



**Jubba Airways Limited v Largus Aviation AB (Commercial Case E344 of 2023)
[2023] KEHC 22239 (KLR) (Commercial and Tax) (15 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22239 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E344 OF 2023
DAS MAJANJA, J
SEPTEMBER 15, 2023**

BETWEEN

JUBBA AIRWAYS LIMITED PLAINTIFF

AND

LARGUS AVIATION AB DEFENDANT

RULING

Introduction and Background

1. On June 4, 2021, the Defendant (“Largus”) and Sahan Jet Limited (“Sahan”) entered into Lease/Purchase agreements for the purchase of Largus’ two used Fokker F50 Aircraft Manufacturer’s Serial Number 20124 (“Aircraft 20124”) and Fokker F27 Mkoso of Aircraft Manufacturer’s Serial Number 20125 (“Aircraft 20125”) respectively for the sum of USD 2,200,000.00 per Aircraft (“the Agreements”). The Agreements were varied when Sahan was substituted and the Plaintiff (“Jubba”) introduced as a sub-lessee on September 14, 2021 since it is the company that had the license for operations. It was a term of the Agreements that Sahan and Jubba would be entitled to a discount if they made early pay-offs for the Aircrafts between 12 and 18 months from delivery. Upon application, the parties were also issued with a Certificate of Registration dated September 22, 2021 by the regulator, Kenya Civil Aviation Authority (KCAA).
2. On July 16, 2022, Aircraft 20125 was declared a total loss after an accident and it is no longer in existence. On November 11, 2022, Largus signed, released and discharged Jubba from liability of the Aircraft 20125 upon payment of USD 2,350,000.00 being proceeds of insurance for the total loss of the Aircraft 20125.
3. By the Plaint dated August 4, 2023, Jubba filed suit claiming that as at the time of substitution, Sahan had made the initial payments amounting to USD 567,220.00 in respect of Aircraft 20125



and USD 567,221.00 in respect of Aircraft 20124 all totaling USD 1,134,441.00 and that at the time of assignment of the Agreements, the balance due to Largus on account of both Aircrafts was USD 3,265,559.00. It contends that it is on account of its contractual indebtedness to Largus and motivated by the discounts agreed upon in the Agreements that it authorised its insurer to pay the entire compensation of USD 2,350,000.00 to Largus.

4. Jubba avers that the payment of USD 2,350,000 together with the deposit of USD 1,134,441 within twelve (12) months from the date of handover entitled Jubba under Clause 5.13 of the Agreements to a total discount of USD 1,000,000.00 on both Aircraft on account of the Early Pay Off and that it has overpaid Largus by USD 84,440.00. That due to this, Jubba avers that it ought to have been granted the title to the Aircraft 20124, free and clear of Largus' liens and the lease terminated contemporaneously with the payments. Jubba accuses Largus of breach of contract and fraud as it has paid for the Aircraft but that Largus orchestrated the cancellation of the Certificate of Registration by KCAA on July 21, 2023 on the basis that it had rescinded the Agreement. It avers that since July 22, 2023, Aircraft 20124 has been wrongfully grounded and has been unable to service its routes and that it has written to Largus requesting it to reconsider its draconian decision to terminate the Agreement.
5. Jubba claims that prior to the cancellation of the Certificate of Registration, Largus applied for and the court declined to issue *ex parte* orders in its favour in High Court Commercial Suit No E317 of 2023; *Largus Aviation AB v Sahan Jet Limited*. Jubba's states that after it failed to secure any orders, Largus devised a scheme to frustrate Jubba through the administrative system of KCAA. Jubba attempted to resolve the issue with KCAA but it is unable to reconsider its decision on account of the wrongful termination of Agreement by Largus.
6. Jubba further claims that following revocation of its approval, Icon Aviation Limited terminated its sub-lease agreement with Jubba on July 28, 2023 and further sought USD 20,000,000.00 for the loss of contract. Further, that as a result of Largus' unlawful cancellation of Agreement, Jubba has lost income, aviation hull and liability insurance, airport parking charges and rehabilitation expenses all amounting to Kshs 20,069,850.00. That in addition to the special damages, Jubba claims a refund of USD 84,440.00 from Largus being the overpayment in respect of the purchase price paid within the early pay off period. Jubba thus seeks the following reliefs:
 - a. An order do issue compelling the Defendant to issue a Bill of Sale in respect of Aircraft Fokker F50 Aircraft Manufacturer's serial Number 20124.
 - b. A declaration that the cancellation of the Plaintiff's approval in respect of Aircraft Fokker F50 Aircraft Manufacturer's serial Number 20124 was unlawful and irregular.
 - c. A declaration that the action by the Defendant in terminating the Lease /Purchase Agreement with the Plaintiff was unfair, prejudicial and unlawful.
 - d. An order do issue to quash, annul and/or invalidate the Notice of Cancellation of Lease dated July 18, 2023 in respect of Aircraft Fokker F50 Aircraft Manufacturer's serial Number 20124.
 - e. A permanent injunction restraining the Defendant whether by itself, agents, servants or employees from selling, disposing of, charging, leasing or in any way interfering with the Plaintiff's proprietary rights over the aircraft Fokker F50 Aircraft Manufacturer's serial Number 20124.
 - f. An order directing the Defendant to pay the Plaintiff the sum of USD 20,000,000 as special damages for loss tabulated in paragraph 30 (a) above.



