IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIAGE, M'INOTI & MURGOR JJ.A.)

CIVIL APPEAL NO. 285 OF 2013

BETWEEN

KENYA ASSOCIATION OF AIR OPERATORS..................APPEALLANT

AND

KENYA AIRPORTS AUTHORITY...............................1ST RESPONDENT

KENYA INTERNATIONAL

FREIGHT & WAREHOUSING ASSOCIATION..........2ND RESPONDENT

(Appeal from the Judgment and Decree of the High Court

of Kenya at Nairobi, (Korir, J.) dated 6th December 2011

in

HC. MISC. CA. NO. 54 OF 2005)

****

JUDGMENT OF THE COURT

The appellant is in this appeal, ***Kenya Association of Air Operators,*** is a registered body of air operators and persons involved in the aviation industry, whilst ***the 1st respondent***, ***Kenya Airports Authority,*** is a body corporate established by the ***Kenya Airports Authority Act (the Act)*** and is responsible for the day-to-day management, control and administration of aerodromes in the country. Although the ***Kenya International Freight Warehouse Association*** was named as an interested party before the High Court and the ***2nd respondent*** before this Court, it did not take any part in the proceedings before either court.

On or about 7th December 2004, the 1st respondent varied the charges for security passes to restricted areas of its premises and aerodromes. The appellant claimed, which the 1st respondent disputes, that the variation thereafter was from ***Kshs 1,500.00*** biannually for each pass to ***Kshs 6,500.00*** upon application, plus a further annual renewal fee of ***Kshs 1,500.00***. On 25th January 2005, the appellant took out judicial review proceedings in the High Court seeking primarily an order of *certiorari* to quash the said decision of the 1st respondent varying the charges, and an order of *prohibition* to stop its implementation.

The appellant contended, in justifying its prayers, that the 1st respondents' decision to raise the fees was arbitrary; that it was in bad faith having been taken during the pendency of negotiations between it and the 1st respondent; that it was unreasonable because the charges were grossly inflated, in breach of sound commercial principles, and intended to commercialise the passes and raise capital for the 1st respondent; that it was illegal and *ultra vires* the powers of the 1st respondent under the Act because of unlawful delegation of power and lack of ministerial or board approval; and that the decision was disproportional to the intended security objectives.

On its part the 1st respondent opposed the application vide a replying affidavit sworn on 4th November 2011 by ***Amos Chenah,*** its Airport Manager, Wilson Airport. Besides denying that its decision was arbitrary, in bad faith, unreasonable, *ultra vires* or unlawful, the 1st respondent contended that the decision was within its statutory powers and was taken in the interest of enhancing security at the airports and aerodromes. It added that the charges were revised on 4th September 2003 from Kshs 1,500 to Kshs 5,000 for the year 2004 and that most of the air operators save some members of the appellant, duly complied and paid the new rates. The appellant further stated that the charge of Kshs 5,000 applied for the year 2004 only and on 6th December 2004 the 1st respondent revised the charges for Wilson Airport from Kshs 5,000 back to Kshs 1,500 for the year 2005. The charge of Kshs 6,500, it maintained, was only due from those who, like the appellant, had defaulted in making payment in 2004.

Korir, J. heard the matter and by a judgment dated 6th December 2011, dismissed the same with costs, thus precipitating this appeal. The learned judge found that the appellant had concealed material facts and was therefore not entitled to exercise of the court's discretion; that an order of *prohibition* could not issue in the circumstances because what the appellant sought to stop had already been implemented; and that the order of *certiorari* could not issue because it was applied for more than six months from the date of the 1st respondent's decision.

Before us the appellant contended that the learned judge had erred by failing to hold that the 1st respondent's decision was *ultra vires* ***section 32*** of the Act; by holding that the appellant had concealed material facts; by failing to hold that the 1st respondent's decision was tainted by bad faith and improper motive; and by holding that the remedies of *certiorar*i and *prohibition* were not available in the circumstances of this appeal.

On the first ground of appeal, the appellant contended that the impugned decision of the 1st respondent was *ultra vires* section 32 of the Act because that provision excludes power to delegate. It was contended further that the 1st respondent had no power under the Act to delegate increase of charges to airport managers. Relying on ***Choitram v. Mystery Model Hair Salon [1972] EA 525*** and ***Gullamhussein Sunderji Virji v. Punja Lila & Another [1959] EA 734*** it was submitted that statutory power must be expressly conferred and cannot be implied and therefore the purported increase of charges was null and void.

On the second ground of appeal the appellant denied having concealed material facts and submitted that it had disclosed that it was aware of the fees increment since 2004. In its view, it was the learned judge who failed to consider its affidavit where the information was duly disclosed.

Turning to the third ground of appeal, the appellant submitted that the decision of the 1st respondent was tainted by bad faith and improper motive. It was contended that while the 1st respondent has statutory power to regulate and control presence of persons in prescribed aerodromes and premises, it could not use that power to generate revenue for acquisition of a pass production unit at the expense of the appellant's members, which amounted to an illegality. The appellant relied on ***Pastoli v. Kabale District Local Government Council & Others [2008] 2 EA 300*** and ***Birmigham & Midland Motor Omibus Co Ltd v Worcestershire County Council, [1967] 1 All ER 544*** for the proposition that judicial review orders will issue where a decision is tainted by illegality, irrationality, procedural impropriety or where a decision maker has acted *ultra vires*.

On the fourth ground of appeal, the appellant submitted that implementation of the 1st respondent's impugned decision was not finalized and therefore an order of prohibition could have issued. It added that

it had obtained interim orders on 18th January 2005 which had stopped the 1st respondent from implementing its decision as relates to the appellant, and that in any event, it had also sought an order of prohibition to stop any further increments in future in disregard of the law.

Lastly the appellant submitted that its prayer for an order of certiorari was not time-barred because it had sought to quash the 1st respondent's decision embodied in the letter of 7th December 2004, which was within 6 months when it lodged the judicial review application. In any event, it was contended, even if the decision was made before 7th December 2004, the 1st respondent had suspended its implementation during the negotiations and it would not have served any purpose for the appellant to move to court then.

Opposing the appeal, the 1st respondent submitted that the impugned decision was *intra vires* its the powers under ***section 12*** of the Act and that contrary to the appellant's contention, section 32 of the Act empowered the 1st respondent and its Managing Director to delegate their respective powers, although in fact the decision in question was not made by the airport manager. It was also the 1st respondent's contention that the powers vested in it by the Act allowed it to raise money for a new unit for production of security passes, which most of the air operators had already paid.

On non-disclosure of material facts, the 1st respondent submitted that it took the decision to increase the charges on 4th September 2003 for only one year (2004) and that most of the air operators with the exception of the appellant, paid the charges. It was contended that the appellant had failed to disclose this material fact and made it appear as if the increment was for the indefinite future. It was also urged that the appellant had failed to disclose that Kshs 6,500 was due only from the appellant, which had refused to pay in 2004 like the other air operators.

The 1st respondent also submitted that the appellant had failed to prove the alleged bad faith or improper motive, contending further that judicial review was concerned with the decision making process rather than the merits of the decision. The judgments in ***Municipal Council of Mombasa v Republic & Another, CA No. 185 of 2001; Joram Mwenda Guantai v The Chief Magistrate, Nairobi [2207] 2 EA 170*** and ***Meixner & Another v Attorney General [2005] 2 KLR 189*** were cited in support of the proposition.

Lastly the 1st respondent argued that an order of *prohibition*, which looks to the future, was not available to the appellant because the decision to increase the charges was taken on 4th September 2003 and was duly implemented. The letter of 7th December 2004, it was urged, was merely a reminder to those like the appellant who had not complied. The decision of this Court in ***Kenya National Examination Council v. Republic ex parte Geoffrey Gathenji Njoroge & 9 Others, CA No. 266 of 1996*** was relied on to make the case that an order of prohibition was not available in the circumstances. As for the order of certiorari, the 1st respondent submitted that the same was not available because it was applied for more than six months after the decision to increase the charges. The judgements of the High Court in ***Oyoo & 5 Others v. Syongo & 2 Others [2005] 1 KLR 423*** and ***Bondo Godfrey J. Obiero v. Teachers Service Commission [2004] eKLR*** were cited in support of that submission.

We have carefully considered the judgment of the High Court, the grounds of appeal, the submissions by the respective parties and the authorities that they cited. The first issue is whether the decision by the 1st respondent to increase the charges for security passes was *ultra vires* its power under section 32 of the Act. The appellant contends that the 1st respondent unlawfully delegated the power of the managing director to increase the charges to the airport managers.

Section 12 of the Act spells out the powers of the 1st respondent which include construction, operation and maintenance of aerodromes and related facilities; provision of amenities and facilities for passengers and other users of its facilities as the Board may determine necessary; control of construction and use of prescribed aerodromes; carrying on any business that may be necessary or desirable for its purpose; acquisition, construction, manufacture, maintenance, or repair of any work, plant or apparatus necessary or desirable for its purpose; determination, imposition and levying of rates, charges, dues, or fees for its services or use of its facilities; granting of licenses, permits, or certificates subject to the approval of the Minister; prohibition, control or regulation of the use by any person of its services or facilities and the

presence of any person within any prescribed aerodrome or premises; and such other power as may be necessary for the performance of its functions.

Section 9 of the Act vests the control and executive management of the 1st respondent in the managing director. As regards delegation of power, section 32 provides as follows:

> ***"32. Delegation and signification***
>
> ***(1) The Board and the managing director may delegate, but not including this present power of delegation, to any person any of the powers vested in them under this Act and may grant to any person powers of attorney.***
>
> ***(2) Any act or decision, or notification thereof, of the Board or the managing director under this Act may be signified under the hand of an employee authorized for that purpose."***

Our understanding of section 32 is, that contrary to what the appellant claims, the Board and the managing director of the appellant have power to delegate to any person their powers under the Act. What section 32 prohibits is the person to whom the Board or the managing director has delegated powers delegating those powers further. Section 32 restates the well-known principle in constitutional and administrative law encapsulated in the maxim, *delegata potestas non potest delegari (delegated power cannot be delegated).* See ***Anyang? Nyongo & 10 Others v Attorney General & Others [2008] 3 KLR (EP) 397*** and ***Kasozi Robinson v. Attorney General, Uganda Constitutional Court, Const, Pet. No. 37 of 2010.***

The evidence on record does not support the appellant's claim that the decision to increase the charges was taken by the airport manager, Wilson Airport. The record shows that the circular dated 6th December 2004 was by the Managing Director, though signed on his behalf by a Mr S. Mutungi. That is perfectly allowed by section 32 (2) of the Act. On the other hand, the letter dated 7th December 2004 by ***Onsarigo Esaman***, the Airport Manager, Wilson Airport, was merely communicating the decision of the Managing Director contained in the previous day's circular. We are satisfied that the first ground of appeal is misconceived and has no merit.

The second ground of appeal is whether the appellant concealed material evidence that precluded the court from exercising its discretion in favour of the appellant. Having carefully reviewed the evidence on record, it is patently clear to us that the appellant's application was, to say the least, quite misleading. While it was clearly within the appellant's knowledge that the Kshs 5,000 increment was for a specified period, namely the year 2004 only, the appellant made it appear as if the increment was for the indefinite future. Moreover, whilst the appellant was aware that respondent was demanding the sum of Kshs 6,500.00 only from those air operators like itself who had not paid for the year 2004, the appellant made it appear as though the amount was being demanded from all air operators across the board. Lastly, the appellant did not disclose that quite a large number of air operators had already paid the Kshs 5,000 for the year 2004. The record shows that by the time the appellant filed its judicial review application in January 2005, not less than 24 air operators had already paid the one-off rate between 1st December 2003 and 21st May 2004.

In these circumstances, we cannot fault the learned judge for finding that the appellant had concealed material facts. It is of critical importance, particularly for a party who approaches the court *ex parte,* as the appellant did in this case on 18th January 2005, to be candid and to disclose all material facts. In ***Aberdare Freight Services v Kenya Revenue Authority (2006) eKLR,*** this Court stated that failure to make full and candid disclosure of facts in any *ex parte* application is the worst torpedo a party can use against its own cause.

In ***R v. Kensington Income Tax Commissioner ex parte Prince Edmond de Polignac [1917] 1 KB 486, Warington LJ*** sounded the same warning in the following words:

> ***"It is perfectly well settled that a person who makes an ex parte application to the court-that is to***

say, in the absence of the person who will be affected by that which the court is asked to do-is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, he will be deprived of any advantage he may have already obtained. That is perfectly plain and requires no authority to justify."

Later in ***Brink?s Mart Ltd v Elcombe*** ***[1988] 3 All ER 188, Balcombe, LJ,*** reiterated:

"The Courts today are frequently asked to grant ex parte injunctions, either because the matter is too urgent to await hearing on notice or because the very fact of giving notice may precipitate the action which the application is designed to prevent. On any ex parte application, the fact that the court is asked to grant relief without the person against whom the relief is sought having the opportunity to be heard makes it imperative that the applicant should make full and frank disclosure of all facts known to him or which should have been known to him had he made all such inquiries as were reasonable and proper in the circumstances."

The learned judge was perfectly in order to hold that he could not exercise his discretion in favour of the appellant for material non-disclosure. That in itself was an exercise of discretion with which we cannot interfere in the absence of demonstration that the learned judge misdirected himself in the exercise of his discretion or from the case as a whole that he was clearly wrong (See ***Mbogo & Another v. Shah*** ***[1968] EA 93).*** This ground of appeal too must fail.

The next ground of appeal is whether illegality, bad faith and improper motive was proved against the 1st respondent so as to justify orders of judicial review. The appellant's contention is that the increase in charges was not motivated by discharge of the 1st respondent's statutory obligations but a desire to raise money from the air operators to purchase a pass printing unit. We have already noted that under the statute the 1st respondent is responsible for among others, control of use of prescribed aerodromes and premises; control or regulation of the use by any person of its services or facilities including the presence of any person within any prescribed aerodrome or premises; and acquisition, construction, manufacture, maintenance, or repair of any work plant or apparatus necessary or desirable for its purpose. In light of those statutory objectives, we are not persuaded that the purchase of a printing unit to issue passes to control or regulate access to specified parts of premises and aerodromes was against the provisions of the statute, or illegal, unreasonable or irrational. To constitute unreasonableness or irrationality, the decision of the 1st respondent would have to be demonstrably irrational, outrageous, arbitrary or lacking in reason or logic such that no reasonable person could have arrived at it. (See ***Associated Provincial Picture Houses Ltd v. Wednesbury Corporation*** ***[1947] 2 All ER 780).***

There is an additional reason why we would not find the 1st respondent's decision unreasonable or irrational as claimed by the appellant. Quite a number of air operators willingly supported and complied with it. We would be slow to find that such a big number of players in the industry would readily subscribe to an irrationality. We also bear in mind the duty of a court in a judicial review application as explained in **The Supreme Court Practice 1997, Vol. 53/1-14/6 (Britain)**, cited with approval by this Court in ***Edward Ilandi Kitheka v Independent Electoral & Boundaries Commission & Another, CA No. 212 of 2017***:

"The Court will not, however, on a judicial review application act as a „court of appeal? from the body concerned, nor will the Court interfere in any way with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which is not within that body?s jurisdiction, or the decision is Wednesbury unreasonable. The function of the Court is to see that lawful authority is not abused by unfair treatment. If the Court were to attempt itself the task entrusted to that authority by the law, the Court would, under the guise of preventing the abuse of power be guilty itself of usurping power."

Like the other two, this ground of appeal is equally bereft of merit.

The last ground of appeal concerns whether the learned judge erred by holding that in the circumstances

of this appeal, orders of *prohibition* and *certiorari* were not available. The learned judge found, on the authority of ***Kenya National Examination Council v. Republic ex parte Geoffrey Gathenji Njoroge & 9 Others (supra),*** that the appellant's decision could not be prohibited because it had already been implemented. We would agree with the appellant as regards itself, the decision had not been implemented because on 18th January 2005 it obtained leave to commence judicial review proceedings, which was ordered to operate as stay of implementation of the decision of the 1st respondent. However, having found that the appellant obtained the order of leave and stay without disclosure of material facts, it would not have been entitled to an order of prohibition on merits due to its conduct. Accordingly, it is of no moment that the learned judge misdirected himself in holding that the impugned decision had been implemented.

As regards the order of certiorari, we are satisfied that the 1st respondent, to the knowledge of the appellant, made the impugned decision on 4th September 2003 and not on 7th December 2004. Order 532 of the Civil Procedure Rules provides as follows in the pertinent part:

> ***"2. Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act..."***

(See also ***section 9 (3)*** of the ***Law Reform Act, Cap 26*** Laws of Kenya).

Decisions of this Court abound affirming that an order of certiorari must be applied for within six months from the date of the impugned decision. See for example ***Ako v. Special District Commisisoner, Kisumu & Another*** ***[1989] KLR 163***; ***Eliakim Munda v. Oremo Owana, CA. No. Nai. 148 of 1991, Wilson Osolo v. John Ojiambo Ochola & Another, CA. No. 6 of 1995*** and ***Aga Khan Education Service Kenya v. Republic & Others [2004] 1 EA 1.***

For the foregoing reasons, we are satisfied that this appeal has no merit and is hereby dismissed with costs to the 1st respondent. It is so ordered.

Dated and delivered at Nairobi this 19th day of January 2018

P. O. KIAGE

....

JUDGE OF APPEAL

K. M'INOTI

....

JUDGE OF APPEAL

A. K. MURGOR

....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR