



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 433 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 28th May, 2015)

KENYA AIRWAYS LIMITED CLAIMANT

VERSUS

KENYA AIRLINE PILOTS ASSOCIATIONRESPONDENT

RULING

1. The application in court is one dated 20th March, 2015 and filed in court on 23/3/2015. The same was brought under a Certificate of Urgency by Gikera and Radgama Advocates and through a Notice of Motion filed under Section 76, 77(1), Section 78(1), Section 65 of the Labour Relations Act, Rule 15 and 16 Sub Rule 1 and 2 Industrial Court Rules 2010 and all the other enabling provisions of law.

2. The Applicants seeks orders:

1. **THAT this matter be certified urgent and service thereof be dispensed with in the first instance.**
2. **THAT the Respondents herein be and are hereby directed to withdraw and revoke their directive/call for a go-slow and/or withdrawal of goodwill circular and all other forms of industrial action call circulated to its members on 17th March 2015 or any other date pending the hearing and determination of this application.**
3. **THAT the Respondents herein be and are hereby restrained from calling for industrial action against Kenya Airways Limited, the Claimant herein without following the due procedure pending the hearing and determination of this application.**
4. **THAT the Honourable Court be pleased to issue directions on conciliation as a matter of urgency and to uphold status quo as at 16th March 2015 as the process of conciliation proceeds.**
5. **THAT cost of this application be in the cause.**

3. It is grounded on the following grounds:

1. ***The Respondent has called for industrial action from the employees of the Claimant in breach of the law and without giving the requisite notice of the same as required under the Labour Relations Act and the Recognition Agreement between the Claimant and the Respondent.***
2. ***Vide a press statement released to media houses by the Respondent's representatives on 16th***

March 2015 indicated that it would be requiring its members to engage in industrial action and more particularly a go-slow, strike and a withdrawal of good will against their employer.

- 3. The go slow is in the form of withdrawal of goodwill by the employees having taken effect as of 17th March 2015. The employees have since the said date refused to honour their duties as outlined in their Employment Contracts and other Agreements by refusing to take work on their off days.*
- 4. The Claimant is apprehensive that its employees might proceed on a strike on or after 24th March 2015 and the said information was leaked by the Respondent to various media houses. This was the same modus operandi that was employed when calling for the go-slow, and it will not be surprising if the employees down their tools on the said date.*
- 5. Notably, the employees themselves have not recorded any complaint concerning their employment relationships with the employer and the Respondent is therefore taking on the role of a bull dog and its conduct is oppressive to the Claimant as it injures its business.*
- 6. Business operations in the country will be grossly injured if the Respondent is not restrained from calling for further industrial actions and the strike planned for 24th March 2015 or thereafter if not prohibited by this Honourable Court.*
- 7. In the two days during which the go-slow has been in force, the Claimant's hands have been shackled prompting it to cancel flights that are over 12 hour long including Direct flights to china and forcing them to be held liable to pay hefty fines in Europe as imposed by the European Union.*
- 8. The ordinary arrangements as per the Collective Bargaining Agreement, is that pilots may work on their day off for which they are paid for as per the Collective Bargaining Agreement.*
- 9. All the employees of the Claimant from whom good will is required have in the regular course of business agreed and taken up assignments under the arrangement that overtime would be paid.*
- 10. The go-slow is an industrial action having grave financial repercussions to the business. Further to that, the said industrial action is unlawful for reasons hereunder elaborated. It endangers the existence of the Claimant as a viable Kenyan business, places the safety and security of passengers and the livelihood of the over 4,000 employees of the company at risk. The Respondent should therefore not be allowed to continue with this reckless behavior.*
- 11. The Management of the Claimant has not received any notification of a strike from the Respondent and therefore, any such action is unlawful and illegal, and it will occasion considerable loss of business and paralyze the Claimant's operations.*
- 12. The two issues that could have precipitated the goodwill withdrawal message and apprehended strike include early retirement of 8 B777 Pilots and an ongoing Deadlock in the Collective Bargaining Agreement.*
- 13. As relates to Early Retirement of B777 Pilots, the Claimant has 4 (four) B777-200 aircraft and 3(three) B777-300 aircraft. Following reduced business growth projections the company has found it increasingly difficult to fill its B777 aircraft which has promoted a legal and informed business decision to exit the B777-200 aircraft by May 2015. There is a possibility of exiting the B777-300 aircraft and this fleet has not been scheduled for any flights after September 2015.*
- 14. B777 is the biggest aircraft in the company, Pilots pay is based on the aircraft type with Pilots in the biggest aircraft being the most paid. The total number of Captains in the B777 fleet are 39 made up as follows: i.e six in B777-200 fleet and thirty three are rated for both B777-300 and B777-200 aircraft.*

The Claimant has nonetheless procured employment for the said 8 employees who were given the retirement notices and this information has been communicated to the Respondent and the individual employees. The Claimant has further invited the Respondent for a meeting on 23rd March 2015 to discuss the modalities of the proposed transition to alternative employment for the 8 Pilots.

15. The Collective Bargaining Agreement (CBA) with the Respondent Clause 34(b) provides as follows on retirement:

- a. 'Retirement age for pilots will be 65 years'*
- b. An employee may opt to retire prematurely or he/she may be retired by the company prematurely with full retirement benefits after he/she has attained the age of not less than 50 years'*

16. In light of the provisions of Clause 34(b) of the Collective Bargaining Agreement, Claimant gave retirement notices to 10 pilots on 9th March 2015 who will be retiring by the year 2018. The Claimant was within its rights to so. The Respondent has however not given its reasons for the calling of the industrial action and has not raised this as a reason, and the Claimant can only speculate.

17. Before then, Management had informed KALPA on its decision to retire 10 pilots and redeploy the others. This was done;

a. In the meeting between the Claimant and the Respondent on the dates of;

- a. 17th November 2014 (Group MD's Quarterly meeting)*
- b. 14th January 2015*
- c. 4th March 2015*
- d. 5th March 2015 and*

b. In the Group MD's letter to KALPA dated 27th February 2015

The Respondent did not give its response on the retirement proposition but challenged the redeployment decision arguing that pilots deployed to other fleets should retain their current pay. Management's proposal had been to peg their salaries on the B787 aircraft.

18. Management had foreseen a possibility of exit of the B777-300 fleet in view of the prevailing business situation. It had therefore proposed to KALPA that the pilots who were to operate that fleet should not be given B777-300 salary but the difference between the B777-300 salary and the pilots then existing salaries be paid on a personal to holder basis. KALPA completely reused that proposition arguing that the salaries had to be paid since the floor was in existence.

19. The decision to lower the salaries to the B787 is based on the fact that Pilots salaries are based on the fleet that a pilot is operating. Since the larger fleet (B777) will be no more, then the B777 Pilots redeployed to the smaller fleets should not maintain the larger B777 salaries.

20. From the foregoing, it is evidence that the Claimant has made all efforts to engage the Respondent, but the Respondent has not raised responded in relation to the retirement of the 8 Pilots, and has instead jumped the gun and called media attention further aggravating and even scuttling dialogue with the Claimant.

21. As relates to the renegotiation of the Collective Bargaining Agreement, the Claimant and the Respondent have a Recognition Agreement that allows for collective bargaining on the terms and conditions of service for the Company's pilots.

22. The practice has been to review the Collective Bargaining Agreement (CBA) every two years.

The current Collective Bargaining Agreement expired on 31st March 2014 and negotiations to renew the Collective Bargaining Agreement for the period 1st April 2014 to 31st March 2016 began in May 2014. To this end, the Company and KALPA have held several Collective Bargaining Agreement negotiation meetings culminating in the 36th meeting held on 5th March 2015.

