liability to be specifically catered for especially as smaller debts were specifically provided for in Clause 2.4 of the settlement Agreement under “**obligations of Jetlink and United**” especially as the officers acknowledging the debt would hence not render their services to Jetlink. In **Affordable Homes Africa Ltd – vs – Henderson & 2 others [2004] 2 KLR**, Njagi J held inter alia that a company can only take decisions through the agency of its organs which are primarily the board of directors or the general meeting of its shareholders. According to Jetlink a debt of the magnitude involved in this case could only be acknowledged after a resolution of the company which has not been exhibited. Jetlink further contends that in the face of its challenge against the acknowledgment of the debt particulars of the claim should have been furnished. These contentions may or may not be true but in my view are not frivolous contentions in view of the previous intertwined relationship between Jetlink and EASA – evidenced by the fact that the accounting functions of both companies were operated by the same staff who now exclusively are answerable to EASA. Besides Jetlink now discredits those accounts. As to whether it will eventually discharge, that burden can only be resolved in a trial. It is also illustrative that the Winding Up Notice was served a mere 11 days after execution of the Settlement Agreement. One would have expected that Siamese twins recently separated would resolve their disputes in a more cordial manner because a Winding up Notice has obvious far reaching consequences and if a petition were to be published it is doubtful that the weaker twin would survive the inevitable run against it.

The claim for USD 4,033,701.70 by Jetlink illustrates how far each of the parties to this litigation is prepared to go at each other’s throat. Obviously there is now no love lost between Jetlink and EASA. Whether or not Jetlink will succeed to establish its claim cannot be resolved at this stage.

In all the above premises, I am not persuaded prima facie that EASA’s Winding Up Notice was served with a genuine purpose of presenting a legitimate petition but was in my view intended to achieve a collateral purpose. That would eventually be an abuse of the process of the court and Jetlink was entitled to challenge the Winding Up Notice in its Chamber Summons. In other words, I am satisfied on a prima facie basis that the debt claimed by EASA is disputed bona fide by Jetlink. A prima facie case with a probability of success has therefore been established. On the 2nd condition for the grant of an interim injunction, I am persuaded that the plaintiff will suffer irreparable injury which cannot be compensated in damages. If the defendant were to proceed with its Winding Up process the plaintiff would be unable to survive having recently lost its senior twin. Even the balance of convenience tilts in favour of granting the injunction. The defendant has supported the plaintiff all along. It can afford to be out of pocket for sometime. The same may not be said of the plaintiff.

I accordingly order that an interlocutory injunction should issue restraining the defendant, its directors, agents and others claiming through it from instituting filing lodging commencing advertising or otherwise prosecuting any winding up Petition or cause against the plaintiff in relation to the disputed debt of USD 902,143 forming the basis of the defendant’s Winding Up Notice dated and served upon the plaintiff on 31.1.2007 or any other sum based on the plaintiff’s business relationship with the defendant until the hearing and final determination of this case.

The plaintiff should file a written and sealed undertaking as to damages within the next 7 days. The costs of this application shall be in the cause.

Orders accordingly.

Before penning off, I must express my gratitude to both counsel for their industry. They cited several authorities all of which I have considered but those authorities applied to different circumstances. This case has presented a unique situation and none of the cases cited was relevant factually.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF JULY 2007.

F. AZANGALALA

JUDGE

Read in the presence of:

Lubulellah for the plaintiff and Kimani for the defendant.

F. AZANGALALA

JUDGE

10/7/07