



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA
CAUSE NO. 1616 OF 2012

AVIATION & ALLIED WORKERS UNIONCLAIMANT

VERSUS

KENYA AIRWAYS LIMITED.....1ST RESPONDENT

MINISTER FOR TRANSPORT.....2ND RESPONDENT

MINISTER FOR LABOUR &

HUMAN RESOURCE DEVELOPMENT 3RD RESPONDENT

ATTORNEY GENERAL4TH RESPONDENT

RULING

This is an application dated 17th December 2012 by the 1st Respondent Kenya Airways Limited brought under Sections 12(3) (1) & (viii) of the Industrial Court Act, 2011 and Rules 16 of the Industrial Court (Procedure) Rules, 2010. The applicant is seeking for orders that execution of the Award and the orders made by this Court on 3rd December 2012 be stayed pending the hearing and determination by the Court of Appeal of the 1st Respondent application for stay of execution of the said award and orders pending appeal in Civil Application No. Nairobi 310 of 2012 (UR 224/2012, Kenya Airways Limited versus Aviation & Allied Workers Union Kenya et al.

The application is based on the grounds that following the award of this Court issued on 3rd December 2012, the 1st applicant was dissatisfied with it and hence applied for proceedings in order to enable them prepare and lodge the Record of Appeal, and that on 11th December they lodged in the Court of Appeal under a Certificate of Urgency an application seeking a stay of execution of the said orders pending the hearing and determination of their intended Appeal in Civil Application No. Nairobi 310 of 2012 (UR 224/2012). That the application for stay of execution at the Court of Appeal has already been satisfied as urgent and sent to the President of the Court of Appeal for him to empanel a three-judge bench to hear the matter as well as fix a hearing date which has now been confirmed for the 14th of January 2013.

Further that this Court has the jurisdiction as well as the duty to grant such relief as may be warranted by circumstances of a particular case so as to preserve the subject matter on an intended appeal or application pending before the Court of Appeal in order to ensure the efficacy of such relief as the Court might ultimately grant and thus this Court should grant a limited stay of execution of its orders of 3rd December

2012 pending the hearing and determination of the 1st Respondent's Application before the Court of Appeal, which will otherwise be futile if this Court does not grant the order for stay.

The Claimant/Respondent herein is opposed to the application in the replying affidavit of Perpetua Mponjiwa sworn on the 19th December 2012 and further raised preliminary issues in the nature of objections that the entire suit is res judicata having been determinate already by this Court hence this Court lacks the capacity to hear this application the issue of stay having been already orally addressed and the Court having made a ruling hence the same is res judicata as only the Court of Appeal has jurisdiction to hear a similar application as this Court is of similar standing as the Court that already decided on the same issue. secondly that this Court lacks the jurisdiction to determine the application as it has become functus officio in that a decision has already been rendered by a court of concurrent jurisdiction and only the Court of Appeal can hear a similar application on appeal. Further that the 1st respondent is involved in forum shopping hence an abuse of the court process.

Further to these preliminary objections, the claimant in reply states that this Court can only grant an injunction where there is a prima facie case and on a balance of convenience to the party so seeking and that the applicant lacks in this as they have already been overtaken by events having reinstated members of the claimants union with back pay-salaries. Further that the orders for stay had been rejected by this Court in an oral application submitted on the 3rd of December 2012. That even though there is an appeal to the Court of Appeal under Certificate of Urgency seeking a stay of execution, the 1st respondent should pursue that application instead of forum shopping and that this is an abuse of the court process.

Parties appeared for inter-parties hearing on the 21st of December 2012 and made extensive submissions and cited various authorities. The preliminary objections raised by the Claimant were heard simultaneously to their reply to the application of the 1st Respondent.

In submission the applicant stated that what is before this Court is an application for stay of execution of Court orders made on 3rd December 2012 since there is now an appeal that has been filed being Civil Appeal No. 310 of 2012. That a Notice of Hearing has been issued for the 14th of January 2013 and in the interests of justice this Court should grant the stay to ensure that whatever the higher court orders is efficacious. That the parties herein have a right of appeal to a higher court and unless the orders granted herein are stayed that appeal will be rendered nugatory and hence to ensure that right of appeal is possible, the applicant seeks that this court preserve the orders of this court until the appeal is determined.

In reply the Respondent stated that the jurisdiction to grant a stay is discretionary and should be judicious and in this case where the claimants were reinstated to their jobs, the stay should not be granted pending appeal as this would not be judicious in the circumstances. That several employees are affected and a stay of the orders herein made on 3rd December 2012 would affect the 447 workers reinstated and their families. Further that this application is an abuse of the court process as the requirements for granting a stay have not been fully satisfied.

The respondent further stated that this case is about the capitalist greed which must be tamed as they have orchestrated this case in their engagement with the 1st respondent being the Kenya Private Sector Alliance (KEPSA) and the Federation of Kenya Employers (FKE). That they are determined that the reinstated workers must be kept away at all costs and since the Court of Appeal will soon be addressing this issue, there is nothing new for this Court to address

Looking at the preliminary objections by the respondent herein I am keen to address the challenge to Jurisdiction of this Court to hear this application and note that under Section 12 of the Industrial Court Act, this Court is conferred with original jurisdiction to hear all labour related matters and indeed 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. This Court authority is not conferred to the individual but rather to the Court as an entity with perpetual succession. The mere absence of an individual does not render this Court inoperative and due to

the administrative operations of the Court and the judiciary as a whole when an individual Judge is away from the Court parties will not be sent away until that Judge returns and or is personally available to address any matter even on matters brought to this Court under Certificate of Urgency. Prudence demands that the authority of this Court vests in the institution and the officers behind the institution must perform each task for the benefit of the public without distinction or any undue delay. That will be a delay of justice. This Court is committed to ensuring the ends of justice are achieved to all parties. This case is not an exception. This Court therefore has jurisdiction to hear this matter.

On the challenge that the matter is res judicata on the basis that this matter has already been decided by the same court of similar jurisdiction, this Court observes that the Rules of the Industrial Court are very clear and where the rules of this Court have not been able to address any particular situation, this Court draws guidance to any other written law and the Constitution of Kenya. In this regard, the stay of execution being sought by the applicant relates to orders granted by this Court on 3rd December 2012 which orders once they were issued the applicant sought through an oral application to have them stayed for 45 days, which this Court overruled. This Court is hereby guided by the provisions of the Civil Procedure Act and the Rules thereto and under Order 41 rule (4) (5) 5) An application for stay of execution may be made informally immediately following the delivery of judgement or ruling that is the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

I note that on the 3rd of December 2012 when the matter came up for the reading of the award herein the applicant herein made an oral application for stay of 45 days as per the law allowed to make pending the filing of a formal application for stay. Even though the Court did not grant the stay that was informally made on the 3rd of December 2012 that was not a bar to them from making a formal application. I therefore find that this application is not res judicata, the applicant is rightly before this Court and the same will be determined on merit.

I further note the third ground of objection was on abuse of the court process where the applicant is indicated to have been engaged in forum shopping. This ground was not supported by any concrete grounds and I will proceed to dismiss it. I further would like to note that the application before this Court is that of stay of execution of orders granted on 3rd December 2012 brought under the above cited sections of the law and not for one for review of any orders previously granted. There are fundamental differences between an application for orders of stay of execution and an application for review of Court orders. In this instance this court has been moved by the applicant for orders of stay of execution.

That as it may, this Court as an institution, even where there would have been an application for review of its orders, would have proceeded to determine the same on merit as the requirements that an application for review to go before the officer and or judge who issued it is only an administrative action for expediency and or pragmatism where the judge making those orders would appreciate the issues being reviewed having issued them. That administrative action does not in any way prevent any other judge upon application and in meeting the ends of justice incapable of hearing an application for review and determining the same based on the grounds advanced and the laws applicable.

I note that under Section 17 of the Industrial Court Act, a party that is dissatisfied with any judgement, award, order or decree issued by this Court has an inherent right of appeal to the Court of Appeal in accordance with Article 164(3) of the Constitution. That right does not abet simply because a party has sought to orally have a stay of execution and the Court denied that application. That right subsists before the same Court upon good grounds advanced in a formal application giving grounds as to why the Court should consider granting such a stay of its orders pending an appeal. The right of appeal is a constitutional right that actualizes the right to access to justice, protection and benefit of the law, whose essential substance, encapsulates that the appeal should not be rendered nugatory, for anything that renders the appeal nugatory impinges on the very right of appeal.

The granting of stay of execution pending appeal by the Court is granted at the discretion of the court when sufficient cause has been established by the Applicant that:

- (a) Substantial loss may result to the Applicant unless the order is made;
- (b) The application has been made without unreasonable delay and
- (c) Such security as the court orders for the due performance of the decree has been given by the Applicant.

I note that the Applicant have acted expeditiously to file an appeal following the orders of this Court. The time used to file Civil Application No. Nairobi 310 of 2012 (UR 224/2012, Kenya Airways Limited versus Aviation & Allied Workers Union Kenya et al and even get a hearing date for the 14th of January 2013 was without delay.

I find that the Applicant has already complied with the orders granted by this Court on 3rd of December 2012 and despite the substantial loss that may result to the Applicant in this regard, in keeping with lawful directives of this Court they have obeyed pending the hearing of the appeal. I note the matter is now pending before the Court of Appeal vide documents submitted before this Court in support of this Application and in compliance with Sections 17 of the Industrial Court Act.

In an application of this nature this Court only seeks to ensure and be satisfied that the appeal is arguable and that if the stay of execution is not granted, its result will be rendered nugatory – see **Trust Bank Limited & Anor v. Investech Bank Limited & 3 Others – Civil Application No. Nai. 258 of 1999 (UR)**. The copy of the appeal annexed to this application, already filed includes grounds which raise substantial points of law and the view of this Court is that the appeal is not frivolous. This is not to say it will ultimately succeed. For the purposes of the present motion the applicant surmounts the test.

In addressing security to ensure the due performance of the decree once the matter is finalised, the practice of the Court has been to have the applicant deposit that security in Court or to ensure that a modality that secures both interests of the parties is made. However in this case the nature of the orders granted by this Court is that of reinstatement, back-payment of salaries among others. In this regards one cannot ask employees to deposit their salaries in Court as security that once the mater on appeal is finalised and the employer herein is successful on appeal they can have those salaries returned back to the employer. That would not be judicious. I however note that since the claimants were reinstated, the respondent/applicant has been able to pay all their dues despite the appeal being lodged and pending prosecution. It would therefore equally be possible for the Respondent/applicant herein to pay salaries and back date them up to when they are due if their appeal is unsuccessful but it would be unfortunately not be the same for the Claimants herein to repay back their salaries if the appeal were to succeed.

For these reasons I grant interim order of stay pending appeal in terms of the Notice of Motion dated 17th December 2012. Costs thereof will abide in the cause.

Dated and Delivered at Nairobi this 14rd day of January, 2013.

M. Mbaru

Judge Industrial Court

In the presence of:

Court clerk

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