23. Both parties have agreed on all clauses in the Collective Bargaining Agreement except the following on which a deadlock has been recorded:

c) Clause 5 – Scope of service

d) Clause 19 (a) & (b) – Sick leave

e) Clause 10 – Rates of pay and allowances

f) Clause 14 – Annual increments

g) Clause 20 (e) – Maternity leave

h) Fleet Agreement

a. New Clause – acclimatization

b. Clause 1.14 – Day off

c. Clause 3– Calculation of maximum flying duty period d. Clause 6 – Rest periods

e. Clause 7.3 – Days off after being away from Base

24. In view of the above, the withdrawal of good will incited and the industrial action called for by the Respondent and the planned strike are unlawful for the reasons that:

- i. The requisite notice provided for under the law has not been given and therefore the action unfairly prejudices and oppresses the Claimant;*
- ii. There has been no authorization by the Minister for any of the planned actions in the form of withdrawal of goodwill, lock out or strike or any other form of industrial action;*
- iii. The Respondent has declined to engage in dialogue with the Respondent in relation to the retirement of the pilots, which dialogue had already been initiated by the Claimant;*
- iv. The Respondent has not given its views in writing or otherwise of the actions taken by the Claimant and the notice issued by the Claimants to 8 of its pilots of its exercise of its right under the Collective Bargaining Agreement to offer early retirement to the said employees.*
- v. The Claimant is and has always provided for and is willing to engage in further negotiations with the Respondent, but the Respondent has moved forward to call for the radical measures in the middle of ongoing engagements.*
- vi. The actions of the Respondent call for industrial actions and strikes prohibited under the Labour Relations Act.*

25. The actions called for by the Respondent are unlawful and infringe on the rights of the Respondent to a legitimate expectation to services provided by its employees. To aggravate the matter, the Respondent has by-passed the proper channels of ventilating its complaints against the claimant.

26.No prejudice whatsoever or at all shall be occasioned on the Respondent if the orders sought herein are allowed.

and also supported by the annexed affidavit of Anthony Ndung'u Gakuo herein who is the Claimant Applicant.

4. The application is further supported by the affidavit of Lucy Muhiu the Respondents Head of Employee Relations annexed herein.

5. The Applicants averment is that on or about 9/3/2015, they issued retirement notices to 10 of the employees. Before issuing the said notices, the Claimant avers that they had engaged the Respondents in various meetings and negotiations. That they had also spoken to individual employees and thereafter issued 6 months notices in line with Clause 34 of the Collective Bargaining Agreement where an employer is authorized to prematurely retire employees at 50 years after serving the company for 10 years. The Claimant avers that all the individuals were 62 years and above.

6. The Applicant aver that this position was not well received by the Respondent and on 16/3/2015, they issued a notice to its members asking them to go on go slow termed as withdrawal of goods will.

The Applicant avers that withdrawal of good will is a breach of contract and a breach of the terms of the Collective Bargaining Agreement because the nature of the jobs for Pilots has no fixed time lines as they are basically on call on 24 hour basis.

The Applicant referred court to Annex KQ 2 and 3 where by one Captain Karauri wrote as follows:

“Esteemed Members,

This is a notice that we will be withdrawing goodwill as from Wednesday 18th March 2015 at 0500H local time.

In addition, please note:

- 1. You are NOT required to pick any calls from Kenya Airways at ANY time unless within the standby duty period.***
- 2. Ensure you have your roster saved/printed. It is possible this function might be blocked so find alternative means of saving your roster like taking a snapshot.***
- 3. ACCEPTABLE roster changes are changes which have no substantial effect on your reporting and off duty times. Any other changes that change these times drastically are not acceptable and MUST be declined. Remember, your life is planned around your roaster.***

Members are urged to avoid becoming dead heroes through attempting actions that can lead to disciplinary action or even dismissal.

FIND FULL GUIDELINES IN ATTACHMENT BELOW

Yours faithfully,

Capt. Ronald Karauri

General Secretary & CEO

KALPA”

7. Of course attached were withdrawals of goodwill guidelines annexed herein as Appendix KQ 3.
8. The Applicant avers that the impact of these instructions was that the employees were being asked not to cooperate with the employer beyond 12 hours and on their off days. The Applicant avers that good will is another expression of overtime which is not expressly provided for under the law but are agreed upon by the parties.
9. The Applicants made reference to schedule 5 of the Collective Bargaining Agreement – Annex KQ 7 which shows how layover allowance is paid to a Pilot who has flown beyond the basic 12 hours flight time and is out of station. The Applicant avers that this is not negotiable.
10. The Applicants aver that there is no issue of representation made between parties over overtime and that the union and its members have over time indicated to employers that they are agreeable to overtime and have always availed their services for the benefit of the employer. That the employer has since 1977 tailored their business around this position and that by implication, voluntary overtime has become a term of contract. The Applicants aver that if the withdrawal of goodwill was to be an isolated case then it would be ok but if it is coordinated by the Respondent, then it becomes an act of industrial action and takes away the powers of the members to decide how they want to operate with the employer.
11. The Applicants therefore argue that the Respondents have overstepped their mandate as a union and caused breach of contract for which individual member will be liable. The Applicants further argue that this breach has far reaching consequences including commercial implications whereby the Respondent has lost about 50 million during the period under review in form of cancelled flights and other liabilities which can also lead to loss of over 4,000 jobs.
12. The Applicants aver that they are open to negotiations and have drawn court's attention to Annex KQ 5 which is an MOU between the Claimants and Respondents providing terms and conditions of overtime which is like goodwill. That this is set down in law and even in the Collective Bargaining Agreements, Memorandum of Understandings and Conduct of parties overtime.
13. They therefore seek for court's intervention to ensure the business goes on. They argue that if the orders sought are not confirmed, the Respondents will continue to take action which is likely to jeopardize the economy without any justifiable reason. They also argue that the issue of retirement of the 15 Pilots is before court and justice can only be done at the conclusion of the suit.

Respondent's position

14. The Respondents opposed the application. They filed their Grounds of Opposition on 13/4/2015 through Mohochi & Company Advocate. They also relied on a Replying Affidavit sworn by one Samir Mohamed Ahmed the Assistant General Secretary of the Respondents herein sworn on 10/4/2015.
15. The opposed the Motion on the following grounds:
 1. ***THAT the application is irredeemably bad in law, hopelessly incompetent, frivolous and vexatious and an abuse of the court process.***
 2. ***THAT the application lacks demonstration of a "prima facie" case to warrant the Claimant/Applicant interlocutory relied as prayed.***
 3. ***THAT the Motion is a classical manifestation of abuse of the process of Court.***
 4. ***THAT the Motion is brought with "unclean hands" after deliberately failing to disclose material facts to the court 'to wit' the existence to an ongoing conciliation under the Labour Relations Act 2007 and the distinction between a 'go slow', 'strike' and 'withdrawal of goodwill'.***

5. ***THAT the Dint and subject matter of this Application is an unlawful strike, or an unlawful intended strike or go slow and not the reasons that may precipitate such industrial action.***
6. ***THAT the “withdrawal of goodwill” and resultant “work to rule” cannot be construed to be an industrial action or strike and is deployed during consultation and or dialogue with the Applicant as a reason catalyst, appreciating that the details of contractual duties by Respondent’s members are contained in the Collective Bargaining Agreement under Schedule VII, fleet agreement and any other extra duties and functions performed by Respondent’s members is upon goodwill and remains their discretion.***
7. ***THAT “operating with Goodwill” is when pilots are voluntarily available to work for certain hours during off time but within legal limits as approved by the Kenya Civil Aviation Authority (KCAA).***
8. ***THAT the Motion has far reaching consequences of unusual complexity, to the extent that it ousts and derogates the rights of the Respondents as provided for and guaranteed under Article 30, 41 (1) and (2) as read together with Article 23(1), (2) and (3) of the Constitution of Kenya (2010).***
9. ***THAT the Motion and prayers sought offends the ‘sprit and the letter’ of the Labour Relations Act 2007.***
10. ***THAT the Motion and prayers sought proactively and in speculative fashion, seeks to restrict trade unionism, while such intent and purpose must be justified on the anvil of necessity and not quicksand of convenience such as is the case and if allowed.***
11. ***THAT Court remains the last bastion where adjudication of disputes as per the Labour Relations Act has failed, which is not the case in this instance.***
12. ***THAT the application lacks any form of demonstration of injury suffered or to be suffered if such reliefs sought by the Claimant/Applicant is disallowed by the court, while engaging in speculative and academic exercise in an attempt to make such demonstration foretasted.***

