

TANZANIA / JUDGMENT

celestial aviation trading limited vs airco holding company limited 2021 tzhccomd 3391 2 november 2021

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2 November 2021

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IN THE HIGH COURT OF TANZANIA COMMERCIAL DIVISION AT DAR ES SALAAM
MISCELLANEOUS COMMERCIAL APPLICATION NO. 130 OF 2021 CELESTIAL AVIATION
TRADING 7 LIMITED,..... APPLICANT VERSUS AIRCO HOLDINGS COMPANY
LIMITED..... 1st RESPONDENT BISEKO NYAGABONA..... 2nd RESPONDENT
FASTJET AIRLINES LIMITED..... 3rd RESPONDENT Date of Last Order: 22/10/2021
Date of Ruling: 02/11/2021

RULING

C. P. MKEHA, J The present application seeks to set aside an order of-temporary injunction dated 24th August, 2021 issued in Miscellaneous Commercial Application Number 114 of 2021. The said order restrained an aircraft namely Embraer S. A ERJ190 bearing manufacturer's serial number 19000167 and registered by the Tanzania Civil Aviation Authority (TCAA) with marks 5H-FJH, from being taken outside Tanzania. The application is made under Order XXXVII Rule 5 of the Civil Procedure Code. Whereas Mr. Gaspar Nyika learned advocate represented the applicant, Mr. Ludovick Nickson represented the 1st respondent. The 2nd and 3rd respondents chose not to resist the application, despite service. In the course of arguing the application , Mr. Nyika learned advocate submitted that, in granting the injunctive order the court relied on the affidavit and submissions of the 1st respondent's counsel that the aircraft belongs to the 3rd respondent. He then proceeded referring to the affidavit supporting the present application which indicates that, the aircraft belongs to the applicant. He also referred to a Bill of Sale that is annexed to the applicant's affidavit. While admitting that the aircraft was formerly leased to the 3rd respondent, paragraphs 7 to 9 of the applicant's affidavit indicate when, how and why the said lease was terminated. The learned advocate insisted that, following termination of the said lease, the applicant is the owner of the aircraft, Fastjet (3rd Respondent) being the operator. According to the learned advocate, the injunctive order was therefore Issued based on wrong information. The learned advocate condemned the 2nd and 3rd respondents for their failure to assist the court in providing; information as to who was the actual owner. Mr. Nyika submitted that, termination of the previous lease is a fact known to the liquidator. He finally urged the court to grant the application. ' Mr. Ludovick learned advocate submitted in reply that, the registration number of

the aircraft as per the chamber summons in the present application is different from the aircraft in respect of which an injunctive order was issued. He went on to submit that, there was no evidence that the 3rd respondent leased the aircraft from the applicant and further that, the purported lease agreement does not indicate that it is the disputed aircraft that was leased to the 3rd respondent by the applicant. That being the case, according to the learned advocate, the 1st respondent had all the reasons to believe that, the aircraft belongs to the 3rd respondent. The learned advocate went on to submit that, since the Ground Handling Agreement was signed by the 1st and 3rd respondents, it is proper to believe that, the aircraft belongs to 2 the 3rd respondent. The learned advocate renounced misrepresentation on part of his client. The learned advocate further reminded the court that, when the injunctive order was issued, the counsel for the 2nd applicant was in court and conceded to the application. The learned advocate asked the court to dismiss the application for being unmeritorious. When Mr. Nyika learned advocate rose to rejoin he alerted the court that the description of the aircraft made by the respondents in the earlier application was incorrect. He asked the court to look on the manufacturer's serial number which is unique, which is the same in both applications. He insisted that, after all, when the application was made, there was only one aircraft grounded at Mwalimu Julius Nyerere International Airport, subject of this application. He then made reference to CAT1, CAT2 and CAT3, Annexures to the applicant's affidavit which give sufficient description of the disputed aircraft. The learned advocate maintained that, there was concealment of information on part of the liquidator. The learned advocate submitted that, the liquidator remained silent, although he knew, the aircraft belongs to the applicant. The learned advocate finally submitted that, the Ground Handling Agreement does not prove ownership of the aircraft on part of the 3rd respondent. Under Order XXXVII Rule 5 of the Civil Procedure Code any order for an injunction may be discharged, varied or set aside by the court on application made thereto by any party dissatisfied with such order. The present application is for purposes of setting aside this court's injunctive order dated the 24th August, 2021 which restrained the disputed aircraft from being taken outside Tanzania. When this court issued the said order, it relied on amongst other things, information contained in the affidavit which supported Miscellaneous Commercial Application No. 114 Of 2021, that, the aircraft belongs to FASTJET AIRLINES LIMITED and the fact that, the 1st respondent then, did not challenge the application. But, when the applicant filed the present application in view of challenging the said order, despite service of the 3 chamber summons, the 3rd respondent declined entering appearance in view of resisting the application. Neither did the 2nd respondent appear, leave alone filing counter affidavit to this application. This is the person who appeared in the earlier application as the 1st respondent. Mr. Ludovick learned advocate who represented the 1st respondent appeared to suggest that, the disputed aircraft belongs to the 3rd respondent, merely, because, the Ground Handling Agreement was signed by the 1st and 3rd respondents. However,, paragraphs 2 to 6 of the applicant's affidavit regarding ownership of the aircraft are not controverted by the 3rd respondent who chose not to file a counter affidavit. According to the said relevant parts of the applicant's affidavit, the applicant is the legal and beneficial owner of an Embraer S.A ERJ190 aircraft bearing manufacturer's serial number 19000167 and registered by the Tanzania Civil Aviation Authority (TCAA) with marks 5H-FJH (the Aircraft). A copy of the

Confirmatory Bill of Sale of the aircraft showing the applicant's ownership is attached to the affidavit as Annexure CAT1. In the circumstances, I am persuaded with the submissions by Mr. Nyika learned advocate that the aircraft belongs to the applicant and not the 3rd respondent who remained to be the operator, when the lease agreement in respect of the aircraft was terminated as per paragraphs 7 to 10 of the applicant's affidavit. Neither can a Ground Handling Agreement stand as evidence of ownership of the aircraft as suggested by the learned advocate for the 1st respondent. The learned advocate for the 1st respondent did not successfully challenge the fact that, the disputed aircraft is described by similar and unique serial numbers, in both applications. For the foregoing reasons, this court's injunctive order dated the 24th August, 2021, which restrained the disputed aircraft from being taken outside Tanzania, is set aside. The application is allowed. 4 Dated at DAR ES SALAAM, this 2nd day of NOVEMBER, 2021 JUDGE 02/11/2021 Court: Ruling is delivered on this 2nd day of November, 2021 in the presence of the parties' advocates. JUDGE 02/11/2021. 5

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CASE PAGE	https://chat.esheria.ai/case-law/tanzania/celestial-aviation-trading-7-limited-temporaryinjunction-tzhccomd-2021

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