REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Civil Appeal 678 of 2008

CAPTAIN MOSES WACHIRA

T/A UNIVERSAL AVIATION..... APPELLANT

VERSUS

KENYA AIRWAYS LIMITED. ..... RESPONDENT

(From the Judgment and orders of C W Githua (Mrs.), Senior Principal Magistrate in Milimani Commercial Courts CMCC No. 14397 of 2004)

J U D G M E N T

The Appellant, in a Re-Amended plaint sought from the Respondent:-

a) US $5544 being the outstanding balance costs of additional services rendered out of $15489, the balance thereof of US $9945 having been paid by Respondent.

b)US $10,393 in respect of fees and commissions arising from a breach of contract allegedly committed by the Respondent by illegal circumvention of a contract existing between the parties.

The facts behind the dispute are that the two parties entered a written contract dated 12th October, 2000, under the contract the Appellant who was a pilot, was to conduct a flight training of captains and first officer's crew for Saab 340B Aircraft on behalf of the Respondent under the terms and conditions expressly contained in the said written contract. Each party was to act in good faith to the other, without circumventing the other. That was intended to avoid bypassing the other in order to deal directly with third parties who came into contact with the parties as a result of the said contract. It was also agreed in the contract agreement that the Appellant could undertake and offer to the Respondent additional services not strictly or expressly included in the original contract, provided they are expressly requested for by the Respondent or authorized by Respondent in writing.

In this case, through the plaint afforested the Appellant (***who was plaintiff in the court below)*** averred

that he offered additional services amounting to US $15489 of which US $9945 was paid, while US $5544 was not paid, hence the part claim for US $5544. The Appellant also alleged that Respondent (who was Defendant) circumvented the contract and delivered its pilots for recurrent training to a third party introduced to the Respondent during the performance of the relevant contract. The Appellant in that respect claimed damages amounting to US $10393 of which US $3465 was commission he would have earned had the training with Panam International Flight Academy, gone through him as stipulated in the contract. He also claimed in the same respect US $6374 which he would spend to book and maintain the pilots, had they been booked by the Respondent through him.

In its defence, the Respondent denied any breach of contract and demanded proof thereof. It denied that it received additional services from the Appellant and in the alternative, it averred that if such additional services were indeed rendered to it, which it denied, they were not to expressly sought in writing or authorized by it in writing, as provided in the contract.

The Respondent did not deny payment of US $9945 to the Appellant on being presented with an invoice of US $15489 for additional services herein claimed. As for the balance of the sum of US $5544, the Respondent averred that it served Appellant with a credit note thereof.

During the hearing of the suit before the honourable magistrate, the Plaintiff testified that in respect to the sum of US $15489 claimed by him, he had specified the details thereof as follows: -

1. ATPL Classes two (2) students **$160**
2. Medical Examination testing (2) Pilots **$480**
3. ATPL Examination testing (2) pilots **$550**
4. Additional Cockpit Procedure Training for 6 (six) pilots **$3000**
5. Additional Room DCA Examiner **$726**
6. Additional Room six (6) **$5544**

He further testified that he sent his invoice accordingly. When he received payment, it was US $9945, without specifications as to what services it covered. In demanding for the balance US $5544, thereafter, the plaintiff had explained to the Defendant that the sum was for additional room for Defendant's six (6) pilots who had been sent by Defendant, to the USA for recurrent training. However, it was at this time that the Defendant/Respondent denied that it had authorized recurrent training for the six pilots. That the Defendant asserted that the Plaintiff was not entitled to payment as he had not expressly sought and/or obtained authority to give out additional services in accordance with the contract Agreement.

In relation to the other sum of US$10393, the Plaintiff/Appellant had testified that the main contract had stipulated that the 11 pilots who originally would be trained, would thereafter again return and receive recurrent training. That after the first training, the Plaintiff/Appellant, sent the Defendant/Respondent, in preparation for the recurrent training, a programme, with a booking note for the pilots and training facilities.

It was the Plaintiff/Appellant's evidence that when later the pilots arrived for recurrent training, they went straight to Pan American Flight Academy without passing through the Plaintiff and without using the facilities which the Appellant had booked for them. According to the Plaintiff, he did not even know when the pilots had arrived, and taken recurrent training. He simply came to learn of the fact that the six (6) pilots, actually did so. That the information was confirmed by one of the pilots, Mr. Muya, who had taken the recurrent training. The Appellant produced in evidence Mr. Muya's logbook Copy, showing an endorsement of the recurrent training he had taken with others.

The Plaintiff/Appellant considered such bypass a circumvention forbidden by their contract and sought

damages in terms of US $3465, being the lost commission in accordance with the contract rates and US $6374 being management costs.

The Defendant/Respondent had however, also testified before the lower court through Allan Lenox Kungu, a pilot then working for Respondent. He confirmed the Contract Agreement signed by both parties. He confirmed that it was the Appellant who got the training and retraining facilities at an American International Flight Academy. He confirmed further that 10 pilots went for recurrent raining in November, 2000. He said that Liz Kitata was the Administrator of the defendant company and she had authority to negotiate or renegotiate the contract with the Appellant and could have requested for additional services in respect to the contract in question but all such additional services and who paid for them, he it did not specify. This made him doubt plaintiff's credibility.

In respect to the sum claimed by Plaintiff on the basis that the Defendant directly sent its pilots to Pan American International flight Academy, the honourable trial magistrate made a finding that, there was no circumvention. She decided that the pilots who attended recurrent training did so by the arrangements made by the plaintiff. That is however, because the re-current training was an additional service as provided in the contract Agreement and the Plaintiff, therefore, required to obtain authorization of the Defendant in writing which he did not seek or obtain except for two pilots only. For that reason, the honourable magistrate stated that the Plaintiff was not entitled to recover the sum of US $10393 but would recover the unit cost for training two pilots amounting to US $160 and TPL Examination testing thereof of US $550 – totaling to US $710.

I have carefully perused the contract documents, the evidence and all other exhibits. I have also perused the trial court's judgment.

It is clear from the record of evidence that the initial training and payment thereto under the contract, raised no dispute. The dispute arose in respect to recurrent training.

The Plaintiff/Appellant in his evidence testified that in preparation for recurrent training for 11 (eleven) pilots he sent Defendant/Respondent, training programmes, booked for the pilots training facilities and otherwise booked for them the slots at the Pan American International Flight Academy as requested. He further testified that the pilots, instead of going through him, were later directly sent to the Academy by the Respondent, thus circumventing the contract Agreement. In response to this however, the Respondent stated that the pilots who went for the recurrent training did so as per the slots booked by the Appellant himself. The Respondent, accordingly denied circumvention but could not be certain that the Appellant's bill for those additional services were paid for.

I have carefully perused the evidence from both sides on this issue. The Respondent admitted through the evidence of DWI, Allan Lenox Kungu who was in charge of training, that recurrent training, which was itself, an additional service, actually took place in November, 2000. While this witness asserted that he did not himself seek for the recurrent training as an additional service, he admitted nevertheless, that the Respondent's Administrator, one Liz Kitata, could have done it as she had authority to seek and authorize such additional services without reverting to DW I. Indeed to that end, the court observes the contents of the Plaintiff's exhibit No. 11(a). In it Liz Kitata the Defendant's said Administrator responded to Captain Moses Wachira's e-mail found on the same exhibit. Liz Kitata gave to Capt. Moses Wachira the eleven (11) names of pilots who would be going through the Plaintiff/Appellant to the Flight Academy for recurrent training. The pilots included Captains Kitua, Kungu, Musau, Nyachieo, Parkar and Jeizan and the First Officers Chebii, Muya, Ochieng, Mbaye and Maundu.

Two issues for determination arose before the lower court and in this court. The first one is whether it is correct for the Respondent to allege that the Appellant did not, in writing, seek and obtain authorization to make full arrangement with the Pan American International Flight Academy to slot in the Respondent's above named pilots for retraining? The second issue is whether the entering of the above pilots for retraining amounted to circumvention of the contract between the parties which would entitle the Appellant to damages?

