



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO.1770 OF 2015

KENYA AIRWAYS PILOTS ASSOCIATION CLAIMANT

VERSUS

KENYA AIRWAYS LIMITED RESPONDENT

RULING

1. On 30th November 2015, the Claimant filed application through Notice of Motion and under the provisions of section 12(3) (i) and 16 of the Employment and Labour Relations Court Act and Rule 16(1) and (2) and 32 of the Court Rules seeking for orders that there be stay of execution of the orders made by the Court on 25th November 2015, review and set aside these orders to the extent that the Claimant members are compelled to sign the Code of Conduct and Ethics.
2. The application is based on the grounds that there is a mistake and error apparent on the face of the record when the Court directed in its orders that the Claimant members should proceed and sign the Code of Business Conduct and Ethics unconditionally as required by the Respondent. That the law is that parties are bound by their pleadings and the Court has no power to make orders outside the prayers made and to so order without the parties' consent is a nullity. There is an error on a substantive point of law.
3. Other grounds are that there is a clear case of a mistake and error apparent on the face of the record which ought to be rectified by review of the orders made as the order is in breach of the law and by the Court making the orders determined the matter in its entirety and therefore there is need for a review.
4. The Claimant has relied on various judicial authorities and principles set out by the Court of Appeal, the High Court and this Court in the following cases – **Chalicha F.C.S. Ltd versus Odhiambo & 9 others [1987] KLR 182; Nyamogo & Nyamogo Advocates versus Kogo [2000] KLR 3017; Jacqueline Kwamboka versus International Energy Technik Ltd, Cause No.2093of 2011; Kenya Shell Ltd versus Kileleshwa Service Station, HCCC No.594 of 2004; Atlas Copco Customer Service Finance Ltd versus Polarize Enterprises Ltd, HCCC No.32 of 2013; Baber Alibhai Mawji versus Sultan Hasham Ialji & Another, Civil App. No.269 of 2011; Maggie Mwauki Mtalaki versus The housing Finance Co. of Kenya, Petition No.70 of 2013; Stephen Omboga & 9 Others versus Spin knit Ltd, Cause no.813(N) of 2009; Godfrey Njunge Samuel versus G4S Security Services, Cause No 171 of 2012; John Nyangechi Ombati versus Callen Ongige Ombogo, HCCC No.98 of 2009.**
5. In response, the Respondent filed their Grounds of opposition on 19th January 2016. The grounds are that the application by the Claimant is an abuse of the Court process and does not conform to the law; the application does not disclose the impugned order; there is no error apparent on the face of the record

to be reviewed; the grounds relied upon for review do not satisfy statutory requirement for such a relief to be granted; and the Court is *fuctus*.

6. The Respondent has relied on various authorities and legal principles set out in the following cases – **John Gachau Gitonga versus Miss Nduta Mbile [2013] eklr**; **John Otieno & Pontus Katama versus Erica Kulumba t/a Rise and Shine Academy [2015] eklr**; **Mwinyi Hamisi Ali Kombo & 7 Others [suing through and on behalf of 401] versus Darius Mbela & 11 others [2008] eklr**; **Ricardo (EPZ) International Co. Ltd versus Transnational Bank Ltd & 2 others [2013] eklr**; **Muyodi versus ICDC & Another (2006) 1 EA**; **Nyamogo 7 Nyamogo Advocates versus Kogo (2001) 1 EA**; **Odd Jobs versus Mubia (1970) EA**; **Eastern and Southern African Development bank versus African Green Fields Ltd & Others (2002) 2 EA**; and **National bank of Kenya versus Ndungu Njau, Civil Appeal No.211 of 1996**.

Submissions

7. Both parties filed their written submissions. The Respondent filed their written submissions on 9th February 2016. The Claimant filed their written submissions on 15th February 2016. The claimant's written submissions are essentially a reply to the submission filed by the respondents.

8. The Respondent submit that the application filed by the Claimant is incompetent for want of form as it has been filed under the provisions of section 12(3) (i) of the Employment and Labour Relations Court Act and under Rules 16 and 32 of the Court Rules. Such an application should be made by submitting *Form 6* in the first schedule of the Rules which is a statutory form and must be accompanied by a memorandum in support of the application. Where the Claimant filed to file the application under the Civil Procedure Rules, the application should be supported by a supporting affidavit as held in **John Gachua Gitonga versus Miss Nduta Mbile [2013] eklr**. The Court has dismissed an application for review for being incompetent as it was filed without complying to the requirements of Rule 32 - **John Otieno & Pontus Katama versus Erica Kulumba t/a Rise and Shine Academy [2015] eklr**. The Rules of procedure cannot be relied upon to circumvent the Rules of the Court as held in **Dishon Ochieng versus SDA Church Kodiaga [2012] eklr**.

9. The Respondent also submit that the Claimant has failed to attach the Orders complained of and the subject of the application for a review dated 25th October 2015. The subject application giving rise to orders of 25th October 2015 asked the Court to stop the Respondent from demanding that the claimant's members execute the code as a condition precedent to receipt of benefits. The execution of the Code or not was the core issue for the Court to address. The Court then directed that the Claimant members should execute such a code and the Respondent should not deny them due benefits. In submissions, both parties addressed the issue of the execution of the code and rightly made a finding. The Court all facts presented upon it even the unled matters which the position is taken by the Court of Appeal in **Odd Jobs versus Mubia (1970) EA**. There is therefore no error apparent on the face of the record to warrant a review as set out in the case of **Miyodi versus ICDC & Another (2006) 1 EA 243**.

10. The Respondent also submit that the orders made herein were based on the interests of justice, discretion of the Court and on a balance of probabilities. Such were applied appropriately. Where there is an error in the application of the law, there exists the right of appeal. The application herein is an abuse of Court process made in an attempt to secure interlocutory orders stopping the Respondent from seeking the execution of the code by the Claimant members while they continue to enjoy their benefits as employees. The application is made to delay overriding objectives of administration of justice;

- on 2nd October 2015 the Claimant obtained interim orders preventing the Respondent from applying the Code or making its members execute it;
- on 23rd October 2015 the Claimant amended the application to include additional prayers requiring the Respondent to re-open the buddy program;
- on 30th November 2015 the Claimant obtained stay orders with regard to orders made on 25th October 2015;

11. The Respondent therefore concluded their submissions that the Court should therefore vacate orders made on 2nd October 2015 as the Claimant is not keen to follow orders made on 25th October 2015. The application herein should be dismissed with costs.

12. The Claimant on their part submitted that Rule 14(5) of the Court Rules provides that a party can object to pleadings but not on their form and the Respondent is therefore forbidden from raising the matters set out in their submissions with regard to the Claimant compliance to form under Rule 32 of the Court rules. The Claimant is relying on the Court of Appeal decision in **Isaac Nyoro Kimita & Another versus Republic Criminal Appeal No.187 of 2009**. In this case, the form of the application is a non-issue as the prescribed form does not envisage additional prayers.

13. The orders of the Court on 25th November 2015 went beyond declining the claimant's application and directed Claimant members to execute the Code making them do the very thing they sought prohibition orders against. The Court should have allowed or declined the grant of the orders sought but what the Claimant was left with were orders they did not pray for. The Claimant has relied on the case of **Chalicha FCS Ltd versus Odhiambo & 9 Others [1987] eklr**.

14. The Claimant also submit that based on the Court orders subject for review, the Court made final orders and thus an error apparent on the face of the record requiring the orders now sought by the Claimant. The Claimant came to Court seeking prohibitory orders but the Court issued a mandatory orders against the Claimant members. Such should be reviewed.

Determination

15. The Rules of procedure are meant to give meaning to due process. Such Rules give such party to litigation a fair chance to articulate themselves in a fair and open manner so as to enable the other party respond effectively and for the Court to be able to address all the issues in dispute in a manner that is coherent. The Rules of procedure therefore set out under the Civil Procedure Act and the Rules of procedure for this court, serve a purpose. Otherwise such Rules would have been unnecessary. Under the Civil Procedure Act and the Rules thereto, a party filing an application must support the same with an affidavit stating the facts leading and for purposes of filing such an application. Equally, the Rules of Procedure for this Court require any application filed before this Court to be supported by a supporting affidavit. Rule 32 in particular lower this requirement and require a party to file an application for review by attaching a Memorandum setting out the reasons and grounds for review. These I find are reasonable requirements that any party filing an application can follow. This is more so for a party enjoying legal representation. Failure to follow such Rules would amount to injustice.

16. The claimant's application is brought under the provisions of section 12 and 16 of the Employment and Labour Relations Court Act and Rules 16 and 32. An application seeking the orders set out under section 12(1) (i) of the Employment and Labour Relations Court Act must be supported by a supporting affidavit. This is also the case when a party relies on the provisions of section 16 of the Act. Also, an application seeking interlocutory orders and filed under Rule 16 must;

(5) A notice of motion shall state in general terms the grounds of the application and where the motion is supported by an affidavit, both the notice of motion and a copy of the affidavit shall be served.

17. These are basic requirements that an applicant must meet. However, where the application is based on Rule 32 of the Court Rules,

(4) An application under paragraph (3) shall be accompanied by a memorandum supporting the application and the Court shall proceed to hear the parties in accordance with section 26 of the Act.

18. In the case of **Samuel Sila Mwisu & 79 Others versus P.V.R. & K.V.K. Sastry Swift Truck Ltd, Cause No.1560 of 2010**, the Court had chance to address similar questions as herein with regard to

the application of Rule 32 of the Court Rules and held that;

... The requirement that a party seeking a review must attach the order subject of such review is important as under Rule 32 of the Industrial Court (Procedure) Rules outline the procedure, form and contents of an application for review before the Court. Reference to the provisions of Article 159 of the Constitution with respect to the Court addressing substantive justice and not being overly concerned with technicalities must be looked at together with the purpose and intentions of Rules of procedure as in the case of Rule 32 of the Industrial Court (Procedure) Rules which are intended to ensure a proficient and effective system and process by which matters and pleadings would be brought to Court. These are mandatory Rules and procedures and cannot be wished away in the civil process as this would cause confusion and confrontation and entirely disrupt the administration of justice. There is therefore good cause for such Rules and procedures. Justice in itself is not only to an alleged wronged party but equally to an alleged aggressor.

19. The above findings are given emphasis in the case of **Michael Njai versus Juan Torres, Cause No.1927 of 2013** where the Court held that;

*... Article 159 (2) (d) of the Constitution cannot be relied upon in the face of the specific provision of legislation or the Rules thereto. This is as held in the **Humphrey Nyagoe Makori versus Kenya Ports Authority, Misc. Application No. 6 of 2012**. The undue regard to technicalities under Article 159(2) of the Constitution does not remove the operation of Rules of Procedure as by law established*

20. The Application by the Claimant is therefore left bare. It has no memorandum in support or a supporting affidavit. Such requirements are regulated in law, such are to ensure that the other party in response is aware of all facts pertaining to an application and to enable their effective response. The provisions of the law particularly the Civil Procedure Act, the Employment and Labour Relations Court Act should be seen in their totality. The Rules thereto with regard to procedures applicable should not be separated and a party fixated on an exclusive word without having the whole context. The want of *form* cannot be substituted to avoid meeting a fundamental requirement to file an affidavit or a memorandum mandatory to an application. The changes to the law especially in employment and labour relations were with a view of making proceedings and procedures before this Court as simple as possible, to therefore require that a party conform with regard to application filed under Rule 32 of the Court Rules by filing form 6 is one such measure towards simplicity. The Claimant is represented and has advantage of knowledge of the application with regard to the Civil Procedure Act and the Rules thereto and the Rules regarding filing matters before this court.

21. However, in view of the Notice of Motion by the Claimant and the grounds set out, it is apparent that they are aggrieved by the orders made on 25th November 2015 and thus the effort to seek a review and setting aside to the extent that the Claimant members should not be compelled to sign the Code of Business Conduct and Ethics. This much I find the Respondent in their submissions have conceded that the orders made, having the impact of taking parties to the position they were at as of 2nd October 2015 should suffice. Without belabouring the fact, the analysis of the issues above, I make the following directions:

In the interests of justice, noting the application and Notice of Motion before court, orders herein made in the interim are vacated in their entirety, parties shall proceed and take hearing dates for the main cause.

Orders accordingly.

Delivered in open court at Nairobi this 25th day of February 2016.

M. Mbaru

JUDGE

In the presence of

Court Assistant: Lilian Njenga

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