



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL OF KENYA**

**AT NAIROBI**

**CIVIL APPLICATION 53 OF 2009 (UR 29/2009)**

**THE HON. ATTORNEY GENERAL**

**THE KENYA CIVIL AVIATION AUTHORITY .....**  
**APPLICANTS**

**AND**

**AFRICAN COMMUTER SERVICES LTD. ....**  
**RESPONDENT**

**(Application for stay of proceedings and execution from the judgment of the  
High Court of Kenya at Nairobi (Nambuye J) dated 18<sup>th</sup> December, 2008**

**in**

**H.C.C.C. NO. 1208 OF 2003)**

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**RULING OF THE COURT**

This is an application under **Rule 5 (2) (b)** of the Court of Appeal Rules for two orders, namely, that the execution of the judgment of the superior court, (Nambuye J.) in Nairobi *H.C.C.C. No. 1208 of 2003* delivered on 18<sup>th</sup> December, 2008 be stayed pending the lodging, hearing and determination of the intended appeal and that the proceedings in Nairobi *H.C.C.C. No. 1208 of 2003* pursuant to the said judgment be stayed pending appeal.

The applicants intend to appeal against the judgment of the superior court (Nambuye J) dated 18<sup>th</sup> December, 2008 whereby the superior court entered judgment against the applicants jointly and severally for a total sum of Shs.928,412,068/50 plus interest and costs for wrongful suspension of the respondent's **AIR OPERATIONS CERTIFICATE** (AOC) No. 128. The judgment of the superior court is voluminous. It runs to 312 pages and deals with various issues of both facts and law. For purposes of this application, we will give a synopsis of the facts and findings of the superior court as is necessary for the determination of the application.

The respondent African Commuter Services Ltd. was incorporated later on 5<sup>th</sup> November, 1996 as East African Commuter Services but changed its name to the current name. It had three directors and

shareholders – Ismael Mohamed Jibril, who was also the managing director; his wife; and M. I. A. International – a sister company. The M.I.A. International was acquiring and leasing aircrafts while the respondent used to operate them. The respondent applied for and was granted an Air Services Licence authorizing it to operate air services pursuant to regulation 3 of the Civil Aviation (Licensing of Air Services) Regulation made under the Civil Aviation Act (Chapter 394, Laws of Kenya as amended by the **Civil Aviation (Amendment) Act 2002** (2002 Act). The respondent further applied and obtained an Air Operators Certificate pursuant to regulation 6 of the **Air Navigation Regulations** which certificate certifies that the holder is competent to secure that the aircraft(s) is operated safely. These licences were obtained from the **Civil Aviation Board**, the predecessor of the **Kenya Civil Aviation Authority** (KCAA). The Air Operators Certificate (AOC) is granted for a duration of one year and is renewed annually. The respondent was granted AOC No. 128 for the year 2003 to operate from Wilson Airport which had an expiry date of 30<sup>th</sup> April 2003. The respondent was also granted AOC No. 128B for the year 2003 to operate from Lokichogi Airstrip which was expiring on 31<sup>st</sup> March, 2003. The respondent was operating seven air crafts registration Nos. 5Y EMK, 5 EMJ, 91-LCP (9XR – AL), 3D – ALH, ER – AJA; 9XR – AB and 9XR – EMJ. On 24<sup>th</sup> January, 2003 at about 5 pm. one of the respondent’s aircrafts Reg. No. 5Y-EMK make Gulf stream G159, was involved in an accident. It crashed as it was taking off for Nairobi at Busia Airstrip. At the time of the accident, the aircraft was carrying 10 passengers and three crew members. The passengers included Cabinet Ministers and Members of Parliament. The accident resulted in the death of three passengers and injuries to several others.

The accident was reported to Mr. Chirchir Arap Kuto – the Director General and Chief Executive Officer of KCAA who was on official duties in Mombasa at the time of the accident. He immediately assembled a search and rescue emergency centre. Later, after getting a preliminary investigations report from the technical officers that the planning of the flight to Busia had not been professionally conducted, he instructed S. H. Nyikuli, the Assistant Director of Air Operations to suspend the respondent’s AOC provisionally pending investigations. On the same day S. H. Nyikuli sent a hand written letter dated 24<sup>th</sup> January, 2003 by fax to the respondent’s offices in the following terms:

**“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 24<sup>th</sup> January, 2003, the Director General of Kenya Civil Aviation Authority has taken immediate action and suspended your Air Operator’s Certificate pending further investigations.**

**Please comply with these instructions with immediate effect.**

(signed)

