



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)**

**COMMERCIAL AND TAX DIVISION**

**CIVIL CASE NO.E037 OF 2018**

**RUDUFU LIMITED.....PLAINTIFF**

**VERSUS**

**PT. TRANSNUSA AVIATION MANDIRI.....1<sup>ST</sup> DEFENDANT**

**DIVINE (K) CONNECTION LIMITED.....2<sup>ND</sup> DEFENDANT**

**KENYA CIVIL AVIATION AUTHORITY.....3<sup>RD</sup> DEFENDANT**

**FREEDOM AIRLINE EXPRESS LIMITED.....INTENDED INTERESTED PARTY**

**JUDGMENT**

1. The plaintiff through a plaint dated 14<sup>th</sup> June 2018 sued the defendants seeking the following orders:-

- a) An order of a Permanent Injunction do issue against the 1<sup>st</sup> Defendant restraining the 1<sup>st</sup> Defendant from transferring the ownership of the aircraft Fokker 50 Manufacture Serial Number 20260, Registration No. 5Y-JRN to the 2<sup>nd</sup> Defendant;
- b) An order of a Permanent Injunction do issue against the Defendants restraining the Defendants from dealing and/or transacting in any manner in the aircraft Fokker 50 Manufacturer Serial Number 20260, Registration No. 5Y-JRN to defeat or otherwise prejudice the Plaintiff's interests;
- c) An order of Specific performance do issue to the 1<sup>st</sup> Defendant to transfer the ownership of the aircraft Fokker 50 Manufacturer Serial Number 20260, Registration No. 5Y-JRN to the Plaintiff immediately upon payment of USD 170,000 by the 2<sup>nd</sup> Plaintiff to the 1<sup>st</sup> Defendant in settlement of the outstanding balance of the purchase price;
- d) The 3<sup>rd</sup> Defendant do hereby be ordered to lift any sanctions and/or orders grounding, restraining or hindering the use of the aircraft Fokker 50 Manufacturer Serial Number 20260, Registration No. 5Y-JRN by the 1<sup>st</sup> Plaintiff;
- e) Cost of the suit;
- f) Any other awards that this honourable court may deem just to award.

2. The 1<sup>st</sup> and 2<sup>nd</sup> defendants filed defence and counterclaim dated 4<sup>th</sup> December 2018 praying the plaintiff's suit against 1<sup>st</sup> and 2<sup>nd</sup> defendants be dismissed and judgment be entered in favour of the defendants in the counter claim as follows:-

- a) Payment of United States Dollars (USD) 240,000 to the 1<sup>st</sup> Defendant/Plaintiff being rent arrears from the Plaintiff/Defendant in counter claim.
- b) Interest of (a) above be charged as agreed in the lease at the rate of 2% per month from 18<sup>th</sup> March 2018 till paid in full.
- c) Payment of loss of user and business to the 2<sup>nd</sup> Defendant/Plaintiff in United States Dollars (USD) 4,266 per day since the Plaintiff/Defendant in counter claim issued a Court Order grounding the Aircraft on the 20<sup>th</sup> June 2018 till the day of lifting/vacating

it.

d) Depreciation of Aircraft at the rate of 20% per Month be provided for and charged to the Plaintiff/Defendant in counter claim in favour of 2<sup>nd</sup> Defendant/Plaintiff in counter claim.

e) Costs of the Applications and suit be provided for.

3. The plaintiff filed Reply to defence and counterclaim dated 5<sup>th</sup> December 2018 and prayed the counter claim be dismissed.

4. The Interested party was subsequently joined as an Interested party upon claiming interest over the subject matter.

5. The plaintiff herein entered into a purchase agreement through a letter of intent to purchase and finance dated 21<sup>st</sup> April 2016 with the 1<sup>st</sup> defendant for purchase of aircraft subject matter of the suit at the costs of **USD 1,050,000**, subsequently a lease-purchase agreement was entered into as between the plaintiff and the 1<sup>st</sup> defendant, followed by payment towards the lease purchase, which facts are not disputed, until when the plaintiff faced financial constraints, by which time the balance towards the purchase was **USD 220,000**.

6. The 2<sup>nd</sup> defendant meanwhile claim to have entered into an intention to purchase aircraft subject matter of the suit with 1<sup>st</sup> defendant and made a deposit of **USD 100,000**. The 2<sup>nd</sup> defendant failed to meet his obligation and the engagement failed, leading to seeking for a refund from the 1<sup>st</sup> defendant.

7. In the meanwhile, the interested party paid to the 1<sup>st</sup> defendant **USD 100,000** and entered into an agreement with the plaintiff to take up the balance and interest over the aircraft on the account of the plaintiff, however the arrangement did not materialize as the 2<sup>nd</sup> defendant filed a suit being Hccc No. 111 of 2018. The Interested party sought for a refund or in the alternative the said amount be on account of the plaintiff leaving an outstanding amount of **USD 930**. The 2<sup>nd</sup> defendant subsequently withdrew the suit No. Hccc 111 of 2018 and therefore forged a relationship with the 1<sup>st</sup> defendant.

#### **The Defendant's Case**

8. The 1<sup>st</sup> and 2<sup>nd</sup> defendants deny signing an Aircraft purchase lease agreement with the plaintiff and deny the allegation that the plaintiff was in possession of the aircraft. They contend that the amount quoted as purchase amount should be part of rent paid by the plaintiff for the use of the aircraft as per the lease agreement signed on 9<sup>th</sup> May 2016. It is further their contention that upon the plaintiffs default in paying rent is what prompted the cancellation and subsequent invocation of **IDERA** Rules to ground the aircraft and have it re-exported.

9. The defendants further have filed a counterclaim against the plaintiff where they seek payment of **USD 240,000** to the 1<sup>st</sup> Defendant/Plaintiff and interest thereon at the rate of 2%. The defendants contend further, that the 1<sup>st</sup> defendant and the plaintiff entered into a written lease agreement as a lessor and a lessee, submitting further the lessor had an option to purchase the Aircraft but did not qualify due to default in payment.

#### **Interested Party's Case**

10. The Interested party contention is, that he negotiated and agreed separately with the 1<sup>st</sup> defendant and the plaintiff to take over the plaintiff's remaining lease outstanding amount and pay the 1<sup>st</sup> defendant a sum of **USD 270,000** being the agreed balance of the purchase price plus penalty interest incurred by the plaintiff as a result of defaulting in making periodic payments, and to pay the plaintiff **USD 800,000** in consideration of the plaintiff's interest in the aircraft. Ultimately, the interested party was to acquire full ownership of the aircraft by paying off the plaintiff and the 1<sup>st</sup> defendant. It is contended by the interested party to this end, it deposited with 1<sup>st</sup> defendant a down payment of **USD 100,000** and balance was to be paid in a manner agreed by the parties and detailed in a letter of intent (**LO1**) to purchase the aircraft executed between the interested party and the 1<sup>st</sup> defendant.

11. It is the interested party's contention, that the situation went south when the 2<sup>nd</sup> defendant out of nowhere alleged, that it had earlier on intended to purchase the aircraft from the 1<sup>st</sup> defendant, however at its own behest cancelled the transaction and demanded a refund of USD 100,000 it had already paid but the same was never refunded. A civil suit case No.111 of 2018 was filed which in effect stopped the ongoing transaction between the plaintiff, the 1<sup>st</sup> defendant and the interested party.

12. That without involvement or notice to the plaintiff and interested party, the 1<sup>st</sup> and 2<sup>nd</sup> defendants settled the civil suit No. 111 of 2018 and commenced fresh negotiations to sell/purchase the said aircraft; notwithstanding having knowledge of the pending transaction between the plaintiff, the 1<sup>st</sup> defendant and the interested party. It is contended by the 1<sup>st</sup> Defendant, that the agreement between itself and the plaintiff was a mere lease and ownership of the aircraft did not pass to the plaintiff. The plaintiff and the interested party contend, that they brought forthwith the suit to permanently stop the effecting of fraudulent transaction and to protect their interest.

