



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.2127 OF 2015

KENYA AIRLINE PILOTS ASSOCIATION ...CLAIMANT

VERSUS

KENYA AIRWAYS LIMITED RESPONDENT

RULING

1. The respondent, Kenya Airways Limited, filed Notice of Preliminary objections on 14th December 2015 relating to the Claimant's application dated 3rd December 2015. The grounds of objection related to;

1. That the suit is incompetent, irregular and defective for violating the following provisions of the law;

Article 159(2) (c) of the constitution.

Section 15 of the Industrial Court Act 2011.

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

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

3. Both parties filed their written submissions.

3. The respondent submitted that the Claim filed by the Claimant sets out the dispute as relating to alleged violations to the parties Collective Bargaining Agreement (CBA); discontinuation of training; cancellation of training without due process; unfair labour practices; and discrimination directed at the Claimant members. That the parties have a Recognition Agreement setting out how both parties are to engage. The objections filed therefore related to the provisions set out under article 159(2)(c) of the Constitution that encourage alternative disputes resolution mechanisms as well as provisions pursuant to section 15 of the Industrial Court Act [Employment and Labour Relations Court Act] that incorporate such alternative dispute resolution mechanisms. That section 73(1) and 74 of the Labour Relations Act also require parties with a Recognition Agreement and a CBA to refer matters to conciliation before filing the same before the Court unless such matters relate to a redundancy or recognition.

4. The respondent also submitted that the objections raises as pursuant to principles set out in the case of **Mukisa Biscuits Manufacturing Co Ltd versus West End Distributors (1969) EA**. that the dispute before Court relate to the Recognition Agreement and the CBA and which agreements are of the nature that where parties disagree the matters are to be negotiated. The issues set out in dispute related to alleged breach of the CBA and as such, these are matters that parties can address by way of internal mechanisms

set therein by the parties before engaging the court. the Claimant filed suit before exhausting such mechanisms and by filing the suit failed to adhere to article 159(2)(c) of the Constitution as well as section 15 of the Employment and Labour Relations Court Act and the directions/requirements granted to parties under the provisions of section 73 and 74 of the Labour Relations Act.

5. As such the dispute is wrongly before the Court as the Claimant has not taken mandatory preliminary procedures agreed by the parties in the Recognition Agreement and CBA. That the suit should be struck out and the matter referred back to the parties as under clause 4(c) of their Recognition agreement.

6. The respondent has relied on the case of **KUDHEIHA versus Papillion Lagoon Reef [2014] ekr; TSC & Others versus KNUT, Civil Appeal No.196 of 2015; and KAPA versus Kenya Airways Limited, Cause no.2133 of 2015.**

7. The Claimant on their part submitted that the objections raise go contrary to the principles set out in **Mukisa Biscuits Manufacturing Co Ltd versus West End Distributors** as they are not based on the law rather on facts and despite the same being so framed under various law, there are matters that still arise that require a determination and cannot be disposed of as submitted. As such, the objections should be dismissed. That if the interim orders sought are not granted, the affected pilots will be left with uncertainty as to flight rosters for 2016 as they have not flown in 2015 and are awaiting directions from the respondent. The disregard for the CBA should be addressed immediately as the Claimant members have no other recourse and this Court has powers under section 12 of the Employment and Labour Relations Court Act to so address the orders sought under Certificate of Urgency and application by the claimant. Orders sought can be addressed even before the Court can direct as under section 15 of the Employment and Labour Relations Court Act.

8. The Claimant also submitted that the respondent is keen to delay justice contrary to article 48 of the Constitution and the alternative methods for dispute resolution proposed is for the Court to determine without encouraging delay to justice sought by the claimant. That there is a dispute between the parties and this ought to be addressed by the court.

9. The parties herein have a Recognition Agreement and a Collective Bargaining agreement. A Recognition Agreement in its nature is a special contract between an employer and a trade union as it sets out up a relationship between an employer and its employees through the trade union. The Agreement grants the trade union 'recognition' and an acknowledgement by the employer as the employees' representative of their Collective interests. Like a contract, the Recognition Agreement sets out how the relationship between the parties is to be governed. Therefore under it, the parties by mutual consent set out the terms to govern their relationship as held in **BIFU versus Maisha Bora Sacco Society Limited, Cause No.2298 of 2014.**

10. Therefore, when the parties herein entered into a Recognition agreement, the terms set out are to be respected by this Court unless such are shown to have been breached or entered contrary to the law. No such breach or illegality has been cited herein. The parties are therefore bound by its terms.

