



**REPUBLIC OF KENYA**

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

**Civil Case 40 of 2006**

**MARK COX (Suing for and on behalf of CYRIL J. FERRAIRA**

**by virtue of a Power of Attorney No. 42302/1).....PLAINTIFF**

**VERSUS**

**ROY DAMERALL NDISI .....1<sup>ST</sup> DEFENDANT**

**PROFILE INVESTMENTS LTD. ....2<sup>ND</sup> DEFENDANT**

**RULING**

The plaintiff did file an application for an injunction to restrain the defendants from removing some two aircraft from the jurisdiction of this court. By that same application the Plaintiff sought orders to restrain the defendants from wasting, damaging, alienating, selling, disposing and/or otherwise parting with the said two aircraft.

Having been served with the application, the defendants filed a replying affidavit, as well as a Notice of Preliminary Objection.

This ruling is in relation to the preliminary objection, which was worded in the manner following;

**"TAKE NOTICE that the Defendants shall at the hearing of the Plaintiff's Application dated 2<sup>nd</sup> February 2006 raise Preliminary Objections to the hearing of the said Application on the grounds that the said Application, and Supporting Affidavit and the Plaint filed in court are bad in law."**

When canvassing the objection, Mr. P. Simani, advocate for the defendants, first drew attention to the fact that both the Plaintiff, Mark Cox, as well as the person on whose behalf he had brought this suit, Cyril John Ferreira, were nationals of South Africa. Indeed, both of them were also resident in that country.

Mr. Ferreira had given to Mr. Cox, a Power of Attorney, which enabled Mr. Cox to bring the action.

Meanwhile, the 1<sup>st</sup> defendant is a Kenyan national, but he was resident in South Africa. And the 2<sup>nd</sup> Defendant was a limited liability company registered in Kenya.

As far as the defendants were concerned, the contract in issue was to be performed in South Africa. Also, the cause of action is said to have accrued in South Africa.

For those two reasons, the defendants submitted that the suit ought to have been filed in South Africa. In

so saying, the defendants pointed out that although the 2<sup>nd</sup> Defendant was a company registered in Kenya, it had never been a party to the transaction in issue. If anything, the 2<sup>nd</sup> Defendant believes that the only reason why it was sued was because it is the registered owner of the two aircraft in issue. For that reason, as the Plaintiff is said to readily concede that the aircraft belongs to the 2<sup>nd</sup> Defendant, it was the said defendant's contention that there would be no issue for determination between the Plaintiff and the 2<sup>nd</sup> Defendant.

The other ground for the Preliminary Objection was founded upon the facts that Mr. Cyril John Fereira was an adjudged bankrupt. For that reason, the defendants contend that Mr. Fereira lacked legal capacity to enter into agreements or even donate Powers of Attorney without the consent of the person who had been appointed as an administrator over his property.

In effect, the defendants submitted that the Power of Attorney was invalid, as it had been donated by a person who was bankrupt.

For those two reasons, the defendants asked the court to hold that both the application and the suit were bad in law.

In answer to the preliminary objection, Mr. Kouna, advocate for the plaintiff, submitted that this court had jurisdiction to hear and determine both the application as well as the suit.

In his view, the contract in issue was to have been performed in Kenya, and that therefore gave to this court the requisite jurisdiction to deal with issues arising from the said contract.

When faced with that contention, the defendants accused the plaintiff of an attempt to distort facts. They emphasized that nowhere in the two Agreements between the parties, was the name Kenya cited. In that regard, I verified from the Agreements dated 22.8.02 and 10.6.03, that the word Kenya was not cited at all. However, in my considered opinion, that alone is not conclusive about the place at which the contract was to be performed.

Similarly, the fact that the two Agreements were signed in South Africa, did not necessarily imply that the contracts were to be performed in that country.

In the circumstances, it cannot be stated with any degree of certainty that the contract was or was not to be performed in Kenya. And inasmuch as that issue of fact is not clear, it would have to be first resolved by the court, after the parties adduce move evidence thereon. For now, I cannot say whether or not the court would have jurisdiction to hear and determine the application, simply on the basis of the plaintiff's assertion that the contract was to have been performed in Kenya.

In the same vein, there is nothing before me from which I can conclusively state that the contract was to be performed or to be completed in South Africa. At least no such material was drawn to my attention.

But there is one common ground in all this, the 2<sup>nd</sup> defendant is a company registered in Kenya. It is also the registered owner of the two aircraft in issue. Therefore, by virtue of the provisions of Section 15 of the Civil Procedure Act, the plaintiff was entitled to file this suit in Kenya because it is within this country that the 2<sup>nd</sup> defendant voluntarily "resides" and also carries on business.

Even though the defendants hold the view that there are no issues in dispute as between the plaintiff and the 2<sup>nd</sup> defendant, that would not, by itself, take away the jurisdiction of the court. But in any event, when it is borne in mind that the plaintiff is seeking, inter alia, a declaration that he was a joint owner of the two aircraft which are currently registered in the 2<sup>nd</sup> defendant's name, I hold the considered view that that claim is directed at none other than the 2<sup>nd</sup> defendant.

For those reasons, the first limb of the preliminary objection fails.

Meanwhile, as regards the legal capacity of Mr. Cyril John Ferreira, there is no dispute about the fact that he has been declared bankrupt, by a court in South Africa.

Had the declaration of bankruptcy been made by a court of competent jurisdiction in Kenya, Mr. Ferreira would have been governed, first with the provisions of Section 9 of the Bankruptcy Act. In other words, all his property would be placed in the hands of the Official Receiver, who would have been constituted the receiver of all such property.

By virtue of the provisions of Section 24 (2) of the Bankruptcy Act, every debtor against whom a receiving order had been made would, inter alia," **execute such powers of attorney, conveyances,**

**deeds and instruments and generally do all**

**such acts and things in relation to his property**

**and the distribution of the proceeds amongst**

**his creditors as may be reasonably required by**

**the official receiver, special manager or trustee,**

**as may be prescribed, or as may be directed by**

**the court .....**"

To my mind, the operative phrase in all this is that the actions of the debtor shall be permissible only if the same were "reasonably required by the official receiver, special manager or trustee....."

Then after a debtor has been adjudged bankrupt, by virtue of Section 101 (1) of the Bankruptcy Act, he would be disqualified from being appointed as a justice of the peace, or from being elected to, or holding or exercising, the office of mayor or member of local authority council, school committee or road board.

However, it must be emphasized that the provisions of the Bankruptcy Act, (Cap 53) of the Laws of Kenya, only apply to matters within this country.

By virtue of the provisions of Section 151 of the Act, the Minister for the time being in charge of Justice and Legal Affairs, is authorised to make a declaration of reciprocating territories and courts, as between Kenya and any territory which had enacted provisions which have like effect as those of our own Act. If that is done, the provisions of part IX of the Bankruptcy Act would apply to all bankruptcy proceedings subsequently instituted in the declared territory, against a debtor having property in Kenya.

The defendants did concede that as between Kenya and South Africa, the Minister had not yet made any declaration of reciprocity. Furthermore, even if such a declaration were in force, the defendants would also need to show that Mr. Cyril John Ferreira had property in Kenya. As at the moment, I understand the defendants to be insisting that Mr. Ferreira did not own any part of the two aircraft which are the subject matter of the suit.

I am aware that the defendants have invited the court to recognize the orders of bankruptcy, which were made in South Africa. They say that this court should take judicial notice of the bankruptcy of Mr. Ferreira.

In the light of the provisions of Section 151 of the Bankruptcy Act, I hold the view that there is a procedure that would make it possible for the courts in Kenya to accept certain developments in other territories. Until and unless there was compliance with the said statutory provisions, it would be the responsibility of the party who wished to persuade the court, to provide such material as would satisfy the court.

In this case, the defendants have not yet satisfied me that the effect of the declaration and adjudication of bankruptcy in South Africa is the same as that in Kenya. It would therefore be wrong of me to assume that they were the same.

In the circumstances, I find that the defendants have failed to persuade me that the power of Attorney issued to Mr. Cox is invalid. Of course, I am not, on the other hand, saying that the said Power of Attorney is valid. All that I am saying at this stage, is that the issue of the validity of the Power of Attorney cannot be determined summarily, through the preliminary objection. The matter will thus remain alive for determination at a later stage, as and when the parties may have placed sufficient material before the court.

For now, the second limb of the preliminary objection also fails.

Accordingly, the Notice of Preliminary Objection dated 20<sup>th</sup> February 2006 is overruled. The plaintiff's application dated 2<sup>nd</sup> February 2006 will proceed to substantive hearing. The costs of the Preliminary Objection are awarded to the plaintiff, in any event.

Read and Delivered at Nairobi, this 30<sup>th</sup> day of October 2006.

**FRED A. OCHIENG**

**JUDGE**