



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE No. 1509 OF 1998

HALIM A ABDINOOR HASSAN.....PLAINTIFF

VERSUS

1. MALINDI AIR SERVICES.....1ST DEFENDANT

2. JOHN MCLEAVE.....2ND DEFENDANT

R U L I N G

At the centre of these proceedings is an aircraft Cessna 404, serial No. 0050 Registration N5Y -BGE. On 24th September, 1997 the plaintiff and the first defendant entered into a lease purchase agreement with an option to purchase whereby the plaintiff as a lessee agreed to hire and the first defendant agreed to let for hire the said aircraft.

It was an agreed term of the lease purchase agreement that the plaintiff would pay a monthly instalment and a deposit upfront and have the option to purchase the said aircraft.

The lease purchase agreement further provided that the plaintiff shall pay a hiring or monthly rental sum, enjoy exclusive possession of the aircraft during the term of the lease purchase agreement and have an option to purchase the said aircraft at the end of the lease. The plaintiff took possession of the said aircraft, paid the initial deposit and started and continued to pay the monthly instalment or rent in terms of the said agreement.

In further terms of the said agreement, part 111 of the schedule, the plaintiff was to pay US\$60,000 as a deposit and make a further payment of 24 instalments each for US\$12,250 per month.

It is pleaded that the plaintiff complied therewith and as at the time of filing this suit had paid 8 equal instalments each of US\$12,250.

It is the plaintiff's case that on or about 2nd July, 1998(not 1992 as appears in the plaint) the 2nd defendant with the due and express authority of the 1st defendant and without authority or legal right flew the said aircraft to Malindi. This was in complete breach and disregard of the lease purchase agreement. The said aircraft is in the possession of the defendants.

The plaintiff avers that she is not in breach of any provisions of the lease purchase agreement and maintains that the agreement subsists and she is entitled to her rights under the said agreement.

Despite demand~ made and notice of intention to sue given, the defendants have failed refused and neglected to return the aircraft to the lawful custody and possession of said aircraft to the plaintiff hence this suit.

The orders sought in the plaint are inter alia.

(a) that the court do issue an injunction compelling the defendants jointly and severally to redeliver the said aircraft to the lawful custody and possession of the plaintiff.

(b) that the court do issue a permanent injunction restraining the defendants jointly and severally from removing and relocating the aircraft from the jurisdiction of this court to a third country.

(c) that the court do issue a permanent restraining order against the defendants jointly and severally, and their agents and/or servants from selling, disposing of, charging, leasing or in any way interfering with the plaintiff's rights over the said aircraft.

(d) that the defendants jointly and severally be compelled to specifically perform the contract.

On the same day the suit was filed, the plaintiff moved the court by way of Chamber Summons under a certificate of urgency for the three injunction orders contained in the plaint. The application under Order 39 Rules 1,2,3, 5 and 7 of the Civil Procedure Rules was supported by an affidavit sworn by the plaintiff. Interim orders 2 & 3 were granted by Patel J on the same and have extended from time to time to date.

The defendants oppose this application and have filed grounds of opposition through counsel and a replying affidavit sworn by John Maurice Cleave the second defendant. There is also a further affidavit sworn by the plaintiff and filed with leave of the court.

Both learned counsel have addressed the court on the issues at hand and I have their submissions on record.

The thrust of the defendant's case is that the plaintiff has not established a prima facie case with any probability of success; that she is not entitled to an injunction as her remedy is in damages; that she is in utter and blatant breach of the agreement of the subject matter of the suit; that her affidavit in support of her application contains half truths, is misleading and has concealed material particulars. Further, the balance of convenience tilts in favour of the defendants. Therefore, the application is mischievous, frivolous and vexatious.

I believe it is common ground that the said aircraft was repossessed by the defendants on 2nd July, 1998. The defendants say there was justification so to do while the plaintiff says it was illegal and in breach of the agreement.

Some authorities have been cited in support of the respective positions. The principles of law are however the same. The plaintiff has to present a prima facie case with a probability of success. It has also to show that the loss to be suffered if the orders are not granted cannot be compensated by an award of damages and lastly that, if the court is in doubt it shall decide the matter on a balance of convenience. - see Giella -v- Cassman Brown Co. Ltd (1973) E.A. 358.

If all the three basic orders sought by the plaintiff were to be granted, they would amount to a mandatory injunction. The courts have given mandatory injunctions in deserving cases but as stated in Civil Application No. Nai 72 of 1994. East African Fine Spinners Limited & Others -v- bedi investments limited per Gicheru J.A:

“At the trial of the action, the court will, of course grant such injunctions as the justice of the case requires but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it sought an order to enforce a contractual obligation.”

It was also stated in H.C.C.C. No. 1317 OF 1996 Belina Consultants Limited & Another -v- Trister Aviation Limited & Another while citing other cases that interlocutory mandatory injunctions should only be granted with reluctance and only in very special circumstances. - See also Shepherd Homes Ltd -v- Sandham (1970) WLR 348.

Before the defendants could take possession of the aircraft under the agreement, they were duty bound to give the plaintiff a notice in writing under clause 10 of the lease purchase agreement and serve the same in terms of clause 12 thereof.

I have seen a letter dated 4th march, 1998 addressed to the plaintiff by the lawyers for the defendants. The plaintiff was accused of breaching the agreement and was in arrears of US\$19,340. Demand was made for the payment thereof within 7 days failure of which the agreement would be terminated.

The learned counsel for the plaintiff has submitted that that was not a notice to terminate the agreement but a demand letter. Whatever the case, the intended re-possession was not effected and there is evidence that the defendants accepted payments from the plaintiff thereafter under the same agreement. Effectively, if the said letter constituted a notice, the same was waived by the conduct of the defendants.

As at the time the aircraft was re-possessed, the defendants have stated that there was not an insurance cover thereon. This has been conceded but it was only two days after the expiry thereof and the aircraft is said to have been parked. Further the agreement provided at clause 4(I) (ii) that the 1st defendant could pay the premiums and the plaintiff shall reimburse the Lessor or the 1st defendant all its costs and expenses forthwith on demand. The first defendant did not do so but elected to take possession of the aircraft.

Perhaps what can be called a notice under clause 10(a) of the Agreement-and it says as much, is a letter dated 8th July, 1998, by the lawyers for the defendants to the plaintiff. It referred to the Lease Purchase agreement dated 24th September, 1997. It alleged breach on the part of the plaintiff. It then reads in part:

“Consequently in accordance with clause 10(a) of the Lease Purchase agreement our client has terminated the agreement and repossessed its Aircraft.”

The said letter then added that the aircraft would only be returned on condition that the plaintiff pays the 1st defendant and NIC Bank a sum of US\$ 116 810.35 and regularise the insurance payments in respect of the said aircraft on or before 22nd July, 1998.

It will be recalled that the aircraft was re-possessed on 2nd July, 1998. This letter coming or written six days later with respect could not operate retrospectively and if anything was a belated damage control. I find that the repossession of the aircraft was before any notice therefor was communicated to the plaintiff.

Paragraph 15 of the affidavit in reply sworn by Mr. John Maurice Cleave reads as follows:

“15. That I further aver and verily believe that the 1st defendant is and has always been able ready and willing to carryout its part of the said Agreement only if the plaintiff does fully and effectively perform her part.”

From the material before me, it is not clear as to how much money is due and owing from the plaintiff to the 1st defendant as the figures presented in various documents filed herein are in conflict. Further some cheques which were allegedly dishonoured are not related to the parties herein.

This matter would not have reached the court had the parties, and especially the first defendant, exercised restraint and reconciled the accounts. As it is the 1st defendant acted in an oppressive manner by taking possession of the aircraft without notice in accordance with the terms of the agreement. The court is therefore duty bound to restore the status quo ante the 1st defendant's action so that the agreement and terms thereof can be restored. Accordingly, the plaintiff's application succeeds in the following terms:

(a) prayers 1,2 and 3 are hereby granted and shall take effect forthwith.

(b) If the insurance cover has not been secured the plaintiff shall secure the same forthwith.

(c) The plaintiff shall resume monthly repayments under the release purchase agreement with effect from 31st August, 1998.

(d) After the parties herein have regularised and reconciled the accounts the plaintiff shall offset the arrears thereof if any within 60 days from the date of such reconciliation but in any case not later than 31st October, 1998.

(e) There shall be liberty to apply

(f) Each party shall bear own costs of this application.

Orders accordingly.

Dated and delivered at Nairobi this 6th day of August, 1998

A. MBOGHOLI MSAGHA

JUDGE