



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 274 OF 2010

**IN THE MATTER OF THE LAW REFORM ACT CHAPTER 26 OF THE LAWS OF KENYA
AND THE**

CIVIL PROCEDURE ACT CHAPTER 21 OF THE LAWS OF KENYA

AND

**IN THE MATTER OF AN APPLICATION BY THE KENYA AIRCRAFT MAINTENANCE
ENGINEERS ASSOCIATION,**

**JOHN NJOROGE MUGO, FRANCIS GITARI MURIUKI AND HEZRON GWIYO JILO FOR
ORDERS OF CERTIORARI**

AND PROHIBITION PURSUANT TO LEAVE GRANTED HEREIN BY THE HONOURABLE

LADY JUSTICE OKWENGU ON THE 25TH DAY OF AUGUST 2010

AND

**IN THE MATTER OF THE CIVIL AVIATION ACT CHAPTER 394 OF THE LAWS OF
KENYA AND THE**

CIVIL AVIATION (PERSONNEL LICENSING REGULATIONS) OF 2007

BETWEEN

REPUBLIC.....APPLICANT

AND

**THE KENYA CIVIL AVIATION
AUTHORITY.....RESPONDENT**

EX PARTE:

1. **THE KENYA AIRCRAFT MAINTENANCE ENGINEERS ASSOCIATION.....1ST APPLICANT**

2. **JOHN NJOROGE MUGO (Suing in his capacity as the Chairman of the**

Kenya Aircraft Maintenance Engineers Association).....2ND APPLICANT

3. **FRANCIS GITARI MURIUKI (Suing in his capacity as the Secretary General**

of the Kenya Aircraft Maintenance Engineers Association).....3RD APPLICANT

4. **HEZRON GWIYO JILO (Suing in his capacity as the Vice Chairman of the**

Kenya Aircraft Maintenance Engineers Association).....4TH APPLICANT

JUDGMENT

The ex parte applicants' application dated 14th September, 2010 seeks the following orders:

“a) THAT an ORDER OF CERTIORARI directed at the Respondent do issue to remove into the High Court and quash the decision of the Respondent contained in an advisory circular Reference Number CAA-AC-PELO22A issued in the month of July 2008 and titled Conversion of Aircraft Maintenance Engineers Licenses issued under Air Navigation Regulations to comply with the civil Aviation (Personnel Licensing) Regulations purporting to implement provisions of the Civil Aviation (Personnel Licensing) Regulations 2007 under the Civil Aviation Act Chapter 394 of the Laws of Kenya.

b) THAT an ORDER OF PROHIBITION directed at the Respondent do issue prohibiting it from implementing a decision contained in the advisory circular Reference Number CAA-AC-PELO22A issued in the month of July 2008 and titled Conversion of Aircraft Maintenance Engineers Licenses issued under Air Navigation Regulations to comply with the Civil Aviation (Personnel Licensing) Regulations purporting to implement provisions of the Civil Aviation (Personnel Licensing) Regulations 2007 under the Civil Aviation Act Chapter 394 of the Laws of Kenya.

c) THAT the costs of this application be provided for.”

On 28th August, 2010 Okwengu, J. granted leave to the applicants to apply for the said orders. The leave granted was to operate as a stay of implementation of the aforesaid decision.

The application was supported by a statutory statement and an affidavit sworn by **John Njoroge Mugo**, the Chairman of the Kenya Aircraft Engineers Association, hereinafter referred to as **“KAMEA”**, which is a registered society under the Societies Act for the purposes of, *inter alia*:

“(a) to promote and further the interests of its members.

(b) to promote and enforce high standards in Aircraft Maintenance.

(c) to provide a means of liaison between the Kenya Civil Aviation Authority and the licensed Aircraft Engineers in connection with all matters involving Licensed Aircraft Engineers and the promotion of safety standards in the Aircraft industry.”

The society was registered on 7th April, 2009.

The respondent is a statutory body established under the provisions of **Section 3** of the **Civil Aviation Act Cap 394** of the laws of Kenya and is responsible for, *inter alia*, the planning, development, management and regulation of the Civil Aviation System in Kenya. It is also charged with the responsibility and granted powers to give effect and implement the Act and the Regulations made thereunder.

By an advisory circular referenced CAA-AC-PELO22A of July, 2007, (hereinafter referred to as “**the Circular**”) titled: **Conversion of Aircraft Maintenance Engineers Licences issued under Air Navigation Regulations to comply with the Civil Aviation (Personnel Licensing) Regulations**, the respondent issued guidelines for the conversion of Aircraft Maintenance Engineers Licences issued under the Air Navigation Regulations under the Civil Aviation Act to the Civil Aviation (Personnel Licensing) Regulations of 2007.

The Circular stated, *inter alia*, that:

“3.1 Licensed Aircraft Maintenance Engineer who holds a valid licence issued under the Air Navigation Regulations, shall be re-issued with licences that are in compliance with the current Civil Aviation (Personnel Licensing) Regulations.

3.2 A holder of a valid AMEL is required to apply for the licence re-issue by completing and submitting to the Authority the application Form for AMEL re-issue. The Form should be duly signed and certified by an authorized person of the AMO or air operator place of work.

3.3 The application Form should be submitted to the Authority at least fourteen (14) days before the expiry of the current licence.

3.4 The new licence issued shall be in line with the categories and ratings as specified in the Civil Aviation (Personnel Licensing) Regulations.”

The circular provides the following as the privileges of the licences:

“3.6.1 AMEL holders without the pre-requisite qualifications for licence categories and ratings as provided for in the Civil Aviation (Personnel Licensing) Regulations will have their licences re issued with restrictions until the holder has satisfied all the PEL Regulations requirements in the subcategory.

3.6.2 The licence privileges extended to AMEL holders with licences that do not comply with Civil Aviation (Personnel Licensing) regulations will become null and void on 31st December 2010.

3.6.3 It is a responsibility of the affected AMEL holders to upgrade their licences to the requirements of the Civil Aviation (Personnel Licensing) regulations within the grace period that has been permitted by the Authority for that purpose.

3.6.4 AMEL holders who will have not up-graded their licences by 31st December 2010 shall loose the relevant limited endorsements or the licences as the case may be and shall have to be fully examined as guided by advisory circular CAA-AC-PEL 013 (Issue, RE-Issue and Renewal of AMEL).”

Prior to the coming into effect of the Personnel Licensing Regulations the licensing of the applicant’s members was done under the Air Navigation Regulations. Subsequent to the issuance of the circular the respondent renewed the licences of some of the members of the 1st applicant for varying periods beyond the 31st day of December, 2010.

The 1st applicant argued that the decision contained in the circular is tainted with illegality and is ultra vires the powers of the respondent for reasons, *inter alia*, that:

- “a) The respondent has issued to members of the First Applicant valid licenses under the Personnel Licensing Regulations for various periods which extend beyond the 31st day of December 2010.**
- b) The members of the First Applicant have already complied with the provisions of the Personnel Licensing Regulations.**
- c) The Respondent has no power in law or otherwise to declare as null and void licenses issued properly and legally by itself under the Personnel Licensing Regulations.**
- d) In any event the respondent lacks the power in law to issue a blanket declaration to the effect that licenses issued to Aircraft Maintenance Engineers including the membership of the First Applicant under the Personnel Licensing Regulations are null and void without granting a hearing to individual applicants and making a determination based on merit.”**

The 1st applicant further stated that the circular deprives its members of their right to apply for renewal of their licences within 12 months after expiry thereof in cases where they fail to renew the licences after they expire. The circular also offends their legitimate expectation that their membership shall have valid licences until expiry thereof, the 1st applicant added.

The respondent filed a replying affidavit that was sworn by **Stanley Mbwanga Kibunja**, the Chief Airworthiness Inspector. He stated that under **Section 8C of the Civil Aviation (Amendment) Act 2002**, the Minister in charge of Civil Aviation is empowered to make regulations to give effect to and the better carrying out of the objects and purposes of the Act. The circular was promulgated for information, guidance and necessary action to facilitate compliance with the conversion of aircraft maintenance engineers licences issued under the Air Navigation Regulations, 2007. The regulation in question was among a set of 12 new regulations which came into force on 5th August, 2008, the respondent stated.

The 12 new regulations implement the International Civil Aviation Organization Standards on Flight Safety. Kenya is a signatory of the **Convention on International Civil Aviation (ICAO)** and therefore has an international obligation to adhere to the standards of the Convention.

The respondent pointed out that the orders sought have been overtaken by events for the reasons that:

- “(i) The Advisory Circular CAA-AC-PEL022A is no longer in force as the grace period expired**

on 31st December 2010.

(ii) The Civil Aviation (Personnel Licensing) Regulations, 2007 are now in force and the licenses are now issued in accordance with the regulations.”

The respondent further stated that the applicants’ application has been overtaken by events for the following reasons:

“(a) The applicants have not shown what public right has been infringed.

(b) The Civil Aviation (Personnel Licensing) Regulations, 2007 came into force on 5th August 2008 and the same now govern the applicants’ members.

(c) An order of prohibition is sought too late in the day and the court cannot prohibit what had been done in the past. The circular in any event is no longer in force as the grace period expired on 31st December 2010 after the applicants’ members had been given more than 2 years to comply with the Civil Aviation (Personnel Licensing) Regulations, 2007.

(d) A court of law cannot act in vain in issuing orders of certiorari and prohibition in respect of a circular whose term has expired. Assuming that the orders are granted, the orders cannot interfere with the licensing regime under the Civil Aviation (Personnel Licensing) Regulations, 2007 which came into force on 5th August 2008 as these regulations have not been challenged and were issued by the state and not the Respondent.”

For these reasons the respondent urged the court to dismiss the application.

The Chairman of KAMEA swore a further affidavit and stated that the contents of the said circular contravene various provisions of the Civil Aviation (Personnel Licensing) Regulations, 2007 because:

“(a) Clause 3.3 of the circular requiring holders of Aircraft Maintenance Engineers Licence (AMEL) holders to submit their application forms for licence re-issue at least fourteen (14) days before the expiry of the current license is contrary to the provisions of Regulations 116 (1) of the Civil Aviation (Personnel Licensing) Regulations of 2007 which requires AMEL holders to apply for the renewal of license at least two (2) months before the expiry period in form and manner prescribed by the Authority.

(b) Clause 3.6.2 of the circular which states that the licenses AMEL holders who do not comply with KCARS Regulations will become null and void on the 31st day of December 2010. This contravenes the provisions of Regulations and Sub-regulation 14 of the Civil Aviation (Personnel Licensing) Regulations of 2007.”

He further stated that the respondent had continued to renew and/or issue licences to the 1st applicant’s members which licences are valid for periods of 24 months.

I have considered the rival arguments advanced by the parties. The major issue for determination is the legality of the impugned circular. Did the respondent have power to issue the said circular?

The applicants argued that only the Minister is vested with power to make regulations and to give effect to them. However, the circular was issued under Air Navigation Regulations and the respondent is the

statutory body enacted under **Section 3A** of the **Civil Aviation Act** responsible for the planning, development, management and regulations of the Civil Aviation System in Kenya. The respondent has the responsibility to give effect to and implement the Act and Regulations.

Under **Section 3B** of the **Civil Aviation Act** the respondent has the mandate of establishing and maintaining a system of administration with a view to enhancing safety in the Aviation industry. The impugned circular was issued within that mandate. The respondent cannot compromise in implementation of any regulation that is intended to enhance safety in Aviation industry in Kenya. That is a paramount consideration in determining this application.

I do not therefore think that the respondent acted *ultra vires* the provisions of the Civil Aviation Act as alleged by the applicants.

The circular that is sought to be quashed was issued for purposes of ensuring that the respondent meets international and regional air safety standards. Kenya is a signatory of the Chicago Convention and the respondent is under an obligation to adhere to the international standards of the Convention. As stated in the respondent's replying affidavit, all the East African countries have enacted regulations intended to implement the International Civil Aviation Organization Standards on Flight Safety.

Public policy consideration in formulating the impugned circular must be borne in mind. The court, in considering an application of this nature must weigh the public interest vis-à-vis the public interest of the applicants. It is not clear whether any public right has been infringed by the respondent. In **SAMUEL MBAKA MONDESTO vs. PERMANENT SECRETARY MINISTRY OF LANDS AND HOUSING [2005] eKLR** the court cited **R vs. EAST PERKSHIRE ex parte WALSH** where it was held as follows:

“An applicant for judicial review had to show that a public law right which he enjoyed had been infringed; where the terms of employment by a public body were controlled by statute, its employees might have rights both in public and private law to enforce these terms but a distinction had to be made between an infringement of statutory provisions giving right to public law rights and those that arose solely from a breach of the contract of employment.”

I agree with the respondent that the orders sought by the applicants have been overtaken by events because the impugned circular is no longer in force. The same expired on 31st December, 2010. The Civil Aviation (Personnel Licensing) Regulations, 2007 came into force on 5th August, 2008. The applicants had been given more than two years to comply with the new requirements but they did not move the court until 19th August, 2010. Although as at 25th August, 2010 when leave was granted and the same ordered to operate as a stay of implementation of the said circular the commencement date of the same had not reached, the applicants did not sufficiently explain why they moved to court so late in the day.

Judicial review remedies are also discretionary remedies and considering the fact that the applicants did not move to court in good time and bearing in mind the rationale behind the issuance of the impugned circular, the court is not inclined to exercise its discretion in favour of the applicants. It matters not that the licences of some of the 1st applicant's members will expire later this year and others next year. Such persons will not be adversely affected by the contents of the said circular.

For the aforesaid reasons the applicants' application is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF OCTOBER, 2011.

D. MUSINGA
JUDGE

In the presence of::

Nazi – Court Clerk

Miss Odero for the Ex Parte Applicants

No appearance for the Respondents