



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 360 OF 2004

INTERNATIONAL AIRCRAFT GROUP S.A.....PLAINTIFF

VERSUS

AIRWAY KENYA AVIATION LIMITED.....DEFENDANT

JUDGMENT

1. By way of an Amended Plaint dated **16th June 2005** the Plaintiff **INTERNATIONAL AIRCRAFT GROUP S.A** prayed for judgment against the Defendant as follows:-

a. Judgment for the Plaintiff against the Defendant for the sum of US\$ 523.787 together with interest thereon at the rate of 11% per annum calculated on monthly basis from February 2005 until payment in full.

b. A declaration that the Plaintiff is entitled to exercise its rights under the said Sale and Purchase Agreement and to terminate its obligation to sell the Aircraft to the Defendant.

c. A declaration that the Plaintiff is entitled to repossess and dispose of the Aircraft in accordance with the terms and conditions of the Sale and purchase Agreement.

d. A mandatory order compelling the Defendant to deliver up the Aircraft and Engines and spare parts to the Plaintiff in an airworthy condition together with all associated log books and records of the Aircraft and together with a Bill of sale made out in favour of the Plaintiff.

e. SPENT

f. Any other relief that the court deems just to grant.”

2. The Defendant **AIR KENYA AVIATION LIMITED** filed their amended Defence to the suit on **27th August 2005**. The hearing of the suit did not commence until **4th April 2019** at which hearing the Plaintiff called one (1) witness in support of their case. The Defendants despite having proper notice of the hearing date did not participate in the hearing and did not call any witness.

THE EVIDENCE

3. PW1 EDWARD WANJOHI MUGO opted to rely entirely on his witness statement dated **28th January 2019**. **PW1** told the court that he was the Plaintiff's Accountant and that he held a special Power of Attorney dated **7th May 2010** granting him authority to appear and testify on behalf of the Plaintiff in this suit. I note that a copy of the duly executed Special Power of Attorney appears at Pages 34-35, the Plaintiffs Bundle of documents filed on **28th January 2019**.

4. The evidence of **PW1** is as follows. By a Sale Agreement dated **30th January 2001** the Plaintiff offered to sell and the Defendant agreed to buy an Aircraft known as **De Haviland DHC -7-102 Serial No.032**, registered on the Yemen Register Civil Aircraft as **No.70 AC2** and registered in Kenya as **SY BPD** (hereinafter “**the aircraft**”) together with all appliances, instruments, systems, parts, components, equipment furnishings sand accessories installed on or appurtenant to the said Aircraft.

5. It was agreed that the Purchase price of the Aircraft was to be **USD 850,000**. Under the Agreement the Defendant was required to pay a deposit of **USD 200,000** to the Plaintiff as part payment immediately upon delivery of the Aircraft. The balance of **USD 650,000** was to be payable by the Defendant by 24 monthly installments together with interest thereon accruing at the rate of 11% per annum calculated on monthly breaks as from **1st March 2001**.

6. It was a term of the Sale Agreement that in order to secure the payment of the balance of the purchase price and interest thereon the Defendant agreed to have the Aircraft registered in Kenya in the joint names of the Plaintiff and the Defendant. Further it was agreed that Title to the Aircraft would at all times be with the Plaintiff except that upon delivery and acceptance of the Aircraft and payment of the deposit of the purchase price, title would pass from the Plaintiff and vest in the Defendant, subject to the Defendant paying the balance of the purchase price as agreed.

7. **Clause 15.2** of the Agreement provided that in the event of failure by the Defendant to pay the deposit or to take delivery of the aircraft or in event of failure by the Defendant to pay the purchase price when due, the Plaintiff would be entitled by notice in writing to the Defendant to terminate its obligation to sell the Aircraft to the Defendant and thereupon neither party would have any further claim against the other.

8. The Plaintiff states that it fulfilled all its obligations under the Sale Agreement and on **Thursday 30th January 2001** the Aircraft was duly delivered to the Defendant. The Defendant signed a Certificate of Acceptance.

9. However, the Plaintiff claims that the Defendant breached their Agreement by failing to pay the deposit of as a one off payment of **USD 200,000**. Instead the Defendant paid the Deposit by way of two (2) installments of **USD 100,000** paid on **13th February 2001** and **17th April 2001** respectively.

10. Consequently, the Plaintiff did not send to the Defendant the Bill of Sale to enable them register the aircraft in their joint names but instead agreed with the Defendant that the Bill of Sale would only be sent after the Defendant had completed payment of **USD 650,000** being the balance of the purchase price plus interest as per the Agreement. It is only upon full payment of this balance that the Defendant would be entitled to register the Aircraft in its own name.

11. Much to its surprise the Plaintiff subsequently discovered that the Defendant had without the Plaintiff's knowledge and consent improperly and unlawfully registered the Aircraft in its own name. That the Defendant also in breach of the Sale Agreement dated **30th January 2001** failed to pay the balance of the purchase price and/or to honour the monthly payments as agreed. The Plaintiff states that the Defendant only made sporadic and inconsistent payments and as at **May 2003** the Defendant owed the Plaintiff the sum of **USD 446,707** plus interest. That the Defendant failed to include the Plaintiff as a beneficiary in the Insurance Policy.

