



**Aviation Aero Consultant & Engineering Solutions Limited v Wings  
Over Africa Aviation Limited & another (Commercial Suit E882 of 2021)  
[2025] KEHC 2828 (KLR) (Commercial and Tax) (11 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 2828 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL SUIT E882 OF 2021  
JWW MONG'ARE, J  
MARCH 11, 2025**

**BETWEEN**

**AVIATION AERO CONSULTANT & ENGINEERING SOLUTIONS  
LIMITED ..... PLAINTIFF**

**AND**

**WINGS OVER AFRICA AVIATION LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**BLUE SKY AVIATION SERVICES LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff instituted this suit against the Defendants vide a plaint dated 25<sup>th</sup> November 2021 seeking judgment against the Defendants for the following reliefs:-
  - a) That the Defendants to deposit forthwith with this Honourable Court security and/or other property sufficient to answer the claim against them, pending the determination of this suit and until the satisfaction of the decree that may be passed against them.
  - b) The sum of USD 79,600 being money paid by the Plaintiff in respect of the two Agreements.
  - c) The sum of USD 5,000 being money paid to the licensing authority of South Sudan.
  - d) The sum of USD 450,800.00 being the loss of user and business between the months of February 2020 and September 2020.
  - e) Damages for Negligence.
  - f) Damages for breach of contract.



- g) Interest on items b), c), d), e) & f) at commercial rates until payment in full.
  - h) Costs.
2. The Plaintiff averred that it engaged the 1<sup>st</sup> Defendant to source an aircraft for operations in South Sudan and Eastern Africa and in February 2020, they executed a lease agreement for aircraft 5Y-BOD. The terms of the contract were that a deposit of USD 80,000 and a lease rate of USD 920 per hour for 60 hours monthly would be paid by the Plaintiff. It was stated that this contract was not consummated at the Defendants' fault. The Plaintiff contended that despite paying USD 56,000, the Defendant failed to deliver the aircraft, which instead had been leased to another party.
  3. The Plaintiff posited that in an effort to mitigate losses, it agreed to source another aircraft with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and new agreement was signed on 2<sup>nd</sup> September 2020 for the same aircraft, which still was also not honored. A subsequent lease for aircraft 5Y-VVA was executed on 25<sup>th</sup> September 2020, which provided for an increased flight rate and additional payments of USD 17,600. However, the Kenya Civil Aviation Authority (KCAA) later found the aircraft unfit for international flights, and it was never delivered to the Plaintiff.
  4. The Plaintiff argued that the Defendants breached the agreements by failing to deliver the aircraft, transferring it to third parties, and disregarding contract terms as well as failing to procure the relevant clearances. Additionally, the Plaintiff alleged fraudulent misrepresentation, asserting that the Defendants knowingly misled it into making payments while unable to fulfill their obligations. The Plaintiff accused the Defendants of leasing the same aircraft to multiple clients, misrepresenting their ability to deliver, and refusing to refund payments. As a result, the Plaintiff claimed losses amounting to USD 450,800 in lost business, USD 79,600 in payments made under the agreements, and USD 5,000 paid to the South Sudan Licensing Authority.
  5. The 1<sup>st</sup> Defendant admitted that the aircraft in question was to operate exclusively in South Sudan with its base at Juba International Airport. However, the 1<sup>st</sup> Defendant denied the Plaintiff's claim regarding the Lease Agreement allegedly executed in February 2020 and asserted that the agreement was, in fact, signed on 6<sup>th</sup> March 2020, not February 2020 as claimed.
  6. The 1<sup>st</sup> Defendant denied knowledge of any deposit amounting to USD 80,000 for procuring the aircraft, stating that the contract specified a deposit of USD 77,000. It further clarified that the lease rate was USD 920 per hour for 70 hours per month, contrary to the Plaintiff's assertion of 60 hours. The 1<sup>st</sup> Defendant also denied that it failed to fulfill the contract, arguing that the Plaintiff wrongfully terminated the agreement by issuing a one-day notice, which was contrary to Article 4.3 of the Lease Agreement. As a result, the Plaintiff was subject to the terms outlined under Article 4.7.
  7. The 1<sup>st</sup> Defendant denied the allegations that it had failed to provide the aircraft and contended that the agreement was structured on a sharing basis, meaning the aircraft's allocation depended on its availability. It further stated that the Plaintiff frustrated the contract by repeatedly missing scheduled appointments. Additionally, the 1<sup>st</sup> Defendant denied that the Kenya Civil Aviation Authority declared aircraft 5Y-VVA unfit for international flights, asserting that it was the engineers who determined that the engine was approaching its time between overhauls (TBO).
  8. The 1<sup>st</sup> Defendant denied the allegations of breach, negligence, and fraudulent misrepresentation set out in the plaint, putting the Plaintiff to strict proof.



## Hearing/Evidence

9. PW1, Mayen Makur, informed the court that he was an aircraft engineer and licensed pilot with 22 years of experience. He adopted his witness statement dated 29<sup>th</sup> June 2022 as his evidence-in-chief and produced a bundle of documents as exhibits. He testified that he contacted the 1<sup>st</sup> Defendant and entered into a lease agreement for a 19-seater aircraft, LETAIO, from the Czech Republic. He initially paid USD 7,000, but before the aircraft could be delivered, the COVID-19 lockdown occurred in 2020. Given the situation, he agreed to extend the agreement until August 2020.
10. During the lockdown, he secured and operated a different aircraft in South Sudan for three months. Once the borders reopened, the 1<sup>st</sup> Defendant reached out in September 2020, and they signed another agreement for the lease of an aircraft. He then paid an additional USD 59,000 on top of the initial USD 7,000, along with USD 5,000 for the aircraft's registration in South Sudan.
11. He stated that the Defendant delivered the aircraft to Juba, but instead of proceeding with registration, it was handed over to another company. He waited for one week and two days before questioning the Defendant, who then advised him to terminate the agreement. When he refused, the Defendant insisted that he take an aircraft from Somalia instead. He agreed, and another agreement was signed for its delivery to Juba, for which he paid an additional USD 14,000. He asserted that the Defendant should be held liable for breach of contract, as his business ultimately collapsed due to the failure to receive the leased aircraft.
12. During cross-examination, he testified that he met the 1<sup>st</sup> Defendant online. He admitted that the lease agreement was not among the documents submitted in evidence and that he had not provided receipts to prove payment. However, he maintained that he had fulfilled all his obligations under the agreement and made all necessary payments. Regarding the payment of Kshs.17,600/=, he admitted that he had not provided receipts to confirm the transaction. He also denied receiving a payment of USD 50,000 from the 1<sup>st</sup> Defendant on 25<sup>th</sup> February 2021. He further asserted that the 1<sup>st</sup> Defendant had never denied owing him money. He confirmed that he had received a refund of USD 47,000 from the 1<sup>st</sup> Defendant.
13. When the suit came up for defence hearing, the Defendants did not produce any witnesses.

## Analysis and Determination

14. I have considered the pleadings and the evidence tendered before court and having done so I note that three issues arise for determination by the court, namely:-
  - a. Whether the Defendants breached the terms of the agreements for the supply of aircrafts to the Plaintiff company.
  - b. Whether the Defendants were negligent in their dealings with the Plaintiff.
  - c. Whether the Plaintiff s suffered a loss and damages as a result of the breach.
  - d. Whether the Plaintiff is entitled to the reliefs sought.

### **a. Whether the Defendants breached the terms of the agreements for the supply of aircrafts to the Plaintiff company:-**

15. It is undisputed that the Plaintiff and the Defendants had a contractual relationship for the supply of aircraft to the Plaintiff in Juba. It was the Plaintiff's case that the parties entered into multiple agreements, beginning with the lease agreement for aircraft 5Y-BOD in February 2020.



16. The Plaintiff contended that despite making payments as required under the agreements, the aircraft was never delivered for its intended use. Instead, the aircraft was allegedly assigned to a third party in Juba, leaving the Plaintiff without the aircraft it had contracted for. The Plaintiff particularized the breach as failure to deliver the aircrafts as per the contract, transferring the same to other parties and failing to procure the clearances as per the lease agreements.
17. In response, the 1<sup>st</sup> Defendant denied breaching the agreements and instead argued that the Plaintiff failed to comply with contractual terms, including scheduling issues and improper termination of the lease agreement. The 1<sup>st</sup> Defendant further stated that the lease agreement was on a shared basis and that delivery of the aircraft was dependent on availability.
18. Black's Law Dictionary, 9<sup>th</sup> Edition, at Page 213, defines a breach of Contract as:-

“a violation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance. A breach may be one by non-performance or by repudiation or by both. Every breach gives rise to a claim for damages and may give rise to other remedies. Even if the injured party sustains no pecuniary loss, or is unable to show such loss, with sufficient certainty, he has at least a claim for nominal damages.”
19. It is trite law that courts cannot re-write contracts for parties, neither can they imply terms that were not part of the contract. In determining whether the 1<sup>st</sup> Defendant was in breach I have reviewed the lease agreements in the Plaintiff's exhibit. It is well noted that the 1<sup>st</sup> Defendant had a contractual obligation to deliver aircraft 5Y-BOD and LET410 UVP E20 to the Plaintiff at Juba International Airport in an airworthy condition.
20. The agreements specified that the Plaintiff was required to make payments totaling USD 79,600, as deposit. The Plaintiff produced annexure 1 to the lease agreement, demonstrating that it had already paid USD 59,000 to the 1<sup>st</sup> Defendant, leaving a balance of USD 20,600. This payment obligation was similarly reflected in the lease agreement dated 2<sup>nd</sup> September 2020 concerning the aircraft LET410 UVP E20. Having met these financial obligations, the Plaintiff expected delivery of the aircraft as agreed. However, the 1<sup>st</sup> Defendant failed to provide any evidence to show that it delivered the aircraft within the stipulated timelines. The Defendant's claim that the lease was on a shared basis and subject to availability does not override its core obligation to supply the aircraft as agreed.
21. It is a well-established principle that a party asserting a fact must prove it. In the present case, the 1<sup>st</sup> Defendant failed to present any evidence to substantiate its claims or contradict the Plaintiff's case. The Plaintiff's evidence, therefore, remained uncontroverted. The court is mindful that failure of a Defendant to attend a hearing and adduce evidence, their defence remains unproved statement of fact. This was affirmed in *John Didi Omulo v Small Enterprises Finance Co Ltd & Another* [2005] eKLR and *CMC Aviation Ltd v Cruisair Ltd* [1978] eKLR, where the courts held that “averments in pleadings, unless supported by evidence, cannot form the basis of a decision.” Accordingly, I find that the 1<sup>st</sup> Defendant was in breach of the lease agreements for failing to deliver the aircraft as required under the contracts.

**b. Whether the Defendants were negligent in their dealings with the Plaintiff:-**

22. The Supreme Court in *Kenya Wildlife Service v Rift Valley Agricultural Contractors Limited* [2018] eKLR outlined the essential elements for establishing negligence: a duty of care, a breach of that duty, causation, and resulting damage. Similarly, in *Caparo Industries PLC v Dickman* [1990] 1 ALL ER



568 and *Chun Pui v Lee Chuen Tal* [1988] RTR 298, the courts emphasized that a duty of care arises from a relationship that provides proximity or a “neighbor” connection.

23. The Plaintiff alleged that the Defendants acted negligently by prioritizing other airlines, failing to deliver a functional aircraft, and failing to remedy the situation in a timely manner. However, upon reviewing the pleadings and evidence, it is evident that the parties’ relationship was based solely on contractual obligations under the lease agreements.
24. Whereas I note that the existence of a contract does not automatically preclude the possibility of a tortious claim, the Plaintiff had the burden of proving that the Defendant owed a duty of care independent of the contractual terms and that this duty was breached, causing harm. In this case, I find that the Plaintiff has not established a relationship that gives rise to such a duty of care. The obligations in question primarily stem from the contractual agreements between the parties, and no evidence has been presented to demonstrate that the Defendants owed the Plaintiff a separate duty of care outside these contracts. As such, the claim for negligence is not sustainable in this case.

**c. Whether the Plaintiff suffered a loss and damages as a result of the breach:-**

25. As per the plaint, the Plaintiff sought compensation for sums paid under the lease agreements, loss of business income, and damages for breach of contract and negligence. The Plaintiff claimed that it had paid a total of USD 79,600 for the aircraft lease, USD 5,000 for registration with the South Sudan licensing authority, and suffered a loss of user amounting to USD 450,800 due to the non-performance of the agreements.
26. The court in the case of *Consolata Anyango Ouma vs. South Nyanza Sugar Co. Ltd* (2015) eKLR held as follows:-

“The next question is whether the appellant was entitled to damages as a result of the breach. As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. This principle is encapsulated in the Latin phrase *restitution in integrum* (see *Kenya Industrial Estates Ltd v Lee Enterprises Ltd* NRB CA Civil Appeal No. 54 of 2004 [2009]eKLR, *Kenya Breweries Ltd v Natex Distributors Ltd* Milimani HCCC No. 704 of 2000 [2004]eKLR). The measure of damages is in accordance with the rule established in the case of *Hadley v Baxendale* (1854) 9. Exch. 341 that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach (see *Standard Chartered Bank Limited v Intercom Services Ltd & Others* NRB CA Civil Appeal No. 37 of 2003 [2004]eKLR). Such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved (see *Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 others*, NRB CA Civil Appeal No. 192 of 92 (UR) and *Charles C. Sande v Kenya Co-operative Creameries Ltd*, NRB CA Civil Appeal No. 154 of 1992 (UR))”.

27. In *Halsbury’s Laws of England Fourth Edition Reissue Vol 12(1)*:

“941 ...The normal function of damages for breach of contract is compensatory. Damages are awarded, not to punish the party in breach, or to confer a windfall on the innocent party”, but to compensate the innocent party and repair his actual loss. Compensation is normally achieved by placing the innocent



party in the same position, so far as money can do, as if the contract had been performed. Only in exceptional circumstances do courts depart from this policy and award some greater or lesser sum'. Ordinarily there is just one measure of damages in contract, which is the loss truly suffered by the promisee".

28. From the evidence presented before the court, the Plaintiff provided proof of payment amounting to USD 59,000. Additionally, PW1 admitted to making an advance payment of USD 17,600 and a further USD 5,000 to the 1<sup>st</sup> Defendant. This evidence remained uncontroverted during the hearing, bringing the total sum paid to USD 81,600. However, the Plaintiff also admitted to receiving a refund of USD 47,000 from the 1<sup>st</sup> Defendant. Taking this into account, the court finds that the outstanding amount owed to the Plaintiff stands at USD 34,600, which remains payable as damages.
29. As to whether the Plaintiff is entitled to loss of user the court in *Ndugu Transport Company Limited & another v Daniel Mwangi Waithaka Leteipa [2018] eKLR* held that:-

a claim for loss of user is a special damage claim. Not only must it be specifically proved, it must also have been specifically pleaded in the plaint.
30. In this case, the Plaintiff ought to have specifically pleaded and provided proof of the loss of user. The burden was on the Plaintiff to demonstrate, through documentary or other credible evidence, the actual financial loss suffered as a result of the Defendant's breach.
31. The court is not satisfied that the Plaintiff has discharged this burden. No financial statements, contracts, or other supporting documents were produced to substantiate the claim that the Plaintiff would have earned the alleged amounts had the aircraft been delivered as agreed. In the circumstances, I find that the Plaintiff has failed to meet the required standard of proof for loss of user. Consequently, this claim fails.
32. In view of the foregoing, I find that the Plaintiff has made out a case against the Defendants on breach of contract. Accordingly, I find for the Plaintiff and enter judgment of USD 34,600 in special damages plus costs of the suit. The said sums shall attract interests at court rates from date of filing suit and date of taxation respectively. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 11<sup>th</sup> DAY OF MARCH 2025.**

.....

**J.W.W. MONG'ARE**

**JUDGE**

In the Presence of:-

1. Ms. Bosire and Dr. Ekuru Aukot for the Plaintiff.
2. Mr. Chalbi Otieno for the 1<sup>st</sup> Defendant.
3. N/A for the 2<sup>nd</sup> Defendant.
4. Amos - Court Assistant

