



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Flying Tiger Oversize Cargo Pty Limited v Safe Air Company Kenya Limited (Commercial Case E205 of 2023) [2023] KEHC 18495 (KLR) (Commercial and Tax) (13 June 2023) (Ruling)

Neutral citation: [2023] KEHC 18495 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E205 OF 2023**

DAS MAJANJA, J

JUNE 13, 2023

BETWEEN

FLYING TIGER OVERSIZE CARGO PTY LIMITED PLAINTIFF

AND

SAFE AIR COMPANY KENYA LIMITED DEFENDANT

RULING

Introduction and Background

1. By a Letter of Agreement dated 7th July 2020 (“the Agreement”), the parties agreed to operate the Plaintiff’s (“Flying Tiger”) aircraft known as Aerospatiale C160 Transall registration number EY-360 (“the Aircraft”) together. Under the Agreement, Flying Tiger agreed to position the aircraft from Entebbe, Uganda to Mogadishu, Somalia as soon as possible whereas the Defendant (“Safe Air”) agreed to pay airport fees, departing and operating airways charges, crew accommodation and per diem at Mogadishu and fuel for repositioning to Mogadishu. Safe Air further agreed to pay the Aircraft’s insurance upfront as advised and that this premium was to be reimbursed by Flying Tiger once operational, by payments to be agreed to. The parties further agreed that to start operations, there will be no fixed Air Craft Crew Maintenance and Insurance (ACMI) hours and that the ACMI rate to start was to be USD 2,200.00 per hour and that charter rates would be as agreed.
2. By a Complaint dated 14th February 2023, Flying Tiger filed this suit accusing Safe Air of fraudulently and/or negligently misrepresenting the status of the insurance coverage of the Aircraft and its operator and acting fraudulently, negligently and fundamentally breaching the express and implied terms of the Agreement. Flying Tiger claims that before its lease to the Safe Air, the Aircraft’s liability insurance was handled by Fred Black Insurance and Reinsurance Brokers and that sometime in 2021, Safe Air’s CEO, Mr. Noor, urged Flying Tiger to transfer the insurance coverage services over the Aircraft from Fred Black to Mua Insurance. He argued that Mua Insurance, who were already providing coverage



to Safe Air's fleet, would provide better rates than Fred Black and that specifically, the move to Mua Insurance would reduce the annual insurance payments from USD 250,000.00 previously paid to Fred Black to USD 126,000.00.

3. Flying Tiger claims that following the move of the insurance coverage to Mua Insurance, Safe Air represented to Flying Tiger that it put the Aircraft under its fleet-wide comprehensive insurance policy with both parties listed as insureds and that Safe Air debited and/or withheld the total sum of USD 278,168.00, on account of insurance premia to be paid to Mua Insurance, from the amounts payable to Flying Tiger under the Agreement.
4. Flying Tiger avers that on or around 3rd November 2021, the Aircraft, whilst being operated by Safe Air made a routine flight within Somalia, caught fire and as it was damaged beyond repair and written off. For these reasons, Flying Tiger seeks *inter alia* USD 2,500,000.00, being the value of the Aircraft, USD 278,168.00 being insurance premia paid by Flying Tiger to Safe Air between July 2020 and September 2021, USD 500,000.00, being the earnings lost by Flying Tiger as a consequence of the loss of the Aircraft, USD 1,027,080.00, being loss of revenue for the remainder period of the Agreement, damages for loss of bargain and loss of business opportunity, general damages for fraud, costs of the suit, interest, a declaration that Flying Tiger is not liable for any loss suffered by the person(s) whose cargo was lost in the fire incident that consumed Aircraft and Special damages of Kshs.30,000.00, being the fees for obtaining the Aircraft Register.
5. Together with the Complaint, Flying Tiger has also filed a Notice Motion dated 14th February 2023 made under sections 1A, 1B, 3A and 22(a) of the Civil Procedure Act (Chapter 21 of the Laws of Kenya), Order 14 Rules 5 and 6, Order 40 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules ("the Rules") where it seeks the following orders:
 1. Spent*
 2. Spent*
 3. Spent*
 4. Spent*
 5. Pending the inter partes hearing and determination of the suit, an order of injunction be and is hereby issued restraining the Defendant whether by itself, agents, servants and/or employees, from removing from the jurisdiction of this Honourable Court, selling, dissipating, alienating, disposing of, assigning, charging, transferring, leasing, mortgaging, encumbering or in any whatsoever dealing with aircrafts registration numbers:
 - (a) 5Y-IRE B727-2Q9E/ADV F, C/N (MSM)21931/153
 - (b) 5Y-GMA B727-2Q9 Serial No. 21930
 - (c) 5Y-CGX F27-MK050 Serial No. 20333
 - (d) 5Y-JIB B727-251 Serial No. 22543
 6. The aircrafts listed in prayer 5 above be held at a secure hangar at Jomo Kenyatta International Airport under the Plaintiff's control and security
 7. In the alternative, an order is hereby issued directing the Defendant to provide security for the sum of US\$3,278,168.00, being the Plaintiff's liquidated claim..



8. In the event of the Defendant's failure to furnish security, an order is hereby issued attaching the Defendant's aircraft registration number 5Y-IRE B727- 2Q9E/ADV F, C/N (MSM)21931/153 to satisfy any decree which may be passed against the Defendant in the suit
 9. The Defendant be and is hereby ordered to produce copies of the applicable Insurance Policy Document, Certificate of Insurance and Cover Note for Aircraft Transall C-160NG, Registration No. EY-360 at the time of its loss in November 2021
 10. The costs of and incidental to this Application shall abide in the outcome of the main suit.
 11. Such other, further and/or incidental Orders as the Honourable Court may deem just and expedient.
6. The application is supported by the grounds set out on its face together with the supporting affidavit of Flying Tiger's CEO, David Berry, sworn on 3rd April 2023. It is opposed by Safe Air through the replying affidavit of its director, Mohamed Noor Aden, sworn on 22nd May 2023.
 7. Following ex-parte orders issued by the court on 16th May 2023, Safe Air filed the Notice of Motion dated 18th May 2023 made under Article 165 of the *Constitution*, section 80 of the *Civil Procedure Act* and Order 45 of the *Rules* seeking to strike out Flying Tiger's suit and application for want of jurisdiction or in the alternative discharge and set aside the ex-parte orders issued by the court on 16th May 2023. The application is supported by the grounds on its face and the supporting affidavit of Mohamed Noor Aden sworn 19th May 2023. It is opposed by Flying Tiger through the replying affidavit of David Berry sworn on 22nd May 2023.
 8. The court directed that the application be heard together. In addition to written submissions anchoring their respective positions, their advocates made oral submissions.

Analysis and Determination

9. I propose to first deal with Safe Air's application as it impugns the jurisdiction of this court by stating that the applicable law and the jurisdiction of the dispute is that of the Federal Republic of Somalia where the Agreement was executed, the Aircraft operated and the cause of action arose.
10. It is now beyond argument that once the issue of jurisdiction is raised by a party, the court must deal with it at the earliest opportunity for without it, a court has no power to make one more step. This position has been affirmed in a plethora of cases among them *Owners of the Motor Vessel Lilian SS v Caltex Oil (Kenya) Ltd* [1989] KLR 1, *Samuel Kamau Macharia v Kenya Commercial Bank & 2 others* SCK [2012] eKLR and *R v Karisa Chengo* [2017] eKLR.
11. Safe Air contends that the court lacks the Jurisdiction on the ground that the Agreement was executed by the parties and performed in the Federal Republic of Somalia. That the Agreement is not one envisaged nor in the nature specified under Order 5 Rule 21 E of the *Rules* for the Court to assume jurisdiction. It urges that Flying Tiger's claim of loss and damages and the cause of action stated in its plaint, can only effectively be determined and proved in Somalia where the payment and maintenance invoices were all issued, where the cause of action arose and where the necessary witnesses are located. Further, that the subject matter of the dispute, that is the Aircraft, is registered in the Republic of Tajikistan and was operated within Somalia, outside the Jurisdiction of this Court, in accordance with the aviation laws and regulations of the Republic of Somalia.
12. Safe Air holds that despite it having offices in Kenya and Somalia, the accident involving the Aircraft and the alleged cause of action against it both occurred within Somalia hence this court lacks



jurisdiction. It urges that there is no express or implied term in the Agreement referring disputes between parties to Kenyan Courts neither does the Agreement provide the Kenyan laws as the applicable laws to the subject matter. Safe Air therefore submits that in the absence of an express term on jurisdiction and the law applicable, then automatically the applicable law and the jurisdiction of the dispute is that of the Federal Republic of Somalia where the Agreement was executed, the aircraft operated and the cause of action arose.

13. Flying Tiger opposes the application to strike out the suit and submits that Safe Air's jurisdictional challenge is legally and factually untenable as it is evident from the Agreement that the parties did not expressly agree on the jurisdiction of choice and law governing the Agreement. It avers that the dominant features of the case connect the cause of action and Safe Air to Kenya hence the matter should be resolved in Kenyan courts which have the closest and strongest connection to the dispute. It submits that it is not in dispute that Safe Air is a limited liability company incorporated and domiciled in Kenya and accordingly, it will not incur unreasonable expense in defending this suit, that the Aircrafts subject of the ex-parte order are registered in Kenya and that as admitted in its deposition it primarily carries on business in Kenya. It adds that the Agreement was executed in Kenya and the same was partially performed in Kenya as most ACMI cash payments were made in Kenya.
14. Flying Tiger submits that Safe Air has not demonstrated that any other jurisdiction, apart from Kenya, has the dominant connections to the dispute or the parties capable of vesting jurisdiction in them. That the only nexus between the dispute and Somalia is that the Aircraft was, aside from making occasional cargo deliveries there, lost in a fire incident in Somalia and that the only nexus between the dispute and Tajikistan is that the Aircraft was registered there and that it is not true as contended by Safe Air that the Aircraft was registered in Somalia. Further, that Safe Air has already submitted to the jurisdiction of the Court by failing to file a Notice of Preliminary Objection formally challenging Court's alleged lack of jurisdiction and entering appearance, without any protest, objection or reservation.
15. While Safe Air states that the Agreement was executed in Somalia, a perusal of the Agreement does not reveal or prove such a contention. However, it is not in dispute that the Aircraft is registered outside Kenya and that the accident also occurred outside Kenya. Further, the totality of the evidence on record shows that the Aircraft largely operated within the Federal Republic of Somalia and was operating there at the time of the accident. It is also not in dispute that Safe Air is incorporated and domiciled in Kenya as its offices and operations are based in Kenya.
16. Additionally, there is no provision in the Agreement stipulating that the applicable law and the jurisdiction of the dispute is that of the Federal Republic of Somalia. If the parties intended that their disputes be resolved by the courts in Somalia while applying Somalia law, nothing was simpler than expressly stating so. In the absence of a clear stipulation in a choice of law or choice of jurisdiction clause, the Court of Appeal, in *United India Insurance Co. Ltd & 2 Others v East African Underwriters (Kenya) Ltd* [1985]KLR 998 stated that the court has discretion to assume jurisdiction even where there is a jurisdiction clause in a contract and that in exercising its discretion the court should take into account all the circumstances of the particular case including:
 - (i) in what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expenses of trial as between the court of the country and the court of foreign country;
 - (ii) whether the law of the foreign Court applies, and if so, whether it differs from the law of the country in any material respects;
 - (iii) with what country either party is connected, and how closely.



- (iv) whether the defendant genuinely desire trial in the foreign country or are only seeking procedural advantage;
 - (v) whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would be deprived of security for their claim, be unable to enforce any judgment obtained, be faced with a time bar not applicable in their country.
17. Taking into account the factors outlined above, I am inclined to agree with the position taken by Flying Tiger that it will serve the convenience of both parties, more so Safe Air, if these proceedings are conducted in Kenya, Safe Air’s country of domicile and operations. Since the issue involves the insurance premium payments in respect of the Aircraft, I note that the insurance brokers involved are Kenyan companies, thus if they are to be called in as witnesses, it will be convenient and cheaper if the trial was to be done here in Kenya, as opposed to Somalia. The expense of the trial abroad for all parties and in particular witnesses would be staggering. Finally, I do not find any prejudice to the parties if the proceedings are conducted in Kenya as opposed to Somalia.
18. Despite finding that this court has jurisdiction, for purposes of completeness I will address whether the Safe Air has submitted to the jurisdiction of this court. The Court of Appeal dealt with this issue in *Evergreen Marine (Singapore) PTE Limited and Gulf Badar Group (Kenya) Limited v Petra Development Services Limited* MSA CA Civil Appeal No. 91 of 2015 [2016]eKLR in a case dealing with exclusive jurisdiction clauses, it observed as follows:
- “Where parties have bound themselves on the jurisdiction and the law to govern the transaction, a party, by conduct may be presumed to have waived the term and submitted to the jurisdiction of the local courts. The well-known circumstances where a party is so presumed include where the party upon service of summons enters appearance without protesting jurisdiction like the appellants initially did. For the exclusive jurisdiction clause to have effect it must be clear to all that jurisdiction is protested at the earliest point of entering appearance. A defendant like in the case of United India Insurance Co. Ltd (supra) can enter appearance in protest and quickly follow it with an application for stay of all further proceedings or for the dismissal of the suit on account of lack of jurisdiction. A party may also file a notice of preliminary objection. See *Raytheon Aircraft Credit Corporation and another v Air Al-Faraj Limited* Civil Appeal No. 29 of 1999 where the court stated that;
- “There are no rules of the court prescribing the procedure for challenging the jurisdiction of the High Court by a foreign defendant who has been sued in this country in breach of contractual forum selection and the exclusive jurisdiction clause. The procedure suggested by the predecessor of the court in *Prabhadas (N) & Co. v Standard Bank* [1968] EA 679 at page 684 paragraph C-E is to enter a conditional appearance and then move the court for setting aside the process.”
- This procedure seems to have gained sufficient traction in law to the point that it is safe to say that the point is settled. In *Fonville v Kelly III and other* (2002) 1 EA 71 it was reiterated that the entering of appearance or filing of a defence under protest, the filing of an application for stay of proceedings or for striking out the proceedings and the raising of a preliminary objection to the suit before trial are all legitimate means of challenging the jurisdiction of the court. [Emphasis mine]
19. I do not think the general principle elucidated above is applicable in this case because, Safe Air only filed a Notice of Appointment and followed it up with the Notice of Motion seeking orders discharging the



ex-parte orders and striking out the plaint on grounds of lack of jurisdiction. In the circumstances, I do not think the Safe Air waived its right to challenge the jurisdiction of the court as it challenged the court's jurisdiction at the earliest opportunity by filing the application to strike out the suit.

20. Having held that in the absence of the choice of law or choice of the jurisdiction clause, the country with the closest and strongest connect to the dispute is Kenya, the issue whether Safe Air has waived jurisdiction is now moot. Needless to say, I decline to strike out the suit for want of jurisdiction.

Prayers for an injunction, security, attachment and production

21. I now turn to determine Flying Tiger's application for injunction as this determination will also dispose of Safe Air's plea to discharge the ex parte orders of 16th May 2023. As stated, Flying Tiger seeks an injunction against aircrafts registration numbers; 5Y-IRE B727-2Q9E/ADV F, C/N (MSM)21931/153, 5Y-GMA B727-2Q9 Serial No. 21930, 5Y-CGX F27-MK050 Serial No. 20333 and 5Y-JIB B727-251 Serial No. 22543. In the alternative, Flying Tiger seeks security for the sum of US \$3,278,168.00, being its liquidated claim and in the event that it does not furnish security, attachment of aircraft registration number 5Y-IRE B727- 2Q9E/ADV F, C/N (MSM)21931/153. It also seeks copies of the applicable Insurance Policy Document, Certificate of Insurance and Cover Note for the Aircraft at the time of its loss in November 2021
22. The parties are convergent about the principles for the grant of an injunction under Order 40 of the Rules. The decision of *Giella v Cassman Brown* [1973] EA 358 is still good law where it was held that in order to succeed, an applicant must demonstrate that it has a prima facie case with a probability of success, demonstrate irreparable injury which cannot be compensated by an award of damages if a temporary injunction is not granted, and if the court is in doubt, show that the balance of convenience is in its favour. These conditions, the Court of Appeal held in *Nguruman Limited v Jane Bonde Nielsen and 2 Others* NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR, are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. This means that if an applicant does not establish a prima facie case then irreparable injury and balance of convenience do not require consideration.
23. A prima facie case flows from what is pleaded in the Plaint. In other words, the injunction sought pending the hearing and determination on the suit must bear a direct relationship for the purpose of the injunction is to protect the subject matter of the suit. I have highlighted the substance of the claim in the introductory part of this ruling. Flying Tiger contends that Safe Air fraudulently and/or negligently misrepresented the status of the insurance coverage of the Aircraft and its operator and that it acted fraudulently, negligently and fundamentally breached the express and implied terms of the Agreement. It accuses Safe Air of leading Flying Tiger to believe that the Aircraft was under comprehensive in-flight insurance similar to the other aircraft in Safe Air's fleet, inducing Flying Tiger to believe that the payments received on account of the Aircraft's comprehensive in-flight cover were fully remitted to the Aircraft's insurer, misrepresenting that both parties had been listed as insureds in the Aircraft's Insurance Policy Document and misleading and/or misrepresenting to the Somalia Aviation Authority that the Flying Tiger and not Safe Air, was the operator of the Aircraft at the time of its loss.
24. I note that in its Plaint, Flying Tiger does not seek relief against the aircrafts it seeks an injunction against. It admits that the aircrafts 5Y-GMA B727-2Q9 Serial No. 21930; 5Y-CGX F27-MK050 Serial No.20333; 5Y-JIB B727 — 251 and Serial No. 22543 are not owned by Safe Air but by third parties. These third parties are not parties in this suit and such, no adverse orders can be made against them without hearing them. No injunction or order is thus available against these aircrafts leased by Safe Air. On the hand, Flying Tiger has produced evidence demonstrating that Safe Air owns aircraft registration number 5Y-IRE B727-2Q9E/ADV F, C/N (MSM)21931/153. The question is



thus whether Flying Tiger has made out a prima facie case that entitles it to an injunction against this aircraft

25. Flying Tiger accuses Safe Air of not maintaining a comprehensive insurance cover and failing to remit the entire insurance premia collected from Flying Tiger to the Aircraft's insurer. As is evident from the reliefs sought in the plaint, the claim is really one for damages and not an action against any of the aircraft cited in the application. Since there is no cause of action or relief sought against the aircraft, the inevitable conclusion is that Flying Tiger has not made out a prima facie case with a probability of success and its quest for an injunction come to a grinding halt in line with the dicta in *Nguruman Limited v Jane Bonde Nielsen and 2 Others* (supra).
26. In substance the application by Flying Tiger is for attachment before judgment as provided for under Order 39 of the *Rules*. I would only reiterate what the Court of Appeal stated in *Kuria Kanyoko t/ a Amigos Bar and Restaurant v Francis Kinuthia Nderu, Helen Njeru Nderu and Andrew Kinuthia Nderu* [1982-88] KAR 1287 that,

“The power to attach before judgement must not be exercised lightly and only upon clear proof of the mischief aimed at by order 38, Rule 5, namely that the Defendant was about to dispose of his property or to remove it from the jurisdiction with intent to obstruct or delay any decree that may be passed against him.”
27. I therefore reject Flying Tiger's contention that it is not necessary for it to present direct evidence establishing the intention or likelihood of Safe Air to engage in certain acts, including dissipation of its aircraft, with the intention of rendering itself judgment proof and such intention can be gleaned from the conduct of Safe Air. The burden cast on an application seeking attachment or security before judgment is quite high (see also *John Kipkemboi Sum v Lavington Security Guards* NRB CA Civil Appeal No. 124 of 1998 [1998] eKLR). It must establish intent hence I hold that Flying Tiger has not discharged its burden of showing Safe Air is taking steps to dispose of its aircraft or remove it out of reach of the court with intent to obstruct or delay any decree that may be passed against it. The mere fact that Safe Air runs a business which by nature involves aircraft leaving the court jurisdiction from time to time is insufficient to establish intent. Safe Air has also demonstrated that it is solvent and will not in any way fail to pay any sum should it be ordered to do so, thus, there is no basis for asking it to furnish the court with security.
28. On the production of copies of the applicable Insurance Policy Document, Certificate of Insurance and Cover Note for Aircraft, Safe Air has produced in its deposition, the ground cover insurance it took out for the Aircraft covering the period of the accident in November 2021. It cannot be ordered to produce what it does not possess. In any case, there is still an opportunity for fuller discovery once parties have exchanged pleadings.

Disposition

29. For the reasons I have set out above, the Plaintiff's application dated 14th February 2023 fails and is dismissed. The Defendant's application dated 18th May 2023 succeeds but only to the extent that now the ex parte orders issued on 16th May 2023 are discharged as a consequence of the dismissal of the Plaintiff's application.
30. The Plaintiff should bear half the costs of the Defendant's application.

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF JUNE 2023

D. S. MAJANJA



JUDGE

Court Assistant: Mr M. Onyango.

Mr Oloo instructed by Muthaura Mugambi Ayugi and Njonjo Advocates for the Plaintiff

Mr Omar instructed by Salim Omar and Company Advocates for the Defendant.

