Kenya Aeronautical College Flying School Ltd v Kenya Civil Aviation Authority (Civil Appeal E512 of 2022) [2024] KEHC 9897 (KLR) (30 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9897 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL APPEAL E512 OF 2022

DKN MAGARE, J

JULY 30, 2024

BETWEEN

KENYA AERONAUTICAL COLLEGE FLYING SCHOOL LTD ..... APPELLANT

AND

KENYA CIVIL AVIATION AUTHORITY ..... RESPONDENT

JUDGMENT

1. The appeal arises from the Judgment and decree of the National Civil Aviation Administrative Review Tribunal delivered on 13/6/2022 in Appeal Case No. 1 of 2021.

2. The Tribunal dismissed the case in favour of the Respondent. The Appellant being aggrieved preferred 6 grounds in the Memorandum of Appeal. The memorandum of appeal raised the following grounds:

    a. The learned tribunal erred in finding that the reweighing of the aircraft was not properly done when the same had been submitted and approved.

    b. The learned tribunal erred in finding that the work package be completed when the same had already been done.

    c. The learned tribunal erred in dismissing the appeal yet the Appellant had closed all findings.

    d. The learned tribunal erred in failing to appreciate the doctrine of retrospective application of statute.

    e. The learned tribunal erred in making a conclusion not supported by evidence.

    f. The learned tribunal erred in finding that the Appellant was largely unsuccessful.

3. The Appellant filed the appeal in the Tribunal on 22/3/21 asserting that on 23/10/2020, the Appellant applied renewal of its certificate of airworthiness for aircraft 5Y-CCN.

4. It was pleaded that the aircraft was inspected and was found to be in good condition save for few issues which the Respondent needed the Appellant to do and which the Appellant subsequently did. The Appellant's case was therefore stated that the Respondent had wrongly refused to issue the renewal certificate despite the Appellant's compliance.

5. The Respondent denied the assertions by the Appellant and stated in material thus:

    a. Previous log books were not available for inspection.

    b. Major repairs were performed on the impugned aircraft without a formal request to the Respondent.

    c. The Approved Maintenance Organisation could not demonstrate access to airworthiness data.

    d. The Kenya Wildlife did not have capacity to weigh the aircraft.

    e. The submitted work package was not compliant with airworthiness regulations.

Evidence

6. The Appellant called Samson Aketch as PW1. He relied on his affidavits filed in court. On cross examination, it was his stated case that the owner of the aircraft was responsible for its maintenance.

7. It was his case that that the aircrafts were to be weighed after 5 years and that it is Kenya Wildlife that reweighed the subject aircraft.

8. It was his further case that they did not have the log books and only got the logbooks one month ago and indeed there was a variance in hours between the last page and the log books of 30.6 hours.

9. PW2 was Oscar Sammy Imbuye. He relied on the documents produced by the appellant. On cross examination, he stated that it was important to reweigh an aircraft. That the aircraft was weighed by KWS, a subcontractor. It had been flying since 2017 and did not have an accident in the last licence.

10. The Respondent called RW1 Mary Keter. The witness adopted her affidavits filed in court and the annextures thereto. On cross examination, she stated that the Respondent had not refused to issue a certificate of airworthiness. But it was the Respondent's position that KWS had no capacity to weigh.

11. It was her further case that there was discrepancies in the hours on the log books. That it was not true that the certificate of airworthiness had been approved.

12. RW2 was Alloice Odhiambo Lumutu. He testified that his role was to check whether the aircraft had necessary approvals. That there was no approval as required under Regulation 42. He stated that the Kenya wildlife service did not have approval to weigh. And the log book were not provided. He also stated that the aircraft had an accident. It was his case that the vessel was not an ordinary aircraft.

Submissions

13. The Appellant filed submissions dated 18/3/2024 and submitted that the tribunal erred in its finding on weighing and work package and also proceeded to retrospectively apply the law to the detriment of the Appellant.

14. Reliance was placed on the case of Commissioner of Income Tax v Pan African Paper Mills (EA) Ltd (2018) eKLR to submit that where a written law repeals a part or whole of another written law, the repeal shall not revive anything in force or affect the previous operations of the repealed law. They Relied on Section 23 of the *Interpretation and General Provisions Act*, Cap 2.

15. The Appellant relied on the Malaysian case of Yew Bon Tew v Kenderaan Bas Mara (1982)3 ALL ER 833, to support the submission that a statute should not operate retrospectively to impair an existing right. In that case the judicial council of the Privy Council stated as follows: -

> " Apart from the provisions of the interpretation statutes, there is at common law a prima facie rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used. A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past. There is however said to be an exception in the case of a statute which is purely procedure, but only a right to prosecute or defend a suit according to the rules for the conduct of an action for the time being prescribed."

16. I was urged to allow the Appeal.

17. The Respondent on their hand submitted that the Appellant applied for renewal of the certificate contrary to Regulation 12(5) of the Civil Aviation (Airworthiness) Regulations, 2018 in that the application was not submitted 6 days before expiry of the license.

18. It was also submitted that the Appellant was not compliant in so far as the submission of the logbooks, prescribed acceptance form and work package was concerned. They submitted in their regard that the tribunal was correct in its finding.

Analysis

19. The issue is whether the tribunal erred in its finding that the Appellant had not proved its case as against the Respondent and dismissing the Appellant's case.

20. This being a first appeal, the Court should with judicious alertness re-evaluate the evidence, and consider arguments by parties and apply the law thereto, and make its own determination of the issues in controversy. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. Therefore, it should give allowance to the fact that it neither saw nor heard the witnesses' testimonies.

21. In the case of Mbogo and Another vs. Shah [1968] EA 93 where the Court stated:

> " ...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

22. The duty of the first appellate court was stated in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968]EA 123, where the court held as follows;-

> " .. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

23. Notwithstanding, the Appellant had the burden of proving the allegations in the appeal. Section 107-109(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

> " 107.
>
> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
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> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
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> 108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
>
> 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

24. In Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, the Court of Appeal held that:

> " As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

25. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in William Kabogo Gitau –vs- George Thuo & 2 Others [2010] 1 KLE 526 stated that:

> " In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely that not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

26. Lord Nicholls of Birkenhead in Re H and Others (Minors) [1996] AC 563, 586 held that;

> " The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the even was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability....."

27. In Palace Investment Ltd –vs- Geoffrey Kariuki Mwenda & Another [2015] eKLR, the Judges of Appeal held that:

> " Denning J, in Miller –vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-
>
> > "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
> >
> > This burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

28. The court has perused the evidence produced in the Tribunal. There is no question that Kenya Wildlife Services was not approved for the purpose of reweighing the aircraft. It was proved that the aircraft had an accident and was not a normal aircraft hence the need for all the procedures that were laid under the regulations for its approval for the purposes of certification.

29. Therefore, the tribunal cannot be faulted. The Appellant failed to prove its case to the required standard. During the hearing of the appeal the court was informed that errors were corrected and a license issued.

30. The need to prove and the burden of proof of such allegations of forgery, fraud, falsehood or dishonesty was elaborated by the court in Christopher Ndaru Kagina vs. Esther Mbandi Kagina & Another [2016] eKLR where the court stated that –

> "... he who alleges fraud must prove fraud. Allegations of fraud must strictly be proved. Great care needs to be taken in pleading allegations of fraud or dishonesty. In particular, the pleader needs to be sure that there is sufficient evidence to justify the allegations. In the Case Central Bank of Kenya Ltd -Vs- Trust Bank Ltd & 4 Others [26] the Court of Appeal in considering the standard of proof required where fraud is alleged stated that fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof is much heavier on the person alleging than in an ordinary Civil Case. The burden of proof lies on the applicant in establishing the fraud that he alleges. In Belmont Finance Corporation Ltd. v. Williams Furniture Ltd [27] Buckley L.J. said:
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> > "An allegation of dishonesty must be pleaded clearly and with particularity. That is laid down by the rules and it is a well-recognized rule of practice. This does not import that the word 'fraud' or the word 'dishonesty' must be necessarily used. The facts alleged may sufficiently demonstrate that dishonesty is allegedly involved, but where the facts are complicated this may not be so clear, and in such a case it is incumbent upon the pleader to make it clear when dishonesty is alleged. If he uses language which is equivocal, rendering it doubtful whether he is in fact relying on the alleged dishonesty of the transaction, this will be fatal; the allegation of its dishonest nature will not have been pleaded with sufficient clarity."

In Armitage v Nurse [28] Millett L.J. having cited this passage continued:

> "In order to allege fraud it is not sufficient to sprinkle a pleading with words like "willfully" and "recklessly" (but not "fraudulently" or "dishonestly"). This may still leave it in doubt whether the words are being used in a technical sense or merely to give colour by way of pejorative emphasis to the complaint."

In Paragon Finance plc v D B Thakerar & Co the court stated that it is well established that fraud must be distinctly alleged and also distinctly proved, and that if the facts pleaded are consistent with innocence it is not open to the court to find fraud. The burden is always on the claimant to prove fraud on the part of the Respondent. The standard of proof where fraud is alleged is high. Though it is the same civil standard of proof on a balance of probabilities, it is certainly higher than the ordinary proof on a balance of probabilities but lower than proof beyond reasonable doubt. It all depends on the nature of the issue and its gravity. Evidence of especially high strength and quality is required to meet the civil standard of proof in fraud cases. It is more burdensome: (see also the cases of Mpungu & Sons Transporters Ltd –v- Attorney General & another. In Jennifer Nyambura Kamau v Humphrey Nandi, the Court of Appeal, Nyeri, emphasized that fraud must be proved as a fact by evidence; and, more importantly, that the standard of proof is beyond a balance of probabilities."

31. The initial evidentiary burden was on the Respondent who alleged unauthorized withdrawal and fraud and forgery. The tribunal therefore contradicted itself in finding that the Respondent had not particularized and proved fraud but had proved his case merely on the basis of inconsistencies in the Appellant's evidence.

32. Therefore, the Appellant failed to prove that allegations levelled against the Respondent. The decision of the tribunal was therefore in light of the weight of evidence. The assertion on retrospective application of the law were not supported.

33. The appeal is thus not merited. It is accordingly dismissed.

34. Section 27 of the *Civil procedure Act* provides as follows: -

> "(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
>
> (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

13. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh *Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012*; [2014] eKLR, as follows: -

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

35. The appeal is accordingly dismissed with costs of Ksh. 305,000/=.

Determination

36. In the upshot, I make the following orders:

    a. The appeal is dismissed.

    b. Judgment and decree of the Tribunal dated 13/6/2022 is upheld.

    c. Costs of Ksh. 305,000/= to the Respondent.

    d. 30 days stay of execution.

    e. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 30TH DAY OF JULY, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

No appearance for parties

Court Assistant – Jedidah