



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & TAX DIVISION
CIVIL CASE NO. 56 OF 2019

MUA INSURANCE KENYA LIMITED.....PLAINTIFF

-VERSUS-

AEROSPACE CONSORTIUM INTERNATIONAL LTD.....DEFENDANT

ENCOMM LTD.....INTENDED INTERESTED PARTY/APPLICANT

RULING

By a notice of Motion Application dated 24th September 2019, brought under **section 1A, 1B, 3, 3A of the Civil procedure Act, cap21 of the laws of Kenya, order 40 rule 7, order 51 rule 1 of the Civil Procedure rules** and all enabling provisions of the law, the Applicant (herein **“the Intended Interested Party”**) sought orders;

- a. That Encomm Limited be enjoined to this suit as an Interested party;
- b. That this Honourable Court does discharge, vary and/or set aside the orders made on 11th February 2019 and varied on 27th February 2019 restraining the Defendant by themselves, their agents or servants from removing from the jurisdiction of this Honourable court, alienating, disposing of, selling, charging, transferring, leasing, mortgaging or in any other way whatsoever dealing with the aircraft of registration numbers **5Y –GME, 5YGMF, 5Y-GMG and 5Y-GMH** to the detriment of the Plaintiff during the pendency of the application for injunction;
- c. That the costs of this application be provided for.

The application was based on grounds;

1. It was not clear from the court record when the injunctive order was obtained but on 27th February 2019 when parties appeared for hearing of the injunction application inter partes, the court ordered that the prayer for injunction be amended/rectified to read that the said aeroplanes **5Y-GME, 5YGMF, 5Y-GMG and 5Y-GMH** (hereafter **“the Aircraft”**) shall be used for regular business of the company and shall not be disposed of by sale, lease or any other way during pendency of the application for injunction.
2. When parties appeared in court for further hearing of the application for injunction on 4th April 2019, they sought more time to attempt an out of court settlement. The matter was therefore deferred to 27th May 2019 for parties to inform the court on the progress of the out of court

negotiations.

3. The Plaintiff filed an application dated 24th May 2019 seeking for judgment to be entered against the Defendant on admission. The application came up for directions on 27th May 2019 and the Defendant sought, and was granted, leave to file a response to the said application within 14 days. The court directed that thereafter parties would file and exchange written submissions on the application and appear for oral highlighting of the submissions on 9th July 2019.

4. The Intended Interested party only became aware of the proceedings before this court when it was served with a letter dated 17th June 2019 from the Plaintiff's advocates on record herein notifying them of the proceedings.

REPLYING AFFIDAVIT

Mr. Johnston Mualuko, Head of Finance Operations for the Plaintiff swore a Replying Affidavit dated 11th October 2019, in response and in opposition to the application seeking orders for;

- a. The Intended Interested Party to be enjoined to this suit;
- b. This Honourable Court does discharge, vary and/or set aside the orders made on 27th February 2019 restraining the Defendant by themselves, their agents or servants from removing from the jurisdiction of this Honourable court, alienating, disposing of, selling, charging, transferring, leasing, mortgaging or in any other way whatsoever dealing with the aircraft of registration numbers **5Y –GME, 5YGME, 5Y-GMG and 5Y-GMH** to the detriment of the Plaintiff during the pendency of the application for injunction; and
- c. The costs of the Application be provided for.

He avers that the application is incompetent and ought to be struck out on the grounds that the Supporting Affidavit sworn by Jackton Obuola was purportedly taken out before the Commissioner for Oaths was a scanned copy and defective under **Section 5 of the Oaths and Statutory Declarations Act**.

In response to the factual background set out at **paragraph 4 to 10** of the Supporting Affidavit, he submits that the interim orders were issued by this Court on 27th February 2019 on the condition that the Defendant is allowed to carry on its regular business. No orders were varied as alleged by the Intended Interested Party.

In response to **paragraph 11** of the Supporting Affidavit, he states that the letter of 17th June 2019 to the Intended Interested Party and the financiers was issued in good faith to notify them that the insurance cover had been cancelled and of these instant proceedings.

In response to **paragraph 17** of the Supporting Affidavit, the temporary injunctive orders ought not to be set aside, varied or discharged on the grounds that;

- a. The Defendant is in breach and in the absence of the lease agreement this Honourable Court is unable to conclusively determine whether the Defendant can deal with the aircraft in a way which would jeopardise the interest of the plaintiff.
- b. The Intended Interested party has failed to demonstrate how the specific injunctive orders issued against the Defendant has caused or will cause it to suffer loss which would necessitate a discharge or variation of the temporary injunctive orders.
- c. The Intended Interested Party has also failed to demonstrate that it cannot be compensated adequately by the Defendant for any harm it shall suffer if the temporary injunctive continue to remain in place.

d. In light of the Defendant's breach, it is necessary that the temporary injunctive orders remain in place.

FURTHER AFFIDAVIT

The Replying Affidavit dated 11th October 2019, sworn by Johnston Mualuko was opposed vide a Further Affidavit dated 1st November 2019, sworn by Jackton Obuola the Managing Director of the Intended Interested Party (herein "**the Encomm Limited**").

He stated in response that the Plaintiff has not adduced evidence to dispute Encomm's ownership of aircraft registration number **5Y- GME, 5YGMF, 5Y-GMG and 5Y-GMH** (hereinafter referred to as "**the Aircraft**") which fact constitutes material grounds for Encomm Limited to be enjoined as an Interested party in this suit as any order issued against the said Aircraft automatically effects Encomm's Interest as the owner of the Aircraft.

In response to paragraph 4 of the Replying Affidavit, he stated that the supporting Affidavit sworn on 24th September 2019 complies with the provisions of **Section 5** of the **Oaths and Statutory Declarations Act** as he took it before a Commissioner for Oaths and the Commissioner duly endorsed his signature, date and official stamp showing the place the affidavit was made in accordance with the stipulations of the law.

In response to paragraph 6 of the Replying Affidavit, he averred that on the basis of good faith and respect for the rule of law, they relied on the contents of the letter by the Plaintiff's advocates dated 17th June 2019 notifying Encomm and the financiers not only of these court proceedings but also of the existence of temporary injunctive orders issued against the Aircraft on 27th February 2019.

In further response to paragraph 6 of the Replying Affidavit, he averred that the Plaintiff has acted in utmost bad faith in the guise of notifying third parties of proceedings before this Court for the following reasons;

- a. The Plaintiff knowingly chose to write to Encomm's financiers directly despite not being privy to any contract with them, notifying them of the interim order of injunction and unfounded and/or false allegations of the Aircraft being grounded without seeking clarification from Encomm.
- b. This false and unfounded information was made to the financiers intentionally with the aim of inducing breach of contract between Encomm and the financiers for reasons only known to the plaintiff.
- c. This false and unfounded information has caused Encomm a lot of distress and uncertainty with the financiers and other third parties who have an interest in the Aircraft either as mortgagee guarantors to secure the obligation to repay the purchase price of the Aircraft.
- d. This false and unfounded information was made despite the Plaintiff knowing that Encomm is not privy to the Insurance Premium Financing Agreement (hereafter "**IPF Agreement**") between the Defendant and Commercial Bank of Africa (hereafter "CBA") on the one part and the Plaintiff as the guarantor on the other part. This is a normal loan recoverable from the defaulter based on the contractual arrangement between parties privy to the IPF Agreement and only free property of the defaulter can be subject of an injunction or any other court process to secure repayment of the debt owed and ultimately execution to recover the judgment sum.
- e. The Plaintiff is aware that the Aircraft are not listed or used as a form of security in the said **IPF Agreement** for them to be the subject of the injunctive order or court process in the manner it was instituted.
- f. The Plaintiff is using illegal and unlawful methods in a bid to enforce payment of an alleged debt

at the risk of including breach of third parties' contracts with far greater ramifications and at the expense of innocent parties who are not privy to the IPF Agreement.

DETERMINATION

- 1. The issues are whether the intended/ interested party should be joined as a party to these proceedings**
- 2. Whether the orders of interim injunction as amended and granted on 27th February 2019 should be set side, varied or amended?**

The intended interested party established that they are owners of the subject aircrafts **5Y- GME, 5YGME, 5Y-GMG and 5Y-GMH** and the Defendant leased these aircrafts from them. The Applicant intended/interested party annexed Aircraft Warrant bill of Sale of the 4 aircrafts annexed and marked **JO- 3 Pg 11-22** to its application.

The Intended interested party also annexed documents marked **JO-4 Pg 24** of its application.

The defendant did not object to the instant application to have the intended/interested party to join these proceedings and did not file any documents in support or against the application. However, during oral submissions Counsel for the defendant supported the Applicant's application.

The Plaintiff objected to the application on form; the Supporting affidavit said to be a scanned copy and it did not comply with **Section 5 of the Oaths and Statutory Declarations**. To this The Court relies on the following provisions that essentially mandate reliance on the substantive matter for determination and not the technicalities.

The relevant provisions are;

Article 159 (d) COK 2010 which prescribes that; **"justice shall be administered without undue regard to procedural technicalities"**;

Order 51 Rule 10 CPR 2010 that provides; **"No application shall be defeated on a technicality or for want of form that does not affect the substance of the application"**

The Plaintiff's objection is that the Defendant took out an Insurance cover the aircrafts which was the subject of the insurance premium financing agreement. This being the Plaintiff's statement of claim, the intended interested party is a stranger to the insurance premium financing agreement. The notice to sue was issued to the contracting party the Defendant.

The Defendant was/is aware of the true status of ownership of the aircrafts and did not fully disclose these pertinent facts in its Replying Affidavit of 4th March 2019. Further, the Defendant did not /has not filed the lease agreement between the defendant and the intended interested party.

From the above submissions, this Court finds as follows;

In **HCCC100 of 2016 Yusuf Abdi Adan & Bluebird vs Hussein Ahmed Farah, Hussein Unshur Mohammed, Mohammed Abdikadir Adan & Mohammed Hassan**; the Court held as follows;

"The Civil Procedure is silent on the concept of interested party except under Order 41 Rule 45 CPR 2010. In Constitution of Kenya (Protection of Rights & Fundamental Freedoms) Practice and Procedure Rules 2013 defines interested party as;

"a person or an entity that has an identifiable stake or legal interest or duty in the proceedings and may not be directly involved in the litigation"

Secondly, the Court invited reliance on **Articles 22(1), 48 & 50 (1) COK 2010** to confirm the right of any person to file a matter in Court, a person's right to access justice and right to fair hearing. These provisions provide an interested party's right to participate in proceedings as one who is closely connected to the proceedings, who has a recognizable stake, one whose Court orders in the proceedings would adversely impact/affect the intended interested party and one whose presence would aid the Court render complete resolution of the dispute.

In the instant case, the intended interested party has established ownership of the aircrafts that are the subject of the dispute the contested IPF agreement is on insurance for Aircrafts that prima facie belong to the intended interested party. The breach of an insurance premium financing **IPF** agreement is guaranteed by the Plaintiff who is obligated to pay **CBA** bank with interest and penalties.

This Court is persuaded by the documents annexed by the intended interested party **Pg 11-23** annexures to the application that they own the aircrafts and have a stake, *locus standi* and sufficient interest in the matter and are hereby joined as interested party to these proceedings.

On the 2nd limb of the application with regard to the interim orders granted by this Court; now that the intended interested party has been joined to these proceedings the parties may take up the issue and address the Court formally on the variance, setting aside of the orders of 27th February 2019 as they were granted in their absence and without taking into account the intended Interested party's claim. A party cannot have *locus standi* to formally address the Court unless and until they are properly enjoined as a party to the proceedings.

DISPOSITION

- 1. The application of 24th September 2019 is granted with regard to Prayer 1 and the intended interested party ENCOMM LIMITED is hereby joined as party to these proceedings.**
- 2. The parties/Counsel to pursue the 2nd prayer of discharging /varying /setting aside orders of interim injunction of 27th February 2019 and/or the hearing of the pending application of judgment on admission on a date agreed on by parties.**
- 3. Each party to bear its own costs.**

DELIVERED SIGNED & DATED IN OPEN COURT ON 15TH NOVEMBER 2019.

M.W.MUIGAI

JUDGE

Mr. Omollo H/b Ms. Mulindi For The Plaintiff

Mr. Ndungu For The Defendant

Mr. Ndungu H/b Mr. Muthiri For Intended Interested Party/applicant

MS JASMINE – COURT ASSISTANT