REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

HIGH COURT CIVIL CASE NO 287 OF 2011

MULTI TRACK

LUFTHANSA TECHNIK

Aero Alzey Gmbh .....PLAINTIFF

-VERSUS-

FIVE FORTY AVIATION LIMITED .....DEFENDANT

JUDGEMENT

PLEADINGS

1. By its plaint dated 4th July 2011 filed in this Court on 5th July, 2011, the plaintiff herein seeks the following orders:

a) A permanent injunction to restrain the Defendant by itself, its agents, servants, employees or any other person acting under the Defendant's authority and/or instructions from alienating, disposing, advertising for sale or in any other manner interfering with the Engine PW 121-8 Serial Number 120799 or Hydromechanical Unit Serial Number F17208.

b) A declaration that the Plaintiff is entitled to possession and/or redelivery of the Engine PW 121-8 Serial Number 120799 and the Hydromechanical Unit Serial Number F17208.

c) An order compelling the Defendant to deliver to the Plaintiff the Engine PW 121-8 Serial Number 120799 together with the Hydromechanical Unit Serial Number F17208 within such time as this Honourable court may direct.

d) The sum of USD 293,916.98 (Equivalent to Kshs.26,646,513.41 at the exchange rate of 1 USD toKhs.90.66, being the prevailing exchange rate at the date of filing suit) plus further lease charges at the rate of 400 Dollars per day from 1st July, 2011 till payment in full together with interest thereon from the date of filing suit until payment in full.

e) In default of prayer number (c) above, an order that the Plaintiff pays the Defendant the sum of USD 750,000.00 and USD 12,810.00 being the value of the engine and

Hydromechanical Unit respectively, (Equivalent to Kshs.69,156,354.60 at the exchange rate of USD to Kshs.90.66, being the prevailing exchange rate at the date of filing suit).

f) Costs of this suit plus interest thereon at Court rates.

g) Such further order as this Honourable Court may deem just to grant.

2. The cause of action according to the plaintiff arose from a request made by the Defendant to the Plaintiff to carry out repairs and maintenance on Engine Serial Number ESN 121 241 which request the plaintiff accepted on the assumption that it was a normal run out Engine, removed for time for standard overhaul purposes. Pursuant thereto the plaintiff prepared a cost estimate on fixed time and material basis of USD 310,518.29. According to the plaintiff the relationship between the parties was to be governed by General Terms and Conditions attached to the cost estimate which was to be subject to the determination of the condition of the engine upon delivery to the plaintiff for disassembly and inspection. The defendant, it was pleaded accepted the said offer by signing the customer acceptance sheet and a contract known as the **Maintenance Agreement** was thereby created.
3. However upon delivery, disassembling and inspection of the said engine, it was found to be in a worse condition than had been represented by the defendant and in accordance with the General Terms and Conditions, the plaintiff sent to the Defendant a revised cost estimate of USD 742,078 which sum was subsequently reduced to USD 698,412.20 but which sum the defendant refused to settle. Upon realizing that the Defendant was reluctant to settle this sum the Plaintiff discontinued further works on the said engine by which time the costs incurred was USD 52,758.52 for which the Plaintiff invoiced the Defendant but the Defendant declined to settle. The plaintiff therefore exercised its contractual tight of lien and retention over the engine and started charging storage charges.
4. By a further agreement dated 9th August 2010 executed on 31st August 2010 (hereinafter referred to as **the Lease Agreement**) the plaintiff leased to the Defendant PW 121-8 Engine Serial Number 120799 to be used in aircraft DHC 8-102 MSN 253 owned by **Avmax Aircraft Leasing Inc** (hereinafter referred to as **Avmax**) to which was attached a Hydromechanical Unit Serial No. F17208 as a replacement for the engine which was undergoing repairs on the consideration that the Defendant would pay a daily fee of 0.00 USD and 130.00 USD per engine flight hour or engine flight cycle whichever is higher with a minimum monthly usage of 180 hrs/cycle. Accordingly the Plaintiff on or about 21st October, 2010 delivered to the defendant the said Engine together with the Hydromechanical Unit valued at USD 750,000.00 and USD 12,810.00 respectively.
5. The Defendant periodically submitted to the Plaintiff Schedules of engine flight cycles on the basis of which the Plaintiff raised invoices. However, despite having initially settled the same, the Defendant failed to settle the subsequent invoices in breach of the said agreement hence entitling the Plaintiff to terminate the said Lease Agreement. Pursuant to the terms of the Lease Agreement the Plaintiff demanded delivery of the said Engine and Hydromechanical Unit. To the Plaintiff upon the said termination the Defendant was nolonger entitled to continue using the Engine or the Hydromechanical Unit and was expected to redeliver the same but the Defendant in breach of its agreed obligations failed to redeliver the same following which the Plaintiff invoked the provisions of the Lease Agreement to levy a daily penalty fee of USD 400 in addition to other outstanding fees from 16th May 2011 till redelivery of the said Engine. The plaintiff in addition lodged a complaint with the Kenya Civil Aviation Authority.
6. From the foregoing the Plaintiff claims from the defendant a total of USD 293,916.98 as particularized in the plaint. However, the Defendant has since offered for sale the aircraft DHC 8-102 MSN 253 and the plaintiff is apprehensive that the said aircraft may be sold together with its Engine and Hydromechanical Unit due to the fact that the Defendant has no other known Engine while the Engine Serial No. 121241 is in the Plaintiff's custody. According to the Plaintiff it is the failure by the Defendant to make good the Plaintiff's claim that has provoked this suit.
7. On behalf of the Defendant it was pleaded in its defence that whereas the defendant and the plaintiff entered into an agreement for the repair of the Engine mentioned in the plaint, the said agreement was not based on the assumption that it was a normal run engine as alleged in the

plaint. According to the Defendant the USD 300,000 quoted by the Defendant was an estimated cost which was subject to confirmation after examination and it was only after confirmation from the last boroscope report that the Defendant confirmed that the engine was a run out engine removed for time and was then able to confirm that the cost of repairs would be USD 310,518.29. It was therefore denied that the estimate at the time of shipping the engine was subject to any further examination. The defendant however admitted having signed the Maintenance Agreement with the Plaintiff which agreement was signed based on what maintenance the engine needed. The defendant however denied it was later discovered that the engine was in worse condition that represented by the defendant. According to the defendant the Defendant did not make any representation and that the condition of the engine was confirmed by the plaintiff's engineers after having access to the last boroscope reading of the engine hence the alleged further estimate costs of USD 742,078.80 which was later allegedly reduced to USD 698,412.20 was in breach of what had been agreed between the parties leading the defendant to institute Milimani HCC No. 253 of 2011

8. According to the Defendant although the agreement was based on specific parts of the engine, the Plaintiff expanded the scope of the work to include parts of the engine which were not subject of the agreement in order to earn more money therefrom. It was therefore pleaded by the Defendant that the Plaintiff is not entitled to the claimed USD 52,758.52 as it is the Plaintiff that is in breach of the said agreement.
9. While admitting that it did lease from the Plaintiff engine Serial No. 120799 as a replacement for its engine at the cost stated in the plaint, the Defendant contended that the said agreement must be read together with the one for the repair of the engine and that upon the breach of the Engine Repair Agreement, the Defendant stopped using the leased engine and removed it from the aircraft and only held on to it as a lien for redelivery of its engine by the plaintiff and compensation for the said breach. The Defendant however did not plead to the value of the Engine and the Hydromechanical Unit and denied the Plaintiff's claim as particularized in the plaint.
10. With respect to the allegation that the Defendant had offered the Engine for sale, the same was denied with the Defendant averring that the aircraft does not belong to it hence the claim was made in ignorance and in bad faith
11. The Defendant further denied the rate of exchange and contended that any claim must remain in the currency of the contract
12. In light of the existence of the suit filed by the Defendant the Defendant disputed the averment that there was no suit pending.

THE PLAINTIFF'S EVIDENCE

13. In support of its case the plaintiff called as PW1 **Fatih Akbulut**, a Sales manager of the Plaintiff. According to him, he is an Industrial Engineer based on Germany and working with the plaintiff in this case as its Chief Executive in Africa-Middle East. According to the Plaintiff's core business is that of Engine Sales and repairs as well as overhaul of aircraft engines.
14. When he came to Nairobi he visited the Defendant on 16th of June 2010 since some of the Defendant's aircraft are on the plaintiff's portfolio and expressed the Plaintiff Company's interest in working with the Defendant. According to him, he met **Mr. Mohammed Uppar** who was the Defendant's Technical Director. At that time however the Plaintiff got no business from the Defendant. However, on 17th June, 2010 he received an email from the said **Mr Uppar** inquiring as to whether the Plaintiff could make an offer for a competitive Company, the Company in question being **Seca**. This quotation by **Seca** was in respect of the price list of the parts of an engine. The email according to the witness stated that the quotation was to be based on the condition of the engine after assessment thereof was performed.
15. On receipt of the email, the witness prepared on offer and sent it to the Defendant stating that the condition of the engine could not be determined until the disassemblement and inspection of the engine. By letter dated 1st July 2010, the Plaintiff forwarded to the Defendant a cost estimate of USD 310,518.29 which estimate was arrived at on the assumption that the repairs were to be carried out on a normal run out engine. The Plaintiff however notified the Defendant that if upon delivery and inspection of the engine it was discovered that the engine required more repairs than what the Defendant had represented, the Plaintiff would invoice the Defendant separately for the

additional repairs required and the Defendant signed the customer acceptance sheet attached to the cost estimate and agreed to be bound by the General Terms and Conditions attached thereto. The acceptance of this by the Defendant was, according to him, signified by the signing of the acceptance sheet which offer was a conditional offer in terms of paragraph 4 of the said document and was in consideration of the Defendant undertaking to settle the invoices raised by the Plaintiff in respect of the repairs undertaken on the engine leading to the execution of an agreement (hereinafter referred to as the "**Maintenance Agreement"**).

16. According to the witness, it was an express term of the Maintenance Agreement that the Defendant would settle all invoices raised by the Plaintiff and would not off set against its own claims or exercise a retaining lien unless its counterclaims are undisputed or had been declared final by a Court of law. Pursuant to the Maintenance Agreement, the Defendant delivered the engine Serial Number 121241 to the Plaintiff and a prepayment deposit was made by the Defendant. However, upon disassembly and inspection, the Plaintiff's engineers discovered that the engine was in worse condition than what had been represented, for instance some parts of the engine were corroded whereas others were missing. The Plaintiff therefore concluded that the engine would require more repairs than previously anticipated. In consequence, the Plaintiff revised the cost estimate upwards to USD 742,078.80 and invoiced the Defendant for this amount. In the schedule attached to the revised costs estimate, the Plaintiff enumerated how the sum of USD 742,078.80 was arrived at by setting out details of the additional parts that required repairs and replacement together with their cost.
17. The Defendant, however, expressed dissatisfaction with the fact that the costs had substantially increased. After an exchange of several e-mail correspondences between the parties geared towards agreeing on the price to be paid for the said repairs, the amount was revised to USD 698,412.20. Despite explanations by the Plaintiff and attempts to revise the figure downwards, the Defendant refused to approve the additional repairs.
18. When it became clear that the Defendant was not going to approve the additional costs, the Plaintiff stopped all works on the engine. By this time, the Plaintiff had rendered services to the Defendant in respect of the engine amounting to USD 52,758.52 and the Plaintiff duly invoiced the Respondent for this amount on 26th May 2011.
19. Although as per Article 7.5 of the General Terms and Conditions, the Defendant had 30 days within which to submit any complaints with respect to the invoices raised, by the lapse of the 30 days, there was no complaint by the Defendant in respect of the said invoice though the Defendant refused to settle the said invoice forcing the Plaintiff to invoke clause 8.2 of the General Terms and Conditions which entitled the Plaintiff to exercise its contractual right of lien and retain over the engine serial number 121241.
20. During the period that the Defendant's engine Serial Number 121241 was undergoing maintenance and/or repairs the Plaintiff agreed to lease to the Defendant its engine PW121-8 Serial Number 120799 to which was attached the Hydromechanical Unit Serial Number F17208 as a replacement engine in consideration of the Defendant paying it the agreed lease fees based on the reports generated by the Defendant on the flight cycles and/or usage of the engine. The parties then entered into a written agreement dated 9th August 2010 but executed by the Plaintiff on 31st August 2010, the "**Lease Agreement"**. The said engine together with the Hydromechanical Unit was to be used in the aircraft DHC 8-102 MSN 253 owned by **Avmax**". According to the statement, the Lease Agreement was clear that the replacement engine would remain the Plaintiff's property and that the Defendant was prohibited from creating any liens to the engine or representing itself as the owner thereof. Accordingly, the Plaintiff delivered the replacement engine and Hydromechanical Unit to the Defendant on 21st October 2010 at which time the engine was valued at USD 750,000.00 while the Hydromechanical unit was valued at US$12,810.00, receipt of which the Defendant duly acknowledged and made a prepayment deposit for the same. Thereafter, as agreed, the Defendant generated and submitted the engine usage reports to the Plaintiff which reports the Plaintiff used to raise invoices. Whereas the Defendant settled the invoices of the prepayments, it defaulted in settling certain invoices and arising from the said default, on or about 1st April 2011, the Plaintiff terminated the Lease Agreement and demanded that the Defendant redeliver the engine back to it. The Defendant, however, refused to redeliver the engine back to the Plaintiff and stopped all communication with the Plaintiff. Being uncertain as to further accumulated engine cycles, the Plaintiff on 20th May 2011 lodged a complaint with

the Kenya Civil Aviation Authority and soon thereafter, by its Advocate's letter dated 25th May 2011, the Defendant demanded that the Plaintiff withdraws the said complaint and in breach of Article 7.1 of the Lease Agreement the Defendant purported to create a lien over the Plaintiff's engine.

21. Despite demand, the Defendant refused to return the engine or settle the sums due to the Plaintiff hence it was contended that the Plaintiff is therefore entitled to charge the lease fees, the interest on the outstanding amount together with a penalty of USD 400 per day from the date of expected delivery until such time as its engine is redelivered back to it.
22. The Plaintiff later discovered that Defendant had without prior authority or consent from **Avmax** advertised as available for lease/sale aircraft DHC 8-102 AMSN 253. The said engine, according to the witness, carries the Applicant's engine and Hydromechanical unit as components hence Plaintiff was reasonably apprehensive that the Defendant may have been planning to dispose of the aircraft together with its Engine Serial Number 120799 and the Hydromechanical Unit Serial Number F17208 unless the orders sought herein are granted, since once the aircraft is sold, it would be illegally deprived of its property in the form of the engine and Hydromechanical Unit.
23. The Plaintiff therefore claimed the sum due.
24. In cross-examination by **Mr. Mungu**, learned counsel for the Defendant, PW1 stated that when they went to solicit for business they were shown a quotation from **Seca** though the quotation did not form part of the bundle of documents. **Seca**, he conceded was their competitor in business. However the quotation was based on what **Seca** had quoted though he did not know the basis upon which **Seca** made their quotation and therefore was unable to tell whether **Seca** saw a boroscope or the last shop report. The Plaintiff however followed **Seca's** quotation and tried to match the same and it was on this quotation that led the defendant to enter into the agreement with the plaintiff instead of **Seca**. Although the plaintiff asked for the boroscope report and last shop report during the visit, not all that they asked for was availed before the quotation. He admitted that the two agreement s were linked and that the claim arises from the two agreements which contained everything including interests. Asked about the commercial rate of interests in Germany, he said he was unaware of the same. Asked about the 5.12% rate he admitted that he could not find the same but averred that the Defendant had no lien over the engine. He admitted that it was true that the Defendant was to deliver their engine 14 days after the plaintiffs delivered theirs and that the plaintiff had not yet returned the defendant's engine because they had not yet been paid. He admitted that they had not yet communicated to the defendant to pick their engine on payment of the charges. While they were obligated to receive the flight hours they only received them up to May 2011 which made them write to the Kenya Civil Aviation Authority in May 2011. He said that he was not aware that immediately they wrote the letter the defendant removed the engine from the plane. He however admitted that the engine had a limitation in respect of time and that if time ran out the engine would have to be removed for repair by the Plaintiff. According to him the engine was supposed to do 682 hours chargeable at the rate of USD 130 per hour though the Defendant was to pay 180 hours per month. After the said 682 hours the engine was meant to be removed. According to him the plaintiff wanted its engine back and that the plaintiff was ready to deliver the defendant's engine after compliance. The labour at page 38 was for the initial work and test runs. The work, according to him would have taken 32 hours when working in two shifts of between 7-8 hours. According to him, they are claiming USD 52,000 in labour charges which were recorded somewhere on the job cards. Although there was a document showing what was done and the hours spent he did not have the said document. The round estimate of the hourly rate was based on assumption and on the contract. To him, they have not put in any parts and if the document shows that they put in any parts in the engine that would be incorrect.
25. In re-examination by **Mr. Kamau Karori**, the witness said that the defendant was not entitled to exercise a lien. Whereas the witness was aware of **Seca's** quotation, there was no reference to the boroscope or the last shop in the said report. He said that a demand was sent and that the labour component is the work done so far and that the engine was not returned due to outstanding costs. According to him, the Defendant has never asked for money from the Plaintiff

THE DEFENDANT'S EVIDENCE

26. On behalf of the defendant, their called **Donald Earl Smith**, the Defendant's Chief Executive

Officer who testified as DW1. He admittedly that the Defendant had dealings with the Plaintiff as a German Company while the Plaintiff is a Kenyan Company. He similarly prepared a statement which was filed in these proceedings and admitted as part of his examination in Chief. According to his statement on or about the month of July 2010 the defendant was about to send their Engine serial number ESN 121 241 for Hot Section Inspection (HIS) to a company known **Seca** with which they had had dealings before and had performed the same Inspection before at an excellent standard at USD 356,000 in writing. This time round the Defendant obtained a quotation of USD 340,000. However, the Plaintiff, through PW1, pleaded for the job. Although reluctant at first DW1 acceded to the request on condition of reduction of **Seca's** quotation by a reasonable margin after which the Plaintiff came with a quotation of USD 310,518 which quotation being specific convinced DW1 that PW1 knew what he was quoting for and that the overhaul would be based on the specified parts. According to DW1 for PW1 to have come with the specific quotation he must have inspected the engine by physical inspection and the inspection of the Logbooks showing used parts as well as the boroscope inspection. In his view, for an engine which had come out of the wing and had been operating perfectly, one would not expect a quote to be substantially different. According to him engines go for overhaul either due to reduced performance in opinion of the manufacturer's recommendations or due to hours or cycles used. According to the witness this particular engine had come from the wing for a time inspection and its performance was still up to standard.

27. However in the statement it was stated that the stated estimated cost of USD 300,000 was said to be subject to confirmation after examination and that the Plaintiff thereafter requested for the last boroscope report of the engine which enabled it to confirm that the engine was in good working order would be removed only due to limited parts being out of time and requiring replacement. It was thereafter able to confirm that the cost of the limited repair would be USD 310,518.29. It was therefore only upon the said confirmation of the estate of the engine and upon notification that the defendant gave its consent to the plaintiff to start the process of limited overhaul of the said engine.
28. Since the overhaul of the said engine was to take some time, the agreement of overhaul had a provision for spare engine support in which it was agreed that the plaintiff would provide the defendant with an engine for the Defendant's use in its plane at no fee but only charging USD 130 as usage fees per engine flight hour and thereafter the Defendant would send its engine for the work to be done. Consequently, the Plaintiff and the defendant in furtherance of the agreement entered into a contemporaneous agreement for the lease of the spare engine whose particulars were PW 121-9 serial number 120799.
29. Subsequently, the spare support engine was duly delivered and the defendant at the same time also delivered to the plaintiff its engine for overhaul and repair. According to the witness the basis of the agreement was the quotation and the price for the work without which the Defendant would not have given the engine and the cost of the overhaul which was shipped to Germany was USD 360,000 which could vary to USD 472,000 due to the alleged fact that the previous overhaul was illegal. According to the witness if the job had gone to **Seca** the Defendant would have paid USD 360,000 and there would have been no dispute.
30. However, once the defendant delivered its engine to the plaintiff, the plaintiff, despite the fact that it was supposed to carry out the repairs based on the first quotation extended the scope of work without authority and escalated the cost of the overhaul by first asking for USD 689,500 and eventually asked for USD 742,078.80 which sum was a complete departure from the initially agreed and confirmed figure of USD 310,518.29. According to him for an engine that had completely run out of time the cost of overhaul would be USD 740,000 which was not the condition the said engine. According to DW1, the largest overhaulers in the World are Atlantic Turbines and when he informed them about this they promised to review the pricing but it went higher by 20-30 Dollars but ought not to double. This second quotation, according to the witness was never documented and as a result the witness felt that he was being taken advantage of since the Plaintiff knew that once it had the engine the Defendant was obliged to pay the amount demanded in order to have the overhaul done since the leased engine only had limited amount of 120 hours which the Defendants used sparingly hence the Defendant was likely to run out of hours before the overhaul of its engine.
31. According to the witness , the costs that the plaintiff was asking for were extremely exaggerated

whereas the condition of the engine had been confirmed by the plaintiff and defendant's technical team from the boroscope report and actual examination and its only upon the said examination and the quotation given that the defendant agreed to ship the engine to the plaintiff in Germany and therefore the escalated costs being asked for were a complete departure from the agreement entered into as to costs of repairs and overhaul. However, when the plaintiff was informed that the costs demanded was unreasonable, it then purported to terminate the lease for the spare engine support and wrote a letter to the Kenya Civil Aviation Authority informing it of its purported termination of the said engine lease.

32. According to DW1, after the redelivery of the engine by the plaintiff the Defendant was allowed 14 days use of the leased engine within which period the Defendant would replace their engine and ship the Plaintiff's engine back. However, the plaintiff, despite being oblivious of the fact that the spare support engine was supplied as part and parcel of the agreement for the repair and overhaul of the defendant's engine and that such lease agreement cannot be dealt with separately, has purported to hold the Defendant's engine that it has alien for some purported and unjustified charges. Accordingly, the Defendant is also legitimately holding the Plaintiff's engine leased to the defendant as a lien for the return of the Defendant's engine and will only release it at such when they return the defendant's engine in its custody since the lease was to support the contract for the overhaul and the contract was one contract. In the witnesses' evidence, the plaintiff's officials dealing with this matter proved to be a very elusive persons who were not willing to keep their word and the defendant has been apprehensive that if it delivers the spare support engine without first receiving back its engine then the plaintiff will continue keeping the said engine therefore leading to the plaintiff suffering loss and damage.
33. It was averred that it was the breach of the agreement for overhaul and maintenance of the Defendant's engine that led the defendant to suspending any payments for the leased engine as the sole purpose of the lease was to ensure that the defendant's aircraft from which the engine was removed is not grounded and if the engine is returned the aircraft will be grounded leading to the defendant suffering loss and damages. Although the defendant has already demanded the return of its engine, the demand has not been responded to. According to him, the engine that the Defendant is holding has no hours for use remaining since 2nd February 2011 and therefore not in use. To him, the defendant is not unwilling to make payments for the leased engine but will only do so once the plaintiff makes a commitment to return its engine at the quoted price.
34. He further testified that the parties herein agreed on the lease fees which were charged daily between 0-130 dollars per hour. A cycle is when the plane takes off and lands and an hour is when the wheels take off and go back. It was his evidence that by the end of September, 2010 the hours were coming to an end and he flew the plane only in an emergency for less than 50 hours per month to enable them come to a solution though the request was for 150 hours per month. According to the Defendant the plaintiff should not factor in a figure without basing it on the hours. Thereafter the plaintiff requested them to remove the engine from the plane but after removal the plaintiff claimed that he was flying the plane without a flying operation. Due the said saving of the hours the plane was still capable of flying after September 2010. However after February, 2011 the engine was not in use although by that time the Plaintiff had not brought back the Defendant's engine. According to him had this been done the Defendant would have returned the plaintiff's engine.
35. In the witnesses' view it is the Plaintiff which is in breach since they have never informed the Defendant why they have never offered to redeliver the said engine. According to him, since the aircraft is on lease the Defendant's could not sell it. He further denied that he owed any fees on the aircraft although he would be happy to pay the money on the lease and return the engine if the plaintiff returns the plaintiff's engine. According to him the Defendant owes about Dollars 56,000 but does not understand the charges incurred in taking the engine apart. To him the engine can do 30 -60 hours a month which is in line with what was agreed upon. To him the plaintiff's engine being a Turbo, it is impossible to do 90 hours and therefore the plaintiff ought to have brought the copy of the Logbook of the engine to justify the hours it is claiming since the figure claimed infers that the Defendant was flying 250 hours per month. Whereas the Defendant would be happy to pay the amount due and return the plaintiff's engine, the witness denied liability in respect of penalty and interest hence he urged the Court to dismiss the case.
36. In cross-examination by **Mr. Kamau Karori**, learned counsel for the plaintiff, DW1 confirmed

that he entered into the Engine Maintenance Agreement and the Lease Agreement and signed both after reading them. He admitted that he was not aware that the validity of the agreement was raised in the defence and denied that he complained about its execution. According to him the defence contains his entire answer to the claim to the plaint based on the available information. He said that he met PW1 in his office several times though he could not recall meeting him anywhere else. He denied that the Defendant has another Yard at River.

37. He however admitted that he did not the Plaintiff the engine and that he did not see the engine being inspected. He had no copy of the boroscope report as well as the last engine shop report. According to him what the plaintiffs meant was that the condition of the engine could not be fully determined until after inspection though they were told the status of the engine which had been established by the boroscope report though he could not tell the date of the inspection of the engine. Similarly, he did not have the names of the persons who carried out the inspection. He was however notified that if there were additional charges the Defendant would have to pay.
38. According to him the engine supplied had limited hours and cycles and was to take 120 days and they did not complain about the number of hours since he expected that it would be repaired within time. He admitted that he had not made any payments towards the repair of the engine under the Repair and Maintenance Agreement. Referred to clause 1 of the Agreement the said that his understanding was that he was expected to pay 50% on overhaul and the balance of 50% on delivery of the engine after the overhaul. Re-delivery, according to him meant the return of the engine to him and that the overhaul was to be completed before payment. He denied that an invoice was sent to him and that he has never seen an invoice under the Repair and Maintenance Agreement for the amount though he had seen a quotation. However referred to page 49 of the plaintiff's bundle he admitted that it was an invoice though he contended it was not stamped. He however denied receiving the same. Referred to the letter dated 6th June 2011 at page 120-121 of the plaintiff's bundle, he admitted that the Defendant must have received the letter though he was unaware of the invoice referred to therein. Though he said that he complained about the amount he was not sure whether the Defendant's lawyers responded thereto. He was however unable to produce the written response. He denied that the Defendant was given the quotation of USD 220,000 and according to him the quotation kept on rising. However on being referred to page 36 he said that the plaintiff gave a satisfactory written explanation. Although the engine could do 150 hours per month he said that would not be done. He could not however say that it did 150 hours without documentation. Referred to page 193 he admitted that the engine could do 193 hours. According to him the Defendant's duty was to return the plaintiff's engine two weeks after return of the Defendant's engine. Referred to page 62 he said that re-delivery of the engine was to the Plaintiff. However, referred to page 69 he said that upon termination of the agreement he was to return the engine and at page 59 the return was on whichever event happened first. While contending that there was no request for the return he said the date was past. He admitted that there was no provision that he had the right to retain the engine or return it. He admitted that the engine was delivered on the basis of the letter at page 6 and that in the said clause there was no clause for redelivery on return of the engine. He admitted that at page 60 first paragraph there was a daily fee of USD 400 notwithstanding the lessor's claim. He admitted that if the invoice went straight to the advocate the necessity of stamping the same by the Defendant would not be there and agreed that he had not raised the issue of stamping.
39. According to him the phrase "delivery" of the repair engine referred to, meant the delivery of the engine to the Plaintiff while "re-delivery" referred to delivery to the Defendant. With respect to the lease "delivery" referred to delivery to the Defendant while "re-delivery" meant delivery to the Plaintiff. According to him, in accordance with clause 9.2 the engine ought to have been returned prior to 29th September, 2010 but was not so returned. With respect to return prior to termination, the same was not returned prior to termination. He admitted that the engine was to be delivered free of lien. However, he said this was waived because the engine was delivered late. He admitted that although the period for delivery was past the defendant still had the engine pending the release of the defendant's engine and not on the basis of a lien. Although he has not refused to return the engine, according to him the failure to return the same does not amount to alien. He clarified that he was not insisting on the right to hold on to the engine. He admitted that he had no report showing the condition of the engine and said that he did not sign the terms and conditions. He had no evidence that the prices quoted by the plaintiff were incorrect. Neither did he have a

report showing that the repairs undertaken by the Plaintiff were unnecessary. He admitted that though the flight hours are ascertainable from the Log book he did not have a copy thereof in court. He however insisted that he would only return the leased engine on return of the repaired engine though he insisted that does not amount to a lien.

40. Referred to page 60 clause 4.1.2 he admitted there was penalty for late delivery. He admitted that page 15 paragraph 8.3 and 12.3 reserved the rights of the Plaintiff in accordance with the laws applicable in Germany. Although he denied that he received the invoice, he however said that he was not denying that the same was received by the Defendant. Although he was unaware that the Defendant had terminated the overhaul agreement, he believed that the lease agreement was terminated. He denied that the flight hours quoted by the Plaintiff were from the plaintiff's records. While admitting that **John Mwangi** worked for him, he disputed that the computer printout was from his computer. While admitting that the date for the shipping of the engine must have been extended, he had no evidence of the extension. He admitted that the initial findings were before the engine was disassembled though it must have been disassembled and although he had earlier on stated that the cost never came down, the same was reduced from USD 700,000 to USD 600,000. He was however expecting the cost to come down after the disassembling though it went up. Referred to the estimate at page 19 he said the same though did not go to him was sent to the Defendant and that he was aware of the costing. He was however sent the cost estimate at page 18C which he confirmed was a cost estimate and not an explanation and denied that there was a cost estimate explanation attached to it. Referred to pages 120-122 he said there were too few hours remaining and that the delivery referred to therein is in respect to delivery to the Plaintiff. While admitting that they did not pay the requisite 30% at the time of the delivery, he gave the reason as due to the fact that the Defendant did not get an invoice as none was raised. Whereas the Defendant filed a case a case the Plaintiff, no final judgement was yet to be obtained. Although he admitted that the engine was meant to run for a certain amount of hours and the Defendant was to provide the number of circles, DW1 informed the Court that he could neither recall the number of hours nor prove the number of circles.

41. In re-examination by **Mr. Mungu**, DW1 said that though the engine was to be delivered on 29th September 2010, that period was before the Defendant received the engine. He denied that he had pledged, charged or created encumbrances to third parties and reiterated that the only reason he was holding on to the engine was because the Plaintiff was yet to return their engine pursuant to clause 3.2. According to him the quotation of the costs was to be based on the Plaintiff's own inspection and not on a third party's quotation and that the said quotation could not be made by mere looking at the engine. He reiterated that he had not refused to return the engine and that the Defendant did not receive the invoice.

SUBMISSIONS

42. I have gone through the submissions on record which the parties themselves appreciate are laborious. Accordingly, I will not reproduce all the submissions on record but will only point out salient issues.

43. On behalf of the Plaintiff it was submitted that the only documentary evidence on record were filed by the plaintiff. Similarly, the issues on record were the only ones filed by the plaintiff. Form the pleadings, it was submitted that the execution of the Repair and Lease Agreements and therefore the identity of the documents comprising the contract between the parties is not disputed as well as the fact of delivery of the Repair Engine to the Plaintiff and receipt of the lease engine by the defendant. According to the plaintiff in light of the admission in the defence the charge out rate in respect of the Lease Engine and the Defendant's obligation to pay the same is similarly not disputed. These admissions appear in DW1's statement. According to the plaintiff. DW1 from his evidence was not a credible witness based on several inconsistencies and contradictions in his evidence and the Court ought to find so based on **Ndungu Kimanyi vs. Republic [1976-80] 1 KLR 1442**.

44. From the pleadings and the evidence, it was submitted that the issues that fall for determination are (a) whether the Plaintiff is entitled to payment of the charges arising from the services rendered in respect of the Repair Engine; (b) whether the plaintiff is entitled to payment in respect of the Lease Engine; (c) Whether the Plaintiff is entitled to an order for the unconditional

redelivery of the Lease Engine; and (d) which party should bear the costs of the proceedings.

45. By failing to pay the deposit or approve the Final Estimate as was provided in the contract, it was submitted, the Defendant breached the terms and conditions of the Repair Agreement hence the Plaintiff was entitled to stop the repair works and raise its invoice in the sum of USD 52,758.58 in accordance with clause 7.6 of the Repair Agreement. Under clause 8.2 of the Agreement the plaintiff was entitled to and did exercise the right of lien over the Defendant's engine. Since the failure to complete the contract was caused by the Defendant's failure to approve the final estimate, the Defendant cannot benefit from that failure. That the engine was disassembled and cleaned was admitted by the Defendant and since the said work had a cost element, without alternative costing from the Defendant, the Defendant has failed to show that the said amount is not due and payable hence the plaintiff is entitled to USD 52,758.52.
46. Although under the Lease Agreement the Defendant was supposed to supply the Plaintiff with monthly usage reports of the engine, the Defendant instead on 10th May, 2011 forwarded to the Plaintiff a report showing the engine usage from October 2010 to April 2011 hence in failing to supply the said reports the Defendant breached its obligations under the Lease Agreement. In the absence of such reports clause 7.6 provided that the plaintiff would charge the minimum monthly usage charges for which invoices were raised but the Defendant failed to settle the same. Following the termination of the Lease Agreement by the Plaintiff the Defendant was obliged under clause 4.1.2 to immediately return the lease engine to the plaintiff which it failed to do hence there was another breach for which the plaintiff charged USD 400 daily penalty which continues to accrue todate. Whereas the Defendant claimed that it was entitled to retain the lease engine until its own engine was returned, it was submitted that under clause 7.1 of the Lease Agreement, the Defendant was barred from creating a lien over the said engine. In any case in the absence of any debt owed to the Defendant by the Plaintiff the Defendant was in accordance with **Saleh Mohamed Juma vs. Ramla Rubeiya Said & Another HCCC No. 267 of 1997** not entitled to a lien over the said engine.
47. In light of the said breaches it was submitted that the plaintiff was entitled to charge a default penalty in addition to he lease fees for usage of the engine hence the Plaintiff has proved that the Defendant is indebted to it in terms of the engine usage and penalty and hence judgement ought to be entered in the total sum of USD 492,675.73 in respect of the lease agreement.
48. Upon termination of the Lease Agreement, it was submitted that the Defendant was required under clause 9.2 as read with clause 12.4 of the Lease Agreement to immediately re-deliver the Lease Engine to the Plaintiff within 14 days of termination which ought to have been by latest 15th May 2011 but it failed to do so hence was in breach. Since the Defendant was prohibited from creating any lien in respect of the Lease Engine, there was no warrant to interpret the same otherwise and should not be allowed to rely on extrinsic evidence to vary the terms of the agreement and on this submission the Plaintiff relied on **Surgipharm Limited vs. Awuondo & Another [2003] KLR at page 99**. Based on Doge vs. Kenya Canners Limited [1989] KLR it was submitted that the Defendant is estopped from denying liability in respect of the lease and penalties. In the premise the Defendant ought to be directed to immediately and unconditionally release the Lease Engine back to the Plaintiff.
49. It was further submitted that the failure to return the Lease Engine deprived the Plaintiff of the opportunity to lease the same to third parties hence denied the Plainti9ff of revenue at the minimum rate of USD 130 by 180 hrs/cycle which amounts to USD 23,400 per month till date of delivery which sum would by April 2013 be USD 491,400. This claim it was submitted arises from clause 12.4 which stipulated that the lease charges would continue to apply till the redelivery of the engine to the plaintiff and in support of this submission reliance was placed on **Olerai Investments Limited vs. Principal Kenya Institute of Mass Communication and Another HCC No. 2348 of 1996** and **Francis A K Muindi vs. Municipal Council of Machakos HCC No. 2630 of 1981**.
50. With respect to the currency the Plaintiff submitted it had no problem with the award being in Dollars though based on **Beluf Establishment & Another vs. AG Civil Appeal No. 134 of 1986** and **Ingra vs. National Construction Corporation [1987] KLR 652 at 655-656**, the Court is entitled to express judgement in foreign currency convertible at the rates prevailing on the date of payment or enforcement of judgement.
51. On costs it was submitted that had the Defendant complied with its obligations under the

agreement these proceedings would have been unnecessary hence the Defendant ought to bear the costs of this litigation.

52. In the result the plaintiff submitted that it is entitled to USD 1,036,834.20.

53. On behalf of the Defendant, it was submitted that with respect to the issue whether the plaintiff is entitled to payment of the charges in respect of the repair engine, it was submitted that Article 1.2 fixed the labour charges for the entire scope of the works at USD 48,375.00. Even in the revised estimate the labour charges were only USD 58,725.00. It was submitted that all that the plaintiff did was disassemble and later reassemble the engine which was not even 10% of the work. Whereas a purported invoice is included in the bundle of documents, it was submitted there is no evidence that the same was sent. It was further submitted that there was no agreement hence the claim for repairs and replacement of the spare parts is not sustainable. It was submitted that the plaintiff was being quite arbitrary, unreasonable and fraudulent when billing the Defendant under this item. To the Defendant as the Plaintiff's demand for exorbitant charges were the case for the engine remaining in Germany for that period of time, all other extra charges associated with the lien over the engine are clearly not payable.

54. It was submitted that the lease period was to run for the duration of the repair of the defendant's engine or until 29th September, 2010. However as the engine was delivered on 20th October, 2010, the reference to 29th September, 2010 became obsolete and the only viable period was in the absence of mutual extension, the return of the Defendant's engine. It was further submitted that termination under clause 12.2(b) could only be done on notice and in the absence of the notice amounted to a breach of the contract and the termination was void. It was submitted that there are un-reconciled data in the usage charged and actual usage. According to the defendant whereas the agreement did not obligate the plaintiff to issue an invoice after reconciling the flight hours, it is in the interest of justice that such reconciliation be carried out more so in light of the fact that there are charges which are patently not legal. Since the termination was not in accordance with the contract it was submitted that the plaintiff is not entitled to penalties. It was submitted that by the time of the termination of the lease agreement the repair agreement had been terminated by conduct and the only thing remaining to be done was for it to raise an invoice, if any and to have shipped the repair engine back to the defendant in order for it to receive the lease engine back.

55. According to the defendant the demand for penalty charges is not payable since penalty is designed as mere security for the performance of the contract and the promise is sufficiently compensated by being indemnified for actual loss and the defendant referred to ***Story, Equity Jurisprudence, s.1316***; **Wilbeam vs. Ashton [1807] 1 Camp. 78**; **Dunlop Pneumatyic Tyre Company, Ltd vs. New Garage and Motor Co. Ltd [1915] AC 79 at 86**; **Campbell Discount Co. Ltd vs. Bridge**. It was further submitted that the agreement was subject to the German law hence the claim as sought by the plaintiff is not tenable

DETERMINATIONS

56. I have considered the pleadings, the evidence and the submissions made and issues in this suit. Accordingly I will deal with what, I my view are the issues for determination.