12. The Plaintiffs position is that in light of said breaches legal title to the Aircraft never passed to the Defendant and the Plaintiff is still the legal and beneficial owner of said aircraft. Despite Notices of Demand sent to it the Defendant has failed to make good its obligations under the Sale Agreement hence the Plaintiffs decision to file this present suit.

13. As stated earlier the Defendants filed an Amended Defence to the suit dated **27th August 2005**. In that defence it was contended that the amounts being claimed by the Plaintiff were far in excess of the amounts actually due to them if at all. Further the Defendant contended that the Sale Agreement did not confer upon the Plaintiff any power to repossess the aircraft. However the Defendant did not participate in the trial and did not call any witness.

14. At the close of the hearing parties were invited to file their written submissions. The Plaintiff filed its written submissions on **12th June 2019**. The Defendant did not file any submissions.

ANALYSIS AND DETERMINATION

15. I have carefully considered the evidence adduced before the court in this matter together with the written submissions filed by the Plaintiff. In all civil matters the burden of proof rests upon the party who asserts the existence of a fact or a set of facts. **Section 107** of the **Evidence Act** provides:-

“107 Burden of Proof

1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

16. The existence of the Agreement of Sale between the Plaintiff and the Defendant is not in any doubt nor was this fact been denied by the Defendant in its Amended Defence. Annexed to the Plaintiffs Bundle of Documents filed on **28th January 2019** at Pages 1-22 is a copy of the Aircraft Sale and Purchase Agreement dated **30th January 2001**. The Agreement is duly executed on behalf of both the seller and buyer.

17. It is trite law that parties will be bound by the four corners of an agreement voluntarily entered into. In the case of **TOTAL KENYA LTD VS JOSEPH OJIEM Nairobi HCCC NO.1243 OF 1999**, the Court held that:-

“Parties to a contract that they have entered into voluntarily are bound by its terms and conditions.”

18. The role of the court is to enforce the terms of such Contracts/Agreements. A court will not rewrite a contract between parties. In **NATIONAL BANK OF KENYA LTD –VS- PIPEPLASTIC SAMKOLIT (K) LTD & ANOTHER [2001]KLR 112** it was held:-

“A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved.”

19. The evidence adduced by **PW1** on behalf of the Plaintiff in this matter remains uncontroverted. The failure of the Defendant to call any evidence in the case means that its pleadings remain mere statement of fact which have not been substantiated at all. In **CMC AVIATION LTD –VS- CRUISAIR LTD (NO.1) [1978] KLR, Hon Justice Madan** (as he then was) stated as follows:-

“Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of “evidence” as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth.”[own emphasis]

20. Similarly in the case of **FRANCIS OTILE – VS - UGANDA MOTORS Kampala HCCS No.210 of 1989**, it was held that the court cannot be guided by pleadings since pleading are not evidence nor can they be a substitute therefore. The failure by the Defendants to adduce any evidence in this matter has consequences. In **AUTAR SINGH BAHBRA & Another –Vs- RAJU GOVINDJI HCCC 548 OF 1998** it was held:-

“Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st Plaintiff case stand unchallenged but also that the claims made by the Defendant in his Defence and counter-claim are unsubstantiated in the circumstances, the Counter-claim must fail.”

21. Likewise, in the case of **EDWARD MURIGA through STANLEY MURIGA –VS- NATHAN IEL D SCHULTER (Civil Appeal No.23 of 1997**, the Court of Appeal held thus:-

“In this matter, apart from filing its statement of defence the Defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st Plaintiff and that of the witnesses remain uncontroverted and the statement of defence therefore remains mere allegations.

22. On the other hand, I find that the Plaintiffs have adduced evidence sufficient support their case. As stated earlier a copy of the Agreement duly executed by the Defendant was availed to the court as an exhibit. At Pages 24-25 of the Plaintiff’s Bundle of Documents is a copy of the Statement of Accounts showing that as at **26th May 2003**, the balance outstanding on the agreed purchase price of **USD 850,000** was **USD 446,707**.

23. The Plaintiff’s allegation that the Defendants proceeded to register the aircraft in their own name notwithstanding its failure to clear the full purchase price, is proved by the **Certificate of Registration of Aircraft Certificate No.1861** issued on **16th July 2001** by the Director of Civil Aviation. This document appears at Page 23 of the Plaintiff’s Bundle of Documents and it shows the name of the owner of the Aircraft to be **AIRKENYA AVIATION LIMITED** the Defendant herein. Correspondence between the parties regarding the unpaid balance of the purchase price are evident in the e-mails appearing at Pages 27-31 of the Plaintiff’s Bundle. At Page 32 of the Plaintiff’s Bundle of Documents is a letter dated **22nd August 2003** by the Plaintiffs lawyers **Raffman Dhanji Elms & Virdee Advocates** giving the Defendant notice of the Termination by the Plaintiff of the Sale and Purchase Agreement dated **30th January 2001**.

24. In light of the several breaches by the Defendant of the terms of the Agreement. I find that the Plaintiffs were well within their rights to invoke **Clause 15.2** of the Agreement which provided:-

“15.2 If BUYER shall fail to satisfy the conditions set out in Section 12.1 on or prior to the Delivery Date, or shall fail to take delivery of the Aircraft by that dated in accordance with this Agreement, or shall fail to pay any part of the purchase price when due SELLER may by notice in writing terminate its obligation to sell the Aircraft to BUYER whereupon neither party shall have any further claim against the other.”

25. The Defendant having failed to pay the purchase price for the Aircraft in question cannot retain possession and use of said aircraft. As pointed out by the Plaintiffs in their written submissions filed on **12th June 2019** this particular point has previously been commented on by other Judges who have handled this suit.

Hon Mr Justice Ochieng” in his ruling on the Plaintiff’s Application dated **19th September 2005** for summary judgment or in the alternative for judgment on admission held as follows:-

“As the Hon Kasango J. has already found, in her ruling dated 29th September 2004, the Defendant was in breach of the agreement, by registering the aircraft in its own name, to the exclusion of the Plaintiff. Similarly, if the Defendant has not

paid the balance of the purchase price, it is in further breach of the agreement. That being the position, I cannot fathom how a party who is in breach of the terms of an agreement can seek to benefit from its said breaches.

If the Defendant were to be permitted to keep the aircraft without paying the balance of the purchase price, this court would have facilitated the unjust enrichment of a party who was in breach of an agreement. And I believe that this court cannot sanction a wrongdoing...”

26. I find no convincing reason and I have not been persuaded to deviate from the above findings made by my learned senior brother. Even if this court were to consider the Amended Defence filed by the Defendants, the Defence basically amounts to a mere denial. As **Justice Ochieng** in his ruling dated of **19th September 2005** referred to above stated:-

“By so doing, whereas I did find one triable issue, I am fully conscious of the possibility that I may have laid myself open to some criticism. I therefore find it necessary to explain that, a close scrutiny of the earlier part of this ruling should make it abundantly clear that in my considered view, there was no defence to the claims for the balance of the purchase price. Therefore, I found no justifiable reason to enable the Defendant to continue enjoying the possession and usage of the aircraft, for which it concedes having not paid the seller thereof.”

27. Similarly I find that the Defence on record does not in any way cast doubt on the Plaintiff’s case. From the evidence on record it has been proved on a balance of probability that the Agreement dated **30th January 2001** created a contractual relationship between the Plaintiff and the Defendant for the Sale and purchase of the Aircraft. It is clear that the Plaintiff delivered the said Aircraft to the Defendant after receiving **USD 200,000** as part payment towards the agreed purchase price of **USD 850,000**. It is evidence that the Defendant breached the Agreement by failing to clear the balance of the purchase price to the tune of **USD 523,787**.

28. On the question of interest Clause 3.2 of the Agreement provides as follows:-

“To secure the payment of the balance of the purchase price namely six Hundred and Fifty thousand (USD 650,000) together with interest accruing at 11% per annum on monthly breaks.”[own emphasis]

29. The Agreement entered into voluntarily between the parties clearly provides for an interest rate of 11% per annum on the outstanding balance of the purchase price. In **JANE WANJIKU EAMBUI –VS- ANTHONY KIGAMBA HATO & 3 OTHERS [2018] eKLR**, the Court held that:-

“...interest prior to the date of the suit is a matter of substantive law and is only claimable where under an agreement there is stipulation for the rate of interest (contractual rate of interest) or where there is no stipulation, but interest is allowed by mercantile usage (which must be pleaded and proved) or where there is statutory right to interest or where an agreement to pay interest can be implied from the course of dealing between the parties.” [own emphasis]

30. The Sale Agreement herein clearly stipulated a rate of interest which bound both parties to the Agreement. I find that the Plaintiff herein has been greatly prejudiced by the conduct of the Defendant. Accordingly I find that the Plaintiff is entitled to the sum claimed in the Plaintiff of **USD 523,787.00** as well as interest at the rate of 11% per annum (in accordance with the terms of the Agreement) calculated from **February 2005** until payment in full.

31. Finally, I am satisfied that the Plaintiff has proved its case to the standard required in law. Accordingly I make the following orders:-

1. Judgment be and is hereby entered for the Plaintiff against the Defendant for the sum of **USD 523,787** together with interest thereon at the rate of 11% per annum calculated on monthly basis from **February 2005** until payment in full.
2. A Declaration be and is hereby issued that the Plaintiff is entitled to exercise its rights under the Sale and Purchase Agreement and to terminate its obligations to sell the Aircraft to the Defendant.
3. A declaration be and is hereby issued that the Plaintiff is entitled to repossess and dispose of the Aircraft in accordance with the terms and conditions of the Sale and Purchase Agreement dated **30th January 2001**.
4. A mandatory Order is hereby issued compelling the Defendants to deliver up the Aircraft and engines and spare parts to the Plaintiff in an airworthy condition together with all associated log books and records of the aircraft and together with a Bill of Sale made out in favour of the Plaintiff.
5. Costs of this suit are awarded to the Plaintiff.

Dated in Nairobi this 7th day of July, 2020.

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Justice Maureen A. Odero