



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: AKIWUMI, BOSIRE & OWUOR, J.J.A)
CIVIL APPLICATION NO. NAI. 257 OF 1999**

BETWEEN

**IBIS AVIATION LIMITEDAPPLICANT
AND
EQUATORIAL COMMERCIAL BANK LIMITED)
JAMES TULLIDEPH BIRNIE)RESPONDENT**

**(An application for injunction pending the Hearing and determination of an intended appeal from
the ruling
of the High Court of Kenya at Nairobi (Commissioner
of assize, P. Ransley) dated 7th September, 1999**

in

H.C.C.C No. 841 of 1999)

RULING OF THE COURT

On 7th day of September, 1998 the superior court (Ransley Commissioner of Assize) declined to grant the applicant, Ibis Aviation Ltd, an interlocutory injunction against the respondents, Equatorial Commercial Bank Ltd. and James Tullideph Birnie restraining;

"the defendants, their agents, servants or any person whatsoever and howsoever acting under them restraining them jointly and severally from exercising the powers of Receiver and Manager in respect of the plaintiff or from appointing such Receiver and M anager or in any other way interfering in the running of the affairs of the plaintiff's/applicant's company until the hearing of this suit or until further orders".

Upon that dismissal the applicant then filed this application in this Court pursuant to rule 5(2) (b) of the Court of Appeal Rules seeking more or less the same orders but this time round, pending the hearing and determination of its intended appeal against the ruling of Commissioner Ransley. The appeal is yet to be filed.

The dispute between the parties revolves around a document dated 15th June, 1998, which on the face of it is a fixed debenture in favour of the 1st respondent (Equatorial Commercial Bank Ltd.), formerly known as Equatorial Finance Limited, in respect of three aircrafts belonging to the applicant, namely Cessna 404, serial No. 404-0088, registration mark 5Y-EAB, Cessna 404, serial No. 404-0055, registration mark 5Y-SNM and Cessna 404, serial No. 404-625, registration mark 5Y-VCK.

The applicant's case both in the superior court and in this Court as can be gathered from the pleadings, affidavits sworn in support of the application by its Managing Director, Surender Sigh Kalsi and the submission of the counsel, to the exclusion of the proceedings in the superior court, can be stated briefly as follows:

That the applicant did not execute any debenture in favour of the 1st respondent on the 15th of June, 1998 or at all. That sometime in 1995 the applicant purchased two aircrafts, Registration No. 5Y-EAB and 5Y-SNM through a hirepurchase agreement with the 1st respondent's predecessor, Equatorial Finance Company Ltd. At the same time it offered yet another aircraft Registration No. 5Y-VCK as security for some money advanced to it by the 1st respondent's predecessor. Further that if indeed it executed the alleged debenture in favour of the 1st respondent, the same become void under **section 96 of the Companies Act (Cap 486)** for lack of registration of the same, within the prescribed 42 days of its execution.

The respondents on their part filed a joint defence in the superior Court asserting their rights as they have indeed done in this Court, under the said debenture. In brief the respondent's case is that the said debenture was executed in escrow by the applicant in or about July, 1995. However, according to the affidavits of M. De Souza and Khadija Mohamed sworn and filed in this Court on 22nd of June, 1999 and 12th October, 1999 respectively, they put the date of its execution as August, 1995. The respondents' contention therefore is that since the document was executed in escrow its actual operative date was when it was dated, after all the conditions which in the first instance necessitated its being signed in escrow had been fulfilled. The material date according to the respondents being 15th June, 1998. The document was thereafter registered on 18th June, 1998 within the period stipulated in section 96 of the Companies Act.

The principles under which our discretion under **rule 5(2) (b)** of the Rules of this Court is exercised are now fairly well settled and as stated severally by this Court, and in particular in **Stanley Munga Githunguri and Jumba Credit Corporation Ltd. Civil Application No. Nai. 161 of 1988.**

"The guiding principles which emerge and discernible from case law on this subject, are first, the appeal should not be frivolous or as is otherwise put the applicant must show that he has an arguable appeal and second, this Court should ensure that the appeal if successful should not be nugatory".

The first question we have to consider is whether or not on the material before the Court the applicant has an arguable appeal to canvass before this Court?

We were addressed at length on the issue of whether the debenture allegedly created to secure the money owed by the applicant to the respondent was validly executed and registered in terms of **section 96** of the Companies Act.

The respondents contention as alluded to earlier in this ruling is that the said debenture was executed in escrow in July or August, 1995. De Souza in his affidavit deponed that

"I could not register the said debenture immediately because of the following reasons:

"(a)I had to wait until the 1st defendant changed its name from Equatorial Finance Company Ltd to Equatorial Bank Ltd. and

(b)The Plaintiff had to bring an original of the Certificate of Registration of one of the aircrafts being offered as security".

... That I aver that our firm waited for a very long time before the plaintiff submitted the Certificate of Registration and due to some oversight I was only able to have the debenture presented for registration in June, 1998 whereby I had the same dated 15th June, 1998".

The superior court relied heavily on the explanation given by De Souza. Even at this preliminary stage of the proceedings there is no clear indication from De Souza's affidavit as to the dates that the two above conditions were fulfilled. There is a complete lack of any correspondence between the parties indicating that the document was executed in escrow.

Mr. Mabeya, counsel for the respondent's submission before us that the fact that the charge had been

registered by the Registrar was conclusive evidence that all the requirements of the act had been complied with. He relied on the English Case of RE Chnye Ltd. [1970] 3 ALL ER 1061, in this case **section 98 (2)** of the English Companies Act, which is almost similar to Section 99 of our Companies Act was considered.

Section 99 of our Companies Act provides as follows:

"The Registrar shall give a certificate under his hand of the registration of any Charge registered in Pursuance of and within any period allowed under this Part stating the amount thereby secured and the certificate shall be conclusive evidence that the requirements of this part as to registration have been complied with".

While section 98(2) of the English Act provides as follows:

"The Registrar shall give a certificate ... of the registration of any Charge registered in pursuance of this part of this Act, stating the amount thereby secured, and the certificate shall be conclusive evidence that the requirements of this part of this Act as to registration have been complied with".

It would appear to us and without expressing any conclusive views on this matter, that our section deems as conclusive only those Charges registered in pursuance and within the period allowed by the Act. The English position does not seem to have such restrictive operation as to time. We would hesitate to state that Re Chnye Ltd. is authority in the interpretation of **section 99 of our Act**. In the particular circumstances of this case it is arguable whether the Registrar's Certificate under that section respecting a Charge not registered within the 42 days can be conclusive evidence that all the requirements as pertaining to registration have been complied with.

Regarding the application of section 96 of the Act, the section renders void any Charge created otherwise than as provided therein as against the liquidator and any creditor of the company if it is not registered within the stipulated time. It would seem to us that the operative words are the liquidator and any creditor of the company. It does not specify what type of creditors are envisaged. To our minds it is arguable whether the 1st respondent is excluded as he claims or not.

We have noted that the applicant has denied ever creating the debenture in 1995 or executing the same in 1998. The issue of forgery has been raised. It is on this questionable debenture that the 1st respondent appointed the 2nd respondent as a Receiver and Manager of the applicant's business. In the circumstances it will not be fair to allow the receiver and manager to act before the issue is resolved one way or the other. The upshot of the foregoing is that there are serious arguable issues to be canvassed in this Court in the intended appeal. We are satisfied that in the event the applicant succeeds in his appeal and the respondent have not been restrained, we see nothing to stop them from enforcing their rights under the debenture unless restrained by an order of this court and thereby rendering the applicant's appeal nugatory.

For the reasons we have stated, this application succeeds and a temporary injunction is hereby issued in terms of prayer (2) of

the Notice of Motion dated 21st September, 1999, the same to remain in force until the hearing and final determination of the intended appeal or further orders.

The costs of this application will be costs in the intended appeal.

Dated and delivered at Nairobi this 30th day of November, 1999.

A.M AKIWUMI

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JUDGE OF APPEAL

S.E.O BOSIRE

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JUDGE OF APPEAL

E. OWUOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR