IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KARANJA, MUSINGA & M'INOTI, JJ.A.

CIVIL APPEAL NO. 311 OF 2009

BETWEEN

THE HON. ATTORNEY GENERAL…..……1ST APPELLANT

THE KENYA CIVIL AVIATION AUTHORITY…….....2ND APPELLANT

AND

AFRICAN COMMUTER SERVICES LTD……...…….…..….RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Nairobi (Nambuye J.) delivered on 18th December, 2008

in

HCCC NO. 1208 OF 2003)

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JUDGMENT OF THE COURT

African Commuter Services Limited (the respondent), a Limited Liability Company, ventured into the Aviation Industry sometime in 1996. According to Ismael Mohamed Jibril, the Managing Director of the said company, he applied for the Air Operators Certificate from the 2nd appellant herein. The application was processed and after satisfying itself that the respondent had met all the laid down requirements to enable it qualify for the certificate, the second appellant issued it with the Air Operators Certificate (AOC).

After being issued with the said certificate, the respondent after demonstrating its competence to operate an aviation business, was granted the necessary Air service licences to enable it operate for hire passenger and freight air charters, and passenger and freight coach services.

By the year 2003, when the cause of action which is the subject matter of this appeal arose, the respondent was running a total of seven (7) aircrafts as listed below:

1. 2 Streams
2. 2 Jet 410
3. 1 AN 28

4. 1 HS 748
5. 1 Sky Van

In his testimony before the High Court (Nambuye, J as she then was) Mr. Jibril, who testified on behalf of the respondent, told the Court that all these aircrafts were duly registered, inspected, maintained, insured and issued with certificate of airworthiness in accordance with the Civil Aviation Laws and Regulations made there under.

Up till January 2003, the respondent successfully conducted its business in the aviation industry without any major hiccup. Then the worst nightmare struck. On the morning of the 24th day of January 2003, one of the respondent's aircrafts namely 5Y-EMJ, an executive jet, was chartered to transport a group of very important persons (VIPs) to a homecoming party hosted by the then Vice President of this country.

The aircraft landed safely and we can surmise that the homecoming party went on well. Later that evening, at about 5.00 pm the same passengers boarded the same aircraft for the return journey. As fate would have it, the aircraft crashed upon take off from the Busia Airstrip resulting into the death of three passengers and others surviving with injuries of varying degrees.

According to Mr. Jibril, he received a telephone call about 5.30 pm and was informed that his aircraft had crashed. He leased another aircraft immediately and flew to Kisumu so that he could visit the scene and also make the necessary arrangements to ferry the injured to hospital and evacuate the others and take them back to Nairobi. While in his hotel room before he could even get to the scene, he saw and heard from the television that the then Minister for Transport and Communications, the late Hon. Michuki, announce that the respondent's operator's licence had been cancelled. Meanwhile, the respondent's office in Nairobi received a handwritten note sent by way of fax but addressed to the wrong company i.e *"Managing Director Commuter Air Services"* from the Kenya Civil Aviation (2nd appellant) stating that the respondent's Air Operator's Certificate was suspended pending further investigations. No reasons were given for the said suspension and nor were the regulations of the Civil Aviation Act relied on cited. It did not indicate either the particulars of the suspended certificate.

An appeal by the respondent a few days later for reinstatement of the certificate fell on deaf ears. This was notwithstanding the fact that the said suspension affected the entire respondent's aircrafts including those that had not been involved in the accident.

A request for a non-objection letter to enable some of the respondent's pilots to continue flying was also turned down. In response to the respondent's letter dated 28th January 2003 pending reinstatement of the certificate, the Director General of the 2nd appellant responded vide a letter dated 4th February 2003 and for the first time invoked **Regulation 57(1)** of the **Kenya Air Navigation Regulations** as the basis for the suspension which he referred to as "Provisional pending further investigations." We shall later in this judgment revisit that regulation in greater detail as the entire appeal appears to revolve around that regulation as the primordial issue in the determination of the culpability or otherwise of the appellants in this matter.

Following the above response, the respondent through its advocates, Ibrahim & Issack, wrote to the 2nd appellant and the Minister for Transport and Communications seeking the unconditional reinstatement of the respondent's Air Operators Certificate with immediate effect and admission of liability for *"unlawful, illegal and arbitrary suspension*" of the said Air Operators Certificate.

Again no response was forthcoming and so six months later, the same firm of advocates wrote another demand letter dated 25th August 2003, threatening to take appropriate legal action against the appellants herein.

This time, a response was received from the 1st appellant denying liability and citing **Regulation 57** of the **Air Navigation Regulations** as the shield from liability. True to their threat, the respondent

moved to the High Court by way of a plaint filed on 21st November, 2003 – almost ten months after the suspension of the Air Operators Certificate.

The gravamen of the respondents plaint was that the suspension of its certificate/licence by the 2nd appellant was illegal, irregular, premature, arbitrary, capricious, unreasonable, oppressive and an unmitigated abuse and misuse of authority. The respondent has given detailed particulars of the abuse/misuse of authority by the appellants at paragraph 12 of the plaint in a bid to show that the suspension of its certificate was totally unwarranted and uncalled for.

The particulars of the loss are tabulated in detail at paragraph 16 of the plaint and we do not find it necessary to repeat them for purposes of this judgment.

In their joint statement of defence filed on 12th January 2004, the appellants herein denied liability for any loss suffered by the respondent. They reiterated that the suspension of the Respondent's Air Operators Certificate was done pursuant to Regulation 57 of the Air Navigation Rules.

At paragraph 21 of their statement of defence, the appellants aver that "*neither the Minister nor the Director of the second defendant suspended and/or cancelled any licence held by the plaintiff as alleged or at all.*"

In the alternative, at paragraph 25 of the statement of defence, they deny that the respondent sustained any loss and/or damage as alleged. They thus entreated the court to dismiss the respondent's suit with costs.

The respondent filed a reply to that defence terming it as a sham and "mere denial" and asked the court to strike it out and enter judgment in its favour as prayed. The High Court (Nambuye, J. as she then was) after hearing a total of three witnesses from each side, and after considering written submissions filed by both counsel, rendered a 313 page judgment on 18th day of December 2008.

In the said judgment, she gave orders of mandatory injunction against the 1st appellant compelling the Attorney General to officially communicate the accident inquiry report to the respondent within 30 days from the delivery of the judgment. The learned Judge also awarded the special damages which were pleaded and proved with a reduction of 5% "*to cater for any margin of error*".

Under the head of Revenue Loss, the learned Judge gave the following orders:

"(a) Revenue Losses

i. Existing Aircrafts.

Gross turn over, Average on audited accounts (year 2002/2003)

7 months Ksh 115, 913,040.25

Less 5% of Ksh 5,795,625.00

Leaving a balance of Ksh 110,117,388.00

ii. Additional Aircraft 9XR – EJ and

09XR-AL Ksh 98,420,000.00

Less 5% of Ksh 4,921,000.00

Which comes to Ksh 93,499,000.00

9XR – AB Ksh 70,707,000.00

Less 5% of Ksh 3,535,350.00

Leaving a balance of Ksh 67,171,650.00

a. **Capital Losses**

Item (i) and (ii) allowed as prayed because they were strictly proved.

Loss of Aircraft

i. Aircraft purchase payments Kshs 21,980,000.00
ii. Payment to field Air motive as installments for Aircraft Ksh 9,847,668.00
iii. Loss of goodwill reduced by 50% because the plaintiff did not have monopoly over the routed as well as the clientele Ksh 14,526,271.00 less 50% of Ksh 7,263,135.50 leaving a balance of Ksh 7,263,135.50.

b. **Consequential Loss**

For reasons given the court allowed loss of up to three years which works out as

Ksh 1,014,222.040.40X3

5

Divide by five which counts to Ksh 608,533,224.00

c. Total Losses A+B+C=318,412,065.50
d. General damages for unlawful suspension of the Air Operators Certificate – disallowed

e. Ksh 10,000,000 (ten million) awarded as aggravated, exemplary and punitive damages.

f. Cost of the suit
g. The amount awarded in prayer C will carry interest at Court rates from the date of filing till payment in full.

h. The amount awarded on prayer (f) will carry interest at court rates from the date of judgment till payment in full.

i. The costs will also carry interest at court rates from the date of taxation and/or agreement."

Being aggrieved by the above orders, the appellants filed this appeal challenging the entire decision. Due to the nature of the appeal and the enormity of the damages awarded, we find it necessary to replicate here all fifty six (56) grounds of appeal proffered by the applicants vide their memorandum of appeal dated 21st of December 2009, as hereunder:-

1. *The learned Judge erred in law and fact in holding that the letter of suspension by the 2nd appellant to the respondent was invalid, illegal and unlawful for failure to comply with regulation 12 of the Civil Aviation (Licensing of Air Services) Regulations when it was clear from the court record that the letter was issued pursuant to Regulation 57 of the Air Services Regulations.*

2. *The learned Judge erred in law and fact by declaring the suspension invalid, void and illegal when said order had not been sought by the respondent.*

3. *The learned Judge erred in fact and law in holding that a proper discharge of function should*

have been for the 2nd appellant giving instructions to his assistant by way of fax and then following it with confirmation under his own hand.

4. *The learned Judge erred in law and in fact in holding that due to the fact that the aviation industry was heavily regulated and that the suspension this demonstrated that due compliance had been met by the respondent not withstanding non-production of all the Certificates of Compliance.*

5. *The learned Judge misdirected herself in holding that a question arose whether the Director General properly exercised his discretion under Regulation 57 of Air Navigation Regulations as this question could only be properly asked in Judicial Review since exercise of discretion cannot be a cause of action in Tort or Contract.*

6. *The learned Judge misdirected herself in holding that the Respondents' Air Operator's Certificate suspended provisionally ended up being suspended indefinitely and had not been lifted at the time of judgment. The suspended license expired on the 30th of April 2003 and therefore was affected by effluxion of time.*

7. *The learned Judge misdirected herself in determining the suit on the principles of Public Law as opposed to private Law as the suit had been commenced by way of plaint on a cause of action purportedly based on Private Law.*

8. *The learned Judge misdirected herself in holding that the 2nd appellant's exercise of discretion was not done in the best interest of the public targeted by virtue of the after effects of the cancellation. The public targeted are not the operators but users and the general public likely to be affected by non-compliance to regulations.*

9. *The learned Judge misdirected herself in holding that an action forcing an operator out of busisness cannot be said to be promoting that operator's business soundly and economically as promoting the public interest behovees on the holder of the power to take action that would benefit the general public and not an individual or a limited company.*

10. *The learned Judge erred in Law and fact in holding that the action by the 2nd appellant was against the spirit of the provisions and/or content of annex 13 of Air Accident Investigation whose purpose of an investigation is not to determine blame worthiness but to prevent future air accidents in view of the fact that the 1st respondent did not investigate the accident. The duty to investigate air accidents is bestowed to the Minister of Transport and not to the Director of Kenya Civil Aviation Authority. Moreover, an act suspending an air Operators Certificate can pre-empt future accident if the cause of the accident is negligence and poor planning.*

11. *The learned Judge erred in Law by misapprehending the provisions of Regulation 6(1) and 9(1) of Air Accidents (Investigation) Regulations which vest the power to appoint persons or a commission to investigate accidents on the Minister for Transport and Communication and not the accidents on the Minister for Transport and Communication and not the 2nd appellant whom he honourable Judge blamed for not investigating the accident.*

12. *The learned Judge erred in Law and fact in holding that the 2nd appellant should have exercised his discretion under Regulation 57(2) as read with Regulation 79 of Air Navigation Regulations and not 57(1). The 2nd appellant properly applied Regulation 57(1) as opposed to 57(2) as regulation 57(10 is provisional suspension while 57(2) is a final decision after investigation.*

13. *The learned Judge erred in law and fact in holding that the cancellation of the Respondent's Air Operators Certificate was not procedural. The appellants state the suspension was done in accordance with the law. The 2nd appellant did not cancel the Respondents Air Operators Certificate but legally suspended it provisionally hence there was no need to follow the procedure*

for cancellation.

14. *The learned Jude erred in law and fact in finding that the Director General delegated his duties to D.W.2 when it was clear on record that the Director General suspended the Air Operators Certificate and instructed D.W.2 to communicate the suspension to the respondent.*

15. *The learned Judge erred in law in issuing a mandatory injunction against the government as the same is prohibited by Section 16 of the Government Proceedings Act Cap 40 of Kenya.*

16. *The learned Judge erred in law in holding that the respondent was properly before the court by an ordinary civil claim as opposed to Judicial Review. The appellant state that the claim is neither based on law of neither tort nor contract and therefore there was no cause of action.*

17. *The learned Judge erred in law in considering irrelevant issues such as the alleged 2nd appellant's staff lacking in the need to take urgent measures, intimidation and leadership as stated in the report of the Commission of Inquiry into the Busia Plane Crash.*

18. *The learned Judge erred in law in finding that in the defence and conduct of the appellants they accepted the omission s and commissions leveled against them as they did not seek any percentage of contributory negligence by way of counter claim or appointment of liability. The matter before honourable judge was not based on Tort or Contract hence contributory negligence did not arise.*

19. *The learned Judge erred in law in holding that the cancellation of the Air Operators Certificate was punitive when the available evidence was that there was no cancellation but provisional suspension pending investigation.*

20. *The learned Judge erred in law in failing to appreciate the fact that the respondent was found to blame for the accident by the Commission of Inquiry into the Busia Plane Crash.*

21. *The learned Judge erred in law in finding that the court was to take into consideration the conduct of the appellants before and during trial because conduct evidence is not relevant in civil law.*

22. *The learned Judge erred in law in holding that the 2nd appellant was involved in High Handed Oppression when no evidence was adduced to that effect.*

23. *The learned Judge erred in law in holding that the 1st appellant was brought on board to advise the 2nd appellant but failed to do so, as the 1st appellant was brought into the proceedings by virtue of provisions of the Government Proceedings Act on behalf Minister for Transport and Communication. The 1st appellant was sued by virtue of the provisions of Section 12 and 13A of the Government Proceedings Act Cap 40 Law of Kenya and not Section 26 of the Constitution of Kenya.*

24. *The learned Judge erred in law in faulting the Attorney General for failing to advise the 2nd appellant when the Attorney General was a party to the suit by virtue of Provisions of the Government Proceedings Act and the Advocates Act hence entitled to protection as an advocate of the High Court of Kenya.*

25. *The learned Judge erred in law in holding that the respondent took full steps to mitigate his loss and yet the said respondent never applied for Air Operators Certificate at the expiry of Air Operators Certificate No. 128 of 2002.*

26. *The learned Judge erred in law in holding that there was proof that the respondent mitigated his loss as the only mitigation of claim could have been disposal of his aircrafts in good time to avert*

further loss.

27. *The learned Judge erred in law in holding that P.W.3 was the best person suited to testify on losses incurred by the respondent despite the fact there existed audited financial statements by a firm of Auditors between the years 1999 to 2003 that indicated that the respondent was making losses.*

28. *The learned Judge erred in law in holding that the appellants jointly and severally grounded the respondents operation yet the 1st appellant had neither the power nor the duty to determine the issues of Air Operators Certificates.*

29. *The learned Judge erred in law by calculating revenue loss by the respondent using income earned instead of net turnover and therefore conferring a double benefit to the respondent. The court considered money going into the business and did not consider the overhead costs involved in running the business*

30. *The learned Judge erred in law by approving the figures provided by the respondent as income earned, yet there was no proof of tax returns that showed that the respondent had made less money than the amount claimed in the plaint.*

31. *The learned Judge erred in law by not considering the independent audited accounts provided by the respondent instead relied on accounts from an employee of the respondent especially taking into account the colossal amounts that were the subject of the suit.*

32. *The learned Judge erred in law in holding that the conduct of the appellants was calculated to sacrifice the respondent operations and appeared to hide the commissions and omissions of the operations of the second appellant which had been uncovered by the Public Inquiry. The Public Inquiry Report was made long after the decision of the 2nd appellant.*

33. *The learned Judge erred in law in failing to appreciate that the goodwill of a company must be assessed by an external auditing firm as goodwill is assessed taking into consideration the relationship with suppliers and customers of the company which cannot be done by a persons who is an employee of the company.*

34. *The learned Judge erred in law in failing to realize that the respondent's goodwill had been severely damaged with its customers due to the accident, the fact that the Commission found the respondent at fault and due to the intense media coverage that the accident received.*

35. *The learned Judge erred in law and fact in holding that the evidence of P.W.3 was an expert opinion though P.W.3was not an auditor not did he produce an audited report.*

36. *The learned Judge erred in law in holding that he respondent was entitled to goodwill when the profit and loss returns showed that the respondent was making a loss.*

37. *The learned Judge erred in law in holding that there was no jurisdiction to suspend the Air Operators Certificate even before or after commencement of investigation as well as the inquiry. Regulation 57 sub paragraphs (1) and (2) are crystal clear on the power of the Director General to suspend provisionally.*

38. *The learned Judge erred in law in awarding judgment against the applicants jointly and severally after making no findings against the Minister for Transport as the Attorney General had been sued on behalf of the Minister for Transport Communication by virtue of the Provisions of Section 12 and 13A of the Government Proceedings Act Cap 40 Laws of Kenya.*

39. *That the learned Judge erred in law and fact in holding that special damages covered under item 16A on Actual losses would suffer 5% (five percent) reduction to cater for any margin of error*

and fluctuating market forces as well as competition from other aviators when there was no basis or evidence for this finding.

40. *That the learned Judge erred in law and fact in calculating Revenue Loss on the basis of other gross income from the Aircrafts.*

41. *That the learned Judge erred in law and fact in awarding capital loss on the basis of Aircraft acquisition through Hire Purchase or at all as the places obtained on Hire Purchase were not fully paid for.*

42. *That the learned Judge erred in law and fact in awarding consequential loss for three years when the licence and certificate expired on the 30th April 2003.*

43. *The learned Judge misapplied the law because she found no proof that the Minister acted illegally and yet found him liable.*

44. *The learned Judge erred in holding that there were silent penalties under Regulation 57 as Regulation 57 does not make provision for penalties.*

45. *The learned Judge erred in law in finding that Regulation 57(1) ousts Rules of Natural Justice as Regulation 57(1) provides for a temporary measure pending hearing and determination and Regulation 57(2) provides for final determination.*

46. *The learned Judge misdirected herself in opining that the pilots were experienced and that had the plane not hit a tree airport, it could have recovered and flown when such evidence was not given by an expert.*

47. *The learned Judge erred in law in faulting the report of the Commission of Inquiry into the Busia Plane Crash when the issue was not before her.*

48. *The learned Judge misled herself in holding that the Charter of the United Nations and the Regional Human Rights instructions had been breached when such evidence had not been adduced before that.*

49. *The learned Judge erred in law in awarding aggravated exemplary and punitive damages by considering extraneous matters as page 284 of the judgment.*

50. *The Hon. Judge misled herself in finding that PW3 was an expert witness when the said expert did not produce any document of his expertise and only produced documents to the effect that he was an accountant with the plaintiff.*

51. *The learned Judge failed to caution herself on the evidence of the PW3 whose independence was questionable being an employee of the plaintiff and being owed salary arrears by the latter.*

52. *The learned Judge erred in admitting exhibit 43 albeit the same being not the audited report of the company. The audited report was not considered by the court though amongst the documents produced.*

53. *The learned Judge misled herself in holding that the issue of expiry of the Air Operators Certificate was to be pleaded by defence yet issues of law are not required to be pleaded in the defence pursuant to the provisions of the Civil Procedure Act.*

54. *The learned Judge erred at page 300 of the judgment in holding that the Director General did not act in public interest when that was not the issue before her.*

55. *The learned Judge erred in law in holding that the respondent was not given equal treatment with other aviators when there was no evidence placed before her to enable her make such a finding.*

56. *The learned Judge erred at page 303 in holding that nothing in Regulation 25(1) of the Civil Aviation Navigation Regulations required the plaintiff as an operator to physically confirm the condition of the Busia Airstrip before flying his aircraft to the Aerodrome Regulation 25(i) C makes provision that the operator ought to satisfy himself that the aerodrome suitable for the purpose.*

Their prayer to this Court is that the judgment of Nambuye, J. dated 18th December 2008 be set aside with the consequent effect that the plaintiff's suit before the High Court be dismissed with costs.

This being a first appeal to this Court, we are enjoined to re-analyse and re-examine the evidence tendered before the trial court afresh and arrive at our own independent findings. This we must do while at the same time not losing sight to the fact that unlike the trial court, we did not have the advantage of seeing the witnesses as they testified and thus give some allowance for that (*see* ***Selle vs Associated Motor Boat Company Limited [1968] EA 123.***

In summary, the salient features of the respondent's evidence before the High Court is as follows:

As stated earlier, Mr. Jibril, who was the managing director of the respondent testified on its behalf. He was a businessman in the aviation industry operating through the respondent herein. The said business was in line with the Articles and Memorandum of Association of the respondent. The air crafts licenced by the said licence are enumerated in the licence as:

a. ***G159 - Gulf stream licenced to carry 24 passengers and 2 crew.***

b. ***LET 410 - from the Czechoslovakia - Republic which was licenced to carry 17 passengers and 2 crews.***

(c) Caravan 402 - licenced to carry 14 passengers.

(d) Antonov - 28T used for short landing, that can land at 700 meters and it is licenced to carry 2 tons of Cargo or 19 passengers.

(e) WYS11 -a Japanese made aircraft licensed to carry 8 tons of Cargo and not passengers.

(f) Hawker Siddley HS 748 - licensed to carry either 48 passengers or 5½ tons of Cargo.

(g) Sky van which is a 19 Seater, Irish made Aircraft licenced to carry 2-2 tons of Cargo. They were seven in total.

According to the respondent, he had employed qualified, competent staff who included the chief pilot and the assistant. At the lower cadre level he had pilots, chief engineers, finance officer, crew and ground staff all certified competent by the relevant authority. He said that all the aircrafts listed above had been certified airworthy to fly Kenyan a ir space after thorough examination/inspection as required under the Civil Aviation Rules.

He gave the following account of the respondent's aircrafts.

(a) 5 Y EMJ - which was an executive jet for V.I.P. had been a campaign plane for former president – His Excellency Hon Mwai Kibaki and it had made trips to North Eastern and other parts of the country without a hitch. The same aircraft used to be leased by UNICEF on contracts between here and Southern Sudan. Whenever it was not engaged as mentioned above it would replace an aircraft the plaintiff had hired out to Flamingo Airline, a subsidiary company of Kenya Airways. The trips to Sudan used to bring in US Dollars 4,250,000 per week. The Aircraft did one trip per week. The 4,180,U.S. Dollars was per rotation and when multiplied by two would fetch Kshs 2,560,000.00 per month.

