REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 137 of 2006

ASTRAL AVIATION LIMITED……...…………………PLAINTIFF

VERSUS

ROLKAN INVESTMENTS LIMITED……......................................…………..DEFENDANT

R U L I N G

On 24th March 2006, the Plaintiff instituted these proceedings by way of a Plaint, which is dated 23rd March 2006. Simultaneously with the Plaint, the Plaintiff filed a Chamber Summons, under a certificate or urgency. In the said application, the plaintiff sought the

Following three substantive orders:

"3. THAT leave be granted to the plaintiff to serve the summons herein and all other court documents in the British Virgin Islands where the Defendant is domiciled.

4. THAT the Defendant by itself, its agent and or servant be restrained from taking possession of and/or denying the plaintiff the peaceable enjoyment of the aircraft registration EK 72902 now leased to the plaintiff.

5. THAT in the alternative the Defendant by itself, its agent and/or servants be restrained from removing aircraft registration No. EK 72902 now grounded at the Jomo Kenyatta International Airport from the jurisdiction of this Honourable Court pending the intended arbitration proceedings."

When the application first came up for hearing on 24th March 2006, the Hon. Azangalala J. certified it as urgent, but declined to issue any orders exparte, in the first instance. Eventually, the application was canvassed inter partes, on 28th April 2006.

When prosecuting the application, the plaintiff notified the

court that it was only pursuing the prayers numbered (4) and (5) as cited above. They explained that there was no need for them to obtain leave to effect service of summons outside the jurisdiction of this court, as the defendant had already appointed an advocate, who had filed a response to the application.

It is not disputed that the plaintiff is a licensed air operator. It is also common ground that the defendant was the owner of the aircraft registration number EK 72902.

The plaintiff's case is that the defendant had leased to it, the said aircraft, by way of a lease agreement dated 1st January 2005. The said agreement is said to have been signed by both parties herein. And, the lease is said to have been valid for twelve months, upto 31st December 2005.

The plaintiff says that prior to the termination of the lease, it required the extension thereof. In response to the plaintiff's wish to renew or extend the lease, the defendant is said to have consented, and then proceeded to execute a new lease dated 21st December

2005. That new lease was said, by the plaintiff, to have been for the period between 1st January 2006 and 31st December 2006.

It was pointed out that the signatories to the "**new lease**" were the same as the ones who executed the first lease dated 1st January 2005.

The court was told, by the plaintiff, that in the business of the leasing of foreign aircraft, the approval of the Kenya Civil Aviation Authority is required. And, in that regard the said Authority is said to have approved the new lease dated 21st December 2005. A copy of the letter of authorisation from the Kenya Civil Aviation Authority is annexed to the affidavit in support of this application, and it is dated 10th January 2006.

Amongst the conditions embodied in the authorisation issued by the Kenya Civil Aviation Authority (hereinafter cited as "**KCAA**") were that the lease would be for one year, and that during that period the aircraft would be for the sole use of the plaintiff herein. KCAA also required that it be notified as soon as either party terminated the lease.

Pursuant to the lease dated 1st January 2005, the plaintiff organised for special passes to be issued by the Immigration

Department, to three aviation crew, namely Captain Sergey Poluyanov, Captain Vladimir Sadovnichiy and Captain Velery Morozov.

The plaintiff's complaint is that whereas the lease agreement provided that it could only be terminated by a four (4) weeks notice, the defendant had purported to terminate the relationship without giving any notice whatsoever. The defendant is said to have written to the plaintiff on 7th March 2006, requiring the latter to remove, forthwith, the aircraft "**AN72 – 100 EK 72902**" from their Air Operator's Certificate.

According to the plaintiff the letter from the defendant did not constitute a lawful termination of the lease. Indeed, the plaintiff went further to submit that the defendant's letter dated 7th March 2006 did not terminate the lease dated 21st December 2005, as it only required the plaintiff to remove the aircraft which is the subject matter of this suit, from its Air Operator's Certificate.

It is the plaintiff's submission that as an Air Operator's Certificate merely specified the type of aircraft which the operator was authorised to handle, an aircraft could not be removed from the said Certificate (hereinafter cited as "**AOC")**

Meanwhile, as the plane in issue was being operated by crew belonging to the defendant, the said crew had declined to take instructions from the plaintiff.

According to the plaintiff, the aviation crew had parked the plane at the Jomo Kenyatta International Airport on 7th March 2006, and then disappeared.

For all the foregoing reasons, the plaintiff believes that it has made out a case to warrant the grant of the interlocutory injunctive reliefs sought. In particular, the plaintiff emphasized that the defendant should be restrained from taking possession of the aircraft, or from denying the plaintiff the right to enjoy

the use of the plane. The plaintiff also wishes to have the defendant restrained from removing the plane from the Kenyan airspace until the proposed arbitration was concluded.

The plaintiff cited the case of **MACHAKOS CENTRAL SQUARE FILLING STATION V CALTEX OIL (KENYA) LTD, (MACHAKOS) HCCC No. 140 of 1989** (unreported), to back its application. In that case, the Hon. Torgbor J. granted an injunction to restrain the defendant from committing further breaches of the

Operator's Agreement pending the settlement of the dispute, through arbitration, as provided for in the Agreement. In the meantime, the court directed that the service station be closed altogether, until the dispute was resolved through arbitration.

When responding to the application, the defendant first pointed out that the plaintiff could not be granted both prayer (4) and prayer (5), in any event. The reason for so saying was that the plaintiff had sought the two prayers, in the alternative.

In that regard, it is quite clear that prayer (5) was sought in the alternative to prayer (4). Therefore, I agree with the defendant, that if the court was minded to grant the prayers sought by the plaintiff, it could not grant both cumulatively. At best, the court could only grant to the plaintiff one or the other of the two prayers, in accordance with the express wording of the same.

The defendant then made the point that the original lease dated, 1st January 2005, was between the plaintiff and a company associated with the defendant. It was said that the defendant was not party to that lease agreement, and that the defendant was only operating through a proxy.

Insofar as the Aircraft Lease Agreement dated 21st December 2005 is on the face of it, between the Defendant as lessor, on the one hand, and the plaintiff as lessee on the other hand, it appears that the defendant was a party to it.

In any event, whether or not the said lease dated 1st January 2005 was valid or not, it lapsed on 31st December 2005. Therefore, the most important question is whether or not there is a valid Lease Agreement dated 21st December 2005, between the parties herein.

The plaintiff says that the said lease was executed by Captain Sergey Poluyanov on behalf of the defendant. Indeed, the plaintiff insists that the said Captain Sergey Poluyanov also signed the first lease agreement dated 1st January 2005. But, Captain Sergey Poluyanov has sworn the replying affidavit, denying signing any of the two alleged leases.

In an endeavour to prove that he was not a signatory to the lease agreements, Captain Poluyanov exhibited his passport, which bears a signature that is very obviously different from the signatures on the two lease agreements.

On the basis of the evidence now available to me, I cannot make any finding of fact, as to whether or not the lease agreements were valid. Of course, the signature of Captain Poluyanov which is on his passport looks dissimilar to the signatures on the lease agreements. To that extent, as the plaintiff has said that it was Captain Poluyanov who signed the leases, on behalf of the defendant, it is my considered view that the plaintiff will have to adduce further evidence, with a view to proving the validity of the leases.

At the same time, the defendant would need to explain the apparent similarity of the signature on the lease agreements, and on the maintenance services – support agreement between the defendant and AMC Aircraft Maintenance Centre F.Z.C.

In the meantime, I cannot determine the authenticity or otherwise of the lease agreements, as I believe that there might be need for a handwriting expert to testify in that regard, before a court can make any

findings on that issue.

For now, it is common ground that the defendant's plane, registration number EK 72906 was used by the plaintiff between July 2005 and December 2005. Captain Poluyanov says so himself.

Therefore, there is no doubt at all that the parties herein have had a relationship which enabled the plaintiff to use the defendant's plane. Indeed, Captain Poluyanov expressly states, at paragraph 15 of his replying affidavit, that the defendant flew the aircraft back to Nairobi's Jomo Kenyatta International Airport, on 7th March 2006, "**with the approval of the plaintiff's manager – Michael Mutahi**."

If, as the defendant asserts, there was no lease agreement between it and the plaintiff, one cannot help but wonder why the defendant needed the approval of the plaintiff's manager. Mr. Michael Mutahi, to fly the plane to Nairobi. To my mind, that can only suggest that the defendant recognised the need to obtain approval from the plaintiff. Such a recognition would appear to lend credence to the plaintiff's version of events, especially as appertains to the second condition set out by KCAA, in its letter of 10th January 2006, which stipulated that the aircraft was for the sole use of the plaintiff during the lease period.

On the other hand, the defendant asserts that KCAA approved the alleged lease agreement only because it had been misled to believe that there was such an agreement, whilst none existed.

As one party asserts that there is a valid lease agreement, whilst the other party denies such an agreement, the vital question which must first be addressed is whether or not the provisions of clause 13 can apply to the parties. That clause states that any dispute arising out of the agreement shall be referred to arbitration in Kenya.

To my mind the parties herein could not be forced to go to arbitration, until and unless the court were to first determine that the lease agreement was valid. And the issue as to the validity of the lease agreement is one which I believe is pegged to the question whether the signature for the lessor was forged or not. Asking an arbitrator to determine that issue is like putting the cart before the horse. He would have been clothed with authority to adjudicate on a matter, before the document from which his authority was to be derived had been ascertained to be valid.

It appears to be common ground that the letter from the defendant, dated 7th March 2006 did not constitute a notice of termination of the lease agreement dated 21st December 2005. The defendant says that that was because the agreement of 21st

December 2005 was not valid. So, why did the defendant want the plaintiff to "**remove our aircraft from your AOC with immediate effect and to inform the Kenya Civil Aviation Authority of the same.**

The defendant explained that for as long as KCAA had issued a licence for AN – 72 Registration Number EK 72902, to the plaintiff, the defendant could not fly the plane.

The said explanation appears plausible. But then again, it appears to demonstrate the defendant's appreciation of the conditions imposed by KCAA in its AOC to the plaintiff. Now, given the fact that the defendant needed the plaintiff's approval to fly the plane from Lokichogio to Nairobi, because KCAA had issued to the plaintiff an AOC in relation to the plane in issue, it implies that the defendant acknowledged, by conduct, that it was still bound to the plaintiff. The binding ties may have been in the nature of the lease agreement, which is now in dispute, or alternatively, it may have been because of the AOC issued by KCAA, to the plaintiff.

As the AOC is pegged to a lease agreement, the Civil Aviation Authority must have deemed the lease agreement dated 21st December 2005, as valid. Was it misled to so believe, as is asserted by the defendant? If that were the position, one would have expected the defendant to have protested to KCAA and the plaintiff, rather than to presume that the defendant needed authority of the plaintiff to fly the plane

to Nairobi or elsewhere.

From all the foregoing, it appears that the plaintiff has made out a prima facie case as to the existence of a lease agreement with the defendant.

The defendant submitted that if I were to hold that there might be a valid agreement, I should find that the plaintiff was in fundamental breach thereof, thus entitling the defendant to terminate it without notice.

It was then said that the plaintiff had failed to pay money for the lease of the aircraft.

I note that although the defendant had raised the issue of non-payment, the plaintiff did not respond thereto in its further affidavit.

Therefore, on the face of it, the plaintiff is deemed to have failed to remit payments for the lease of the aircraft. In effect, that may have entitled the defendant to terminate the lease agreement without notice. However, both parties are in agreement that the letter from the defendant, dated 7th March 2006, did not constitute termination.

If anything, the defendant's conduct of flying the plane on the authority of the plaintiff appears consistent with an acknowledgement that the lease was still in place. So, should this court issue the orders sought by the plaintiff?

The conditions for the grant of an interlocutory injunction are set out in the celebrated case of **GIELA V. CASSMAN BROWN & CO. LTD [1973] E.A 360**. The applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable loss or injury, which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.

In this case I have already held that the plaintiff has demonstrated, or a prima face basis, the existence of a valid lease agreement with the defendant. That would imply that the arbitration clause was available to the parties herein.

In those circumstances, should an injunction issue, as prayed for by the plaintiff?

In answering that question I must now give it due consideration in the face of the second ingredient or condition for the award of interlocutory injunctions. The plaintiff has said that unless the court granted an injunction, it would have to continue shouldering the parking charges of the aircraft. Furthermore, it would suffer great loss, damages and a besmirch of reputation, said the plaintiff. The reason why the plaintiff says it stands to suffer a great loss and damages is because it is unable to fulfil its obligations to its client who had booked space for freighting of cargo, using the aircraft in issue.

Regrettably, the plaintiff has not exhibited any contract with its said client. Therefore, the court is not able to assess the alleged potential loss.

More importantly, it is noted that the plaintiff readily admits that the lease agreement could be lawfully terminated by a four week's notice. That being the case, I hold the considered view that at all material times, the plaintiff ought to have conducted its affairs in such a manner that if a lawful notice was given, the plaintiff should have been ready to continue carrying on services to its clients without interruption. In other words, the damages which the defendant may be liable to pay, if the court were to finally hold that the said party was in breach of the lease agreement, would be pegged to the duration of four weeks, which would have otherwise made valid, a termination notice.

Accordingly, I hold the considered view that the plaintiff is not likely to suffer irreparable injury which cannot be compensated by an award of damages.

But assuming that I am wrong in that respect, and that the plaintiff might actually end up suffering irreparable injury, then I ought to determine the issue on a balance of convenience.

At present, the defendant says that it has not been paid the lease charges since January 2006. The plaintiff has not countered that contention. Also the special passes exhibited by the plaintiff, which were to enable the aviation crew to work in Kenya were only valid for three months, beginning 26th October 2005. In effect, the passes are no longer valid. Meanwhile, the aircraft is parked at the Jomo Kenyatta International Airport, whereat it is attracting parking charges. In the circumstances, an order to restrain the defendant from denying the plaintiff the peaceable enjoyment of the plane would be subject to other forces about which this court has no control. For instance, the parking charges would have to be paid, and the Immigration Department would have to issue special passes to some aviation crew to operate the plane. The court cannot be sure that the Immigration Department will be amendable to issuing such passes, and were the department to decline, the court would have acted in vain.

As regards, the alternative prayer, I find no good reason to restrain the defendant from removing the plane from the jurisdiction of this court. Had the plaintiff demonstrated to me that they have paid all dues that were payable to the defendant; and also had the plaintiff expressed a readiness to provide an appropriate security to the defendant in the event that the plaintiff's action ultimately failed, I might have considered granting the order. But as none of that has been done, I hold the view that the balance of convenience rests in favour of the defendant.

In the final analysis, the application dated 23rd March 2006 is without merit. It is therefore dismissed, with costs to the defendant.

Dated and Delivered at Nairobi this 18th day of May 2006.

FRED A. OCHIENG

JUDGE