



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL & TAX DIVISION**

**HCCC NO. E 134 OF 2020**

**SILVERSTONE AIR SERVICES LIMITED.....PLAINTIFF**

**VERSUS**

**KENYA AEROSPACE LIMITED.....1<sup>ST</sup> DEFENDANT**

**JETWEST AIRLINES LIMITED.....2<sup>ND</sup> DEFENDANT**

**GARAM INVESTMENTS AUCTIONEERS.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. Silverstone Air Services Limited (Silverstone) is a Tenant at AIS Building and Hanger located at Wilson Airport. One of the issues the Trial Court will determine is who between Kenya Aerospace Limited (Kenya Aerospace) and Jetwest Airlines Limited (Jetwest) is the landlord of Silverstone.

2. For now, Silverstone maintains that it leased the premises from Jetwest through a lease agreement dated 1<sup>st</sup> July 2018.

3. What triggered the current proceedings is a proclamation by Garam Investment Auctioneers (Garam), on behalf of Kenya Aerospace, of assorted goods and aircrafts on 4<sup>th</sup> May 2020. Silverstone states it is the owner of assorted goods while the aircrafts belong to its clients and which were undergoing maintenance at the premises.

4. The grievance by Silverstone is that it does not owe any rent to Jetwest and that in any event no commercial or tenancy relationship exists between it and Aerospace.

5. In the main suit, it seeks the following orders:-

a) A permanent injunction restraining the Defendants, their servants, agents, employees or anybody working under their instructions from intimidating, closing, incarcerating, evicting or in any way interfering with the Plaintiff's business and peaceful occupation of the premises.

b) The cost of this suit.

c) Interest on (b) and at Court rates.

d) Any other relief the Honourable Court deems fit to grant.

6. At the time of filing the suit, Silverstone also filed an application for injunction dated 7<sup>th</sup> May 2020 in which it seeks for an order to restrain the Defendants from proclaiming/repossessing/destraining or auctioning the moveable property or in any way interfering with its peaceful conduct of business.

7. A similar order is to restrain the Defendant from intimidating, closing, evicting and/or interfering with its peaceful occupation of the premises.

8. Aerospace leased the premises to Jetwest through a Head of Terms dated 25<sup>th</sup> May 2018 and a further Head of Terms. From the first Head of Terms, the commencement date of the lease was 1<sup>st</sup> June 2018 and the second was 1<sup>st</sup> July 2018. A formal lease dated 24<sup>th</sup> July 2018 was then contracted but with a commencement date of 1<sup>st</sup> June 2018 (a date that had then passed).

9. The case by Aerospace is, that by virtue of the sublease, Jetwest assigned all its rights and obligations under the lease to the Silverstone and that Silverstone has been paying the rent. In this regard, a bundle of cheques, pay in slips and remittances drawn or made by Silverstone was shown to Court.

10. This is an application for injunction in which the Applicant, to be deserving of the orders, must meet the threshold set out in the case of Giella –vs- Cassman Brown( 1973) E.A 358;

- i. The applicant must show a prima facie case with a probability of success;
- ii. An injunction will not normally be granted unless the applicant might otherwise suffer irreparably injury;
- iii. When the court is in doubt, it will decide the application on the balance of convenience.

11. Aerospace levied the distress for rent under the provisions of the Distress for Rent Act (Cap 293). The statute has a raft of provisions on how distress for rent should be levied against a tenant or an under-tenant.

12. Parties take different positions as to whether Silverstone is a tenant or a sub-tenant of Aerospace and that will be determined in a full blown trial. However, this Court can make some observations on the material currently before it.

13. It is common ground that Aerospace, in writing, approved the sub-lease from Jetwest to Silverstone. Although Aerospace makes the point that the sub-lease is an assignment of the lease, it may not be so on the basis of the wording of the sub-lease as the obligations of Jetwest under the main lease remain with it.

14. If that was all to the matter, then the argument by Silverstone that it is not the tenant of Aerospace could carry the day.

15. Yet shown to Court are payments made directly by Silverstone to Aerospace. While it is the contention by Silverstone that these direct payments were made on directions of Jetwest and not in acknowledgment that it was a sub-tenant, Silverstone has not explained why it has on occasion held itself out as a Tenant of Aerospace.

16. Take for instance, the letter of 6<sup>th</sup> April 2020 in which Silverstone promises to secure a bank guarantee for the rent in respect to the premises. Take again, its letter of 2<sup>nd</sup> May 2019 which reads:-

*“2<sup>nd</sup> May 2019*

*Kenya Aerospace Limited,*

*Nairobi.*

*Dear Sir,*

*RE: SECOND QUARTER RENT PAYMENT*

*Reference is made to the above.*

*We are kindly requesting to be given time to pay for this quarters rent, we had already committed to making other payments.*

*We shall issue the cheques by the 17<sup>th</sup> of May 2019.*

*Thank you for your patience and understanding.*

*Yours faithfully,*

*Mohamed Ibrahim Somow*

*Managing Director”*

17. Of significance as well is the statement of David Odhiambo Ojwack made to the police. That Statement is attached to the supplementary affidavit of Mohamed Ibrahim Somow of 18<sup>th</sup> May 2020. He describes himself as the client operation officer of Silverstone, he states in part:-

“The guarantee documents had been presented by our landlord Aerospace company to honour deposit payment of U.S dollars 168,858.”

18. There is therefore a possible case for finding that, by conduct, Silverstone held itself out as a direct tenant of Aerospace inspite of the sub-lease. On that basis, Aerospace would be entitled to levy distress against Silverstone as a tenant in the event of default of rent.

19. Aerospace, as an alternative, asked this Court to find that it would still be entitled to levy distress against Silverstone even if Silverstone was treated as an under-tenant or sub-tenant. That distress can be levied on an under-tenant is inferred from the provisions under Section 19(1) of the Act:-

“(1) If a superior landlord levies, or authorizes to be levied, a distress on any furniture, goods or chattels of—

(a) an under-tenant liable to pay by equal instalments not less often than every quarter of a year a rent which would return in any whole year the full annual value of the premises or of such part thereof as is comprised in the under-tenancy; or

(b) a lodger; or

(c) any other person not being a tenant of the premises or of any part thereof, and not having any beneficial interest in any tenancy of the premises or of any part thereof, for arrears of rent due to the superior landlord by his immediate tenant, the undertenant, lodger or other person may serve the superior landlord, or the licensed auctioneer or other agent employed by him to levy distress, with a declaration in writing made by the under-tenant, lodger or other person, stating that the immediate tenant has no right of property or beneficial interest in the furniture, goods or chattels so distrained or threatened to be distrained upon, and that the furniture, goods or chattels are the property of or in the lawful possession of the undertenant, lodger or other person, and are not goods or livestock to which this section is expressed not to apply; and also, in the case of an under-tenant or lodger, stating the amount of rent (if any) then due to his immediate landlord, and the times at which future instalments of rent will become due, and the amount thereof, and containing an undertaking to pay to the superior landlord any rent so due or to become due to his immediate landlord, until the arrears of rent in respect of which the distress was levied or authorized to be levied have been paid off.”

20. I hear no answer from Silverstone in respect to that proposition and I accept the argument of Aerospace to be correct.

21. A second limb of the case for Silverstone is that it is not in arrears of rent. It states that it had a memorandum of understanding with Jetwest that it would lease aircrafts to the Jetwest and the same would be used to set off rent payable to Jetwest by Silverstone. What the Applicant failed to do is to display a copy of that memorandum of understanding.

22. It has not been demonstrated that Aerospace were not entitled to distress for rent. Still, the Applicant raises two issues in respect to how the distress was effected.

23. First, that the proclaimed aircrafts are owned by a third party and not Silverstone. Yet even if that was true, the chattels could only be exempted from distress if shown that they were delivered to Silverstone to be carried, wrought, worked up or managed in its trade. See Section 16(1) (d) of the Act. The Applicant did not produce any evidence, other than word of mouth that the Aircrafts were in its possession undergoing maintenance. It did not take up the opportunity to bring the goods within the exemption set out in Section 16.

24. It is true that the proclamation notices were addressed to Jetwest and not Silverstone. In those notices Jetwest is cited as the Debtor. The Applicant argues that the distress is wrongful.

25. The Court has found that on the material before it, Aerospace was entitled to levy distress against Silverstone regardless of whether or not it was a tenant or under-tenant. While the proclamation names Jetwest as a debtor, Silverstone’s case is that the property proclaimed either belongs to it or its clients. To that extent the proclamation targets the right debtor, i.e Silverstone. And it has to be repeated that in so far as Silverstone did not demonstrate that the property said to belong to its clients was its possession for maintenance (as alleged) or delivered to it to be carried, wrought, worked up or managed in its trade, the property was liable for distress.

26. The conclusion to be drawn is that the irregularity on the face of the proclamation is not fatal and does not go to the root or foundation of the process.

27. Unable to find that the Applicant has demonstrated a prima facie case with probability of success, the Application of 7<sup>th</sup> May 2020 falls for dismissal and it is hereby dismissed with costs.

**Dated, Signed and Delivered in Court at Nairobi this 21<sup>st</sup> Day of July 2020**

**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 17<sup>th</sup> April 2020, this Ruling has been delivered to the parties through virtual platform.

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

**Amanya for Plaintiff.**

**Chege Njoroge for 1<sup>st</sup> and 3<sup>rd</sup> Defendants**