(b) The next Aircraft is SY - EMK which the Plaintiff had specifically bought for Flamingo - Kenya Airways. The cost was Kshs 660,000 US dollars. It had been purchased from South Africa on a lease purchase terms, by virtue of which the plaintiff was required to pay 60,000.00 US dollars per month. This aircraft had been leased to Flamingo Airlines . It was required to fly 100 hours per month at the end of which it was guaranteed an amount of 66,000.00 Dollars. The money so earned went to service the hire purchase loan. This means that the aircraft had to be serviceable and be operational at all times. Necessitating that whenever it was not available i.e. during grounding for maintenance purposes, the plaintiff had to replace it with another one. The payments were on two weekly basis as shown by the documentary evidence exhibited. These earnings which total to 60,000 US dollars had to be topped up by the respondent to make up the total 66,000.00 US dollars as monthly remittances. It was the respondent's evidence that under this arrangement, if he paid for the aircraft fully, then he would acquire its full ownership, but if he defaulted, he would lose it together with all that had been paid so far towards the aircraft hire purchase. As proof of this arrangement the respondent exhibited the lease hire agreement. The contract period was to run from 30th August, 2002 to June 2003 at the rate of 660,000 US dollars. It is the respondent's evidence that as at the time of the accident the aircraft had not yet been paid for in full having paid about 68% of the total purchase price.

c. The 3rd aircraft, LET 410 - Reg No.9C - LCP. which was a Cargo Aircraft and worked on ad hoc basis, was mainly hired out to NGOS dealing with UN relief organizations. The hire rate was 950.00 US dollars per hour. It was the respondent's evidence that this particular aircraft used to do up to 130 hours bringing in about 7,000,000.00 per month. There were two such aircrafts and they were operated as such. The second aircraft under this category was the Reg. No. 9XR EJ, also a jet 410.
d. The 5th aircraft was Reg. No. ARAJA Antonov 28. It was a two (2) ton aircraft licenced to carry 17 passengers. It was said to have been used mainly to carry relief cargo to Southern Sudan and did a minimum of 100 hours per month. The pick-up points were at Wilson Airport or at Lokichogio.
e. The 6th aircraft is the Skyvan Reg. No.3D - ALH, a 2.2. ton Aircraft. It was licensed to carry 2.2. tons of cargo or 19 passengers. It too, used to do 100 hrs per month mostly on famine relief cargo destined for Southern Sudan, relief services and any other errands for NGOS. It also brought in 7,000,000.00 per month.
f. The 7th aircraft was a Hawker Siddley Reg.No. 9XR -- AB. It was licenced to carry 48 passengers or 8.5 tons, its rate was 950 US Dollars per hour at 100 hrs per month. It did a minimum of 70 hrs per month bringing in income of about 7,000,000.00 per month. This aircraft was also said to do a lot of cargo charters to the Southern Sudan and also was used to transport BBC crew to Southern Sudan among many other trips.

As stated earlier, this evidence was basically unchallenged and the trial court considered it in its judgment as evidence tendered in support of the specific damages pleaded.

According to the respondent, the action taken against him was drastic, unwarranted and discriminatory because since 1996 when he held the first licence he had never had any problems with the regulatory body, KCAA. He was inspected routinely and allowed to renew his certificate, having been found competent each year. The respondent and his witness PW3, further, stated that the action taken against him had never been taken before in this country or anywhere else after an air crash like the one his aircraft was involved in. The suspension of his certificate took him by surprise. What surprised him more is that though indicated to have been provisional, which according to him, should not have been for more than two weeks, at the most a month, had taken four years as at the time of his testimony and yet no action had ever been taken. It is his contention that this was an unfair treatment in that he was aware of two Kenya Airways aircrafts involving loss of lives and yet Kenya Airways licence had never been cancelled or suspended. To him, launching of investigations into the aircraft should not have been used to unfairly punish him in the manner they did. It is the respondent's contention that by reason of the 2nd appellant's unjustifiable and unwarranted conduct, he incurred losses which he proceeded to enumerate as here under:

i. The aircraft he had purchased on lease hire purchase, he had hire purchased it for 660,000.00 US dollars out of this amount he had paid 61.3 % leaving a balance of 38.7 %. As a result of the suspension of the AOC, he was unable to service the loan rendering the aircraft to be repossessed. He incurred costs seeking permission to have it flown to South Africa and also purchasing a special insurance cover for its flight back.
ii. Following the said repossession, the respondent lost its lucrative contract with Kenya Airways to which he had leased the said aircraft. It was the respondent's evidence that a day after the said accident, he received a letter from Kenya Airways notifying them that they could not continue with the contract because they had learned that the respondent's AOC had been cancelled. The respondent moved to court to challenge the action of Kenya Airways to rescind the contract. The matter was referred to arbitration but the respondent lost the claim and was left grappling with a huge bill incurred by way of costs and arbitration fees paid to the arbitrator.
iii. As a result of the said cancellation, the respondent lost every revenue it was generating from all the aircrafts it was operating. It is the respondent's evidence that the aviation industry is small and once an incident happens, the victims get ostracized and lose clients, sellers of spares or hirers of aircrafts. This arises because the regulating body has branded the victim as dangerous and careless. He maintained that he was doing booming business as evidenced by the company profile which boasted of some high profile clientele.

The total loss incurred was indicated in the financial report. To his knowledge, the respondent's earnings were spent as follows: 25% on fuel, 15% on maintenance, 20% on spare parts, 60% goes back to the machinery and 15% to the staff and licensing. It is his stand that the plaintiff company had a good reputation and that is why it served luminaries such as the passengers on the ill-fated flight.

His account of the after effects of the cancellations of the AOC is that the respondent lost its customer base in Wilson Airbase. As such the sister base in Lokichogio could not be served as their customers abandoned them for other airlines. The respondent could not train or retain staff at its Wilson Airbase and the remaining air planes were flown out of the jurisdiction. In consequence of matters aforesaid, he took out these proceedings against the State. He confirmed that in respect to the AOC which was due to expire on 30.4.03, he did not apply for renewal of the same because it had been suspended and he had no reason to apply for the renewal until the suspension was lifted. It is his evidence that without the operation of licence No128, No 128B was useless as he could not operate from Nairobi to Lokichogio and vice versa. As at the time of his testimony, none of the aircrafts that formed the subject of the cancelled certificate were available the respondent was unable to maintain them as he had no money. He gave their current status as follows;

(a) 5Y -EMJ - is the one that crashed in Busia.

(b) 5Y EMK which was on lease hire agreement was repossessed and taken back to South Africa.

(c) 9L-LCP(9XR-AL) was sold by at the respondent end of 2003

(d) 3D-ACH – Skyvan was under a lease agreement from a 3rd party and it was repossessed at the end of the same year; 2003.

(e) ER-AJA was sold off to Bukavu end of 2003.

(f) 9XR - EJ- as at the time of trial was parked somewhere in Congo where it had been for two (2) years. He had tried to work with it there and it did a few hours. It may have operated for 900 hrs at the rate of 950 Dollars an hour.

g. 9XR-AB was sold in 2004.

The respondent maintained that its claim is justified because if the licence had not been suspended it would not have sold its aircrafts and would have continued with its aviation business which was on an

upward trend. It would then have been in a position to pay its debts and even wade off the winding up petition that was filed against it.

Apart from the actual losses, the respondent also asserted that they were entitled to the loss of good will as they had pioneered some of the routes.

On the powers of the regulatory body, PW1 agreed that KCAA had the power to renew, revoke, and suspend licences/certificates but maintained that the relevant regulations and/ or procedures were not followed when the licence was suspended. It was his evidence that had the right procedure been followed, the respondent would have been able to mitigate its loss by giving Kenya airways the requisite 90 days' notice before cancellation of their contract as stipulated in their agreement. It would also have had the option to take over the route itself and continue paying the remaining hire purchase installments for the aircraft and thus avert the repossession.

He denied the suggestions that the respondent had bloated the claims for damages. To him the claim is minimal compared to what the company would have made in terms of profits over the claim period had its certificate not been suspended. In support of its case, the respondent called Captain Joe Mule Mutungi, one of the pioneer African pilots in this country with impeccable qualifications. His evidence was largely uncontested and we do not deem it necessary to repeat the same here verbatim for purposes of this judgment. He nonetheless shed very useful insights on the operations of the aviation industry.

When asked about suspension of certification as a result of an accident, the witness stated that for the 30 years he had been in the aviation industry, he had never come across a situation where the operator's certification is cancelled because of an accident involving one of the operator's aircrafts. To support his stand, the witness enumerated the following as examples.

- A Kenya Airways accident in Cameroon a few years ago, its licence was not suspended or cancelled.
- In 2004 – a Blue Bird jet had an accident in Kitui, to his knowledge the licence of Blue Bird was neither suspended nor cancelled.
- In the year 2003 East Aviation Safari Airways lost an aircraft in Lokichogio. It ran off the runaway and it was written off. The licence was neither suspended nor cancelled.
- 2001 Aircraft Leasing Services lost an Aircraft at Jomo Kenyatta International Airport. They were working in partnership with Kenya Airways. Their licence was never suspended or cancelled.
- In the year 2000, Kenya Airways lost an Aircraft in Ivory Coast. P.W.2 was the Chief pilot then and Kenya Airways licence was never suspended or cancelled.

The witness was categorical that he had never come across a situation where an operator's licence was either suspended or cancelled because of an accident and the subject of these proceeding is one such one.

P.W.2 said he was conversant with the provisions of Regulation 57 and the powers donated there in. To him, "provisional" means temporary and it should not be made to last more than a month. If longer, definitely the operator is likely to run out of funds leading to the collapse of the business. To his knowledge, it is only the Director of Civil Aviation who has powers donated to him under the said regulation to suspend a licence or certificate.

He told the court that to his understanding a suspended licence does not run and one cannot apply for renewal because of its suspension. One can only apply if it is reinstated with a rider from the Director specifying for which period the reinstated licence is to run.

He confirmed that by being suspended the operator is grounded and the business is likely to go under.

PW.3 gave his testimony to the effect that he was an experienced Accountant, who had worked for various companies as enumerated in his evidence. He eventually joined the respondent as a Finance Controller, rising to the rank of Finance Manager. He was still engaged with the respondent as at the time of his testimony. He was called to testify on the financial status of the respondent. At the request of the

court, he prepared the report produced as exhibit 43 using documentation made up of cashbooks, cheque books, invoices, ledgers, sales and purchase journals, profit and loss accounts, balance sheets from the audited financial statements, banking slips which formed part of the documents produced in court in volume 1, 2 and 3 and also supplementary bundles. P.W.3 confirmed that he had thoroughly examined all books of accounts and documents and came up with a sound report. According to this witness, as at July 2002 when he joined the respondent company, the same was in a healthy financial position in terms of its profit and loss balance sheet and cash flow as confirmed by the audited documents in court. Nonetheless, as at the time he prepared exhibit 43 on 20.7.07, that position had changed for the worse and the company could no longer support itself financially and had ground to a halt.

The Audited Accounts for the years 2000 to 2004 were produced as exhibit 26-30 with invoices produced as exhibit 25, Lease Agreement between Kenya Airways and the respondent as exhibit 44, and the letter terminating the lease as exhibit 45. The witness went on to produce a letter recalling the aircraft which was on lease hire back to South Africa as exhibit 46. The report goes further to demonstrate the payments the company had made towards the said hire purchase agreement. The report reflects earnings from hire of the planes to Flamingo Airlines. Exhibit 61 contains flight details of each Aircraft, what each brought in and expenses incurred by the respondent on each flight. It also explains how the goodwill was calculated. Exhibit 43 also contains details of the respondent's debts, some of which led to the filing of bankruptcy proceedings against It. The consequences of the suspension of the AOC are reflected as financial loss, loss of staff, loss of assets namely the aircrafts, loss of continuity of the business and loss of the company's good will, loss of investment to the shareholders.

In addition to the above, PW.3 stated that he also worked out a projection of the loss of income over a period of 5 years. This reflected the loss in the growth of the company profits had the company continued to grow at the rate it was growing before the suspension of the AOC. The underlying factors influencing that projection are said to have been the steady growth of the Kenyan economy which had arisen from 6% to 10% as at the time of calculation, new openings for expansion of their business especially to Southern Sudan and Somalia, following the signing of the peace agreement. Also potential business prospects in the Democratic Republic of Congo and Rwanda after the onset of political stability in those two countries.

By reason of what has been set out above, P.W.3, maintained that the projection of the losses presented in the plaint is not only realistic but also on the lower side. Further, that the two methods used to arrive at the loss are the two accepted mode for calculating one's loss of profits namely; the gross revenue method incorporating capital items which gives the total loss to be Kshs 2,786,953,741.06 and the operating profit loss including capital items which comes to Kshs.1,408,309,742.06.

When cross-examined on the profits that the company was making, P W3 conceded that in the year 2001 there were operating losses to the tune of Kshs 2,438,133,00. The losses were arrived at when considering all the income for that year as compared to the operating expenses of the particular year, largely contributed to by the heavy payments on the lease charge, on the aircraft held on lease hire agreement. By reason of this, the said loss should not be taken to mean that the company was not making profits. The truth is that the company was making profits but instead of keeping that money, the same would be re-absorbed into the business and utilised to defray the hire purchase charges.

It was his evidence that this situation would have been reversed as soon as they finished the payment of the lease charges a few months after the suspension of the AOC.

On further cross-examination, P.W.3 stated that he had all along been part of the respondent's management and by virtue of that position he was conversant with all the financial issues of the respondent. P.W.3 conceded that the loss reflected in the report (exhibit 43) was more than the claim in the plaint but reiterated that what they have claimed in the plaint is reasonable. He further explained that the revenue loss of Kshs 115,913,040.25 was based on gross turnover and not the profit. He explained that the losses demonstrated in his report and for which the respondent seeks compensation do not arise from business transactions but from the suspension of the respondent's AOC.

He further testified that in the three years preceding the cancellation of the AOC, the respondent was on

an upward tangent in terms of growth. According to the documents exhibited in court, in 2001 - 2002 the turnover was Kshs 15,629,518.00. In 2002 this went up by 76% to Ksh141,409,971.00. In 2003 it went up higher to 198,718.069.00which is an increase of 40.52%. In 2004 when they were not operating they dropped to 96,055,398.00 which is a drop of 51.66% which was long after their licence had been terminated.

On their part, the appellants also called three witnesses. The main witness was the Director General of the 2nd appellant. We have analysed the aspects of their evidence that is germane to this case elsewhere and we shall not therefore go into the nitty gritty of the same and particularly those issues that have already been covered in the analysis of the respondent's case.

The factual evidence surrounding the occurrence of the crash and the suspension of the AOC is not denied. According to the appellants however, contrary to the claim by the respondent, it is the Director of the Kenya Civil Aviation Authority, who acting within his powers, suspended the AOC pending investigation, by way of a hand written note dated 24.1.2003 faxed to the plaintiff on the same day shortly before midnight.

They defended the action by DW1 saying that the suspension was within the law and was done in '*public interest'* as provided for under regulations 57 of the Civil Aviation Air Navigation Regulations of the Civil Aviation Act Chapter 394 laws of Kenya, (ANR)

The evidence was to go further and demonstrate that the respondent's appeal for reinstatement of the AOC 128 was turned down because the investigations were pending, which investigations were continued by the public inquiry commenced by the minister for transport and communications.

On the issue of the respondent's claimed losses, according to the appellants, the respondent company had been making losses in its operations prior to the suspension and it should not therefore have been compensated in the manner it was claiming. Alternatively if the court, were to find that the appellants were liable for any losses to the respondent, then the same should be limited to be calculated up to and limited to the period for the remainder of the life span of AOC 128.

DW1 denied the allegations leveled against him to the effect that he suspended the respondent's AOC on the basis of the utterances made by the then Minster for Transport and Communications, as he was not aware of them. He solely took action in accordance with regulations 57(1) and not at the behest of the minister.

His evidence was that the respondent never submitted an application for the renewal of the specific certificate. He maintained that, there was nothing to be reinstated as the AOC expired while the suspension was still on and as such, the respondent should have applied for a reissue.

The appellants thus urged the court to dismiss the respondent's claim because the suspension of the AOC was lawful. On cross-examination, DW1 conceded that once the certificate is suspended, it is put in abeyance but not forever.

He agreed that regulation 57(2) directed him on what to do once the investigations were over, but said that since the investigations were not completed, he could not exercise those powers. He said that by the time the investigations ended, the certificate had already expired and so chose not to exercise his powers under regulation 57(2).

He told the court that he did not take action under Regulations 12(2) because it deals with licences and not AOCs.

He conceded that he had knowledge that by suspending the AOC, its effect would be to ground the operations of the respondent and in the process that would cripple the respondent's business but said that that was not his intention. He denied the suggestion that his action when suspending the respondent's AOC was reckless, malicious and unprofessional.

D.W.2, Samwel Henry Odoyo Nyikuli, testified that at the time the events, the subject of these proceedings occurred, he was the Manager Air Traffic Services. He admitted being the author and sender of the note that is responsible for these proceedings. The effect of his action is discussed elsewhere in this judgment.

The Director called D.W.2 at around 11.00 p.m. or thereabout and instructed him to suspend the AOC as per exhibit P6.

DW3, Benjamin Enyenze, on the other hand, gave evidence in his capacity as the Deputy Director, Air Transport Department. He had served the ministry for the last 19 years prior to his testimony. The sum total of DW 3's evidence is that he was aware that on 23.1.03 there was an air crash at Busia Airstrip at 5.00 p.m. involving aircraft Reg. No.5Y-EMJ type Gulf stream G159. Thereafter the then Minister for Transport and Communications, Hon. Michuki appointed a Commission of Inquiry led by Mr. Lee Muthoga to hold a public inquiry into the cause and circumstances of the accident. His evidence was, in our view, not very relevant to the issues for determination before the trial court and before us.

At the close of the case before the High court, counsel who appeared for the parties in this matter filed written submissions which the learned Judge duly considered before arriving at the impugned decision. For the sake of brevity we shall not repeat them here. Moreover, the same issues raised in those submissions have been raised in the submissions before us in this appeal.

We shall consider this evidence along with the grounds of appeal raised in the memorandum of appeal, the very able submissions of all counsel herein and the law applicable. It is worth noting that most of the facts raised herein are not disputed. The fact of the occurrence of the accident and the cause thereof are not in dispute. Even the handwritten note with the wrong addressee faxed to the respondent's office on the night in question is not in dispute. We shall therefore not dwell too much on the factual aspects of the case.

This appeal proceeded by way of written submissions. The 1st appellant filed its submissions on 9th August 2011, while the 2nd appellant filed its submissions earlier on 20th July 2011. The respondent's submissions were filed on 28th July, 2011. They also filed their list of authorities all of which we have given our due consideration.

After receiving the submissions of the 1st appellant, the respondent filed a reply thereto on 28th September 2011. Upon being served with the respondents submissions, the 2nd appellant filed further submissions in answer thereto on 7th December, 2011.

We are not able to replicate all these submissions here for purposes of this judgment. We nonetheless thank all learned counsel herein for their thoroughly researched submissions which have been of great assistance to us in the preparation of this judgment. We have considered carefully the contents therein along with the cited authorities, the grounds of appeal and the entire evidence adduced before the High court.

Having done so, we have narrowed the issues for determination as tabulated hereafter. We shall then take each issue separately and apply the evidence surrounding it, the rival submissions in respect of the same, and the law applicable and then make our determination on each. These issues are as hereunder and are not necessarily listed in order of their importance.

1. ***The validity, legality or otherwise of the suspension of the respondent's Air Operators Certificate (AOC) and what amounts to public interest.***

2. ***Whether the learned Judge erred in applying Public Law Principles to what the appellants say was the arena of private law.***

3. ***Whether a statutory body or an officer of such a body can be held culpable for loss or damage occasioned to a private citizen as a result of such body/officer performing a statutory duty.***

4. ***Whether a mandatory injunction could issue against the Government.***

5. ***Whether the respondent has any cause of action against the appellants – particularly the 1st appellant.***

6. ***Whether there was contributory negligence on the part of the respondent.***

7. ***Whether the awarded damages were proved as by law required.***

8. ***Whether the respondent mitigated its loss?***

These issues are not exhaustive. Indeed there are many other issues which are subsumed in the ones above but all which we shall endeavor to address simultaneously.

VALIDITY/LEGALITY OF THE SUSPENSION OF THE RESPONDENT'S AIR OPERATORS CERTIFICATE (AOC)

The Aviation industry in this country is controlled and regulated under the Civil Aviation Act (Cap 394 of the Laws of Kenya) which came into force in 1977. The same has nonetheless been amended severally to cater for the emerging demands of the fast growing aviation industry, the latest amendments having been done in January 2013 vide Act No.21 of 2013. For purposes of this judgment however, we shall only concern ourselves with the law as it was as at the time the cause of action herein arose. This statute has a raft of multifarious regulations which are divided into several parts and schedules. Each of these parts are comprised of several regulations, all interrelated and with the common purpose of regulating several aspects of aviation, ranging from licensing, operation of aircrafts, rocket firing, investigations of accidents, restriction of buildings in declared areas among others. Some of the regulations even seem to overlap. For purposes of this judgment, we shall only concern ourselves with the rules that are relevant to the subject matter.

Section 3 of the Civil Aviation Act creates the Kenya Civil Aviation Authority (the 2nd appellant) which is a body corporate charged with the responsibility of, among other things, planning, managing, developing, regulating and otherwise ensuring the safe economical and efficient operation of the Civil Aviation Industry in Kenya.

The Director General appointed under Section 5 of the Civil Aviation Act is the Chief Executive Officer of the said authority. He is responsible for the day to day running of the affairs of the authority (2nd appellant). Among his duties is to *"ensure that the provisions of the Civil Aviation Act and any rules and regulations made therein are complied with to the extent necessary in the interest of aviation."*

It was in this context that the Director General of the 2nd appellant, Christoper Chirchir Arap Kuto, (DW1 in trial court) purported to invoke the provisions of regulation **57(1)** of the **Air Navigation Regulations** (ANR) when suspending the respondent's licence. This regulation provides as follows:

> ***57(1) "The Director may, where he considers it to be in public interest suspend provisionally (pending further investigations) any certificate, licence, approval, permission, exemption or other document issued or granted under these Regulation."***
>
> ***(2) "the Director may, upon the completion of an investigation which has shown sufficient ground to his satisfaction it to be in the public interest, revoke, suspend or vary any certificate, licence, approval, permission, exemption or other document issued or granted under these Regulations."***

Before we consider the ambit of the application of this regulation, it is important for us to revisit the issue of how the same was executed.

As stated earlier on in the introduction of this judgment, upon learning of the occurrence of the Air traffic accident involving one of the respondent's aircrafts, the Director General instructed one of his junior officers to communicate the suspension of the AOC to the respondent.

As a result of this, one S. H. Nyikuli, signing for "Director General, KCAA wrote the short note at page 397 of the record of appeal. This letter is the genesis of this matter. It is in our view important to reproduce it here verbatim.

"The Managing Director

Commuter Air Services Ltd

Wilson Airport

NAIROBI

RE: SUSPENSION OF YOUR COMPANY AIR OPERATOR'S CERTIFICATE (AOC)

Following the fatal accident involving one of your aircraft 5Y-EMJ, G-159 this afternoon of 24th January 2003, the Director General of Kenya Civil Aviation Authority has taken immediate action and suspended your Air Operation Certificate, pending further investigation.

Please comply with these instructions with immediate effect.

S. H. NYIKULI, for DIRECTOR GENERAL, KCAA."

As stated earlier on, it is explicitly clear that this letter which was acted upon to ground the operations of the respondent was not even addressed to the respondent. On the face of it therefore, it was meant to address the managing director of "Commuter Air Services Ltd" – which according to the Managing Director of the respondent had nothing to do with his companies. The same nonetheless made reference to one of the respondent's aircrafts and he therefore clearly understood that the letter in question was meant to be addressed to him. Mr. Jibril (PW1) also informed the court that before he could even get to the scene of the accident, he saw and heard on television the Minister for Transport and Communications, the late Hon. John Michuki, announce that his operator's licence had been cancelled.

Let us pause here and analyse the validity/legality of the letter in question. As stated earlier, it is addressed to the wrong person so the respondent could easily have disowned it – not that it would have changed anything given the Minister's directive. Secondly, it is not signed by the Director General himself but by one S. H. Nyukuli. Is this countenanced by the Civil Aviation Act? **Section 5B(1) of the Civil Aviation Act** provides as follows:-

> ***"the Director General may from time to time, in writing, either generally or particularly delegate to any person all or any of the powers exercisable by him under any written law, but not including this power of delegations."(emphasis supplied)***

The above provision is explicit and needs no elaboration. The delegation has to be in writing. The discretion implied by the use of the word "may" is only in the decision to delegate which in our view must be in writing. In this case, the Director General did not delegate in writing as by law required. In his testimony before the trial court at page 172 of the record of appeal, Mr. Kuto stated,

> ***"I instructed him (Nyikuli) and he issued instructions on my behalf and I am accountable. I delegated that communication that the licence be suspended. I have the powers to delegate in writing. In this particular case there was no opportunity to delegate because delegations has to***

be in writing." (emphasis supplied)

Mr. Nyikuli in his testimony before the trial court confirmed that he was given instructions to write the said note by the Director General on phone. He confirmed that by that time, none of the officers from KCAA had visited the scene and they were not even sure what the cause of the accident was.

The issue of the delegation contemplated by Section 5B Civil Aviation Act has not been seriously challenged by the second appellant. We find, like the learned Judge of the High Court did in her judgment, that the cancellation of the AOC was "unprocedural" for lack of proper delegation of power by the Director General to Mr. Nyikuli.

This was a very delicate situation whereby by a stroke of the pen the respondent's entire aviation business was to be grounded to an abrupt halt. It called for more serious consideration and strict compliance with the relevant laws and regulations. It definitely needed much more than an improperly addressed, handwritten missive dispatched by way of fax in the middle of the night, and signed by a person who had clearly no authority to do so for lack of proper delegation.

We also note that the said note did not even indicate the provisions of the law relied on to suspend the licence.

For the foregoing reasons, we find and hold that the said note was invalid, unlawful and ultra vires. This brings us to the application of Regulation 57 of the Civil Aviation Act Regulations. The first time this Rule was cited as having been the basis for the suspension of the said license was in the Director General's letter dated 4th February, 2003.

Did the Director General of the second appellant properly exercise discretion under Rule 57 of the Air Navigation Regulations?

This regulation has two very important aspects. Firstly, as clearly admitted by all parties, the power of the Director General under this regulation is discretionary. This discretion must nonetheless be exercised judiciously and in a prudent and fair manner, being mindful of all circumstances surrounding the particular matter. It is discretion that cannot be applied in a capricious or draconian manner.

Secondly, the regulation can only be invoked where public interest is involved. Further, it is common ground that the Director General can only provisionally suspend a certificate under Regulation 57 pending further investigations. The word "further" in Regulation 57(1) denotes that there must be some initial or preliminary investigations carried out before the suspension is done which investigations should form the basis of the further investigations.

We pause here to apply these aspects to the circumstances of this case.

As far as the issue of proper use of discretion is concerned, we note that the decision to suspend the AOC was made in a rush following the loss of lives of some prominent Kenyans. There does not appear to have been much thought given before the decision to suspend was made. That in our view would explain why the decision was made before any investigations were done on the ground as to what had caused the accident. DW1 in his testimony before the trial court (at page 176 of the Record of Appeal) stated "***none of my officers had visited the site by the time I made a decision***."

Mr. Nyakuli (DW2), the author of the impugned "suspension" note told the trial court that as at the time he was instructed to write the said note, they had not ascertained "*the immediate cause of the accident*" (see page 195 of the Record of Appeal), and they had to rely on a document called **James Book of Aircraft Record**. It was from the said book that they surmised that the aircraft must have tried to take off from a shorter runway. On cross-examination, Mr. Nyikuli had this to say;

"I confirm that by the time I wrote the letter I had not travelled to Busia…. When I wrote the note, I had not talked to any of the officers or owner of the company whose Aircraft was

involved in the accident……

It is correct that I did not tell the director to suspend the licence." Pg 197 ROA)

The question that begs an answer therefore is "***on what basis did the Director General decide to exercise his discretion to suspend the AOC?"***

From the foregoing, it is clear that he had no justifiable basis to instruct Mr. Nyikuli to write the letter which we have found to have had no force of law at all. The accident had already happened it would have been more prudent to wait until the following day, visit the *locus in quo*, let the expert do the initial analysis of the scene; have some credible basic facts as to what had caused the accident and then if the situation warranted it, suspend the AOC. That way, the blunders of having an unauthorised person purport to suspend the licence could have been avoided. The long and short of this is that the Director General did not exercise his discretion prudently as he is enjoined by law to do.

The second facet of Regulation 57(1) as stated earlier on is the issue of whether the decision was in public interest. What then does "Public Interest" entail? According to learned counsel for the 1st appellant, it means "*acting in public interest of the ordinary person or determinate class of persons to ensure that their security and life is guaranteed."*

He further submitted that the "*public targeted by Regulation 57 are the users of the Aircrafts and not Operators."* It was learned counsel's contention that it was the "general public" who are likely to be adversely affected by the non-compliance of the regulation.

On his part, Mr. Waweru Gatonye, learned counsel for the 2nd appellant submitted that the 'public' targeted by Regulation 57 is not the operators (read respondent) but the users of the aircrafts and the general public likely to be affected by non-compliance to regulations.

None of them however, expounded on how this particular accident could have affected the general public. According to Mr. Athuok, learned counsel for the respondent, the appellants did not disclose to the Commission of Inquiry that was appointed to investigate the accident in question or to the High Court what amounts to "Public Interest" as envisaged by Regulation 57 of the Air Navigation regulations.

Interestingly, Mr. Athuok himself did not even attempt to define what "Public Interest" means. We acknowledge, however, that since it is the appellants who are relying on the issue of public interest to avoid culpability then the onus was on them to explain to the court what "Public Interest" entails and bring the action of the Director General within the ambit of that definition.

According to Mr. Athuok, however, and echoing the testimony of Captain Joe Mule Mutungi (who testified as PW2) before the High Court, there has never been any suspension of any aircraft in the Kenya aviation history under Regulation 57 under the guise of "Public Interest".

According to Strouds Judicial Dictionary Vol 4 (4th Edition) Public Interest is defined as follows;

> ***"A matter of public or general interest does not mean that which is interesting as gratifying curiosity of a love of information or amusement; but that in which a class of the community have a pecuniary interest or some interest by which their legal rights or liabilities are affected."***

Black's Law Dictionary (6th edition) on the other hand define "Public Interest as:

> ***"something in which the public, the community at large has some pecuniary interest, or some interest by which their legal rights or liabilities are affected. It does not mean anything so narrow as mere curiosity, or as the interests of the particular localities, which may be affected by the matters in question. Interest shared by citizens generally***

in affairs of local state or National Government."

Precisely put, Public Interest is about the well-being of the general public; the commonweal. It must be something that is beneficial to a large section of society. It must therefore, transcend the parochial interests of a particular social class. It is a commonly accepted good. A few examples of public interest issues that come to our minds include matters to do with public order, public health, public security, public morals, public safety and economic welfare of the community.

In the matter before us, what pertaining to the accident traversed across the general public? Was it public safety? We have not been told so. Was the continued operation of the respondent's aircrafts a threat to public safety? Had the respondent's aircrafts been involved in several accidents before, then we would agree that public interest would come into play. There was no such claim here. Indeed, the real cause of the accident had not even been established by the time the respondent's AOC was suspended. It is our view that there was no issue of public interest involved to cause the total grounding of the respondents entire aviation business and the livelihood of all those who were dependent on the same. We say the entire business because even Mr. Kuto admitted in his evidence before the trial court that:

> ***"It is obvious that by suspending the air operating certificate I would be grounding all his aircrafts. It was obvious that the suspension would cripple the plaintiff's business with immediate effect as much as that was not the intention of my suspension."***

From our definition above as to what amounts to "Public Interest", it is evident that we do not agree with the trial courts understanding of what amounts to public interest. According to the learned Judge, public interest under Regulation 57(1) of the Air Navigation Regulations *"should be construed to mean players in the Civil Aviation fraternity, the managers or National Civil Aviation industry, the operators the crew and consumers."*

That notwithstanding however, we are of the view that there was no issue of public interest involved in this matter and we are therefore in concurrence with the learned Judge that the discretion envisaged in regulation 57(1) Air Navigation Regulations was not exercised in the public interest. Indeed, we find that in view of Mr. Kuto's admission that he was aware of the consequences of the suspension in question, it is clear that discretion was exercised capriciously, unreasonably and in bad faith. There being no issue of public interest involved, the Director General ought not to have invoked Regulation 57(1) of the Air Navigation Regulations to suspend the respondent's certificate. Having done so however, the said suspension ought to have been provisional pending further investigations. In this case, as at 21st November 2003 when the respondent moved to the High Court after futile attempts to have his certificate reinstated, he had not been informed of the results of any investigations that had been carried out. According to Mr. Kuto, the investigations they had started after the accident pursuant to Regulation 57(1) were terminated and a Commission of Inquiry appointed to carry out an inquiry into the matter. Mr. Kuto admitted in his evidence (pg 173 of the Record of Appeal) that he did not inform the respondent that the investigations he had been waiting for had been terminated. He said he failed to do so because by then, the certificate in question had already expired. This brings us to the question as to whether the certificate could expire while still suspended.

Mr. Kuto did admit that once suspended, a licence is put in abeyance (see page 173 ROA). We could not agree with him more. Once a licence or certificate is suspended, time freezes and stops running until such a time that the suspension is lifted. In this case, as long as the suspension remained in place, the respondent could not even apply for renewal of the certificate because it could not expire. If the Director General wanted to revoke the certificate, then he could only have done so pursuant to Regulation 57(2) of the Aviation Navigation Regulations. There is no way one can apply Regulation 57(1).

The appellant should have either revoked the certificate after investigations were completed or reinstated it and then refuse to renew it if that was ultimately their aim. By suspending the respondent's certificate *sine die*, they paralysed its operations permanently and in our view unjustly.

On the issue of breach of rules of natural justice, we noted that Regulation 57(1) whose

application is provisional in nature, has no room for observance of rules of natural justice. This is so, in our view, because the regulation anticipates provisional suspension pending further investigations. It is in the course of the further investigation which should form the basis of the Director General's decision to revoke or suspend, that an effected party should be heard. In this case, however, this second step was overlooked and regulation 57(2) was never complied with. Even as at the time of filing the suit before the High Court, the certificate had still not been revoked as envisaged under regulation 57(2) and it was still in suspension. The right to be heard had not therefore crystallised and was inchoate. The 2nd appellant proceeded on the wrong premise or supposition that the certificate had already expired by effluxion of time which was not so.

We do, however, agree with the learned Judge that for the revocation of a certificate to be lawful under the entire Air Navigation Regulations, then there must be total compliance with Regulations 57(1) and 57(2) and also Regulation 79 which gives the offending party an opportunity to be heard. In this case, there was total non-compliance with both Regulations 57(2) and 79 of the Air Navigation Regulations which in our view rendered the entire process unlawful.

Submissions were made to the effect that the 2nd appellant ought to have proceeded under Regulation 12 of the Civil Aviation (Licensing of Air Services) Regulations in suspending the licence instead of Regulation 57. It is our considered view that indeed the Director General could have opted to use regulation 12 of the Civil Aviation (Licensing of Air Services) if he so wished.

This would have entailed a different procedure all together and different penalties. According to Mr. Kuto however, he did not apply that regulation because it targets the licence of air services and not the Air Operators Certificate. In his view, the action he deemed appropriate in the circumstances of this case was to suspend the Air Operation Certificate which had the effect of grounding the entire fleet of the respondent's aircrafts.

A reading of these regulations clearly shows that the suspension of the AOC would have a faster or what one would call "*electric shock treatment*" than suspending a licence which would require twenty eight (28) days' notice in writing.

These regulations would not have enabled the Director General to ground the entire fleet of the respondent's aircrafts at night by the stroke of a pen. Having chosen to invoke regulation 57, then he should have followed those provisions to the letter which unfortunately he did not do.

We note from the learned Judge's judgment (at pg 523 Record of Appeal) that she did not "interrogate the infringement of Regulation 12" and so her decision was not based on that regulation at all. Regulation 12 is therefore, not an issue in this appeal. The learned Judge's judgment was premised on the provisions of Regulation 57(1), 57(2) & 79 of the

Air Navigation Regulations, as we have discussed earlier on.

This brings us to the other issue on whether the learned Judge erred in applying Public Law principles to what the appellants say was the arena of Private Law?

It was submitted on behalf of the 1st appellant that since the Director General of the 2nd appellant was performing a statutory duty in suspending the respondent's certificate, then any claim against him would lie in administrative remedies by way of judicial review and not by way of a claim for damages by way of plaint.

In support of this proposition, learned counsel for the 1st appellant cited several House of Lords decisions among them, **O'REILLY VS ACKMAN** [**1983] QBD page 237; O'Rouke vs Camden London Borough Council [1998] A.C. 188** and **Stovin vs Wise [1996] 3 ALL ER 801.**

In the O'Reilly case (supra) the House of Lords held inter alia;

"that since <u>all the remedies</u> for infringement of rights protected by public law could be obtained on an application for judicial review as a general rule, it would be contrary to public policy and abuse of the court process of the court for a plaintiff complaining of a public authority infringement of his public law rights seeking redress by ordinary action."

This finding presupposes that the process of judicial review in England accords an aggrieved party "all remedies" he might seek. In our jurisdiction the remedies awardable under judicial review are very limited and do not include a claim of payment of damages. Other than the case law cited by appellants counsel, we were not told what the current statutory law in England provides on this subject which is what would elucidate the circumstances surrounding these authorities and help us to concur with the findings in those authorities or distinguish the same. Citing the case of **Stovin vs Wise** (supra), learned counsel submitted that the general rule is that an omission by a public authority to exercise a statutory power conferred for the benefit of the public does not give rise to breach of duty resulting in damages.

That general principle in our view can only come into play when the said power or discretion is properly exercised. A statutory discretion cannot be properly exercised in an unreasonable manner, i.e. in a way no sensible authority with a proper appreciation of its responsibilities would act. A duty of care even where not expressly imposed by statute can be implied depending on the circumstances of each case and the nature of the duty the public body is supposed to perform. If the act to be performed is likely to cause harm to some other persons and such harm or damage is foreseeable, then the public body is enjoined to carry out that task in a manner that is reasonable and which will not cause unnecessary harm or damage to the others. In other words, such a public body owes a duty of care to those who are likely to be affected by its actions.

In the case before us, as we stated earlier on and as admitted by Mr. Kuto, in cancelling the AOC, he was well aware that he was going to ground the entire fleet of the respondent's aircrafts. He must have clearly foreseen the financial impact it was going to have on the respondent and all those who depended on the company to earn their livelihood. This has also to be viewed in the context that there were other provisions of the law which could have been invoked with less punitive results. Even assuming that the Director General was right in invoking regulation 57(1) of the Air Navigation Regulations as he did, as stated earlier on, he failed to comply with the requirements of that provision and suspended the AOC indeterminately instead of provisionally as provided in the said rule. Whichever way we look at it, we fail to see how the 2nd appellant can escape culpability in this case.

As to whether the respondent ought to have moved the court by way of plaint, we are of the view that judicial review was not the proper way to go in this case. We say so because unlike in England (see O'Reilley case (supra)) one cannot claim for damages in our courts by way of judicial review.

Indeed in England, the House of Lords has held that "*a remedy in the form of* an *award for damages is possible without confusing the uneasy divide between private and public law''*. The common law is still sufficiently adaptable. See **Anns vs Marton London Borough Council [1978] A.C. 728.**

A public body which fails to exercise its statutory power/discretion in a reasonable manner or whose officers act negligently in performance of their statutory duties may also be liable in damages.

The same situation pertains in India where the Supreme Court held in **Rajkot Municipal Corporation vs Manjulben Jayantilal Nakum [1997] SCC 552 111 79;**

"Undoubtedly, a public authority is liable for the negligent acts of its servants or agents in carrying out their duties, or exercising their powers, within the operational area, although if the performance of their duties or exercise of their power involves the exercise of discretion an act will not be negligent, if it is done in good faith in exercise of, and within the limits of the discretion."

In legal systems like ours where judicial review does not provide for an award of damages, we see nothing wrong with an aggrieved party claiming for damages where the cause of action is pegged on a

public body's breach of a statutory duty. It is our finding therefore ,that the learned Judge did not therefore misdirect herself in applying public law as opposed to private law in awarding damages.

This analysis answers our issues No. 2 and 3. This brings us to the issue of whether the learned Judge erred in giving orders of mandatory injunction against the Government.

It was the appellants' submission that orders of injunction cannot be issued against the Government by virtue of Section 16(1) (i) of the Government Proceedings Act, Cap 40 Laws of Kenya. That was indeed the law before the coming into force of the Constitution of Kenya, 2010. It is now debatable whether Article 23 of the Constitution insulates the Government from being injuncted by the High Court where a party to a petition for violation of fundamental rights seeks to have the Government being injuncted by the High court. Since this suit was determined before the enactment of the new constitution, that provision would not apply and we do not think it is necessary for us to delve into that issue.

According to the respondent, however, an injunction could issue against the 2nd appellant as the 2nd appellant is not "Government". We are in agreement that an order of injunction could issue against the 2nd appellant herein because it is a body corporate which is capable of suing or being sued as provided by Section 3(2) a of the Civil Aviation Act.

On the other hand, however, orders of mandatory injunction could not issue against the 1st appellant in its capacity as Attorney General of the Republic of Kenya. We note that the learned Judge actually issued the mandatory injunction against the 1st appellant and not the 2nd appellant. To that extent, the Judge fell into error.

On the issue as to whether the respondent had any cause of action against the appellants, the foregoing discussion clearly shows that the respondent indeed has a cause of action against the 2nd appellant and it was properly sued.

As far as the 1st appellant is concerned, according to paragraph two of the plaint, the 1st appellant was sued for and on behalf of the Minister for Transport and Communications.

According to the respondent, as it was busy in the process of rescuing and airlifting the survivors of the plane crash, the then Minister for Transport and Communication on whose behalf the 1st appellant is sued, appeared on national media and announced that he had cancelled the respondent's AOC. He thereafter "took an unprecedented step" and appointed a Commission of Inquiry to inquire into the accident; he is said to have continued to make prejudicial statements against the respondent which statements damaged the respondent's reputation locally and internationally and influenced the outcome of the inquiry. The Minister is also said to have refused to formally give the respondent a copy of the final report following the inquiry – hence the prayer for mandatory injunction against him.

When it came to the judgment however, the learned Judge appears to have made her findings on the 1st appellant's culpability on totally different issues other than those pleaded in the plaint.

The learned Judge made a finding that the respondent had not established that it was the Minister who had suspended the AOC. We agree with the learned Judge on that issue and add that even if the Minister may have gone on air and claimed to have cancelled the AOC, the same was actually suspended following the handwritten note by Mr. Nyikuli and so the Minister's statement could not have reflected the correct state of affairs.

As far as ordering of the inquiry was concerned, we note that the minister acted within the powers bestowed on him by Regulations 6 and 9 of the Civil Aviation (Air Investigations) Regulations. He was not, therefore, in breach of any law when he ordered the inquiry into the accident. In any event, by the time he did so, as we have observed earlier on, the respondent's fate appears to have been sealed already. Even after the findings of the Commission of Inquiry, the 2nd appellant, which was charged with the responsibility of proceeding under the provisions of Regulation 57(2), never did so and that is why

according to the respondent, even as at the time he was giving evidence before the High court, its licence was still under suspension and there was no communication informing him that the same had been revoked.

All this absolves the 1st appellant from culpability in respect of the claims in the plaint. Indeed in her judgment, the learned Judge made the following findings;

> ***"the mandate of the relevant Minister for Transport and Communication in relation to the Civil Aviation Authority is set out in Section 8A and 8C of the Civil Aviation Amendment Act No. 6 OF 2002. Neither Section 8 nor 8A makes provision for a suspension or cancellation of any licence or AOC. The Minister's role ends at promulgations of regulations among them dealing with endorsements, issuance, renewal, suspension and cancellation of licences. It therefore follows that had the plaintiff demonstrated through documentary proof that indeed the then relevant minister cancelled the AOC, this Court; would not have hesitated to declare the same illegal as the same would not have been within the law…."***

What then did the learned Judge base her findings of culpability of the 1st appellant on?

At page 619 of her judgment, the learned Judge stated;

> ***"the Attorney General failed to discharge its double role bestowed upon it (sic) by Section 26(1)(2) of the Kenya Constitution as construed by this Court both to the Government and the plaintiff as a jurisdic (sic) citizen."***

In his submissions, Mr. Athuok, learned counsel for the respondent, submitted that culpability attaches to the 1st appellant by virtue of his constitutional role as advisor of Government and therefore, by extension the 2nd appellant.

Such advice, according to learned counsel, included advice on interpretation of Regulations 57(1) and 57(2) of the Civil Aviation (Air Navigation Regulations); Section 5B of the Civil Aviation Act (on the issue of delegation) and many other issues including the dictionary meaning of the word "provisional". According to counsel therefore, the 1st appellant was as culpable as the 2nd appellant and the learned Judge was therefore right in finding both of them jointly and severally culpable.

We have considered the submissions of all counsel on this issue. It is true that according to the plaint, the 1st defendant was sued "*for and on behalf of the Minister for Transport and Communications*" and it was on that basis that the statutory notice of intention to sue under Section 13A of the Government Proceedings Act was served on the Attorney General.

Was the learned Judge therefore, in order to depart from the pleadings and make findings on liability on grounds not pleaded?

We appreciate the role of the Attorney General, particularly as provided for under **Section 26(2)** of the repealed Constitution, to the effect that the Attorney General shall be the principal legal advisor to the Government of Kenya. It is indeed in that capacity that the Attorney General is usually joined as a defendant in cases against the Government. But that was never an issue in these proceedings.

In our view, had the 1st appellant been sued for failing to advise the 2nd appellant from the word go, it would have been given an opportunity to respond adequately and therefore give reasons as to why it had not advised the 2nd appellant or tendered any other relevant defence which the court would have considered before the findings on culpability were made.

It is our finding that the learned Judge erred in creating as against the 1st appellant, a cause of action that had not been pleaded and pegging culpability on it.

We therefore, find that the learned Judge erred in awarding judgment against the applicants jointly and severally even after making no adverse findings against the Minister on whose behalf the Attorney General had been sued.

Having found, however, that the suspension of the AOC was unlawful, capricious, malicious and indeed void, it goes without saying that the 2nd appellant cannot escape culpability. We agree with the learned Judge of the High court and for the reasons we have given above that the suspension of the respondent's AOC in the manner that it was done was unlawful and it could not be validated even by the subsequent appointment of the Commission of Inquiry and its subsequent findings.

Moreover, it is admitted by counsel for the 2nd appellant that the Director General of the 2nd appellant "acted independently" in exercising his discretion under Regulation 57(1) of the Civil Navigation (Air Navigation Rules) and that it had nothing to do with the findings of the Commission of Inquiry. That being the case, we do not find it necessary to delve into the detailed findings of the Commission of Inquiry.

The finding on culpability was not therefore anchored on the causes of the accident and who could have been responsible for it, which issues only came to the fore after the conclusion of the Commission of Inquiry. Liability attaches from the unlawfulness of the cancelation of the AOC, which we have analysed earlier on in this judgment. The only time the respondent would therefore share blame is if it played a part in that unlawful cancellation. From the record, it is clear that four days after the said cancellation, the respondent wrote to the Director General of the second appellant and pleaded its case for reinstatement of the AOC, which plea was turned down. We also note that there was subsequent correspondence from the respondent's advocates to the appellants before they eventually served the notices to sue which notices bore no fruit. It is also noteworthy as observed by the learned Judge, that even as at the time the judgment of the High court was being delivered, six years down the line, the 2nd appellant had still not communicated its decision to the respondent to either reinstate or revoke the AOC pursuant to regulation 57(2) of the ANR. They were still on "provisional" mode.

The respondent cannot be faulted for this. We therefore find that the respondent could not in any way have been condemned to shoulder part of the blame in respect of the manner in which its certificate was cancelled. The scenario would have been different had the 2nd appellant complied with the legal requirements stipulated under the Civil Aviation Act and Regulations.

This brings us to the issue of application of international conventions by the learned Judge in arriving at her decision. In her judgment, the learned Judge brought on board the provisions of the "Chicago Convention" through Section 3B (4) of the Civil Aviation Act which mandated the second appellant to apply international standards and practices as recommended by the Chicago Convention. This was nonetheless brought about by the submission by the respondent's counsel that the 2nd appellant should have carried out its investigations in accordance with the Civil Aviation (Air Accidents Regulations) and in particular regulation 12 thereof. We note however, that even after analyzing exhaustively the articles of the Chicago Conventions and its Annex 13, ultimately, the learned Judge at page 294 of her Judgment made the following finding;

> "***The proceedings herein show that the plaintiffs licence was not cancelled, hence the decline by this Court, to interrogate the infringement of regulation 12, the provisions relating to the issuance and cancellation of a licence."***

It is clear therefore, from the above pronouncement that she did not rely on the Chicago Convention and her analysis of its articles was totally unnecessary. Having found that the cancellation of the AOC was pursuant to regulation 57(1) of the Civil Aviation (ANR) and not regulation 12 of the Civil Aviation (Investigation of Accidents Regulations), we do not therefore, deem it necessary to fall back on the provisions of the international conventions for purposes of this judgment. This is more so because regulations 57(1) and 57(2) are self-explanatory and do not call for recourse to the international conventions cited.

From the body of the learned Judge's judgment, it is clear that there is a mix-up of regulation 12 of the Investigation of Accidents Regulations and Regulations 57(1) & 57(2) of the Air Navigation Regulations and their applications and this has created quite some confusion in the judgment. For instance, the finding at page 298 to the effect that:

> ***"This Court's construction of regulations on the Civil Aviation Accidents/Incidents Regulations is to the effect that there is no jurisdiction to suspend the AOC even before or after commencement of the investigation as well as the inquiry. There is only jurisdiction to recommend and or cancellation or endorsement and the authority to so recommend is vested only in the public inquiry court."***

Clearly, this is misdirection as the learned Judge seems to have been confusing the licence with the AOC. Regulation 12 applies to cancellation of the Air Services Licence and has nothing whatsoever to do with the AOC. The AOC can be suspended or revoked pursuant to Rules 57(1) and 57(2) of the Air Navigation Rules which is what happened in this case. Nonetheless, even with the mix-up and confusion of the regulation, the learned Judge still arrived at the right conclusion on culpability of the 2nd appellant which we have analysed earlier on in this judgment.

Before we discuss the issue of the award of damages and whether the respondent mitigated its loss, we find it necessary to say something about the manner in which the respondent was treated by the 2nd appellant.

The learned Judge made a finding to the effect that the respondent was not given equal treatment with other aviators as no AOC had been suspended or revoked before in spite of several accidents occurring before this incident.

It was not disputed that no other AOC had been cancelled in the history of the Civil Aviation in Kenya. **PW2, Captain Joe Mule Mutungi,** who was a professional career pilot since 1973, testified that no such drastic action had been taken against any operator although several aircrafts had crashed before with casualties. He gave five examples of such accidents which were within his personal knowledge yet no AOC had been cancelled during the 30 years he had been in the aviation industry in Kenya. According to this witness, to his knowledge and understanding, a suspended certificate is assumed to be awaiting further directions from the Director General after investigations and so it cannot expire.

We agree with this witness and the finding of the learned Judge that the respondent was not accorded equal treatment with other operators who had been faced with similar circumstances. He was clearly discriminated against, purely in our view, on account of the status of the passengers involved. There is no doubt that the "permanent" suspension of the respondent's AOC was capricious, punitive and retributive.

It was argued by the 2nd appellant that only one AOC was suspended and that AOC number 128B which was based in Lokichogio was still valid. It was nonetheless admitted that the said AOC on its own was of little use to the respondent given that its clients were basically in Nairobi and would have to start off their journeys from Wilson Airport.

Indeed DW1 himself admitted that:

> ***"It is obvious that by suspending the air operating certificate I would be grounding all his aircrafts. It was obvious that the suspension would cripple the plaintiff's business with immediate effect…."***

It was therefore, clear to the 2nd appellant that even with AOC No. 128B, the respondent was totally emasculated and could not carry out aviation business as before. In his submission, learned counsel for 2nd appellant, citing the arbitral proceedings at page 433 of the record, stated that the respondent admitted that he had been using the AOC No. 128B even as at the date of the arbitration. In the same

proceedings, the respondent said he tried to use the said AOC from Lokichogio to southern Sudan with little success and he had to give up.

It was from this perspective that the learned Judge proceeded to assess and award the damages she awarded to the respondent.

We now come to the issue of damages.

It is not disputed that the respondent suffered immense economic loss following the cancelation of its Air Operator Certificate by the 2nd appellant. We have also found that the said 'suspension' which ended up being permanent instead of provisional as provided for under Rule 57(1) and 57(2) of the ANR was unlawful. We have found culpability on the part of the 2nd appellant and it is therefore, liable to compensate the respondent by way of damages for the loss suffered.

In its plaint dated 12th November 2003, the respondent had claimed Ksh. 1,345,616,019.65 as special damages; general damages for unlawful suspension of the Air Operators Certificate/Licence; and aggravated, exemplary and punitive damages, costs of the suit and interest on all the above at the rate and for such period as the honourable court may deem fair.

At this point, our task is to re-evaluate the evidence tendered before the High Court on the issue of the said damages and make our own findings as to whether the said damages were proved.

According to the respondent, (at paragraph 16 of the plaint) before the AOC was suspended, it was carrying out a successful business with an annual turnover of USD 2.5 million. After the said suspension, the respondent suffered not just loss of that business but of its reputation and credibility in the business world. As we have stated elsewhere in this judgment, its entire fleet of aircrafts was grounded, the employees were rendered jobless and its entire business kingdom came tumbling down. The particulars of actual loss are enumerated as hereunder;

A. **ACTUAL LOSSES**

a. **REVENUE LOSS**

i. Existing Aircrafts -

Gross Turnover Average based on Audited Accounts

(Year 2002/2003) 7 months = Kshs. 115,913,040.25

(ii) Additional Aircraft –

9XR-EJ & 9XR – Minimum each 100 hours @

US$950 per month @ Kshs. 74.00 – (to the US Dollar) = Kshs.98,420,000.00

9XR-AB – Minimum 70 hours @ 1950 per month

@ Kshs.74.00 – (to the US Dollar) = Kshs.70,707,000.00

B. **CAPITAL LOSSES**

LOSS OF AIRCRAFT

i. (Aircraft lease purchase payments) – US$280,000.00 @ Kshs.78.50 –

(to the US Dollar) – 5Y-EMK = Kshs.21,980,000.00

ii. Payments to Field Air motives as installments for

Aircraft purchase – US$125,448 @ Kshs.78.50 –

(to the US Dollar) - 5Y-EMK = Kshs.9,847,668.00

iii. loss on Goodwill – US$181,608.5@Kshs.78.50 = Kshs. 14,526,271.00

(to the US Dollar)

Total Revenue and Capital Losses = Kshs.331,393,979.25

iv. **CONSEQUENTIAL LOSSES (5 years projection**

based on last year's audited accounts as at 28.2.00)

Annual Turnover – Kshs 198,709,069 X 5 years = Kshs. 993,540,345.00

Provision for growth 2% P.A. cumulative = Kshs. 20,681,695.40

Kshs.1,014,222,040.40

v. **Total losses = A+B+C** = **Kshs.1,345,616,019.65**

What we need to do now is to consider and see if these claimed damages were indeed proved. In her judgment, the learned Judge awarded the claimed damages but subjected the same to 5% reduction to 'cater for any margin of error, fluctuating market forces as well as competition from other aviators'.

The evidence on the assessment of damages was based on the evidence of the respondent herein and that of **PW3, Michael Johnstone Obiero K'Owino,** who was the respondent's Financial Controller as at the time of the crash. He, at the behest of the court, prepared exhibit 43 – which was a report on the financial status and projection of the respondent's profit/loss for four years. In preparing the said report, he used cash books, cheque books, invoices, ledgers, sales and purchase journals, profit and loss accounts and balance sheets and an array of other financial documents which had been prepared in the normal course of the respondent's business dealings.

According to PW3, when he joined the respondent company in July 2002, the same was in a healthy financial position in terms of making profits. Four years down the line, i.e. in July 2007 when he prepared the report in question, he said that the respondent had been grounded and it was not therefore making any profits.

In his analysis of the respondent's financial status for those four years, PW3 produced the audited accounts of the respondent, and also worked out a projection of the loss of income for over a period of five years.

We shall start from the premise that as at the time of the crash and subsequent cancellation of the AOC, all the respondent's aircrafts listed in the plaint were airworthy and were duly licenced for flying. After the crash and suspension of the AOC, all of them were grounded at no notice at all. According to PW1, and that was not challenged, all the aircrafts were also insured and out of the seven aircrafts four were fully owned by him. He told the court however, that following the shutdown of the business, he was unable to continue paying installments for some of the aircrafts which were on hire purchase. He said that some of them were automatically recalled while he subsequently sold others. He told the court that he had to sell some of the aircrafts at throw away prices in order to mitigate his losses. He told the court that what he was claiming was minimal based on costs of business as at the time of suspension of the

AOC but not as at the time of hearing the suit.

As stated earlier, the figures relied on by the court in assessing the damages were those prepared by PW3 and summarized in Exhibit 43. Before doing so, the learned Judge addressed herself to the need to put the evidence of PW3 to test to see if it could pass as expert evidence. We note that learned counsel for the appellant faulted the learned Judge for relying on the said evidence, saying that PW3 was an employee of the respondent and could not, therefore, have been impartial. The learned Judge noted however, as we do, that there was no other witness called by the appellants to controvert the said evidence. As we have also noted, the witness relied on the information contained in the several documents of accounts which had been prepared in the normal course of business. That being so, and given the fact that the said airplane crash and the subsequent suspension/cancellation of the AOC was not anticipated, there was no likelihood of doctoring the records. The only document that was prepared when the matter was in court was Exhibit 43 and that was a summary of all the other documents as requested by the learned Judge.

The learned Judge subjected the said report to the test as set out in the case of **Kimatu T/A Kimatu Mbuvi and Bros vs Augustine Munyao Kioko Nairobi CA 203 of 2001.** (Unreported)

The same requires that the evidence of an expert be subjected to careful consideration; that the same is considered alongside other relevant evidence on record; and that the court must decide on whether the same meets the credibility test and is believable.

In his testimony, PW3 testified that the said report did not need to be audited as it was compiled from the extracts from audited financial reports. He conceded that the respondent had unpaid debts of almost Kshs. 33 million.

From his report, however, the respondent had a turnover of Kshs. 15,629,518.00 in 2001 – 2002. In 2002 the records showed their turnover shot up by 804.76% to Kshs.141, 409,971; and in 2003, the same shot up to Ksh.198,708,069. There was a drop in 2004 to Kshs. 96,055,398 which was the year after the AOC was suspended.

Asked why in spite of these otherwise healthy looking accounts the respondent appeared to be making losses, PW3 stated that the income that was coming in was being used to service hire purchase charges for one of the leased aircrafts. That was the aircraft that was repossessed upon cancellation of the AOC notwithstanding the fact that the respondent had paid 63% of the installments.

The learned Judge who, unlike us had the opportunity to observe PW3 as he testified, was satisfied that he qualified as an expert witness, was truthful and was seized of sufficient knowledge in his area of expertise. She stated in her judgment:-

> ***"The court is satisfied that PW3 is a reliable witness. He also appears to be conversant not only with the figure work, but thorough knowledge of financial operations of the plaintiff. The manner he responded to questions both in the examination in chief and cross-examination confirmed his and PW1's assertion that he was qualified for the job, was conversant with the entries which go to confirm his assertion that most of them were made by him or by others under his supervision and thereafter verified by him. PW3 also withstood the test of cross examination."***

According to the trial Judge, the defence had not offered their own expert to rebut or otherwise challenge PW3's report and she therefore decided to rely on the same to assess the loss suffered by the respondent. She noted however, that the said evidence corroborated that of PW1.

In assessing the damages, the learned Judge started by applying the principle of '*restitutio in integrum'* which means restoring a party to its original position i.e. the position before the occurrence of the cause of action. In this case however, the learned Judge went further than this and even put into account the respondent's position three years after the cancellation of the certificate. The projection of business claimed was for five years but the learned Judge decided to reduce it to three years.

As stated earlier on, in doing so, she totally relied on the report compiled by PW3.

In his report, PW3 gave two methods of calculating the loss suffered by the respondent. In the first method, he considered the gross income vis a vis the capital losses. He arrived at a figure of Kshs. 2,786,953,741.06.

In the second method, he worked with the net operating profit/loss and capital items. This gave him the figure of Kshs.1, 408,309,742.06. He told the court that those two methods were the generally accepted standard for calculating loss. It was his view therefore, that the respondent's claim of Kshs.1, 345,616,019.65 was an understatement.

A reading of the proceedings before the trial court however, reveals that on cross examination of PW3, he was referred to some audit reports on the respondent. From the said audited reports e.g. the auditor's report for 1999, the respondent had undergone a loss of Kshs.2, 002,623. In 2000, the situation improved and the profits were in the tune of Kshs.2, 721,677.

According to PW3 most of the money they were making was going towards payments for the hire charges of the aircrafts. The respondent was about to complete payments for Aircraft 57 EMK when they were grounded. This therefore meant that the money that was being applied towards payment of the installments would have been converted into profits.

Whereas the appellants urged the court to consider the audit reports that showed that the respondent was not making so much profits, the respondent's contention is that the assessment of damages should not be pegged on the profit/loss accounts, but on the capital and revenue losses.

Indeed, in its plaint, the respondent did not claim loss of profits in its particulars of loss. It has claimed damages under the heads of revenue loss, capital losses, and consequential losses. The reason behind this is that following the wanton and unlawful suspension of the respondent's AOC, the respondent lost its business entirely and not just the anticipated profits.

It is our view therefore, that the position taken by the respondent and accepted by the learned Judge was the correct one as opposed to that taken by the appellants. We shall now proceed to consider each head of the claim and decide which ones have been proved and if so, to what extent.

Before we go to the computation of the damages, we shall consider the issue of mitigation of damages which was raised before the High court and also before this Court in this appeal. It was the appellants' submission that the respondent did not mitigate its damages. In their view, one way of mitigating damages would have been for the respondent to re-apply for the renewal of the AOC to enable it continue utilizing the other aircrafts. We do note, however, that the respondent wrote to the 2nd appellant a few days after the suspension of the AOC seeking its reinstatement but the request was denied. Subsequent engagement of the 2nd appellant by its advocates yielded no fruits. Not even the notice of intended prosecution could move the 2nd appellant to change its mind and so the matter ended up in court seven months later.

Also, as we have stated elsewhere in this judgment, the 2nd appellant never lifted the suspension and so the respondent could not apply for the renewal of a certificate that had not expired.

It was further urged by the appellants that the respondent could have used AOC No 128B and operate from Lokichogio airport. We believe we have covered this earlier. The respondent's clients needed to depart from Wilson Airport and not from Lokichogio. Clearly the respondent needed both certificates in order to operate. Furthermore, the Director General of the 2nd appellant is on record as having testified on oath to the effect that he was aware that the cancellation of AOC No 128 meant that the respondent's entire business was grounded to a halt. We also note that some of the companies the respondent had been doing business with e.g. Kenya Airways, cancelled their contracts following the cancellation of the AOC.

Also as noted by the learned Judge, the respondent had to send back one of its aircrafts which was on hire purchase from South Africa in order to avoid 100% loss, suffering instead 63% loss. It also sold other aircrafts at below market prices incurring huge losses in the process.

It is our finding therefore, that the respondent did all it could to mitigate its loss.

This brings us to the damages awarded by the learned Judge.

Under the head of Revenue Loss, the respondent claimed Kshs 115,913,040.25 for the seven months for the year 2002/2003. In his testimony on behalf of the respondent, Mr. Jibril gave a detailed account of how this amount was arrived at. He told the court that as at 23rd January 2003 the respondent had a gross turnover of 198 million US Dollars. One of its aircrafts was on lease by Kenya Airways who used to pay the respondent 66,000 US Dollars per month for every 100 hours. He told the court that Kenya Airways would pay the standard 100 hours @ 655 US Dollars per hour per month whether the aircraft was flying or not.

Kenya Airways terminated that lease without notice once the AOC was suspended because the lease was frustrated. According to the respondent, had the 2nd appellant given them notice, the respondent would have been able to sort out the lease before expiry and in the process avoid or otherwise mitigate the loss. The respondent testified that the said lease was valid for six months. He testified that he had by then paid 405,448 US Dollars for the cost of the aircraft but the same was recalled and so the respondent lost that amount. The company also lost the 14,000 US Dollars for a special insurance cover it had to pay for the said aircraft to be sent back to South Africa. That amount is also included in the amount claimed as loss.

This claim being one of specific damages, the same must be specifically proved. We observe, like the learned Judge did, that the loss is indeed particularised in the plaint. The learned Judge went ahead to find the same proved. This being a first appeal, as stated earlier on, we are not bound by the amounts and figures arrived at by the learned Judge. We are enjoined to revisit the said figures vis-à-vis the evidence of PW1 and PW3 and come up with the amounts which in our view were proved. We reiterate here, as stated elsewhere, that what is in issue here is not the profit and/or loss which the respondent was making but the loss of capital. It is in that light that we must assess the damages awardable to the respondent.

We also note that Exhibit 43 which was made from extracts of the audited accounts of the company is, in our view, reliable and offers a good basis or point of reference for us when making the awards. As noted in the report, the loss suffered by the respondent as calculated using the audited extracts of the books of accounts far exceeded the amounts of loss claimed by the respondent. We have tried to do our math but we agree that some of the amounts claimed are reasonable. We shall interfere with some of the figures where we find justification for us to do so but let be those figures that do not call for our intervention.

As far as the award for **Revenue loss** is concerned, we note that the gross turnover average was based on the audited accounts of year 2002/2003 for seven months. The amount of Kshs. 115,913,040.25 is therefore, justified subject to the adjustment of 5% done by the learned trial Judge, leaving a net sum of Kshs. 110,117,338.00.

This amount excluded the revenue loss in respect of three aircrafts namely, 9XR-EJ, 9XR-AL and 9XR-AB. From the evidence of PW1, PW3 and the accounting records produced in evidence, aircraft 9XR-EJ and 9XR-AL each used to fly an average of 100hrs per month charged @ USD 950 per hour@ ksh74(to the dollar) which would translate to kshs. 98,420,000.00 for the seven months period.

Aircraft 9XR-AB on the other hand was flying a minimum 70 hours @USD1950 per hour per month which amounted to kshs. 70,707,000.00 for the seven months. From the evidence tendered before the court it had a passenger capacity of 44 persons and a luggage capacity of 5.5 tons and that amount was therefore in our view not exaggerated.

The learned Judge found these amounts specifically proved after going through the records and evidence adduced in support thereof. We too find the same proved and we consequently allow the same subject to

the 5% reduction applied by the learned Judge.

The entire claim under the head of **REVENUE LOSS** is therefore allowed with the 5% adjustment as indicated earlier.

On **CAPITAL LOSSES**, we note that the respondent had claimed and was awarded kshs.21, 980,000 as loss for Aircraft lease purchase installments for 5Y-EMK. There were also other monies paid to Field Air Motives as installments for the same Aircraft amounting toKshs. 9,847,668 which amount is supported by exhibit 43 and the other financial records. These were the installments it had already paid with the expectation that it would own the aircraft upon completion of payment of the installments. The aircraft was repossessed and the installments were therefore lost and the expectation of owning the said aircraft was shattered. We find that payment in order.

We disallow the amount claimed as goodwill for the following reasons. Firstly, although the 2nd appellant's act of suspending the AOC permanently was unlawful, even if the correct procedure had been observed, it would still not have erased the fact that an accident had happened involving the respondent's aircraft and passengers had died. An average customer would have been more concerned with the occurrence of the accident as opposed to the validity, lawfulness or otherwise of the cancellation of the AOC. The respondent would therefore still lose business on that account and that would not be attributed to the 2nd appellant.

Secondly, since the respondent never went back to the business it was doing before the cancellation, it was not possible to ascertain how much goodwill it would have retained or lost had it reopened its business. We are not satisfied that loss on goodwill had been proved to the required standards. We therefore disallow that claim.

Under the head of consequential losses, we appreciate that although the respondent was not making high profits before the crash, the evidence availed to the court showed monumental growth in revenue. We also note that from the evidence adduced, the respondent would have completed paying the hire purchase installments for one of its aircrafts in a few months and this would have changed its profits projection considerably.

From the audited reports availed to court, the respondent's business was not doing very well by 2002/2003. For the year 2002, the profit was indicated at Kshs.1, 386,319.

The Court was nonetheless informed that the reason for this was that the money the respondent was making was going into offsetting the hire purchase installments for one of its aircrafts. Its profits would therefore have been much higher in the following years had it continued to trade. Our view of this matter is that since the respondent had been compensated for loss of capital and revenue, it should not have been awarded more money as annual turnover but for projected profits. Considering that the profits were on an upward trend compared to the previous years, we shall award the respondent Kshs. 50,000,000 as projected profit for three years which, according to the learned Judge was sufficient for the respondent to recover from the traumatic experience and loss it had gone through.

For the foregoing reasons, this appeal only succeeds in part. The same is partially allowed in the following terms:-

1. The appeal by the Honourable Attorney General – (1st appellant) succeeds and is hereby allowed with costs in this court and the High court.
2. The appeal by the 2nd appellant partially succeeds to the following extent.

REVENUE LOSS:

a. The award for **Revenue Loss** as awarded by the learned Judge of the High Court is undisturbed i.e.

(i) Gross turnover average based on audited accounts (year 2002/2003) 7 months Kshs.110,117,338.00

(ii) Additional Aircrafts 9XR-AL and 9XR-A Kshs. 93,499,000.00

(iii) Aircraft 9XR-AB Kshs. 67,171,650 (for the loss of the aircrafts).

(b) Capital Losses.

(i) Kshs. 21,980,000 (aircraft purchase installments paid)

5Y-EMK

(ii) Ksh. 9,847,668 Payments made to Field Air Motives as installments for the Aircraft purchase-5Y-EMK

(c) Consequential Loss is adjusted to Ksh. 50,000,000 for reasons given above.

(d) Aggravated damages Ksh10, 000,000.

TOTAL……..Kshs.362,615,656.

(e) The respondent is awarded 50% Costs of the suit in the High Court and in this Court as against the 2nd appellant.

(f) Interest at court rates on (a) and (b) from date of filing. In (c) and (d) from the date of judgment till payment in full.

Dated and delivered at Nairobi this 7th day of February, 2014.

W. KARANJA

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JUDGE OF APPEAL

D. K. MUSINGA

……..…….

JUDGE OF APPEAL

K. M'INOTI

…….

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR