REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.2133 OF 2015

KENYA AIRLINE PILOTS ASSOCIATION …………………………CLAIMANT

VERSUS

KENYA AIRWAYS LIMITED ……………………...…………..….RESPONDENT

RULING

1. On 3rd December 2015, the claimant filed their application through Notice of Motion seeking restraining orders against the respondent for declining, sending, failing and taking actions that affect the leave of its members. In reply, the respondent filed Notice of Preliminary Objections to the entire suit and proceedings seeking to have the suit struck out on the grounds that;

The suit is incompetent, irregular and defective for violating the following provisions

Article 159(2) (c) of the constitution

Section 15 of the Industrial Court Act [Employment and Labour Relations Court Act]

Section 73(1) of the Labour Relations Act 2007.

The entire suit is otherwise an abuse of process of court.

2. The respondent thus submitted that the court lacks jurisdiction to hear the dispute in line with the principles set out in the case of **Owners of the Motor Vessel "Lillian S" versus Caltex Oil (K) Limited (1989) KLR1** with regard to a court which is challenged with regard to its jurisdiction must stop and address the same before moving any step further. Also the respondent has relied on the case of **Mukisa Biscuits Co. versus Westend Distributors (1969) EA**, with regard to a party having to raise any objections at the earliest point and before proceeding on any other matter until the issues of law are addressed.

3. With regard to the challenge on jurisdiction, the respondent submitted that under paragraph 3 of the Memorandum of Claim the claimant has stated that the relationship between the parties is in accordance with the Collective Bargaining Agreement (CBA) and the Recognition Agreement. The issue in dispute is that the respondent violated the CBA with regard to the pilots checks, tests and training and that they have been forced to go on leave or been denied leave. That the respondent is in breach of the CBA which go back to 2012 and that there have been consultative meetings on the issue of leave. That the grievances in court relate to matters under the CBA and therefore, the Recognition Agreement sets out the procedure applicable in such a case which is agreed as that of conciliation. By filing the matter in

court, the claimant I in breach of the recognition Agreement which they are bound to observe.

4. The respondent also submitted that by the claimant filing the suit herein, they have ignored the Labour Relations Act at section 74 which lists matters that came be addressed by the court – redundancy and recognition. The Labour Relations Act was passed to ensure the voluntary settlement of disputes pursuant to Recommendation 92 of the ILO and to rush to court as herein and seek mandatory orders is to defeat the spirit of the ILO conventions and its recommendations.

5. The respondent relied on the case of **Rift Valley Railways Workers Union versus Rift Valley Railways (K) Ltd & Another [20130 eklr** where the court held that the union should have gone for conciliation instead of filing suit in court. in **TSC & Others versus KNUT & Another Civil Appeal No.196 of 2015** the Court of Appeal held that section 61 of the Labour Relations Act takes jurisdiction from the court and conciliation of parties to a CBA is imperative before parties can file suit in court. in this regard therefore, conciliation is mandatory. That even where parties come to court under a Certificate of Urgency and despite the issues in dispute herein arsing way back in 2012, there is no urgency and the claimant should have filed a dispute with the Minister before coming to court.

6. In reply, the claimant submitted that parties have a right to move court and seek interim relief. The claimant moved the court on the grounds of safety posed to pilots and passengers they fly and there was an inherent risk requiring immediate relief pending hearing of conciliation and pursuant to section 12(3) of the Employment and Labour Relations Court Acct. the claim is that there is a collective complaint seeking conservatory orders pending CBA negotiations and as held in **Kenya Union Commercial Food and Allied Workers versus Tusker Mattresses Cause No.1273 of 2014** where the court held that though internal disputes mechanisms had not been exhausted and the matter was properly before the court. In Kenya Airways versus KAPA Cause No.433 of 2015, the respondent filed suit before exhausting conciliation and therefore even in the instant case the claimant was right to move court and seek interim relief and therefore the objections raised are not valid as it should dispose of the suit but in this case there are issues pending determination.

7. The claimant also submitted that section 15(4) of the Employment and Labour Relations Court Act apply where the court can stay proceedings to allow parties to go for conciliation as the case was in **Rift Valley Railways Workers Union versus Rift Valley Railways (K) Ltd & Another [20130 eklr,** the court stayed proceedings to allow conciliation. The objections therefore should be dismissed to allow the claimant proceed with the application.

Determination

8. What is clear from the onset is that the claimant is not opposed to the issues raised by the respondent with regard to this matter going for conciliation. There was no specific objection/s to the issues raised by the respondent.

9. The sanctity of a CBA cannot be overemphasised here. This is a binding document to the parties as it is a contract as it were. It creates rights and responsibilities and parties to it are bound by its terms. The Labour Relations Act recognises a CBA at section 59(5) as an enforceable agreement. Like an employment contract, a CBA and its provisions is to be understood in its own meaning and the court will go out to uphold its terms unless a party alleges any other meaning to such terms which requires proof. It is therefore important here, on the grounds noted that the court lacks jurisdiction on the grounds that the same is ousted by the CBA herein to revisit the CBA between the parties.

10. However, before delving into the issue of the CBA as noted above, I refer to the provisions of article 162(2) of the constitution with regard to the mandate granted to this court. The court has original and unlimited jurisdiction over employment and labour relations matters in Kenya thus;

> *(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—*

(a) Employment and labour relations;

11. Such jurisdiction is constitutional. It is further expounded under section 12 of the Employment and Labour Relations Court Act. The court is therefore clothed appropriately to grant interim orders on matters relating to employment and labour relations disputes. Such cannot be taken away by a CBA or any other document outside the constitution or the law. My reading of the decision in **TSC & Others versus KNUT & another Civil Appeal No.196 of 2015** is that the court has jurisdiction over employment and labour relations matters but where there is a CBA that recognise conciliation, then under the provisions of section 61 of the Labour Relations Act, such a procedure should be undertaken before filing suit in court. This then does not necessary limit the jurisdiction of the court, rather it sets the procedural requirements for disputes resolution between parties to a CBA that should commence by reference to conciliation and upon such a procedure, then proceed to filing suit before this court. similarly, and as submitted by the respondent, matters that ought to go for conciliation pursuant to the provisions of section 74 of the Labour Relations Act are to be so referred save that urgent application on recognition of a trade union or redundancy can be filed in court under certificate of urgency.

12. Such therefore, creates a distinctive process of filing disputes before this court and to the Minister for conciliation purposes. In this case, the claimants admit that the matters in dispute relate to allocation of leave time, how to proceed on leave, leave not allowed, lack of adherence to approved leave timelines which have impacted on fair labour practices. That such matters on leave have been pending since 2012 unresolved. The claimant also admit that there exists a CBA between the parties where it is recognises the application of the law within its terms and conditions.

13. Noting the objections raised therefore, article 159(2) (c) of the constitution sets the guiding principles in the exercise of judicial authority where the court are court may refer disputes to alternative disputes resolution mechanisms but with due cognisance of the primary role of the court as the holder of the original and unlimited jurisdiction holder. Similarly under statute, section 15 of the Employment and Labour Relations Court Act, with regard to alternative disputes resolution mechanisms states;

> *(2) The Court may refuse to determine any dispute, other than an appeal or review before the Court, if the Court is satisfied that there has been no attempt to effect a settlement pursuant to subsection (1).*
>
> *(3) Subject to any other written law, a certificate issued by a conciliator accompanied by the record or evidence of the minutes of the conciliation meetings giving reasons for the decisions as arrived at by the conciliator, shall be sufficient proof that an attempt has been made to resolve the dispute through conciliation, but the dispute remains unresolved.*

14. The operative words here is *may* where applicable refer the matter for conciliation. The Labour Relations Court Act, therefore being the statute passed by Parliament to grant the court jurisdiction in terms of article 162 of the constitution, and my reading of the provisions of section 61 and 74 of the Labour Relations Act, the court *may* refuse to determine a dispute if it is satisfied that there has been no effort on the part of the parties with a CBA and have a dispute and have not applied any alternative disputes resolution mechanism set out in Part VIII [8] of the Labour Relations Act. The law here is set purposely to encourage parties to settle disputes through conciliation first before proceeding to court. Such promotes the spirit of the constitution at article 41 of the constitution which promotes fair labour practices and advances the terms of the CBA.

15. Reading all the cases set out by both parties, the issues in dispute and particularly the objections set out by the respondent, and the court having the jurisdiction to grant interim reliefs where such are warranted, for good order and respect to procedures that are good and promotes fair labour practices, it is also in good order to stay these proceedings and refer parties to conciliation. The court having issued initial order, such conciliation process shall remain monitored through a mention date.

I hereby invoke section 15(4) of the Employment and Labour Relations Court Act and refer the matter to conciliation. The matter herein is stayed. The court shall mention this matter in 60 days

to register settlement or otherwise order as appropriate. Mention on 23rd March 2016. The Registrar of the Court shall serve the Minister with this Ruling. Parties shall abide as directed by the Minister with regard to conciliation.

Each party shall bear their own costs.

Orders accordingly.

Delivered in open court at Nairobi and dated this 20th day of January 2016.

M. Mbaru

JUDGE

In the presence of:

Lilian Njenga: Court Assistant

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