REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Misc. Civ. Appli. 258 of 2008

KENYA ASSOCIATION OF AIR OPERATORS…..…..….. APPLICANT

VERSUS

THE DIRECTOR GENERAL KENYA CIVIL

AVIATION AUTHORITY…....…..….........................….1ST RESPONDENT

THE MINISTER FOR TRANSPORT.......................2ND RESPONDENT

R U L I N G

The exparte applicants, Kenya Association of Air Operators, has filed an application for judicial review, seeking orders against the Director General, Kenya Civil Aviation Authority, (hereinafter referred to as the 1st respondent), and the Minister for Transport, (hereinafter referred to as the 2nd respondent), as follows: -

1. An order of prohibition directed at the respondents prohibiting them from implementing a decision (made on a date unknown to the Exparte applicant) but embodied in a notice contained in the Daily Nation on 28th April, 2008, under the hand of the 1st respondent seeking to implement contentious provisions of the Kenya Civil Aviation Regulations, 2008 ("KCARs") during the pendency of discussions between the parties herein to resolve and rationalize serious anomalies of far reaching consequences detrimental to the aviation industry and contained in the said regulations.

2. An order of certiorari to remove into the High Court and quash the aforesaid decision (made on a date unknown to the ex parte applicant) embodied in a notice contained in the Daily Nation on 28th April, 2008, under the hand of the 1st respondent.

3. An order of prohibition directed at the respondents prohibiting them from issuing and implementing any further decisions or notices seeking to implement contentious provisions of the Kenya Civil Aviation Regulations, 2008 ("KCARs") during the pendency of discussions between the parties herein to resolve and rationalize serious anomalies of far reaching consequences detrimental to the aviation industry and contained in the said regulations.

4. The costs of and incidental to this application be awarded to the ex-parte applicant.

Leave to file the application for Judicial Review was granted on 8th May, 2008 by Hon. Wendo J.

who refused to order that the leave operate as a stay of the decision of the respondents. The exparte applicant has now come to this court by way of a notice of motion dated 28th July, 2008 brought under Section 3A of the Civil Procedure Act, Order L Rule 1, Sections 8 and 9 of the Law Reform Act, Cap 26 and Order LIII Rule (1) and (2) of the Civil Procedure Rules, seeking the following orders: -

That this Honourable Court be pleased to vary its orders granted on 8th day of May, 2008 and order that pending the hearing and determination of the proceedings herein leave granted to apply for judicial review herein do operate as stay of the decision of the respondents or either of them (made on a date unknown to the exparte applicant but embodied in a notice contained in the Daily Nation on 28th April, 2008 under the hand of the 1st respondent or of any further decision of similar effect), seeking to implement contentious provisions of the Kenya Civil Aviation Regulations, 2008 ("KCARs") during the pendency of discussions between the parties to resolve and rationalize serious anomalies of far reaching consequences detrimental to the aviation industry and contained in the said regulations.

The hearing of the notice of motion dated 28th July, 2008 has fallen upon my shoulder as the vacation Judge on duty, leave having been granted under the High Court (Practice and Procedure Rules) for the matter to be heard during the High Court vacation.

The application is anchored on an affidavit sworn by Col, (Rtd). E.K. Waithaka, the chief executive of the exparte applicant and grounds stated on the body of the application. It is contended that the respondents having published in gazette supplements notice nos. 13, 14, 16, 17, 21, 28 and 29 of 2007 new Kenya Civil Aviation Regulations (hereinafter referred to as KCARs), has now published an advertisement in the Daily Nation of the 28th April, 2008, indicating that compliance with the KCARs will be required with effect from 5th May, 2008. It is contended that consequent to the filing of the proceedings for judicial review, the exparte applicant and respondents have entered into discussions with a view to identifying a suitable compromise. Notwithstanding the discussions the 1st respondent has issued a notice by way of an Aeronautical information circular dated 20th June, 2008 indicating its intentions to implement the KCARs with effect from 5th August, 2008. It is contended that the circular is intended to forestall the decision of the court on the merits of the application for judicial review. It is maintained that the intended implementation of the KCARs without full consultation is unreasonable, and liable to render all operations of the members of the exparte applicant illegal and unworkable. This will lead to very serious and detrimental effects to the industry and place in jeopardy the insurance and contractual obligations of the members of the exparte applicant.

Counsel for the applicant has submitted that the respondent is contributing to the delay in hearing the application for judicial review by failing to file their skeletal submissions. Although it is conceded that the court can only make an independent evaluation as to whether the regulations will be workable after the main motion is heard, it is submitted that there is a risk that the motion will be rendered nugatory if the order for stay of implementation of the regulations is not made. It is submitted that the applicants will suffer extreme consequences as they will be exposed to legal sanctions. It is further contended that in the event of an accident operators of aircrafts will no longer be covered by insurers and their contracts or leases may be terminated. It was further submitted that the respondents would not suffer any prejudice if an order for stay of implementation of the regulation is made.

The application is opposed by the 1st respondent through a replying affidavit sworn by Zadarak Achoki, a legal officer of the 1st respondent. Achoki depones that the circular issued by the 1st respondent on 20th June, 2008 was for information and guidance to facilitate compliance with the KCARs which should be enforced from 5th August, 2008. Achoki further depones that KCARs is a set of new regulations which implements the International Civil Aviation Organization standards on flight safety. It is contended that Kenya being a signatory to the convention on International Civil Aviation, it has an obligation to adhere to the standards of the convention. It is further stated that the implementation of KCARs is extremely crucial for Kenya to attain and maintain the mandatory international air safety standards. It is maintained that the Aeronautical information circulars was issued following consultation meetings between the applicant and the respondents on the 16th May, 2008. It is deponed that the Aeronautical information

circular does not repeal the law, but merely informs the industry the time by which the KCARs must be fully complied with. It was contended that the applicant's contentions were alarmist and self serving, merely intended to enable them enjoy blanket immunity over aviations safety interests. It is further contended that the applicant has not come to court with clean hands.

Counsel for the 1st respondent has submitted that the applicants have not identified any particular regulation which is detrimental to them. Relying on ***Misc.Civil Application No. 115 of 2008 in the matter of an application by Selex Sistemi Integrati vs Kenya Civil Aviation Authority***, it was submitted that an order for stay would compromise the country's national interest as the safety of passengers would not be guaranteed. It was further submitted that an application for leave and an application for stay of execution cannot be separated. In this regard counsel for the 1st respondent cited the Court of Appeal decision in ***Shah vs Resident Magistrate Nairobi, (2001) 1 EA 208***, it was submitted that the applicants ought to have appealed against the order of the court refusing to grant a stay at the time the leave was granted.

For the 2nd respondent it was submitted that there being no order of stay in force, KCARs was already in force as law and the notice of which the applicant is aggrieved was not introducing anything new. It was maintained that there was no prejudice likely to be suffered by the applicant.

In response to the submissions made on behalf of the respondents, Counsel for the applicant maintained that although the minister had signed the KCARs on 5th March, 2008, the KCARs were not in force yet, and the 1st respondent has issued a specific notice to bring them into force. It was maintained that the respondents were aware that some of the members of the exparte applicant's were not able to comply with the regulations. Counsel for applicant urged the court to exercise its inherent jurisdiction which was unlimited to preserve the substratum of the motion. In this regard, Counsel relied on ***Misc. Civil Application No.439 of 2005 Blue Shield Insurance Co. Ltd vs the Commissioner of Income Tax and Another***.

I have carefully considered this application. The first issue that comes to the fore is whether the court has powers to review the orders which were made on 8th May, 2008. It is common ground that the order sought to be reviewed was made exparte on the 8th May, 2008 at the time the application for leave to apply for orders for judicial review was heard. Those orders were granted under Order LIII Rule (1), (2) and (4) of the Civil Procedure Rules. In the case of ***Republic vs Commissioner of Cooperatives, Exparte Kirinyaga Tea Growers (1999) 1 EA 245,*** the Court of Appeal had this to say about these provisions of the law:

"*Order LIII provides as follows in the relevant parts:*

(1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefore has been granted in accordance with this rule

(2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the ground on which it is sought and by affidavits verifying the facts relied on…….

(4) The grant of leave under this rule to apply for an order of mandamus, or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the Judge orders otherwise.

It is clear from rule (1) above that no application for the three orders can be made unless leave has been granted and rule (2) sets out the manner in which the application for leave is to be made and what must accompany such an application. According to rule (2), there are three mandatory requirements, namely:

(a) that the application must be made ex parte to a judge in chambers;

(b) that the application shall be accompanied by a statement of facts; and

(c) that the application is also to be accompanied by affidavits verifying the facts relied on.

If the application must be made ex parte, then it follows that it must be heard and granted or refused ex parte. If the application is granted, then rule (4) of Order LIII must also be dealt with because it is at the granting stage that the judge is required to deal with the issue of whether the leave granted shall act as a stay. From the provisions we have set out it is clear to us that a judge has no power to separate the granting of leave ex parte from the issue of whether or not such leave shall act as a stay. The Judge must decide at the stage of granting leave whether or not such a grant shall act as a stay. There is no power to make one portion of the chamber summons ex parte and the other portion of it to be heard inter partes."

In this case, the court is being asked to revisit the application *inter partes* and review the order which was made on the 8th May, 2008 refusing to order the leave granted to apply for orders of judicial review to operate as a stay. An order granting or refusing leave to operate as a stay is made under Order LIII pursuant to an application for leave to file an application for judicial review at the *ex parte* hearing of the application for leave. A limited power to vary such an order is implied under Order LIII Rule 4 (above quoted). In my understanding such power is limited to cases where leave has been ordered to operate as a stay of the proceedings or act in question, in which case, the Judge may intervene at any stage and order otherwise. In this case, no stay was granted and no power to review that order would arise. Moreover, leave having been granted, and the application for judicial review having been filed, the orders are spent and cannot be revisited or reviewed.

Further, if the applicant was aggrieved by the order refusing to allow the leave to operate as a stay, the applicant had the option to appeal against the said order. Having failed to adopt this avenue the applicant cannot now purport to invoke the inherent jurisdiction of this court to review the said order.

Notwithstanding the above, I have considered the application, and do note that the *ex parte* applicant's main complaint is the 1st respondent's circular dated 20th June, 2008 intimating the 1st respondent's intention to enforce the KCARs with effect from 5th August, 2008. Although the *ex parte* applicant has contended that the implementation of the KCARs will expose its members to extreme consequences, including possibility of legal sanctions, the applicant has not identified any particular contentious or offending regulation nor have they made any efforts to have any of the regulations repealed, amended or declared null and void. The KCARs have apparently already been gazetted as law through subsidiary legislation. The applicant has not shown prima facie that the circular of 20th June, 2008 is contrary to the gazetted law or contravenes any other law. Moreover, the gazetted regulations all have saving and transitional provisions which provide at the very least a grace period of 12 months from the date of commencement of the regulations. Why the applicant is coming to this court after the period of 12 months is a question which has not been answered.

The applicant has not therefore established any justification for this court to issue an order of stay at this stage which would have the effect of suspending the implementation of the KCARs. On the other hand, the respondents have shown that the implementation of the KCARs is necessary to maintain the mandatory international air safety standards. At this interlocutory stage the court cannot risk an order which might be detrimental to the interests of the public. The balance of convenience is therefore against the applicant. Even assuming that the court had the powers to grant an application for stay at this stage, the orders would not be available to the *ex parte* applicant as his application has no merit.

For these reasons, I find that the notice of motion dated 28th July, 2008 cannot succeed. It is accordingly dismissed. I award costs of the application to the respondents.

Dated and delivered this 13th day of August, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Odawa H/B for Mugambi for the applicant

Gichuhi for the 1st respondent

Omondi for the 2nd respondent