16. The Respondents have further argued that the prayers sought by the Applicants are imprecise and confirmed for instance prayer No. 2 which they argue would require supervision of this court to define whether any conduct of the Respondent is within any industrial action.

17. They also argue that the application is defective as it seeks injunction reliefs pending hearing of the application and not of the claim. They contend that the orders sought are also mandatory in nature and court should not grant them unless there are compelling reasons for court to consider.

18. The Respondents also argue that the Applicants should not be granted the orders sought having come to court seeking equitable remedies without doing equity being full disclosure i.e. that the parties had gone for conciliation as per Lucy’s affidavit and the replying affidavit of Mohamed. They aver that the non material disclosure was made to induce court to give interlocutory orders that the court gave thus painting the Respondent in bad light.

19. On goodwill, they argue that it is not a contractual component of respective Pilots contract nor part of Collective Bargaining Agreement. They argue that withdrawal of goodwill is not withdrawal of overtime. They contend that goodwill is a relationship in personnum between individual pilot and employer and it is not something that the Respondent can force its members to observe. That it all depends on desire of an individual pilot as buttressed by the Civil Aviation Act and Regulations of 2013 Part 9 and it cannot form part of the Contract. They aver that enforcing it will compromise on safety of pilots and crew and passengers.

20. They submit that Regulation 203 obliges KQ to establish limits of flight time, duty roster and flight

duty. These they submit, are specified by the law and that it is pursuant to Regulation 230 that the Collective Bargaining Agreement Schedule 7 was negotiated between the parties and the Collective Bargaining Agreement provides for rest periods – when crew are free from any duty whatsoever. The Collective Bargaining Agreement also provide for standby duty – a period when a crew member is available for duty but not on duty.

21. The Respondents have submitted that the circular issued is not a call to strike but a call to members to observe day off as provided in respective contracts and to specifically draw member's attention to guidelines in the Kenya Civil Aviation Act 20134 and rules made therein.

22. They also aver that as a sign fidelity to court order, when court made certain orders, they wrote to their members to work as per their contract. They aver that in the history of the Respondents they have never gone on strike and what they are trying to exercise, is their right under Act 41 of the Constitution and Prevention of forced labour on certain pilots.

23. The Respondents cited various authorities amongst them **Kenya Ferry Services Limited vs Dock Workers Union (2014) eKLR**, **Giella vs Cassman Brown Company Limited (1973) EA 358** and **TSC vs Kenya Union of Teachers & Another (2012) eKLR**. They asked court to reject the application.

Applicants rejoinder

24. The Applicants have urged court to allow the application stating that non-disclosure of material facts is not true as the issue of there being conciliation process has been disclosed in the claim. They also argue that the application is not frivolous and the fact of quoting wrong provisions of law can be corrected by this court. It is also their position that issue of forced labour is not true as the Respondents are being called upon to work during the time the law and Collective Bargaining Agreement allow and not during their rest time. They ask court to grant them the orders sought pending hearing and determination of the claim.

Issues for determination

25. Upon hearing the submissions of the parties, the issues for determination are as follows:

- i. ***Whether a prima facie case has been established by the Applicants herein to warrant issuance of prayers sought.***
- ii. ***What orders this court can grant in the circumstances.***

26. On the 1st issue, it is true that in the application the Applicants asked court to grant orders pending hearing and determination of this application when they should have been referring to the claim. They indeed corrected this situation as they made their submissions. The Respondents had submitted that they should be bound by their pleadings. It is true that parties are bound by their pleadings but it is also true that this court is a court of justice and cannot shut its eye on a genuine mistake of the parties and punish them and therefore subvert justice.

As demonstrated by the Applications, they made a genuine mistake which they asked court to use its discretion to correct. Guided by the provisions of Article 159 of the Constitution I find that this is an error on process and not on substantive justice and I therefore agree with the Applicants and I find that the omission to state that the orders were to be granted pending hearing of the claim was a genuine mistake and does not render the application incurably defective.

27. On the 2nd issue, in determining whether a prima facie case has been established to warrant issuance of the orders sought, this court has interrogate certain terms of the contract and the law.

28. To start with, is the issue of the word goodwill and its meaning and applications: In ordinary English Language goodwill means “a kind”, helpful on friendly feeling or attitude” – (see Webster dictionary).

However, this term as used by the Respondents herein is more pregnant with meaning as per the circular issued by the Respondent to its members. According to the letter Appendix KQ 2 and 3 the withdrawal of this goodwill had elaborate instructions including not picking phone calls. It is apparent that the goodwill expressed here was more than a helpful and friendly feeling as it was part of an elaborate instruction stated in the circular by Respondent to its members.

29. The Applicant submitted that goodwill is the same as over time but the Respondent submitted differently stating that was a relationship in personnum between the individual pilot and the employer bordering on comity and respect. I do agree with the position advanced by the Respondents that indeed goodwill here was a relationship that was based on respect and understanding between the individual pilot and the employer but over time, this relationship graduated into some form of custom and usage which was taken over by the Respondents and “controlled” at that level hence the circular from the Respondents. This goodwill however had to be done within certain parameters as provided in the law – i.e. The Civil Aviation Act 2013 and Regulations made thereunder.

30. According to Fatigue of Crew and Protection of Flight Crew From Cosmic Radiation – Part IX of the Regulation made under the KCAA 2013: - Certain terms are defined and these included:-

1. ***“Rest period – means a continuous and defined period of time subsequent to and/or prior to duty during which flight or crew members are free of all duties”.***
2. ***“Standby” means a defined period of time during which a flight or cabin crew member is required by the operator to be available to receive an assignment for a specific duty without an intervening rest period”.***

31. The Respondents are arguing that the Claimants seek to change the period of work during which the Respondents members are to work when they should be resting thereby endangering their lives and those of the passengers. The Applicants aver that this is not the position but that the Pilots are only called upon to work during standby period and are then paid for the same.

32. As to whether withdrawal of goodwill amounts to industrial action, it is this court’s position that it is especially if it follows a communication from the Respondent. If Respondent insists that goodwill is a personal issue, they should not be seen to be urging their members to withdraw it on a certain date. By so doing, the Respondents are demonstrating that they as a union control the individual pilot and thus defeating the said purpose of goodwill.

33. The Applicants submitted that they stand to suffer greatly if the orders sought are not granted. They argued and submitted that in the period when the Respondents asked members to withdraw goodwill, the employer suffered big losses which amounted to over 50 million and were set to go higher. This position was not refuted by the Respondents.

34. From the above submissions it is apparent that the issue of goodwill withdrawal greatly impacts on Applicants operations and the same is demonstrated on the face of it.

The principles established in **Giella vs Cushman Brown** on a prima facie case being established fall in place by the demonstration by the Applicants that the action by the Respondent is causing great damage to them and this is bound to become worse unless this court intervenes.

I therefore find that indeed a prima facie case is established and I allow the application in the following terms:

1. ***That the Respondents are directed to withdraw and revoke their directive/call for withdrawal of goodwill circular circulated to its members on 17th March 2015 or on any other date pending the hearing and determination of this claim.***
2. ***That the Respondents are hereby restrained from calling for industrial action against the Claimants on the issues pending before court pending the hearing and determination of this***

claim.

4. *That I direct that the parties do forthwith proceed to negotiate and engage in a conciliation process within 90 days from the date herein and report back to court on their progress.*
5. *Costs of the application in the cause.*

Read in open Court this 28th day of May, 2015

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Munyaka for Claimant– Present

Reke holding brief for Mohochi for Respondents- Present