



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)**  
**COMMERCIAL AND TAX DIVISION**  
**CIVIL CASE NO.E 037 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

**RULING**

1. When this matter came up for hearing on 24<sup>th</sup> July three applications had been set down for hearing being as follows:-

- a) Applicant's application being Notice of motion dated 14<sup>th</sup> June 2018 seeking injunctive orders against the Respondents.
- b) Third party's application being a notice of motion dated 21<sup>st</sup> June 2018 seeking the 3<sup>rd</sup> party to be enjoined as an interested party.
- c) The 3<sup>rd</sup> Respondent Application being a notice of motion dated 4<sup>th</sup> July 2018 seeking the suit against the 3<sup>rd</sup> Respondent be struck out.

2. That after brief hearing of the Advocates on record it was ordered that application (b) and (c) above both of them proceed to hearing.

**(A) Application by Third party. Notice of motion dated 21<sup>st</sup> June 2018.**

3. The Notice of motion is brought pursuant to Article 50(1) of the Constitution of Kenya 2010, **Rule 2, 7(1)** Constitution of Kenya (protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013; Sections 1A; 1B and 3A of the Civil Procedure Act (Cap 21) Laws of Kenya; Order 1 Rule 1, of the Civil Procedure Rules, 2010) seeking the following orders:-

- 1) THAT Freedom Airlines Express Limited is joined as an interested party to the suit.
- 2) THAT parties be ordered to serve Freedom Airline Express Limited with copies of their pleadings.
- 3) THAT Freedom Airline Express Limited is granted leave to file an affidavit outlining its interest.
- 4) THAT the costs of the application be in the cause.

4. The applicant's application dated 14<sup>th</sup> June 2018 was adjourned to await the outcome of application (b) and (c) above as by proceeding with application (a) may be prejudicial to the third party's application in case the application is allowed. The interim orders in application (a) were ordered to remain in force till the application is heard and determined.

5. The application is based on the following grounds:-

- a) Freedom Airlines Express Limited has a legitimate interest over Fokker 50 MSN 20260 registered as 5Y-JRN (hereinafter the "Aircraft") having paid a deposit of USD 100,000.00 to the 1<sup>st</sup> Defendant towards its purchase;
- b) Freedom Airlines Express Limited has possession of the Aircraft which possession was yielded by the Plaintiff and the 1<sup>st</sup> Defendant in the sale purchase transaction amongst them;
- c) Freedom Airlines Express Limited proceeded to undertake major repairs on the Aircraft to make the Aircraft airworthy whereof they caused the Aircraft to get a fresh coat of white paint and replacement of passenger seats before they were served with court orders prohibiting among others Freedom Airlines Express Limited from any dealings with the Aircraft which included further repairs by the 2<sup>nd</sup> Defendant;
- d) Freedom Airlines Limited continues to park the Aircraft at its Hanger at Wilson Airport at its own cost and expense;
- e) Freedom Airlines Express Limited's interest in the Aircraft and or the court process is known by all parties to the suit;
- f) No party will be prejudiced in any way by allowing Freedom Airline Express Limited to participate in the suit as an interest party; and
- g) Other grounds as may be adduced at the hearing.

The application is further supported by an affidavit of **MAHAD H. ABSHIR**, interested party in the matter.

6. In the supportive affidavit, it is averred, that the deponent is one of the directors of the Applicant/Interested party; that interested party is a licensed air operator by the 3<sup>rd</sup> defendant based at Hanger 6, Wilson Airport; that the plaintiff has staked a claim over a **Fokker 50 MSN 20260** registered by the 3<sup>rd</sup> Defendant as owned by the 1<sup>st</sup> defendant and the plaintiff having an interest to lease a **5Y-JRN** and which aircraft the interested party has a legitimate interest, in having paid a deposit of USD 100,000 to the 1<sup>st</sup> defendant towards purchase (see annexures marked "**MHA 1" 2 and 3**); that in light of interest by plaintiff, the negotiation to purchase **Fokker 50 MSN 20260** registered as **5Y-JRN** was between, the plaintiff, the 1<sup>st</sup> defendant and the interested party; that the plaintiff and 1<sup>st</sup> defendant yielded possession to the interested party on the basis of the interest to purchase the Aircraft between the interested party and the 1<sup>st</sup> defendant and commercial negation between the plaintiff and the interested party; that the interested party proceeded to incur cost and expense to make the aircraft airworthy and giving it a facelift for purposes of use in its business; that the interested party has a direct and identifiable legal stake in respect of the aircraft having paid substantial sum of money towards its purchase and incur more cost in its repairs and that the interested party continues to park the Aircraft at its Hangar at Wilson Airport at its own cost and expense.

7. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants are opposed to the intended interested party's application dated 21<sup>st</sup> June 2018 and in doing so, filed joint grounds of opposition being as follows:-

- 1) **THAT the Applicant's application is misconceived, mischievous, in bad faith, bad in law, unmaintainable and an abuse of the process of this Court.**
- 2) **THAT the Application is devoid of merit geared to delay and waste of time for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents/Defendants business as time is of essence in aviation business.**
- 3) **THAT the applicant has seriously concealed material facts of their position and locus standi.**
- 4) **THAT the applicant was seeking to enjoin the suit where they have no interest at all.**

8. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed a Replying affidavit dated 6<sup>th</sup> July 2018 deponed upon by Boniface Kimani; Director of the 2<sup>nd</sup> defendant arguing that he is legal purchaser/owner of Aircraft **Fokker 50 MSN 20260**, Registration **5Y-JRN** from **PT Panca Global investindo**; that the intended interested party affidavit is misconceived, mischievous, frivolous, bad in law, unmeritable and an abuse of the court process; that the deponent purchased the aircraft in question on 4/6/2018 (attached and marked **BK 110**, and BK 1(b) copies of the Bill of Sale and Aircraft Sale Agreement); that the documents and submissions of intended interested party; that 1<sup>st</sup> Respondent letter of intent (**LOI**) to purchase the Aircraft executed by both parties was not a binding contract. (Annexed "**BK 2**" is a copy of the letter of interest (**LOI**); that intended interested party was a party to the suit Hccc 111/2018 which he withdrew after confirming the owner was not interested in the purchase of the aircraft and recalling back its deposit of 100,000 USD (attached marked **BK 3(a)** and **BK 3(b)**); that the letter of interest (**LOI**) was mutually cancelled on 29<sup>th</sup> March 2018 (see attached and marked **BK 4**); that on 11<sup>th</sup> June 2018, the Applicant/Plaintiff withdrew the suit after confirming that the issues were settled out of court and same adopted as an order of the court (attached and marked **BK 5**).

9. It is further deponed by the 1<sup>st</sup> Defendant and 2<sup>nd</sup> Defendant; that the contents of paragraphs 3, 4,5,6,7 and 8 of the intended interested party are not true as the said Aircraft is parked at Wilson Airport on the grass Apron 3 and not on the Hangar as claimed (attached and marked **BK 7**) are pictures of the said Aircraft and that the Applicant was not authorized or required by anybody to perform maintenance work (attached and marked as **BK 8**) is Aircraft certificate of Airworthiness issued by 3<sup>rd</sup> Respondent/Defendant expiring in 3 weeks and lastly the application has no merit to justify it being allowed.

10. The intended interested party filed further affidavit dated 17<sup>th</sup> May 2018 arguing that the plaintiff is a registered lessee of **Fokker 50 MSN 20260 (MHA)**; that 1<sup>st</sup> defendant is also registered owner; that he allegation the 2<sup>nd</sup> defendant bought the aircraft from **PT Panca**

**Global investindo** is sham as party cannot be able to give what it does not have; that the allegation of purchase of aircraft at USD 270,000 is a fraud; that the intended interested party entered into agreement with plaintiff and 1<sup>st</sup> defendant (see "**MHA 2-A**", **MHA 2-B**); that intended interested party paid USD 1,070,000 as consideration for buying all interest in the aircraft from plaintiff and 1<sup>st</sup> defendant; that USD 100,000 was transferred to the 1<sup>st</sup> defendant; that a letter the intended interested party wrote to the defendant to send back the money due to issues arising out Hccc 111 of 2018 (**MHA-7**) but 1<sup>st</sup> defendant did not respond (**MHA-8**); that e-mail by 2<sup>nd</sup> defendant is edited; that the claim by the 1<sup>st</sup> defendant is fraudulent and calculated to deny intended interested party its right; that the court should not allow the 1<sup>st</sup> and 2<sup>nd</sup> defendants to benefit from the fraud they are perpetrating.

11. At the hearing of the application Mr. Omigo, learned Advocate for the plaintiff did not oppose the application. Miss Mugo, learned Advocate, for the 2<sup>nd</sup> defendant similarly did not oppose the application. Mr. Odiek and Mr. Nyakundi, learned Advocates for the 1<sup>st</sup> and 2<sup>nd</sup> defendants opposed the intended interested party's application. Mr. Gitau, learned Advocate for intended interested party relied on his written submissions dated 30<sup>th</sup> July 2018 whereas the 1<sup>st</sup> and 2<sup>nd</sup> defendants relied on their combined written submissions dated 18<sup>th</sup> July 2018. I have considered the pleadings by both parties, counsel written submissions as well as the oral submissions. I find the only issue for consideration is whether the intended interested party has satisfied the conditions established for joining him as an intended party.

12. What is the definition of an intended party in any case before court? In the case of **Yusuf Abdi Adan & Another Vs Hussein Ahmed Farah & 3 Others (2016) eKLR** the court stated thus:-

**"One who has a direct interest or stake in the case though he or she was not a party to the cause ab initio. The court continued to define the party as one who will be affected by the decision of the court when it is made either way, and who person feels that his/her interest will not be well articulated unless he himself or she herself appears in the proceedings to champion his or her cause."**

13. The intended interested party in his affidavit has at great length pointed out he has direct interest or stalk in the case though not a party at the moment. He stated that he entered into an agreement with the plaintiff, as a lessee and 1<sup>st</sup> defendant has purchased the aircraft and paid a consideration. The plaintiff has not challenged the intended parties averments. He has also stated how there are attempts to defraud him by the 1<sup>st</sup> defendant, pointing out some documents have been edited with an intention to defraud him. The intended interested party avers that he raised USD 100,000 deposit which todate has not been refunded. The interest therefore arises from the agreement it made with the plaintiff and 1<sup>st</sup> defendant and payment of money for purchase of the aircraft in question. It's interest is still alive and kicking.

14. The 2<sup>nd</sup> defendant claims to have purchased the aircraft from **PT Panca Global investindo**, yet no documentation were annexed showing how he came to be the new owner of the aircraft which the intended party claims the owner to be 1<sup>st</sup> defendant (see **MHA 1**).

15. In **Ment Development Limited Vs. Lenana Investment Limited & 2 others (2018) eKLR** the court stated obiter that:

**"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."**

16. The registration of the 1<sup>st</sup> Defendant as the owner of the aircraft vests all rights in the aircraft to the 1<sup>st</sup> Defendant to the exclusion of all others. Ownership interests and/or rights could only be transferred to **PT PANCA GLOBAL INVESTINDO** upon its registration as the new owner of the aircraft. **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 was stated:-

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

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

This is to the effect that even if the aircraft was indeed sold to **PT PANCA GLOBAL INVESTINDO**, whatever interests so 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 leasee.

17. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents urges that it is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to the standard above a balance of probabilities but not beyond reasonable doubt; urging the intended interested party has first asserted fraud from the bar without any clear distinct allegation just trying to defeat the procedure. It is further urged such a statement must contain precise and full allegation of facts and circumstances leading to the reasonable inference that fraud was the cause of the loss complained of (see **Lawrence Lord Vs. Norreys (1880) 15 APP. (at 210 to 221)**).

18. Indeed the law does not allow fraud to be left to be inferred from the facts. It must be specifically pleaded and proved as general allegations, however strong are of no evidential value. In the case of **Vijay Morjaria Vs. Nansingh Madhusing hDarbar & another (2000) eKLR Tunoi J A (as he then was)** stated as follows:

**"It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts."**

[Emphasis ours]

19. In the instant application, the Applicant is yet to be enjoined as a party, it is only seeking court's leave to be enjoined in the proceedings and as such it could be accused of not having specifically pleaded fraud nor of not having proved the same; it is however clear in its affidavit it has specifically deponed on the fraud and given particulars. In view of the aforesaid the Applicant is not guilty of not having specifically pleaded and particularized the particulars of fraud. The intended interested party has not in its affidavit left fraud to be inferred as alleged by the 1<sup>st</sup> and 2<sup>nd</sup> defendants. On the issue of the relation of the parties and various accusation and counter-accusation these issues can only be conversed once the intended interested party is enjoined as party, however for any party to demand court to make a final finding at the interlocutory stage would amount to determining the case without giving parties opportunity to be heard and would go against the principle of fair hearing; as ensured under Article 50 of the Constitution of Kenya 2010.

20. The intended interested party having allegedly paid a deposit towards the purchase of the aircraft, the subject of dispute in this suit, and having not been refunded his money for withdrawing from the transaction, due to alleged deceit on part of 1<sup>st</sup> defendant; that in itself vest direct interest to the Applicant in the aircraft. The decision that will be made in this matter will have direct impact on the intended interest party. That by allowing this application all parties will have an opportunity to get justice in the corridors of justice, no one will suffer any prejudice if this application for enjoinder of the intended interested is allowed.