13. I have very carefully considered the pleadings, the parties oral evidence, counsel rival written submissions, the authorities relied upon, and from the above, arises the following issues for consideration:-

a) Whether the plaintiff and 1<sup>st</sup> defendant entered into valid contractual agreement?

b) Whether the interested party transacted with the rightful owners?

- c) Whether the 1<sup>st</sup> defendant refunded USD 100,000 to the interested party?
- d) Whether the 2<sup>nd</sup> defendant has authority to sue on behalf of the 1<sup>st</sup> defendant?
- e) Whether the 1<sup>st</sup> defendant is entitled to prayers sought in the counterclaim?
- f) Whether the plaintiff has shown commitment in paying the full purchase price of the aircraft?

**A) Whether the plaintiff and 1<sup>st</sup> defendant entered into valid contractual agreement?**

14. The plaintiff in support of its claim called two witnesses, whereas the defendants and the interested party called one witness each in support of their respective positions.

15. **PW1** Captain Simon Ngigi Kimani, a Pilot, as well as a director of the plaintiff company relied on his witness statement (**exhibit P-1**) as his evidence in chief and documents dated 14<sup>th</sup> June 2018 (**exhibit P-2**) and supplementary list of documents dated 18<sup>th</sup> July 2018 (**exhibit P-3**). **PW1** averred, that the 1<sup>st</sup> defendant sold the aircraft Forker 50 Serial No.20260 Kenya Registration No.5Y JR to the plaintiff for Kshs.105 Million equivalent to **USD 1,050,000** and both entered into an agreement to purchase the aircraft which is a lease to purchase the aircraft on 21/4/2016 and paid **USD 700,000** equivalent to Kshs.700, 000,000. He stated the total that **PW1** has paid is Kshs. 87,000,000. That when **PW1** was buying the aircraft it was at a place called Sura Baya. That he went and brought the aircraft to Kenya. **PW1** contend paying and leaving a balance of **USD 270,000**.

16. The 2<sup>nd</sup> defendant wanted to purchase the same aircraft a year after, and paid 1<sup>st</sup> defendant USD 100,000 equivalent to Kshs.10, 000,000 but the transaction did not materialize because the 2<sup>nd</sup> defendant could not raise the balance of the agreed purchase price.

17. **PW1**, upon facing financial challenging to raise the balance of USD 270,000, approached the interested party, who agreed to pay the balance of purchase price to the 1<sup>st</sup> defendant and paid **USD 100,000** to the 1<sup>st</sup> defendant.

18. In the instant suit, the plaintiff paid **USD 150,000** as initial deposit to **PT** Transnusa, which sum is not refundable, if final purchase documentation is executed. The sum has not been refunded by the 1<sup>st</sup> defendant, as it concedes the intention of both parties was to enter into lease-purchase agreement of the aircraft. It is imperative in matters concerning lease-purchase agreement of an aircraft to note, that the letter of intention is vital in such transactions as it provides; the identity of the parties; express understanding of basic terms of the contract-ad idem, the purchase price and deposit amount once execution of the purchase is made.

19. The letter of intention to purchase and finance lease on Fokker 50 dated 21<sup>st</sup> April 2016 clearly stipulates payment terms:-

**"Buyer agrees to pay the selling price above...."**

I find from the contents of the letter of intention primary intention of the parties was a sale. The parties executed an agreement knowing very well they intended to enter into binding agreement.

20. In the instant suit, the agreed purchase price of **USD 1,050,000** is not in contention nor is it disputed. Price as per section 10 of the sale of Goods Act Cap 31 Laws of Kenya is provided as follows:-

**"Price may be fixed by the contract, or may be left to be fixed in a manner thereby agreed or determined in the cause of dealing, between the parties. On the other hand consideration forms a vital part of any contractual agreement which is "an act or promise offered by one party and accepted by the other party as the price for the other promise."**

21. In the instant suit, the 1<sup>st</sup> defendant, the seller offered a particular aircraft with a fixed purchase price which the plaintiff accepted. The offer was specific and was not vague. The lease purchase agreement was executed by both the 1<sup>st</sup> defendant and the plaintiff and substantial part of the purchase price paid in terms of the agreement. In this matter parties made intentions through **Lo1** fixing the price later at **USD 1,050,000**.

22. In the instant suit, I find that lease purchase agreement dated 21<sup>st</sup> April 2016 entered into between the plaintiff and 1<sup>st</sup> defendant is not contested. The same has key elements which entails, the setter to transfer the property in goods to the buyer for money consideration thus the price. The two pillars of the purchase agreement are property and price. I find the two parties entered into a contract. I also find that as per **Lo1** the parties intention was to enter valid agreement. Considering the elements of the lease-purchase agreement entered into by the plaintiff and the 1<sup>st</sup> defendant herein, I find the lease-purchase agreement is a valid contract which binds both plaintiff and the 1<sup>st</sup> defendant herein.

**B) Whether the interested party transacted with the rightful owners?**

23. The interested party gave evidence as **I.W.1** and introduced himself as Mahad Abshir, a Captain and Director with Freedoms Airlines Express Limited. He testified that he was claiming **USD 100,000** paid to the 1<sup>st</sup> Defendant, as the interested party had intention to purchase the subject aircraft in this suit, when it was lying at the Wilson Airport; Nairobi Kenya. He testified that he first did due diligence and came to know it was jointly owned or registered in the name of two companies thus the 1<sup>st</sup> defendant and plaintiff, through obtaining certificate of Registration of aircraft from **KCAA**; which reflected the registered owners as **PT. Transnusa Aviation Mandiri** and **Rudufu Limited. I.W.1**,

testified, that they contacted the 1<sup>st</sup> defendant and he agreed to sell the aircraft at **USD 270,000** and contacted the plaintiff who agreed to pay **USD 800,000**. That it was agreed for interested party to pay the 1<sup>st</sup> defendant **USD 100,000** and the plaintiff to pay **USD 295,000**. That before payment in full the 2<sup>nd</sup> defendant approached them claiming he had interest in the aircraft, claiming to have paid **USD 100,000** and sued the plaintiff and interested party. **I.W.1** then cancelled the deal and send e-mail to the 1<sup>st</sup> defendant and asked for a refund; which 1<sup>st</sup> defendant opted to refund but to date has not done so. **I.W.1** produced letter of cancellation annexure **MHA-6**. **I.W.1** testified that he is interested in refund of **USD 100,000** and not the aircraft.

24. The defendant in this suit contend the lease agreement between the plaintiff and the 1<sup>st</sup> defendant was terminated. On termination the court draws grounds from clause 15.2.4 of the Aircraft Lease Agreement which required the 1<sup>st</sup> defendant to give a notice in writing to the plaintiff of an acceptance of repudiation and by notice to the plaintiff terminating the lease of the aircraft. In this suit no notice of termination was issued and served to the plaintiff, but instead the 1<sup>st</sup> defendant proceeded to negotiate and agreed with the interested party to take over the remainder of the lease with consent of the plaintiff. In view of the evidence on record and the absence of evidence in rebuttal, I find the lease-purchase between the plaintiff and 1<sup>st</sup> defendant has never terminated. The amount, that was to be paid by the interested party was the balance pending between the plaintiff and the 1<sup>st</sup> defendant plus penalty interest for default on part of the plaintiff.

