



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

COMMERCIAL CASE NO. E134 OF 2019

KENYA AIRLINE PILOTS ASSOCIATION (KALPA).....PLAINTIFF

VERSUS

CO-OPERATIVE BANK OF KENYA LIMITED.....1ST DEFENDANT

KENYA AIRWAYS LIMITED.....2ND DEFENDANT

RULING

1. There are two applications for consideration. One was filed by the plaintiff (“KALPA”) dated 9/11/2020 and the other by the 2nd Defendant (“KQ”) dated 18/5/2020, respectively.
2. KQ’s application was made *under sections 1A, 1B and 3A of the Civil Procedure Act, Order 8 Rules 3, 5 and Order 51 Rule 1 of the Civil Procedure Rules*. It sought leave to amend and file an Amended Defence. It was supported by the affidavit of **Geoffrey Orai Obura**, Advocate sworn on 18/5/2020. Mr. Obura contended that, having reviewed the matter, he was of the view that the Court might not have jurisdiction to hear this matter and he wished to plead the same in the amended defence.
3. The application was opposed by the plaintiff through Grounds of Opposition dated 18/9/2020.
4. KALPA’s Motion was dated 9/11/2020 and was brought under *sections 1A, 1B and 3A of the Civil Procedure Act, Order 8 Rule 3, Order 40 Rules 1 and 2 and 5 and Order 51 Rule 1 of the Civil Procedure Rules*. It sought various injunctive orders against the defendants.
5. That application was supported by the affidavit of **Capt. Muriithi Nyagah** sworn on 10/11/2020. It was opposed through the affidavits of **Jacquelyne Waithaka** sworn on 26/11/2020 and **Evelyne Munyoki** sworn on 8/12/2020.
6. In addition to the foregoing, KQ lodged a Notice of Preliminary Objection dated 16/11/2020 wherein it contended that the Court had no jurisdiction to entertain the suit and any of the applications arising therefrom. *Article 162(2) and 165(5) of the Constitution read together with Section 12(1) (a) and (b) of the Employment and Labour Relations Court Act No. 20 of 2011* were invoked in support of the preliminary objection.
7. The facts of the case are simple. In the year 2010, KQ floated a tender for a financier to fund its Pilots’ and Cabin Crew training scheme. The 1st Defendant (“the Bank”), was the successful bidder. Pursuant thereto, KQ and the Bank entered into an agreement whereby the Bank was to advance loans (hereinafter “the loan facility”) to young Kenyans who wanted to become pilots to pay for their pilot training. The loans were guaranteed by KQ. Those trainee pilots that were lucky to be employed by KQ were bonded for eight years during which period, they were expected to repay the loan extended by the Bank through deductions in their salaries.
8. KALPA describes itself as a trade union duly registered under the Laws of the Republic of Kenya and governed by the *Labour Relations Act, 2007*. Pursuant to a recognition agreement dated 5/5/1978, KQ recognized it as the body to represent all pilots employed by KQ in all matters pertaining to their terms and conditions of service.
9. KALPA’s case is that on or about 20/5/2013, the Bank amended the terms of the loan facility and that together with KQ, they demanded/coerced/unduly influenced KALPA’s members to sign new loan application forms (“the revised facility letters”). That the revised facility letters contained fresh terms and conditions of the loan facility materially altering the interest rate payable pursuant to the Memorandum of Scheme executed between the Bank and KQ.
10. KALPA’s claim is that the introduction of the accruing interest has prejudiced its members as there was a moratorium in place and its members were not earning any income. That the capitalization of interest and subjecting it to further interest unlawfully circumvented

compliance with the *in duplum* rule and thus contravened this rule. That the defendants acted unconscionably by exploiting their influence to direct the conduct of the beneficiaries

11. In **Republic v Karisa Chengo & 2 others [2017] Eklr**, the Supreme Court of Kenya stated: -

“Jurisdiction” has emerged as a critical concept in litigation. Halsbury’s Laws of England (4th Ed.) Vol. 9 at page 350 thus defines “jurisdiction” as “... the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.” John Beecroft Saunders in his treatise Words and Phrases Legally Defined Vol. 3, at page 113 reiterates the latter definition of the term ‘jurisdiction’ as follows:

“By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”.

From these definitions, it is clear that the term “jurisdiction”, as further defined by The Black’s Law Dictionary, 9th Edition, is the Court’s power to entertain, hear and determine a dispute before it”.

12. In this regard, the Court will first deal with the preliminary objection by KQ. In **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors [1969] EA 696**, it was held that a preliminary objection consists of a point of law that is pleaded and which if argued as a preliminary point, may dispose of the suit. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

13. Counsel for KQ has attacked the proceedings from two fronts: The locus standi of KALPA to institute the present suit and the Court’s jurisdiction to entertain the suit. Counsel urged that in law, the recognition agreement upon which KALPA has founded its suit is for purposes of collective bargaining and not to institute suits in the High Court.

14. That Paragraph 3 of the Complaint on the recognition agreement between KALPA and KQ ought to be viewed within the context of **section 54 of the Labour Relations Act**. That the said provision provides for conciliation in case of any dispute between the employer and the union. That the arbitral and adjudicating authority recognized by the **Labour Relations Act** is either a conciliator, an arbitrator and ultimately the **Employment and Labour Relations Court (“ELRC”)**. In this regard, Counsel submitted that for purposes of settling any dispute arising pursuant to the provisions of the **Labour Relations Act** and the Recognition Agreement relied on by KALPA, the only court of call is the ELRC established by the **Employment and Labour Relations Court Act No. 20 of 2011 (“ELRCA”)** pursuant to **Article 162(2)** of the **Constitution**.

15. It was further submitted that KALPA was never a party to the loan and guarantee contracts between the ab initio pilot trainees and the Bank and KQ respectively. That the reliefs sought in the original complaint and proposed amended complaint are not for the benefit of KALPA but for the said ab initio trainees who are not parties to the suit, and whose identities have not been provided in the body of the complaint itself. That by dint of **Order 1 Rule 1** of the **Rules**, KALPA has no locus to maintain the suit as a trade union cannot purport to be an agent as the only recognized agents who can appear in the High Court are specified under **Order 9 Rule 2** of the **Rules** of which KALPA is none of them.

16. On the foregoing, it was submitted that this Court lacks jurisdiction to entertain this suit. The cases of **National Union of Clerical Commercial Employees v. Drapers Ltd (1969) EA 63**, **Kenya Plantation and Agricultural Workers Union v. Kenya Agricultural Research Institute (KARI) & Another (2007) Eklr**, **Shafi Grewal Kaka and Others v. International Air Transport Association (IATA) (2015) Eklr**, and **Nehawu Obo Adekayo v. Central University of Technology Free State and Another (2009) 30 ILT 1261**, were relied on in support of those submissions.

17. It is common ground that **Article 162 of the Constitution** contemplated the establishment of a Court to hear and determine disputes relating to employment and labour relations. Through Parliament and the **ELRCA**, the ELRC was created as a superior court that enjoys equal status as the High Court.

18. **Section 12(1)** provides for the jurisdiction of the ELRC.

19. The question is whether the instant suit falls within a dispute provided under that section.

20. It has not been disputed that KALPA is a registered trade union and that it represents all pilots employed by KQ. It has also not been disputed that the Bank and members of KALPA entered into loan agreements to facilitate their training as pilots which were guaranteed by KQ. KALPA faults the manner in which the initial facility terms were altered by the Bank and the manner in which the Bank and KQ made them sign the said revised facility letters. KALPA claims that this was done through undue influence/pressure and coercion. From the foregoing, it is clear that the dispute is between KALPA as the trade union and the Bank as a third party together with KQ as the employer of the members of KALPA. The inclusion of the bank as a lender does not change the nature of the dispute. It relates to the employment conditions of the members of KALPA who are KQ’s employees. The dispute herein is as a consequence or incidental to the employment relations between KALPA’s members and KQ.

21. In **Francis Mutunga Musau Vs Devki Steel Mills Limited (High Court Misc. Application No. 91/2015)**, it is only the ELRC that has jurisdiction to deal with causes of action that arise from labour relations.

22. In the present case, the suit has been instituted by KALPA to safeguard the interests of its members arising from their employment with KQ.

23. In view of the foregoing, I hold the view that this court lacks jurisdiction to entertain this suit. To this end, to determine the issue of locus standi will be an academic and moot exercise which will waste the court's valuable judicial time.

24. Having found that the Court lacks jurisdiction, what order should be made? In **Prof. Daniel N. Mugendi Vs Kenyatta University & 3 others (Civil Appeal No. 6 of 2012)** the Court of Appeal held:-

“...And in order to do justice, in the event where the High Court, the Industrial Court or the Environment and Land Court comes across a matter that ought to be litigated in any of the other courts, it should be prudent to have the matter transferred to that court for hearing and determination. These three courts with similar/equal status should in the spirit of harmonization, effect the necessary transfers among themselves until such time as the citizenry is well acquainted with the appropriate forum for each kind of claim.”

25. Similarly, in **John Mwangi Karanja Vs Alfred Ndirangu (2011) eKLR Waweru J** held:-

“With the enactment of Sections 1A and 1B of the Civil Procedure Act, the time has perhaps now come for this matter of transfer of suits to be looked at afresh.

If a suit finds itself in the wrong court, surely it is in the interests of justice and in the interest of all concerned that the suit be forwarded to the appropriate court with jurisdiction so that the issues in dispute can be properly and finally adjudicated. What prejudice would any party suffer in that event? After all, the overriding objective of the Civil Procedure Act and Rules is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act (Section 1A)”

26. From the foregoing, I am persuaded that unlike in instances where a suit is filed before a Magistrate's Court which has no jurisdiction, where a suit is wrongly filed in any of the 3 Superior Courts, High Court, Land and Labour Court, such suit should be transferred to the appropriate court and not to be dismissed.

27. Accordingly, I uphold the Notice of Preliminary Objection dated 16/11/2020. The Applications dated 18/5/2020 and 9/10/2020 together with the entire suit are hereby transferred to the Employment and Labour Relations Court for determination.

28. For the avoidance of doubt, the status quo order made by the court on 19/11/2020 shall subsist until the matter is mentioned before the Employment and Labour Relations Court for further directions but not later than thirty days from the date of this ruling.

29. Each party to bear own costs

DATED and DELIVERED at Nairobi this 20th day of January, 2021.

A. MABEYA, FCIArb

JUDGE