



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT AT NAIROBI
CAUSE NO 1436 2015

ALEX NGOTHO MBUGUA CLAIMANT

Versus

KENYA AIRWAYS LIMITED RESPONDENT

M/S Baabu for Claimant

Mr Obura for Respondent

RULING

1. The applicant filed a notice of motion application on 17th August 2015 seeking to stop the respondent from proceeding with the disciplinary proceedings commenced against the applicant and from taking any disciplinary action against him.
2. The applicant seeks the court to prohibit the Respondent from interfering or removing the applicant from his rostered and from taking any action that would prejudice the claimant's licence renewal through or with the assistance of the respondent or his ability to operate an aircraft.
3. The application is based on the grounds set out in the notice of motion and in the supporting affidavit of the applicant.
4. The brief facts of the case are that, on 2nd May 2015, the claimant was on standby duty from 5.00 a.m. on 2nd May 2015 to 5.00 a.m. on 3rd May 2015.
5. In terms of the fleet agreement which is an addendum to the collective bargaining agreement (CBA) between the Kenya Airline Pilots Association (KALPA) and the respondent, "standby duty" is defined as a period of time in which a crew member has not been assigned to a specific duty but is available for duty.
6. The respondent alleges to have contacted the applicant through his mobile phone with an intention of scheduling him for a flight scheduled to leave Nairobi at 12.00 p.m. on 2nd May 2015 and return at 9.25 p.m. on the same day, being KQ 762.
7. The claimant states that he did not receive any such communication from the respondent and as such did not avail himself for the scheduled flight.

8. That the respondent did not send a text message to the applicant as is the practice. That the respondent knew or ought to have known that the applicant could not legally fly KQ 762 as he would have exceeded the legal maximum duty hours as stipulated in Regulation 240 of the Civil Aviation (operation of Aircraft) Regulations 2013 and clause 8 of the fleet agreement.
9. On 23rd July 2015, the claimant was notified to attend a disciplinary hearing on 28th July 2015, which was later deferred to 14th August 2015. The hearing took place as scheduled.
10. The applicant states that the respondent has no legal, valid or justifiable reasons for commencing disciplinary proceedings against the claimant. The proceedings are malicious and lack *bonafides*.
11. The applicant has reasonable apprehension that if the disciplinary proceedings are permitted to proceed he will be summarily dismissed as has been the case in the recent past with other pilots subsequent to 'show cause disciplinary hearing.'
12. Despite being sent on compulsory leave, the applicant has been rostered by the respondent for a number of flights, however on notification of these proceedings the respondent is likely to remove the applicant from the roster.
13. The removal will prejudice the applicant as he is required to have flown within a period of 90 days prior to the date of expiry of his licence which expires on 16th September 2015. As at the time of hearing the application however, the licence had been renewed.
14. The applicant states that he will suffer irreparable harm to his reputation and career development as a commercial pilot if he is summarily dismissed and this would ruin his chances of securing alternative employment.
15. The applicant prays that the application be granted pending the hearing of the main suit on the merits.

Response

16. The respondent filed a replying affidavit sworn to by Lucy Muhiu the Head Employee Relations for the respondent on 21st August 2015 and filed on the same date.
17. She depones that the respondent crew scheduling staff made an attempt to contact the applicant to report on duty and operate a scheduled flight KQ762 by making calls to his telephone primary number 0714247300 at 05.15 a.m., 05.17 a.m., 05.18 a.m., 05.19 a.m. and 10.24 a.m. all on 2nd May 2015 but the calls were not answered.
18. That upon failure to reach the applicant, the respondent's flight KQ 762 was delayed for 11 hours and 25 minutes. This flight was later down graded. Crew members who were to operate another flight KQ 304 had to be switched to operate the delayed flight KQ 762. The changes led to the cancellation of flight KQ 304 and delay to yet another flight KQ 310 which delayed with 3 hours and 15 minutes so as to accommodate the passengers in the cancelled KQ 304.
19. That the delay of flight KQ 762 and KQ 310 and the cancellation of flight KQ 304 had far reaching effects by inconveniencing passengers and occasioning huge loss to the respondent estimated at US\$ 70,400 not to mention subjecting the respondent to disrepute.
20. In light of the above, the Acting Chief Pilot invited the claimant for a meeting attended also by Captain Wangai Kimemia, the flight Safety Manager and Eglu Tov, Human Resources Relationship Manager to establish what went wrong and also to discuss certain allegations pertaining to the applicant's sickness.

