



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO.1621 OF 2015

CAPTAIN JORIM OWINO NYAMOR.....1ST CLAIMANT

CAPTAIN ABDI ALI HERSI IDLE.....2ND CLAIMANT

VERSUS

KENYA AIRWAYS LIMITED.....RESPONDENT

RULING

1. On 3rd December 2015, the Respondent filed their Application through Notice of Motion under the provisions of Rule 14(5) and 16(1) and (5) of the Court Rules and on 5th December 2015 filed Statement of Response to the Claim under protest. The application is premised on the prayers that the claim as filed in an abuse of the process of the Court and should be struck out. This application is supported by the annexed affidavit of Alban Mwendar and on the grounds that the Claimants are members of the Kenya Airlines Pilots Association (KALPA) and KALPA is the Respondent in ELRC Cause No.433 of 2015 seeking similar reliefs as herein and as such by filing this suit, the Claimants are in abuse of Court process.
2. In the affidavit of Mr Mwendar, he avers that he is the respondents Group Human Resource Director and that the Claimants are members of KALPA, their union, and where they made monthly contributions. On 23rd March 2015 the Respondent filed Cause No.433 of 2015 against KALPA challenging industrial action to protest the retirement of the Claimants together with other pilots on account of the circumstances which are the subject matter herein. On 16th June 2015, KALPA filed a memorandum of defence and counter-claim and therein listed the Claimants among the pilots on whose behalf they were acting and in the claim seek compensation on account of alleged unfair termination by way of redundancy.
3. Mr Mwendar also avers that the reliefs sought by KALPA on behalf of the Claimants in Cause 433 of 2015 are the same as herein and arise from the same facts. That to seek the same reliefs in two suits arising from the same facts concerning the same parties is an abuse of the process of the court.
4. In submissions, counsel for the Respondent stated that the Claimants herein were until their termination by the Respondent unionised and members of KALPA where they paid their dues. Their termination arose from the facts that the Respondent withdrew its Boeing 777 flights that the Claimants were flying and as a result their union instigated an industrial action that ended in the Respondent filing Cause No.433 of 2015. In defence, KALPA filed a defence and counter-claim and list the Claimants as grievants and on whose behalf they seek compensation. KALPA also support their case on the basis that

the existing CBA was violated and its members including the Claimants suffered and therefore ought to be compensated. To therefore file the current claim is duplication of suits as it is based on the same facts and seeking similar orders as under cause 433 of 2015. That the Claimants state they have since withdrawn from suit 433 of 2015 when they wrote to the Deputy Registrar of the Court but this is not evidence of withdrawal of suit as no order to this effect has been made by the court. the Claimants being grievants in Cause no. 433 of 2015 have no capacity to withdrawal that suit as KALPA is the claimant and has not moved the Court in that regard.

5. also submitted that under article 41 of the constitution, KALPA has the right to file suit on behalf of its members unlike the context or article 50 which is not correctly applied by the claimants. The Claimants as grievants in Cause No.433 of 2015 have more claims and can seek an amendment to include what would be required herein instead of duplicity and multiplicity of suits.

6. The Claimants filed their reply through the **Replying Affidavit** sworn by Captain Jorim Owino Nyamor who avers that the application by the respondents is full of untruths, half-truths and misleading and aimed as a ploy to buy time. That cause No.433 of 2015 has issues distinct from the suit herein. At the time of filing the current suit the Claimants had been terminated and never instructed KALPA to file Cause No.433 of 2015. Before filing this suit the Claimants realised that they had been mentioned several times by KALPA and prayers made on their behalf by their union in a counter-claim that had been filed. That the Claimants then wrote to the Court deputy registrar on 16th September 2015 with information that they were not part of cause No.433 of 2015.

7. Mr Nyamor also avers that under article 50(1) of the constitution, every person has a right to seek redress and file suit as herein. That where an employees' right has been violated this cannot be abrogated by the trade union to sue on their behalf. That the Claimants having directed the Court to be withdrawn from Cause No.433 of 2015 they have a right to set out their claims as herein. That abuse of the Court process only happens where a party has already filed a suit in Court and files another suit seeking precisely the same order but Cause No.433 of 2015 was filed on 23rd march 2015, a time way before the Claimants were terminated from employment on 15th April 2015 and 31st march 2015 for the 1st and 2nd Claimants respectively. Cause No.433 of 2015 was filed by the Respondent herein and the Claimants are not parties to that suit.

8. Mr Nyamor also avers that the subject in Cause No.433 of 2015 is whether the Respondent has a right to call a strike (KALPA) and whether the claimant (Kenya Airways Ltd) has a right to sack pilots and thus the rights of the Claimants herein is not only secondary or collateral in that suit but actually irrelevant. That the Court can determine the issues herein without reference to the other suit. That to continue in cause No.433 of 2015 would be detrimental to the interests of the Claimants where there are two sets of grievants, those employees still enjoying a salary and those terminated without a salary. That a trade union has a right to represent employees while in employment but the Claimants have since been terminated and thus stopped contributing to KALPA.

9. That the application by the Respondent is meant to delay the cause of justice for the claimant and should be dismissed.

10. Counsel for the Claimants also submitted that the Claimants are not party to Cause No.433 of 2015 as they have since served notices indicating that they should not be party to that suit. A notice and letter has since been filed with the deputy registrar as to move therein, their rights will not be addressed. The union filed cause No.433 and included the Claimants and it would be an injustice to the individual employee whose rights are not well articulated to be denied the right to file their claim as herein. Article 50(1) entrenches the right to access justice and fair trial and were a personal right has been violated the employee has the right to instruct an advocate of choice to submit their case. The union cannot take away such a right. Article 50 of the constitution cannot be limited.

11. Counsel also submitted that the Claimants are not in abuse of the Court process as their conduct is not such. The purpose of the application is to cause the Claimants not prosecute their right and be forced to do so through a trade union so as to defeat justice. That the issues raised herein go beyond what is

claimed under cause no. 433 of 2015 and to therefore file the current suit is a right that should not be taken away. That in some cases the union can represent its members but in certain circumstances such as herein, where the Claimants rights are likely to be adversely affected, they can secure their rights in a such as herein.

Determination

12. The abuse of the Court process is a matter taken so seriously in the administration of justice as with it a suit can be struck out. Where a claimant files a suit knowing that there is a similar suit pending in a Court of competent jurisdiction, the Court in **Leonard Onyancha versus Post Bank Credit Ltd (Kisumu) HCCC No.396 of 2000 [2000] LLR;**

[Where a claimant] swears a verifying affidavit to the effect that there is no other pending that amounts to an abuse of the Court process and the suit is struck out.

13. The rationale for this is to be found in **Standard Chartered Bank Ltd versus Jennifer Atieno Odok, HCCC No.120 of 2003** that;

It is not within the rights of parties to engage in a multiplicity of suits as the multiplicity of suits is meant to obstruct the due process of law and when a party shows design to abuse the powers of the court, such actions must be stopped to avoid unnecessary costs and waste of judicial time.

14. Therefore where a claimant has filed numerous suits which revolve around the same issues, such conduct speaks of bad faith and the Respondent is entitled to apply for orders to have the same struck out for being an abuse of Court process. This is so as to protect the dignity and authority of the court, which should not be flagrantly abused. See **Apondi versus Canuald metal Packaging, Reference 1454 [2005] 1 EA,** and the Court finding that;

A party is at liberty to choose forum which has the jurisdiction to adjudicate his claim, or chose to forgo part of his claim and he cannot be heard to complain about that choice after the event and it would be otherwise oppressive and prejudicial to other parties and an abuse of the Court process to allow litigation in instalments.

15. In this case therefore, the Claimants on 16th September 2015 each swore in a Verifying Affidavit in support of the claim dated the same day that there existed no other suit previously instituted and involving the same parties on the same facts as herein. Such are matters that the Court is now seized of and come into focus in an application such as the one filed by the respondent.

16. The above set out, I make reference to the provisions of Section 22 of the Employment and Labour Relations Court Act, a party to any proceedings may act in person or be represented by an advocate, an officer bearer or official of their union. As such, a party has the option to appear in person or through their union and or legal representative. However, which mode of appearance, Rule 5 of the Court (Procedure) Rules requires that the claimant or applicant and or petitioner must file their Verifying Affidavit in terms of Rule 4.

17. Under the Court Rules, Rule 6 regulate how matters filed under the provisions of the labour Relations Act should be filed. Under the Labour Relations Act, employee who are unionised join a particular trade union for the purpose of the union representing their collective interests. As such, where an employee opts to join a trade union on their own volition, such a trade union takes the responsibility of protecting the interests of such an employee. The provisions of the Labour Relations Act with regard to unionisation and the role of a trade union has its conceptual framework under the Bill of Rights under article 36 with regard to the right to association and under article 41 with regard to the right to unionisation thus;

18. Article 36 provides;

36. (1) *Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.*

19. With this right to association being a fundamental right, the constitution also provides under Article 41 (2) thus;

(2) *Every worker has the right—*

(a) ...

(b) ...

(c) *To form, join or participate in the activities and programmes of a trade union;*

20. It is therefore not lost that unionisation is a constitutional right and with it every employee can exercise this right and join a trade union. The Claimants admit that they were members of KALPA. They paid their union dues while in the employment of the respondent. Such unionisation is protected under the Labour Relations Act which recognises that;

... [this is an act of Parliament] to promote sound labour relations through the protection and promotion of freedom of association, the orderly and expeditious dispute settlement, conducive to social justice and economic development and for connected purposes.

21. Such is the rich foundation and preamble to the Labour Relations Act and to the purpose of unionisation and the power given to the freedom of association in labour relations. It cannot therefore be a good case for the Claimants to state that when their union KALPA filed cause No.433 of 2015 and listed them as grievants therein, that such a union did not have their mandate. Indeed in the Replying Affidavit paragraph 6, Captain Nyamor avers;

6. That just before filing this suit the Claimants realised that their names had been mentioned severally in the previously filed suit to the extent that some prayers were made on their behalf by their union representatives (KALPA) in a counter-claim that was filed in the previous suit.

7. that the Claimants quickly moved to disassociate themselves with the previous suit as it was not based on instructions given to the union and we wrote letters to the Registrar on the 16th day of September 2015 informing her that we are not part of the suit and we filed notices of withdrawal from suit on the 16th day of September 2015.

22. For the Claimants to thus state that the trade union only represents them while in employment and such representation ought to terminate with the termination of their employment is a misapplication of the law. The context of unionisation and indeed the purpose of Labour Relations Act with regard to the formation of trade union is precisely to secure the rights of employees and to ensure legal representation where a termination arises that is alleged to be unfair and or unprocedural with regard to the application of a collective agreement. Unionisation does not cease with termination of employment.

23. Where KALPA therefore filed a claim through their counter-claim under Cause No.433 of 2015 and listed the Claimants as grievants, therein, the Claimants ought to have set out their interests. As set out above in the case of **Standard Chartered Bank Ltd versus Jennifer Atieno Odok**, to file a new suit such as herein is a multiplicity of suits and such actions must be stopped as these only serves to increase costs and to waste judicial time.

24. That set out, an employee retains the primary right to set out their claim before this court. Such can be filed personally, through their legal representative or through their trade union. As such, the employee retains the right to articulate their case before this court. this is however not to be abused as where a trade union moves the Court and files suit, where the employee stated as a grievant is no longer keen to proceed as therein, their union, such as KALPA should receive such instructions and cause a withdrawal and or

amendment to the suit and have the grievants not interested removed. To proceed as the Claimants have done by directing communication to the Deputy Registrar and not their union under whose umbrella Cause No.433 of 2015 was filed is to lead to a multiplicity of suits and mar issues.

25. On the one hand the Claimants admit that indeed there exists suit No.433 of 2015 where they are listed in the counter-claim; that such suits conflate issues with regard to some employees who are enjoying orders as against others not similarly placed and hence the claimant's interests therein are not protected. Such averments I find to be selfish, not protective of any rights under article 50(1) of the constitution; and in essence will lead to the Court issuing orders on a matter with similar facts, based on similar parties and or issues, orders that may have double-implications upon the Respondent over the same employees or former employees.

26. Counsel for the Claimants submitted that;

... The issues raised herein go beyond issues in Cause No.433 of 2015. The Claimants claim herein relate to illegal decisions made against them by the Respondent ... the Claimants are not challenging that the union has no right to sue but in certain circumstances such a right can operate adversely against some grievants and this is one such case.

27. The rights of the claimant remain secured. They can maintain this claim as of right. However this cause can only proceed as such upon the claimant meeting the following conditions;

First, moving the Court through KALPA under Cause No.433 of 2015 as the Respondent and with a counter-claim, to have the two Claimants herein withdrawn from that suit;

Secondly, the claimant shall only be heard herein upon filing an order that they have no claim whatsoever under cause No.433 of 2015;

Thirdly, the Claimants have the option to withdraw the current suit and join under cause No.433 of 2015 and move through their Union KALPA as appropriate; and

Fourthly, noting the conglomeration of issues herein at the instance of the claimants, costs herein shall be to the respondent.

28. The Claimants should have settled their issues under Cause No.433 of 2015 before filing the current suit. To file this cause while the other suit still subsists, despite the unfettered right to file individual suits as herein, the mode of withdrawing from Cause No.433 of 2015 through letters to the deputy registrar as stated is not what a party enjoying legal representation should do. However well set out the rights under article 51(1) of the constitution should be enjoyed, due process is a cornerstone of our legal process. Where the Claimants enjoy their right to access justice, the Respondent too enjoy similar rights. Where procedure requires that a suit be filed, no other new suit before the same forum should be maintained and or filed before the previous one is complete.

In the interests of justice, noting the matters set out above, the application by the Respondent and dated 2nd December 2015 shall not be allowed save that the Claimants shall meet costs herein for the Respondent. The Claimants shall only move the Court herein upon confirmation of meeting directions set out above at paragraph 27.

Orders accordingly.

Delivered in open court at Nairobi this 27th day of January 2016.

M. Mbaru

JUDGE

In the presence of

Court Assistant: Lilian Njenga

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