11. A Collective Agreement on the other hand, also creates a special relationship between the employer and the trade union for and on behalf of the employees and members respectively. This Agreement sets out the terms and conditions of employment for the employees and the employer in Recognition of the trade union as the employees' representative to negotiate these terms and conditions of employment. the sanctity of the Collective Agreement is thus given a lot of prominence by this Court as it must be agreed upon by the parties, analysed by the Minister and pursuant to section 60 of the Labour Relations Court, this Court must ensure that;

(6)The National Labour Court [Employment and Labour Relations Court] shall not register a Collective Agreement that –

(a) conflicts with this Act or any other law; or

(b) does not comply with any directives or guidelines concerning wages, salary levels and other conditions of employment issued by the Minister under the Labour Institutions Act.

12. Therefore, unlike any other ordinary contract or Agreement between parties, employment and labour relations occupies a special status in Kenya and the registration of a CBA with the Court gives such an Agreement the status of a judicial order as with it, it carries rights and obligations that must be met and once one party fails to oblige, the other party has a right to cause enforcement. Such an Agreement is therefore not to be taken lightly.

13. As set out by this Court in **KAPA versus Kenya Airways Limited, Cause No.2133 of 2015;**

The sanctity of a CBA cannot be overemphasised here. This is a binding document to the parties as it is a contract ... 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...

14. Both parties agree that the Collective Agreement between them create a forum for disputes resolution. Such terms are binding on the parties unless where a party is seeking to address matters set out under section 73 and 74 of the Labour Relations Court Act with regard a protected strike or lock-out; matters relating to an essential service or a dispute is filed under a certificate of urgency due to the need for the Recognition of a trade union, the dispute relates to a redundancy or the disputes relates to an essential service.

15. Such must however been seen with regard to the overall jurisdiction of the Court and the powers granted under the provisions of section 12 of the Employment and Labour Relations Court Act. Where a party files a dispute with regard to the preservation, conservation and or seeking restraining orders over subject matter and pending the hearing of the same, such, and as of right, the Court is to address as appropriate. An employer or employee cannot be locked out from this Court where in the interests of justice, interim orders are sought and where the Court finds a legitimate case, such interim orders are to issue pending further directions as appropriate. I make reference to **Said Ndege versus Steel Works Ltd, Cause No.158 of 2013 (Mombasa)** and the court finding that;

... In industrial relations, the parties are referred to as social partners who are expected to act in good faith towards and with each other. Being social partners the parties should not lightly go back on explicit promises made to each other whether registered or not.

16. In this case therefore, the Claimant moved the Court seeking urgent interim orders and upon assessment by the court, directions were granted. The Respondent appreciates that indeed there is a dispute with regard to allocation of leave to claimant members, such matters are addressed under the CBA and have been pending for some years now. There is therefore a legitimate cause that brought the claimant to court in the first instance. It is therefore upon this background that reference must be made to the objections now raised by the Respondent.

17. Article 159(2) (c) of the Constitution read together with section 15 of the Employment and Labour Relations Court Act are mutually reinforcing. They give emphasis to the need for parties to go through alternative dispute resolution mechanisms before filing a matter in court. The Collective Agreement sets out how the parties herein are to address any dispute arising through internal mechanisms before coming to court. Such I find to be reasonable and mutually agreed procedures that keep industrial peace. Such mechanisms of dispute resolution before reference to the Court are encouraged.

Noting there are no interim orders, and in reference to the parties Recognition Agreement at clause 4 and pursuant to the provisions of section 15(4) of the Employment and Labour Relations Court Act, the dispute herein is hereby referred to the Minister for conciliation. The matter herein is stayed.

Orders accordingly.

Delivered in open Court at Nairobi this 4th day of February 2016.

M. Mbaru

JUDGE

In the presence of:

Lilian Njenga: Court Assistant

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