REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

MISC. CAUSE NO. 87 OF 2013

(Before D.K.N. Marete)

KENYA AIRLINES PILOT ASSOCIATION……..……..…APPLICANT

Versus

KENYA AIRWAYS LIMITED…….……..…….RESPONDENT

RULING

This is an application by way of Notice of Motion dated the 2nd December, 2013 by and brought to court by way of a certificate of urgency and seeks the following orders;

1. ***THAT***, *this application be certified as urgent and heard Ex-parte in the first instance.*

2. ***THAT***, *the Honourable Court do issue an Ex-parte Interim order restraining the Respondent; its Agent and/or Servants from commencing or continuing conducting trainings including Command Course (Commair Course) Computer based Training (CBT) Simulator Training and Route Training for any of the Expatriates Pilots (Direct Entry Contract Pilots) pending hearing of this application Inter-partes.*

3. ***THAT***, *the Honourable Court do issue an Interlocutory Injunction restraining the Respondent; its Agent/or Servants from commencing or continuing conducting trainings including Command Course (Commair Course) Computer based Training (CBT) Simulator Training and Route Training for any of the Expatriates Pilots (Direct Entry Contract Pilots) pending hearing and determination of this suit.*

4. ***THAT***, *the costs of this Application be in the cause.*

And is grounded on;

1. *The Respondent is a private 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 share holder with an Equity share holding of 26.73% while the rest 43.47% shareholding is publicly traded at the Nairobi Stock Exchange.*

2. *The Applicant/Claimant is the apex professional body for pilots in Kenya, registered on 6th December, 1972 with a membership of over 400pilots presently and expertise of 40 years in*

relation to pilot's welfare issues and aviation matters generally.

3. *The Applicant/Claimant is equally a national member of the International Federation of Airline Pilots Association (IFALPA), a global body for pilots representing over 100,000 pilots and comprising of over 100 member association.*

4. *The Petition herein seeks the intervention of this Honourable Court to ensure that an ongoing infringement of a fundamental right affecting over 400 Kenyan pilots generally and (27) pilots specifically all members of the Applicant to the extent that they are being discriminated upon on the basis of race is halted to forestall unwarranted industrial action.*

5. *Both the Applicant/Claimant and the Respondent mutually appreciating pilots staffing constrains entered into a Memorandum of Understanding (MOU) dated 5th October 2012 to enable the Respondent recruit (13) thirteen expatriate pilots (Direct Entry Contract Pilots) on the understanding that existing protocols and practice in relation to seniority list and promotion shall be applicable to the incoming expatriate pilots.*

6. *A subsequent Memorandum of Understanding (MOU) dated 15th august 2013 establishing a framework of Kenyanization program to gradually replace all expatriate pilots (Direct Entry Contract Pilots) with Kenyan pilots currently undergoing training.*

7. *Pursuant to the aforesaid Memorandum of Understanding referred to in Para 6 above the Respondent recruited (12) Twelve Expatriate pilots from January 2013 to dated (8) eight of whom all proceeded for their command course and currently (3) three of them who had returned to the country and have secretly being slotted for (Computer Based Training) at the Ground school in Embakasi and subsequently transferred to Amsterdam Netherlands, to undergo simulator training.*

8. *That some of the (27) Kenyan pilots the Applicant/Claimant's members that underwent similar command course upto (6) Six months prior and are still awaiting their opportunity to complete their conversion course.*

9. *That the ongoing Discrimination of 27 Kenyan pilots by the Respondent will in the next week see the (3) three expatriate pilots (Direct Entry Contract Pilots) placed on route training before qualifying as pilot in command to the disadvantage of Kenyan pilots.*
10. *The unilateral actions by the Respondent not only contravenes mutually binding Memorandum of Understanding but portends disruption and disorganization of the seniority and promotion list that is sacrosanct in aviation world.*

11. *The ongoing action by the Respondent would imply a similar situation shall entail as soon as the remaining expatriate pilots (Direct Entry Contract Pilots) complete their command course expatriate pilots (Direct Entry Contract Pilots), to overlap many more Kenyan pilots that are waiting in line for Ground School training (Computer based), Simulator Training and Route Training.*

12. *The overlapping in training of the expatriate pilots (Direct Entry Contract Pilots) by the Respondent not only has a hearing on plane command responsibility but has monetary bearing upon the disadvantaged Kenyan pilots overlapped.*

13. *There is need for this Honourable Court to uphold the letter and spirit of the Constitution by making equitable orders and directions aimed at ensuring that a continuing infringement of a fundamental right of the (27) Twenty Seven Applicant/claimant's members by the Respondent is forthwith halted and remedied.*

14. *The Applicant verily believes that the blatant disregard of the two Memorandum of Understanding (MOUs) dated 5th October 2012 and 15th August 2013 respectively and subsequent*

unilateral actions by the Respondent, is not only discriminatory but ill motivated to further weaken the Applicant/claimant a union.

15. *It is in the best interest of equity and just ice that this Application be allowed.*

16. *Granting this Application will enable the Court to dispense justice effectively, expeditiously and affordably.*

The application is supported by the Supporting Affidavit of Ronald Karauri the respondent's Secretary-General sworn on the same date.

The application describes the respondent as a private company listed at the Nairobi Stock Exchange whereas the claimant is the Apex professional body for pilots in Kenya with a membership of over 400 pilots presently and an expertise of over 40 years in pilot welfare and aviation matters. This application seeks to ensure that an ongoing infringement of fundamental rights affecting over 400 pilots generally and 27 pilots specifically, members of the Applicant to the extent that they are being discriminated upon on the basis of race and also to forestall unwarranted industrial action.

The respondent through a replying affidavit sworn by Captain Kenneth Githuko Gichoya, the respondent's chief pilot on 14th December, 2013 opposes the application and avers that the parties (R&C) have time and again entered into CBA's for the regulation of terms and conditions of employment of the applicant's members engaged by the respondent, the current being one of 15th August, 2011 but these CBAs do not apply to the respondent's employees employed on specific term contracts like the circumstances of this case and therefore would not apply to expatriate captains the subject matter of this dispute. Clause 36 of the CBA endows the respondent with the discretion on all matters relating to employment contracts of expatriate pilots.

The respondent further avers and posits that the present scenario was necessitated by the introduction of Embrean aircraft which are operated by a Captain and a First Officer as co-pilot and due to a shortage of such caliber staff. The parties entered into an agreement for the recruitment of expatriate captains to cover such shortages. This was with the agreement albeit reluctant of the Claimant/Applicant and conditions upon a Kenyanisation plan on the eventual offloading of these expatriate pilots.

These expatriate captains were qualified but had to undergo and partake conversion of foreign licenses in accordance with domestic legal requirements and therefore the conversion training of the expatriate pilots to assimilate and induct them into our local circumstances. This process was at all times known or ought to be known to the claimant even at the time of entering the memorandum of agreement.

The Claimant's/Applicants are also aware that the engagement of expatriate pilots is a stop gap measure intended to cater for an emergency situation and therefore the initial three year period of the program.

The expatriate pilots have indeed been engaged and signed employment contracts for only two years. That the interim injunction and the interlocutory injunction being sought by the applicant would jeopardise the respondent's expatriate captains programme and disrupt the same leading to massive loss as a consequence of cancellation of scheduled training and eventually employment contracts.

The respondent in the penultimate denies the discrimination aspects of this programme and avers that the applicant's members have been engaged and considered for various training as need arises and also as per the agreement *inter parties*. She therefore prays this application be dismissed with costs.

The issue for determination in a nutshell, is whether an interlocutory injunction should or should not issue pending hearing and determination of this suit.

The matter came for hearing on 20th December, 2013 when the parties submitted in favour/support of their various cases respectively. Notable of these submissions was the respondent's reference and submission on the Notice of Preliminary Objection launched on 16th December, 2013 as follows;

TAKE NOTICE that during the hearing of the Claimants Application dated 3rd December 2013 the Respondent would be raising a Preliminary Objection to the suit on the basis of its being incompetent and bad in law and will contend that it be dismissed with costs.

She opposed the application and submitted that these proceedings are incurably defective and should be struck out for being an abuse of the process of court. She further submitted that even on the reliance of the authority of **Giella Vs Cassman Brown, [1973] EA 358** there is no prime facie case. Indeed, there is no case at all the same having been filed as a constitutional application and referred to as such. When it was filed in court, there was no petition but an application. There was no pending suit in support of the application and that the new cause, Industrial Cause No. 1935 of 2013 was not placed before court as at the time of the petition. The claim was launched on 17th December, 2013 and there having been no petition or claim, the initial orders made on 3rd December, 2013 were made in a vacuum and are therefore defective and should be vacated.

Counsel for the respondent further submitted that rule 8(1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules form is specific on the nature of these applications. It enables and provides the procedure for applications for conservatory orders as in the present case.

A determination of this application would of necessity have to start with an analysis and determination of issues raised by the respondent in the preliminary objection whose first limb is one that the application is defective in that this is a constitutional application that was filed in court out of form. This is because it comes in as an application and not a petition as expected of the law and procedure on these proceedings. It is therefore amorphous, hybrid and unclear on its intentions and form. Moreover, even if this was to be treated as a normal application by way of Notice of Motion and therefore rightly before court it would rightly be argued that this was not supported by a pending suit as at the time of filing and issue of the interim orders of injunction. It is trite law that applications and petitions must be supported by a pending suit. This is disputed in the circumstances.

The respondent's case is that Industrial Court Cause No. 1935 of 2012 was filed on 17th October, 2013 and did not exist at the date of filing the application on 3rd December, 2013. The Claimant/Applicant denies this and supports the opposing view that this was filed on due date on 3rd December, 2013. A scrutiny of the record of court reveals two court stamps bearing both of these disputed dates and a cancellation on the latter one, 17th December, 2013. This casts a shadow on the authenticity of the date of filing of the claim. Is the cancellation of the date on the pleadings an accident, an error, erasure or is it deliberate? Is there a superimposing date connection between 3rd December, 2013 and 17th December, 2013 as to justify an error or oversight on the part of the receiving officer? Is there a near or possible relationship between 3rd December, 2013 and 17th December, 2013? My answer is NO. These are not in any way related as to confuse each other. If this was linked to immediate following dates like 2nd December, 2013, 4th December, 2013 or 16th December, 2013 and 18th December, 2013 or thereabouts one would understand. As submitted by the respondent this scenario is suspicious and should be deemed irregular. In the circumstances, I hold that there was no pending suit in support of this application and this nullifies its effect. The application should be struck out due to its nakedness.

The respondent in his submissions also sought to interrogate the mode of launching on filing of this cause in court. The application at all times is filed as a constitutional application and at all times referred to as such. However, it is brought to court as an application instead of a petition.

The respondent further posited that such constitutional petitions can only be filed in the High Court and then referenced to the Industrial Court. This position, she argues is dictated by rule 8(1) of the Constitution of Kenya (Protection of Rights and fundamental Freedoms) Practice and Procedure Rules. Here, form is specific on the nature of the application. It is critical and so to speak, a matter of life and death.

Coincidentally, all parties to this cause chose to apply and rely on Article 22 of the Constitution of Kenya, 2010 on enforcement of the Bill of rights. This is the process for the pursuit of fundamental freedoms

under the now-pronounced Bill of Rights in our constitution. Under Article 22(3) the Chief Justice is empowered and mandated to make rules providing for the method of commencing proceeding under this subject. It also lays clear-cut guidelines and procedure to be followed in pursuit of fundamental freedoms under the Bill of Rights.

The Chief Justice pursuant to Article 22(3) aforementioned vide Kenya Gazette Supplement No. 95 of 28th June, 2013 – Legal Notice No. 117 came up with The Constitution of Kenya (Protection of Rights and fundamental Freedoms) Practice and Procedure Rules, 2013 to as heretofore referenced accommodate procedure in the enforcement of fundamental freedoms under the Bill of Rights. Counsel for the respondent submitted that unlike in the instant case, rule 8(1) of these rules provides that every cause under these rules must be instituted in the High Court, which court may order a reference of the petition transferred to another court. This is as follows;

Rule 8.(1) Every case shall be instituted in the High Court within whose jurisdiction the alleged violation took place.

Rule 10 provides that these proceedings shall only be brought to court by way of a petition.

10.(1) An application under rule 4 shall be made by way of a petition as set out in form A in the Schedule with such alterations as may be necessary.

The respondent underlines the importance of the strict application of these procedural aspects of the pursuance of the Bill of Right in court. The applicant dismisses this and argues that the application is rightly in court as this is a court of competent jurisdiction. That Article 23(3) of the Constitution urges courts to avoid technicalities and formalities in so doing and therefore this application should be allowed to see the light of the day.

This court is duty bound to address these critical issues raised by the parties in support of their respective positions and cases. Article 23 emphasizes the procedure for the enforcement of fundamental freedom and rights, which is a critical segment of the Constitution of Kenya, 2010.

The Chief Justice, in his wisdom dedicated the application of fundamental freedoms to the High Court and provided that this be pursued through a petition under form A.

What is the constitutional meaning of the term, High Court? Article 165(1) establishes and constitutes the High Court. Under Article 165(2) the jurisdiction of the High Court is provided for.

Article 165 states as follows;

165.(1) There is established the High Court which –

(a) shall consist of the number of Judges prescribed by an Act of Parliament; and

(b) shall be organised and administered in the manner prescribed by an Act of Parliament.

(2) There shall be a Principal Judge of the High Court, who shall be elected by the judges of the High Court from among themselves.

(3) Subject to clause (5), the High Court shall have –

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under the Constitution to

consider the removal of a person from office, other than a tribunal appointed under Article 144;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of –

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question to conflict of laws under Article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

(4) Any matter certified by the court as raising a substantial question of law under clause (3) (b) or

(d) shall be heard by an uneven number of Judges, being not less than three, assigned by the Chief Justice.

(5) The High Court shall not have jurisdiction in respect of maters –

(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

(b) falling within the jurisdiction of the courts contemplated in Article 162(2).

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

The constitution under Article 165(2)(a) and (b) above not only gives the High Court unlimited original jurisdiction to hear and determine criminal and civil matter but also awards jurisdiction to determine questions as to whether a fundamental freedom under the Bill of Rights has been denied, violated, infringed or threatened. Sub Article 2(b) therefore, like is argued by counsel for the respondent vests the High Court with exclusive jurisdiction and power to hear and determined issues in the realm of the subject matter of this application – fundamental freedoms under the Bill of Rights.

Article 165 (5) of the Constitution however excludes and restricts jurisdiction by the High Court as follows;

(5) The High Court shall not have jurisdiction in respect of matters –

(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

(b) falling within the jurisdiction of the courts contemplated in Article 162(2).

This brings out the broad and yet disputed issue of whether courts constituted under Article 162(2) of the Constitution indeed are part of the High Court or are subordinate to the High Court.

1. *162.(1)…*

2. *(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to –*
    a. *employment and labour relations; and*
    b. *the environment and the use and occupation of, and title to, land.*

Article 162 expresses a system of courts with the status of the High Court established to undertake specialized aspects of the jurisdiction of the High Court and therefore this court and the Environment and Land courts. In so doing it was the intention of parliament to cure anomalies in legal practice relating to these aspects of legal practice and also enhance their jurisdiction to that of the High Court.

Would the term '*with the status of the High Court'* mean that these specialized courts are indeed the High Court, part of the High Court or the equivalent of the High Court? My take is that these courts carry the status of the High Court – no more. The constitution intentionally established and created two regimes of the High Court, the one under Article 165 generally and particularly Article 165(1) and others under Article 162(2.) These are distinct but equal arms of the High Court of Kenya. The distinction only arises in their utility.

One of the methods of statutory interpretation is to look at the intention of parliament at the time of making legislation. If the intention of parliament was to incorporate these courts into the mainstream High Court, this would have been clearly expressed in the Constitution. Moreover, an adoption of this other criterion for statutory interpretation – searching into the ordinary meaning of words brings out a similar scenario. The ordinary meaning of the words that express Articles 162(2) and 165, particularly Article 165(5) clearly brings out a situation that the constitution intended and indeed has come out with distinct versions of the High Court: the one under Article 162(2) and the other created under Article 165. These have the same power and jurisdiction but are distinct in intent.

How then would we treat the respondent's submission that this cause would have rightly been initiated by a petition in the High Court? Would this argument suffice in view of the finding on Article 162(2) and Article 165(5) above? My answer and finding is no. It would be an anomalous and unconstitutional to bring out a petition involving Employment and Labour Relations matters or even Environment and Land to the mainstream High Court. It would offend Articles 162(2) and 165(5) and therefore not be feasible or tenable. I would therefore agree with the submissions of the respondent as to the procedure of approach to court – Petition, but not the court to which such petition would be filed. Litigants have the choice between the mainstream High Court and the courts established under Article 162(2), all determinate by the subject matter of the cause. In the instant case, a petition should have been brought to this court for hearing and determination. This is captured in rule 8 of the constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 as follows;

Rule 8.(1) Every case shall be instituted in the High Court within whose jurisdiction the alleged violation took place.

(2) Despite sub rule (1), the High Court may order that a petition be transferred to another court of competent jurisdiction either on its own motion or on the application of a party.

(10) An application under rule 4 shall be made by way of a petition as set out in form A in the Schedule with such alternations as may be necessary.

23(1) Despite any provision to the contrary, a Judge before whom a petition under rule 4 is presented shall hear and determine an application for conservatory or interim orders.

The rules prescribe the manner and format under which a petition under the subject would be commenced in court. This is a new area of practice and requires amplification besides clear cut scrutiny and guidance in order to perfect a core area in the realization of the Bill of Rights.

This is the more so why clarity should be had in the definition of the term High Court. It's relationships with courts established vide Article 162(2) on the issue of application and articulation of matters relating

to fundamental freedoms under the Bill of Rights must be exacted.

The application in my estimation, faulters and fails on two aspects. Firstly, the format. It does not come out as a petition despite loud claims to this extent. Secondly, it is grounded under Articles 2(5)(6) and 19, 20, 22(1) and (2), 27(5) and 41(1) besides the National Cohesion and Integration Act No. 12 of 2008 and the Employment Act, 2007. This strictly spells out a Constitution Petition as envisaged by Article 22 of the constitution of Kenya, 2010 but fails to abide by the criterion, rules and regulations on the initiation of the same. Further, even in the current format, it is filed without the anchorage of a suit in court. In the instant case there is doubt that this application was filed in the company of a claim or other form of suit. The authenticity of the date of the claim is on record is wanting. The application is therefore not self-sustaining and I hold as such.

In the meantime, it would be unworthy of delving into the merits of the application. This is despite vehement submissions and authorities by the parties in support of their respective cases.

I am in the penultimate inclined to strike out this application with costs to the respondent.

Dated, delivered and signed this 17th day of January, 2014.

D.K. Njagi Marete

JUDGE

Appearances:

1. Mr. Muraguri instructed by Mohochi & Company Advocates for the Applicant.

2. Mr. Obura instructed by Obura Mbeche & Company Advocates for the Respondent.