



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: KWACH, SHAH & KEIWUA, JJ.A.)

CIVIL APPEAL NO. 105 OF 1999

BETWEEN

MALINDI AIR SERVICES LIMITEDAPPELLANT

AND

CMC AVIATION LIMITED..... RESPONDENT

(Appeal from a ruling of the High Court of Kenya at Mombasa (Hon. Mr. Justice P.N. Waki) dated the 29th January, 1999

in

H.C.C .C. NO. 426 OF 1998)

JUDGMENT OF THE COURT

This appeal concerns **Aircraft Registration NO 5Y-BGE**, a **Cessna 404, Serial No 0050** (hereinafter called "the Aircraft") owned by **Malindi Air Services Ltd** (the appellant). National Industrial Credit Bank Ltd (NIC) provided the financing for the purchase of the Aircraft and retained a mortgagee's interest in it.

By a lease purchase agreement dated 24th September 1997 entered into between the appellant (as owner) and one Halima Abdinoor Hassan (the hirer) the Aircraft was leased by the appellant to the hirer on terms and conditions set out in the agreement. Under **Clause 4 (b)** the hirer was required to maintain the Aircraft to an approved maintenance schedule for commercial flying and to punctually pay the cost of maintenance including replacement and overhaul of engines and propellers.

Under the agreement the maintenance of the Aircraft was to be undertaken by a company called Benair Engineering Ltd but after taking possession the hirer decided to have the maintenance carried out by CMC Aviation Ltd, the respondent in this appeal (hereinafter called "CMC"). For this purpose the hirer and CMC entered into a maintenance contract dated 2nd

December, 1997. Pursuant to this agreement for maintenance the appellant released 5 Log Books relating to the Aircraft to

CMC,
(1)Two
(2)Two
(3)One airframe Log Book.

engine
propeller

Log
Log

namely-
Books.
Books.

Without these Log Books no maintenance work can be carried out on the Aircraft. There are very strict procedures required to be undertaken under the Civil Aviation (Regulation of Rocket Firing) Regulations by anyone carrying out any repairs that require details of the work done to be meticulously reflected in the Log Books. Apart from this the Aircraft could not be flown in the Kenya airspace without these documents, among others.

In March 1998 the hirer took the Aircraft to CMC and had the engine overhauled at a total cost of **Shs. 2,330,996/=**. She paid 900,000/= leaving a balance of **Shs.1,430,996/=** and to secure this sum CMC retained the Log Books in exercise of its repairer's lien. The Aircraft was released to the hirer temporarily and conditionally to allow her to fly it to raise money to pay off the repair charges. On 2nd July, 1998 while the Aircraft was parked at Wilson Airport in Nairobi it mysteriously disappeared. It was later found parked in the appellant's hangar in Mombasa. Subsequent investigations established that the Aircraft had been stolen from Wilson Airport by a certain John Maurice Cleave at the material time the Managing Director of the appellant. As the Aircraft could not be maintained or a certificate of airworthiness issued, without the Log Books the appellant filed a suit against CMC in the superior court seeking among other reliefs a declaration that CMC was not entitled to detain the Log Books and a mandatory injunction compelling CMC and its servants and agents to release the same to the appellant. CMC filed a defence and a counterclaim claiming a repairer's lien in respect of the unpaid repair charges.

The appellant applied for a temporary injunction under **Order 39 of the Civil Procedure Rules** for an order compelling CMC its servants and agents to release the 5 Log Books to the appellant. The application was heard by Waki, J. who dismissed it in a considered ruling dated 29th January, 1999. He took a dim view of Cleave's conduct and held that the illegal manner in which the Aircraft was repossessed by the appellant disentitled it to the equitable remedy of injunction and could not in law terminate CMC's lien. It is against that decision that the appellant now appeals to this Court.

Although the memorandum of appeal contains 11 grounds of appeal, we asked Mr. Mabeya, learned counsel for the appellant, to address us only on grounds **2,3,4,5 and 7** which relate to CMC's claim to a repairer's lien.

Mr. Mabeya submitted that the decision by CMC to release the Aircraft to the hirer albeit only temporarily had the effect in law of terminating the lien. CMC had released the Aircraft to her to operate to raise money to pay off the debt she owed to it in respect of the balance of the repair charges. He also submitted that if CMC had any lien as claimed, this related solely to the Aircraft and did not extend or include statutory documents such as the Log Books. He contended therefore that the attachment and retention of those documents by CMC was unlawful and the appellant was entitled to their return.

In deciding this appeal, we have to bear in mind that this is an interlocutory appeal against the refusal of the learned Judge to issue an injunction in exercise of his discretionary equitable jurisdiction. This is important because at this stage we must be careful not to make conclusive findings of fact or law which may tie the hands of the Judge who will ultimately hear the case. The explanation given by the appellant for seizing the Aircraft is to be found in **paragraph 8** of the affidavit sworn by Cleave on 19th October, 1998 in support of the application for injunction where he deposes-

"(8)That I aver that due to fundamental breaches of express terms and conditions of the said Agreement by the lessee, the plaintiff terminated the said Agreement and repossessed the said Aircraft on 2nd July, 1998."

We are bound to say straightaway that the manner and circumstances in which Cleave removed the Aircraft from Wilson Airport on 2nd July, 1998 constituted an act of theft which is a criminal act. It was procured by deception and without the knowledge or consent of CMC. A repairer's lien can only be

broken if the repairer voluntarily releases the chattel to the owner but if the owner or its agents breaks into the repairer's yard and steals the chattel the lien remains, although possession has been disturbed by an unlawful act.

The Log Books in issue are not just ordinary documents as those relating to motor vehicles. The learned Judge was of the opinion that they are part and parcel of the Aircraft and cannot be treated in isolation. A careful reading of the Regulations shows that the Aircraft cannot be maintained without these Log Books nor can a certificate of airworthiness be issued. That is why the appellant has not operated the Aircraft since 2nd July, 1998 when it was allegedly repossessed.

To obtain the order sought in the application, the appellant had to satisfy the learned Judge that it had a prima facie case with a probability of success. It failed to discharge this burden because on the evidence it resorted to criminal device of theft to break CMC's lien instead of paying the balance of the repair charges due to CMC. This was made abundantly clear to both the appellant and NIC in CMC's letter dated 18th June, 1998 part of which read - "***We advise that CMC Aviation Ltd is holding 5Y BGE in exercise of a Repairer's Li en. 5Y BGE will be released after payment due to us is received.***"

In view of the cogent evidence that CMC had a legitimate repairer's lien which the appellant did not settle before stealing the Aircraft, the learned Judge acted properly in refusing to grant the injunction sought by the appellant. The appellant was seeking an equitable remedy but its hands were heavily stained. In the result this appeal fails and is dismissed with costs.

Dated and delivered at Mombasa this 20th day of July, 2000.

**R.O.
JUDGE OF APPEAL**

KWACH

**A.B.
JUDGE OF APPEAL**

SHAH

**M.
JUDGE OF APPEAL**

KEIWUA

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