25. In instant suit the interested party dealt with both the plaintiff and the 1<sup>st</sup> defendant, who has the interest over the aircraft as per the aircraft certificate of Registration of aircraft issued by **KCAA**. The interested party dealt with the registered owners of the aircraft and not strangers. I find a "*condition precedent*" in the **Lo1**, the interested party was required to acquire consent from the plaintiff, in recognition of the plaintiff's interest as the initial buyer. The plaintiff and interested party entered into an "Aircraft Purchase and Sale Agreement dated 8/3/2018, which recognized the interested party's right to buy the plaintiff's interest. The interested party would then acquire ownership of the aircraft at its market value of **USD 1,070,000**.

26. The 2<sup>nd</sup> defendant, gave evidence, though Boniface Kimani, who testified there was **Lo1** signed between the plaintiff and the 1<sup>st</sup> defendant (**exhibit D-2**). He urged the intention of **LO1** was not reached, urging there was another agreement between the two of 9/5/2016. The 2<sup>nd</sup> defendant averred the interest of the plaintiff was extinguished and aircraft purchased by the 2<sup>nd</sup> defendant from PT Panca Global Investindo, but the certificate of Registration of the aircraft do not reflect PT Panca Global Investindo as the registered owner of the aircraft, and without being not the registered owner, it had no aircraft to sell nor pass good title in the aircraft to the 2<sup>nd</sup> defendant. The 2<sup>nd</sup> defendant sought to rely on documents on pages 115-119 of the 1<sup>st</sup> and 2<sup>nd</sup> defendants, Bill of sale and on aircraft sale agreement, which the defendant urged constitute proof of ownership of the aircraft; however this court has taken note to the fact that **DW2**, in his evidence in chief stated he was given final document of Bill of Sale but the transfer was never effected. That though the documents were lodged for registration the said Registration was cancelled. I find without registration and transfer having been effected, the papers relied upon by the 2<sup>nd</sup> Defendant remain of no legal effect and do not pass title to an intended transferor.

27. In the case of **Merit Development Limited vs Lenana Investment Limited & 2 others [2018] eKLR** in the court *obiter* that: It was stated thus;

**"A party can only transfer what he owns. The above position gets credence from the Latin Maxim of Nemo dat quod non habet which means that one can only give what he or she has, or can only transfer what he or she owns. The above principle therefore means that a person who does not own property cannot confer it on another except with the true owner's authority."**

28. Under the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, a contract of sale is one which inter alia relates to an aircraft which the seller has power to dispose.

29. The Registration of the 1<sup>st</sup> defendant as owners of the aircraft subject of this suit, vests all rights in the aircraft to the 1<sup>st</sup> defendant to the exclusion of all others, and a party who is not registered as such remains a stranger with no capacity to pass any interest over the aircraft. The **PT Panca Global Investindo** having not been registered cannot in law be said to have any capacity to sale, lease or transfer the aircraft subject of this suit. Under **Article 29(1) of the Convention on international interests in mobile equipment** signed at Cape Town on 16<sup>th</sup> November 2001 it stated;

**"A registered interest has priority over any other interest subsequently registered and an unregistered interest."**

**Article 29(3) (a) further states that..." the buyer of an object acquires its interest in its subject to an interest registered at the time of its acquisition of that interest."**

**Therefore whatever interests PT PANCA GLOBAL INVESTINDO acquired being unregistered could not defeat the interests of the 1<sup>st</sup> Defendant as the registered owner, and those of the Plaintiff as the registered lessee."**

30. In addition to the above, it cannot be said that the 2<sup>nd</sup> defendant is an innocent purchaser for value without notice as contended by the 2<sup>nd</sup> defendant. He avers to have purchased the plane at **USD 270,000** notwithstanding, the value, that was to be paid by the interested party of **USD 1,070,000** and the plaintiff of **USD 1,050,000**. The 2<sup>nd</sup> defendant was aware of the plaintiff's and interested party's interest over the aircraft having introduced a claim against them in Cmcc 11 of 2018. He knew the aircraft value could not be **USD 270,000**. I find he had sufficient notice of the circumstances surrounding the transaction in existence between the 1<sup>st</sup> defendant, the plaintiff and interested party and as such it was not a bona fide purchaser. That if any sale took place between the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant, it was intended to defeat the plaintiff's and interested party's' interest and it is null and void *ab initio*.

