



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 433 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 3rd February, 2016)

KENYA AIRWAYS LIMITED.....CLAIMANT

VERSUS

KENYA AIRLINE PILOTS ASSOCIATION.....RESPONDENT

RULING

1. The Application before Court is one dated 21.01.2016, where the Applicant seeks the following Orders:

1. *The Application be certified as urgent, its service be dispensed with at first instance and it similarly be heard ex parte in the first instance;*
2. *That pending the granting of the Order sought under Paragraph 3 below and pending the hearing and determination of this instant application inter partes the injunctive Orders which were issued by this Honourable Court on 14.10.2015, against the dismissal from employment of six (6) members of the Applicant Association be extended as from 20.1.2016.*
3. *This Application be placed for directions and further determination before the Learned Justice Hellen Wasilwa on a priority basis.*
4. *That this Honourable Court be pleased to review or set aside the Orders made on 20.1.2016 by this Honourable Court, the Learned Justice Hellen Wasilwa, and which Orders were inter alia to the effect that the main cause be heard in absence of the applicant (the Respondent in the main cause), the main cause be marked as closed and the Claimant do proceed to file its final submissions on the main cause.*
5. *That costs of this application be provided for.*

2. Which Application is based on the grounds that:

1. *The hearing of the main cause herein commenced on 20.1.2016, and owing to the failure (and which failure was wholly and sincerely inadvertent and is deeply regretted) by the Applicant's Advocates and the Applicant's witnesses as set out below, this Honourable Court ordered the Claimant present its case and upon conclusion thereof ordered the main suit be marked as closed without the benefit of hearing testimony and/or receiving evidence from the Applicant. This Honourable Court also ordered that the Claimant do proceed to file and serve its final submissions.*

2. *The Ex parte orders as above mentioned were made in light of the failure by the Applicant's advocates – Messrs. Daly & Figgis Advocates and the Applicant's witnesses to attend Court on 20.1.2016.*
3. *The reasons for the non-attendance (and which failure was wholly and sincerely inadvertent and is deeply regretted) by the Applicant's advocates and the Applicant's witnesses before this Honourable Court on 20.1.2016 are as follows:-*
 - a. *When this matter came up for mention on 14.10.2015, it was adjourned for hearing of the main cause to the new term in the year 2016.*
 - b. *The Applicant's advocate in personal conduct of the matter Mr. George Muchiri understood and recorded the hearing date given by this Honourable Court as 21.01.2016.*
 - c. *Subsequently, the Applicant's advocate expressly informed the Applicant's witnesses that the hearing of the main cause will proceed on 21.01.2016 and in connection thereto held two (2) pretrial meetings on 13th and 18th January 2016, with the Applicant's witnesses.*
 - d. *Mr George Muchiri and the Applicant's witnesses were therefore ready to attend Court on 21.1.2016 and proceed with the hearing of the main cause.*
 - e. *On the evening of 20.1.2016, Mr George Muchiri upon perusing the on-line daily cause list for 21.1.2016, with an end towards confirming to the Applicant whether or not the main cause herein was proceeding for hearing on 21.01.2016, he discovered that the said suit had not been listed for 21.01.2016 but rather on 20.01.2016.*
 - f. *Upon making the above discovery, Mr. George Muchiri immediately called the counsel representing the Claimant Company, Ms. Jacqueline Munyaka of Gikera & Vadgama Advocates on her personal number – 0719366943 to inquire as to what transpired in Court that morning who informed him that the orders set out in paragraph 1 above were granted.*
4. *All along, Mr. George Muchiri and the Applicant's witnesses honestly believed that the main cause had been fixed for hearing on 21.01.2016, and they absolutely had no idea that the matter was in fact scheduled for hearing on 20.01.2016. Pre-trial briefings and pre-trial preparations were made based on the foregoing belief.*
5. *On the morning of 20.01.2016, Mr. George Muchiri was in Nairobi and was in fact before the Honourable Mbichi Mboroki of the Business Premises Rent Tribunal in Tribunal Case No. 216 of 2008 – Super Cosmetics Limited Vs. Jubilee Insurance Company of Kenya Limited. The foregoing mater was one he would have assigned to a colleague to deal with if he honestly knew and believed that the main cause herein was proceeding for hearing on 20.1.2016.*
6. *Failure to attend Court on 20.1.2016, constituted an inadvertent, honest and innocent failure on the part of the Applicant's Advocate and his mistake in advising the Applicant's witnesses of the wrong hearing date resulting in this Court's Orders making the main cause closed and mistake on the part of an advocate ought not to be visited on an innocent litigant herein – the Applicant.*
7. *Other than having filed a credible and substantive defence in opposition to the Claimant's suit, the Applicant has also filed a counterclaim in the main cause. The Applicant has credible evidence in support of its defence and a genuine sustainable claim in its counterclaim and craves for an opportunity to present its case and witnesses.*
8. *If the Application herein is not heard on priority the Applicant stands to suffer irreparable loss and prejudice, to wit:*

- i. The ex parte Orders made by this Honourable Court have the effect of condemning the Applicant and eight (8) of its members unheard.*
 - ii. Interim Orders which were issued by the Court on 14.10.2015, which secured the jobs and thereby the livelihoods of six (6) of the above mentioned eight (8) pilots were not asked to be extended.*
 - iii. The affected members grievances as pleaded in the main cause (their cause of action) are that they have and/or are in the process of being unfairly and unlawfully terminated from the Claimant Company.*
 - iv. Were the Orders issued by the Court on 20.1.2016, allowed to stand then six (6) of the affected members will unfairly and unlawfully be terminated from their employment and two (2) of the affected members who have already been terminated from employment will fail to receive their just final dues and benefits.*
 - v. Similarly and through the Orders issued on 20.1.2016 the Applicant Association has missed an opportunity to defend the claim by the Claimant that it (the Applicant) engaged in industrial action through its calling for a withdrawal of goodwill.*
 - vi. A failure to have a reasoned judgment, founded on arguments from both parties, on the issue of goodwill will have far reaching implications on the Kenya Aviation Industry as goodwill has been a bone of contention in respect of the relationship between the Pilots and the Claimant Company.*
 - vii. This Honourable Court will proceed to deliver its judgment to the exclusion of the Applicant's witness' evidence, the resultant prejudice being condemnation of the Applicant/affected members without being given an opportunity to fully ventilate its case;*
 - viii. This Court will in delivering its judgment almost invariably, and as guided by case law, draw a negative inference as to the failure by the Applicant to present its case and to call its witness. This inference will be drawn despite the fact that the failure to call the said witness was wholly inadvertent.*
- 9. It will be in the furtherance of the rules of natural justice and fair hearing if the Applicant and the affected members were allowed to articulate their case before the Court.*
 - 10. This Application has been made in good faith and without unreasonable delay.*
 - 11. That no prejudice will be occasioned on any party to this suit if the Applicant's prayers are granted as this would open the way for this suit to be heard and determined on merit.*
 - 12. If there is prejudice suffered by the Claimant as a result of the granting the Orders sought herein the same will be compensable by way of quantifiable damages. The Applicant and/or Mr. George Muchiri are ready and willing to personally recompense the claimant for any reasonable loss it may suffer as a result of the granting of the Orders sought herein.*

3. During the hearing the Applicant's Advocate reiterated the grounds on the face of the application and in the supporting Affidavit of George Muchiri. He states that failure to attend Court was due to an inadvertent mistake on his part which he regrets. An extract of his diary marked as "GM2" is annexed to the application showing that he actually diarized the matter for 21.1.2016 instead of 20.1.2016. He only realized that the case was listed on 20.1.2016 upon perusing the online cause list for 21.01.2016 and failed to see the matter but found it had been published in the cause list for 20.1.2016.

4. He immediately thereafter moved the Court on 21.1.2016 under certificate of urgency to set aside the Orders of 20.1.2016. He states that the Applicant's members will suffer great prejudice if the Orders

sought are not granted and further states that the matter ought to be heard and determined on merit as envisaged under Article 50(3) of the constitution. That the decision will affect other pilots as well. That the Claimant's prejudice can be remedied by way of costs.

5. The Applicant also states that this Court has jurisdiction and discretion to review its own decision and that the reasons given are sufficient to warrant setting aside the Orders of 20.1.2016.

6. The Respondent opposes the Application but did not file any response to the Application to avoid any further delay in the matter. The Respondent states that no concrete reason has been given to warrant setting aside of the Orders of 20.1.2016 and that this application is a deliberate attempt to delay the matter.

7. According to the Respondent this matter was brought to Court in March 2015 and there has been a multiplicity of Applications which led the Court to stop all the applications and ordered for the main suit to be set down for hearing. That the Applicant and its members were in Court on the date the hearing date was set and all of them could not have made a mistake.

8. The Respondent avers that there are status quo Orders in place allowing the pilots to receive salaries though their retirement notices have expired. That the Respondent is in a precarious financial position and it is unable to sustain payment of salaries to employees who have retired. That the Orders of this Court are being abused by the Applicant and its members.

9. The Respondent prays that the status quo Orders ought to be set aside and the instant application be dismissed. The Respondent also states that its witness who is the Human Resource Manager will also be inconvenienced if the proceedings are set aside as it will be very difficult to find time to attend Court again.

10. I have considered the submissions of both parties. The Applicant has explained his absence in Court on that day and even showed how he misdiarized the day of hearing. The reasons seem valid.

11. This Court has however a duty to deliver justice and to ensure that no party is condemned unheard. It is for this reason that I will allow the application and set aside the exparte proceedings and all other consequential orders. The parties will now have to take a priority date to dispose of this matter in the shortest time possible.

12. This is however subject to the lifting of the Interim Orders in force at the moment given that this case was filed under Certificate of Urgency and the cost of any further delay with the Interim Orders in force will be enormous. That in effect means that the orders stopping the retirement notices are lifted.

Read in open Court this 3rd day of February, 2016

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Munyaka for Claimant

Muchiri for Respondents