REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI
CORAM: KWACH, TUNOI & SHAH JJ.A
CIVIL APPLICATION NO. NAI. 326 OF 1998 (130/98 UR)
BETWEEN

RAYTHEON AIRCRAFT CREDIT CORPORATION

NAC AIRWAYS LIMITED.....APPLICANTS

AND

AIR ALFARAJ LIMITED.....RESPONDENT

(Intended Appeal from the Ruling of the High Court of Kenya at Nairobi (Hon. Mr. Justice Mbogholi Msagha) given on the 8th day of October, 1998 in H.C.C.S. NO. 1611 OF 1998)
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RULING OF THE COURT

On 21st July, 1998, the respondent AIR AL-FARAJ LIMITED (hereinafter referred to as "the plaintiff") filed a suit in the High Court against RAYTHEON AIRCRAFT CREDIT CORPORTATION (a U.S. Company) and NAC AIRWAYS LIMITED (a Kenyan Company) (hereinafter referred to as "the defendants") seeking the following reliefs:

> ***(1)A mandatory injunction compelling the defendants to return the Aircraft (Beechcraft 1900 serial No.UC-144, Kenyan registration 5YBND) to the jurisdiction of the court and to the lawful custody and possession of the plaintiff. (2)A permanent injunction restraining the defendants their agents, servants from selling disposing of, charging, leasing deregistering or in any way interfere with the plaintiff's rights over the aircraft.***
>
> ***(3)A declaration that the defendants in the allegedly (sic) repossessing the Aircraft were not entitled to repossession in law.***

At the time of the filing of the suit the plaintiff took out a chamber summons under a certificate of urgency claiming interlocutory reliefs consonant with the prayers in the plaint, and also seeking to restrain the defendants from deregistering the aircraft from Kenyan register of aircraft.

On 22nd July, 1998 the superior court (Patel, J) granted, ex-parte, an order restraining the defendants from deregistering the aircraft from Kenyan register of aircraft and ordered that the application be heard inter-partes on 5th August, 1998. When the application came up for hearing inter partes before Mbogholi-Msagha J, the defendants took up two preliminary objections before the learned judge. These are:

"1.That this Honourable court has no jurisdiction with respect to the matters the subject of the plaintiff\applicant's application and suit AND

2.That the first defendant\respondent did before the plaintiff\applicant's application with respect to such matters commence civil proceedings against the plaintiff\ applicant in the proper court and jurisdiction."

The second preliminary objection is not at all clear but we think it is that the second defendant had taken some proceedings in the "proper court and jurisdiction" presumably under the law of the state of Kansas in the U.S., in the Eighteenth Judicial District Court of Sedgwick County, Kansas.

The defendants did not file a formal application for stay of the proceedings in the superior court but they raised the issue of jurisdiction of the High Court of Kenya by way of a preliminary point. The question before the learned judge was, as he put it:

"Whether this court can decline to enforce a choice of law or forum clause in a contract which is otherwise binding between the parties."

It was conceded before the learned judge, as it is indeed conceded before us, that the court had jurisdiction to evaluate and consider an issue relating to choice of law and choice of forum and determine its enforceability. Shorn of technicalities, it was conceded that the court had jurisdiction to rule on the issue of the law and forum clause in the contract wherein or whereby the parties chose foreign law and foreign forum to govern the enforceability of the contract. Mr. Ahmednasir's argument to the effect that having 'conceded' the jurisdiction of the High Court to decide on the matter in controversy, Mr. Muigai could go no further is not tenable in view of what is clearly on record.

The defendants' argument before the superior court was simply that since the parties have chosen the law applicable to the contract in question and also the forum, the plaintiff ought to be non-suited. The result of this argument, if it was upheld, would obviously have meant striking out of the suit. That would have been more draconian than an order for stay of proceedings. The reason why we are going into this issue is that Mr. Ahmednasir, for the plaintiff, has strenuously urged that no stay of proceedings could be granted here as none was formally or otherwise sought in the superior court. A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of a pleading or an application before the court and which, if argued as a preliminary point, may dispose of the suit. Examples clearly are (amongst others):

(1)whether or not a court has jurisdiction to try the suit

(2)whether the claim is barred under and by virtue of the Limitation of Actions Act

(3)whether or not a condition precedent to refer the dispute to arbitration bars a court from hearing the suit (if proper steps are taken by the applicant) and

(4)whether or not parties' choice of law and forum can bar another forum from applying any other law.

The superior court obviously had the jurisdiction to decide the preliminary point as, if successful, it would have gone to the very root of the matter. Whilst it would be prudent to make a formal application, the High Court has, nevertheless, jurisdiction to hear arguments and rule on a point such as was taken in the superior court.

Mr. Ahmednasir submitted that the intended appeal is frivolous. In support of that argument he referred to the concession made by Mr. Muigai as regards the court having jurisdiction. We have already pointed out that it was a conditional concession. The point in issue is, clearly, in our view, arguable. It is not frivolous. The authorities quoted and relied on by both counsel clearly point out that issues of forum and law applicable are weighty issues. In the case of Carl Ronning v. Societe Navale Chargeurs Delmas

Vieljeux (SNCDV) and Groupament d'Interet Economique Svedel, trading as "The Svedel Line" (The Francois Vieljelex) [1982- 88] IKAR 398 this Court held that a Kenyan statute (Kenya Carriage of Goods by Sea Act) did not have the effect of overriding the jurisdiction clause in a bill of lading. In that case there was a dissenting opinion by Chesoni Ag.JA (as he then was). Quite clearly the issue needs to be argued out fully.

In the case of ***United India Insurance Co and Kenindia Insurance Co. v. East African Underwriters*** (Kenya) [1982-88] IKAR 639 it was held that parties should be held to their agreement as regards jurisdiction clause and that a judge ought not to exercise his discretion to grant an order of stay of proceedings unless a very strong case was made out by the plaintiff for ousting the jurisdiction clause.

In this particular case it is also arguable if the learned judge was right in considering that whilst only the plaintiff was bound to go to Kansas jurisdiction, the first defendant had unlimited right of fora which fact rendered the relevant term of the contract oppressive in relation to the plaintiff.

It is also arguable if section 60(1) of the Constitution of Kenya which gives unlimited original jurisdiction to the High Court of Kenya ousts or can oust a freely negotiated jurisdiction clause. The learned judge's reliance on what Kuloba, J said in the case of Pattni vs. Ali & 2 others (H.C.C.C. NO. 418 of 1998), (Unreported), as regards High Court's jurisdiction as donated by section 60(1) of the Constitution was, in our view, out of place and not germane to the issue before him. Convenience of the plaintiff, alone, in choosing his forum cannot by itself oust a jurisdiction and the applicable law clause. Strong cause must be shown to justify a departure from the jurisdiction and applicable law clause, and the onus of showing such strong cause lies on the plaintiff.

Having held that the intended appeal is not frivolous and is an arguable one, we come to the question as to whether the result of the appeal, if successful, would be rendered nugatory if a stay of further proceedings is not ordered. The aircraft, the subject-matter of the appeal, is not within the jurisdiction of the High Court. We are told it has been flown to South Africa. If it is ordered that the aircraft be returned to Kenya, the order may not be enforceable. A court should not make an order which to its knowledge is incapable of enforcement, and besides there is here no suggestion that the defendants may not be able to pay damages for breach, if any, of the contract.

The application before us meets the two prime requirements to be kept in mind whilst ordering a stay of proceedings pending appeal. We allow the application and order that further proceedings in High Court Civil Case Number 1611 of 1998 be and are hereby stayed pending the hearing and determination of the intended appeal. Costs of this application be in the intended appeal.

Dated and delivered at Nairobi this 15th day of January, 1998.

R. O. KWACH

JUDGE OF APPEAL

P. K. TUNOI

JUDGE OF APPEAL

A. B. SHAH

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.