



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCCC NO. 054 OF 2020

FRED BLACK INSURANCE BROKERS LIMITED..... PLAINTIFF

VERSUS

JETWAYS AIRLINES LIMITED..... DEFENDANT

RULING

1. The Plaintiff seeks attachment before Judgment for the sum of USD 245,009.03. The request is in the Notice of Motion dated 6th October 2020 whose substantive prayer is for the following order:-

“2. THAT a temporary injunction do issue against the Defendant/Respondent, its agents, servants, employees and/or any other third parties howsoever acting on the Defendant’s instructions restraining them from selling, transferring, leasing, pledging out as security to third parties, flying or removing the Defendant’s aircrafts known as Fokker 100 SY-SIA s/n 11307, Fokker 50 5Y – JWZ s/n 20208, Fokker 50 5Y JWX s/n 201209, Fokker 50 5Y JYK s/n 20233, Fokker 50 5Y SMX 20122, Fokker 50 5Y SMQ s/n 2020, Fokker Dash 8 – 200 5Y-JWD s/n 20202, Fokker 50 – Cargo 5Y-JWG s/n 20191, Fokker 50 – Cargo 5Y – JWB s/n 20197, Fokker 50 – Cargo 5Y – JWC s/n 20191 and Fokker 70 5Y – JWF s/n 11581 out of the country of Nairobi within the territory of the Republic of Kenya pending interparties hearing and determination of this suit.”

2. The main anchor for the Application is Order 39 Rule 5 of the Civil Procedure Rules which reads:-

“Where defendant may be called upon to furnish security for production of property.

5. (1) Where at any stage of a suit the court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him—

(a) is about to dispose of the whole or any part of his property;

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court, the court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the

disposal of the court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

(2) The plaintiff shall, unless the court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) The court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.”

3. Even if I was to find that the debt claimed is truly due from the Defendant to the Plaintiff, still I am disinclined to grant the order, in the circumstances of this suit, as to do so would be an antithesis of the object of Order 39 Rule 5.

4. Of that object, the Court of Appeal in **Kuria Kanyoko t/a Amigos Bar and Restaurant V Francis Kinuthia Nderu, Helen Njeru Nderu and Andrew Kinuthia Nderu (1988)2 KAR** observed:-

“The power to attach before judgment 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.”

Order 38 Rule 5 of the former Civil Procedure Rules is the current Order 39 Rule 5.

5. In an attempt to reach this threshold, the Plaintiff states the following as a ground in support of the Application:-

(2) THAT I am aware that the Defendant is the registered owner of aircrafts known as Fokker 100 SY-SIA s/n 11307, Fokker 50 5Y – JWZ s/n 20208, Fokker 50 5Y JWX s/n 201209, Fokker 50 5Y JYK s/n 20233, Fokker 50 5Y SMX 20122, Fokker 50 5Y SMQ s/n 2020, Fokker Dash 8 – 200 5Y-JWD s/n 20202, Fokker 50 – Cargo 5Y-JWG s/n 20191, Fokker 50 – Cargo 5Y – JWB s/n 20197, Fokker 50 – Cargo 5Y – JWC s/n 20191 and Fokker 70 5Y – JWF s/n 11581 which are currently situated in Nairobi awaiting air worthiness certification to enable the Defendant to fly the aircraft out of the country,”

Enclosed herewith is a true copy of the cover note No. FB/18158/ANN031218 produced as marked PD-1.

6. This is reiterated in the affidavit of Pernille Duckwort in support of the application.

7. Of the Aircrafts, the Defendant has provided proof that it is the registered owner of two aircrafts being Fokker 100 5Y SIA and Fokker 50 5Y JWF. The former is said to be grounded and the latter flies the Nairobi – Mogadishu route and is leased out. It states that the other are owned by various entities and are leased to it. In regard to these sets of aircrafts the Plaintiff retorts that even if not owned by the Defendant they are under the care, custody and control of the Defendant under lease or on lease purchase.

8. The onus is on the Applicant to provide cogent proof that the Defendant is about to dispose of its property or to remove it from the jurisdiction of the Court with intent to obstruct or delay any decree that may be passed against it. In this matter the Plaintiff simply states that there is a risk of the Defendant removing the assets from the jurisdiction of the Court. It is not, for instance, alleged and proved that the Defendant has reorganized its operations in such a way as to be a “flight risk”. The basis for the apprehension is neither explained nor elaborated and so remains just that, an apprehension. That is not enough to require an answer from the Defendant or to require the Defendant to furnish security.

9. The Notice of Motion dated 6th October 2020 fails to achieve the legal threshold of such applications and is dismissed with costs.

DATED, SIGNED AND DELIVERED IN COURT AT NAIROBI THIS 11TH DAY OF MAY 2021

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17TH April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

No appearance for the Plaintiff.

No appearance for the Defendant.