



IN THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO. 360 OF 2004
INTERNATIONAL AIRCRAFT

GROUP S.A.....PLAINTIFF/APPLICANT

VERSUS

AIRWAY KENYA AVIATION LIMITED.....DEFENDANT

RULING

This application by way of Chamber Summons has been brought by the plaintiff under Order 39 Rule 1, (a), (b) Rule 2 and Order 38 Rule 5 of the Civil Procedure Rules and Section 3A and 63 (c) and (e) of the Civil Procedure Act.

The orders sought are as follows: -

- (a) That an order of injunction do issue restraining the defendant whether by itself, its servants or authorized agents from using, utilizing or flying the Aircraft known as “*De Havilland DHC – 7 – 102, Serial No. 032, Registration No. 70 ACZ* in Yemen and registered as 5 Y BPD in Kenya and/or from using or utilizing the engines and all appliances, instruments, equipment, furnishings and accessories installed on or appurtenant to the said Aircraft pending the hearing and determination of this suit;
- (b) That in the alternative, a mandatory order of injunction do issue compelling and/or hand over the said Aircraft and engines to the Plaintiff in an Airworthy condition together with all associated logbooks, spare parts, appliances, records and instruments systems, components, equipment furnishings and accessories installed on an appurtenant to the said Aircraft pending the hearing and determination of this suit;
- (c) That further and in the alternative, the defendant do give an undertaking that it shall desist from using, utilizing or flying the Aircraft known as *De Havilland DHC – 7 – 102, Serial No. 032, Registration No. 70 ACZ* in Yemen and registered as 5 Y BPD in Kenya and/or from using the engine and all appliance, instrument, equipment, furnishing and accessories installed on or appurtenant to the said aircraft pending the hearing and determination of this suit.

The said application is supported by the grounds contained therein.

The plaintiff seems to have made a mistake in the plaint in the name of the defendant, which ought to be Air Kenya Aviation Limited and not Aviation Air Kenya Limited. The defendant did not raise an issue in this and I do not intend to make it the subject of this ruling.

The parties have a contractual relationship where on 30th January 2001 the plaintiff offered for sale and the defendant agreed to buy the Aircraft known as *De Havilland DHC – 7 – 102, Serial No. 032,*

registration No ACZ in Yemen, for the price of \$850, 000 USD. The price was payable in the following manner: -

- (i) US \$ 200, 000 was payable as part payment towards the purchase price which sum was to be paid upon delivery of the Aircraft and the same was to be regarded as deposit;
- (ii) The balance of the purchase price US \$ 650, 000 was to be paid within 24 months installments together with interest accruing at 11% per annum calculated on monthly breaks;
- (iii) As security for payment of US \$ 650, 000 plus interest the defendant was to cause the Aircraft to be registered in Kenya in the joint names of plaintiff and defendant.

The parties accepted that the defendant paid the deposit of the purchase price and further payments leaving a balance outstanding of US \$ 446, 000. The plaintiff argued that under clause 6.3 of the agreement the title in the Aircraft had not passed to the defendant because the deposit had not been paid in accordance with the agreement, it was alleged that the defendant made payment towards the deposit on 13th December 2001, US \$ 100, 000 and 17th April 2001 US \$ 100, 000. Additionally the plaintiff counsel argued that the defendant's failure to pay the whole of the purchase price in accordance with agreement negated a good title.

My reading of clause 6.3 shows that is in conformity with defence counsel's submissions that a good title passed on delivery and acceptance of the Aircraft and on payment of the deposit payment of the deposit by the defendant. Both those two conditions were fulfilled and I therefore find that the defendant has a good title. The fact that the defendant failed to register the Aircraft in the joint names of the plaintiff and itself I believe is evidence of partial breach which can be compensated in damages, and does not go to the title of the Aircraft.

Indeed this finding, I believe, is fortified by the plaintiff's own authority, *Halsbury's Laws of England Vol. 4 1 page 648 paragraph 706* and apt quote is as follows; -

“.....Accordingly the property in the goods passes where the terms of the contract show a clear intention that it will pass, notwithstanding that there may be an express provision in the contract to the contrary”.

The plaintiff's counsel argued that the Plaintiff, in view of the defendant's failure to pay the entire purchase price, had a lien on the Aircraft and on that basis was entitled to an injunction.

In response to this argument the defence counsel argued that the agreement had clearly stated, clause 21.1, that the applicable law to this agreement was English Law.

Indeed, I accept that submission that it is provided in the agreement that the applicable law to the contract is the English Law.

Having accepted that submission, the Sale of Goods Act 1979 of England would be the applicable law and Section 41 provides.

“Subject to this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price”

It then follows that the plaintiff's lien over the Aircraft extinguished the moment delivery was effected to the defendant.

Plaintiff's counsel argued that the plaintiff had through its advocates by letter dated 22nd August 2003, given notice of termination as per clause 15 of the agreement. The defence disputed that argument on the basis that since the title had passed to the defendant it was not open to the plaintiff to terminate the agreement.

Clause 15.2 provides that the plaintiff could terminate on or prior to the delivery date. Now, both parties accept that the Aircraft was delivered and is presently in the possession of the defendant, indeed that is why this present action is in court. That being so, the plaintiff cannot terminate the agreement, in any case such termination would simply put to an end all the unperformed portions of the agreement; it cannot terminate the portions that have been performed.

The defence counsel argued that the plaintiff ought not to be granted prayers sought for mandatory interlocutory injunction because it had waited for a period of over 3 years to come to court and in any case they had not satisfied the conditions of the case of

AMERICAN CYANAMID CO. – V – ETHI CO LTD (1975) 1 ALL ER 504, in that the plaintiff had not shown a serious question that can be tried at the trial. To quote the holding of that case it states:

“.....ALL that was necessary was that the court should be satisfied that the claim was not frivolous or vexatious, i.e. that there was a serious question to be tried.”

Considering all the arguments before me I am of the view that the plaintiff has failed to satisfy that test for granting of an injunction and accordingly I will decline to grant the prayers sought.

I am however of the view that even if the plaintiff has not passed the test for mandatory injunction it would not be just to allow the defendant to have possession of the Aircraft without any restraint on selling or passing possession of the same to a Third party to the detriment of the Plaintiff.

I do therefore invoke section 63 (e) of the Civil Procedure Act to restrain the defendant from selling or dispossessing itself of the Aircraft to a third party, this will ensure that the ends of justice will not be defeated.

Accordingly the orders of this court are as follows: -

(a) The prayers sought in the chamber summons dated 5th July 2004 are hereby dismissed.

(b) That the defendant whether by itself, its servants and/or authorized agents are hereby ordered not to dispossess themselves or part possession with Aircraft known as “*De Haviland DHC – 7 – 102, Serial No. 032, Registration No 70. ACZ* in Yemen and registered as 5Y BPD in Kenya, in any manner whatsoever until the final determination of this suit.

(c) The costs of the application dated 5th July 2004 shall be in the cause.

Dated and delivered this 29th September 2004.

MARY KASANGO

JUDGE