



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE NO.1770 OF 2015**

**KENYA AIRWAYS PILOTS ASSOCIATION ..... CLAIMANT**

**VERSUS**

**KENYA AIRWAYS LIMITED ..... RESPONDENT**

**RULING**

1. On 2<sup>nd</sup> October 2015, the Claimant filed application and Notice of Motion which was amended and filed on 22<sup>nd</sup> October 2015. In the Amended Notice of Motion the Claimant is seeking orders that;

1. Spent.
2. *The Court be pleased to issue an order prohibiting the respondent, its servants, agents or employees from applying the Code of Business Conduct and Ethics Version 2 referenced KQ/HR/3/CBC (hereinafter referred to as “the Code”) to the claimant’s members; pending the hearing and determination of this application inter parties.*
3. *This Court be pleased to issue an order prohibiting the respondent, its servants, agents or employees from demanding that the claimant’s members execute the Code as a condition precedent to receipt by the claimant’s members of any benefit and/or entitlement and/or any necessary assistance pending the hearing of this application inter parties.*

*3a. This Court be pleased to issue an order compelling the Respondent to re-open registration of the claimant’s member’s nominee for the buddy pass program for 2015 pending the hearing and determination of this application inter parties.*

4. *The Court be pleased to issue an order prohibiting the Respondent its servants, agents employees from applying the Code to the Claimant members pending the hearing and determination of the suit.*
5. *The Court be pleased to issue an order prohibiting the respondent, its servants, agents or employees from demanding that the claimant’s members execute the Code as a condition precedent to receipt by the claimant’s members of any benefits and or entitlement and or any necessary assistance pending the hearing and determination of the suit.*
6. *The Court be pleased to issue an order compelling the Respondent to re-open registration of the claimant’s member’s nominees for the buddy pass program for 2015 pending the hearing and determination of this suit.*
7. *That the Court be pleased to direct the Respondent to discuss and to collectively negotiate the terms of the Code with the Claimant prior to its implementation.*
8. *The costs of this application be awarded to the claimant.*

2. The application is supported by the annexed affidavit of Ronald Karauri and on the grounds that

the Respondent through staff notice circulated the Code to all staff which Code was to introduce key amendments to the terms and conditions of services of Claimant members especially suspension without pay; retention of warning letters; staff to seek permission before taking appointment with for-profit businesses; and movement of spouses to different departments and which conditions are contrary to Clauses, 26, 27 of the Collective Bargaining Agreement (CBA) between the parties herein. Other grounds are that the Respondent is in the process of offering recognition and protection to persons engaged in acts characterised under Kenyan law as unnatural contrary to section 162 of the Penal Code and that the Respondent with the view of coercing Claimant members to sign the Code has made the signing conditional to enjoyment of certain benefits especially the buddy program; issuance of letters confirming employment and enjoyment of staff travel privileges.

3. That the buddy pass program registration of nominees has closed for 2015 closing out Claimant members through discrimination due to the coercive demands to sign the Code before registration. The relationship between the parties herein is governed by a CBA from 1978 and most current one dated 15<sup>th</sup> August 2011. Under the CBA, clause 4 provide that all amendments and additional staff rules, regulations, notices and other standing instructions which reduce the terms and conditions and terms of service as under the CBA should be discussed before implementation. The only exception is where terms and conditions are changed by the law. The Claimant has objected to the application of the Code but the Respondent continues to use it.

4. The application is that the matters herein are urgent as the use of the Code by the Respondent has denied the Claimant members privileges, benefits and assistance contrary to terms of the CBA. The use of coercion to sign the Code has put Claimant members at the risk of disciplinary action.

5. In the affidavit of Ronald Karauri, he avers that as the Claimant General Secretary and chief executive officer he is aware that the buddy pass program has closed for 2015 and which program entitled staff to significant discounts of up to 75% on ticket fares. Claimant members have been discriminated by being locked out from program due to the Respondent coercive demand that they sign the Code prior to registering their nominees. The holiday season is around the corner, it is unfair for Claimant members and families to be locked out noting the program is only open once a year. The Claimant met Respondent management on 13<sup>th</sup> October 2015 to request the re-opening of the registration for Claimant members but the Respondent sought to seek advice and revert back by 19<sup>th</sup> October 2015 but no such response has been received.

6. In reply, the Respondent filed Replying Affidavit sworn by Alban Mwendar the Group Human Resource Director and a person who has served at different intervals as group human resource for various entities. He avers that based on his professional and work background and noting the application, claim and orders sought are not justified. Clause 39a) of the CBA sets out items which are subject to negotiations between the parties to;

- a. Rates of pay
- b. Duration of employment
- c. Hours of work
- d. Method of wages payment
- e. Paid leave
- f. Collection of claimant's dues
- g. Medical facilities
- h. Sick leave
- i. Insurance
- j. Fleet agreements
- k. Kenyanisation and
- l. Other generally accepted terms and conditions of employment

7. Clause 3(d) of the CBA gives the Respondent the right to conduct its business and manage its operations including staff while the Claimant has a right to represent its members on matters which are negotiable. Staff rules, regulations and practices of the Respondent apply to all employees inclusive of

Claimant members unless the CBA has amended them or been superseded as agreed.

8. Mr Mwendar also avers that in keeping with modern business culture and practice and as part of corporate governance obligations, the Respondent formulated the Code to be observed by its directors, officers and rest of employees. The Code as a tool of management sets out organisational values, responsibilities and ethical obligations to provide employees with guidance in handling difficult ethical situations related to the business. The Code has to be embedded in the business for employees to know how to apply its values. The Code is of general application to all employees and business considerations are not always in consonance with contractual legal rights of employees but where there is a conflict the contractual rights prevail. To signify acceptance of the Code each employee ought to append a signature, the Code in issue is a revised one previously issued to staff and the one subject herein had not been negotiated with the Claimant as is the norm.

9. The allegations that the Respondent has amended clause 26 and 27 of the CBA and made changes to clause 7.13.5 of the human resource manual are not correct. The Respondent has no intention of using the Code to amend the CBA to the prejudice of Claimant members. There is no intention to suspend employees on disciplinary grounds without pay and clause 6.4 of the Code does not sanction such. Warning letters are to last up to 6 months but form work record as pilot jobs are highly regulated. It is a requirement of employees to seek approval before taking positions in for-profit business so as to safeguard conflict of interest or abuse of office by an employee. The requirement for employees to disclose their relatives employed by Respondent at the same time is noble and not intended to effect demotion but the Respondent intends to place such employees in different departments for effective work environment. The Claimant officer Ronald Karauri was a pilot with the Respondent together with his spouse which he disclosed and no adverse action was taken. The Code make provision for non-discrimination of persons due to their sexual orientation which is wholly necessary for respondent's ethical values as it covers both local and foreign employees. Sexual orientation is not criminal and does not impute criminal intention on the part of the Respondent or any employee who subscribe to it. The requirements on intoxication are made for the purpose of respondent's compliance with the Civil Aviation Act and this does not compromise Claimant member's rights or the CBA.

10. Mr Mwendar also avers that the order sought seeking the Respondent to be compelled to provide the Claimant members with benefits is beyond the Court jurisdiction; the Respondent cannot issue visa letters to employees on official duties and such require board approval on its discretion. The Respondent is under great financial difficulties and requires external financiers and as a sign of good governance the Code is essential for survival and as an indicator of compliance with international best practice. 87% of staff have signed the code, 97 pilots out of 512 pilots and none of those who have signed have been adversely affected. To thus grant the orders sought would make the Court descend into the general business of the Respondent and the administrative prerogatives which is not the role of the court. to shield Claimant members from signing the Code would be an act of discrimination against the 87% employees who have signed and agreed to be bound by it thus contrary to section 5(3)(b) of the Employment Act.

11. The respondent's view is that there is nothing wrong in signing the Code or withholding privileges which are discretionary and intended for an employee and where such an employee is disobedient, insubordinate and is unreasonably uncooperative when asked to abide by standing rules as the case of Claimant members. There is thus no *prima facie* case made by the Claimant for the orders sought as the Code is not intended to amend the CBA and the Claimant interpretation of it is wrong and issues complained of are non-negotiable. The Code is an internationally recognised tool. To observe the Code would not cause any damage to the Claimant and on a balance of convenience, which favours the respondent, the application should be dismissed with costs.

## **Determination**

12. The application by the Claimant is premised on the provisions of section 12(3) of the Employment and Labour Relations Court Act and Rule 16 of the Court procedure rules. The orders sought are of the nature seeking to prohibit and compel the Respondent in the use of the Code and to re-open the buddy pass program respectively. The grounds and basis of the application is that the Code violates the terms

and conditions of the CBA between the parties herein. The Respondent contests that the Code is an internationally accepted tool, a best practice and does not in any way change or amend the CBA and where there is such misconstruction, the CBA and other policy documents such as human resource policy and employment contracts of employment are to prevail. That the Code is not discriminatory against the Claimant members and to require that the claimants not be bound by the Code would be discriminatory against employees who have signed it.

13. It is common cause that parties herein have a CBA. Such CBA has the terms and conditions of employment for Claimant members. Under the CBA there are set out items which are subject of negotiations. It is also agreed that the Code subject herein is the Revised Code setting out the organisation values, responsibilities and ethical obligations and supposed to provide employees with guidance in handling difficult ethical situations related to the business. However in this regard, the Respondent in the Replying Affidavit of Alban Mwendar dated 6<sup>th</sup> November 2015 States at paragraph 13 thus;

*13. THAT because codes are of general application to all employees and business considerations are not always in consonance with contractual legal rights of employees it is always a rule that where provision of a Code conflicts with an employee's contractual right the latter should prevail. Otherwise employees have a duty to observe and obey the terms of the Code as part of the organisation's policy document as the Code forms part of staff rules and regulations.*

14. Mr Mwendar at paragraph 8 of his Replying Affidavit also avers that the items subject of negotiations between the parties herein include;

- a. Rates of pay
- b. Duration of employment
- c. Hours of work
- d. Method of wages payment
- e. Paid leave
- f. Collection of claimant's dues
- g. Medical facilities
- h. Sick leave
- i. Insurance
- j. Fleet agreements
- k. Kenyanisation and
- l. **Other generally accepted terms and conditions of employment** [emphasis added].

15. Therefore, the Respondent acknowledges that the Code creates a duty on the employees to observe and obey its terms as part of Respondent policy document and that it forms part of staff rules and regulations and under the CBA part of the negotiable items is as set out at clause 3(a) and particularly with regard to **Other generally accepted terms and conditions of employment**.

16. That therefore set out, the orders sought herein must be seen in this context of matters not contested and forming common and mutual aspects between the parties herein. The complaint by the Claimant is that they have not been consulted by the Respondent with regard to the use of the Code which averment is admitted by the Respondent at paragraph 16 of Mr Mwendar Replying Affidavit;

*That the Code being replaced was not preceded with negotiations between the Respondent and the Claimant as is the norm of industrial relations practice and as is further acknowledged by the parties Recognition Agreement. [Emphasis added].*

17. The rationale by the Respondent for not negotiating seem to be on the grounds that the Code does not modify the employment relationship between the parties, there is no change of policy and the Code is to be read in addition to the various policies and procedure manuals of the respondent. One would then ask, why have the Code then if there already exists the CBA, the Employment contract, and other policy documents?

18. First answer can be traced at paragraph 34 of Mr Mwendar Replying Affidavit where he avers;

*That the Respondent is undergoing great financial constraints and requires external financing to support its operations. As a sign of good governance, it is part of the financier's expectations that employees subscribe to and sign a Code of business conduct and ethics. For the purpose of survival of the airline, job protection for nearly 4,000 employees and the sustenance of all sectors supported by the airline, it is imperative that all staff comply with the requirement of signing the Code of Business Conduct and Ethics.*

19. This then forms a noble criteria for the requirement for the Code. The claimant members being employees of the Respondent, aware of the need to secure employment would support the Respondent in this regard towards sustenance. There is however a second reason set out at paragraph 41 of the Replying Affidavit;

*THAT the Respondent is further of the view that there is nothing wrong with withholding discretionary privileges for an employee is the employee is disobedient, insubordinate and is unreasonably uncooperative when asked to abide by standing rules and regulations as in the case of the claimant's members.*

20. Matters of an employee being disobedient, insubordinate and uncooperative are serious disciplinary matters already set out in the parties CBA and also regulated under the Respondent human resource policy. To thus use the Code for these purposes, to withhold a benefit, privilege or right accorded to other employees on the basis of not signing the Code, on the face of it is to set aside and separate such an employee who is disobedient, insubordinate or uncooperative for different treatment other than the treatment set out in the CBA or other policy documents agreed on by the parties. Such would amount to discriminatory practice.

21. In the case of **American Cyanamid versus Ethicon 1 (1975) A.C.** the Court held that;

*... The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. ...*

22. In this regard, I refer to the Court decision in **Esther Mbinya Musau versus National Bank of Kenya Limited, Cause No.989 of 2015;**

*... Unlike in ordinary contracts, an employment contract is founded on special circumstances that are regulated by statute unlike the ordinary law of contract. An employment contract has its foundational basis under the provisions of article 41 of the constitution and where an employee cites the violation of their rights, such rights must be ascertained under the applicable law as well as under the constitution. To thus cite an unfair practice; ... special attention must be given into the allegations and circumstances of such stated wrongful action; illegal practice/s for the Court to make a finding as to the unfair conduct.*

24. In this case therefore, noting the Respondent failed to negotiate with the Claimant over the Code, which Code touches on fundamental terms and conditions of service, I find there exists a *prima facie* case as set out in by the Court of Appeal in **Kenya Railways Corporation versus Thomas Nguti & Others, Civil Appeal No.210 of 2004** where the Court made the following reference with regard to the case of **Giella versus Cassman Brown** thus;

*... The Court does not need to get into the depth of the matter. Basically for mandatory and*

*prohibition injunction, the principle applicable to both branches of injunction is the statement by SPRY JA in GIELLA vs CASSMAN BROWN & CO. LTD. 1978 EA 358 where he said that for interlocutory injunction to issue the applicant must show that he has a prima facie case with probability of success, that if the injunction is not granted he is likely to suffer irreparable damage that cannot be adequately compensated in damages and if the Court is in doubt to decide the case on balance of convenience. The principle applies also to mandatory injunction except that the latter is awarded sparingly and in very rare occasions because normally it involves un-winding, sometimes at great expense, what had already been done so it becomes a point to consider whether the costs involved in regaining the position would be much compared to the cost involved in regaining the position as it is.*

25. Noting thus the competing interests and rights the Court shall not go into the merits of each at this point. This would be to pre-empt the eventual hearing of the matter. I however hasten to add that both parties, though from a different perspective have raised questions with regard to discrimination. Such are matters so serious and once stated as such, the Court must stop at everything else and delve into any aspect of discrimination against any party at the workplace. Such are matters that require the party alleging discrimination against them or against any other person or persons, class of persons or employees to call for evidence in that regard. I therefore find even with the Court addressing the current application, there remains serious other matters for adjudication.

26. As submitted by the Respondent, which I agree, under section 5 of the Employment Act, no employee should be accorded special treatment against the other for being unionised or out of any union as equality of terms should be due to all employees without discrimination against them. Where the Claimant members seek for the application of the Code, the starting point should be to seek its application to all employees of the respondent without setting out conditions that separate and distinguish others due to their status of any kind including on the grounds of their sexual orientation. On the other hand, where the Code is challenged for being contrary to specific terms and conditions under the CBA, such application should be guaranteed or challenged as in this case for the benefit of all Respondent employees without distinction on any prohibited grounds under the constitution and with due regard to article 27 and other internationally accepted best practices protecting minority and marginalised populations. Where such groups/class of person form part of the Respondent workforce, no Code, CBA or other policy document should set them aside for separate and different treatment without reasonable cause or without justification permitted in democratic societies such as ours as that would amount a discriminatory practice. Such a practice is what section 5 of the Employment Act is keen to address with a mandatory prohibition.

**In the interests of justice, on a balance of convenience and noting the application dated 2<sup>nd</sup> October 2015 and as set out above, in the INTERIM pending hearing of the suit I make the following orders and directions;**

- a. **The Claimant members shall proceed and sign the Code of Business Conduct and Ethics unconditionally as required by the respondent;**
- b. **The Respondent shall proceed re-open registration of the Claimant members nominee for the buddy pass program for 2015;**
- c. **The above (a) and (b) shall be undertaken within the next 7 calendar days from the date herein inclusive;**
- d. **The above (a), (b) and (c ) being mutually complementary, where any party does not comply, the other shall be at liberty to move the Court as appropriate;**
- e. **Noting the orders (a) and (b) above, a hearing date herein shall be allocated on priority basis;**
- f. **Costs shall be in the motion.**

**Orders accordingly.**

Delivered in open court at Nairobi this 25<sup>th</sup> day of November 2015.

**M. MBARU**

**JUDGE**

In the presence of:

.....

.....