**S. H. NYIKULI**

**For DIRECTOR GENERAL KCAA”.**

The Director General suspended the AOC under Reg. 57 (1) of the AIR NAVIGATION REGULATIONS, which provides:

**“57. (1) The Director may, where he considers it to be in public interest suspend provisionally (pending further investigations) any certificate, licence, approval, permission execution or other document issued or granted under these regulations”.**

Regulation 57 (2) is also relevant. It provides:

**“The Director may, upon the completion of an investigation which has shown sufficient ground to his satisfaction and where he considers 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”.**

By a letter dated 28<sup>th</sup> January, 2003, the respondent appealed to the Director General of KCAA seeking the lifting of the suspension but the Director General by a letter dated 4<sup>th</sup> February, 2003 rejected the appeal saying:

**“This is to inform you that this Authority is not in a position to re-instate, your Air Operator’s Certificate as you requested because, on the basis of available preliminary evidence, there is doubt in the competence of your organisation to secure the safe operations of the aircraft.**

**Please note that the action of suspending your Air Operator’s Certificate (AOC) is not intended to prejudice the outcome of the ongoing investigations and public inquiry into the cause of the accident. It is an action taken under powers conferred by regulation of the Kenya Air Navigation Regulations.**

**Therefore your, Air Operator’s Certificate Number 128 remains suspended provisionally (pending further investigations).**

**(name stamp.)**

**C. A. KUTO**

**DIRECTOR GENERAL”.**

The respondent’s aircrafts were grounded after the AOC was suspended. Within 2 – 3 days of the accident the Minister for Transport and Communications appointed a Commission of Inquiry led by Mr. Lee Muthoga, a Senior Counsel as Chairman to establish the cause or causes that may have led to the accident as the first term of reference. The Commission of Inquiry was also mandated to look into any other matter relating or consequential to the accident and make adequate appropriate recommendations. There were five assessors who were appointed to sit with the Chairman. The commission of Inquiry ultimately made a report dated 30<sup>th</sup> April, 2003. A copy of the report was produced at the trial.

The Commission of Inquiry made findings, *inter alia*, that the pilot did not have the experience of flying into and out of rough airstrips with G159 Gulf Stream that the flight was negligently planned and carelessly executed; that the runway was too short for the aircraft to successfully take off and that the accident occurred due to a pre-mature take off leading to a stall. The commission of Inquiry recommended, among other things, that the respondent’s AOC be suspended until the respondent complies with all KCAA’s requirements for issuance of AOC.

The Minister for Transport and Communications appointed the Commission of Inquiry pursuant to Regulation 9 (1) of The Civil Aviation (investigation of Accidents) Regulations, which provides:

**“Where it appears to the Minister that it is expedient to hold a public inquiry into the causes and circumstances of an accident, to which those regulations apply, he may direct that a public inquiry shall be held by such person as he may appoint for that purpose; and in any such case, any investigations being carried out by an inspector relating to the accident shall be discontinued”.**

An accident can be alternatively investigated by an inspector of accidents pursuant to Regulation 6 (2) which investigations are by Regulation 7 (2) required to be held in private.

On 21<sup>st</sup> November, 2003, the first respondent filed a suit against the two appellants claiming damages for wrongful suspension of the respondent’s AOC.

The plaint indicates that the Attorney General was sued on behalf of the Minister for Transport and Communications. It is clear from the plaint that the claim against the Minister was made on the basis that it is the Minister who suspended the first respondent’s AOC or influenced KCAA to suspend it. Paragraph 11 of the plaint summarises the claim against the Minister, thus:

**“The plaintiff avers that the Minister had no legal power to suspend or order for the suspension, cancellation of its certificate/licence and further unduly influenced the second defendant to do the same so as to cover up the illegal and whimsical ministerial directive”.**

However, the trial Judge considered and made a finding of fact that there was no documentary proof that the Minister in fact cancelled the first respondent’s AOC or influenced its cancellation.

By **section 3 (2)** of the Civil Aviation Act as amended by the 2002 Act the 2<sup>nd</sup> respondent is a body corporate with power to sue or be sued in its corporate name and was sued as such.

The cause of action against the KCAA is stated in paragraph 12 of the plaint, thus:

**“12. The plaintiff further avers that the suspension of its certificate/license by the second defendant was illegal, irregular, premature, arbitrary, capricious, unreasonable, oppressive and unmitigated abuse and misuse of authority for the following reasons.**

**(a) The requisite twenty eight days (28) days notice and the reasons for the suspension were not given contrary to regulation 12 of Civil Aviation (Licensing of Air Services) Regulations.**

**(b) The particulars of the decision to suspend the certificate/licence were not published in the Kenya Gazette.**

**(c) The rules of natural justice were not observed in that the suspension was effected before the plaintiff was heard in its defence.**

**(d) Since the plaintiff’s aircraft was not the first to be involved in an accident, the appointment of a Commission of Inquiry and the suspension of its certificate/licence before the conclusion of the inquiry amounted to a selectively harsh and unfair treatment and application of the law.**

**(e) The decision to suspend was in excess of jurisdiction and/or without jurisdiction”.**

The first respondent claimed “special damages” of Shs.1,345,616,019/65 comprising loss of revenue from three aircrafts; value of one aircraft, loss of good will and consequential losses. The first respondent further claimed general damages for unlawful suspension of AOC; aggravated, exemplary and punitive damages; a mandatory injunction to compel the first appellant to release the report of the Commission of Inquiry to the first respondent, and, lastly, a mandatory injunction to compel KCAA to issue or reinstate the first respondent’s AOC.

The appellants filed a statement of defence denying, *inter alia*, that the Minister suspended or cancelled the AOC; and that the suspension of AOC was unlawful. The appellant further averred that the plaint did not disclose a cause of action.

Mr. Athuok, learned counsel for the respondent submitted at the trial, *inter alia*, that the accident should have been investigated under the Civil Aviation (Investigation of Accidents) regulations which did not have provision for suspension of AOC pending investigations; that the application of Air Navigation Regulations, and Regulation 57 in particular, was unlawful and that the letter dated 24<sup>th</sup> January, 2003 suspending the respondent’s AOC was unlawful as the Director General had not delegated his authority to S. H. Nyikuli in writing as required.

Mr. Obwayo, learned Senior Principal State Counsel on his part, submitted at the trial, among other things, that the pleadings did not disclose a cause of action either in tort or contract; that the public inquiry was itself the investigation of the accident; that the Director General exercised his discretion properly under Reg. 57 (1) of Air Navigation Regulation; that the award of damages was not correct as the respondent was making losses in its operations and that the damages claimed were not based on audited accounts.

The superior court in its lengthy judgment made some of the following findings (*in our own words*):

- (i) That the Minister of Transport and Communications has no authority to suspend an AOC and did not in this case suspend the respondents AOC..
- (ii) That the letter dated 24<sup>th</sup> January, 2003 suspending the respondent's AOC is invalid, illegal, unlawful and a nullity in that the Director General had not delegated his power in writing to S. N. Nyikuli contrary to section 5B (1) which provides:  
**“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 present power of delegation”.**
- (iii) That the invalidity could have been cured if the Director General had issued a subsequent letter to the respondent ratifying the suspension.
- (iv) That the Director General's letter dated 4<sup>th</sup> February, 2003 confirming the suspension was not such ratification.
- (v) That those findings notwithstanding, although the Director General has jurisdiction under Reg. 57 (1) of Air Navigation Regulations to suspend an AOC pending investigations the suspension of the AOC was not in the public interest because the welfare of the respondents employees, the interests of the respondent and the interest of the entire civil aviation fraternity both national and international were not taken into account.
- (vi) That the Director General should have suspended the AOC under Regulation 57 (2) after the completion of the inquiry.
- (vii) The suspension of AOC was done prematurely because nothing in Reg. 57 (1) prevented the Director General to wait and gather sufficient information to enable him to make a sound reasonable and informed decision.
- (viii) The suspension of the AOC which had initially been treated as provisional was in effect a cancellation due to the prolonged nature of the suspension.
- (ix) The cancellation of AOC was harsh and selective because no evidence had been adduced by defence to show that a similar action had been taken before by KCAA or its predecessor.
- (x) “The public inquiry recommendation for cancellation of the respondent's AOC went contrary to the principles and ideals enshrined in annex 13 to the International Convention Civil Aviation (sic) as well as those of the parent convention which advocate equal treatment for all players in Civil Aviation Industry and stress that the purposes of an investigation is not to apportion blame for the accident but to avoid future accidents”.

The superior court after finding the applicants liable awarded a total of Shs.918,412,066/50 comprising of loss of revenue, loss of aircraft, loss of good will and consequential loss. The court in addition awarded Shs.10,000,000/= as aggravated, exemplary and punitive damages and granted a mandatory injunction requiring the 1<sup>st</sup> applicant to “officially communicate” the report of Commission of Inquiry to the respondent within 30 days of the judgment.

The discretion of the court in an application of this kind has to be exercised judicially and upon the established principles which require an applicant to satisfy the court both that the intended appeal or appeal is arguable; that is to say that, it is not frivolous, and, that, unless the order sought is granted, the appeal, if ultimately successful would be rendered nugatory.

On the merits of the intended appeal, Mr. Obwayo, submitted that the intended appeal is arguable and

identified several arguable grounds including the liability of the 1<sup>st</sup> applicant in view of the finding of the superior court that the Minister did not suspend the AOC; the legality of order of mandatory injunction against the Government; whether the signing of the letter dated 24<sup>th</sup> January, 2003 by S. N. Nyikuli for Director General amounted to a delegation of power or was merely a communication of the decision of the Director General; whether a suspension of AOC which expired by effluxion of time three months after suspension would be said to be indefinite or a cancellation; whether the operator is entitled to a hearing before the suspension of an AOC under Reg. 57 (1) of Air Navigation Regulations; whether consideration of “*public interest*” under Regulation 57 (1) includes consideration of individual interest of the operator etc and whether the award and assessment of damages was correct in the absence of independent audited accounts and when the respondent was making losses. Mr. Athuok, on his part submitted in essence that the issues being raised are not arguable as the law is very clear.

The applicants have filed a draft memorandum of appeal containing 45 grounds of the intended appeal.

The basis of the judgment against the applicants is the alleged unlawful suspension of the respondent’s AOC. It was common ground that the AOC which was suspended was to expire by effluxion of time on 30<sup>th</sup> April, 2003 and that the respondent did not apply for the renewal of the AOC at all. The respondent however, contended that the suspension extended the validity of the AOC until such time that the suspension would be lifted. It is also common ground that the Commission of Inquiry blamed the respondent, *inter alia*, for negligent planning and execution of the ill-fated flight and recommended the suspension of the respondent’s AOC.

It is apparent that the construction given by the superior court to Reg. 57 (1) and particularly to the phrase “*in the public interest*” and further by its dismissal of the recommendation of the Commission of Inquiry that the AOC of the respondent be suspended has far reaching consequences to the operation of the Civil Aviation Act.

Lastly, the enormity of the damages awarded calls for an inquiry of the correctness of the award.

On our consideration of the findings of the superior court in the light of the above observations, we have no hesitation in reaching the conclusion that the intended appeal raises several issues of fact and law fit for consideration by the Court.

Mr. Nicholas Enos Bodo, the Acting Director General of KACC deposes in the supporting affidavit, that if stay of execution is not granted the applicants stand to suffer as the amount involved is colossal being almost the whole annual budget of KCAA and twice the budget of the Attorney General; that the award is to be paid from the Consolidated Fund, a fund that is to be expended for the benefit of the public; that the Managing Director of the respondent confessed at the trial that respondent has no income; that if the applicants paid the decretal sum to the respondent and the appeal succeeded, the respondent will not be able to refund.

Ismael Mohamed Jibril deposes in the repaying affidavit, among other things, that by **Section 7F** *Civil Aviation Act*, the 2<sup>nd</sup> applicant enjoys almost impervious immunity against execution; that the applicants have not offered any security and that stay of execution, if granted, should be conditional on the applicants’ depositing the decretal amount in court as security. In addition, Mr. Athuok, submitted that it is not in the public interest to grant stay in view of the fact that interest accrues on the decretal sum at the rate of about Shs.400,000/= per day which should be avoided by paying immediately.

There was evidence at the trial that the seven aircrafts that the respondent owned no longer existed. In addition, the respondent does not claim to have any other assets and does not also dispute that it is incapable of refunding the decretal sum in the event the appeal succeeds.

In the circumstances, if the decretal sum is paid now the operations of the applicants will not only be severely affected but also the applicants will suffer substantial financial loss which would render the success of the appeal, if any, nugatory.

In **Attorney General vs. Equip Agencies** – Civil application No. Nai. 432 of 2001 (unreported) where the decretal sum against the Government was Kshs.186,2302,092/50 this Court said:

**“We think therefore, that it would cripple the operations of the Ministry of Health, if we were to refuse to grant a stay of execution of the order of the superior court ..... a situation that could cause more hardship than would serve the cause of justice”.**

The same principle with respect applies in this case.

In the final analysis, we allow the application to the extent that we grant a stay of execution of the judgment of the superior court in terms of the application. However, the application for stay of proceedings is not warranted and we dismiss it. The costs of this application shall be in the appeal.

**Dated and delivered at Nairobi this 12<sup>th</sup> day of June, 2009.**

**E. M. GITHINJI**

.....

**JUDGE OF APPEAL**

**P. N. WAKI**

.....

**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

.....

**JUDGE OF APPEAL**

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

DEPUTY REGISTRAR