57. The first issue for determination in my view is whether there was an agreement with respect to the amount which was payable to the plaintiff by the defendant in respect of the Maintenance Agreement. According to the Plaintiff the estimate was subject to inspection, boroscope report and the last shop report which were not available at the time of the agreement. In other words the final estimate could not be determined at the time of the agreement. The Defendant's position on the other hand was that the Agreement was entered into between the parties based on the representation that the Plaintiff's quotation would be less than the quotation made by **Seca**. From the version presented by the Plaintiff, it is clear that the parties were not at idem with respect to the exact amount which was to be paid since the amount would be determined on receipt of the boroscope report, the last shop report and further inspection. However, in cross-examination, PW1 acknowledged that when they went to solicit for business they were shown a quotation from **Seca**, their competitor in business and that their initial quotation was based on what **Seca** had quoted. He however admitted that he did not know the basis upon which **Seca** made their quotation and therefore was unable to tell whether **Seca** saw a boroscope or the last shop report. He, however admitted that the Plaintiff followed **Seca's** quotation and tried to match the same and it was this

quotation that led the defendant to enter into the agreement with the plaintiff instead of **Seca**. Therefore from the Plaintiff's own evidence it was clear that the

Defendant was induced into entering into the Maintenance Agreement with the Plaintiff based on the fact that the Plaintiff's quotation was lower than the one from **Seca**. Unfortunately the said quotation from **Seca** was never produced in evidence by any of the parties so that the Court was unable to confirm the magnitude of the work which was to be performed by **Seca**. In this case it comes out clearly even from the Plaintiff's own evidence that for the contract to have been properly concluded, further inspection and examination was to be performed by the Plaintiff after which the Plaintiff would communicate its findings to the Defendant and the Plaintiff would not commence the work until approval from the Defendant. In other words, in the event that what was to be done was found to be not the kind of work expected to be undertaken on a normal run out engine further work had to be approved by the Defendant. In fact it was the failure by the Defendant to approve further work that led to the termination of the Maintenance Agreement. The question that the court would have to ask itself is what would have been the terms between the parties had the contract proceeded after the said inspection. In **Bakshish Singh and Brothers vs. Panafric Hotels Ltd [1986] KLR 538; [1986-1989] EA 34** the Court of Appeal held:

> **"To a good contract there must be a concluded bargain, and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties. An agreement between two parties to enter into an agreement in which some crucial point of the contract matter is left undetermined is no contract at all. But if there is silence on that point sometimes it is provided for by implying the test of reasonableness, e.g. the reasonable price of goods which the Sale of Goods Act of 1893 supplies or the contractor will complete the work within a reasonable time of being given possession of the site. On the other hand it is perfectly good contract if it is agreed that one party should decide the point. Where there is provision for the parties to agree on the critical point later and they never do, there is no contract. If a provisional agreement intended to be binding is reached until a subsequent agreement in precise and formal language is drawn and executed the provisional one is fully and immediately binding. When the time of completion in a written building contract signed by the employer is blank even if he and the contractor are told verbally of the date, it is not enough to seek an order to introduce this term into such a contract by parol evidence. There must be something very strong in the case before this can be done, especially where it introduces a penalty or forfeiture. A party is entitled to resist an action for breach of contract on any ground that is available even though before action he gave no reason at all".**

58. In **Triple Eight Construction Company (Kenya) Limited vs. China Petroleum Pipeline Bureau &Another Nairobi High Court (Commercial &Admiralty Division) Civil Suit No. 186 of 2010,** I held that "without identifiable terms of the contract it is clear that the plaintiff would not be entitled event to an award of damages since an award of damages for breach of contract must necessarily flow from the breach of the terms of the contract." In that case I relied on **Alfred M O Michira vs. M/S Gesima Power Mills Limited Civil Appeal No. 197 of 2001** where the Court Appeal held that where there is no meeting of the minds of the contracting parties the contract is incapable of performance. The Court further held that where the agreement is uncertain on the fundamental term on the payment of the purchase price in that it does not provide for the time within which the balance of the purchase price is payable or secure the payment, it makes the entire agreement void for uncertainty and neither party can be held to be in breach of the agreement or be entitled to any damages from the abortive agreement. A similar position was taken by the same Court in **Nairobi Homes Ltd. vs. Major Bashir Kalyan Civil Appeal No. 50 of 1985.**
59. Therefore, unless it is the plaintiff's contention that there was a provisional agreement between the plaintiff and the defendant that in the event that the inspection revealed that the nature of the work to be undertaken on the Defendant's engine was more than the normal run out engine the defendant would enter into an agreement with the plaintiff so as to apply the principle that, ***if a provisional agreement intended to be binding is reached until a subsequent agreement in***

precise and formal language is drawn and executed the provisional one is fully and immediately binding, I do not see how it can be said that there was a contract between the plaintiff and the defendant with respect to such further works. The plaintiff's case, in my view, even on a stretch of imagination would in my view have only been in the category of what could be termed a mere commitment or agreement to enter into a future contract broadly on the terms stated therein loosely characterised as a contract to enter into a contract which according to **Patron Card International Ltd vs. Harambee Co-operative Savings & Credit Savings & Credit Society Ltd [2010] eKLR** is not enforceable.

60. I am therefore unable to find that by merely declining to endorse the Plaintiff's final estimates, the Defendant committed a breach of the contract between the parties.
61. That leads me to the issue whether the Defendant is under an obligation to pay the Plaintiff in respect of the work performed by the Plaintiff in respect of the said Maintenance Agreement. From the agreement it was clear that fixed rate of labour was to be USD 48,375.00 which encompassed disassembly, cleaning, inspection, non-destructive testing, balancing and assembly as well as final inspection and preparation for engine shipment, technical documentation and certifying staff. It has not been alleged that the normal run out engine repair was completed by the Plaintiff. According to PW1, however, the plaintiff was entitled to USD 52,000 in labour charges. These charges according to him, were recorded somewhere on the job cards. Those documents however not produced and the witness said that the round estimate of the hourly rate was based on assumption and on the contract. He, however conceded that the plaintiff had not put in any parts and if the document showed that they put in any parts in the engine that would be incorrect.
62. As this aspect of the claim is not disputed and was necessary to be undertaken by the Plaintiff whether the work was in respect of the said normal run out engine repair or otherwise, I do not see the reason why the Defendant should not be liable to pay the said sum of USD 48,375.00.
63. The next issue is with respect to the lease agreement. According to the Plaintiff, the leased engine was delivered by the Plaintiff to the Defendant on 21st October, 2010. The lease period was, however, provided under clause 3.2 of the Lease Agreement s follows:

Parties agree that Engine is leased in order to replace Lessee's engine during the time of services provided by LTAA [read the Plaintiff] on Lessee's engine according to the MRO Agreement. Hence Lessee has to return Engine within fourteen (14) Business Days after shipment of Lessee's engine...from Lessor to Lessee or until 29th September 2010. The earlier date shall be binding. The lease shall start with Shipment of Engine to Lessee ("Lease Start Date") and runs until Redelivery of Engine plus three (3) Business Days ("Lease End Days"), unless agreed otherwise by fax or email ten (10) Business Days prior to the Lease End Date. This period, including any mutually agreed extensions, shall herein be referred to as the "Lease Period".

