**REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL AND TAX DIVISION**

**CIVIL SUIT NO. 397 OF 2011**

**NORDIC AVIATION CAPITAL A/S.....PLAINTIFF**

**VS.**

**WESTERN AIRWAYS LIMITED….....1ST DEFENDANT**

**DOUGLAS ODHIAMBO.....2ND DEFENDANT**

**JUDGEMENT**

1. Nordic Aviation Capital A/S (Nordic) brings this suit on the basis of an alleged Lease Agreement in respect to an Aircraft to Western Airways Limited (Western) in which Douglas Odhiambo (Odhiambo) was said to be a surety. Douglas is a Director and Shareholder of Western.

2. Nordic was formerly known as Nordic Aviation Contractor A/S (Nordic Contractor) and is described as a Limited Liability Company incorporated under the Laws of Denmark. It has operations in Kenya and in the Plaint dated 5th September 2011 and presented in Court on 19th September 2011 it avers to be the owner of;

i. An Aircraft Cessna Caravan 208B Carvan Manufacturer Serial Number (MSN) 208B0239 and registered in Kenya as 5Y-BUR (thereafter the Aircraft).

ii. Aircraft Engine PT6A-114A.

iii. Propeller Serial Number 921613.

3. Nordic's case is that, by a Lease Agreement signed on 5th October 2006 (*by itself*) and 20th November 2006 *(by Western*), it leased the Aircraft to Western for a period of 72 months from 1st December 2006 to 30th November 2013. A point of contention however is the nature of the Agreement because Western holds the position that it was an outright purchase and the Contract was a Lease Purchase Agreement.

4. Anyhow, the Agreement was subsequently amended four (4) times, the last being Amendment No.5 of 8th February 2008 granting a Lease Holiday to the Lessee for four (4) months and the Lease period extended to 1st July 2013.

5. Nordic alleges breach of Contract and by a Notice of 25th March 2011 it gave Western a Notice of Default and Lease Termination to the Lease under Section 17.2(b) of The General Terms & Conditions. The Claim by Nordic is for outstanding Lease payments due and owing as at 1st April 2011 being USD 1,034,122.47. In addition Nordic seeks USD 205,946.26 on account of recovery expenses.

6. In respect to Odhiambo, Nordic case is that he stood surety to the Agreement when he signed a Contract of Guaranty and Notarization on 20th November 2006 in which he agreed that, "with his entire estate, possessions and fortune" he took himself to be joint and severally liable for any commitment of Western as Lessee pursuant to the Lease Agreement.

7. Nordic seeks judgement against Western and Odhiambo jointly and severally as follows:-

a. The sum of United States Dollars One Million and Thirty Four Thousand, One Hundred and Twenty two (USD. 1,034,122.00).

b. The Sum of United States Dollars Two Hundred and Five Thousand Nine Hundred and Forty Six and Twenty Six Cents (USD.205,946.26) as recovery expenses to restoration and redelivery of the Aircraft under the Agreement.

c. Interest on sums due under and above at Court rates from 1st April 2011, till payment in full.

d. Interest on sum due under (b) at Court rates from 10th June 2011, till payment in full.

e. The sums awarded under (a) – (d) above be converted to Kenya Shillings at the applicable Exchange Rate published by the Central Bank of Kenya as at the judgement date.

f. Damages for Loss of Profit to be quantified.

g. Costs of this suit.

h. Such other further orders that this Honorable Court deems just and expedient to grant.

8. Western and Odhiambo filed separate Statements of Defence. Some aspects of their Defence overlap. Western denies having executed a Lease Agreement with Nordic and therefore breach and liability. It makes an alternative plea that it did agree, orally, to outrightly purchase the Aircraft in 2006 from Nordic Contractor for a sum of USD 1,400,000 upon which it paid USD 400,000.

9. The balance of the purchase price was not paid immediately as repairs had to be undertaken due to defects occasioned by a minor propeller accident to the Aircraft. As it was doing so, Nordic allegedly as a Successor to Nordic Contractor, unlawfully repossessed the Aircraft and sold it to a third party without its participation and authority.

10. Western sees illegality and fraud in the said sale and cites the following:-

i. Selling an Aircraft valued USD 1,200,000 for a paltry USD 500,000.

ii. Selling the Aircraft without its participation.

iii. Re-possessing the said Aircraft when the final payment was not due.

iv. Unlawfully terminating the verbal contract.

Western signaled that it would at an opportune time, after obtaining all relevant information and documents, lodge a Counter-claim against Nordic and Nordic Contractor.

11. In addition to matters taken up by Western, Odhiambo denied executing any legal Contract of Guarantee and Notarization on 20th November 2006. In respect to the Lease Agreement, he alleges that it was an intention which never came to fruition because:-

i. It never received a resolution by Western.

ii. It was never ratified by Western.

iii. It was never executed by Western.

iv. It was never authorized by Western.

v. It was not economical and beneficial to Western.

Finally Odhiambo averred that the claim was not maintainable in Law as there was no contractual relationship between the two and no privity of Contract existed between Nordic and himself.

12. From the Pleadings and Evidence tendered, the Court is called upon to determine the following issues:-

i. Did Nordic enter into a valid Contract with Western in respect to the Aircraft?

ii. If so what was the nature of the Contract?

iii. Is there a valid personal Guarantee by Odhiambo to take up all commitments of Western under the Contract?

iv. Was there breach of Contract by Nordic?

v. If so, are both Western and Odhiambo liable?

vi. If so, is Nordic entitled to the prayers sought?

This Court is keenly aware that, separately, in their respective submissions Counsel to the parties proposed certain issues for determination.

The Court has taken a view that some of those issues do not flow from the Pleadings or issues, if any, that may have been embraced for determination and are therefore outside the scope of the dispute as presented.

13. The fulcrum of Nordic's case is an Agreement of intituled "Lease Agreement between NAC Nordic Aviation Aircraft Contractor A/S and Western Aircraft Ltd" (executed by Nordic Contractor on 5th October 2006 and by Odhiambo on behalf of Western on 20th November 2006) and the subsequent amendments. Western denies that it executed the Lease Agreement.

14. In the original Agreement, the Lessee is named as Western Airways and on the execution page the following words appear,

> "As duly authorized signatories and with the approval of The Board of Directors of Western Airways Ltd (Lessee) have executed this Agreement by my initials on each of its parties and my signature on this *page*". In witness hereof this Agreement was made in duplicate on 20th November 2006 under these words is the name "Douglas Odhiambo" and a signature thereunder. The evidence by Pia Rosendahl (PW1) a witness for Nordic is that it was Odhiambo who signed the Agreement on behalf of Western and this was not controverted by Odhiambo (DW1) when he took the witness stand.

15. I take it that the Agreement was executed by Odhiambo who also initialed each of its pages including the execution page as vow that he was not only an authorized signatory but had the approval of the Board to execute the Agreement. On the basis of this statement, Nordic Contractors would be entitled to presume that Western had adhered to all internal procedures in respect to approvals and that manner in which execution was done had the authority of its Board of Directors.

16. It is true that in the original Agreement and the three (3) Amendments that followed on 5th March 2007, 8th February 2008 and 4th December 2006(?), Nordic Contractor is the Lessor. In its Defence Western refers to Nordic as "calling itself a Successor" of Nordic Contractor. Under clause 9.7 of the General Terms and Conditions, the Lessor (Nordic Contractor) was authorized to assign all and any of its rights under the Agreement as follows:-

> **"9.7 (b)Lessor may assign all or any of its rights under the Agreement and in the Aircraft provided that the lessor will in the case of an assignment other than by way of security have no further obligation under this Agreement following the assignment of all its rights under this Agreement but notwithstanding that assignment will remain entitled to the benefit of each indemnity under this Agreement. Lessee will comply with all other reasonable requests of lessor, its successors and assigns in respect of any such assignment. Lessor will promptly notify Lessee of any assignment.**
>
> **(c) If Lessor desires to effect a transfer of its rights and obligations under the Agreement, Lessee agrees to cooperate and take all such steps as Lessor may reasonably request to give the transferee the benefit of this Agreement".**

17. However the contents of the Letter of 25th March 2011 (Bundle page 53) seem to suggest that there was simply a change of name from "Nordic Contractor" to "Nordic" and so there was no assignment of the Lease. Certificate of Particulars of Nordic (page 56) shows that, Nordic Contractor is the secondary name of Nordic Capital; a suggestion that the two entities are one and the same. Importantly however, on Amendment NO.5 (page 99-102) "Nordic Aviation Capital A/S" is described as previously known as "NAC Nordic Aviation Contractor A/S" and this change is acknowledged by Western.

18. The conclusion to be drawn is that "Nordic Contractor" and "Nordic" are one and the same entity and this is the Lessor in the Contract which is the subject matter of the suit. Western gains nothing by trying to split hairs about this change of name when it recognizes it by executing Amendment NO.5.

19. The answer to the first issue is that there is a valid Contract between Nordic and Western in respect to the Aircraft. But what is the nature of the Contract?

20. Nordic asserts that it was a Lease Agreement with the Option to purchase. On the other hand Western submits that it was a Lease Purchase Agreement. It is argued by Western that in construing the nature of the Agreement, regard should be made not to what the agreement is called but what it is intended to be and cites the case of Abdul Jalil Yafai vs . Farid Jalil Mohamed [2015] eKLR in support of that position. Let me approach this question in that way.

21. Section 2 of The Terms Sheet of the Agreement is headed "structure & intention". It reads,

> **"Lessor is in the possession of an used aircraft- hereafter called the Aircraft-financed by financer. Lessee is desirous of leasing the Aircraft from Lessor while retaining an option to purchase. It is therefore the intention of this agreement- hereinafter called the agreement- to establish the structure, substance, procedures and conditions under which Lessee has taken on the Lease with a purchase option of the Aircraft."**

The spoken and unequivocal structure and intention is stated to be twofold:-

a. That Western is desirous of leasing the Aircraft from Nordic with an Option to purchase.

b. The Agreement was intended to facilitate the Structure, substance, procedures and condition of the Lease with a purchase option.

22. Section 13 of The Terms Sheet provides:-

**"For regulations concerning Purchase Option, also see General Terms and Conditions section 18**

**Lessee has an option to purchase the Aircraft at the last day of each month should Lessee elect to exercise the option to purchase the price shall be determined in accordance with Annex III, Purchase Option Plan."**

23. The above Provision of the Agreement favours the interpretation proposed by Nordic but Western sees it differently. Western makes reference to Section 13.2 and 18.3 of The General Terms and Conditions of the Agreement. Under Section 13.1 Western was required to maintain a policy or policies of Insurance Covers for the Aircraft from certain losses or damage. Section 13.2 specifies certain risks that the Insurance Policy or Policies must cover. It is under this latter Section that Western is sometimes referred to as a Buyer and Nordic as Lessor and Owner. This is much the same under Section 13.1 which are the terms on Delivery of the Aircraft.

24. Yet it has to be said in those very two Sections (13.1 and 31.2) the words lesee and Lessor appear.

25. No doubt however, Section 18 of The General Terms and Conditions on ownership is critical in understanding the real nature of the Agreement. But that Section must be read beginning with Section 13 of The Terms Sheet. Under the latter, Western was given an option to purchase the Aircraft at the last day of each month and if it exercised the option, the purchase price would be determined in accordance with Annex III. Annex III sets out the Purchase Option price at the end of each month assuming that the monthly lease instalments were paid when due. Thus the provisions of Section 18.3 and 18.4 which read:-

**"18.3 If Lessee has paid all Lease instalments and has duly performed all other obligations under the Agreement and any other Agreement between Lessor and Lessee, Lessor will at first request of Lessee make the necessary arrangements for the execution of the notarial deed of transfer in order to effect the sale and transfer the title to the Aircraft to Lessee. The Purchase price will be equal to the amount of the last Lease instalment.**

**18.4 Upon giving one month prior notice to Lessor, Lessee will have the option to purchase and acquire ownership of the Aircraft at the end of each month by payment of the Total amount of**

**a. The Purchase Option Price (Annex III) of the Aircraft at the time of Early termination; plus**

**b. The costs of Lessor because of the Early termination (5% of Purchase Option Price at the time of Early Termination); plus**

**c. Any other amount owed to Lessor at the time of payment Less the sum of I and II below**

**I. Any unused amount accumulated in the Maintenance Reserves Account pertaining to the Aircraft;**

**II. Any unused amount of the Aircraft Lease Deposit."**

26. The Courts construction of the arrangement is that:-

a. Title is transferred from the Lessor to the Lessee once the Lessee has paid all lease installments over the period of the contracted period.

b. However the Lessee need not wait to the end of the period and can seek early termination of the lease and pre-pay the entire balance with some penalty. This is the purport of Section 18.4.

27. I would think that where the lease runs its entire life and agreed monthly instalments are duly paid, the purchase happens upon the payment of the last lease installment. In the second scenario the purchase happens when the entire balance and the agreed pre-payment penalty is paid. Yet before the purchase happens the arrangement is a lease. In both cases Transfer of title can only be effected upon a successful purchase.

28. Counsel for Western argued with some force that in paying Lease Purchase instalments, the Lessee is building Equity in the Aircraft and makes reference to a book by an Author Christopher Boobyer (Leasing and Asset Finance; "*The Comprehensive Guide for Practitioners"*). It is then submitted that any sale of the Aircraft and recovery of debt should take into account and specifically catered for the interests of the Lessee through the built up equity accrued from the already paid monthly installments.

29. I must say that, however attractive the argument of Western may be, it has to come to naught because of Western's own Defence. Although it had stated its intention to lodge a Counter-claim, Western never followed through that intention with an amendment nor did it plead a set-off.

30. On the question as to whether Odhiambo executed a valid personal guarantee to underwrite the commitments of Western under the Agreement, Odhiambo has blown hot and cold. In his Defence he states as follows:

**"The 2nd Defendant denies executing any legal Contract of Guarantee and Notarization with anybody on the 20th November 2006 regarding the subject matter of this suit and puts the Plaintiff to very strict proof of any allegation to the contrary".**

31. Nordic relies on the contract of Guaranty and Notarization which is part of the Agreement as containing the Guarantee. It reads:-

> **"I the undersigned, being one of the owners of Western Airways Ltd with my entire estate, possessions and fortune hereby take upon myself to be joint and severally liable for any commitment of lessee pursuant to Lease agreement. This statement is made unconditionally and to the fullest legally enforceable sense of the Law."**

The word Guaranty is a variant form of guarantee. The words used in Contract of Guaranty do not brook an ambiguity that it is a Guarantee and that Odhiambo was a surety to the commitments of Western pursuant to the Lease Agreement.

32. Perhaps well aware of this, there was a shift in positon and Counsel for Odhiambo submitted,

> "It is of no contestation that an alleged '*document of guarantee*' was signed and executed by the Plaintiff and the 2nd Defendant".

33. They raises two matters which were not pleaded. One came up after the close of the Plaintiff's case and the other only at submissions. It was argued that as the document was only signed by Odhiambo and not Nordic it could not be the basis of a claim. This would be in terms of Section 3(2) of The Law of Contract Act which reads:-

> "No suit shall be brought whereby to charge any person upon on by reason of any representation on assurance made or given concerning or relating to the character conduct, creditability, trade or dealings of any other person to the interest or purpose that such other person may obtain credit, money or goods unless such representation or assurance is made in writing, signed by the party to be charged herewith".

34. Secondly that because the original Contract was varied by the Amendments, the surety was discharged from the Contract.

35. These two issues are in the nature of issues that needed to be pleaded in the Defence but were not. Regard is given to the provisions of Order 2 Rule 3 of The Civil Procedure Rules:-

> **"A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—**
>
> **a. Which he alleges makes any claim or defence of the opposite party not maintainable;**
>
> **b. Which, if not specifically pleaded, might take the opposite party by surprise; or**
>
> **c. Which raises issue of fact not arising out of the preceding pleading.**

36. The provisions of the Law of Contract was neither pleaded or later embraced as a matter for determination at a later stage and should really not be discussed. However, if this Court were to make an observation, the Contract of Guarantee was a Contract within the Lease Agreement Document which was signed by Nordic and I would have to find that by signing the Lease Agreement, Nordic was party to all the contents of the Lease Agreement including the Contract of Guaranty. Indeed, the Contract of Guaranty was initiated by the person who executed the Lease Agreement on behalf of Nordic in affirmation that it had executed the Guarantee.

37. The issue as to whether the subsequent amendments to the Agreement discharged the Guarantee first appeared at the Defence case and so Nordic invited trouble to itself when it chose to make it an issue for determination by submitting on it without protesting that it had not been pleaded. The Defendants also made extensive argument on the implication, if any, of the amendments to the Lease Agreement to the Guarantee. In deference to the old decision of Odd Jobs vs. Mubia [1970] EA 476, I must decide on it.

38. This Court appreciates the extensive submissions made by Counsel in this respect and the many Authorities cited. However, for purposes of determining the question before me this Court is content to state the General Rule as being that where there is a variation or alteration in the principal Contract without the knowledge and consent of the Guarantor, the Guarantor stands discharged unless such alteration is evidently inconsequential or for the benefit of the surety. See the Decision in National Bank of Nigeria ltd vs. Oba M.S Awolesi [1964]1 WLR 1311 in which it was held that the Bank's action of opening a second account for the principal debtor, unknown to the surety (equivalent of guarantor), was a substantial variation of the contract. The Surety was therefore discharged.

39. As a starting point to answering this well contested question the nature of the Amendments need to be set out and understood;

> a. Amendment NO. 2 dated 5th May 2007 (pages 40 to 43) seeks to increase the basic purchase option price and to extend the Lease term to April 2013.

It also provides a Lease Holiday for 60 days.

> b. Amendment NO.3 is dated 8th February 2008 (Pages 44-48). A lease Holiday is granted for 4 months. Lease period is extended to July 2013.
>
> c. Amendment NO.4 (pages 49 to 52) is dated 4th December 2006 and seems to be the first amendment and has two highlights:-
>
> - While the Lease period remains 72 months it revises the period to be from January 1 2007 to December 31, 2012.
> - The purchase option price is revised to reflect that change.

d. Amendment NO. 5 (page 99-102). In this Amendment Nordic agrees to reimburse Western some accumulated interest on condition that Western pays some outstanding sums in the manner set out thereunder. It is essentially a payment plan of the outstanding debt.

40. The backdrop to these Amendments is that Western fell back on its payment obligations and sought extension of time and a Lease holiday. Under cross-examination Odhiambo said,

> "We asked for an extension of time. Emails, personal meetings verbal. Page 104 – this was our email asking for a Lease Holiday. We put a proposal. Page 104. The proposal was accepted. No mention of waiver of Guarantee. After Lease Holiday was granted we made payments. It is partly true that the five amendments to the Contract was necessitated by our nonpayment of instalments".

41. In the email of 22nd February 2007 (page 104), for example, Odhiambo summarizes the nature of the request as follows:-

> i. A refinancing of the penalty interest so far accumulated together with the February lease installment. i.e the amounts to be spread over the full term of the lease contract.
>
> ii. A lease holiday for the period that the engine will be under repair i.e 60 days from the 28th of February which is the time we expect the engine to have been shipped out for repair.
>
> iii. The lease holiday interest to be paid 15 days from the 26th, (this is due to the heavy expense of securing the aircraft i.e loaner engine, charter aircrafts, engineers etc which have to be paid out immediately) and the next 30 days later.
>
> Summary
>
> a. Penalty interest plus February installment refinanced (spread) over full term of the contract.
>
> b. Lease holiday for 60 days from the 28th of February
>
> c. First lease holiday interest payable 15 days from the 26th of February
>
> d. Second lease holiday interest payable 30 days from (c) above

42. Evidently the nature of the Amendments was to postpone payment of monthly instalments which then had an effect on the Purchase Option Price. However it is my understanding that the obligation of Western would be the monthly instalments, the purchase option price simply being the purchase price that Western had to pay on the day if wished to exercise its option to purchase. In other words the Debt of Western would be any unpaid monthly instalments not the purchase price. Seen in this way the amendments do not seem to have fundamentally altered the lease Agreement. And it might be asked how does the postponement of the obligation prejudice the Guarantor whose nightmare scenario is to be suddenly called upon to meet the default of the principle? An American Judge is said to have commented as follows in respect to such circumstances,

> "The Law has shaped its judgements upon the fictitious assumption that a surety who has probably lain awake nights for fear that payment may someday be demanded has infact been smarting under a repressed desire to force an unwelcome payment on a reluctant or capricious creditor (See Paper by Professor John Philips "*The Law of Guarantees; Balancing the interest of The Parties*" found at http://ink.library.smu.edu.sg/jday_lect

43. Yet Odhiambo argues that from his vantage (as Guarantor) the Amendments had dire consequences, because, as he testified,

> "In my understanding what I was guaranteeing was default of monthly payment. This was the default secured by the initial deposit. The Deposit of USD 80,000 has never been refunded. By retaining the Deposit I am discharged from my personal Guarantee".

44. Reinforcing this view, his Counsel submits that liability of the Guarantor comes into effect at the point of default. That the default as per the terms of the Lease Agreement was at first point of failure to make payment and should be limited to a single month's Lease payment.

45. What in effect Odhiambo is arguing is that by postponing payment of instalments, and in a sense tolerating default, Nordic was increasing his exposure as Guarantor as the debt was building. This is not an argument to be wished away easily.

46. If I presume that the forbearance that was encapsulated in the Amendments was prejudicial to the rights of Odhiambo as Guarantor, then I can only find him still liable if he had knowledge and consented to the forbearance.

47. Odhiambo was one of the three Shareholders and Directors of Western. The other two being Caroline Nzioka and Bertha Owour. The three Shareholders had equal shareholding yet it is only Odhiambo who gave the Guarantee. Again it is Odhiambo who sought the forbearance on behalf of Western, led the discussions that culminated in the amendments and eventually signed the amendments on behalf of Western. Can it be fairly said that as he was acting in his capacity as a Director of Western he did not have personal knowledge of these critical developments? Can it be said that his mind as guarantor was shut out from the requests and arrangements he was making on behalf of the Company? I think it would be illogical to artificially split the mind of Odhiambo in that way and this Court comes to the conclusion that Odhiambo, as Guarantor, was in full knowledge of the variations that were embodied in the Amendments.

48. As to whether he consented, this Court takes the view that Odhiambo must or was expected to know the implication of the forbearance on the Guarantee he had given. Yet he never raised any personal objection to it. On the contrary he championed the Amendments. In the circumstances of this case a finding is made that by his conduct there was constructive consent. To hold otherwise would be to reach an unconscionable outcome.

49. And it is of some significance that the call up of the Guarantee by Nordic was made on Odhiambo through a letter of 17th June 2011 which is a date within the Lease period in the original Lease Agreement (72 months from 1st December 2006 to 30th November 2012).

50. The question of breach of Contract by Nordic is the easier to answer. The substantive claim by Nordic is twofold. The first is the sum of USD 1,034,122.47 being Lease payments due and owing. The other is a sum of USD 205,946.26 on account of Repair and Recovery expenses.

51. A Lease instalment of USD 24,149 (subject to the agreed adjustment provided in Section 8 of the Terms Sheet) was to be paid monthly in advance on the last day of the previous calendar month. There was default in payment by Western. This was conceded to by Odhiambo when he testified,

> "By the time that the Aircraft was repossessed we were not upto date with payment because of numerous accidents".

52. In two emails of 20 Maj 2010, (page 119) and 4th June 2010 (page 120), Nordic does not dispute default but seeks for indulgence. The amount outstanding as per a statement dated 10th June 2011 (page 66) is USD 1,034,122.47.

53. Through the evidence of its witness, Western blamed its default on numerous accidents. In its submissions Western states,

> "They (the Plaintiff) have tried to mar in ambiguity the fact that all setbacks regarding the Aircraft were due to insurable accidents".

However in the email of 22nd February 2007, Odhiambo explained that payment was later due to grounding of the Aircraft due to engine seizure. (This was not an insurable accident.) In the email of 20th May 2010 he gives this Background as to the woes and its financial situation,

> "We have had a hectic 2 year season with this particular Aircraft. Last year alone we have had 2 engine hot sections with expenses in excess US$100000.00 and downtime of over 60% to date. This situation was preceded by a political interruptions with resultant economic negative implications. The result has been erratic monthly payments as highlighted in your mail to Carol. It is my observation that the situation is extremely regrettable but one that was none the less mostly beyond my control.
>
> With the payment of US$ 120000.00 for engine release, the total payments which we will have made towards the aircraft either directly to NAC or indirectly to third parties for repairs total to approximately US$ 250000.00. This payments are against a utilization of below 50% due to repair downtime. The aforesaid situation is the principal reason for the dire financial situation that we now face".

54. In addition to mechanical problems, Western blames its situation on the state of the Economy. If there was doubt as to who or what Western attributed its woes then it is clarified by this Letter (page 114) of Carol Nzioki (its director). In none of these communications does Western blame Nordic nor does it dispute its debt.

55. There is common evidence that in November 2005 in the course of operations while in Southern Sudan, the Aircraft suffered an accident. Western insists that the Claim was insurable and it reported the accident to Nordic and the Insurance. That subsequently it brought the Aircraft to Kenya to an agreed repair facility. The Engine needed specialised repairs and it was sent to a repairer (Euravia) in the United Kingdom. The position taken by Western is that the Party responsible for negotiations and pursuing the Insurer was Nordic as the owner/lessor. In Western's view any expenses incurred in removal, storage and repair of the Aircraft was a Claim to the Insurance.

56. Nordic counters this by pointing to Section 13 and 14.1 of The General Terms and Conditions. Section 13.1 provides;

> "Lessee shall, from signing the Certificate of acceptance throughout the period of the Agreement, maintain a policy or policies of insurance covering the Aircraft against loss or damage from whatsoever cause arising including, without prejudice to the generality of the foregoing, a policy of war risk insurance including, inter-alias confiscation and hijacking, on an agreed value basis which shall not be less than the amount stated in Term Sheets under Insurance "Agreed Value". All such policies must be arranged by or approved in writing by Lessor for the account of Lessee".

57. By virtue of Section 13.6 all premiums and other costs affecting and maintaining the Insurance was on the account of Nordic. In his evidence Pia Rosendahi (PW1) for Nordic stated,

> "At the time of accident it was insured but there were arrears in premium so the insurance declined liability".

58. Odhiambo disputed this and stated that the Insurance premiums were fully paid up and that the Aircraft was operating was proof enough that it had not defaulted in its Insurance obligations. This is a contest as to whether Western had paid for the insurance. The obligation to pay the Insurance was on Western. Whether or not it had paid insurance is a fact which would be especially within its knowledge and so Western was bound by the provisions of Section 112 of The Evidence Act to prove this fact. That obligation is as follows:-

> "In Civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him".

59. Other than the oral assertion by its Director, Western did not produce any documentary evidence to back that payment. This Court is unable to find that Western had duly paid the Insurance Premium and believes the version of Nordic.

60. At any rate Western may not be able to extricate itself from the rigours of the provisions of Section 14.1 which reads:-

> "From the delivery of the Aircraft to Lessee until delivery of the Aircraft to Lessor, Lessee shall bear the full risk of any damage to or loss or theft of the Aircraft or of any part thereof and shall be responsible for the cost of repairing any damage to the Aircraft whether or not the insurance policies taken out under Section 14 pay out in respect of any claim made. In the event of any such damage or loss, Lessee shall forthwith give Lessor written notice thereof within twelve (12) hours".

61. Western has been unable to prove that the outstanding payments can be attributed to any wrongdoing on the part of Nordic. The debt that was due was demanded in a letter of 17th June 2011 from Western (page 72 and 73). On the same day and by a separate letter (page 69 to 71) Nordic formally called up the Guarantee from Odhiambo.

62. Nordic seeks the sum of USD 205, 946.26 as the Total Cost of restoration and re-delivery. It is the Plaintiff's contention that the Defendants did not re-deliver the aircraft as agreed and so they took possession of the aircraft at their own cost. The Plaintiff gave a breakdown of the total cost of repair and re-delivery as can be gleaned at paragraph 77 of its submissions. However this Court is unable to grant the prayers in respect to payments made for Repair and overhaul of the Engine by Euravia (page 61), fees allegedly paid to Aircraft Business Management Ltd (pages 61 to 63), purchase price of parts to Tex-Air parts (page 64) as the documents said to be Bank swift transfer are in a language that this Court does not understand and no translation was availed. In respect to freight and insurance costs by Euravia Engineering no proof of payment was furnished. In respect to some payment to Reginal Airline Support Group (page 65) only an invoice was provided. It was upon Nordic to sufficiently prove the same by producing substantive documentary evidence to back the same. It is also trite law that he who alleges must prove. (**Section 107 of the Evidence Act**)

63. The upshot is that judgment is entered against the Defendants jointly and severally for USD 1,034,122.47 with interest at Court rates from the date of filing of the suit. Should the Plaintiff want to convert the Judgment sum into local currency, the applicable exchange rate shall be that published by the Central Bank of Kenya at the date of payment or enforcement of the Judgment.

**Dated, Signed and Delivered in Court at Nairobi this 11th day of May ,2018**.

**F. TUIYOTT**

**JUDGE**

***PRESENT;***

Mweu for Plaintiff

Sagini for Okeyo Defendant

Nixon - Court Assistant