



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 502 OF 2015

KENYA AIRLINES PILOTS ASSOCIATION CLAIMANT

VERSUS

KENYA AIRWAYS LIMITED1ST RESPONDENT

JAMBOJET LIMITED2ND RESPONDENT

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

RULING

1. The application before court is the Notice of Motion dated 30/3/2015 filed by the Claimants herein through Mohochi & Company Advocates. The application was filed under Section 12 (3) (i) and (viii) of the Industrial Court Act No. 20 of 2011 and Rule 16 of the Industrial Court Rules.

2. The Applicants seek orders as follows:

1. That, this application be certified as urgent and be heard ex-parte in the first instance.

2. That, the Honourable Court do issue an ex-parte interim order restraining the Respondents; its agent and/or servants from commencing or continuing any intended or commenced commercial flights to Lamu, Ukunda, Malindi, Kisumu and Eldoret on any chartered Aircraft Make Dash 8 Q400 on wet-lease agreement pending hearing of this Application inter-partes.

3. That, the Honourable Court do issue an Interlocutory Injunction restraining the Respondents; its agent and/or servants from commencing or continuing any intended or commenced commercial flights to Lamu, Ukunda, Malindi, Kisumu and Eldoret on any chartered Aircraft Make Dash 8 Q400 on wet-lease agreement pending hearing and determination of this suit.

4. That, the costs of this Application be provided for.

3. The application is supported by the annexed affidavit of Captain Ronald Karauri herein and on the following grounds:

- 1. The Application herein involves a matter of great public importance touching on strict adherence to law, labour relations, collective bargaining and recognition and air operator certification and administration.**
- 2. The 1st Respondent is a Public Limited Company listed at the Nairobi Stock Exchange with 29.8% equity share holding by the Government of Kenya in trust of the people of Kenya, with the Dutch KLM Company being the 2nd largest shareholder with an equity share holding of 26.73% while the rest 43.47% equity shareholding is publicly traded at the Nairobi Stock Exchange.**
- 3. The 2nd Respondent is a wholly owned subsidiary of the 1st Respondent operating in Kenya as a low budget airline since April 2014.**
- 4. The Applicant is the apex professional body for pilots in Kenya, registered on 6th December 1972 with a membership of over 400 pilots presently and expertise of 40 years in relation to pilot's welfare issues and aviation matters generally.**
- 5. The Applicant is a registered Trade Union under the Labour Relations Act No. 14 of 2007 with a Recognition Agreement and a Collective Bargaining Agreement entered into with the 1st Respondent.**
- 6. The Applicant is the national member of the International Federation of Airline Pilots Association (IFALPA), a global professional body for pilots representing over 100,000 pilots and comprising of over 100 member associations.**
- 7. The Application herein seeks the intervention of this Honourable Court to forestall an illegal Wet leasing agreement entered into by the 2nd Respondent contrary to the Civil Aviation (Air Operator Certification and Administration) Regulations, 2013 in flagrant breach of the Applicants rights to fair labor practices with far reaching negative consequences on the Applicant's labour relations.**
- 8. The 2nd Respondent is not a licensed Air Operator Certificate (AOC) Holder from the Civil Aviation Authority in line with the Civil Aviation Act No. 21 of 2013 and the Civil Aviation (Air Operator Certification and Administration) Regulations, 2013 hence incapable of executing any Wet-Lease Agreements.**
- 9. Both 1st and 2nd Respondents recognize the Claimant as a trade union in line with the Labour Relations Act No. 14 of 2007 and as such any desire or intention to enter into a wet lease agreement entails consultation and concurrence which has been disregarded in the instant case.**
- 10. That the 1st Respondent in flagrant disregard of an ongoing conciliation before the Labour Commissioner on the subject matter has unilaterally together with the 2nd Respondent initiated new flight routes that would be serviced by wet-leased flights to the disadvantage of the Claimant.**
- 11. Unless this application is heard and determined as a matter of urgency, the Claimant and its members stand to suffer irreparable loss and damage which may lead to some of them being rendered redundant.**
- 12. It is in the interest of justice and in the public interest that the Application herein be heard and determined as soon as possible.**

4. In their oral submissions in court, the Applicants stated that they had 4 prayers but the first two have either been overtaken by events or extinguished and now sought to canvas for prayer 3 and 4.

5. The Applicants have submitted that they are an apex professional body for pilots in Kenya and a member of the International Federation of Airline Pilots Association, registered on 6th December 1972 with a membership of over 400 pilots presently and expertise of 40 years in relation to pilots welfare issues and aviation matters generally.

They also submitted that they are a recognized trade union under the Employment Act 2007 and engages as such in welfare negotiations on behalf of its membership.

6. The Applicants submitted that the 1st Respondent on the other hand is a Public Limited Company listed at the Nairobi Stock Exchange with 29.8% equity share holding by the Government of Kenya in trust of the people of Kenya, with the Dutch KLM Company being the 2nd largest shareholder with an Equity Share holding of 26.73% while the rest 43.37% equity shareholding is publicly traded at the Nairobi Stock Exchange.

7. The 2nd Respondent, the Applicant submitted is a Limited Liability Company and a Subsidiary of the 1st Respondent who hold 100% equity and it commenced its operation as a law budget airline in April 2014.

8. The Applicants have averred that they are a registered Trade Union under the Labour Relations Act No. 14 of 2007 with a recognition Agreement and a Collective Bargaining Agreement entered into with the 1st Respondent on 5/5/1978 – a copy of which is annexed and marked RK 1(a) and RK 1(b). It is also the Applicants contention that by dint of the recognition agreement above mentioned, the 2nd Respondent being a subsidiary of the 1st Respondent, automatically recognizes the Claimant Applicant.

9. The Applicant further avers that they have had regular management meetings with the 1st Respondent for smooth operations and air safety. They aver that in history any wet- lease agreements have had to be done upon consultation with the Applicant Claimant a case in point being year 2011 where the 1st Respondent sought to enter into a wet-lease agreement with KLM and consultations were carried out and concurrence was mutually arrived at and the same was mutually extended. (RK 29) Minutes of the meeting of 8/9/2011 and RK 2 minutes of the meeting of 19/2/2013 were annexed as exhibits.

10. The Applicants aver that since mid 2014 they have been discussing review of the Collective Bargaining Agreement with the Respondents and one sticky issue has been Clause 5 which is on Scope of Service and the 1st Respondent has insisted on non-inclusion of the 2nd Respondent arguing that the Claimant should enter into a separate Collective Bargaining Agreement with the 2nd Respondent.

11. That this issue – was referred to Labour Commissioner and a Conciliator appointed with the 1st conciliation meeting having taken place on the 25th March 2015.

12. The Applicant aver that during the pendency of the conciliation, the 2nd Respondent has proceed to enter into a wet-lease agreement with DAC Aviation E.A Limited and Chartered Aircraft Make Dash 8 Q 400 with crew members and proceeded to commission 3 new flight routes.

This, the Applicants avers is to the detriment of their members as the 1st Respondent currently has a fleet of parked aircrafts without use.

13. The Applicants have submitted that the 2nd Respondents actions alleging to wet lease Dash 8 Q 400 planes is contrary to the Civil Aviation Act No. 21 of 2013 and the Civil Aviation Air Operator Certification and Administration Regulations 2013.

14. They also submitted that the 2nd Respondent is not an Air Operator Certificate (AOC) holder and hence cannot purport to enter into a Wet Lease Agreement.

15. The Applicants also submitted that the action by both the Respondents attempting to introduce new aircrafts and crew during pendency of conciliation process is manifestation of ill will and an attempt at frustrating any conciliation process thereby hindering fair labour practices.

16. It is for the above reasons that the Applicants seek orders sought being prayer 3 and 4 as they aver that prayer 1 and 2 seems to have been overtaken by events or extinguished.

17. The Respondents filed their replying affidavit to this application on 22/4/2015. The same was sworn by Haanee Khan the Legal Counsel for the 1st Respondent and Willem Hondius Chief Executive Officer for 2nd Respondent respectively. The same was filed through the firm of Messrs Ochieng, Onyango, Kibet and Ohaga Advocates. The Respondents also sought to rely on their further affidavits sworn by the same deponents and filed in court on 9/6/2015.

18. The Applicants opposed the application herein and their 1st averment is that the Employment and Labour Relations Court is not the correct forum for this court as it is purely not in the employment and Labour Relations domain. They content that there is no foundation of any alleged dispute between an employer and employee laid down. They also aver that the Applicants though annexing their Collective Bargaining Agreements with Respondent, they have not shown to court which of the provisions aggrieve the Applicants or which injury is threatened to the Claimant on its members.

19. The Respondents further aver that the Applicants have made extensive reference to the Civil Aviation Act and rules thereto and they submitted that this court does not have jurisdiction to investigate matter falling under the Civil Aviation Act and Rules thereto nor whether an aircraft operates or is licenced or not nor existence of wet lease or nature of arrangements entered into by 2nd Respondent and DAC Aviation.

20. The Respondents submitted that if the Applicants are aggrieved by the arrangement made between the 1st Respondent and DAC Aviation, they should report the grievance to the KCAA which will then undertake such investigation as are appropriate and determine the sanctions to be implored and that this does not fall within the Collective Bargaining Agreement.

21. The Respondents have further submitted that the supporting affidavit of Applicants further reveal how far the Applicants have departed from the original case filed in court and from the Statutory foundations upon which this court is required to act and this is in reference to alleged irregular arrangement between 2nd Respondent and DAC, alleged lack of approval of arrangement with DAC by KCAA. They aver that the affidavit has no indication as to what aspect of the affidavit relates to the Collective Bargaining Agreement between the Applicants and the 1st and 2nd Respondent jointly.

22. The Respondents have also submitted that paragraph 27 of the affidavit of Applicant avers that unless the Respondents are restrained, the Applicants members will be rendered redundant. The same paragraph also talks of air safety. The Respondents aver that air safety is concern of KCAA and on question of redundancy, that is one of evidence and that there is no specific letter or document showing that arising from the arrangement, redundancies have occurred.

23. The Respondents have submitted that the intend of prayers sought is to interfere with commercial arrangement of Respondents and 3rd parties who are not presently before the court. That the ambit of those prayers has no foundation in Section 12 (3) of Industrial Court Act 2011. They submit that the prayers sought are not geared to protecting the relation of employer or employee in a labour relation but are for a malafide purpose indeed to cripple the commercial undertakings of 2nd Respondent.

24. The Respondents have cited various authorities *being Karisa Chengo, Jefferson Kalama Kengha and Kitsao Charo Ngati vs Republic (2015) eKLR, Samuel Kamau Macharia and Another vs Kenya Commercial Bank & 2 others (2012) eKLR, Owners of Motor Vessels 'Lillian S' vs Caltex Oil (K) Limited (1989) LLR 1653 (CAK) and David Joseph Motion (As Administration of the Estate of Josephine Magdalene Motion) vs Kilimani Junior Academy Limited & 2 others (2014) eKLR.*

25. The Respondents have further submitted that the principles in **Giella v Cassman Brown** have not been made out and no prima facie case is established. They urged this court to dismiss the application accordingly.

26. As a rejoinder to the Respondents averments, the Applicant has submitted that they have a valid case and that this court has jurisdiction to entertain this application. They aver that there is no misjoinder of parties as between 1st Respondent and 2nd Respondent as 2nd Respondent is a subsidiary of 1st Respondent with 1st Respondent owning 100% equity in 2nd Respondent. They aver that the issues scope of service in Collective Bargaining Agreement negotiations cannot be raised in a Preliminary Objection. They also submit that they have not varied their claim as compared to their averments in their supporting affidavit.

27. Having considered the submissions of both parties, there are 2 issues for this courts determination:

(1) Whether this court has jurisdiction to entertain this application.

(2) If yes, whether the Applicants have established a prima facie case with a probability of success to warrant issuance of orders sought.

28. On the 1st issue, the Respondents have submitted that this court lacks jurisdiction to entertain this matter. This, they aver is based on the orders sought by the Applications. The orders that the Applicants seek is to the extent that this court stops forthwith the Respondents, its agents and/or servants from commencing or continuing any intended or commenced commercial flights to Lamu, Ukunda, Malindi, Kisumu and Eldoret on any Chartered Aircrafts Make Dash 8 Q 400 on wet lease agreement pending hearing and determination of this suit.

29. This court's jurisdiction is set out under Section 12 (1) of Industrial Court Act 2011 as follows:

(1) The court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162 (2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the court relating to employment and labour relations including:

(a) Disputes relating to or arising out of employment between an employer and an employee;

(b) Disputes between an employer and a trade union;

(c) Disputes between an employers' organization and a trade unions organization;

(d) Disputes between trade unions;

(e) Disputes between employer organizations;

(f) Disputes between an employers' organization and a trade union;

(g) Disputes between a trade union and a member thereof;

(h) Disputes between an employer's organization or a federation and a member thereof;

(i) Disputes concerning the registration and election of trade union officials; and

(j) Disputes relating to the registration and enforcement of collective agreements."

30. Article 162 (2) of court in establishing this court also gives its jurisdiction to be in matters of employment and labour relations. The question then is whether the issue of stopping commercial flights

to routes stated is an employment or labour relations issue?. I do not find the matters raised to be labour related perse. They lie in the commercial filed of the High Court. This court would have entertained the application had the Applicants gone further and demonstrated how the Claimants' members stand to loose if the commercial arrangement is not vacated.

31. In the celebrated case of "Lillian S" the Court of Appeal rendered itself as follows:

"With that I return to the issue of jurisdiction and to the words of Section 20 (2) (m) of the 1981 Act, I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has not power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it hold the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority".

32. It is important that this court must certify itself as having jurisdiction and without jurisdiction this court cannot proceed an inch. Having found that I lack jurisdiction, I will not proceed and make further orders and consider the merits of this application. I believe the best forum will be the Commercial Division of the High Court where I transfer this file to be heard and determined.

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

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Okolo holding brief Muhochi for Applicants

No appearance for Respondents