



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL DIVISION –MILIMANI**

**Civil Case 150 of 2005**

**AERONAV LTD ..... PLAINTIFF**

**VERSUS**

**ROSSAIR KENYA LTD ..... DEFENDANT**

**RULING**

On 18th March 2005, Aeronav Limited, the Plaintiff instituted a suit against Rossair Kenya Limited, the Defendant for recovery of USD 46,661.40 together with costs and interest thereon. The claim arises from an aircraft lease agreement by which the Plaintiff leased its Aircraft to the Defendant which lease the Defendant terminated and at the time of institution of the suit was indebted to the Plaintiff in the sum claimed. It is pleaded that despite its acknowledgement of indebtedness to the Plaintiff and various promises to pay, the Defendant has failed, refused and/or neglected to settle its debt to the Plaintiff.

Simultaneously with the Plaint, the Plaintiff lodged an Application by way of Chamber Summons grounded on Order XXXVIII Rules 1,5 and 11, Order XXXIX Rules 1,2,3 and 9 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all enabling provisions of the Law. He sought orders inter alia that the Defendant be ordered to deposit security for USD 46,661.40 or its equivalent of Kshs 3,449,605 and that the Defendant be restrained from settling, disposing or in any other way getting rid of all its property in Kenya pending, hearing and determination of this suit.

The Application is supported by an Affidavit sworn by one Joseph Martin Ririani the Plaintiff's Managing Director. The Defendant has neither filed a Replying Affidavit nor Grounds of Opposition in opposition to the Application.

In the Plaintiff's supporting affidavit it is deponed that by an aircraft lease agreement dated 26.5.2004 between the Plaintiff and the Defendant, the Plaintiff leased its aircraft known as 5Y-GSV to the Defendant. On 6.11.2004 the Defendant terminated the contract and requested for a final reconciliation and invoice for payment. The Plaintiff complied and the Defendant made part payment leaving a sum of USD 46,661.40 unpaid and remained unpaid at the time of institution of the suit despite promises to pay.

It is further deponed that the Plaintiff on 13.3.2005 came to know that the Defendant was taking out one of its aircrafts to South Africa and that other aircraft would similarly be taken out of the country. On 16.3.2005 the Plaintiff through its Managing Director leant through a "Memo" that the Defendant was closing down and that it had financial difficulties. It is further deponed by the Plaintiff that the Defendant's parent company in South Africa, M/S Rossair Contracts (ppty) Ltd, has already closed shop due to liquidation. In the Plaintiff's view the Defendant is liquidating its properties and/or removing them out of the jurisdiction of this Court to defeat the claim by the Plaintiff.

When the Application was canvassed before me on 9th June 2005, Counsel for the Plaintiff maintained the position taken in the supporting affidavit. Counsel for the Defendant having filed nothing in opposition was content to point out that the annexures relied upon by the Plaintiff did not show that the Defendant had admitted the Plaintiff's claim or that the Defendant was in liquidation.

I understand the Law to be that before a Court can either order a Defendant to furnish security or attach his property before judgment as provided by Order XXXVIII Rule 5 of the Civil Procedure Rules, it must be satisfied that the Defendant "with intend to obstruct or delay the execution of any decree that may be passed against him:

***(a) is about to dispose of the whole or any part of his property, or***

***(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court."***

It is illustrative that on 5th April, 2005 the Defendant consented to the following order:

***"That the Defendant by itself, agents, employees or otherwise be and is hereby restrained from moving any of the following aircrafts from Wilson Airport..... pending the hearing and determination of this application or until further orders of this Court: 5YBOS – DHC-6, 5YRDS-DC3, ZSMFY-DC-3."***

That consent order was amended by a consent letter dated 26th May 2005 as follows:-

***"This order will apply to all listed planes whether at Wilson Airport or any other airport in Kenya and the order will operate to prevent all the listed planes from being flown out of the airports or outside Kenya pending the hearing of the Application dated 18th March 2005."***

The Defendant consented to the orders stated above and has to-date not filed any opposition, replying affidavit or Grounds of Opposition. In my view the behaviour of the Defendant both before the institution of these proceedings and after would cause apprehension to the Plaintiff. The Defendant's behaviour is more worrying in view of the subsequent proceedings by interested parties laying claim to the aircraft, the Defendant consented to not moving or removing from wherever they were in Kenya. The above circumstances incline me to believe that the Defendant intends to do what is feared by the Plaintiff. I am satisfied that the Defendant intends or is about to dispose of its property and may also remove its property from the local limits of this Court's jurisdiction with intend to obstruct or delay the execution of any decree that may be passed against it. The orders that commend themselves to me are as follows:-

**(a) The Defendant should within fourteen (14) days from the date hereof deposit security in court of the sum of USD 46,661.40 or its equivalent of Kshs 3,449,605/=.** Such security to be in form of cash, or banker's bond or Reputable Insurance Company's bond in the like amount. In default of compliance, the Defendant's property sufficient to satisfy the said sum be attached.

**(b) The Plaintiff's costs of this Application be borne by the Defendant.**

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JULY 2005.**

**F. AZANGALALA**

**JUDGE**

**Read in the presence of:-**