



Finejet Limited v Five Forty Aviation Limited; East Africa Safaris Air Limited (Objector) (Civil Case 331 of 2011) [2023] KEHC 22038 (KLR) (Commercial & Admiralty) (4 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22038 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND ADMIRALTY
CIVIL CASE 331 OF 2011
JWW MONG'ARE, J
SEPTEMBER 4, 2023**

BETWEEN

FINEJET LIMITED PLAINTIFF

AND

FIVE FORTY AVIATION LIMITED DEFENDANT

AND

EAST AFRICA SAFARIS AIR LIMITED OBJECTOR

RULING

1. On 19th August 2021, the Applicant by a Notice of Motion filed under Section 1A, 1B, 3A and 34 of the [Civil Procedure Act](#) and the inherent powers of the court seeking the following orders:-
 - a. Spent
 - b. Spent
 - c. Spent
 - d. The Honourable Court to declare that the Aircraft No. 5Y-CGL serial number 479 does not belong to the Defendant/Applicant and cannot be attached or sold in execution of the decree herein.
 - e. The attachment of Aircraft 5Y-CGL serial Number 479 made on 2nd August 2021 be lifted immediately.
 - f. Costs of this application be provided for.



- g. Further or any other relief that the Honourable Court might deem fit to grant.
2. The application is supported on the grounds set on its face and by the affidavit of Donald Earle Smith sworn on 20th August 2021. On 19th August 2021, by a Notice of Motion brought under Sections 1A and 3A of the [Civil Procedure Act](#), Order 22 Rule 51 of the Civil for and behalf of East Africa Safaris Air Limited, the Objector herein, seeking the following orders:-
- a. Spent
- b. Spent
- c. That the attachment of Aircraft Registration 5Y-BUZ type: DHC-8-102 serial Number 235 attached by Nairobi Connection Services Limited conducted on 2nd August 2021 be lifted unconditionally.

The said application was supported on the grounds set on its face and the supporting affidavit of George Kivindyo the General Manager of the Objector sworn on 20th August 2021.

3. Both applications are opposed and the Plaintiff /decree holder filed grounds of opposition and an application dated 23rd September 2021 seeking leave to execute the decree before taxation. The said application is supported by an affidavit sworn by one John Kimani, a director of the Plaintiff on 23rd September 2021.
4. Parties filed written submissions and appeared before the court to highlight the same. The Defendant/ Applicant in the application filed on 19th August seeks to have the attachment of the Aircraft registered as 5Y-CGL-serial number 479 which was attachment pursuant to the execution warrants of the decree of the court emanating from the Judgment issued on 17th April 2020 for USD 512,894.93. Subsequently the decree holder instructed the Auctioneers firm of Nairobi Connection Service and the said auctioneers have proclaimed assorted goods including 2 Aircrafts Registrations Numbers 5Y-CGL and 5Y-BUZ on 2/8/2021 to satisfy the said judgment.
5. In opposing the attachment, the Defendant has argued that the Aircraft registered as 5Y-CGL serial number 479 has been leased from Avmax Aircraft Leasing who are the registered owners and that the Defendants are mere lessees and have no title to the same. In any event, the Defendant argues, even if the Aircraft belonged to the Defendants, the same is a tool of trade since the Defendants profession is operating an airline and included in the tools is an airline. The Defendant argues that Section 34 of the [Civil Procedure Act](#), preclude goods or items necessary for the performance of one's trade from attachment and that is the risk the Plaintiffs took when they contracted with the Defendant.
6. On its part the objectors are opposed to the attachment of the second Aircraft Registered as 5Y-BUZ Type DHC-8*102 Serial Number 253. Similarly, the objectors argue that they have since 15th September 2015 leased the said Aircraft from Avmax Aircraft Leasing and that they use the same to carry out its businesses in various regions within the country and that they stand to suffer irreparable loss if the attachment is not lifted. They urge the court to lift the said warrants of attachment.
7. In its grounds of opposition and the subsequent submissions thereto, the Plaintiff has urged the court to dismiss both applications and allow the attachment to proceed. The Plaintiff argues the two attached Aircraft belong to the Judgment Debtor as no registration or otherwise has been availed by either the Defendant or the Objector. Instead, both parties have attached letters as evidence of leasing agreements written by Kenya Civil Aviation Authority and without any explanation whatsoever as to the whereabouts of the actual registration documents to prove ownership. In any event, the letters from Kenya Civil Aviation Authority only make reference to a lease agreement without detailing which Aircraft the letter is in respect of. The Plaintiff argues that the letters from Kenya Civil Aviation



Authority availed by the Defendant and the Objector refer to a period of 12 months from the dates of the letters. One letter was issued in 2015 while the other was issued in 2017 and yet the attachment period was in 2021. These are two different time zones and therefore the Plaintiff argues that the said documents have no relevance whatsoever to the attached Aircrafts. The Plaintiff urges the court to allow the attachment to proceed noting that in opposing the attachment the judgment debtor makes no proposal on how it intends to clear the debt. Instead, the Defendant is inviting the court to find that the Plaintiff in contracting with the Defendant took a risk and it should be prepared to shoulder part of the same.

Analysis and Determination

8. After careful consideration of the pleadings by the parties and the subsequent submissions thereto and the oral highlights of the same I have identified one issue for determination to wit; “Whether the attachment of the proclaimed goods should be lifted”. Two arguments emerge from the application, one that the goods so attachment do not belong to the judgment debtor and the attachment should therefore be lifted.
9. In the argument put forth by the Defendant and the Objector, both allege that the property attached in the form of Aircrafts do not belong to them. They have exhibited letters from the Kenya Civil Aviation Authority that make reference to a lease agreement for each of the Aircrafts. Both Aircrafts are alleged to belong to a Canadian company known as Avmax Aircraft Leasing Company. Like all motorable vessels, Aircrafts are registrable chattels and there must exist a form of record keeping indicating the details of ownership of each Aircraft for identification and licensing. In this case, none has been produced and no affidavits have been exhibited in both applications from the Avmax Aircraft Leasing Company to whom the letters from Kenya Civil Aviation Authority make reference to.
10. Courts have held time and again that in any objection application brought under Order 22 of the Civil Procedure Rules, the onus is on the Applicant to prove indeed the attached goods belong to them and not the judgment debtor. This was held in the in the case of *Arun C. Sharma versus Ashana Raikundalia t/a A. Raikundalia & Co. Advocates & 4 others* [2014] eKLR where the court held as follows:-

“The objector bears the burden of proving that he is entitled to or has legal or equitable interest on the whole or part of the attached property. The key words are; entitled to or to have a legal or equitable interest in the whole or part of the property. Has the objector proved it is entitled to or to have a legal or equitable interest in the whole or part of any property attached in execution of a decree?”
11. Similarly in *Precast Portal Structures versus Kenya Pencil Company Ltd & 2 others* [1993] eKLR it was held:-

“The burden is on the objector to prove and establish his right to have the attached property released from the attachment. On the evidential material before the Court, a release from attachment may be made if the Court is satisfied.

 - (1) that the property was not, when attached, held by the judgement-debtor for himself, or by some other person in trust for the judgement-debtor; or
 - (2) that the objector holds that property on his own account.”
12. There is no explanation either from the Defendant or the Objector as to why the real owner of the attached Aircrafts could not provide necessary proof that the same belonged to it and neither were



any documents of ownership or the leases referred thereto availed. The court is left with only one conclusion that the goods so attached are the property of the Defendant/Judgment Debtor and are available for attachment in satisfaction of the judgment debt therein.

13. The second argument advanced by the Defendant was that the Aircrafts are tools of trade as envisioned under Section 44 of the *Civil Procedure Act* and are therefore necessary for the performance of the profession of the Defendant and not available for attachment. Section 44 of the *Civil Procedure Act* provides as follows:-

“Section 44; All property belonging to a judgment debtor, including property over which or over the profits of which he has a disposing power which he may exercise for his own benefit, whether that property is held in his name or in the name of another but on his behalf, shall be liable to attachment and sale in execution of a decree:-

Provided that the following shall not be liable to attachment or sale—

1. the necessary wearing apparel, cooking vessels, beds and bedding of the judgment-debtor and of his wife and children, and those personal ornaments from which, in accordance with religious usage, a woman cannot be parted;
 2. the tools and implements of a person necessary for the performance by him of his trade or profession;
 3. where the judgment-debtor is an agriculturalist—
 - a. the first ten thousand shillings in value of his livestock, if any; and
 - b. the first five thousand shillings in value of all implements, tools, utensils, plant and machinery used in connection with stock or dairy farming or in the production of crops or plants; and
 - c. the first one thousand shillings in value of agricultural produce necessary to enable him to earn his livelihood
14. I have considered the argument put forth by the Defendant that the Aircrafts are tools of trade necessary for the performance of his trade or profession. In my view, the Aircrafts so attached cannot be considered tools of trade necessary for the profession as an airline is a business and not a profession as envisioned by the *Civil Procedure Act*.
15. In conclusion therefore, I find and hold that the two applications by the Defendant and the Objector have not been proved to the required standard on a balance of probabilities. The same are hereby dismissed with costs to the Plaintiff/Decree Holder. The attachment in execution of the warrants herein can proceed to its logical conclusion. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 4TH DAY OF SEPTEMBER 2023.

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J. W. W. MONG'ARE
JUDGE

In the Presence of:-

1. Mr. Muganda for the Plaintiff/Respondent.



2. Mr. Mungu for Defendant/Applicant and holding brief for Ms. Khasira for the Objector.
3. Sylvia- Court Assistant