As already stated above, there is clear evidence in the e-mail on exhibit II (a) dated 24th November, 2000 that Liz Kitata confirmed to Captain Moses Wachira of Universal Aviation, that the Respondent's therein named, 6 captains and 4 First Officers, would be going for recurrent training. The Respondent in its testimony confirmed that the training as shown in the schedules P. Exhibit 12, took place and even proceeded to eliminate the possibility of circumvention. The Respondent indeed asserted that the pilots undertook the recurrent training strictly in accordance with arrangements made by the Appellant at the said Flight Academy.

In the above circumstances, and with respect to the honourable trial magistrate, the recurrent training in question was clearly carried out with the knowledge and written and implied authority of the Respondent. The only other close related issue is whether the Respondent's said request to the Appellant to slot in the said Respondent's pilots in the Flight Academy, meant and/or included the request to arrange for them and where necessary provide everything required to admit them for such training including initially paying for them any relevant and necessary funds as would be required by the pilots to effectively achieve the benefits of training as originally intended and expected of them by their employer, the Defendant/Respondent.

I have carefully considered the above issue after re-reading the Contract Agreement between the parties, particularly clause 6 and 7 among others. In Clause 6, all costs to the Appellants (Universal Aviation) for additional services were to be paid by the Respondent (Kenya Airways) provided the same had prior authorization of the Respondent. Furthermore under clause 7, the Appellant was to assist with local day to day logistics and on-site co-ordination procedures during the training periods which was over three years (three years plus one automatic year), after end of the initial period of 3 years.

It is the view and finding of this court accordingly, that the Appellant's act of initially paying for six pilots for medical examination which was required of them to enable them to proceed with the retraining fell within its obligations of "***assisting with local day to day logistics and on-site co-ordination procedures during the training periods"***. The same goes with other necessary services rendered by the Appellant during the said period which if not immediately taken care of by the Appellant would have either delayed or completely frustrated the pilots retraining, as tabulated in the Appellants invoice dated 15th January, 2001.

The Honourable trial magistrate allowed items one (1) and three (3) of the said Invoice because according to her, the same had been specifically approved. In this court's view, and as have already demonstrated, the whole lot of additional services in the invoice, had the authorization of the Respondent. The latter chose to settle part of the invoice amount to US Dollars 9945 out of the claimed US $15489 without stating then which services amounting to US $5544 it did not approve. The Appellant however, noted that the sum unpaid from the total bill was the last item in the invoice which related to room accommodation for six (6) pilot who had attended re-training and for whom the Appellant had to pay for, to enable the pilots get accommodation.

As already concluded above by this court the Appellant had the obligation under clause 7 of the contract to assist with local day to day logistics to ensure that the retraining proceeded as arranged. It would be totally unreasonable and indeed contrary to the said Clause 7 above for the Appellant who had booked the pilots accommodation to decline to pay for them in the first instance and thereafter claim refunding. The Respondent did not claim that it had taken care of the issue directly with the accommodating hotel where the six pilots stayed in November, 2000. On the contrary, DW I confirmed that that pilots took up the arrangements as arranged by the Appellant. In the above circumstances, the Appellant was entitled to the refund of US$5544 claimed.

Turning now to the issue of circumvention of the contract, I find no evidence on record to support it. PW I claimed himself testified **(Page 13 of proceedings on page 86 of Appeal Record**) that in preparation for the recurrent training for eleven (11) pilots, he sent programmes to the Respondent and booked the pilots who arrived but did not use the arranged facilities. If they did not use the arranged facilities, how did his bill in the invoice Exhibit 13 arise? Furthermore, DW I confirmed PW I's evidence that Respondent's pilots used the arrangement put in place by the Appellant as stated in evidence by both. I

believe the same, as did the lower court. In the circumstances, I find that the Respondent did not circumvent the contract and I dismiss the part of Appellant's claim related thereto.

The result of this appeal accordingly, is that the Appellant's claim for US $5544, is hereby allowed with costs as the rest of claim is hereby dismissed. Each party will bear own costs of Appeal. Orders accordingly.

Dated and delivered at Nairobi this 14th day of May 2012.

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D A ONYANCHA
JUDGE