



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 1297 OF 2001 (2)

VOLGA ATLANTIC AIRLINES

(PROPRIETARY) LIMITED PLAINTIFF (IN LIQUIDATION)

VERSUS

YURI SIDOROV DEFENDANT

SECOND RULING ON SECOND PRELIMINARY OBJECTION

The Defendant filed a Notice of Preliminary Objection which stated in part as follows:

“2. THAT the Plaintiff cannot avail itself to the procedure prescribed under Section 241 of the Companies Act, Cap. 483 and the suit filed herein is a nullity and leave granted to commence these proceedings were improperly instituted and illegally granted as the Plaintiff is not a “Company” or an existing company within the meaning of the Companies act, cap. 486 and this court has no jurisdiction to entertain the Plaintiff’s Affairs.

3. No judgment of the High Court of Namibia having been registered in the High Court to become judgment of this court there is no foundation for the proceedings now before the court. Consequently there is no suit within the meaning and definition in section 2 of the Civil Procedure Act Cap.21 (Also see Section 3(1)(b) Foreign Judgments (Reciprocal Enforcement) Act, Cap.43).

4. This court has no jurisdiction to entertain a Judgment or order of a foreign court “in proceedings for the Winding Up or re-organisation of a corporation or similar matter” (Section 3(3)(1); Foreign Judgments (Reciprocal Enforcements) Act Cap.43).

5. The Plaintiff having failed to serve the Defendant with Pleadings WITHIN THREE DAYS from the date of the court’s order, the suit herein should be struck out under Order VI rule 13(b) and (c) of the Civil Procedure Rules and there is no need for formal application to be filed for this purpose.

(i) See Order 39 Rule 3(3)- Civil Procedure.

(ii) Ruling of Ringera, J in Nairobi (Milimani Courts HCCC No. 2047 of 2000 – Musingo – vs- Habo Agencies Ltd.

6. The Plaintiff, being a foreign company (in liquidation), which has not deposited security for costs or security for Damages likely to be suffered by the Defendant cannot be permitted to promote continued mischief to the detriment of the defendant and the current Orders

should be discharged forthwith (Rules of natural justice)”.

Mr. Adala, the learned counsel for the Respondent, when submitting before me, added another ground of Preliminary Objection and that was that the orders herein were not properly obtained as the Plaintiff/Applicant was not candid with the court in that it failed to state in the Plaint as is required by Order 7 Rule 1 (e) that there is another suit in South Africa between the same parties.

I have reproduced the Preliminary Objection herein leaving out the first Preliminary Objection because that was necessitated by a Notice of Motion earlier on filed by the Plaintiff the which Notice of Motion was withdrawn and hence the first Objection was also not pursued. As can be seen from the above, there is what I may call a typing error as far as the second Preliminary Objection herein is concerned as the companies act is at one time referred to as Cap 483. I will treat it as a typing error because at all times in the same Notice it is referred to as cap 486 which is the correct chapter.

The entire case was commenced by way of a Plaint and is seeking a declaration as to the ownership of the subject aircrafts, an order seeking the delivery of their possession to the Plaintiff, injunction and damages. It was filed by the Plaintiff before the same Plaintiff got leave to file it; further the Plaintiff is in liquidation in a foreign country and not in Kenya. The Affidavit filed together with the chamber summons herein encloses a number of annexures, but none of them is certified true copy of the documents, so that their recognition by this court is a matter to be considered as the Plaintiff is seeking to rely on them to obtain the orders sought in this application. Certainly there are no certified copies to the effect that those who brought this suit are liquidators of the company in Namibia.

In the grounds for the application, the Applicant is contending that it is entitled under the company law of both Kenya and Namibia to immediate possession of the aircraft and to bring the aircraft under the jurisdiction of the High Court of Namibia but it does not attempt to show by authentic acceptable legal way what that High court in Namibia has done that would entitle the Kenya courts to act to bring the aircraft under the jurisdiction of that court here in Kenya. There is also the question of whether the Applicant ought to have sought leave first to bring this suit before filing it, i.e. by way of an application in a different Miscellaneous suit or not. Hon. Commissioner Ransely had dealt with the question of leave and had granted it. I do feel in law, I cannot interfere with the question of leave at this stage and the Respondent has his remedy on appeal only as the two parties are already before me by the decision that allowed the Plaintiff to bring this suit. Whereas I feel all the above matters and particularly matters raised covering Section 241 of the Companies Act and matters covering the need to invoke Foreign Judgments (Reciprocal Enforcements) act chapter 43 will need to be decided in detail when the entire application is being heard particularly because the Applicant disputes the facts giving rise to them and thus they are matters to be fully canvassed at a full hearing, there are two matters that I do feel must be considered at this juncture.

The first is whether or not the Plaint herein complied with the requirements of order 7 rule 1 (e) and if it did not, then what is the effect of that non-compliance on the exparte orders already obtained. Order 7 rule 1 (e) states as follows:

“1(1) The Plaint shall contain the following particulars

(e) an averment that there is no other suit pending, and that there have been no previous proceeding, in any court between the Plaintiff and the defendant over the same subject matter’.

This is a mandatory rule. The Plaint filed by the Applicants and which was used for obtaining the exparte orders herein state at paragraph 10 thereof as follows:

“There is no other suit pending and there have been no previous proceedings in any court between the Plaintiff and the Defendant over the same subject matter with the exception of the Winding Up proceedings in the High Court of Namibia”.

The Plaint clearly shows that this matter is between Volga Atlantic Airlines (Proprietary) Limited (In

liquidation) and Yuri Sidorov and was filed on 23rd August 2001. The suit was brought by David John Bruni and Ian Robert McLaren on behalf of and in the name of Volga Atlantic Airlines (Proprietary) Limited (In liquidation). The Respondent now says that there is a suit which was filed in the High Court of South Africa Transvaal Provincial Division case No. 21108/2001. That case was filed on 20th August 2001 and is between Ian Robert Maclaren, David Bruni and Volga Atlantic Airlines (PTY) Ltd as the Applicants and Yuri Sidorov and Air Traffic & Navigation Services Company Limited. The Applicant has not disputed that fact. Mr. Gachuhi, the learned counsel for the Applicant says that the Applicant did not know about that case. That cannot with respect be true as the Founding Affidavit in that case was sworn by the Applicants' advocates on the instructions from the Applicants. There is no averments as is required by Order 7 Rule 1(e) of our Civil Procedure Rules in the Plaintiff that there is that case between the parties existing in the High Court of South Africa. That case, as I have stated, was filed only three days before this case and so must have been still fresh in the minds of the liquidators when they filed this suit. That they did not to make any averments about it is not only concealing a material fact from court but is also failure to comply with the requirements of rules of procedure. The Plaintiff as I have said, was used to obtain ex parte orders. The law is now well settled. Any person seeking ex parte orders of the court must come to court with clean hands. Orders obtained ex parte without revealing all material facts of the matter to that court cannot stand. In fact the law goes even further and says such orders cannot stand even if there were good grounds for the orders.

There is also allegation that the Plaintiff failed to serve the Defendant with the Pleadings as is required by order 39 Rule 3(3). The Applicant says that the Respondents agents were served but it agrees that upto the time of hearing this application summons to enter appearance have not been served. The ex parte orders were obtained on 23rd August 2001 and that is certainly over three days ago. Order 39 rule 3(3) states:

“In any case where the court grants an ex parte injunction the Applicant shall serve the order, the application and pleading on the party sought to be restrained within 3 days from the date of the order’

. In this case, the party sought to be restrained is an individual and not a limited liability company. He was the one to be served and not upon agents. He has not been served with pleadings. Under Section 2 of the Civil procedure Act pleadings is defined as follows:

“Pleading” includes a petition or summons, and the statement in writing of the claim or demand of any Plaintiff, and of the defence of any defendant thereto, and of the reply of the Plaintiff to any defence or counter-claim of a defendant”.

Mr. Gachuhi admitted that summons have not been served upon the Respondent and that other documents were served upon what he called agents and not upon himself.

I think this was also not proper. In this case the adverse orders were made way back on 23rd August 2001 and the summons was supposed to be served latest 26th August 2001. By the time I heard this matter on 6th September 2001, the Respondent had not been served in person and yet the ex parte injunction orders were still in force against his interests. That is taking unfair advantage of the ex parte injunction orders.

For what I have stated above, whereas I will not strike out the application, I will however vacate the ex parte orders granted in respect of prayer 4, 5, 6 and 7. I will allow the Applicant to take such steps as would be appropriate such as amending the Plaintiff. The application to proceed to hearing on a date to be taken at the Registry. The Preliminary Objection succeeds to this extent. The Respondent will have costs of the Preliminary Objection. Orders accordingly.

Dated at Nairobi this 12th day of September 2001.

ONYANGO OTIENO

JUDGE