



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT KENYA AT NAIROBI

CAUSE NO.1518 OF 2014 CONSOLIDATED WITH

CAUSE NO.1519

MARIANA ONICA 1ST CLAIMANT

MAX MASOUD ROSHANKAR2ND CLAIMANT

VERSUS

SKY AERO LIMITED RESPONDENT

AND

SKY AERO LIMITED (IOM)..... OBJECTOR

RULING

1. The Objector herein Sky Aero Limited (IOM) through their application filed on 16th February 2015 brought under Notice of Motion and under the provisions of section 3A of the Civil Procedure Act and Order 22 Rule 51 and 52 of the Civil Procedure Rules is seeking for orders that;

This court be pleased to issue temporary injunction against the claimants/respondents by themselves, their agents or otherwise howsoever from disposing the plaintiff of the aircraft Registration Mark 5Y-CDP Macdonnel Douglas Corp DC9-39 Serial No. 48145 by restraining him from interfering with the objector/applicant's interest in the said aircraft pending the hearing and determination of this application.

*That the court be pleased to issue a permanent injunction against the claimant/respondents by themselves, their agents or otherwise howsoever from disposing the plaintiff of the aircraft **Registration Mark 5Y-CDP Macdonnel Douglas Corp DC9-39 Serial No. 48145** by restraining him from interfering with the objector/applicant's interest in the said aircraft.*

2. The application is supported by the annexed affidavit of Max Meienberg the plaintiff/applicant and on the grounds that the Objector is the lawful registered owner of the aircraft **Registration Mark 5Y-CDP Macdonnel Douglas Corp DC9-39 Serial No. 48145**. The Claimants have attached this aircraft of the Objector while the Objector is not a party to the suit. The threat of dispossessing of the Objector of this aircraft is so eminent that unless the court grants the orders sought, the Objector will suffer great prejudice and irreparable loss and damage. The Objector is not in any way related to the Respondents herein which is a company registered in Kenya while the Objector is a company registered in the Isle of Man and the two are independent entities without any relations whatsoever.

3. In the affidavit of Max Meienberg he states that he is a director of the Objector herein and dully authorised to make the affidavit in support of the application. The Claimants have obtained orders and attached the objector's aircraft **Registration Mark 5Y-CDP Macdonnel Douglas Corp DC9-39 Serial No. 48145** and the Objector being the owner of the aircraft object to the attachment as the Claimants have a mistaken belief that this aircraft belongs to the respondent. The Objector is not a party to the suit and the court cannot order for attachment of the property of a party that is a stranger to the proceedings. Ownership of the aircraft has not been demonstrated by the Claimants noting that this aircraft **Registration Mark 5Y-CDP Macdonnel Douglas Corp DC9-39 Serial No. 48145** is the property of the objector; there is no relation between the Objector and the Respondents herein who is the judgement debtor; the Objector is an independent legal entity registered in the Isle of Man while the judgement debtor is a company registered in Kenya and that there is no relation between the Objector and the judgement debtor save that they do share a common name.

4. Mr Meienberg also depones that the Objector and the respondents are registered in different jurisdictions where the Respondents is a Kenyan company while the Objector is a company registered in the Isle of Man United Kingdom. The Objector has not transferred any rights and interests over the aircraft to the Respondents and the attachment now effected by the Claimants is misguided. It is paramount that the Claimants be restrained from interfering with the objector's enjoyment of his property rights to the aircraft.

5. The objector's counsel also submitted that the property of the Objector has been attached by the Claimants which property is registered in the Isle of Man while the respondent/judgment debtor herein is a company registered in Kenya. The Objector has attached articles of association to show the two companies are different, one registered in Kenya and the other registered in the Isle of Man. Where a company is registered it becomes a distinct legal person as held in **Channan Agricultural Contractors Kenya Ltd versus Rosemary Nanjala Oyula & 2 others, Court of Appeal No. 6 of 2010**. In this case, the address of the Respondents is noted as being in the Isle of Man but the correspondences were done under the Respondents registered office in Kenya. The judgment of the court noted that the Respondents is based in Kenya and there is no proof of service at Isle of Man. The directors of the Respondents are John Clarke and Dewey Christopher while the article of association for the Objector shows different directors. The only director of the Objector in the Isle of Man is Max Meienberg and the certificate of registration of the craft 5Y-CDP Macdonnel Douglas Corp DC9-31 Serial No. 48145 is the objector's address. The Objector has made a demand notice to the Respondents as they owe a further demonstration that these are two different companies.

6. In reply, the Claimants filed their Replying Affidavit on 23rd February 2015 sworn by Mariana Onica the 1st Claimant for and on her behalf and for the 2nd claimant. She depones that the employment contracts entered into by the Claimants and the respondents were with John Clarke who is a director of the Objector as evidenced by the contract of employment signed in the Isle of Man. The 2nd Claimant also entered into negotiations with John Clarke a director of the Objector and contracts of employment were signed upon exchange of emails between the parties where the address of John Clarke is noted to be the same as that of the Objector herein. In the communications between the parties, John Clarke describes himself as the executive chairman of Sky Aero Limited 3-5 Victoria Road Douglas, Isle of Man IM2 4EY British Isles the same address used by the supposed director Mr Max Meienberg as a director of Sky Aero Limited 3-5 Victoria Road Douglas, Isle of Man IM2 4EY British Isles.

7. Ms Onica also avers that she received a contract from John Clarke where he stated that the contract of employment was with Aero Limited 3-5 Victoria Road Douglas, Isle of Man IM2 4EY British Isles and that they had a contract to supply certain personnel to Sky Aero Nairobi office and thus she remained an employee of Aero Limited 3-5 Victoria Road Douglas, Isle of Man IM2 4EY British Isles, the Objector herein.

8. Ms Onica also avers that when the matter was filed in court, the Respondents advocate raised preliminary objectors to the effect that the contract is domiciled in the Isle of Man and as such the Claimants cannot make any claim in Kenya and that they are employees of the objector. The objection was filed by Shaun Dewey who is a director of Sky Aero Kenya stating that the contracts of employment

were entered with the objector. John Clarke sent a letter to the 2nd Claimant that he had resigned from the Objector company as director and the letter had the address of the objector. On 2nd April 2014 a mail was sent by John Clarke as the director of the Objector directing an insurance brokerage firm in Dubai to take out insurance covers for various aircrafts that belong to the Objector herein among them being aircraft **Registration Mark 5Y-CDP Macdonnell Douglas Corp DC9-39 Serial No. 48145** subject of the objector's application. Insurance certificates were therefore issued by Malakut Insurance Brokers for the aircraft **Registration Mark 5Y-CDP Macdonnell Douglas Corp DC9-39 Serial No. 48145**.

9. Ms Onica also states that on 10th September 2013 she received an email from Max Meienberg who claims to be a director of the Objector forwarding a copy of the de-registration form for C5-LIM which is 5Y-CDP Macdonnell Douglas Corp DC9-31 Serial No. 48145 that is the subject of the application herein the craft was purchased by the Sky Aero Limited from Alfa Air International S.A based in the Gambia. In the form, Max Meienberg signed the form for the seller who is Alpha Air International S.A yet he claims to be the purchaser and owner of 5Y-CDP Macdonnell Douglas Corp DC9-31 Serial No. 48145. That Max Meienberg as the director of the Objector is not the owner of 5Y-CDP Macdonnell Douglas Corp DC9-31 Serial No. 48145 as evidenced from communication between him and John Clarke who advises Max Meienberg to sign a certificate of de-registration on behalf of Alpha Air International S.A, the seller of the craft 5Y-CDP Macdonnell Douglas Corp DC9-31 Serial No. 48145 and the buyer was noted as the Objector herein. Therefore Max Meienberg cannot be acting for the seller and the buyer at the same time according to the communications exchanged between him and John Clarke. Further the bill of lading for 5Y-CDP Macdonnell Douglas Corp DC9-31 Serial No. 48145 show that Max Meienberg signed the same as the attorney for the seller Alpha Air International S.A who were selling it to Sky Aero limited and thus has no legal standing to claim ownership of 5Y-CDP Macdonnell Douglas Corp DC9-31 Serial No. 48145 the subject matter in this application and case.

9. Ms Onica also states that both the Respondents and Objector have not dispute the judgment of the court and documents filed before this court by the respondents show John Clarke and Shaun Dewey are the directors of Sky Aero Kenya limited. The articles of association now filed by the Objector are bad in law as these documents are not notarised for them to be admissible under this jurisdiction and have not been verified and certified as true copies by the British High Commission in Kenya as being true and authentic documents in their jurisdiction. There is therefore no evidence to show what relations exists between the Respondents and the Objector that necessitated the Respondents to be in possession of and make use of 5Y-CDP Macdonnell Douglas Corp DC9-31 Serial No. 48145; Max Meienberg has not proved that he is a director of the objector; and documents attached as articles of association for Sky Aero Kenya Limited are not genuine as confirmed with an official search. That it is not possible for the Objector to have been owed \$200,000 by the Respondents and then one month later loan them \$1,411,469 and this does not make any economic sense as indicated in the invoices attached to the objector's application. John Clarke is a director of both the Respondents and Objector as evidenced by his various communications.

10. That the orders sought by the Objector should not be granted as the Claimants will suffer irreparable damage and loss and the judgment will be rendered nugatory and an academic exercise. The directors of the Respondents and the Objector are one and the same and use their addresses interchangeably for convenience and to evade the law. The application before court is therefore an abuse of the court process and should be dismissed.

11. The suit filed herein by the Claimants is premised on an employment relationship. The Claimants filed their claim against Sky Aero Limited vide the Amended Statement of Claim filed on 8th December 2014. At paragraph 2 of the statement of claim, the Respondents is described as;

Sky Aero Limited, hereinafter referred to as the Respondents is a company incorporated in the Isle of Man and having its office at Aerospace Consortium Limited at JKIA Nairobi.

12. Therefore at all material times the court proceeded with the hearing of the case and in making its decision under the fact that the employer being the Respondents is a company incorporated in the Isle of Man and having its offices in Kenya. This being an employment claim, what is important is the contract of employment that spelt out the terms and conditions of employment for the Claimants and the

respondent. Under the contract of employment for Ms Mariana Onica at paragraph it notes;

Sky Aero Limited a company incorporated in the isle of Man and having its registered address at 3-5 Victoria Road, Douglas, Isle of Man IM2 4EY (hereinafter called "SKY")

...

SKY has a contract to provide certain personnel to SKY Aero Limited, having its registered offices at Aerospace Consortium Ltd, JKIA Nairobi, Kenya.

...

The consultant shall provide to NBO such aircraft engineering and maintenance planning and technical record services as agreed by NBO and the consultant from time to time. The consultant shall for the duration of the SKY contract with NBO, report directly to the Engineering Manager of NBO...

13. This contract is signed by John Clarke, for Sky Aero Limited as Director for the employer and the 1st Claimant on her part.

14. For Max Masoud Roshankar, his contract stated;

Further to your interview with us we are pleased to offer you employment with Sky Aero Limited herein after referred to as the "company" on the terms set out in this letter

...

Appointment and terms of employment

You will be engaged in the capacity of Frist officer on the Company's DC9 fleet based at Nairobi JKIA Airport and leased to Aerospace Consortium Limited. For the period of the aircraft lease term you will be seconded by the company to Aerospace Consortium Limited in accordance with the terms herein. ...

15. This contract is signed by Shaun Dewey, Chief Operating Officer, Sky Aero limited for the employer and the 2nd Claimant on his part.

16. The question of the operative law in this case came into question during preliminary stages and court had occasion to address the same. this arose from preliminary objections raised by the Respondents advocate noting that the court had no jurisdiction as the contracts of employment were entered into at the Isle of Man between the Claimants and the Respondents herein and the applicable law was stated in the contracts as that applicable in the Isle of Man and on that basis this court has no jurisdiction. The Respondents submitted that the Respondents is registered in the Isle of Man, Victoria Road and the Claimants are serving in Kenya as consultants and deployment at JKIA Nairobi at Aerospace offices. The Claimants are paid in United States Dollars and thus theirs is a posting to Kenya for a fixed period. The Respondents is allowed to operate in Kenya under the Aviation Act and has a work permit to undertake business in Kenya. The Claimants also submitted that their place of work is at KJIA one as an aviation Engineer and the other as a Pilot serving as expatriates in Kenya for the Respondents who has been registered in Kenya with an air operator certificate. Salary is paid in United States Dollars.

17. On the preliminary objection raised by the Respondents on the question of jurisdiction of the court, the court delivered a ruling noting that the Claimants place of work was in Kenya for an employer registered in Kenya all under the jurisdiction of the court as the Claimants once employed were deployed to Kenya and despite the contract being paid in United States Dollars both parties are resident in Kenya.

18. That far the contract of employment and the place of work are clear. One is made in the Isle of Man

United Kingdom, while the place of work is Kenya where the Respondents had registered offices and the Claimants were deployed. Whether there are different corporate directors for the Objector now on record and others for the Respondents in this case is immaterial as the Respondents herein is **Sky Aero Limited** and not Sky Aero Limited (K) or Sky Aero Limited (IOM). The employer remained the same.

19. So then who owns the subject craft 5Y-CDP Macdonnel Douglas Corp DC9-31 Serial No. 48145 subject of the current application?

20. This is resolved by the Objector in the affidavit of Max Meienberg at paragraph 4;

THAT the Objector herein is the owner of the aircraft registration 5Y-CDP Macdonnel Douglas Corp DC9-31 Serial No. 48145 contrary to the claimants'/respondents' belief. I attach herewith the sale agreement and certificate of registration marked 'MM-2A, B'.

21. The document marked 'MM-2A, B' is a Certificate of Registration by Kenya Civil Aviation Authority, Certificate no. 2524 that indicate the owner of aircraft Serial number 48145, registration mark 5Y-CDP manufactured by Macdonnel, Douglas Copr DC9-31 [5Y-CDP Macdonnel Douglas Corp DC9-31 Serial No. 48145] is SKY AERO LIMITED, and leased to Aerospace Consortium. The address of the owner is 3-5 Victoria Road, Douglas, Isle of Man British Isles IM24EY and the address of the lessee is JKIA KAHL BLD 1st Flr Suite 150A, P.O. Box 5400-00506, Nairobi.

22. The owner of the subject aircraft registration 5Y-CDP Macdonnel Douglas Corp DC9-31 Serial No. 48145, being Sky Aero Limited as per the documents on record and submitted by the Objector leave no doubt to the court that this is the same person/entity/company/body that employed the Claimants as under their contracts of employment being Sky Aero Limited a party registered at the Isle of Man British Isles whose address is 3-5 Victoria Road, Douglas, Isle of Man British Isles IM24EY, the name and registered office of the Objector who in essence is the Respondents herein, SKY AERO LIMITED is one and the same. The Objector herein is a sheer camouflage of the real respondent. To add (K) or (IOM) to the name of the Respondents and then call the Respondents a different name is not sufficient to sway justice the way of the supposed objector. The memorandum of claim filed by the Claimants herein is true to the letter, the employer who is the Respondents is SKY AERO LIMITED and not Sky Aero Limited (K) or (IOM) as the supposed Objector would want the court to register.

23. Whatever intentions that exist for the Respondents and the supposed Objector herein to circumvent the course of justice, that will not be given legitimacy by this court. To take the court round under the guise of ownership of the aircraft now attached to satisfy a valid judgment of this court is to interfere with due process, rule of law and abuse of the court process. This is not the purpose or objective of this court.

The application dated 16th February 2015 filed by the respondents as the supposed Objector is dismissed. Costs herein are awarded to the claimants. The interim orders granted by the court on 11th February 2015 shall remain in force pending hearing and determination of application dated and filed on 10th February 2015.

Delivered in open court at Nairobi this 2nd Day of March 2015.

M. Mbaru

Judge

In the presence of:

Lilian Njenga: Court Assistant

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