



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT NO. 214 OF 1997

MALINDI AIR SERVICE LTD.....PLAINTIFF

VERSUS

PRESTIGE AIR SERVICE LTD.....DEFENDANT

RULING

These are objection proceedings taken out by one Gurbrachan Benawra (the objector) under order 21 rule 57 Civil Procedure Rules Chitembwe & Co Advocates to act for him on 27.7.2000. Prior thereto he had filed a Notice of Objection in person on 27.6.2000 but gave only his postal address in Nairobi as his address for service.

The subject matter of the objection was an aircraft, Cessna 404 registration No 57BNW. The plaintiffs herein had obtained judgment against M/s Prestige Air Services Ltd (the judgment debtor) for the principal sum of USD 10,835.88 for which a decree 'was issued' on 19.2.1998. Execution of the decree to recover in excess of Shs 1 million inclusive of costs and interest was filed on 23.4.98. Attachment was levied on 8.5.98 in respect of another aircraft Cessna 404 registration No 5YEAB and on some moveable items.

An objection was then raised to that attachment by M/s Ibis Aviation Ltd through M/s Arum & Co Advocates and although the decree holder intimated thereafter that they wished to proceed with the attachment, that execution appears to have been abandoned.

A fresh application for execution was filed on 27.8.1999 seeking the attachment of the aircraft now in issue. It was attached on 23.9.99 but on 27.9.99 a company known as M/s Prestige Air Ltd, through M/s Arum & Co Advocates, claimed ownership of the aircraft and stated through its Managing Director one Tajinder Singh Kalsi that it was not a party to the court proceedings and knew nothing about them. They filed a Chamber Summons seeking the lifting of the attachment on 22.10.99. They produced a registration certificate for the aircraft in the name of M/s Prestige Air Ltd which was issued on 9.3.1999.

It transpired however from a search carried out in the registry of companies that there was only a change of name of the judgement debtor from Prestige Air Services Ltd to Prestige Air Ltd. And that change was made on 30.10.1998 when a certificate of change of name was issued. The Company otherwise remained the same. That change was made long after judgement and decree in this suit were obtained. The registration of the aircraft in the name of the Company was also soon after the application for execution of the decree was filed on 27.8.99. The decree holder opposed those objection proceedings on the basis that the judgement debtor and the objector were one and the same person.

It would appear from the record that those objection proceedings were terminated when the objectors' application dated 21.10.99 was dismissed on 9.5.2000 for non-prosecution when it came up for hearing. An application filed on 25.5.2000 (dated 22.5.2000) seeking to reinstate those objection proceedings is still pending hearing .

The aircraft was then advertised for sale on 21.6.2000 to take place on 7.7.2000 when the current objector landed on the scene by filing his Notice of Objection on 27.6.2000. In his supporting affidavit he said he had bought the aircraft from M/s Prestige Air Ltd sometime in October 1999 but left it in possession of the seller. He only learned on 24.6.2000 that it had been attached, a fact which the seller never disclosed to him earlier.

A stay of execution was granted and in the meantime the decree holder was asked whether they wished to proceed with the attachment. They filed the notice of intention to proceed on 3.7.2000 and posted it under registered mail to the postal address given by the objector in Nairobi. The objection proceedings were however not instituted until 27.7.2000.

The first objection taken by counsel for the decree holder Mr Mabeya was therefore that the application was filed out of time and was therefore incompetent. In view of the fact that the registered mail was returned with the remarks "unknown" and the mysterious acknowledgement of the letter by the post office on 4.7.2000 when it was not posted until 5.7.2000, I will give no serious consideration to the matter of delay and will deal with the merits of the application itself.

Mr Chitembwe advocate for the objector relied on the affidavit in support of the application which shows that the objector entered into an agreement for purchase of the aircraft on 14.10.1999 after an exchange of four letters in June, July, September and October 1999. The purchase price was USD 250,000 payable by 8 instalments the last of which would fall on 31.5.2000.

It was signed between him and Tajinder Singh Kalsi for the Company and he paid all the instalments which are confirmed by letters signed by the said Tajinder Singh Kalsi as the Managing Director. It was confirmed on 15.6.2000 that the full purchase price was paid but no transfer was given since there was an oral agreement that the seller would keep the aircraft for maintenance. The aircraft therefore did not belong to the judgement debtor and could not be attached. The objector was an innocent purchaser without notice of the attachment.

For his part Mr Mabeya saw *mala fides* in the application and the purported agreement for sale; For one the purported agreement is not a lawful document as it is invalidly executed, and remains unstamped contrary to the Stamp Duty Act. Even the purported payments do not refer to cheques or other legal tender paid or receipts issued by the Company as proof of payment. In any event the purported seller is the judgement debtor in this suit who changed its name with the sole purpose of evading execution of the decree. The seller abandoned another objection application only to raise the issue of sale of the aircraft to another party. Even if there was any sale, Mr Mabeya submitted, then it was subject to the attachment and if the judgment debtor did not disclose that fact to the objector, then it was acting fraudulently. The aircraft is not shown to have been sold free from encumbrances one of which was the attachment, and the objector should pay up the decretal amount if he wants the aircraft.

I have considered all the material on record and the submissions of counsel.

The onus lies on the objector to prove to the satisfaction of the Court that the attached property was wrongly attached and that it was owned by him.

One thing is clear to me on the evidence on record. The judgement debtor has attempted to evade settlement of the decree in this matter and one of the stratagems employed was the change of name at the company's registry which does avail the judgment debtor as the legal position on its property remained the same. The judgement debtor and M/S Prestige Air Ltd are one and the same. The other was to make objections to attachment on the pretext that the property of the judgment debtor is now owned by other people unconcerned with the judgement debtor's debts. The Managing Director one Tajinder Singh Kalsi

has been instrumental in these manouvres and if he did not disclose to those he enticed to take part in the manouvres that the company's property was under attachment, then he must have been acting fraudulently or to be charitable to him, not in good faith. I cannot put it beyond him to arrange for execution of the sale agreement exhibited and to issue the letters exhibited showing purported receipts of money. What was the difficulty in having the seal of the Company on the sale agreement witnessed by other officers of the Company or to show that he was the sole authorised officer for signatures?

Why was it difficult to have it stamped? Or to have official receipts as opposed to letters written by him acknowledging receipt of money? Why did he keep possession of the aircraft and delay the transfer despite having received the entire purchase price of USD 250,000? He may well have to answer those questions in a suit filed against him or the company by the objector. But as regards the objector and the decree holder I find no legal basis for lifting the attachment of the aircraft which I find lawfully belonged to the judgement debtor who changed its name during the pendency of the execution proceedings. If it was sold to another person after attachment, then it was sold subject to the encumbrance of attachment and the decretal amount should be recovered before the aircraft is released to whoever claims ownership.

I dismiss the objection proceedings with costs

Dated and Delivered in Mombasa this 1st day of November 2000.

P.N.WAKI

JUDGE