64. It is therefore clear that the leased engine was to be returned either within fourteen business days after the shipment of the Defendant's engine from the Plaintiff to the Defendant or 29th September, 2010 whichever date was earlier. However, as it is clear from the foregoing, the leased engine was not delivered until 21st October, 2010. To insist that the engine was to be returned on 29th September, 2010 would in my view make no sense. Therefore the only relevant provision dealing with the return of the leased engine would be 14 business days after shipment of the Defendant's engine by the Plaintiff. It is not disputed that that engine is yet to be shipped. The Plaintiff however rely on the provision of clause 8.2 of the Maintenance and Repair Agreement which provides:

In case on non-payment by Customer, LTAA shall have by virtue of its services rendered a contractual right of retention and a contractual lien over the subject matter in its custody as well as the right to repossess any property of LTAA in Customer's possession. These rights as well as set-off right may also be claimed for services rendered or material supplied previously. LTAA also has the right to immediately stop current services until payments due have been remitted.

65. It is however agreed by the parties that the two agreements were interlinked. Therefore no agreement ought to be read in isolation to the other. If this clause is read in isolation of the Lease Agreement it would mean that the Plaintiff would have been entitled to retain the Defendant's engine for non-payment of any sum due. That would in effect render clause 3.2 of the Lease Agreement superfluous. The law is that contractual terms are subject to the rules of construction of contracts generally, particularly, mercantile contracts and this is that even if clauses are found to have been incorporated in a contract, the *"contra profentem"* rule is applied in cases of ambiguity or where other rules of construction fail and if it is applicable, it results in a contract being construed against its maker. See ***Principles Of Banking Law (Oxford) [1977] At Page 154, 155*** and **The National Bank of Commerce Ltd vs. Nabro Ltd & Another [2008] 1 EA 432.**.
66. With respect to the exercise of the right to a lien, a general lien and a particular lien are both categories of a legal lien and a lien is a right at common law in one man to retain that which is rightfully and continuously in his possession belonging to another until the present and accrued claims of the person in possession are satisfied. See ***Halsbury's Laws of England (4th Ed) Para 502 at 221*** and **Unibilt Kenya Ltd (Under Receivership) vs. Mukhi and Sons Ltd [2004] 2 EA 340.**
67. Reading the two clauses together, the only reasonable conclusion would be that after carrying out its part of the contract, the Plaintiff was entitled on notice pursuant to clause 12.2(b) of the Lease Agreement to exercise the right of lien. There is however, no evidence that any such notice was given.
68. Accordingly, it is my view and I so hold that the Plaintiff has not put in motion condition precedent to enable the Defendant return the leased engine.
69. It is however, claimed by the Plaintiff that though Defendant periodically submitted to the Plaintiff Schedules of engine flight cycles on the basis of which the Plaintiff raised invoices as per the Lease Agreement and initially settled the same, the Defendant failed to settle the subsequent invoices and the said agreement was terminated in April 2011. The Plaintiff however testified that it was uncertain as to further accumulated engine cycles. That the Plaintiff is entitled to the sum due in respect of the accumulated unpaid engine cycles is not in doubt. However, as was held in **Firozali Noormohamed Lalji vs. Elias Kapombe Toka & 3 Others [1981] KLR 325** plaintiffs must understand that, if they bring actions for damages, it is for them to prove their damage; it is not enough to write down particulars and so to speak, throw them at the head of the Court, saying "This is what I have lost, I ask you to give me these damages". They have to prove it.
70. The parties are, however, unable to agree on the sum due in this respect since the Defendant did not supply this information yet it was on the basis of the information supplied by the Defendant that the Plaintiff would have been able to determine the sum due to it under this head of claim. According to the Defendant, the Defendant owes the plaintiff about USD 56,000. It would therefore only be just and fair that the exact sum due be determined for payment to the Plaintiff. I am however unable to agree with the Plaintiff that the Plaintiff is entitled to charge USD 400 till redelivery since the non redelivery of the leased engine by the Defendant to the Plaintiff was occasioned by the failure by the plaintiff to put in motion that process by returning to the Defendant the Defendant's engine.
71. In cross-examination, the Defendant while denying having received the invoice did not rule out the fact that the invoice could have been received by or on behalf of the Defendant. Even if the invoice had not been sent under clause 12.4 of the Lease Agreement, upon termination of the agreement, the Defendant was nolonger entitled to use the Engine and all amounts owed by the Defendant under the Agreement was to become due and payable within five business days from the date of termination. In his evidence, DW1 admitted that the agreement was terminated and there was undisputed evidence that the same was terminated in April 2011.
72. The above determinations take care of all the issues identified by the plaintiff this suit.

ORDER

73. Having considered the pleadings the evidence and submissions I grant the following reliefs:

a. **Although the Defendant has stated that it does not and cannot dispose of or alienate the Plaintiff's leased engine, I grant a permanent injunction restraining the Defendant by itself,**

its agents, servants, employees or any other person acting under the Defendant's authority and/or instructions from alienating, disposing, advertising for sale or in any other manner interfering with the Engine PW 121-8 Serial Number 120799 or Hydromechanical Unit Serial Number F17208.

b. **I declare that the Plaintiff is entitled to possession and/or redelivery of the Engine PW 121-8 Serial Number 120799 and the Hydromechanical Unit Serial Number F17208 within fourteen business days of the return to the Defendant of the Defendant's engine Serial No. ESN 121 241. I accordingly grant an order compelling the Defendant to deliver to the Plaintiff the Engine PW 121-8 Serial Number 120799 together with the Hydromechanical Unit Serial Number F17208 within fourteen business days of the return of the Defendant's engine Serial No. ESN 121 241.**
c. **I decree to the Plaintiff USD 48,375.00 less the prepayment deposit in the sum of USD 15,106 being the labour charge in respect of the Repair and Maintenance Agreement.**
d. **I direct the parties to agree on an independent aircraft expert to carry out an inspection of the leased engine to determine the used hours and/or cycles in order to determine, based on the lease agreement, the sum payable by the Defendant to the Plaintiff in respect thereof. The fees to be incurred in respect of this undertaking to be paid by the Defendant since this cost has been occasioned by the failure by the Defendant to submit the report of the said hours/cycles to the Plaintiff. In default of such agreement within 30 days the parties be at liberty to apply.**
e. **The sum due to earn interests at Court rate from the date of filing this suit till payment in full.**
f. **The Plaintiff will have the costs of this suit.**

Dated this 10th day of February 2014

G.V. ODUNGA

JUDGE

Delivered the presence of:

Miss Odari for Mr Kamau Karori for the plaintiff

Mr Mungu for the Defendant