



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 16 of 2006

MOSES WACHIRA.....PLAINTIFF

VERSUS

NIELS BRUEL.....1ST DEFENDANT

HELMUTH RAME.....2ND DEFENDANT

AIR TRAFFIC LIMITED.....3RD DEFENDANT

R U L I N G

The Plaintiff’s application by chamber summons dated 7th February, 2006 was on 8th February, 2006 certified urgent and fixed for hearing *inter partes* on 28th February, 2006 in respect to prayers (c), (d), (e), (f) and (h) thereof. The court also granted, *ex parte*, an interim injunction in terms of prayer (d) of the application, the same to remain in place until 28th February, 2006, and subject to the Plaintiff filing an appropriate undertaking as to damages by 1.00p.m on 13th February, 2006. The order sought in prayer (d) was as follows:-

“(d) *In the alternative to (prayer) (c) the Defendants, their servants and/or agents be restrained by way of injunction from removing from the jurisdiction of this court, selling, giving in exchange, encumbering, charging, giving as security, trading in, wasting, parting with possession, or in any other way alienating, limiting or prejudicing their title and possession of aircrafts registration numbers BEEHCRAFT KING AIR 200 Registration No. 5Y– BMA, BEEHCRAFT KING AIR 200 Registration No. 5Y – EKO, KING AIR C90 Registration No. 5Y – NBB and KING AIR 200 BB 211 Registration No. 5Y – BMC.*”

When the application came up for hearing on 28th February, 2006, the 3rd Defendant, who was then an Interested Party, had on 24th February, 2006 filed an application by notice of motion of the same date seeking, *inter alia*, leave to be enjoined in the suit, and also an order to lift and/or set aside the temporary order issued on 8th February, 2006. In the alternative it sought an order to vary or review the said temporary order of 8th February, 2006 to the extent that the 3rd Defendant may, pending the hearing and determination of the application and the suit, be allowed to remove from the jurisdiction of the court the following two aircrafts for the purposes of its air-freighting operations:-

1. Beechcraft King Air 200, BB–155, Registration No. 5Y- BMA.

2. Beechcraft King Air 200, BL-2, Registration No. 5Y – EKO.

It would appear that these two aircrafts are the same as the Beechcraft King Air 200, Registration No. 5Y - BMA and Beechcraft King Air 200, Registration No. 5Y – EKO, that appear in the Plaintiff's application dated 7th February, 2006, and hence in the *ex parte* order granted on 8th February, 2006.

Following arguments by the learned counsels appearing and the ruling I made on 28th February, 2006, I heard this application of the then Interested Party (now 3rd Defendant) on 3rd March, 2006. The Plaintiff's application dated 7th February, 2006 was in the meantime stood over generally awaiting disposal of the Interested Party's application. The Interested Party was by consent enjoined in the suit as the 3rd Defendant. The 3rd Defendant then presented the rest of the application which comprises prayers 3, 4, 5, 6 and 7. As already pointed out, prayer 3 seeks an order to lift and/or set aside the *ex parte* temporary injunction granted on 8th February, 2006. Also as already pointed out prayer 4 seeks the alternative order to vary or review the *ex parte* temporary injunction so as to permit the 3rd Defendant to remove from the jurisdiction of the court two of the aircraft covered in the order for purposes of its air-freighting operations. Prayer 5 seeks such further or other orders as may be necessary to enable the 3rd Defendant to continue operating the said two aircraft pending the further orders of the court. In prayer 6 is sought an order for the Plaintiff to furnish security for the loss incurred and/or likely to be incurred by the 3rd Defendant as a consequence of the *ex parte* temporary injunction. Prayer 7 is for costs.

At the hearing learned counsel for the 3rd Defendant urged only the alternative prayer for variation or review of the *ex parte* temporary injunction. I did not understand her to mean that she had abandoned the other prayers. The *ex parte* temporary injunction affects the 3rd Defendant only in so far as the order prohibits the removal of the two aircraft named in its application from the jurisdiction of the court. This is because the 3rd Defendant is the hirer and not the owner of the two aircraft. This fact is common ground. For that reason the 3rd Defendant cannot seek an order to lift or set aside the entire *ex parte* temporary injunction granted on 8th February, 2006. The bulk of that injunction is against the 1st and 2nd Defendants. I would therefore refuse prayer no. 3 of the application. Regarding prayer no. 6, I would say as follows. Once the Plaintiff's application by chamber summons dated 7th February, 2006 is heard *inter partes*, and if it is allowed, the court will no doubt impose a condition or conditions to cater for any loss or damage that the Defendants may have suffered on account of any injunction granted to the Plaintiff, should his suit ultimately fail. In the meantime, the undertaking for damages dated 13th February, 2006 executed by the Plaintiff's advocates and filed in court on the same day, should serve that purpose. I would thus refuse prayer no. 6. Regarding prayer no. 5, the court has the inherent jurisdiction always to make such orders as may be in the interests of justice.

That leaves only the alternative prayer for an order to vary or review the *ex parte* temporary injunction. One thing I must state at the outset. The Plaintiff knew when he came to court that the 3rd Defendant was the hirer of the two aircraft in question. He was thus alive, or ought to have been alive, to the interest of the 3rd Defendant in the two aircraft. He also ought to have known that the *ex parte* injunction sought and granted on 8th February, 2006 would adversely affect the 3rd Defendant. But all that is now water under bridge as the 3rd Defendant is before the court. One thing is clear: the interests of the 3rd Defendant must be brought into the equation of the *ex parte* temporary injunction granted on 8th February, 2006.

I have considered the submissions of the learned counsels appearing, including the many cases that they cited. I have also read the affidavits sworn in support of and in opposition to the application. Indeed I have perused the entire record of the case. Most of the issues they submitted upon must await the hearing of the Plaintiff's application dated 7th February, 2006. To decide those issues now would be to pre-judge issues that must inevitably arise and feature prominently in that application. Indeed some of those issues must await trial of the action itself. What then is the duty of the court at this stage, in this application? It is simply to balance the interests of the Plaintiff and the interests of the 3rd Defendant in order to see if the

ex parte temporary injunction granted on 8th February, 2006 will continue to serve the ends of justice in the meantime, ***pending hearing and disposal of the Plaintiff's application dated 7th February, 2006.*** I am satisfied, ***prima facie***, that the 3rd Defendant hired the two aircraft to do business. I am also satisfied, ***prima facie***, on the material placed before the court, that the 3rd Defendant is currently under contractual obligation to a third party that necessitates flying the two aircraft out of this court's jurisdiction. I am also satisfied, ***prima facie***, that the ***ex parte*** temporary injunction, in so far as it prohibits the flying out of jurisdiction of the two aircraft, exposes the 3rd Defendant to serious financial loss for non-user of the aircraft out of jurisdiction. Furthermore, the 3rd Defendant also faces the risk of other contractual liabilities to 3rd parties on the same account. But then, the Plaintiff has put before court a case which, ***prima facie***, is not without the possibility of success. He has already expended a large sum of money which he apprehends, not on unreasonable grounds, he could lose. The 1st Defendant is a foreigner and already out of jurisdiction of the court. The 2nd Defendant is also a foreigner. He is the managing director of the 3rd Defendant. It has been stated that the 3rd Defendant has a director who is a national of this country, though this is not quite certain as yet. In these circumstances the continued safeguarding of the interests of the Plaintiff is also necessary pending hearing and disposal of his application dated 7th February, 2006.

I am inclined, in the interests of justice, to sustain, pending hearing and disposal of the chamber summons dated 7th February, 2006, the temporary injunction granted on 8th February, 2006, but with some variation. That variation will be that the 3rd Defendant shall be permitted to fly the two aircraft out of jurisdiction of the court as required by the exigencies of its operations subject to the following conditions:-

- 1. Two directors of the 3rd Defendant, one of whom must be a Kenyan national, shall personally undertake in writing, and under pain of contempt of court, to produce the two aircraft at Nairobi for inspection by the Plaintiff or the court as and when required.**
- 2. Such undertaking shall be filed in court by 3.00 p.m. on 13th March, 2006.**
- 3. The 3rd Defendant shall file in court the routing and suggested operating schedule in respect of the two aircraft for each week in advance starting from 13th March, 2006.**

I shall also order that the Plaintiff's application by chamber summons dated 7th February, 2006 be heard and disposed of on priority basis.

The 3rd Defendant's application by notice of motion dated 24th February, 2006 is allowed in prayer no. 4 to the extent indicated above. The costs of the application shall abide the outcome of the chamber summons dated 7th February, 2006. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 9TH DAY OF MARCH, 2006.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 10TH DAY OF MARCH, 2006.