31. In view of the above and considering the facts in this matter, I find that the interested party in transacting in this matter with the plaintiff

and 1<sup>st</sup> defendant, it did transact with the rightful owners of the aircraft subject of dispute in this matter.

**C) Whether the 1<sup>st</sup> defendant refunded USD 100,000 to the interested party?**

32. There is no dispute, that the interested party paid a sum of **USD 100,000** to the 1<sup>st</sup> defendant as a deposit towards the purchase of the aircraft subject of this suit upon agreeing with the plaintiff and 1<sup>st</sup> defendant to take over the transaction initially commenced between the plaintiff and 1<sup>st</sup> defendant. The interested party subsequently terminated the **LO1** between itself and the 1<sup>st</sup> defendant and sought refund of the said deposit. The 1<sup>st</sup> defendant offered to refund the said deposit, however there is contention on the refund.

33. In the e-mail of 3<sup>rd</sup> April 2018, the interested party's finance officer Mr. Abubakar Ahmed, communicated to the 1<sup>st</sup> Defendant the account number to which to remit the refund of the deposit to wit Standard Chartered Bank of Kenya **USD Account No. 8702027637600**.

34. I have considered the submissions over the above and very carefully considered the documents marked "**MHA-7**" and "**MHA-8**" in which "**MHA-7**" is a print out of the truthful communication between the interested party and the 1<sup>st</sup> defendant and "**MHA-8**" is a print out of the screen shot and a clear extract of the impugned e-mails changing the payment instructions. In comparison of the two it reveals the following differences:-

**"a) In a true/genuine email, the sender Mr. Abubakar's email reveals the sender by name followed by his email address i.e. "Abubakar" abubakar@freedomairexpress.com. In the impugned/fabricated email, his name is his email address followed again by his email address i.e. "abubakar@freedomairexpress.com" <abubakar@freedomairexpress.com>. The same difference appears for the parties in copy. Notably however, the recipient's (the 1<sup>st</sup> Defendant's director) email is consistent in both the true and the fabricated emails."**

35. The interested party gave evidence and denied receipt of the refund. It further testified that it sought to have the impugned emails forwarded to it but, that has never been done. The defendant did not offer any reason for failure to comply nor disclosed the source of the changed instructions. I find from the above the only reasonable conclusion for failure on part of the 1<sup>st</sup> defendant to controvert the interested party's claim is that the impugned emails never existed in the first place because in it is utterly impracticable to forward an email that does not exist. To further support this explanation, **I.W.1** testified its directors copied in the impugned emails had never received the emails.

36. Further to the above, the impugned email stated, that the money should be deposited in the Interested party's Barclays Bank Account in the United Kingdom. The Interested Party's witness, a director of the Interested Party, confirmed that the Interested party has never operated a bank account in the United Kingdom. As if that was not enough, the 1<sup>st</sup> Defendant did not present any one from the 1<sup>st</sup> Defendant Company to testify to the authenticity or truthfulness of the documents and emails.

37. Having considered the interested party's uncontroverted evidence, and observing the demeanor of **I.W.1**, I am satisfied the witness was sincere and honest and told the truth. I find therefore the interested party's deposit was never refunded by the 1<sup>st</sup> defendant and that the impugned emails and bank transfer forms supplied by the 1<sup>st</sup> defendant were meant to deprive the interested party its deposit and deceive it into believing the funds were refunded; when that was not the case.

**D) Whether the 2<sup>nd</sup> defendant has authority to sue on behalf of the 1<sup>st</sup> defendant?**

38. The 2<sup>nd</sup> defendant avers that it has authority to sue on behalf of the 1<sup>st</sup> defendant. The authority document is headed as follows:-

**"Authority to sue on behalf of Transnusa Aviation Mandiri".**

The 2<sup>nd</sup> defendant avers that by virtue of the document, Boniface Kimani of 2<sup>nd</sup> defendant has authority to sue on behalf of the 1<sup>st</sup> defendant. The authority states:-

**"We PT Transnusa Aviation Mandiri... hereby give authority to Boniface of Divine (K) Commercial Limited to swear a Replying affidavit in this matter on our behalf."**

39. Upon perusal of the authority the interested party submitted as follows;

**a) The authority is not dated and as such it is not clear to when it was issued.**

**b) The Authority is to swear a Replying Affidavit on behalf of the 1<sup>st</sup> Defendant.**

**c) The Authority is purportedly signed by Junenile Jodjana stated to be President Director of the 1<sup>st</sup> Defendant. The known President Director of the 1<sup>st</sup> Defendant is Juvenile Jodjana.**

40. In the instant suit, it is revealed as regards the pleadings. The 1<sup>st</sup> defendant instituted counterclaim. That the verifying affidavit is deponed by Boniface Kimani. The interested party submitted that the following should be noted:-

**a) The Authority to Boniface Kimani if at all valid is to sue and not to defend the suit against the 1<sup>st</sup> Defendant.**

**b) The Counterclaim is not accompanied by the verifying affidavit of an officer of the 1<sup>st</sup> Defendant. Boniface Kimani is not an officer of the 1<sup>st</sup> defendant.**

**c) The Deponent of the verifying affidavit to Counterclaim states he is the Plaintiff in the Counterclaim. He clearly is not.**

**d) The capacity in which the deponent of the verifying affidavit swears the said affidavit is not in relation to his position in the 1<sup>st</sup> or 2<sup>nd</sup> defendant.**

41. It should be noted the Civil Procedure Rules provides who should swear a verifying affidavit in a corporation. It provides under **Order 4 rule (4) of Civil Procedure Rules** as follows;

**"Where the plaintiff sues in a representative capacity the plaintiff shall state the capacity in which he sues and where the defendant is sued in a representative capacity the plaintiff shall state the capacity in which he is sued, and in both cases it shall be stated how that capacity arises."**

42. It is trite that an authority to act on behalf of a company has to be unambiguous and unequivocal as to the matter that it appertains to. The same should indicate the subject matter and be dated. I have very carefully considered the authority annexed by the 2<sup>nd</sup> defendant and the basis for purporting to be acting on behalf of the 1<sup>st</sup> defendant herein; I find the authority to be ambiguous and general and lacking the quality to vest any authority whatsoever to Mr. Boniface Kimani to either sue or defend on behalf of the 1<sup>st</sup> defendant. It is if acceptable as genuine, giving Mr. Boniface Kimani authority to only swear a Replying affidavit in this matter on behalf of the 1<sup>st</sup> defendant. In the 1<sup>st</sup> defendant's company Mr. Boniface Kimani is not a Director or Official and by law he cannot sign a verifying affidavit on behalf of the 1<sup>st</sup> defendant. Mr. Boniface Kimani, gave evidence as **DW1**, and did not bother to produce any letter or form of instructions in whatever form from the 1<sup>st</sup> defendant to him or 2<sup>nd</sup> defendant on the issue in this manner or with regard to representation in this suit. Secondly the defendants were not sued in the same capacity nor are prayers the same but distinct. Their defence ought to have been pleaded separately since the causes of action against them are different and separate.

43. In view of the above I find that the 2<sup>nd</sup> defendant has no authority to sue or defend the suit on behalf of the 1<sup>st</sup> defendant. The pleadings filed by the 2<sup>nd</sup> defendant on behalf of the 1<sup>st</sup> defendant are therefore null and void.

**E) Whether the 1<sup>st</sup> defendant is entitled to prayers sought in the counterclaim?**

44. The claim by the defendants in the counterclaim is a claim for special damages. It is trite, that a special claim must not only be specifically pleaded but has to be strictly proved. In the instant suit no evidence was adduced to strictly prove the special damages. No receipts or documents have been availed in their counterclaim for claim of **USD 240,000** by 1<sup>st</sup> defendant being rent arrears and interest of 2% per month from 18<sup>th</sup> March 2018 till payment in full; and also in the 2<sup>nd</sup> defendant claim of **USD 4266** per day for loss of business and rapid depreciation in value of the aircraft at a rate of 20% per month since the order before court to demonstrate there existed a claim of **USD 240,000** in arrears. The 1<sup>st</sup> defendant did not appear nor called any evidence in support of the claim. The 2<sup>nd</sup> defendant similarly did not call evidence in support of the loss of **USD 4266** per day. I find that the counterclaim is not proved. The claim by 1<sup>st</sup> defendant is null and void for want of authority to the 2<sup>nd</sup> defendant to institute the suit or defend the suit on behalf of the 1<sup>st</sup> defendant.

**F) Whether the plaintiff has shown commitment in paying the full purchase price of the aircraft?**

45. In this suit there is no dispute of the plaintiff having paid substantial part of the purchase price to the 1<sup>st</sup> defendant. The letter of intention and lease-purchase agreement provides for money to be paid in instalment and effective transfer be done when the lessee notifies the lessor. The principle of equity demand the equity looks at the intent rather than the favour. I have considered the parties intention and the intention of the plaintiff has been shown is to clear the remaining small balance so as to effect the transfer. I find as such the failure to honour the payment of purchase price should not entirely render the contract repudiated as the plaintiff anxious to settle the outstanding balance.

46. The upshot is that the plaintiff's suit is meritorious and the defendants counterclaim is without merit. I proceed to make the following orders;

**a) An order of a Permanent Injunction be and is HEREBY issued against the 1<sup>st</sup> Defendant restraining the 1<sup>st</sup> Defendant from transferring the ownership of the aircraft Fokker 50 Manufacture Serial Number 20260, Registration No. 5Y-JRN to the 2<sup>nd</sup> Defendant;**

**b) An order of a Permanent Injunction be and is HEREBY issued against the Defendants restraining the Defendants from dealing and/or transacting in any manner in the aircraft Fokker 50 Manufacturer Serial Number 20260, Registration No. 5Y-JRN to defeat or otherwise prejudice the Plaintiff's interests;**

**c) The 1<sup>st</sup> defendant do refund USD 100,000 to the Interested party or in the alternative to refunding USD 100,000 to the interested party, the 1<sup>st</sup> defendant do authorize the same to be added to Plaintiff's share of the amount already paid by the Plaintiff as part of the purchase price of aircraft to the 1<sup>st</sup> Defendant, and Plaintiff be allowed to complete payment of balance of the purchase price, and in that case 1<sup>st</sup> defendant be discharged from interested party's claim of USD 100,000.**

**d) An order of Specific performance be and is HEREBY issued to the 1<sup>st</sup> Defendant to transfer the ownership of the aircraft Fokker 50 Manufacturer Serial Number 20260, Registration No. 5Y-JRN to the Plaintiff immediately and upon payment of**

USD 170,000, (USD 270,000 less USD 100,000 paid by interested party if 1<sup>st</sup> defendant authorizes the sum to be paid as per order (c) above, in default of authorization the plaintiff to pay full balance of USD 270,000) to the 1<sup>st</sup> Defendant in settlement of the outstanding balance of the purchase price;

e) The 3<sup>rd</sup> Defendant be and is HEREBY ordered to lift any sanctions and/or orders grounding, restraining hindering the use of the aircraft Fokker 50 Manufacture Serial Number 20260; Registration No. 5Y-JRN by the plaintiff.

f) The 1<sup>st</sup> and 2<sup>nd</sup> Defendants counterclaim is dismissed; with costs to the plaintiff.

g) The Plaintiff and Interested party is awarded costs of the suit.

Dated, signed and delivered at Nairobi this 13<sup>th</sup> day of June, 2019.

J .A. MAKAU

JUDGE