REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI
CIVIL APPLICATION NO. NAI. 202 OF 1998 (90/98 UR)

MALINDI AIR SERVICES

JOHN M. CLEAVE.....APPLICANTS

(ORIGINAL DEFENDANTS)

AND

HALIMA ABDINOOR HASSAN.....RESPONDENT

(ORIGINAL PLAINTIFF)

(Application for a stay of Execution and injunction pending the lodging and hearing of an Intended Appeal from the ruling of the High of Kenya at Nairobi (Mbogholi Msagha J.) dated 6th August, 1998 in H.C.C.C. NO. 1509 OF 1998)
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RULING OF THE COURT

By a notice of motion dated 14 August, 1998 brought under rules 5(2)(b), 41 and 42 of the Court of Appeal Rules the applicants/original defendants (hereinafter referred to as the Defendants) have moved the court for an order for stay of execution or further execution of the order of the superior court (Mbogholi Msagha J.) made on 6th August, 1998 in Civil Case No.1509 of 1998. In the alternative the defendants have sought an order that the plaintiff, Halima Abdinoor Hassan (hereinafter called the plaintiff) by herself, her agents and or servants be compelled to redeliver Aircraft Cessna 404 Serial No.0050 Registration No. 5Y - BGE subject matter of the said suit to the lawful custody and possession of the Defendants.

The said application having been certified as urgent in accordance with rule 47 of the said rules was heard by the court during the current vacation on 25th August, 1998.

By her plaint dated 8th July, 1998, the plaintiff sued the defendants stating that on 24th September 1997, the plaintiff and the 1st defendant entered into a lease purchase agreement (the agreement) whereby the 1st defendant as the lessor agreed to let to the plaintiff for hire the aforesaid aircraft subject

to the terms and conditions of the agreement. The plaint avers that it was an express term of the agreement that the plaintiff shall pay an initial deposit of U.S.$ 60000.00 upfront and then regularly pay a monthly instalment U.S.$. 12250.00 commencing from 1st November, 1997 in accordance with the schedule of payment annexed to the agreement.It is further averred that pursuant to the agreement, the plaintiff took possession of the aircraft and paid the initial deposit and has regularly paid the monthly instalments as agreed and stipulated in the agreement. Thus the plaintiff claims that she has paid the said deposit of US$ 60000.00 and paid 8 equal instalments of US.$ 12,250.00 as stipulated in the agreement. According to the plaintiff although she has not been in breach of any of the provisions of the agreement and that the agreement is subsisting and the plaintiff is entitled to her rights under the agreement, it is averred by her that on 2nd July, 1992 (which should obviously read 2nd July, 1998), the 2nd Defendant with the express authority of the 1st Defendant and without due authorisation or legal right, flew the aircraft to Malindi from Nairobi in breach and disregard of the agreement and has kept the aircraft in the possession of the defendants. Despite demand and notice of intention to sue in default of their returning the aircraft to the plaintiff, the Defendants have failed, refused or neglected to do so.

The plaintiff therefore has prayed in her suit inter alia for an injunction compelling the defendants jointly and severally to redeliver the aircraft to her.

Along with her plaint, the plaintiff by a chamber summons applied under Order 39 rr 1, 2, 3, 5 & 7 of the Civil Procedure Rules for a mandatory injunction compelling the defendants jointly and severally to redeliver the said aircraft into the lawful custody of the plaintiff. She also sought orders to restrain the defendants from removing and relocating the aircraft and from selling disposing of, charging, leasing or in any way interfering with the plaintiff's rights over the said aircraft.

By her supporting affidavit sworn on 8th July, 1998 the plaintiff testified to the correctness of the contents of her plaint. We hereunder set out three pertinent paragraphs of her said affidavit.

***Paragraph 4*. "That I have pursuant to the said Lease purchase agreement made substantial payment towards the same including a deposit of US.$ 60000.00"**

***Paragraph 5* "That as of today, I have paid to the defendants diligently and observed religiously all due instalments and fulfilled all the provisions of the lease purchase agreement."**

***Paragraph 7* "That todate I have apart from the deposit paid all the instalments (a copy of the receipts confirming payments are hereto annexed and marked HAH 2)**"

By their grounds of opposition dated 13th July, 1997 the defendants stated inter alia:

1.The plaintiff has not established a prima facie case with any probability of success.

2.The plaintiffs remedy in any event is in damages.

3.The plaintiff is in utter and blatant breach of the agreement.

By his affidavit sworn on 16th July, 1998, the 2nd defendant testified inter alia that the deposit payable by the plaintiff was U.S.$ 80000.00 and not US.$ 60000.00 as alleged by the plaintiff and the plaintiff had paid an equivalent sum of U.S.$ 60,660.00 and that there was still due and owing from the plaintiff a sum of U.S.$ 19340.00, on account of the initial deposit, that he had been informed by N.I.C. Bank to whom the monthly instalments were agreed to be directly payable by the plaintiff that the plaintiff had paid a total sum of U.S.$ 36,460.00 to them thus leaving at 2nd July, 1998 a balance of U.S.$ 73,790 on

account of the defaulted monthly instalments. Annexed to his affidavit is a fax message dated 13th July, 1998 from N.I.C. Bank to the 1st Defendant giving details of the payments received by N.I.C Bank from the plaintiff. It shows that the total payments, if regularly made, from 1st November, 1997 to 1st July, 1998, would have been U.S.$ 110,250 whereas total payments which had been made by the plaintiff were equivalent of US.$ 36460. Thus there is an unpaid balance of U.S.$ 73,790.00 against the plaintiff on that account.

Also annexed to the said affidavit of the 1st Defendant, is a photostat copy of a letter dated 15th July, 1998 addressed by the N.I.C. Bank to the 1st Defendant confirming that a cheque for Shs.900,000 dated 25th March, 1998 issued by the plaintiff in favour of N.I.C. Bank towards payment of the said monthly instalments had not been paid. It had been returned unpaid even on its re-presentment for payment.

Also annexed to the said affidavit, is a copy of a letter dated 1st July, 1998 written by Corporate Insurance, the insurers of the aircraft, to the plaintiff intimating her that as she had failed to honour her obligations for payment of the insurance premium, the cover had been cancelled "without further reference to her."

Again annexed to the said affidavit, is a copy of another letter dated 13th July, 1998 written by CMC Aviation Ltd to the 1st Defendant stating that the aircraft had been placed by the plaintiff under their maintenance care in December, 1997, and that the total cost of repair was Shs.2,330,996.00. The plaintiff had made a payment of Shs. 900,000/= only and a balance of Shs.1,430,990.00 was still outstanding according to that letter. It also confirmed that cheques totalling Shs.550,000/= given to them by the plaintiff were returned unpaid.

By another letter dated 2nd July, 1998 copy whereof is annexed to the said affidavit of the second defendant, N.I.C. Bank wrote to the 2nd Defendant that arrears owing to them had accumulated to over Shs.5.2 million and full flight risk cover on the aircraft had expired and not renewed and that the second defendant was therefore required to confirm that the aircraft had been grounded and kept safely so that it could not be used until the insurance cover had been renewed. A copy of that letter is shown to have been marked for the plaintiff.

By their letter dated 4.3.1998 a copy whereof is also annexed to the said affidavit, the defendants' advocates m/s Timamy & Timamy wrote to the plaintiff that she had breached the terms of the agreement particularly regarding payment of rentals and notified her that unless she regularised the default within seven days the defendants would have no option but to terminate the agreement in accordance with the agreement and ground the aircraft.

The second defendant has by his said affidavit admitted that he repossessed the aircraft on the said 2nd July, 1998 but he has said that he repossessed it from the plaintiff and or her servants or agents at Nairobi with her and/or her servants and agents knowledge and he took it to Mombasa and not Malindi as alleged by the plaintiff. He has denied that he repossessed the aircraft by making any misrepresentation to the airport control tower or anybody else.

With the leave of the superior court, the plaintiff filed her further affidavit sworn on 21st July, 1998, in which she points out that the defendants were asking for a payment of U.S.$ 116,810.35 which represented about 12 monthly instalments. But she has not denied that she had committed breach(es) of the agreement. Nor has she controverted at all various allegations of default made against her by the 2nd Defendant in his said affidavit. She has had full opportunity to do so, if she so cared. She has also annexed to her further affidavit a copy of a letter dated 8th July, 1998 written by the defendants said advocates to her confirming that due to her failure to pay U.S.$ 22660 to the Defendants and U.S.$

94,150.38 TO N.I.C. Bank, the 1st defendant had terminated the agreement and repossessed the aircraft. The letter further said that the defendants were prepared to return the aircraft to her on condition that she paid the aforesaid sums totalling U.S.$ 116,810.35 and regularise the insurance cover by 22nd July, 1998.

By his ruling dated 6th August, 1998 the learned Judge, granted all the prayers of the plaintiff's chamber summons. The orders granted by the learned Judge do not appear to be interlocutory but are, in effect, final orders including an order commanding the defendants to redeliver the aircraft to the custody of the plaintiff. The learned Judge in his ruling appears to be fully aware that there was some money due and owing by the plaintiff to the 1st defendant but according to him "it is not clear how much money is due and owing from the plaintiff to the 1st Defendant as the figures presented in various documents filed are in conflict." The learned Judge has also finally found at the interlocutory stage, of the suit that "the repossession of the aircraft was before any notice therefor was communicated to the plaintiff". The learned Judge also took note that the insurance cover on the aircraft had lapsed for non payment of the insurance premium but he said it was only two days since the cover had expired and yet the aircraft had been parked. The defendants, he said, could have paid the premium and the plaintiff would have reimbursed them.

At this stage the least we say about the merits of the defendants intended appeal against the said ruling of the superior court, the better. Suffice to say that in order to succeed in their present application before us the defendants have to satisfy us that (a) they have an arguable appeal and (b) that in case the defendants succeed in their intended appeal, it would become nugatory unless we order stay of execution of the said ruling and order of the superior court.

Mr. Ahmednasir for the plaintiff has conceded that the plaintiff was in breach of the agreement as she had not been paying the monthly instalments strictly in terms of the agreement. Whereas according to the defendants the plaintiff owed at 2nd July, 1998, a sum of U.S.$ 93,130.00 to the 1st Defendant on account of the unpaid monthly rentals and the initial deposit, according to Mr. Ahmednasir, the sum should be in the region of US.$ 70000.00 This, he agreed, was by no means an insignificant breach of the agreement by the plaintiff.He also conceded that the plaintiff mis-stated to the superior court by her affidavit in support of the application for injunction that she had paid to the defendants diligently and observed religiously payment of all due instalments and had fulfilled all the provisions of the agreement as provided therein. It is then at least arguable that the superior court should not have granted mandatory injunction to the plaintiff who is in default of her own obligations under the lease hire agreement and who has not come to court with clean hands and who has made on oath untrue statement to the court. Granting an interlocutory injunction is a matter of discretion of the court and it is granted only when there is complete and utmost good faith and when there is no material untruthfulness on the part of the party seeking assistance of the court at an interlocutory stage when the court cannot perceive or judge what the final result of the case is going to be.A mandatory injunction at an interlocutory stage is rarely granted; only when the plaintiff's case is clear and incontrovertible. It is again arguable that the plaintiff's case as laid before the court was not so strong and clear as to entitle her to a mandatory injunction in the terms granted by the superior court.

We shall now consider whether the defendant's intended appeal would become nugatory in the event of success. The plaintiff is already in default of payment of at least US$ 70000 that is approximately Shs. 4.5 million. She has been issuing cheques which have been returned unpaid. She has failed to take out the flight insurance cover for the aircraft. She has failed to pay the repair bill to the extent of shs.1,430,996.00. The aircraft is charged with N.I.C. Bank Ltd who due to non payment of the monthly payments by the plaintiff may seize the aircraft and sell it in order to recover their dues to the detriment of the 1st Defendant. No security for the regular payment of the future instalments has been offered by

the plaintiff in case the aircraft is given to her.Nor has she undertaken to pay the defaulted instalments.

The plaintiff's conduct has not been shown to be trustworthy. She has been shown to be a self confessed liar. If the aircraft is given into her custody, neither the 1st defendant nor N.I.C. Bank may be able to get it back from her in case the defendants succeed in their intended appeal. She has neither undertaken to pay the insurance premium and take out the risk cover nor has she undertaken that she will not fly the aircraft unless and until the said cover has been obtained. Considering these and all other surrounding matters of this case and in particular the conduct of the plaintiff we agree with Mr. Oraro, Counsel for the Defendant that unless we grant stay of the execution of the said order of the superior court, the Defendants intended appeal will become nugatory.

We therefore grant the application and order stay of execution of the said order made on 6th August, 1998 until the final determination of the Defendant's intended appeal or until further order of the court, whichever may be earlier.

As the aircraft is still in the possession of the 1st Defendant, we need not consider the alternative prayer sought by the defendants that the plaintiff may be compelled to redeliver the aircraft to the defendants.

The defendants are however hereby restrained from removing the aircraft from the jurisdiction of the court. They are also restrained from selling or otherwise parting with possession of the aircraft during the pendency of their intended appeal. It is further ordered that the defendants shall produce the aircraft and place it at the disposal of the court whenever required to do so.

Costs of the notice of motion shall abide by the result of the intended appeal.

Dated and delivered at Nairobi this 1st day of September 1998.

A.B. SHAH

JUDGE OF APPEAL

G.S. PALL

JUDGE OF APPEAL

E. OWUOR

JUDGE OF APPEAL

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

DEPUTY REGISTRAR