- g. An order directing the Defendant to pay the Plaintiff the sum of USD 69,850 per month from the date of filing, as special damages for items b-f tabulated in paragraph 30 above.
 - h. An order directing the Defendant to pay the Plaintiff the sum of USD 84,440 being the over payment in respect of the purchase priced paid within the early pay off period.
 - i. Interests at Court rate on f and g above from the date of filing until payment in full.
 - j. General damages for unlawful cancellation of the Plaintiff's approval in respect of Aircraft Fokker F50 Aircraft Manufacturer's serial Number 20124.
 - k. Exemplary and aggravated damages against the Defendant.
 - l. Costs of the suit.
7. Based on the aforesaid averments in the Plaint, Jubba has filed the Notice of Motion dated August 4, 2023 made, inter alia, under Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules seeking the following orders:
1. Spent
 2. Spent
 3. Spent
 4. Spent
 5. That pending the hearing and determination of this suit, this Honourable Court be pleased to issue an injunction restraining the Defendant/Respondent whether by itself, employees, agents and/or anyone acting on their authority from removing and relocating the Aircraft Fokker F50 Aircraft Manufacturer's Serial Number 20124 from the jurisdiction of this court to a third country.
 6. That pending the hearing and determination of this suit, this Honourable Court be pleased to issue an injunction restraining the Defendant/Respondent, whether by itself, employees, agents and/or anyone acting on their authority from selling, disposing off, charging, leasing or in anyway interfering with the Plaintiff/Applicant's rights over the Aircraft Fokker F50 Aircraft Manufacturer's Serial Number 20124.
 7. That pending the hearing and determination of this suit, this Honourable Court be pleased to issue an order restraining the Defendant/Respondent, whether by itself, employees, agents and/or any person or entity acting on their authority, from interfering with the Plaintiff/Applicant's operations, including but not limited to flight schedules and cargo handling, over the Aircraft Fokker F50 Aircraft Manufacturer's Serial Number 20124.
 8. That this Honourable Court be pleased to issue any other order or relief that the Court deems just, fair and expedient.
 9. That the costs of the Application be borne by the Defendants/Respondents.
8. This application is supported by the grounds set out on its face together with the supporting affidavit and further affidavit of Jubba's Asset Manager, Said Qailie, sworn on August 4, 2023 and August 23, 2023. It is opposed by Largus through the replying affidavit of its Asset Manager, Thomas Carlborg sworn August 18, 2023 and the Notice of Preliminary Objection dated August 21, 2023.
9. Jubba's case in its application is along the lines set out in its Plaint that I have already outlined above.



10. Largus opposes the application on the ground that it is sub-judice as there is a pending suit on the same subject being HCOMM No E317 of 2023. It states that Jubba is still indebted to it to the extent of USD 665,559.00 in respect of Aircraft 20124 and that since more than 24 months have passed, the debt is due and no discount is possible as per the clause 5.13 of the Agreement. Largus avers that it has already issued a Bill of Sale for Aircraft 20125 but that Aircraft 20124 has not yet been fully paid for and Jubba has not provided proof of payment in dispute in HCOMM E317 of 2023.
11. Largus states that the Agreements of the Aircrafts were different and Jubba computing the calculations as one is baffling as the insurance monies amounting to USD 2,350,000.00 was not part of the amount to be paid by Jubba for the debt owed for the Aircraft 20124. Largus contends that it has terminated the Agreement as Jubba failed to pay the stipulated instalments from July 28, 2022. That Jubba is in breach of the Agreement as it has also failed to adhere to the notice of termination and should return Aircraft 20124 in accordance with Clause 12.
12. Largus avers that it accommodated Jubba by amending the Agreement for Jubba to pay the initial payment of USD 500,000.00 in instalments but Jubba still defaulted. It also issued a discount via email dated June 20, 2023 but that Jubba failed to pay the arrears of USD 665,559.00 and is still indebted. Largus confirms that KCAA cancelled the operations of the Aircraft 20124 after it forwarded the termination notice to KCAA but that it was not responsible for the cancellation as KCAA as a statutory body has the right to cancel the operations of an aircraft which does not adhere to fair trading practices, aviation laws and regulations. That if Jubba felt so aggrieved by the decision of KCAA it would have challenged it before the National Civil Aviation Administrative Review Tribunal (NCAART).
13. Largus states that it terminated the Agreement for breach after issuing several reminders and notices by email to Jubba which failed to pay the arrears and adhere to the terms of the Agreement. Largus states that from 2021 when the Agreement was signed, it has suffered massive losses on account of the investments into the market which has brought its business to a halt. It reiterates that the application should be dismissed as Jubba has not produced evidence to prove that it has paid the arrears.

Analysis and Determination

14. Before dealing with the substance of the application, I propose to first deal with the issue raised by Largus that this suit upsets the doctrine of res subjudice on account of HCOMM No E0317 of 2023 pending in respect of the same subject matter. Section 6 of the *Civil Procedure Act* provides as follows on the issue of sub judice:

"No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."

15. The Supreme Court in *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* [2020] eKLR observed that, "[67] A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives."



16. Having considered the pleadings in HCOMM No E317 of 2023 (“the former suit”) alongside the aforementioned principles on doctrine of res subjudice, I am unable to agree with the contention by Largus for the following reasons. The parties in the former suit are Largus and Sahan, who are different from those in the present suit. In the former suit, Largus seeks payment of USD 1,683,251.00 which it claims is the balance due on the Aircraft 20124 from Sahan and claims that Sahan is in breach of the Agreement between them. This is in contrast with what it seeks in this case, which is USD 655,559.00 from Jubba. Largus does not mention or seek relief from Jubba in its pleadings in the former suit. As a result of the aforesaid matters, I hold that the doctrine of res subjudice does not apply to this suit.
17. Turning to the substance of the application, Jubba mainly seeks injunctive orders with respect to the Aircraft 20124. According to the principles settled in *Giella v Cassman Brown* [1973] EA 358, in order to succeed in its application, Jubba 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. Additionally, these three conditions are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially as was held by the Court of Appeal in *Nguruman Limited v Jane Bonde Nielsen and 2 Others* NRB CA Civil Appeal No 77 of 2012 [2014] eKLR. This means that if an applicant does not establish a prima facie case then irreparable injury and balance of convenience do not require consideration. On the other hand, if a prima facie case is established, then the court will consider the other conditions.
18. A prima facie case flows from what is pleaded in the Plaint, which I have highlighted in the introductory part. Jubba contends that it has overpaid for the Aircraft 20124 by USD 84,440.00 and that it is entitled to a discount of USD 500,000.00 since it made an early pay off for the Aircraft from the date of handover. As such, it avers that it is entitled to both possessory and proprietary ownership of the Aircraft 20124. At this stage, let me point out that the court is not required to conduct a mini trial but must nevertheless determine whether there is a prima facie case at least based on the material before it (see *Nguruman Limited v Jane Bonde Nielsen and 2 Others (Supra)*).
19. Reprising the arguments, Jubba states that before applying the early pay off discount and after applying the surplus insurance proceeds from Aircraft 20125, the balance for the Aircraft 20124 is USD 915,560.00. On its part, Largus contends that applying the amount paid by Sahan as Lessee and that of the insurance, the remaining debt is USD 665,559.00. Clause 5.13 of the Agreement provides in part that, “..Seller will give the following discounts. Pay-off within twelve (12) months from delivery US\$ 500,000 or Pay-off between twelve (12) and eighteen (18) months from delivery US\$ 250,000 and where Pay-off is more than eighteen (18) months from delivery No discount will be applicable”
20. Jubba contends that it was entitled to the aforesaid discounts as the insurance payment and the initial payment by Sahan was done within 12 months from the date of the delivery. However, Largus disputes this position by stating that more than 24 months have elapsed and the debt is still due. Further, that the insurance payment for the total loss of Aircraft 20125 was not in respect of both Aircraft but Aircraft 20125 and could not be used to offset part of Aircraft 20124 as they are subject to two separate Agreements.
21. I agree with the position taken by Largus as a reading of Clause 11.1 of the Agreement on the “Events of Loss” provides in part that “.....Upon the event of the receipt by the Lessor of the insurance proceeds in respect of the Total Loss.....Lessor shall deduct all remaining Rent and any other amounts payable by Lessee under this Agreement from the Lessor Total Loss Proceeds and immediately remit any additional remaining balance to Lessee...” It is evident that only surplus insurance proceeds in respect of that particular Agreement were payable to the Lessee. The Lessee could not use these proceeds to



offset the debt of another agreement as has been contended by Jubba. Therefore, even if I was to assume that Jubba was entitled to a discount of USD 500,000.00, it would still be indebted to Largus for a sum of at least USD 415,560.00. This means that the Aircraft 20124, at least on a prima facie basis, has not been paid for in full and thus, Jubba cannot claim its absolute possession and proprietorship. Since Jubba has not made full payment, let alone within 18 months from the date of delivery, no discounts were available to Jubba.

22. It is for the above reasons that I find that Jubba has not made out a prima facie case with a probability of success. Its quest for an injunction comes to a grinding halt in line with the dicta in *Nguruman Limited v Jane Bonde Nielsen and 2 Others (Supra)*. In any event, since Largus has already terminated the Agreement in accordance with its provisions, a temporary injunction is not available to Jubba. The only redress available to it is an award of damages for the alleged breach (see *Esso Kenya Ltd v Mark Makwata Okiya* KSM CA Civil Appeal No 69 of 1991 [1992] eKLR)

Disposition

23. I dismiss the Plaintiff's application dated August 4, 2023. The Plaintiff shall bear the Defendant's costs.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF SEPTEMBER 2023.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Ms Asli instructed by Ahmednasir Abdullahi Advocates LLP for the Plaintiff.

Ms Okoth instructed by Okello Okoth and Advocates LLP for the Defendant.

