

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCCS NO. 431 OF 2014

ASANTE AVIATION LTD:..... PLAINTIFF

VERSUS

STAR OF AFRICA AIR CHARTERS LTD

DBA AFRICA BUILDING SUPPLIERS CC

AVIATION LEASING INTERNATIONAL GMBH

JOHN GLENDINNING :.....DEFENDANTS

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

J U D G M E N T:

The Plaintiff Asante Aviation Ltd filed this suit against Star of Africa Air Charters Ltd, Africa Builders Supplies CC, Aviation Leasing International GMBH and John Glendinning herein after referred to as the Defendants for recovery of USD 33,550.15, specific performance, permanent injunction and costs.

This suit arises out of an aircraft purchase deal in which the Defendants sold to the Plaintiff a 1997 Cessna Grand Caravan aircraft, Registration No. 5X- SUS at a price of USD 1,100,000.

It is the Plaintiff's contention that the entire amount as agreed was paid in three installments namely; USD 464,248.58 on 21st June 2012 from Stanbic Bank, USD 304,751.58 through Citibank NY and USD 330,000.

The Defendants were to sign transfer documents on completion of payment. It is the Plaintiff's contention that notwithstanding the completion of payment, the Defendants have refused and neglected to sign the transfers as earlier agreed which has caused damage.

The Plaintiff therefore prays for;

- 1) An order of specific performance compelling the Defendants to transfer the aircraft into the Plaintiff's names.
- 2) That the Defendants refund USD 33,530.15 paid to them in excess by the Plaintiff.
- 3) The Defendants be ordered to hand over log books to the Plaintiff.
- 4) General damages
- 5) Aggravated damages
- 6) Interest on 2,4 and 5
- 7) Costs.

In response the Defendant denied liability and contended that they had received only USD 769,000 in respect of the purchase price. That the Plaintiff was still indebted in the sum of USD 127,000 towards purchase of the plane.

The Defendants also contended that the interest which the Plaintiff was trying to avoid was agreed upon. That the forex variation of USD 11,462.93 was occasioned by the Plaintiff who preferred to transfer USD at an unreasonable exchange rate yet it had been agreed that the money would be paid in Rand.

In their counterclaim, the Defendants claim USD 127,000 as unpaid balance on purchase of the plane. They also seek exemplary/aggravated damages, interest and costs of the suit.

In the counterclaim the Counterclaimants contended that they indeed entered into a sale agreement in which they sold an aircraft Registration No. 5X-SUS a Cessna Grand Caravan 1997 to the Plaintiff at a consideration of USD 1,100,000 to be paid in 3 installments.

The parties had also been in a plane leasing arrangement with a running account that had overdue balances. That the 1st Counter Defendant sought assistance from Stanbic Bank (U) Limited which is the second Counter Defendant to advance USD 200,000 as part payment of what was owed to the Counterclaimant by the 1st Counter-Defendant.

In the undertaking **Exh CC2** made by the 2nd Counter-Defendant on 12th July 2012, it seems already a sum of USD 770,000 had been paid towards the purchase of the plane.

Meanwhile the Counterclaimant was under penalty of interest as a result of credit they had got from Wesbank Aviation. From **ExhCC5**, it is clear that the Defendants' obligations were known to the Plaintiff. **ExhCC5** also shows that by August 24th 2012 the Plaintiff was still indebted to the Defendants.

This was then followed by a tirade of emails of demands by the Defendants and promises of payment by the Plaintiff until 3rd April 2013 when Nicholas Nabende wrote to the Defendants and declared that all the money due had been paid with an overpayment of USD 1,202.93. The Defendant objected to this in a letter dated 4th April 2013 and insisted that USD 112,709 was still owing.

The Plaintiff seems to have conceded that they still owed the Defendants because on 6th May 2013 Sheila wrote;

“As earlier mentioned we are already organizing alternative funding to clear the account in the good spirit of doing business with you... Stanbic is also promising but we are not expecting a lot from them. I have a meeting starting in 30 mins with one new financier of which I will keep you posted of once out.”

On the 24th June 2013 there is every indication that there was still unpaid money as this email shows. Sheila wrote to Malan;

“We have just come back from the bank after a tight negotiation with them on transfer of funds to you as earlier discussed with John.”

By 25th September 2013 the Plaintiff had still not paid the balance. Malan wrote attaching a schedule indicating a balance of USD 103,155.24 as at August 2013.

Writing back, Ronald a Director with the Plaintiff wrote back;

“Please mail through the SUS schedule as well so we can have a full picture to reconcile with, and put this to bed.”

In my view this last communication by Ronald shows that the two accounts were being handled together. On the 30th July 2014 M/S Kateera & Kagumire Advocates on behalf of the Second Counter-Defendant appointed a receiver to the Plaintiff in which it intended to take possession and dispose of two aircrafts which included the 5X SUS.

The issues agreed upon by the parties were;

- 1. Who is indebted to whom?**
- 2. Whether the Defendants/Counter-claimants are entitled to the interest payments claimed in the counter-claim?**
- 3. Whether the Counter-claimants have a cause of action against the 2nd Counter-Defendant?**
- 4. Remedies available.**

On the issue of indebtedness, the clearer position is brought out in **Exh D16**, the reconciliation that both parties agreed upon. The Plaintiff tried to avoid it by saying it was obtained through duress. Duress is defined to include a threat of harm made to compel a person to do something against their own will or judgment; **Blacks Law Dictionary 8th Edition Page 542**.

Exh D16 is a reconciliation document showing how much had been paid by the Plaintiff and how much was outstanding. Incidentally it is in respect of both leasing and purchase. PW1 in re-examination stated that the signing of **Exh D16** was because the Defendant threatened to ground the plane. That the signing was just to avert the threat.

The relevant part of **Exh D8** in which the Defendants threatened to ground the plane reads;

“Johnny is coming to you to

- 1) Either secure that balance of our funds including interest and the variance in the rate of exchange or*
- 2) As our verbal arrangement which we wanted to send to you at the time you told us that you were not able to reply as your system was down, whereby we*

explained that if the monies were not received in 7 days the aircraft would be grounded.”

It is contended by the Plaintiff that this amounted to duress leading to the signature of **Exh D16**.

Duress was considered in detail in **Pao On vs Lau [1979] 3 ALL ER 65 at 78**;

*“Duress ,whatever form it takes, is a coercion of the will so as to vitiate consent....There must be present some factor which could in law be regarded as coercion of this will such that there was no true consent, it is material to enquire whether the person alleged to have been coerced did or did not protest; whether at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy, whether he was independently advised; whether after entering the contract he took steps to avoid it. All these matters are, as was recognized in **Maskell v Home [1915] 3 KB 106**, relevant in determining whether he acted voluntarily or not.” **Burton vs Armstrong [1976] AC 104 at 121**.*

From the foregoing the person who alleges duress must show that he protested during the time he was being coerced and prove that he had no alternative course to take , like going to court and other types of relief.

Where a Plaintiff is forced to sign a document under duress and is therefore put in a serious disadvantage justice will require that the payment or entering into such an agreement does not deprive him of the right to assert his rights on a balanced plane. In **The Sibeon and the Sibotre [1976] 1 Lloyds Report 293** the court laid down tests to be considered when dealing with duress;

1. Whether the Plaintiff protested at the time of demand.
2. Whether the Plaintiff regarded the transaction as closed or intended to repudiate the new agreement.

Where a Plaintiff is aggrieved, he must take immediate steps to repudiate the agreement.

The Plaintiff in the instant case did not run to court or immediately protest or in any way repudiate the agreement. On the contrary they made further payments and followed them with

promises to pay and even worked very hard to obtain money from Stanbic Bank to clear the debt. These moves were to satisfy the terms of **Exh D16**. The conduct of the Plaintiff cannot be viewed as that of a person who was acting under duress but rather as those of a person who was fulfilling terms entered into with intentions to enforce them.

Taking all the circumstances into consideration I do not find any acts of duress by the Defendants. It is court's finding that the Plaintiff signed the agreement well aware of its implications. I would add here that to decide otherwise would be an adjustment to a contract between agreeing parties. Contracts concluded between parties should be respected by court. In this I am buttressed by **Stockloser vs Johnson (1954)1 ALL ER 630** in which Court was of the view that;

“People who freely negotiate and conclude a contract should be held to their bargain and judges should not intervene by substituting, according to their individual sense of fairness, terms which are contrary to those which the parties have agreed upon themselves.”

Further, the court is of the view that there was no duress because the threat to ground the aircraft by a creditor who had been seeking payment for over 6 months is normal, expected and legitimate. Furthermore, where after the agreement was signed, and the Plaintiff went ahead to effect several part payments, the protection of duress could not stand. In this case the Plaintiff was very late in payments, made several false promises and there were indications that they would go under. The terms in Exh D16 were freely reached by the parties and court shall not interfere with their intentions

Exh D16 which was a reconciliation document between the Plaintiff and Defendant shows that payment was being made in respect of the lease and purchase. It showed that as of 3rd October 2012 the Plaintiff owed the Defendant USD 227,336.82. These figures included interest calculated and deposits returned/credited. It read;

“This serves to confirm that both parties to this account being Aviation Leasing International and Asante Aviation Ltd agree to the figures and balances stated above including interest calculated and deposits returned/credited. It is therefore agreed that this will be the final balance owing to Aviation Leasing

International by Asante Aviation Ltd on the Current account as at this 2nd day of October 2012.”

This document written 2nd October 2012 was signed by both parties on the 3rd of October 2012. It was followed by several payments made by the Plaintiff on 16th January 2013, 14th February 2013, 12th March 2013, and 3rd April 2013, **ExhP11** with other payments indicated on the SUS schedule.

Another thing that showed the indebtedness of the Plaintiff to the Defendant is seen in the various communications from the Plaintiff to the Defendant acknowledging indebtedness and promising payments. For example, as late as 6th May 2013 Hope Sheila Busingye on behalf of the Plaintiff acknowledged the debt in these words;

“As earlier mentioned we are already organizing alternative funding to clear the account in good spirit of doing business with you.”

On 24th June 2013 she wrote;

“We have just come back from the bank after a tight negotiation with them on the transfer of funds to you as earlier discussed with John.”

The foregoing makes it clear that it was the Plaintiff who was indebted to the Defendants. Court finds the Plaintiff indebted to the Defendants.

On the issue of whether the Defendants/ Counterclaimants were entitled to the interest payments, I have already found that the reconciliation document **ExhD16** was a valid document entered into between the two parties. **Exh D16** showed that interest was agreed upon. This court is not about to make contracts for parties by interfering with what they agreed. This court will instead endeavor to give effect to the clear intentions of the parties as seen in **Exh D16** in that interest was agreed upon.

That being the case, it is my finding that the Counterclaimants were entitled to interest.

On the issue of whether the Counterclaimant has a cause of action against the 2nd Counter-Defendant, the Counterclaimant contended that the breach by the 2nd Counter-Defendant when he failed to remit the money owed to the Counterclaimant by the 1st Counter-Defendant on its own

stalled the recovery of the money which led to the Counterclaimant incurring losses and penalties from its financiers.

Submitting on this point, Counsel for the Counterclaimant conceded that there was no contract between the Counterclaimant and the 2nd Counter-Defendant. He however relied on the undertaking made by the 2nd Counter-Defendant, **Exh CC2**. In the instant case it is necessary to trace where the 2nd Counter-Defendant came from.

In the sale agreement **Exh P2** Stanbic bank which is the 2nd Counter-Defendant was stated as the financier to the purchaser and had in fact been in correspondence with Wes bank which was the Defendants' banker. The 2nd Counter-Defendant in an undertaking **Exh CC2** clearly confirms that they are financiers of the Plaintiff towards purchase of the aircraft. The undertaking written to the Defendants reads in part as follows;

“In consideration of Stanbic Bank Uganda Limited extending to Asante Aviation Limited credit for the purchase of Aircraft Registered as 5X SUS.

Whereas, Stanbic Bank Uganda Limited remitted USD 770,000(United States Dollars, Seven Hundred and seventy thousand only)

It is hereby acknowledged that the above amount of USD 200,000 will be remitted on to your account below;

Bank: CitiBank NY

Account Name: Aviation Leasing International GmbH

Account No: 16.701685132

IBAN: CH 87 0828 3016 7016 85132

Swift: CITIUS33 ABA 021000089

In favour of: Aargauische Kantonalbank, Aaru

Swift: KBAGCH22-Acc. No.109.371.63

We shall advise both parties to this transaction accordingly.”

While this undertaking was a communication between three parties it served to show that the Plaintiff was borrowing money from the 2nd Counter-Defendant to be remitted to the Counterclaimant.

This did not make the Counterclaimant privy to the contract between the 1st and 2nd Counter-Defendant. The question now therefore is whether the Counterclaimant could sue for recovery when She was not privy to that contract.

Privity of contract is a legal doctrine that confers rights and imposes liabilities on only the parties to the agreement. This means that a third party cannot sue those that have entered into their contract because it does not have that close, mutual or successive relationship to the same rights of property or power to enforce a term in the agreement.

In summary only parties to a contract may sue for the breach of contract. Ordinarily the Counterclaimant not being a party to the loan agreement would not proceed to sue under that agreement. The position in practice has however changed and it is now possible for a person not privy to a contract to sue. Such instances are where the third party is a beneficiary to the agreement between the other two parties. The test lies in the question of whether the two contracting parties intended the third party to derive benefit from their contract.

Such a party is at times referred to as a third party beneficiary. In this case a third party would be the intended beneficiary of the contract as opposed to an incidental beneficiary. The third party will especially benefit when he moves to do his part of the contract with one of the contracting parties because the relationship of the contracting parties gives him assurance of what he expects to benefit.

In the instant case, the sale agreement itself provided that the 2nd Counter-Defendant would be the one to finance the purchase of the aircraft. That this would be the case is fortified by **Exh CC2** in which the 2nd Counter-Defendant states how she had already paid USD 770,000 and how a further USD 200,000 would be paid by her.

This undertaking explicitly shows that the payments would be to the benefit of the Counterclaimant. It is not in doubt that the Counterclaimant got assurance from the agreement which named the 2nd Counter-Defendant as financier of the purchase and **Exh CC2** in which She undertook to pay a further USD 200,000. In **Dunlop Pneumatic Tyres vs Selfridge & Co. Ltd [1915] AC 847** the court held that a third party beneficiary may uphold a promise made for its benefit in a contract to which it is not a party; **Trident General InsuranceCo. Ltd vs MacNeice Bros Pty Ltd (1988) 165 CLR 107**.

In the instant case, it is clear that the intended beneficiary of the contract between the two Counter-Defendants was none other than the Counterclaimant. In several emails written by Sheila Busingye on behalf of the 1st Counter-Defendant to the 2nd Counter-Defendant it is clear that when the two entered into the loan agreement it was for the benefit of the Counterclaimant. It is also clear from the various correspondences from both the Counter-Defendants that they were aware that the money that was to be remitted was expected to sort out the Counterclaimant's financial obligations. One such communication is a communication from Sheila **Exh CC5** of the 1st Counter-Defendant to Nicholas of the 2nd Counter-Defendant. She wrote;

“I have just had a discussion with Mr. John Glendinning on payments, funds remittances. While we finalise the schedule of payments, I share his sentiments on the delays we have had and inconveniences at the same time. He mentioned to me he has commitments to end month and would much appreciate if our schedule can tally with his.

The purpose of this mail therefore is to request that as decisions and any approvals are being sought to finalise this transaction, special consideration is made in the interest of time to allow John meet his obligations. He mentioned he has commitments for end month and would very much want to honor this time round.”

The reliance the Counterclaimant placed on the relationship between the two Counter-Defendants and their assurance that payments were going to be made to the benefit of the Counterclaimant brings the 2nd Counter-Defendant into the arena of those who could be sued by

the Counterclaimant even if She was not a party to the contract between the two Counter-Defendants. It is therefore my finding that the Defendant/Counterclaimant rightly sued the 2nd Counter Defendant.

By way of special damages the Defendant prayed for USD 127,000 as money that was still owing. **Exh D16** showed a balance as agreed by the parties of USD 227,336.82. It is clear from **Exh P11** that several payments were made thereafter starting 16th January 2013 which according to the Defendants reduced the sum to USD 126,470.39.

By **Exh P12** the Plaintiff conceded that money was owed but most of it was interest which had not been agreed upon and placed money owing at USD 4,831.90. I have earlier considered the issue of interest and found it as a sum that had been agreed upon. Putting back the interest that the Plaintiff attempted to deduct would bring the figure to USD 119,602.94. If there had been no other adjustments that in my view would have been the money owing.

During submissions the Defendants conceded that due to forex variances and engine life extensions having been considered, money had been deducted from that originally claimed to USD 90,408. The Plaintiff did not give any evidence to show that other payments had been made. The figure USD 90,408 therefore remains undisturbed and I therefore hold that the Plaintiff is found liable in a sum of USD 90,408 to the Defendants.

The Counterclaimant prayed for general damages, exemplary damages and aggravated damages. An award of general damages is in the discretion of court and the law presumes it to be a natural probable consequence of the Defendant's act or omission; **James Fredrick Nsubuga v Attorney General HCCS 13/89; Erukana Kuwe vs Isaac Patrick Matovu HCCS 177/03.**

The delay to remit the money by the 2nd Counter-Defendant exposed the Counterclaimant to pressure from its creditors, misled her in thinking that payments were going to be made only to be disappointed and lastly caused the 1st Counter-Defendant to keep the Counterclaimant out of its money a result of which she suffered damages.

The Counterclaimant based her claim on the fact that the two Counter-Defendants promised to pay the purchase price of the aircraft and the 1st Counter-Defendant took possession of the aircraft which she put to her benefit. Failure to pay deprived the Counterclaimant of the use of its

money and being a business person She lost whatever profits this money would have made instead incurring otherwise avoidable interest to her financiers.

Because of the foregoing, I find the two Counter-Defendants both jointly and severally liable in general damages.

Taking into account the length of the time the Counterclaimant was deprived of the money, the inconvenience caused, the loss of business reputation occasioned by the two Counter-Defendants I find a sum of UGX 50,000,000/= as general damages appropriate. It is so awarded. Both the Counter-Defendants shall be jointly and severally liable for this sum.

The Counterclaimant also asked for exemplary and or aggravated damages. These are damages which are awarded in situations where there has been oppressive, arbitrary or unconstitutional behavior laced with impunity. The Counterclaimant has not in any way justified the claim for these damages and the same are denied.

The Counterclaimant also prayed for interest at commercial banking rate from date of filing the suit till payment in full. In **Uganda Revenue Authority vs Stephen Mabosi SCCA 16/1995** the courts held that interest was at the discretion of the court but this discretion must be exercised judiciously. As held in **Harbutt's Plasticine Ltd vs Wyne Tank & Pump Co. Ltd [1970] 1 Ch 447** the basis for the award of interest is that a party has been kept out of the use of his money while the other party has had use of it so the injured party ought to be compensated accordingly.

I have already found that the Counterclaimants were kept out of the use of their money as far back as 14th June 2012 which resulted into penalties being imposed upon them by their financiers.

Taking into account the suffering and anguish they went through and taking into account that the special damages are in dollars, this court finds an award of interest of 6% per annum on the decretal sum appropriate from date of filing this suit till payment in full.

Furthermore the court also awards interest at court rate on the general damages from date of judgment till payment in full.

Lastly, having considered that the Plaintiff failed to prove its case the suit against the Defendants is dismissed with costs.

Wherefore judgment is entered in favor of the Defendants/ Counterclaimants against the Plaintiff / Counter-Defendants as follows;

- a) The Plaintiff's suit is dismissed with costs.
- b) The Plaintiff to pay USD 90,408 to the Defendant/ Counterclaimant
- c) General damages of UGX.50,000,000/= to be paid by both Counter-Defendants
- d) Interest on (b) at 6% per annum from date of filing the suit till payment in full.
- e) Interest on (c) at court rate from date of judgment till payment in full.
- f) The CounterDefendants shall pay the costs of the Counterclaim.
- g) On payment the Defendants to handover documents pertaining to the aircraft as agreed in the Purchase agreement.

Dated at Kampala this 2nd day of November 2017.

**HON. JUSTICE DAVID WANGUTUSI
JUDGE**