REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 16 OF 20006

MOSES WACHIRA ……..……..…..……. PLAINTIFF

VERSUS

NIELS BRUEL ……..…..…….. 1ST DEFENDANT

HELMUTH RAME ……..…..…… 2ND DEFENDANT

AIRTRAFFIC LIMITED ……..…..…… 3RD DEFENDANT

R U L I N G

1. Before this Court there are 2 Applications - the Interested Party's Application dated 2nd November 2012 seeking enjoinder and the Amended Notice of Motion of the Plaintiff dated 21st May 2013. It would seem judicious that the Court should deal with and determine the two Applications in date order as the same touch upon different issues for such determination. The Interested Party's Application requests the court to order that **Anders Bruel** be enjoined to the suit mainly because the subject matter of the same and the attachment Application before Court relate to aircraft registration numbers 5Y-EKO and 5Y-BMA (hereinafter together called "the Aircraft"). Mr. Bruel maintains that he is the owner of the Aircraft and the trades under the trade name of Queenscross Aviation. The Applicant considered that his presence before Court in connection with this suit may be necessary in order to enable it to effectually and completely adjudicate upon and settle matters in dispute between the parties.
2. The said Application of the proposed Interested Party was brought under the provisions of **Order 1 Rule 10 (2)** of the *Civil Procedure Rules, 2010* and was supported by the Affidavit of the said **Anders Bruel** sworn on 30th October 2012. Attached to the Supporting Affidavit the deponent exhibited true copies of the Certificate of Registration of the Aircraft duly registered by the Kenya Civil Aviation Authority (hereinafter "KCCA") both dated 4th April 2011. The deponent noted that in July 2012 he had taken legal action against KCCA by way of Petition lodged in the High Court being *Petition No. 243 of 2012*. The deponent sought orders of *certiorari* to quash letters written by the KCCA dated 2nd March 2012 and 19th of March 2012 which revoked his Certificates of Registration for the Aircraft. The KCCA had also cancelled the release of the Aircraft to Capital Airlines Ltd. The said application sought Orders of *mandamus* to reinstate the deponent as the owner of the Aircraft as well as a permanent injunction preventing the KCCA from interfering with his property rights over the Aircraft. Judgement had been delivered in respect of the Petition by **Mumbi Ngugi J**. and the deponent attached a copy of the same to his said Affidavit. He maintained that the Court had found in his favour to the extent that the ownership of the Aircraft was recognised in Queenscross Aviation. The deponent maintained that

he had filed an application for review as the learned Judge had failed to recognise that Queenscross Aviation is not a limited liability company but a trade name used by the deponent. As it was, upon my perusal of the learned Judge's Judgement delivered on 12th October 2012, she found that Mr. Anders Bruel was neither the registered owner of the Aircraft nor the lessee thereof. It appeared that his only connection to the Aircraft seemed to be that he had provided a mailing address for the owner of the Aircraft (as the Judge saw it) – Queenscross Aviation.

3. Mr. Anders Bruel concluded his Affidavit, in support of his Application to be enjoined, by stating that he was a party directly affected and that he thought that his presence may be necessary in order for this Court to effectually and completely adjudicate upon and settle all questions involved in the entire suit. He also maintained that such would save vital judicial time. There was a further Supporting Affidavit attached to the said Application sworn by one **Ulrik Holsted-Sandgreen** on 26th October 2012. The deponent detailed that he was a qualified lawyer practising as a partner in a law firm in Copenhagen, Denmark known as the Bech-Bruun Law Firm. Having detailed his qualifications and his practical experience of Danish law, the deponent confirmed that he knew that the said Anders Bruel was a Danish citizen and carried on business in Denmark under the name "Queenscross Aviation" explaining that in Mr. Bruel's private capacity he owned the assets of "Queenscross Aviation". The deponent went on to confirm that Danish law does not require for a sole proprietorship to be registered with the Danish trade register, the Danish Business Authority or any other Governmental agency, so long as the undertaking/business was not liable to pay Value Added Tax. He further confirmed that according to Danish law, any business involved in the operation of aircraft was not subject to Value Added Tax.
4. The Plaintiff filed Grounds of Opposition to the proposed Interested Party's said Application on 18th. June 2013. He maintained that the Application was bad in law, unmaintainable and an abuse of the process of this Court. He also maintained that it was premature as it sought for the Applicant to enjoin the suit as an objector to execution before the attachment for execution. The Plaintiff further maintained that the Applicant was seeking to enjoin the suit under a purported release from a fraudulent transfer by the judgement debtor to defeat the execution. In this regard, the Court has difficulty in interpreting the said Grounds of Objection based on the premise that the proposed Interested Party was an objector to execution, when there was nothing before this Court filed by the Plaintiff to indicate that such was the case. No Replying Affidavit has been filed to verify the Grounds of Objection.
5. Mr. Kahonge submitted at length on behalf of the proposed Interested Party, Mr. Anders Bruel. He noted that **Order 1 Rule 10 (2)** of the *Civil Procedure Rules* detailed as to when joinder can be made. It could be made at any stage of the proceedings before Court. Joinder would normally be allowed where a party's presence may be necessary, effectually and completely, to allow the Court to adjudicate all questions involved in a suit. Counsel maintained that justice is to be effectually and completely dispensed. Anders Bruel had deponed to the fact that he trades as Queenscross Aviation and is the owner of the Aircraft. This was a question of fact as such was found by Ngugi J. in her own Judgement. Further, the KCAA was aware that the 1st Defendant in this case had sold the Aircraft to Queenscross Aviation and a copy of the Deed of Sale had been annexed to the Affidavit in support of the Application before Court. Consequently on the issue of ownership, Mr Anders Bruel had shown that he had an interest in the Aircraft, the subject matter of these proceedings. Counsel maintained that no prejudice would be suffered by the Plaintiff by enjoining Anders Bruel at this stage of the proceedings. He detailed that the Affidavit sworn by Ulrich Holsted-Sandgreen dated 26th of October 2012 clearly detailed the relationship as between Anders Bruel and Queenscross Aviation. The position in Denmark as regards registration of businesses is different from Kenya. In Denmark, counsel submitted that the two are one and the same person. He noted that registration of aircraft in Kenya is covered by the *Civil Aviation (Aircraft Registration & Marketing) Regulations 2007*. **Rules 4 and 5** thereof detailed that it was possible that ownership and registration in the name may not be the same. The mere cancellation of the Registration Certificates by the KCAA did not take away Anders Bruel's right of ownership. Indeed Note 1 on the Certificate clearly states that it is not proof of aircraft ownership. Counsel urged the Court that based on the Ruling of Ngugi J., it should find that Anders Bruel was the true owner of the Aircraft as a result, the Court should allow him to be enjoined at this stage.
6. In response to Mr. Kahonge's submissions, Mr. Kanjama attacked the Affidavit sworn on behalf of Mr. Anders Bruel by his advocates as well as his attorney in Denmark. He maintained that the

authorities to which he had referred the Court detail a basic principle of law which is that advocates should not swear affidavits in relation to contentious matters and indeed should only do so when swearing to matters directly within their knowledge. Any contentious issues raised in such affidavits should be disregarded by the Court. Similarly, the Affidavit of Ulrich Holsted-Sandgreen was being used as an expert opinion on Danish law and consequently amounted to a legal submission. Further, it deponed on issues of fact to wit the legal and actual status of the proposed Interested Party. Counsel noted that Queenscross Aviation was not a corporate entity nor was it a registered business name in Denmark. Before Court was an unsupported averment by a lawyer that Queenscross Aviation did not need to be registered in Denmark. Such begged the question as to whether an unregistered business name can be used to obtain legal rights in Kenya without any registration of the same here. Counsel submitted that in contract/commercial law in this country, such a legal instrument would be void or voidable for uncertainty. He further noted that the basis upon which the Registration Certificates for the Aircraft were issued was a purported Bill of Sale. That Bill noted that the seller had agreed to sell the Aircraft to Queenscross Aviation whose address was indicated care of Anders Bruel. It did not disclose the amount paid for the Aircraft and was ambiguous about the consideration therefore. Counsel went on to say that the Bill of Sale was not a Deed merely a document that contained the signature of the purported seller.

7. Mr. Kanjama further submitted by saying that under the law of sale of goods, title passes upon transfer upon payment of consideration. In this case, the Bill of Sale was a domestic arrangement with no consideration detailed. If the Aircraft were transferred for “love and affection” then such would require being by Deed. Mr. Kanjama stated that he conceded that a Certificate of Registration was not necessarily conclusive proof of ownership but it is evidence that should be taken into account in determining ownership. He detailed that even though registration may not be conclusive proof of ownership, the refusal to register or the cancellation of the Certificate is proof that ownership was in dispute. He asked the Court to note that its duty was not so much to determine ownership as to ascertain whether the goods (the Aircraft) were subject to execution. The Plaintiff had provided authorities which detailed that the executing Court should consider any transfer of conveyance made with the intention of defeating execution. Counsel maintained that **section 2** of the *Civil Procedure Act* defines a Decree as the formal expression from an application which, so far as the Court expressing the same, conclusively determines the Court’s finding. Counsel asked the question as to what would be the effect of enjoining of the proposed Interested Party? It would mean that Anders Bruel would participate in all the proceedings including the Application before Court for contempt, the taxation of the Plaintiff’s Bill of Costs and any future application as to the execution of the Decree. The Court should not act in vain by enjoining a party that clearly would have no interest in the subsequent proceedings. Queenscross Aviation has an interest in the execution of the Aircraft but that only. Prayer 3 of the proposed Interested Party’s application sought to enjoin him to the whole of the suit. Order 22 of the Civil Procedure Rules deals with objections after attachment and this is where the proposed Interested Party’s interests lay. On the basis of the evidence and documents before this Court, the burden of proof would be on the Objector (Anders Bruel) to prove that he had a title to the Aircraft, so as to defeat execution. Counsel emphasised that the proposed Interested Party may have an interest in the current proceedings which starts only after attachment. The Aircraft were already the subject of an Order for stay and the reason why that Order exists is that the moment the Aircraft are set free by the Court, the 1st Defendant/Interested Party would immediately try to take such assets outside the jurisdiction. Mr. Kanjama concluded his submissions by stating that the Defendants have no other attachable assets in Kenya and the Decree herein would be no more than a paper Decree such that would cause a grave miscarriage of justice to the Applicant. He maintained that if the Court was to allow the Application for attachment before taxation, then the Plaintiff would have no problem with the proposed interested party being enjoined as an Objector.
8. In determining whether the intended Interested Party should be enjoined to this suit, I have noted from paragraph 6 of his Affidavit in support of the Application that he filed a Review Application as regards Judge Ngugi’s Judgement of 12th October 2012. Although the deponent stated that he was attaching a copy of the Review Application to his said Affidavit, no such copy was attached. However, as regards the Plaintiff’s Application by way of Amended Notice of Motion dated 28th May 2013, I note from the Supporting Affidavit thereto sworn by the Plaintiff on 8th May 2013, that he has attached, as exhibit “MW 5”, a copy of the Ruling of Ngugi J. dated 14th March 2013

in respect of the Review Application. At paragraph 5 thereof the learned Judge summarised the Interested Party's position as regards the Petition before her (and by extension this suit before Court):

> **"5. The application seeks a review of the judgement on several grounds which are set out in his application. The first is that there was an error apparent on the face of the record with regard to his legal capacity. He alleges that the name 'Queenscross Aviation' is a business name and not a limited liability company, and that he had used this business in its trading capacity. He therefore charged that the court erred in finding that he had no *locus standi* in the Petition."**

The Judge's finding in that regard is a paragraph 19 of her Ruling on page 7 thereof viz.:

> **"19. The petitioner has relied on the affidavit of Ulrik Holsted-Sandgreen, described as a qualified lawyer based in Denmark, in his affidavit sworn on 26th October 2012 in support of the application for review, in which he makes certain averments with regard to Danish Law, in particular that according to Danish Law, it is not a pre-requisite for a sole proprietorship to be registered with the Danish Business Authority or any other Governmental Agency to give effect to the sole proprietorship as long as the undertaking is not liable to pay Value Added Tax. It is not clear what this affidavit is intended to achieve. The matters that are deponed to in the affidavit were not before the court at the time this petition was heard. They were not in the pleadings by the petition, nor were they brought before the court as judicial authorities. To consider them in an application for review would, in my view, amount to a re-opening of the petitioner's case and admitting evidence that was not before the court at the hearing of the petition. At any rate, these matters do not constitute an error 'apparent on the face of the record'. To take them into account would amount to permitting these matters to be adduced as additional evidence and a re-consideration of the facts presented before the court. What the court is being asked to do is not to review its decision because there are errors apparent on the face of the record, but to allow the introduction of new matters by the petitioner".**

9. It seems to me that the proposed Interested Party having failed to convince Ngugi J. as to his status before the Constitutional Court, he now wants to try his luck before this Court. Unfortunately for the intended Interested Party, I find that my hands are tied by the Judgement and Ruling of Ngugi J. in *Petition No. 243 of 2012* and I consider the Interested Party's Application before this Court as *res judicata*. Despite there being no objection to the Application by the Defendants, I dismiss the intended Interested Party's Application dated 2nd November 2012 with costs to the Plaintiff.
10. Turning now to the Amended Notice of Motion filed by the Plaintiff 28th May 2013, the same is brought under the provisions of **Order 45 Rule 1 (1)** of the *Civil Procedure Rules*, **Section 80** of the Act and is supported by the Plaintiff's said Affidavit sworn on 8th May 2013. Such seeks to review the Ruling and Orders of the Court issued on 23rd November 2012. Further it seeks that the initial Orders of the Court issued on 23rd November 2012 be substituted with:

> "a. Allow the application for execution by attachment before judgement in respect of any property of the 1st Defendant including the two additional aircraft 5Y EKO and 5Y BMA.
>
> b. Order that the Plaintiff be entitled to attach and sell the said aircraft and that pending such attachment and sale, no chances, alienation or interference with the status quo in respect of the two aircrafts be allowed or permitted".

The same is brought before Court on the grounds that after oral arguments on the application before

Court dated 12th March 2012, the 1st Defendant filed two letters in Court which were not served upon the Plaintiff seeking to adduce new evidence. Accordingly, the Plaintiff maintained that there was an error apparent on the face of the record in that the Plaintiff had never been heard in respect of the new information placed before the Court. Further, the Court had relied on a judgement that had in fact dismissed an application by Queenscross Aviation to have the registration of the aircraft transferred to a third party. In the Plaintiff's view that transaction's sole purpose was to defeat execution by the Plaintiff. The Court was also made aware of that the initial transfer was annulled by the KCCA because of the legal requirement that a transfer of ownership of the aircraft in Kenya can only be valid if between Kenya citizens or persons resident in Kenya. Neither the first Defendant nor the intended Interested Party (nor his business) was a Kenya citizen or resident in Kenya at the time. The Plaintiff noted that the Court had not been informed that he had not been a party to the Petition as above. The *obiter dicta* in the said Judgement of the Petition, was contradicted by the eventual finding being the dismissal of the Petition. The Plaintiff commented that the Court file in respect of this matter disappeared soon after a mention of the same on 17th December 2012. The file was finally traced and the further Orders made by the Court on 23rd November 2012 were finally extracted on 22nd April 2013. He drew the attention of the Court to the dismissal of the review Application (of the Petition) as above, which has now rendered the current Application necessary.

11. The Plaintiff's Affidavit in support of the Application over and above detailing what was contained in the grounds in support of the same, detail that on 23rd November 2012 this Court had ruled that the Plaintiff be allowed to attach and sell aircraft registration no. 5Y NBB which, as it turned out, had been grounded for 13 years and could only be sold as scrap. The Aircraft were in a serviceable condition but 5Y BMA another asset of the 1st Defendant was grounded but could be sold for components. The Plaintiff went on to say that the 1st Defendant had been making fresh attempts to transfer the Aircraft in spite of Court Orders and related that the 1st Defendant, through his son, the said Anders Bruel, had attempted to release and/or sell the Aircraft to a company known as Westwind Aviation having failed to have the Aircraft transferred to Capital Airlines. The Plaintiff attached copies of applications made by the 1st Defendant for the re-registration of the Aircraft, together with related correspondence. In the view of the Plaintiff these were new and important matters that should be disclosed to Court and which would have influenced the decision of the Court in its Ruling of 23rd November 2012. On 17th June 2013, the Plaintiff swore and filed a Further Affidavit referring to the contents of a Replying Affidavit sworn on 5th June 2013 by the 1st Defendant's advocate. That Affidavit was filed without leave of this Court as required by the Rules and as a consequence the Court takes no cognizance thereof.
12. With reference to the said Replying Affidavit dated 5th June 2013 in opposition to the Amended Notice of Motion dated 28th May 2013, the same was sworn by **Allen Gichuhi** a partner in the firm of advocates on record for the 1st Defendant. The deponent maintained that the Application was a gross abuse of the Court process because the Plaintiff had not given any reasons why it had not prosecuted for taxation purposes, its Bill of Costs dated 20th of February 2012. Such Bill had been filed almost a year after Judgement had been delivered in this suit. Mr. Gichuhi further noted that after the Judgement was delivered on 30th March 2011 an application for extension of the interim Orders was made but the same were not extended and no formal application for such extension was made by the Plaintiff despite the directions of the Honourable Judge. Thereafter, the deponent attached copies of various correspondence had as between the parties and the KCCA. Of particular note was the deponent's firm's letter dated 13th November 2012 informing this Court that **Ngugi J** had found that the Aircraft were owned by Queenscross Aviation. Also of note was paragraph 8 of the Replying Affidavit in which counsel pointed out that the 1st Defendant's Notice of Motion dated 26th May 2011 seeking review of the judgement was dismissed by the Court which held that the 1st Defendant should appeal. In counsel's view the same *ratio decidendi* and equal treatment should apply to the Plaintiff's said Amended Notice of Motion.
13. From the Plaintiff's Application, it seems that the Order complained about was granted by my learned brother Musinga J. (as he then was) on 23rd November 2012 which read:

> **"THAT the plaintiff may also attach any other property of the defendant other than the aircrafts registration numbers 5Y EKO and 5Y BMA in satisfaction of the decree pending taxation of his bill of costs."**

The Plaintiff intimated that if the Judge had known and had the facts before him as detailed in the grounds in support of the Application and the Supporting Affidavit, he would not have excluded the Aircraft from the Plaintiff's entitlement to attach and sell the same along with any other property of the Defendant. To this end, learned counsel for the Plaintiff, Mr. Kanjama submitted that his firm had taken over the handling of the matter on behalf of the Plaintiff from Messrs. Musyimi & Co. Advocates and had argued the Application before Musinga J. (as he then was) on 9th of November 2012.

14. The learned Judge had reserved his Ruling until the 23rd November 2012 but during the intervening period, the Advocates for the 1st Defendant had written to the Deputy Registrar of this Court a letter dated 13th November 2012 which had been copied to Mr. Kanjama's firm. In that letter the said Advocates referred to a letter dated 8th November 2012 which they had addressed to Mr. Kanjama's firm in which they had asked whether there was any objection to filing a consent letter allowing the 1st Defendant to put in Grounds of Opposition and brief submissions confined to the ownership of the Aircraft. The said Advocates had received no response from Mr. Kanjama's firm to that end. That letter dated 13th November 2012 to the Deputy Registrar, had enclosed a copy of the said Judgement of Justice Ngugi dated 12th October 2012 (referred to above). The Advocates pointed out that the learned Judge had made a finding that the Aircraft belonged to Queenscross Aviation. Mr. Kanjama submitted that by way of that action the 1st Defendant's advocates were seeking to reopen their submissions prior to the Ruling being delivered by Musinga J. Such was admittedly an important issue to be brought to the attention of the Court. However, it was Counsel's strong submission that the approach adopted by the advocates for the 1st Defendant was an abuse of the Court process, mischievous and totally inappropriate in a matter of this nature. If the 1st Defendant had really wanted to arrest the Ruling, it ought to have fixed the matter for mention *inter partes* or otherwise filed an inter-parties application before the Ruling date. Mr. Kanjama pointed out that the letter dated 13th November 2012 to the Deputy Registrar had not been served upon his firm and as a result, the first he knew of the said Judgement of Ngugi J. was when Judge Musinga referred to the same in his Ruling and used the contents thereof as the main basis for denying the Plaintiff's Application.
15. Counsel for the Plaintiff, after the delivery of the Ruling of Judge Musinga, had brought to the attention of the Court firstly, that the Plaintiff had not participated in the Constitutional application which gave rise to the said Judgement of Justice Ngugi. Secondly, the real ratio of that Judgement was to be derived from the outcome which was that the Petition was dismissed. The Petitioner was no other than Anders Bruel who is now claiming that KAAA should allow the Aircraft to be registered in his name. Thirdly, the said Anders Bruel, being dissatisfied with the Judgement, had applied for its review, such application being heard and dismissed on 14th March 2013. Fourthly, the said Anders Bruel was the son of the 1st Defendant and was the purported transferee of the Aircraft through a document entitled "Bill of Sale" for an undisclosed amount. Counsel noted that this alleged transaction took place on the very day that the Judgement herein was delivered by Okwengu J. Fifthly, counsel submitted that the circumstances surrounding the alleged transaction were evidence of a fraudulent intent to defeat the Plaintiff as Judgement Creditor and was therefore void or voidable. Sixthly, Anders Bruel had obtained a transfer of registration of the Aircraft to himself but the same had subsequently been revoked by KAAA. The Aircraft were and still are registered in the name of the 1st Defendant. Musinga J. at the time he delivered his Ruling was not aware that the registration had been revoked. Counsel referred the Court to the original Affidavit which showed the current status as to the ownership and registration of the Aircraft which, in his opinion, was still an open question contrary to what was being alleged by the 1st Defendant. On discovering these facts, as well as hearing counsel's argument that there was an error on the face the record in terms of the denial of the right to be heard, Judge Musinga had exercised his discretion, extended the interim Orders and directed the Plaintiff to file a formal review application within 21 days. It is that Application currently for determination by this Court.
16. In terms of the Application, counsel submitted that under the provisions of **Order 45 Rule 1** as well as **section 80** of the *Civil Procedure Act*, an applicant is required to show either that there was an error apparent on the face of the record or that there had been discovery of new and important matter or for any other sufficient reason. In his opinion, the grounds in support of the Application by the Plaintiff disclose enough material to fall under either or each of the said 3

categories. This was exemplified by the denial of the right to be heard, the unprocedural re-opening of the application both constituting an error on the face of the record. The matters as detailed in paragraph 12 above constituted new and important matters as well as the subsequent Review of the Judgement of Ngugi J. Some of the facts were known to the Plaintiff (but not all) prior to the hearing of the application before Musinga J. but he had not been given a chance to address such facts and put in an affidavit in verification or contradiction of the same. Counsel submitted that the error on the face of the record must be evident and he felt that the Plaintiff had shown that. The Ruling of Musinga J. contained details of material which had been irregularly introduced to Court. This denied the provisions of Article 48 of the Constitution as to the right to be heard and the principles of natural justice. Mr. Kanjama further referred this Court to Mulla's Code of Civil Procedure 15th Edition at pages 2718 – 2729, more particularly what amounts to an "error on the face of the record" or "other sufficient reason". Other authorities referred to included **Musiara Ltd v Ntimama (2004) 2 KLR 172, Mumby's Food Products Ltd & Ors v Cooperative Merchant Bank Ltd Civil Appeal No. 270 of 2002, Chotabai. M. Patel v Chaturbhai M. Patel & Anor. HCCC No. 544 of 1957, Fidelity Commercial Bank Ltd v Agritools Ltd & Ors HCCC No. 1677 of 2000, Kiwalabye v Uganda Commercial Bank & Anor (1994) IV KALR, Halsbury's Laws of England 4th Edition Vol. 1 (1) paras 84-100, Savings and The loan Kenya Ltd v Odongo & Ors (1987) KLR 294 and Ridge v Baldwin (1963) 2 All ER**. Mr. Kanjama summed up his submissions by stating that on the basis of the authorities and the facts of the case, that this was a right occasion for the Court to allow attachment before execution. The Judgement Debtor had no other attachable assets within reach of the Plaintiff apart from the Aircraft.

17. Learned counsel for the 1st Defendant, Mr. Allan Gachuhi, submitted that the Plaintiff seemed to want to cherry pick. He had refused to abide by the Court's Order that he should pick up and attach the aircraft spare parts. Similarly, there is an application for contempt sitting on the Court file which has never been heard. The Plaintiff had filed an application on 23rd February 2012 and the same was gathering dust. Another example of the Plaintiff not abiding by Court Orders was with regard to the aircraft registration no. 5Y NBB which the Court had allowed him to attach but, to date, he had not done so. The Plaintiff had filed its Bill of Costs for taxation but was intent on pursuing his Application for attachment before taxation. Counsel failed to understand why the Plaintiff had not set a date for the same particularly as the 1st Defendant had not registered an objection to the taxation. The Judgement herein had been delivered as long ago as 30th March 2011 and the interim orders made by Waweru J. on 10th May 2006 had lapsed immediately the Judgement was delivered. Similarly, claim (b) of the Decree annexed to the Replying Affidavit prayed for the attachment before judgement of the Aircraft as well as aircraft registration number 5Y BMC. Such was not awarded in the Judgement. Further, the Plaintiff's counsel has submitted that he was unaware of the contents of the 1st Defendant's Advocates' letter of 13th November 2012. Mr. Gachuhi pointed to page 11 of the annexure to his said affidavit which was a copy of his firm's Delivery Book which clearly indicated that the said letter had been signed for by the Plaintiff's Advocates on 14th November 2012.

18. Mr. Gachuhi then drew the attention of the Court to other matters in reference to Mr. Anders Bruel's correspondence with the KCAA in connection with the transfer of the Aircraft but then went on to note that the Plaintiff had filed Notice of Cross-Appeal dated 15th October 2012, a copy of which was exhibited at pages 28-30 of the annexure to the Replying Affidavit. In that Notice, the Plaintiff was seeking exactly the same orders that it had sought from the High Court. Counsel then referred to page 11 of the annexure to the Affidavit in support of the Application being a letter from the KCAA dated 19th of March 2012 which referred to non-existent Court Orders. The Plaintiff's previous advocate had been the authors of all this and the 1st Defendant was under a duty to point out the same. KCAA had acted on lies and deceit. Mr. Gachuhi commented that such actions on the part of those advocates had that led to them being sued by Anders Bruel in *HCCC No. 374 of 2012*.

19. Counsel continued with his submissions by detailing that the main thrust of the Plaintiff's Review Application was that Musinga J. did not have the facts before him when he delivered his Rule. Counsel disputed this position and indicated, for example, that at page 32 of the Ruling, the Judge had noted that the Aircraft had already been transferred to the 1st Defendant's son. The Judge had already known that, it was nothing new. Moreover, at page 36 paragraph 12 of the Ruling, the

learned Judge had relied upon the substantive fact that the Aircraft belonged to Queenscross Aviation. Counsel asked the question as to whether his client, the 1st Defendant, could be accused of fraud for transferring the Aircraft to his son? The information in that regard was already before Musinga J. at the time that he delivered at his Ruling. Counsel further noted that Ngugi J. had expressly stated that the Aircraft were owned by Queenscross Aviation under the heading "Undisputed Facts". Counsel also noted that the Petition had been served on the Plaintiff's then advocates on 20th June 2012 with a copy of the same bearing the stamp of Musyimi & Co. The Plaintiff chose not to participate and there had been no application for him to be enjoined as an interested party. In conclusion, Mr. Gachuhi submitted that on the issue of review, he referred to the Court to the case of **Nyamogo & Nyamogo Advocates v Kogo (2001) EA 170, Touring Cars (K) Ltd v Mukanji (2001) 1 EA 261** and **Oyster Properties Ltd. v Kinondoni Municipal Council & Ors (2011) 2 EA 315**. In counsel's view, no new evidence had been put before this Court or had been suppressed. The former advocates for the Plaintiff had misled parties by detailing non-existent Court Orders. Accordingly there was a lack of good faith by the Plaintiff. Finally, counsel submitted that a distinction exists between ownership and registration (aircraft).

20. The last word with regard to the Application for attachment before taxation lay with Mr. Kanjama who requested the Court to strike out the paragraphs of Mr. Gachuhi's Replying Affidavit as regards the accusations against the Plaintiff's former advocates, as they were irrelevant to the matter before Court. He noted that the Defendants had maintained that the stay Orders as regards the Aircraft had never lapsed because the dispute was ongoing. The Court record would show that after the Application for attachment before taxation was filed in March 2012, the parties agreed, by consent, to maintain the status quo in relation to the Aircraft as there was a pending application for review. He pointed to paragraph 4 of the Plaintiff's Further Affidavit which he had detailed that there were numerous proceedings after Judgement was delivered making it impossible for the Applicant to tax his Bill of Costs. This Court, as above, takes no cognizance of that Further Affidavit for the reasons given and, in any event, finds that the proceedings since the Application before Court was filed have not been so numerous in a period of 18 months so that the Plaintiff was unable to set a date for the taxation of his Bill of Costs. Such is a very poor excuse for indolence. Counsel went on to detail that he considered there were two different interpretations as to what transpired when Judgement was delivered on 24th March 2012. His version was that the Orders in respect of the Aircraft were not set aside while the 1st Defendant's interpretation was that the existing stay orders lapsed automatically. I have perused what Judge Musinga detailed on that day which reads:

> **"2. In the meantime, the status quo in respect of ownership and leasehold registration of the aircrafts registration numbers 5Y EKO and 5Y BMA as it exists today (13/3/2012) shall be maintained pending the hearing and determination of the aforesaid application for review."**

That application for review was dated 26th May 2011. Prior to that the record shows that after the delivery of the Judgement on 30th March 2011, an oral application as regards security made by the advocates for the Plaintiff asking for an extension of the Orders made by Waweru J. on the 10th May 2006. This was objected to by the advocate for the 2nd and 3rd Defendants and the learned Lady Justice Okwengu detailed:

> **"unless the Plaintiff make a formal application security pending execution of the Decree."**

It seems therefore in this light, that upon delivery of the Judgement, the stay Orders lapsed automatically.

21. Mr. Kanjama wound up his submissions by stating that the Notice of Cross-Appeal filed by the Plaintiff affirmed the Decree of the Court in full. The Defendants had frustrated execution for 2 years and consequently, they did not come to Court with clean hands and have acted in bad faith. As regards the authorities quoted by Mr Gachuhi, Mr. Kanjama submitted that the Plaintiff had demonstrated the errors on the face of the record and he relied upon the ground of "any other

sufficient reason". He noted that in the **Touring Cars** case the point was a lack of disclosure on the part of the applicant therein while in this matter, the Plaintiff had disclosed all material facts in accordance with the principles of law. The **Oyster Properties** case could be distinguished in that it had involved a Deed of Settlement which had been uncertain, incomplete and could not be relied upon. Then, as per the case of **Hunker Trading Company Ltd versus Elf Oil Kenya Ltd (2012) eKLR** counsel submitted that there had been no disobedience of a Court Order by the Plaintiff who had not displayed a lack of faith nor had he failed to disclose material facts. He requested this Court to come out strongly and not give assistance to Defendants who were intent on employing any strategy to defeat a valid and subsisting Decree. There was no act to bring the judicial process into disrepute other than the deliberate act of third party Defendants in converting Court Decrees into worthless bits of paper.

22. Of all the authorities supplied to Court by the parties in connection with the dangers of the advocates swearing Affidavits for and on behalf of their clients, I found the most useful was the Ruling of **Mbogholi Msagha** in **HCCC No. 1632 of 1997 Ngui v Overseas Courier Services (K) Ltd.** wherein I consider that the learned Judge had most carefully reviewed the law in this connection. I have already commented upon the Affidavit of the Danish Attorney in support of the Application for Anders Bruel to be enjoined in this suit, as above. Certainly the Affidavit sworn was roundly attacked by Counsel for the Plaintiff when opposing the Application for enjoinder. However, Counsel seemed also to attack the Replying Affidavit of **Allen Gachuhi** sworn on 5th June 2013. I have noted from the **Ngui** case the extract from **Halsbury's Laws of England, 3rd Edition, paragraph 845** as quoted by **Ringera J.** in **HCCC No. 1625 of 1996 Kentainers Ltd v Assani & Ors** as follows:

> **"Affidavits filed in the High Court must deal only with facts which the witness can prove of his own knowledge, except that, in interlocutory proceedings or with the leave, statements as to a deponent's information or belief are admitted, provided the sources and grounds thereof are stated…. For the purposes of this rule, those applications only are considered interlocutory which do not decide on the rights of the parties but are made for the purpose of keeping things in status quo until the right can be decided, or for the purpose of obtaining some direction of the court as to the conduct of the cause."**

In my view, as endorsed by Mr. Kahonga for the proposed Interested Party, the said Affidavit of Mr. Gichuhi merely annexed what is on record before the Court including Court Orders, Court proceedings and correspondence that had been exchanged with the Plaintiff's former advocates. All these matters were within the knowledge of Mr. Gachuhi and, I am sure, if called upon, he could well defend the same in cross-examination. To that end, I do not find the said Affidavit offends so as to be struck out.

23. Turning to the Application for review, I have perused with interest the authorities put before this Court by both the advocates for the Plaintiff and the advocates for the 1st Defendant. To my mind, the most useful authorities to assist in arriving at a determination of the Application before Court were the **Nyamogo & Nyamogo case,** the **Kenya Planters Cooperative Union** case and the extract from the **Indian Civil Procedure Code Order XLVII – Review.** (All supra)**.**

In the **Nyamogo** case the Court of Appeal detailed what it is understood to be an error on the face of the record. The Court detailed as follows:

> **"An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two**

opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view as adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for appeal."

Similarly, along such lines, my learned brother **Odunga J.** detailed in the **Kenya Planters Cooperative Union** case as follows:

"Where a court of law has made a decision, parties should heed it and any party dissatisfied with the same should appeal against the same and only in deserving circumstances apply for review. The procedure for review should not be an avenue ventilating matters which, properly speaking, should be ventilated by way of an appeal…… A good ground of appeal, it has been stated time without number, is not necessarily a good ground for review since mere error or wrong is not a ground for review."

24. Turning to the Plaintiff's submissions it was interesting to note in the Civil Procedure Code of India that the Calcutta High Court had held that the words **"sufficient reason"** include a misconception of fact or misconception of law by an advocate. Similar to our **Order 45**, *Civil Procedure Rules, 2010,* the Indian Code details that a review may be applied for any of the following cases:

"I. On the ground of the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the party or could not be produced by him at the time when the decree was passed or order made; *or*

II. On account of some mistake or error apparent on the face the record; ***or***

III. For any other sufficient reason."

If I understood Mr. Kanjama correctly he was relying on the ground III as above as justification for this Court to review the Ruling of Musinga J. dated 23rd November 2012. Counsel was basing his argument on the fact that the advocates for the 1st Defendant had introduced material before Court which they had not shared with the Plaintiff's advocates, the same having been referred to by the learned Judge in his said Ruling. Counsel maintained that his client had not had the opportunity of being heard in relation thereto. Of course, the material introduced was a copy of the said Judgement of **Ngugi J.** in the said Petition No. 243 of 2012. Based on this, counsel had introduced the authorities as above of **Musiara Ltd, Savings & Loan Kenya Ltd** as well as the extract from **Halsbury's Laws of England** in relation to the breach of natural justice. The extract from paragraph 84 of the volume 1(1) reads as follows:

"*84. Natural justice and fairness.* Implicit in the concept of fair and adjudication lie two cardinal principles, namely, that no man shall be a judge in his own cause (*nemo judex in causa sua*), and that no man shall be condemned unheard (*audi alteram partem*). These two principles, the rules of natural justice, must be observed by courts, tribunals, arbitrators and all persons and bodies having the duty to act judicially, save where their application is excluded expressly or by necessary implication."

At paragraph 96 of the same volume, the learned authors detail thus:

"*96. Opportunity to be heard*. A person or body determining a justiciable controversy between parties must give each party a fair opportunity to put his own case and to correct or contradict any relevant statement prejudicial to his view. A corresponding duty may rest upon an authority notwithstanding that

> **its enquiry or decision relates to the affairs of one party only, or that the controversy lies between itself and a single party. In some situations fairness will require a deciding body to take the initiative in inviting the interested parties to submit representations to it."**

As held by the Court of Appeal in the **Savings & Loan Kenya** case:

> **"The very foundation upon which any judicial system rests is that a party who comes to court shall be heard fairly and fully. The court is duty bound to hear all parties to the case and failure to do so is an error."**

25. From the foregoing, it would appear that Counsel for the Plaintiff was unaware of the Judgement of **Ngugi J.** as above when he addressed **Musinga J**. at the hearing on 6th November 2012 as regards the Plaintiff's Application dated 9th March 2012 in which the status quo of the Aircraft was sought to be maintained. I have perused the record before this Court of the 6th November 2012. I have noted that there was some altercation between Mr. Kanjama for the Plaintiff and Mr. Kahonge for the proposed Interested Party as regards the latter's Application (again as above) to be enjoined as an Interested Party to the suit. However, **Musinga J.** noted that the Plaintiff's application dated 9th March 2012 had been pending before Court for quite some time. He did not consider that the proposed Interested Party's application was a legitimate bar to the hearing of the Plaintiff's application. Thereafter, Mr. Kanjama proceeded to address the Court detailing that the Plaintiff's said application was not opposed and that the Orders of status quo in respect of the Aircraft pending attachment, should be maintained. Mr. Kinyanjui, acting for the 2nd and 3rd Defendants detailed that as the Plaintiff had proffered an appeal as against the said Judgement of **Okwengu J.**, it was not entitled to the Orders sought. The learned Judge stood over the delivery of his Ruling on the Plaintiff's said application to 23rd November 2012. What is apparent in relation to those proceedings before **Musinga J.** was that no response had been filed to the Plaintiff's said application by any of the Defendants. In other words, the Judgement in relation to *Petition No. 243 of 2012* was not before Court at the time and, as a result, Mr. Kanjama is right when he says that he did not have an opportunity of being heard in connection therewith at the time he was submitting in relation to the Plaintiff's said application. I also note that at page 6 of **Musinga J's** Ruling of 23rd November 2012, the Judge made reference to the letter dated 13th November 2012 from the 1st Defendant's advocates on record which had been copied to the other advocates. Indeed at paragraphs 9 and 10 on page 7 of the learned Judge's Ruling, he made a further reference to the finding of **Ngugi J.** in her said Judgement dated 14th March 2012. Finally, there is little doubt that **Musinga J.** based his Ruling on the finding of **Ngugi J.** to the extent that the Aircraft did not belong to the 1st Defendant and were thus not available to satisfy the Plaintiff's Decree herein.

26. The conclusion to my reasoning as above, is that even though the Plaintiff and his advocates may have known about the said Judgement of **Ngugi J.** (although the Plaintiff was not a party to the Petition), the same was not canvassed at the hearing of the Plaintiff's said Application before **Musinga J.** As a result, I find that this Application by the Plaintiff falls under the heading of **"for any other sufficient reason"** under **Order 45 Rule 1 (1)** and so he is entitled to have **Musinga J's** Ruling reviewed. Further, I find that there has been prejudice as against the Plaintiff as a result of the learned Judge basing his findings in relation to matters that were not properly before him. In my opinion, there is an error apparent on the face of the record in that the Plaintiff was never given an opportunity to be heard despite the fact that new information had been laid before Court. Accordingly, I uphold the Plaintiff's Application by way of Amended Notice of Motion dated 28th May 2013 and I set aside the said Ruling of **Musinga J.** delivered on 23rd November 2012 along with the prayers 2 and 3 of the initial Orders of the Court issued on the same day. However, I am not prepared to grant Orders in respect of paragraphs a. and b. of Prayer 4 of the Application at this stage. I order that the Application dated 12th March 2012 shall be re-heard *inter-partes* before another Judge of the Commercial Division of this Court on a date to be fixed at the Registry. The Plaintiff will have the costs of his Application.

DATED and delivered at Nairobi this 9th day of October, 2013.

J. B. HAVELOCK

JUDGE