21. Besides judicial pronouncements, the constitution of Kenya (*Protection of Rights and Fundamental Freedoms*) Practice and Procedure Rules, 2013, defines an interested party as;

**"A person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation."**

22. Article 50 (1) of the Constitution of Kenya on the other hand states that;

**"Every person has the right to have any dispute that can be resolved by the application of the law decided by the application of law decided in a fair public hearing before a court or if appropriate, another independent and impartial tribunal or body."**

23. Article 48 of the Constitution also states that;

**"The state shall ensure access to justice for all persons, and if any fee is required, it shall be reasonable and shall not impede access to justice."**

24. The upshot is that intended interested party's application dated 21<sup>st</sup> June 2018 is allowed and I proceed to make the following orders:-

- a) **THAT Freedom Airlines Express Limited is joined as an interested party to the suit.**
- b) **THAT parties be and are ordered to serve Freedom Airlines Express Limited with copies of their pleadings.**
- c) **THAT Freedom Airlines Express Limited is granted leave to file an affidavit outlining its interest.**
- d) **THAT the costs of the application be in the cause.**

**B) Notice of motion by 3<sup>rd</sup> Defendant**

25. The 3<sup>rd</sup> Defendant through a Notice of motion dated 4<sup>th</sup> July 2018 brought pursuant to order 2 Rule 15(1) (a) (b) (d) and order 51 Rule 1 of the CPA and Section 3A of the Civil Procedure Act and all enabling provisions of the law seeks the following orders:-

- 1) **THAT this suit against the 3<sup>rd</sup> Defendant be struck out.**
- 2) **THAT costs be awarded to the 3<sup>rd</sup> Defendant.**

26. The Application is premised on the grounds on the face of the application being:-

- 1) **THAT the instant suit is based on an Aircraft Purchase Lease Agreement between the Plaintiff and the 1<sup>st</sup> Defendant dated 9<sup>th</sup> May 2016 (hereinafter referred to as the Lease Agreement) and an alleged intent by the 1<sup>st</sup> Defendants to defeat the Plaintiff's ownership interests by purporting to transfer the ownership of the Aircraft to the 2<sup>nd</sup> Defendant.**
- 2) **THAT the 3<sup>rd</sup> Defendant is not a party to the Lease Agreement between the Plaintiff and the 1<sup>st</sup> Defendant, which Lease Agreement forms the substance of the suit. The 3<sup>rd</sup> Defendant is further not a party to any letter of Intent to purchase the subject aircraft.**
- 3) **THAT the Plaintiff has not demonstrated any Prima Facie Case against the 3<sup>rd</sup> Defendant.**

4) THAT the 3<sup>rd</sup> Defendant is unnecessarily being drawn into a dispute arising from an agreement that it was not party to and hence entirely none of its concern.

5) THAT it is only fair that the Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants proceed to settle their disputes without enjoining the 3<sup>rd</sup> Defendant in any way whatsoever by virtue of the 3<sup>rd</sup> Defendant not being a party to the Lease Agreement and the disputes arising thereof.

27. It is further deponed that the 3<sup>rd</sup> defendant need not be a party to the proceedings to implement any court orders; that shall be issued touching on its mandate and that the 3<sup>rd</sup> defendant shall comply with any court orders issued in these proceedings; that touch on its mandate as the Regulation in the Kenya Civil Aviation industry.

28. The 3<sup>rd</sup> Defendant's application is opposed. Mr. Joseph Maingi, Finance Manager of the Plaintiff/Respondent filed an affidavit dated 6<sup>th</sup> July 2018 arguing the suit against the 3<sup>rd</sup> Respondent is properly filed; as he is the regulator of the aviation industry and custodian of the relevant documentation and consent requisite to enable aviation, and that should 3<sup>rd</sup> Respondent wish to withdraw from the suit it should commit to abide by the Honourable Courts decision; that any cost should be borne by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as they sought the intervention of the 3<sup>rd</sup> defendant while not disclosing the true and actual position in respect to the dispute with intent to defeat the plaintiff's right over the aircraft subject matter.

29. At the hearing the Advocate for the intended interested party, the Advocate for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not take part in this application as it is mainly between the plaintiff and the 3<sup>rd</sup> Defendant; however the Advocates for 1<sup>st</sup> and 2<sup>nd</sup> defendants are not opposed to the application. The issue for consideration in the application is brief and can be summarized as follows:-

1) Whether the plaintiff suit discloses any cause of action against the 3<sup>rd</sup> defendant?

30. What is reasonable cause of action was well enunciated in the case of **Time Magazine International Ltd and another Vs. Michael F. Rotich and another [2000] eKLR** where Onyango Otieno J (*as he then was*) adopted a definition of reasonable cause of action as meaning "a cause of action with some chance of success." In **Drummond Jackson Vs. British Medical Association and Others, (1970) 1 W.L.R 688** at page 696 Lord Pearson thus defined a reasonable Cause of Action as follows;"

.....No exact paraphrase can be given, but I think "reasonable cause of action means a cause of action with some chance of success when.....only the allegation in the pleadings are considered as required by paragraph 2 of the Rule: "If when those allegations are examined it is found that the alleged cause of action is certain to fail, the statement of claim should be struck out."

31. In the plaint dated 14<sup>th</sup> June 2014 and filed on 18<sup>th</sup> June 2018, the 3<sup>rd</sup> defendant appears in the descriptive part of the plaint under paragraph 4 of the plaint, the rest of the paragraphs deals with other defendants. In the part seeking various orders against the defendants the plaintiff seeks under prayer (d) the following:-

**"THAT 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."**

In the body of the plaint there is no allegation that the 3<sup>rd</sup> defendant having issued any orders or sanction grounding, restraining or hindering the use of the aircraft **Fokker 50** manufacture number **20260**, Registration No. **5Y-JRN** by the plaintiff.

32. The matters pleaded in the plaint are primarily touching on the relationship between the plaintiff, 1<sup>st</sup> and 2<sup>nd</sup> Defendants. What is pleaded in the plaint do not connect the 3<sup>rd</sup> defendant in anyway with this suit. He is mainly a spectator in the pleadings and adds no value to the suit save incurring unnecessary costs by remain this suit as a party.

33. The order sought against the 3<sup>rd</sup> Defendant relates to its regulatory function yet there are no complaints laid down against the 3<sup>rd</sup> defendant on exercise of its Regulatory mandate. There is no indication or averment that the 3<sup>rd</sup> defendant exceeded and acted contrary to its mandate leading to being joined as a party. That if court orders are issued against the 3<sup>rd</sup> defendant whether it is a party or not and do not comply with the orders; there is a laid down mechanism of having such orders complied with. Party can't sue another party in anticipation that it will if orders are issued for it to comply with, it won't and that would justify to have the party in the proceedings though there is no claim against it.

34. The 3<sup>rd</sup> defendant is mandated to regulate the Aviation Industry as enumerated in the relevant Act and that in exercise of its mandate, the Defendant's dealings regarding the subject aircraft were only limited to its mandate and not to the Aircraft Lease Agreement between the parties or the private commercial agreements between the Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants which are clearly the cause of the dispute herein.

35. In this matter I am guided by case of **Samuel Njenga Vs Augustino Onanda & another [2015] eKLR** in which it was stated as follows:-

**"However, where the pleading or suit is plainly and obviously without substance or is groundless or fanciful and or is instituted with the intention to overreach or with ulterior motive or for purposes of gaining some collateral advantage, which the law does not recognize as a legitimate use of the process, the court will not permit its processes to be used as a forum for**

such theatrical maneuvers since to do that will be giving an opportunity to parties to crowd the court or litigate over matters which lack bona fides with the sole intention of vexing the adverse party and subjecting them to unwarranted anxiety, trouble and expense and also wasting very precious judicial time and resources that could be allotted to deserving cases, in contravention of the very overriding objectives of the law as espoused in Section 1A and 1B of the Civil Procedure Act, 2010."

36. In the instant suit there is no allegation that the 3<sup>rd</sup> defendant is a party to the lease agreement between the plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> defendant, which lease forms the substance of the suit. There is nothing in the plaint that the plaintiff can state justifies the 3<sup>rd</sup> defendant to be in this suit. I find enjoining the 3<sup>rd</sup> defendant in this suit adds no value to the plaintiff's suit. It is scandalous, vexatious and frivolous of the plaintiff to have joined the 3<sup>rd</sup> defendant in this suit as it is offensive and intended to cause unnecessary anxiety, trouble and expense above wastage of the 3<sup>rd</sup> defendant's valuable time chasing after a wind.

37. The upshot is that the 3<sup>rd</sup> Defendant's application is allowed. I proceed to make the following orders:-

a) **The Plaintiff's suit against the 3<sup>rd</sup> Defendant M/s Kenya Civil Aviation Authority be and is HEREBY struck out.**

b) **Costs of the suit and the application to the 3<sup>rd</sup> Respondent.**

Dated, signed and delivered at Nairobi this 11<sup>th</sup> day of **October, 2018.**

.....

**J .A. MAKAU**

**JUDGE**