



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO. 638 'B' OF 2014**

**AVIATION & AIRPORT SERVICES WORKERS UNION (K) ..... CLAIMANT**

**VERSUS**

**KENYA AIRPORT AUTHORITY ..... RESPONDENT**

**KENYA AVIATION WORKERS UNION .....INTERESTED PARTY**

**RULING**

**Oronga Advocate for the Claimant**

**Oyombe Advocate for FKE for the Respondent**

**Achiando Advocate for the interested Party.**

1. On 13<sup>th</sup> May 2014, the Interested Party herein, the Kenya Aviation Workers Union (IP) filed Notice of preliminary objection to the application of the claimants, Aviation & Airport Services Workers Union (K), (AASWU) on the grounds that;

- a. The application has been drawn, filed and instituted by an advocate who has no authority to draw the pleadings as he has not filed his Notice of Appointment with the honourable court therefore does not have the right of audience;
- b. The present application is fatally defective for material nondisclosure by the applicant in that the applicant at the filing of the application failed to disclose to this honourable court the existence of Industrial Court, Cause No 689 of 2014 which they had filed and obtained similar orders.
- c. The present application as taken out, drawn and filed in incompetent, misconceived, fatally defective, unsustainable, bad a nullity in law, therefore are of no legal consequence or at all.

2. The claimant filed their grounds of Opposition to the objections raised by the IP on 9<sup>th</sup> June 2014 noting that the same have no legal basis, is misconceived and an abuse of the court process as there is no similar suit as Cause No. 689 of 2014 and thus the objections should be rejected.

3. On 4<sup>th</sup> July 2014, all parties represented by Oronga Advocate for the claimant, Oyombe Advocate for the respondent and Achiando Advocate for the IP made their oral submissions in Court. The IP submitted that when the claimant filed their application dated 28<sup>th</sup> April 2014 the advocate acting did not have the capacity to do so as there was no Notice of Appointment for the advocate to act in the matter and thus all the records filed were a nullity in law and the advocate who filed these records has no right of audience. The IP relied on the case of **Kenya National Security Workers union versus Total Security Surveillance Limited, Cause no. 1405 of 2012**. That where the law has set the procedures to be applied,

these should not be ignored and where an advocate has failed to file their Notice of Appointment before filing a matter in court, this is an omission that is fatal.

4. Under Rule 16(6) of the Industrial Court Procedure Rules, a court order should not be extended for more than 14 days and the Court has no discretion to extend it. The claimant has enjoyed interim orders since 2<sup>nd</sup> May 2014 causing the IP prejudice and caused them to lose representation before the respondent who is undertaking a retrenchment. There is a Recognition Agreement between the IP and respondent that is rendered not operational due to the ex-parte orders given to the claimant.

5. The IP also submitted that the claimant is guilty of nondisclosure. The claimant filed a similar case seeking similar orders in **Industrial Cause No. 689 of 2014** and there are orders made on 25<sup>th</sup> April 2014 and then on 28<sup>th</sup> April 2014 the application before court was filed. The claimant in filing this application failed to disclose that there was an existing matter over the same issues and parties and that there were orders in that respect. On 5<sup>th</sup> May 2014, the claimant filed a Notice to Withdraw **Cause No. 689 of 2014**. This withdrawal was allowed and costs awarded to the respondents. This however did not cure the mischief on non-disclosure as at the time the application herein was filed there existed another suit.

6. The IP also submitted that under the provisions of section 48(7) of the Labour Relations Act, members of the claimant had tendered their resignations from the Union and hence an employer cannot make deductions from such an employee who has so resigned. Once there is a resignation, the notice takes effect within a month. The Recognition Agreement has a provision that the resignations should take three (3) months which is contrary to the law which provide for one month. Section 47 read together with section 9, once an employer receives a resignation, there should be no deduction. The claimant's application should be dismissed.

7. The respondent on their part supported the submissions of the IP and also noted that the application by the claimant is seeking similar orders as in *Cause No. 689 of 2014* without disclosing that there was a similar suit where the claimant got similar orders as in this cause save for the order of remittance of union dues to claimant despite that having been part of the prayers in the application and being unhappy with that order, the claimant filed a new application where the order was granted. This Court granted the orders without the knowledge that there were similar orders. This is double expense for the respondent and has effects on the employees and tantamount to forum shopping by the claimant as they are choosing which orders favour them most and hence the withdrawal of **Cause No. 689 of 2014** was not in good faith and should not be used to benefit a party that has failed to disclose material facts in obtaining orders. The application should therefore be dismissed with costs.

8. The claimants on their part submitted in opposition to the preliminary objection that the threshold for preliminary objections has not been met that the same is based on arguable grounds that require evidence. There is no law that has been violated. There is no law that requires an advocate who has drafted pleadings to separately file a notice of appointment and the cited case in **Cause 1405 of 2012** relate to facts where a party had filed pleadings in person and the advocate joined in the course of the matter and hence had to file a notice of appointment.

9. That there is a notice to withdraw **Cause No. 689 of 2014** and this was done before the preliminary objection herein was filed by the IP. The suit is not material to the current case as the same is marked as withdrawn. The objections raised should therefore be dismissed to allow the claimant proceed with the suit.

10. It is now common practice that is accepted by litigants before the Court and any other Court that where a party is represented, the pleading are drawn by the Party, Union or Advocate acting for the party they represent or act for. My reading of the Civil Procedure Act and the Rules thereto as well as the Industrial Court Act and the Rules thereto does not strictly separate the filing of initial pleadings requiring a Union or an Advocate to do so separately from the descriptions in the pleadings. Where an advocate takes over the matter when it has taken course, then as a matter of procedure and practice, a Notice of Appointment must be filed as a requirement and rule whether before the Industrial Court or any other

Court. This is the gist of what Rika J. in **Cause No1405 of 2012** held in that an advocate who took over a matter from a party who was acting in person had to file the Notice of Appointment. This is not the case here as the advocates on record for the claimants filed the initial pleadings and indicated that they were acting of the claimants and this is well outlined in all the pleadings filed.

11. On the question of extension of court orders, the interim orders herein are extended on good grounds that the court finds to be fair and just in the circumstances of each case. Once this is established, without violating and ensuring that the rights of the party brought to court due to the *ex parte* orders is given a hearing at the earliest time possible, then the court on good reason can extend the interim orders. However, as noted by the IP, even where the court has discretion to extend *ex parte* orders, the discretion must be exercised judiciously. What is judicious is as held by the Court of Appeal in **CMC Holdings Limited vs. Nzioki [2004] 1 KLR 173** where it was held as follows:

*In an application for setting aside ex parte judgement, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously..... In law the discretion that a court of law has, in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error.*

12. The court in this case dully considered the nature of orders granted and granted the extensions herein that were reasonable. The interim orders were not to be issued in futility.

13. With regard to the question of nondisclosure of material facts by the claimant when they obtained the *ex parte* orders herein It is common ground that **Cause No. 689 of 2014** was filed first and the parties herein are similar as in that cause and that all the orders being sought in the current cause are the same. When this cause was filed the orders in **Cause No. 689 of 2014** were still pending before this Court though issued by a different Judge. This suit is between the claimant and the respondent and the IP as the 2<sup>nd</sup> respondent. Therefore during the pendency of that suit, the present suit has been filed in the. It is now common ground that **Cause No. 689 of 2014** has now been marked as withdrawn.

14. What is in dispute is whether the failure by the claimant to disclose to this court of the existence of **Cause No. 689 of 2014** is fatal to their suit for nondisclosure. That due to this nondisclosure, the claimants obtained the *ex-parte* orders that they continue to enjoy to date and should therefore not be allowed to so enjoy having committed the offence of nondisclosure of material facts. In this regard I rely heavily on the provisions of the provisions or Order VII Rule (1) (e) of the Civil Procedure Rules. These provisions are mandatory and go a long way to serve any gaps that may exist in the industrial Court Procedure Rules with regard to filing of multiple claims.

15. Together with the above finding, I am also guided on what should consist in a preliminary objection in that only matters of law which has been pleaded or which arises by clear implications out of pleadings, and which if argued as a preliminary point may dispose of the suit. This is per the principles set out in **Mukisa Biscuits manufacturing Co. Ltd versus Westend Distributors Ltd and Another [1969] E.A. 696**.

16. The provisions of Order VII Rule 1(1) (e) of the Civil Procedure Rules provide:

*An averment that there is no other suit pending, and that there have been no previous proceedings, in any court between the plaintiff and the defendant over the same subject matter.*

17. It has been held time and again that a claim must comply with the mandatory provisions of Order VII Rules 1 and 2 as held in **Paul Koinange versus Donald kipkorir et al, high Court Civil Suit No. 2040 of 2000** which decision was reaffirmed in Court of Appeal **Civil Appeal NO.80/1988 POP-IN (K) LTD & 30 Others versus Habib Bank A.G. Zurich** on the principles thus:

*The admission of a fact fundamental to the decision arrived at cannot be withdrawn and fresh litigation started with a view of obtaining another judgment upon a different assumption of facts.*

*Parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case or new version which they present as to what should be a proper apprehension of the court of the legal result either of the construction of the documents or the weight of certain circumstances. If this was permitted litigation would never end, except when legal ingenuity is exhausted. It is a principle of law that this can never be permitted.....*

18. Thus when a party comes to Court on an application supported by an Affidavit under oath and fails to outline and disclose matters that are material to the granting of orders, such a party is acting in a manner suggesting that they are peddling falsehood while under oath. The consequences of such conduct are well settled in law. Any advantage gained by such non-disclosure, the grant of *ex-parte* orders will be taken away from the offending party. In the case of **Ruaha Concrete Co. Ltd et al versus Paramount universal Bank Ltd et al, HCCC No. 430 of 2002**, the Court outlined in that case the principles of non-disclosure and the consequences which will follow as a result of such non-disclosure.

*The duty is not to make full and fair disclosure of all material facts, the material facts are those which is material for the judge to know in dealing with the application as made, materiality is to be decided by the Court, and not by assessment of the applicant, and the applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to any additional facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries. The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including:-*

- (a) The nature of the case the applicant is making when he makes the application.*
- (b) The order for which the application is made and the probable effect of the order on the Defendant or the Plaintiff.*
- (c) The degree of the legitimate urgency and the time available for the making of the inquiries.*

19. Filing another suit during the pendency of a similar suit is clearly an abuse of the process of the court. It is immaterial that the claimant has taken the step to have the first suit withdrawn, the fact of filing a new suit during the pendency of the earlier suit and failing to disclose this fact to the court during the granting of *ex-parte* orders is tantamount to peddling falsehoods while under oath. This is to be discouraged and avoided by all means possible and a party so offending must pay the cost.

**In the result, I find that preliminary objection with regard to non-disclosure of material facts is well founded in law. The up-shot is that the application and the suit herein are dismissed with costs to the respondent and Interested Party.**

**Delivered in open Court at Nairobi and dated this 10<sup>th</sup> day of July 2014.**

**M. MBARU**

**JUDGE**

In the presence of:

Lilian Njenga: Court Assistant

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