REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NO. 900 OF 2014

(Before D. K. N. Marete)

BLUEBIRD AVIATION LIMITED.....CLAIMANT

VERSUS

MATHEW NJAE KEARIE.....1ST RESPONDENT

DAC AVIATION (EA) LIMITED.....2ND RESPONDENT

JUDGEMENT

This matter was originated by a Memorandum of Claim dated 27th May, 2014. The issues in dispute are therein cited as;

1. *Is the 1st Respondent guilty of breach of contract?*

2. *Was the Training Bond Agreement dated 10th May, 2013 valid and enforceable?*

3. *Did the 1st Respondent breach the terms of the Training Bond Agreement?*

4. *Has the 2nd Respondent interfered with the Claimant's business by unlawful means?*

5. *Did the 2nd Respondent knowingly and intentionally induce the 1st Respondent to breach his contracts with the Claimant?*

6. *Was the 2nd Respondent justified to induce the 1st Respondent to breach his contracts with the Claimant?*

7. *Is the 2nd Respondent liable for the tort of the inducement of breach of a contract?*

8. *Is the 2nd Respondent guilty of the tort of the inducement of breach of contract?*

9. *Has the Claimant succeeded in his claim and what remedies are available?*

The 1st respondent in a First Respondent's Statement dated 27th June, 2014 denies the claim and prays that this be dismissed with costs.

The 2nd respondent in a 2nd Respondent's Statement of Response dated 29th March, 2016 denies the claim and prays that this be dismissed with costs.

The claimant in a Reply to the First Respondent's Defence dated 19th February, 2015 counters the 1st respondent's defence by *inter alia* a reiteration of his case.

The claimant in a Reply to the 2nd Respondent Response dated 18th April, 2018 counters the 1st respondent's defence by *inter alia* a reiteration of his case.

The claimant's case is that by a letter of appointment dated 19th January, 2012 or about 1st February, 2013, the 1st respondent commenced employment as an avionics engineer in the claimant's aircraft maintenance Engineering Department. His monthly salary was Kshs.277,703.00.

The claimant's further case is that the employment contract *inter alia* provided for a three (3) months notice or payment of three (3) month's salary in lieu of notice.

The claimant's other case is that while in the employment in the 1st respondent, it enhanced its fleet by introducing the latest Dash 8Q400 as a first airline to do this and thus required training of her staff on this locally and abroad. This is as follows;

> *7. That vide a Training Bond Agreement ("Bond Agreement") dated 10th May 2013m the Claimant agreed to arrange and sponsor the 1st Respondent for a training course and the 1st Respondent agreed to apply himself to learning and undertake a specialized maintenance initial court for Dash 8 Q400 aircraft conducted by Flight Safety International, Toronto, Canada, based on mutually agreed covenants (see Annexure 2). The training course commenced on 20th May 2013 and ended on 14th June 2013. The 1st Respondent was issued with a certificate after completion of his training course (See Annexure 3).*
>
> *8. The Bond Agreement was supplemental to the contract of employment. The pertinent terms of the Bond Agreement were as follows:-*
>
> *a) The 1st Respondent was to stay in the employment of the Claimant for a period of three (3) years ("Bond Period") to enable the Claimant to recoup its investment; and*
>
> *b) That should the employment of the 1st Respondent with the Claimant terminate at a time within three (3) years of the commencement of his training he would reimburse and make good to the Claimant the cost of the training.*

The 1st Respondent was not required to make any payment or reimbursement to the claimant as long as he stayed in her employment for the duration of the bond period. On 31st October, 2013, the 1st respondent abruptly resigned from the claimant's employment vide a letter of the same date. This was without notice or pay in lieu. She puts it thus;

> *12. The claimant avers that at the time of the 1st Respondent's abrupt resignation, he was earning a monthly salary of Kenya Shillings Three Hundred and Forty Eight Thousand Six Hundred and Eleven (349,131/=). The Claimant further avers that the 1st Respondent was well remunerated and his monthly salary increased over a short period as follows;*
>
> *i) From 1st February 2012.....Kshs.277,703/-*
>
> *ii) From 1st January 2013.....Kshs.306,274/-*
>
> *iii) From 1st July 2013.....Kshs.349,131/-*
>
> *PARTICULARS OF BREACH* (of contract)
>
> *i) Terminating the contract of employment*
>
> *ii) Terminating contract of employment without notice*
>
> *iii) Failing to issue three month's notice to terminate the contract*
>
> *iv) Failing to pay the Claimant the equivalent of three months' salary in lieu of notice.*
>
> *PARTICULARS OF BREACH* (of Bond)
>
> *i) Terminating the contract of employment without notice or payment in lieu or payment in lieu of notice.*
>
> *ii) Terminating Bond of Agreement without notice.*
>
> *iii) Failing to issue three month's notice to terminate the Bond Agreement.*
>
> *iv) Failing to serve the Bond Period of three years.*
>
> *v) Failing to reimburse the cost of training being USD30,000 and within 30 days of demand.*

The 2nd respondent operates next to the claimant's premises and their respective employees have casual interaction.

The claimant's further case is that the aviation industry in Kenya by norm and usage requires that an airline operator has to obtain clearance from the previous employer before employing somebody from other firms. In the instant case, the 2nd respondent immediately engaged the services of the 1st respondent without obtaining the requisite clearance for the claimant: a breach of the terms of the charter and trade and norms of usage of the aviation industry. This is illustrated as follows;

> *20. The Claimant states that the 2nd Respondent knowingly and intentionally induced or procured the 1st Respondent to break his*

contract of employment and the Bond Agreement with the Claimant in order to obtain his services for itself to the economic detriment of the Claimant. The 2nd Respondent purposed and intended the breach.

21. In a blatant case of poaching, the 2nd Respondent instead of training its own engineers illegally offered inducement to the 1st Respondent and lured him away from the Claimant thus breaching the 1st Respondent contract with the Claimant.

22. The 2nd Respondent was aware of the fact that the 1st Respondent had an existing contract with the Claimant.

The claimant has suffered and continues to suffer loss and damages as a consequence of the actions of the respondent and claims these jointly and severally. The two connived to cause economic injury to the claimant this amounting to civil conspiracy.

She prays as follows;

a) Declaration that the 1st Respondent unlawfully terminated the Contract of Employment.

b) Declaration that the 1st Respondent unlawfully terminated the Training Bond Agreement.

c) Declaration that the unlawful terminations were caused induced and/or contributed to by the 2nd Respondent.

d) An order that the Respondents pay the Claimant sum of Kshs.1,047,393/- being the three months' salary in lieu of notice.

e) An order that the Respondents to reimburse the claimant the training cost in the sum of US Dollars Thirty Thousand (USD30,000) as per the Training Bond.

f) General damages against the 2nd Respondent.

g) Cost of the suit.

h) Interest on d, e, f and g at court rates until payment in full.

i) Any other relief that his Honourable Court may find fit.

The 1st respondent's further case is one of a denial of the claim.

The 1st respondent's further case is that by virtue of attesting the signing of the Training Bond, these are not eligible to represent the complaint as it offends the Advocates Practicing Rules.

The 1st respondent's other case is that Bond was signed one month after the training and cannot therefore operate retrospectively. He further denies appearing before Biriq, Advocate who purports to witness the 1st respondent's signature or that the tenure of the Bond was explained to him. The 1st respondent states that the said document was given to him to sign by the Technical Director of the Complainant and that the said advocate was not present as purported and the said execution was obtained through coercion.

The 1st respondent further avers that at initiation, this training was intended to be in Canada but he was along the way trained at his work station. This renders the amount of monies demanded unconscionable. It amounts to unjust enrichment on the part of the claimant. He puts it thus;

9. The First Respondent further avers that the Complainant was in breach of the contract of Employment and the said Bond in that:-

a) The Complainant kept on holding and delaying the First Respondent's Salary;

b) The Terms of the employment required the First Respondent to service Dash 8Q400 but the Complainant widened the scope to service and maintenance of other aircrafts without commensurate remuneration.

The 2nd respondent's case opens with a catalogue coterie of issues for determination. This is a quiet unusual way of frame up. These are;

1. Did the 2nd Respondent, by offering the 1st Respondent employment, knowingly and intentionally induce the 1st Respondent to breach his contract with the Claimant?

2. Is there any charter, norm and/or usage in the aviation industry that required the 2nd Respondent to seek clearance from the Claimant before employing the 1st Respondent?

3. Is the Claimant stopped by its own past conduct from claiming any rights arising from the alleged and/or any charter, norm and/or usage in the aviation industry that required the 2nd Respondent to seek clearance from the Claimant's business by unlawful means?

4. Did the 2nd Respondent, by offering the 1st Respondent employment through a competitive application process, interfere with the Claimant's business by unlawful means?

5. Is the Claimant's claim against the 2nd Respondent an embarrassment to the 2nd Respondent and an abuse of process?

In sum, the 2nd Respondent submits that:

a. Being a non-party to the contractual relations between the Claimant and the 1st Respondent; and

b. There being no privity of contract between the 2nd Respondent and the Claimant; and

c. Being that the Claimant's claim is solely based on contractual relations between it and the 1st Respondent, and

d. There being no charter and/or trade and/or norms of usage in the aviation industry that required the 2nd Respondent to seek and/or obtain clearance from the Claimant before employing the 1st Respondent; and

e. The 2nd Respondent having lost five of its employees to the Claimant without ever being requested for clearance by, or without granting any clearance to, the Claimant; and

f. Having advertised the position, in the local dailies, to which the 1st Respondent was subsequently competitively recruited to;

The matter came to court variously until 16th October, 2018 when the parties agreed on a disposal and determination by way of written submissions.

The issues for determination therefore are

1.Whether the claimant "kept on holding and delaying the 1st respondent's salary and whether the 1st respondent salary was paid 'haphazardly and erratically' (1st respondent's statement)?

2. Whether the training bond between the claimant and the 1st respondent is valid and binding *inter partes*?

3. Whether there was privity of contract between the claimant and their 2 nd respondent?

4. Whether the claimant is entitled to the relief sought?

5. Who bears the costs of this claim?

The 1st issue for determination is whether the claimant "kept on holding and delaying the 1st respondent's salary and whether the 1st respondent salary was paid 'haphazardly and erratically' (1st respondent's statement)? In her written submissions dated 29th October, 2018, the claimant answers this in the negative and therefore holds and submits that the contract between herself and the 1st respondent was executed properly and normally and therefore cannot have been the causative or excuse for the 1st respondent's abrupt resignation from his employment with the claimant. This is demonstrated in the witness statement of Noor Maalim Adan (the claimant's head of safety and quality manager.)

The claimant also ousts the possibility that the 1st respondent resigned from employment on grounds of having been made to service and maintain other types of aircrafts as opposed to the Dash 8Q400 aircraft for which he had been contracted and employed to service. Again, she deems this as a mere excuse for his resignation and breach of contract.

On the issue of delayed and haphazard mode of payment of the claimant's salaries, the claimant denies the same. The claimant's submissions outline a schedule of payments of salary which outrightly contradicts the allegations of the 1st respondent on the same. It is her ultimate submission that these allegations by the 1st respondent are intended to justify his departure from work and are in bad faith and utterly false.

The respondents do not seem to address this issue for determination whatsoever.

I find the case of the claimant plausible and convincing in the circumstances. There is no evidence of frustration of contract on grounds of delayed salary payments or uncontracted and unconventional allocation of duties to the 1st respondent. It would appear that the 1st respondent is merely forging and coining a defence to suit the circumstances of his case. It cannot be true as is ably demonstrated by the claimant. And this answers the 1st issue for determination.

The 2nd issue for determination whether the training bond between the claimant and the 1st respondent is valid and binding *inter partes*. The claimant submits existence of a bond *inter partes* with the 1st respondent. This was supplemental to the contract of employment and had terms as follows;

a) The 1st Respondent will be bonded for an amount of United States Dollars Thirty Thousand (USD 30,000) ("the training cost")

b) The 1st Respondent was to stay in the employment of the Claimant for a period of three years (the "Bond Period") to enable the Claimant to recoup its investment.

c) That should the employment of the 1st Respondent with the Claimant terminate at a time within three years of the commencement of his training, he would reimburse and make good the Claimant's cost of the training.

This bond was pegged on the 1st respondent's continued stay in the claimant's employment for the duration of the bond period. The abrupt and irregular resignation from employment by the 1st respondent therefore occasioned a breach for which the said respondent should be contractually held liable.

The claimant further enjoins the 2nd respondent to the liability on the bond on grounds that her hire and employment of the 1st respondent was an intentional inducement by the 2nd respondent to the 1st respondent to break his contract of service with the claimant. This therefore imposes joint liability for the training costs of the 1st respondent by the claimant.

The claimant in buttressing his case relies on the authority of **Walker v. Cronin, 107 Mass. 555 (1871)**, where the court observed as follows;

"Everyone has an equal right to employ workmen in his business or services; and if, by the exercise of his right in such manner as he may fit, persons are induced to leave their employment elsewhere, no wrong is done to him whose employment they leave, unless a contract exists by which such other person has a legal right to further continuance of their services. If such a contract exists, one who knowingly and intentionally procures it to be violated may be held liable for the wrong, although he did it for the purpose of promoting his own business."

The 1st respondent in his written submissions dated 29th October, 2018 denies the efficacy of the bond of training. He enlists the following as grounds for such denial;

- The bond was signed on 10th May, 2013 while he was employed on 19th January, 2012. The bond therefore cannot have operated retrogressively.
- The bond was signed before Abdiwahid Biriq, advocate. This is denied. The said advocate did not file an affidavit to clear the air.
- The complaint offence the provisions of Rule 9 of the Advocates Practice Rules in that the documents giving rise to these proceedings were signed by Sagana Biriq & Company Advocates. They are not entitled to commence and prosecute this cause as they are potential witnesses in the same.
- The claimant has not tabulated and particularized his loss.
- Court will not enforce contracts for restraint of trade unless it is shown that these were entered into voluntarily.

The 1st respondent's case in regard to the bond is whimsical and escapist. He entered into a training bond and is bound by the same unless he proves that this was entered into under duress or undue influence. He cannot be heard to want to escape his contractual obligations through technicalities of the law. Article 159 (2) (d) of the Constitution applies. The training bond therefore applies and binds the claimant and the 1st respondent and I hold as such.

The 3rd issue for determination is whether there was privity of contract between the claimant and their 2nd respondent. The 2nd respondent submits a case of no privity of contract between herself and the claimant in that she was not privy or party to the contract entered into between the claimant and the 1st respondent through their letter of appointment dated 19th January, 2012. She is not a party to any rights or obligations entertained in this contract of employment. She is therefore cannot be held responsible for the outcome of the contract.

She further amplifies this as follows;

8. From the Letter of Appointment between the Claimant and the 1st Respondent dated 19th January 2012 and the Training Bond Agreement also between the Claimant and the 1st Respondent dated 10th May 2013, the 2nd Respondent was a party to neither the Employment Contract nor the Training Bond Agreement.

9. We humbly submit that the 2nd Respondent is not a party to the contract in which the 1st Respondent allegedly breached its terms, such contractual relations are exclusively between the Claimant and the 1st Respondent and such matters are outside the contemplation and knowledge of the 2nd Respondent.

10. …, it is bad law for the 2nd Respondent to be liable for some alleged breach of a contract in which it is not a party to.

The 2nd respondent further argues and submit that the claimant has not adduced any evidence of the existence and or subsistence of any norm or usage in the aviation industry that debars members from engaging employees from other (read rival) firms. This does not exist. It is, in any event, the burden of the claimant to prove her allegations. He who alleges must prove, is the statement of the law.

The 2nd respondent further submits a case of tit for tat in that herself and the claimant had previously engaged in a mission of poaching the 1st respondent from each other's employment and vice versa. The claimant cannot therefore be heard to complain for being beaten in the last laugh. It is a case of, serves you right.

I agree with the 2nd respondent on the twin issues of privity of contract and the absence of evidence of any norm or usage in the aviation industry in Kenya that binds members to seek authority from their colleagues in the event of engaging employees from them. I find as such.

From the foregoing analysis of the respective cases of the parties, it is clear that the bond and employment contract between the claimant and the 1st respondent only bound them. It did not involve the 2nd respondent. The claimant is therefore entitled to relief as against the 1st respondent alone. And this answers the 3rd issue for determination.

I am therefore inclined to allow the claim as against the 1st respondent and order relief as follows;

i. A declaration be and is hereby issued that the 1st respondent unlawfully terminated the Contract of Employment *inter partes*.

ii. A declaration be and is hereby issued that the 1st respondent unlawfully terminated the Training Bond Agreement.

iii. A declaration be and is hereby issued that the unlawful terminations were caused, induced and or contributed to by the 2nd respondent in her taking up the 1st respondent into her employment.

iv. That the 1st respondent be and is hereby ordered to meet and pay Kshs.104,739.30 being three (3) months salary in lieu of notice to the claimant.

v. That the 1st respondent be and is hereby ordered to meet and pay a sum of US Dollars Thirty Thousand (USD30,000) to the claimant being the contractual amount in contravention and breach of the Training Bond agreement.

vi. The cost of the claim shall be borne by the 1st respondent.

Dated and signed this ... day of ... 2018.

D.K. Njagi Marete

JUDGE

Delivered and signed this 20th day of December, 2018.

Maureen Onyango

PRINCIPAL JUDGE

Appearances

1. Mr. Moindi instructed by Sagana, Biriq & Company Advocates for the claimant.

2. Mr. Thuo instructed by D. K. Thuo & Company Advocates for the 1st respondent.

3. Mr. Olao holding brief for Mr. Mshweshwe instructed by Olive Mshweshwe Advocate for the 2nd respondent.