21. That the meeting of the 12th June 2015 was not a disciplinary meeting but an exploratory and investigative proceeding to establish what caused the disruptions of the flights on 2nd May 2015.
22. The applicant in the meeting of 12th June 2015 explained that on 2nd May 2015 at around 7.00 a.m. he had gone to town and his phone got stolen. That he was to meet someone who was to organize for his birthday. That he later purchased a phone and tried to reactivate his old number but could not remember the original PIN so he had to buy another line. That he used the new line to communicate to crew scheduling personnel at around noon on the same day and he was told that he has been unreachable and he would be operating flight KQ 103 on 3rd May 2015.
23. This explanation was found unsatisfactory and the applicant was issued with show cause letter on 22nd June 2015. The other issue discussed at the meeting was absenteeism from place of work by the applicant from 20th May 2015 to 10th June 2015. The applicant had reported sick from 20th May 2015 and subsequently resurfaced on 10th June 2015 claiming that he was fit to fly. However, according to the Civil Aviation (personnel licencing) Regulations 2012, Regulation 12 (2), any pilot who is sick for more than 20 consecutive days ought to be cleared by the Kenya Civil Aviation Authority (KCAA) before resuming duties.
24. When the applicant was pressed on this issue, he changed his story and said it was his mother who was sick and not himself.
- The applicant was asked to clear the issue of his sickness with KCCA since it had already been informed of his sickness and proceed to respondent's doctor for medical evaluation and proceed on annual leave while his medical status was being addressed.
25. On the issue of failure to take the telephone call, a disciplinary hearing was held in which the applicant and KALPA acknowledged the applicant's omission and he accepted that he ought to have been reachable while on standby duty. KALPA requested that the applicant be issued with a warning letter.
26. In his closing remarks the claimant apologised and regretted the events of 2nd May 2015.
27. The respondent submits that the applicant has no legal right to injunct a disciplinary hearing in which he had been accorded a fair hearing and the panel was only due to render a decision on the matter.
28. That were the application to be allowed, it would reduce the court to the level of micromanaging, employer/employee relationship, a situation which the courts are not established for. In any event, the disciplinary process had been concluded and the application had admitted liability.
29. That the applicant has not established the preliques of granting interim injunction and the application should be dismissed with costs.

Determination

30. In the case of **Mrao Ltd. Vs. First American Bank of Kenya Ltd. & 2 others, Civil Appeal No. 39 of 2002**. The Court of Appeal, at Mombasa per Kwach, Bosire & O'kubasu JJA held;

“The principles for granting an interlocutory injunction are that:

- a. *The applicant must show a prima facie case with a probability of success;*
- b. *an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages;*
- c. *if the court is in doubt, it will decide an application on the balance of convenience.*

The court went on to state;

“a prima facie case in a civil application includes but is not confined to a ‘genuine and arguable case.’ It is a case which, on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

31. Upon a careful evaluation of the case presented by the applicant, and upon considering the explanation given by the respondent, it is the Court’s finding that the applicant has not discharged the onus placed on him to warrant the grant of the interim injunction sought in this matter.

32. As was stated by the **East African Court of Justice in Mary Arviza and Okotch Mondoh Vs. AG of Kenya & Secretary General of East African Community, EALS 2005 – 2011 P.4.**

“At this stage we must of course refrain from making any determination on the merits of the application (read case) or any defence of it. A decision on the merits or demerits of the case must await the substantive consideration of the facts and applicable law after full hearing of the Reference (read case).”

33. The application lacks merit and is dismissed.

34. Costs in the cause.

Dated and delivered at Nairobi this 6th day of May, 2016.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE