



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), M'INOTI & SICHALE, J.J.A)

CIVIL APPEAL NO. 78 OF 2018

BETWEEN

KENYA AIRWAYS COMPANY LIMITED.....APPELLANT

VERSUS

JOSEPH OTIENO AND 114 OTHERS.....RESPONDENTS

(Being an appeal from the Ruling and Order of the Employment and Labour Relations Court (Hellen Wasilwa, J.) dated 18th December, 2017

in

E&LRC Cause No. 2390 of 2017)

JUDGMENT OF THE COURT

JOSEPH OTIENO OYUGA and 114 OTHERS, (the respondents herein and the then claimants) filed a notice of motion dated 4th December, 2017 in the Employment and Labour Relations Court. KENYA AIRWAYS COMPANY LTD, the appellant herein was named as the respondent. In prayer 2 of the motion, the respondents sought the following order:

“Pending *inter partes* hearing and determination of this application, an order be and is hereby issued against the respondent directing the suspension of the purported dismissal of the applicants and maintenance of the *status quo ante* with no loss of seniority, privileges, salary, benefits and allowances.”

On 18th December, 2017, the application came up for hearing before Wasilwa, J. Mr. Weru, learned counsel holding brief for Mr. Obura for the appellants sought an adjournment for one day to enable the appellant file a response to the motion. The learned Judge granted the adjournment. In so doing, she directed that:

“The respondents have one day to file their responses.

However, given the sensitivity of the issues involving the aircraft and security of human lives, I will temporarily reinstate the applicants and grant Prayer No. 2. Hearing of the application *inter partes* on 20th December, 2017.”

The appellant was aggrieved by the order of the Judge and filed a notice of appeal dated 18th December, 2017 and subsequently a memorandum of appeal dated 12th March, 2018. In the memorandum of appeal, the appellant listed six grounds of appeal. These are:-

“1. THAT the learned Judge erred in law by issuing a mandatory interlocutory injunctive order against the appellant without affording the Appellant an opportunity to be heard.

2. THAT the learned Judge erred in law and in fact by issuing a mandatory interlocutory injunctive order against the appellant reinstating the respondents back to their employment yet the respondents had sought an alternative prayer to be compensated in monetary terms.

3. **THAT** the learned Judge erred in law and in fact by issuing an injunctive order contrary to the provisions of the Employment and Labour Court (Procedure) Rules 2016.

4. **THAT** the learned Judge erred in law and in fact by issuing a mandatory interlocutory injunctive order to benefit the respondents yet there was no evidence and or sufficient evidence to support the application for injunction.

5. **THAT** the learned Judge erred in law and in fact by relying on extraneous issues not before the court and/or which can only be adduced by an expert witness through testimony.

6. **THAT** the learned Judge erred in law and in fact by issuing an order not tenable in law.”

On 25th June, 2018, the appeal came before us for plenary hearing. Prof. Githu Muigai, learned SC, teaming up with Mr. Obura and Mr. Imende, learned counsel, appeared for the appellant whilst the respondents were represented by Mr. Wambora and Ms. Babu, learned counsel.

In its oral highlights, the appellant relied on its written submissions and list of authorities dated 4th June, 2018 whilst the respondents relied on their submissions dated 21st June, 2018 and their list of authorities filed on the same date.

In his submissions before us, Prof. Githu Muigai explained that the gravamen of the appellant’s appeal is that the Judge gave a final mandatory order at an interlocutory stage; that the Judge was not moved by either party to grant the said order; that the Judge based her order on her appreciation of security of air travel without the benefit of expert opinion; that contrary to the judge’s findings, striking engineers may as well pose a threat to air safety; that there were no special circumstances that justified the grant of an ex parte mandatory order; and finally, that the appellant continues to pay the respondents their salaries in spite of them not working, thus causing a strain to the appellant’s resources.

In opposing the appeal, Mr. Wambora contended that some of the respondents were on duty on the day of the strike; that special circumstances existed that warranted the issuance of a mandatory injunction at an interlocutory stage; that the learned Judge took judicial notice that a large number of engineers had been dismissed thus causing a shortage that impacted on air safety; that the appellant had engaged in “sharp practice” as the respondents’ jobs were immediately advertised and interested persons given a deadline of 15th December, 2017 to apply for the advertised positions; that the appellant was guilty of discrimination as it had since reinstated 40 of those that it had dismissed and that the impugned order was made in the presence of the appellant’s counsel and to that extent it was not *ex parte*.

In a brief response, Mr. Obura urged us to find that the appellant was not heard as all that transpired on 18th December, 2017 was that the appellant sought an adjournment in order to file a replying affidavit. The learned Judge granted the adjournment but proceeded to issue the impugned order.

We have considered the record, the written submissions, the authorities cited and the rival oral highlights made before us, and the law.

The facts leading to the issuance of the impugned order are not disputed. The parties appeared before Wasilwa, J. on 18th December, 2017. Mr. Weru for the appellants sought an adjournment in order to enable the appellant file its replying affidavit. The learned Judge granted the adjournment. From the record, none of the parties moved the court to issue the order in question. Granted, the order was sought in prayer number 2 of the motion but in absence of hearing the motion, and in the absence of the appellant’s response to the motion, we are in agreement with the appellant that short of the parties being heard and short of the appellant’s response to the motion, there was no way that the court could have reached the conclusion that there were special circumstances that warranted the issuance of a mandatory order at the interlocutory stage.

In **Nation Media Group & 2 Others V. John Harun Mwau** [2014] eKLR, this Court stated:

“It is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances.....a different and higher standard than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides, existence of exceptional and special circumstances must be demonstrated as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases.” (Emphasis supplied)

We reiterate that in our view, without hearing the parties and/or in the absence of the appellant’s response to the motion, there is no way the court could have determined that special circumstances existed for the issuance of a mandatory injunction at an interlocutory stage. The special circumstances, if at all, had not been demonstrated.

We are also in agreement with the appellants’ counsel that the learned Judge unilaterally took it upon herself, without expert evidence, to determine issues of safety of air travel.

For the foregoing reasons, we find that this appeal has merit. It is hereby allowed and the orders of the High Court of 18th December, 2018 are hereby reversed and set aside. Costs of this appeal is awarded to the appellant.

Dated and delivered at Nairobi this 17th Day of August, 2018.

W. OUKO, (P)

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR