

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 260 OF 2004

A.D. AVIATION (AIR CHARTER)LTD :::::::::::::::::::::::::::::::PLAINTIFF

VERSUS

AVIATION ASSISTANCE A/S :::::::::::::::::::::::::::::::DEFENDANT

RULING

This application dated 19th May 2004 is seeking a temporary injunction to restrain the Respondent by itself, its servants or authorized agents from using, utilizing or flying the Air Crafts known as King Air 200 serial Number BB 211 and registered in Kenya as 5Y BMC and King Air 200 serial Number BB 155 and registered in Kenya as BY BMA pending the hearing of and determination of this suit. In the alternative the Plaintiff seeks a mandatory order of injunction to issue compelling the Defendant to deliver and/or handover the said Aircrafts and engines to the Plaintiff in an Airworthy condition together with all associated Logbooks, spare parts, appliances, and records and instruments systems components equipment, furnishings and accessories installed on or appurtenant to the said Aircraft pending the hearing and determination of this suit. The main grounds are that the Defendant owes the Plaintiff USD 689,287.42 and in settlement of this sum the Defendant proposed to sell to the Plaintiff the Aircraft King Air 200 Serial Number BB 211 registered in Kenya as 5Y BMC (hereinafter called the Aircraft) and that the Defendant is a lessee in respect of the said Aircraft and King Air 200 Serial Number BB 155 registered as 5Y BMA with an option to purchase the same.

The application is supported by an affidavit of one Ann Abercromby Dick the Plaintiff's Managing Director. The supporting affidavit gives details of the transactions between the Plaintiff and the Defendant. The application is opposed not by the Defendant but by 2 interested parties who filed replying affidavits.

When this application came before me for hearing inter-partes on 18th June 2004, Counsel for the Plaintiff informed me that since the filing of the application he had discovered that the Aircraft known as King Air 200 Serial Number BB 155 is registered in the name of Aviation Assistance (Kenya) International who are not parties to these proceedings. Proceedings in respect of this Aircraft were therefore struck out and the interim orders made in respect of this Aircraft were discharged. This application is therefore concerned with the Aircraft known as King Air 200 Serial Number BB 211 and registered in Kenya as 5Y BMC (hereinafter referred to as the remaining aircraft).

It is difficult to understand how these proceedings can be maintained when the Plaintiff admits that the remaining aircraft is not owned by the Defendant. At paragraph 7 of the supporting affidavit of Ann Abercromby Dick sworn on 19th May 2004 she avers that the remaining aircraft was leased to the Defendant by one Niels Birke Bruel and who apparently was aware of the negotiations between the Plaintiff and the Defendant in respect of the Aircraft.

The said Niels Birke Bruel is the 2nd Interested Party and through his Counsel Collins Namachanja has sworn a replying affidavit in opposition to the Plaintiff's Application. It is averred on behalf of the 2nd Interested Party that he is the beneficial and legal owner of the remaining aircraft. This is indeed common ground. Yet no orders are sought against the 2nd Interested Party as a Defendant for purposes of making a claim against him.

I have considered the application. I have no doubt in my mind that the Plaintiff was not entitled to the orders it obtained ex-parte. The remaining aircraft does not belong to the Defendant. It is irrelevant that

the Defendant and the Plaintiff may have a claim against the 2nd Interested Party. Currently no claim has been made against them. The Plaintiff has hopelessly failed to show a prima facie case with a probability of success. No orders of attachment can be made in respect of property that does not belong to the Defendant.

In the result the Plaintiff's application dated 19th May 2004 is dismissed in its entirety with costs to the Interested Parties.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JULY 2004.

F. AZANGALALA

AG. JUDGE

Read in the presence of: