



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**PETITION NO. 88 OF 2017**

*(Before Hon. Lady Justice Maureen Onyango)*

**KENYA AVIATION WORKERS' UNION.....PETITIONER**

**-VERSUS-**

**KENYA AIRPORTS AUTHORITY.....1<sup>ST</sup> RESPONDENT**

**DR. ELIZABETH KALEI.....2<sup>ND</sup> RESPONDENT**

**R U L I N G**

There are two separate applications for determination before me. The first is a preliminary objection dated 8<sup>th</sup> November 2017. It is filed by the respondents on even date. The grounds of preliminary objection are as follows –

1. The substratum of the application and petition is a dispute on a Recognition Agreement and Collective Bargaining Agreement dated 22<sup>nd</sup> April 2014 and 28<sup>th</sup> January 2015 between the petitioner and the 1<sup>st</sup> respondent which agreements, dispute and or issues matters in issue pending determination in this court on **Nairobi ELRC Cause No. 2204/2015, Kenya Aviation Workers Union -vs- Kenya Airports Authority**.
2. The allegations, matters or issues raised in the petition hereof particularly at inter alia paragraphs 50 – 70 of the petition and the affidavit in support of the petition and application are substantially similar to, raised, reliefs thereof and *sub judice* to a pending suit in this court in **Nairobi ELRC Cause No. 2204/2015, Kenya Aviation Workers Union -vs- Kenya Airports Authority**
3. The petition and application is vexatious, contrary to the overriding objective of this court as the parties, the subject matter, issues and reliefs in the application and petition are similar to the pending **Nairobi ELRC Cause No. 2204/2015, Kenya Aviation Workers Union -vs- Kenya Airports Authority** which parallel proceedings result in divergent decisions.
4. The matters raised in the petition are purely allegations of violation of private law obligations and not violations of fundamental rights or freedoms as alleged or at all.
5. The petition and application is therefore contrary to public policy and otherwise an abuse of court and legal process and should be struck with costs.

The second application is a notice of motion dated 24<sup>th</sup> November and 27<sup>th</sup> November 2017. It is filed under Section 3, 12 (3) (viii) of the Employment and Labour Relations Court Act, Section 3 and 9 of Kenya Airports Authority Act, Rule 17 of the Employment and Labour Relations Court Rules and all other enabling provisions of the law. The application seeks the following orders –

1. That the petition herein be consolidated with the cases/petitions pending in this court and set out below for effectual and complete adjudication of all the issues therein
  - a) **Nairobi ELRC Cause No. 2204/2015, Kenya Aviation Workers Union -vs- Kenya Airports Authority & Dr. Elizabeth Kalei;**
  - b) **Nairobi ELRC Petition No. 48/2015, Kenya Aviation Workers Union -vs- Kenya Airports Authority**
2. That the claim against and or the name of the 2<sup>nd</sup> respondent, Dr. Elizabeth Kalei be struck out from the proceedings herein.

3. That the court be pleased to make such further orders as may deem fit towards effectual, expeditious and complete adjudication of all issues in the disputes hereof.

4. That the costs of this application be provided for.

The application is supported by the affidavit of KATHERINE N. KISILA sworn on 24<sup>th</sup> November 2017 and the following grounds –

i) The substratum of the petition herein, **Nairobi ELRC Petition No. 88/2017** and **Nairobi ELRC Cause No. 2204/2015** is a dispute arising from or relating to Recognition Agreement dated 22<sup>nd</sup> April 2014 and Collective Bargaining Agreement dated 28<sup>th</sup> January 2015 between the parties herein in respect of SG-5 employees.

ii) The substratum of **Nairobi ELRC Petition No. 48/2017** is also dispute arising from or relating to Recognition Agreement dated 22<sup>nd</sup> April 2014 and Collective Bargaining Agreement dated 28<sup>th</sup> January 2015 between the parties herein

iii) The petitioner and claimant in the petitions and suit hereof relate to employees of the 1<sup>st</sup> respondent and alleged members of the petitioner and claimant.

iv) All the petitions and suit herein relate to same parties and pending before this court.

v) The petitions and the suit hereof are based on common set of facts, evidence, issues of law/fact and reliefs yet heard by different courts with same status and jurisdiction.

vi) Separation adjudication or isolation of the suits is contrary to the overriding objective of the court.

vii) Separate adjudication of the suits or matters hereof may lead to absurdities occasioned by parallel and contradictory determinations over common questions of law and fact by the same court.

viii) Separate filing of multiple petitions and suits raising common questions of fact and law is otherwise an abuse of court and legal process.

ix) The suit and or joinder against the 2<sup>nd</sup> respondent herein is a misjoinder, vexatious, incompetent, fatally defective and discloses no reasonable cause of action law against her.

x) All actions and or decisions made by 2<sup>nd</sup> respondent in respect to matters herein are for and on behalf of the 1<sup>st</sup> respondent.

xi) The suit and petition against the 2<sup>nd</sup> respondent is contrary to sections 3 and 9 of the Kenya Airports Authority Act.

xii) It is just and fair that the application be granted.

Essentially, therefore there are only two prayers in both the preliminary objection and the notice of motion being

1) The consolidation of **Nairobi ELRC Petition No. 88 of 2017** (this petition) with **Nairobi ELRC Cause No. 2204 of 2015 Kenya Aviation Workers Union -vs- Kenya Airports Authority & Dr. Elizabeth Kalei** with **Nairobi ELRC Petition No. 48 of 2015, Kenya Aviation Workers Union -vs- Kenya Airports Authority**

2) The striking out of the name of Dr. Elizabeth Kalei from these proceedings.

The grounds and arguments given by the applicant in both the preliminary objection and the notice of motion are that the issues in dispute in the two petitions and the claim are the same or substantially the same, that it would save on court's time to consolidate and hear them together, that it would avoid embarrassment of different decisions being made by different courts on the same issue and that the petitioner will not be prejudiced by the consolidation. It is further the respondent/applicant's argument that the filing of multiple suits by the petitioner is an abuse of court process.

In support of the application and preliminary objection, the applicant has relied on the following authorities –

1. **Kiama Wangai -vs- John M. Mugambi & Another [2012] eKLR**

2. **Muchanga Investments Limited -vs- Safaris Unlimited (Africa) Limited & 2 others (2009) eKLR**

3. **Joseph Okoyo -vs- Edwin Dickson Wasunna (2014) eKLR**

4. **Nyati Security Guards & Services Limited -vs- Municipal Council of Mombasa (2004) eKLR**

5. **Valentine Opiyo & Another –vs- Masline Adhaimbo T/A Ellyams Enterprises (2014) eKLR**

On the second issue, the applicant submits that Dr. Elizabeth Kalei is an agent of the 1<sup>st</sup> respondent and did not act in her personal capacity. It is submitted that the issues raised against the 2<sup>nd</sup> respondent are the same as those raised against the 1<sup>st</sup> respondent who is a disclosed principle.

The respondents prays that both the prayers in preliminary objection and the application be granted.

The petitioner opposes both the preliminary objection and the application and filed a replying affidavit of MOSS NDIEMA. The petitioner submits that the subject matter in the two petitions and the claim sought to be consolidated by the respondent are different, that Cause No. 2204 of 2015 has been concluded and is currently pending for determination of contempt proceedings against the respondent/applicant for failure to comply with court orders before another Judge of equal status and therefore cannot be consolidated with Petition No. 48 of 2017 and this petition. The petitioner submits that it will be prejudiced by the consolidation and further that the respondent has not filed any reply to petition no. 88 of 2017 (the instant petition) and the preliminary objection and notice of motion are intended to delay the conclusion of the petition.

On the prayer for striking out of the name of Dr. Elizabeth Kalei, the 2<sup>nd</sup> respondent, the petitioner submits that the 2<sup>nd</sup> respondent has been sued for personal violations and infringements of the constitution that need to be determined by the court and further that Sections 3 and 9 of the Kenya Airports Authority Act does not oust the jurisdiction of this court.

### **Determination**

As I have stated herein above, there are only two issues for determination. The first being consolidation of this petition with **Petition No. 48 of 2017** and **Cause No. 2204 of 2015** and the second issue being the striking out of the name of the 2<sup>nd</sup> respondent Dr. Elizabeth Kalei from the instant petition.

### **Consolidation of Petition 833 of 2017 with Petition No. 48 of 2017 and Cause No. 2204 of 2015**

Rule 23 of the Employment and Labour Relations Court (Procedure) Rules permits this court to consolidate suits where –

- (a) Some common question of fact or law arises, or;
- (b) It is practical and appropriate to proceed with the issues raised in the suits simultaneously.

My understanding of the issues in the present **Petition (No. 88 of 2017)** is that the petitioner is contesting the termination of both the Recognition Agreement and the Collective Bargaining Agreement signed between the petitioner and the 1<sup>st</sup> respondent. Its grounds for seeking the orders sought is that the termination of the Recognition Agreement and Collective Bargaining Agreement is in violation of Articles 27, 36, 41 and 47 of the constitution.

The issue in dispute in **Petition No. 48 of 2017** is the refusal by the respondent to engage in collective bargaining negotiations with the petitioner and refusal to deduct union dues on grounds of deregistration of the petitioner by the decision of this court, which has since been stayed by both the Court of Appeal and the Supreme Court.

The issue in dispute in **Cause No. 2204 of 2015** is failure of the respondent to deduct union dues from employees in Job Grade 5 and refusal to implement the Collective Bargaining Agreement in respect of the said employees. It is thus an issue of implementation of Collective Bargaining Agreement.

Although there is commonality of parties being **Kenya Aviation Workers Union** and **Kenya Airports Authority**, the subject matter in the suits are not the same and the evidence required to prove or disprove each of the cases as well as the facts in each of the cases are not the same. The questions of fact and the questions of law for determination in the two petitions and the claim are not the same.

As stated by the petitioner, **Cause No. 2204 of 2015** is pending for determination of an application for contempt against the respondent.

As was stated in the case of **Joseph Okoyo -vs- Edwin Dickson Wasunna [2014] eKLR**, also relied upon by the respondent, referred to by the applicant –

*“The principle is that consolidation of suit will be ordered where common questions of law or fact arise of such importance as to make it desirable that the whole of the matter be disposed of at the same time. This would mean that the suits are brought together with a view to disposing of them simultaneously, if the questions of law or fact to be answered in each of them are one or common and they can conveniently be disposed of simultaneously.”*

Again, in **Nyati Security Guards and Services Limited -vs- Municipal Council of Mombasa**, the court stated that –

*“The situations in which consolidation can be ordered include where there are two or more suits or matter pending in the same court where; -*

1. *Some common question of law or fact arises in both or all of them; or*
2. *The rights or relief claimed in them are in respect of, or arise out of the same transaction or series of transactions or*

3. For some other reason it is desirable to make an order for consolidating them.”

The issue in dispute in the suits sought to be consolidated being different, I find no merit in the application for consolidation and decline to grant the same.

**Striking out of the name of the 2<sup>nd</sup> respondent Dr. Elizabeth Kalei**

In the undated replying affidavit sworn by Dr. Elizabeth Kalei in response to the petition and application filed by the petitioner herein, she deposes that she is an employee of the 1<sup>st</sup> respondent and that the actions for which she has been sued were undertaken in the course of employment on behalf of the 1<sup>st</sup> respondent under directions and instructions of the 1<sup>st</sup> respondent.

She deposes that this is contrary to Sections 9 and 13 of the Kenya Airports Authority Act, vexatious and an abuse of legal process. She has not attached any instructions from the 1<sup>st</sup> respondent to that effect.

As has been submitted by the petitioner, it is a matter that ought to be determined by the court after assessing the evidence before it. The issues as framed in the petition are “whether the 1<sup>st</sup> and 2<sup>nd</sup> respondents” breached, violated or infringed the rights of the petitioner and the employees of the 1<sup>st</sup> respondent under Article 27, 36, 41 and 47 of the constitution.

Sections 3 and 9 of the Kenya Airports Authority Act, which the 2<sup>nd</sup> respondent relies on in the prayer to be removed from these proceedings, provide as follows

**3. Establishment and incorporation of the Kenya Airports Authority**

**(1) There shall be established an Authority to be known as the Kenya Airports Authority.**

**(2) The Authority shall be a body corporate with perpetual succession and a common seal and shall have capacity in its corporate name to sue and be sued and to acquire, hold and dispose of movable and immovable property for the purposes of this Act.**

**9. Management of the Authority Subject to this Act, the control and executive management of the Authority shall vest in the managing director.**

The two sections do not relate to liability of staff of the Kenya Airports Authority in suits similar to the instant petition or at all.

**Conclusion**

In conclusion, I find that the respondents have not persuaded the court that they merit the reliefs sought in both the preliminary objection dated 8<sup>th</sup> November 2017 and notice of motion dated 24<sup>th</sup> November 2017 with the result that both are dismissed with costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13<sup>TH</sup> DAY OF APRIL 2018**

**MAUREEN ONYANGO**

**JUDGE**