



**Wells Fargo Trust Company, National Association & another v Five Forty Aviation Limited & another; Kenya Civil Aviation Authority & another (Interested Parties) (Commercial Case E360 of 2022) [2025] KEHC 3607 (KLR) (Commercial and Tax) (24 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3607 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E360 OF 2022**

**AA VISRAM, J  
MARCH 24, 2025**

**BETWEEN**

**WELLS FARGO TRUST COMPANY, NATIONAL ASSOCIATION .... 1<sup>ST</sup>  
PLAINTIFF**

**AVMAX AIRCRAFT LEASING INC ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**FIVE FORTY AVIATION LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**EAST AFRICAN SAFARI AIR LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**KENYA CIVIL AVIATION AUTHORITY ..... INTERESTED PARTY**

**KENYA AIRPORTS AUTHORITY ..... INTERESTED PARTY**

**RULING**

1. The Plaintiffs are beneficial owners and trustees of two Bombardier Aircrafts bearing Kenyan registration numbers 5Y GCG and serial number 426 and 5Y RJS and serial number 250, the subject of this proceedings. The Plaintiffs claim from the Defendants inter alia USD 5,245,127.83/- and USD 759,104.86/- and repossession of the Aircrafts based on two settlement agreements and conditional sale agreements entered into between the parties for which the Plaintiffs allege breach.
2. Sometime in February 2023, the Plaintiffs filed an application before Court seeking inter alia, storage of the Aircrafts in an independent hangar, and when the matter came up for inter partes directions



before the court (Mwita J.,) on 1<sup>st</sup> March, 2023, the Plaintiffs and the Defendants recorded a Consent which was adopted as an order of the Court as follows (“the Consent Order”):-

1. THAT the Plaintiffs and Defendants do a joint inspection of the aircraft (including technical records) within 14 days for purposes of handing over the aircraft to the Plaintiffs
  2. THAT the Aircraft should in the meantime remain where they are parked pending the inspection and further order of the court
  3. THAT second Interested Party do allow access to the Plaintiffs’ and Defendants’ representative for purposes of joint inspection
  4. THAT Directions on 20/3/2023
3. The present Application dated 14<sup>th</sup> April, 2023, seeks to find the Defendants’ Managing Directors and their representatives, in contempt for breach of the terms of the Consent Order. The Applicant prays that the said Directors be committed to civil jail; or in the alternative, that the Court imposes a daily fine of not less than Kshs. 50,000.00/- per day, on each of the alleged contemnors, until such time they purge the contempt.
4. The Application is supported by grounds on its face and further grounds in the supporting affidavit of the 2<sup>nd</sup> Plaintiff’s Aircraft Maintenance Engineer, Russ McNeil, sworn on 14<sup>th</sup> April, 2023. It is opposed by the Defendants through the Grounds of Opposition dated 3<sup>rd</sup> May, 2023, and the replying affidavit of the Defendants’ Operations Manager, David Winston Cattermole, sworn on the same date.
5. The Court directed that the application be canvassed by way of written submissions which are on record, and which, together with the pleadings, I will make relevant references to in my analysis and determination below.

### **Analysis and Determination**

6. The main issue for determination is, whether the Defendants’ Managing Director and representatives are guilty of contempt of the Consent Orders, and if so, whether they should be committed to civil jail or fined not less than Kshs. 50,000.00/- per day, until they purge their contempt.
7. As submitted by the Applicant, it is trite that once a court issues an order, it binds all and sundry, the mighty and the lowly, equally, without exception. The requirements to be proved for a successful contempt prosecution were set out by the Court of Appeal in *Ochino & another v Okombo & 4 others* [1989] KECA 65 (KLR), where the court cited its own decision in *Mwangi Mangondu v Nairobi City Council* (Civil Appeal No. 95 of 1988), and pronounced itself as follows:-
- “[T]he court will only punish as a contempt breach of injunction if satisfied that the terms of the injunction are clear and unambiguous, that the Defendant has proper notice of the terms and that breach of the injunction has been proved beyond reasonable doubt.” (Emphasis mine)
8. The position on the applicable standard of proof was later finessed in *Gatharia K. Mutitika v Baharini Farm Limited* [1985] KLR 227 where the Court of Appeal considered the fact that contempt of court was criminal in character, hence the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt. It added that, “the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge.”



9. The Plaintiffs' version of events is that despite the Consent Orders, the Defendants denied them access to various technical records for the joint inspection including; Original Engine Logs, Landing gear installation records, Propeller records, AD and SB status records and Inspection records. On the other hand, the Defendants' version of events is that a full and unrestricted inspection took place on 9<sup>th</sup> March, 2023. The unrestricted access to the technical records was granted to the Plaintiffs' joint inspection representatives namely Mr. Sammy Omwenga Ondari and Mr. Russ William Mc Neil, in accordance with the Plaintiffs' Advocates letter addressed to the Defendants' Advocates on 8<sup>th</sup> March, 2023, which expressly proposed commencement of the inspection of the technical records to be held on 9<sup>th</sup> March, 2023, and physical inspection to be held immediately thereafter, on the 10<sup>th</sup> March, 2023.
10. The Defendants deponed that the technical records inspection exercise ran smoothly and unrestricted access was allowed to the representatives of the Plaintiffs, including inspection of the aforementioned records. Further, that a report in relation to the exercise was prepared, where all the respective representatives of the parties signed off to the effect that the inspection had been conducted fully. In the Defendants' view, no reservations or additions were stipulated in the report by either party, and as such the terms of the Consent had been complied with.
11. Based on the record before me, while it is evident that a joint inspection took place on 9<sup>th</sup> March, 2023, and indeed the same was signed by all parties present stipulating that the free and full access was provided, it is also evident that the inspection was incomplete.
12. Had the inspection been completed fully, and to the satisfaction of the Plaintiff, there would have been no reason for the parties to enter into the consent dated 13<sup>th</sup> March, 2023, extending the period for inspection stipulated in the original consent to 22<sup>nd</sup> March, 2023. Evidence of the same is found at annexure RM 9 of the Applicants' supporting affidavit.
13. Based on the correspondence between the parties, it is evident from a reading of the letter dated 13<sup>th</sup> March, 2024, that the reason for the said extension of time, entered into by way of consent, was because the initial inspection was delayed to 9<sup>th</sup> March, 2023, to accommodate the Defendants, and such accommodation had left the Plaintiffs without sufficient time to complete the inspection. Evidence of the same is found at annexure RM 7 of the Applicants' supporting affidavit.
14. In the event that the inspection had been completed, there is no logical reason why the said consent extending time for the same would have been necessary. The Defendants would simply have responded to the letter stating that the exercise had been carried out in compliance with the order, and that no extension of time was necessary. This did not happen, and having extended the period of time to complete the inspection, I am persuaded that the Defendants knew full well that the process had not been completed. It appears more likely to me that the Defendants changed their mind after having entered into the consent as a mere afterthought.
15. While I am cognizant that the letter dated 9<sup>th</sup> March, 2023, stipulates that full access was granted, I note that the same does not say that the exercise had been completed in full, and to the satisfaction of the parties, in accordance with the terms of the consent. Nothing would have been easier than for both parties to attest the same and append their signatures, had this been the case.
16. Further, given that the terms of the Consent Order provided for a 14 day period within which the exercise ought to have been completed, it is not lost on me that this period of time had been mutually agreed, and was in the contemplation of the parties, having been the authors of the terms of the consent. Therefore, I am not persuaded that after only one day of investigation and inspection, the Defendants could reasonably have reached the conclusion that the time was sufficient.



17. Rather, I am inclined to think that having crafted the terms of the consent, the Defendants knew that the process would take a period of approximately 14 days to complete, and further, ought to have known that once the Consent had been adopted as an order of the court, compliance with the terms, including access for the period of time stipulated for the purpose of inspection, was mandatory, and not optional.
18. Having found the above, I now turn to the applicable law. The law that currently governs contempt of court proceedings in Kenya is the English law applicable in England. The current provision governing contempt proceedings in England is rule 81.4 of the English Civil Procedure Rules (Amendment No. 3) Rules, 2020, which under sub-rule (1) provides:- Unless and to the extent that the court directs otherwise, every contempt application must be supported by written evidence given by affidavit or affirmation. This was discussed and determined in the Court of Appeal in the case of Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 others [2014] eKLR.
19. I note that the present Application is premised on Section 5 of the Judicature Act and the rule cited in the Application is rule 81 of the English Civil Procedure Rules, which is the correct provision for the commencement of contempt of court proceedings (See Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR). I therefore find that same is competent, and has been brought under the correct provisions of the law as affirmed by the above-cited authorities.
20. I therefore turn to the terms of the Court Order. I reiterate that the Court Order was issued by this Honourable Court by consent of the parties, and was clear and express in its wording, specifically: "The Plaintiffs and Defendants do a joint inspection of the Aircraft (including technical records) within fourteen (14) days". The same includes specifically, 'technical records' as part of the joint inspection. The wording of the Court Order is therefore, clear and unambiguous.
21. Further, based on facts set out above, the Defendants had notice of the same. The Court Order in question was a Court Order entered into by consent of the parties on 1<sup>st</sup> March, 2023. There is therefore no doubt in my mind on this issue. It is also not lost on me that to date, the Defendants have failed to comply with the said order, almost two years later.
22. I therefore turn to question of whether the Defendants deliberately acted in breach of the terms of the Court Order? In *Katsuri Limited v Kapurchand Depar Shah* [2016] eKLR, this Court cited with approval the text from the treatise *Contempt in Modern New Zealand* as follows:-

"The Applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:-(a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the Defendant;(b) the Defendant had knowledge of or proper notice of the terms of the order;(c) the Defendant has acted in breach of the terms of the order; and (d) the Defendant's conduct was deliberate."
23. Based on the facts set out above, and especially given the correspondence between the parties, of particular relevance being the letter dated 13<sup>th</sup> March, 2023, which as I have said culminated in a further consent, (extending the period for inspection, which period was also thereafter was dishonoured), I find that the refusal on the part of the Defendant was deliberate. I therefore find that the relevant threshold has been met.
24. In *Econet Wireless Kenya Ltd vs Minister for Information & Communication of Kenya & Another*, this Honourable Court emphasised the need for adherence to court orders as follows:- "The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors".



- 25. Having stated the above, I am of the opinion that committal to civil jail ought not issue in the first instance. Accordingly, I find that the issuance of a fine in the amount prayed for by the Applicant is an appropriate remedy in the current circumstances, and in the first instance.
- 26. In the event of further non-compliance by the contemnors, the Applicant is at liberty to set the matter down before the Deputy Registrar for Notice to Show Cause why they should not be committed to Civil Jail. I therefore allow the Application dated 14<sup>th</sup> April, 2023, in the following terms:-
  - i. Prayer 4 of the Application is allowed as prayed for and a daily fine is hereby imposed on Mr. Don Smith; Mr. David Cattermole; and Mr. George Kivindy, of Kshs. 50,000/- from the date of the present order, each, per day, until the said contemnors do purge their contempt.
  - ii. The Defendants are directed to comply with item No. 1 and 3. of the Consent Order. Time shall start to run from the first day that the Plaintiff are granted access for the purpose of inspection in accordance with the terms of the Consent Order, until 5pm of the 14<sup>th</sup> day unless the parties agree otherwise.
  - iii. Prayer 5 is allowed and accordingly the costs of the Application shall be borne by the Contemnors personally.

**DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 24<sup>TH</sup> DAY OF MARCH, 2025**

**ALEEM VISRAM, FCI Arb**

**JUDGE**

**In the presence of;**

.....**Court Assistant**  
 .....**for 1<sup>st</sup> Plaintiff**  
 .....**for 2<sup>nd</sup> Plaintiff**  
 .....**for 1<sup>st</sup> Defendant**  
 .....**for 2<sup>nd</sup> Defendant**  
 .....**for 1<sup>st</sup> Interested Party**  
 .....**for 2<sup>nd</sup> Interested Party**

**Page 3 of 3**

**HCCOMM. NO. E360 OF 2022**

