



REPUBLIC OF KENYA
INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 610 OF 2013

KENYA AIRWAYS LIMITEDCLAIMANT

-VERSUS-

KENYA AIRLINERS PILOTS ASSOCIATION.....RESPONDENT

Mr. Obura for Claimant

Mr. Migochi for Respondent

JUDGMENT

1. Application filed on 30th April 2013 seeking interim relief was withdrawn on 28th May 2013 and the parties consented to proceed on the main claim.
2. The statement of claim dated 30th April 2010 seeks the following relief:
 - a. *That there be an injunction restraining the Respondent, its members, agents or servants from demanding or in any way seeking to be paid increases on salary; House /Owner Occupier Allowance. Transport Allowance, Monthly Productivity Allowance; Training and checking Allowance; and/or benefiting from any adjustments in Provident Fund dues which should have been paid and/or implemented with effect from 1st April 2013 as provided in **Clause 51** of the Collective Bargaining Agreement (hereinafter CBA) dated 15th August 2011 read together with Schedule 1 “B”; 11 B; III and IV “B” of the same CBA.*
 - b. *That the injunction issued under (a) above to remain in force until 31st of March 2014.*
 - c. *That there be an injunction restraining the Respondent, it members, agents and or servants from demanding an increase in salary, House/Owner Occupier Allowance; Transport Allowance and Monthly Productivity Allowance over and above the figures provided in the CBA dated 15th August for a minimum period of two (2) years from 1st April 2014 or until such time as the Honorable Court orders to the Contrary.*
 - d. *That either party be at liberty to move the Court.*
 - e. *That the Respondent to meet the costs of this suit.*

3. The statement of claim is supported by appendices one (1) to twenty four (24) which the claimant relies on to argue its case.

4. The Respondent filed a response to the Statement of Claim and counter claim dated 20th May 2013. The Respondent seeks the following relief:

- a. *The claim be dismissed with costs to the Respondent*
 - b. *The court orders the full implementation of the CBA dated 15th August 2011.*
 - c. *The Claimant pays all outstanding wages and allowances as stipulated in the CBA dated 15th August 2011.*
 - d. *Interest on (c) above at commercial rates with effect from April, 2013.*
 - e. *Any other order as the court may deem fit.*
5. The Claimant called **Mr. Dick Kimathi Murianthi** in support of its case.

His testimony may be summarised as follows :

6. That he is the head of financial control at Kenya Airways, the Respondent herein and had served the Respondent for ten (10) years and nine (9) months four (4) of which have been in his current position.
7. The witness is a holder of B. Com degree from the University of Nairobi and a Masters degree in Finance from the Moi University. He was a Certified Public Accountant CPA (K) and Certified Internal Auditor (CIA).
8. He told the court that he was well versed with the finances of the Respondent and the matter before court. He outlined the issues for consideration as the ability of the Respondent to pay or continue paying previously concluded agreements; the Respondent's performance in the recent past which has deteriorated from over two (2) billion profit to a loss of 10.3 Billion before taxes.
9. The witness adopted the pleading of the Claimant in total and in particular the plea to defer the salary increment in terms of the current CBA of the parties and freeze any further

increments for at least two years so that the increments due in April 2014 be payable in April 2015 and a freeze of 2015- 2016 notifications.

10. JUSTIFICATION

The plea by the witness is predicated on the 10.3 billion loss so as to give the Respondent respite to recover.

The witness took the court through the financials of the Respondent and concluded that it was imperative to drastically reduce the operational costs of the Respondent to guarantee its sustainability by returning to profitability and commerce cash.

11. CAUSE OF THE LOSS.

The witness highlighted the causes of the present poor performance of the Respondent to include but not limited to decline in numbers of premium passengers due to the Euro crisis, perceived insecurity in Kenya and the region due to the media focus on grenade attacks in parts of the country, kidnapping of tourists at the Coast and other parts of the country, the aging fleet of the Respondent's aeroplanes; and competition from Middle East carriers who have come to Nairobi and to the

Respondent's network in Africa, including Lusaka South Africa and Lagos. Fares have declined as a result therefore and many customers have been lost.

12. Dream liner impact

The Respondent had projected a 20% reduction in fuel consumption upon acquisition of the Dreamliner which have not been acquired yet for reasons beyond the Control of the Respondent. He told the court that fuel accounts for 50% of total cost and 41% of turnover. He adopted the entire annexes outlining the financial predicament of the Respondent which in his view presents an overwhelming justification for the prayers sought.

13. Freezing of Salary for Management staff

The witness told the court that for the past two (2) years, the Respondent has frozen salary increments for all Management staff and for the past one year for other staff. He said presently no salary increment negotiations were going on in respect of these staff.

14. Pilot's Salaries

The witness referred the court to Appendix 17 at page 119, a table which reflects the current remuneration for the pilots including 1st officers which indicates the lowest paid earned a gross monthly salary of Kenya Shillings Five Hundred Thousand (Kshs.500,00) with the highest earner getting One Million Nine Hundred Thousand (1.9Million)

He said that they earned quite well as compared to the executive of the company. It is this group that was the subject of the matter before court as they are the ones covered by the CBA in issue.

15. Steps taken to alleviate the situation

The witness outlined the various cost cutting measures undertaken by the Respondent so far which include but not limited to:

- (a) restructuring resulting in voluntary early retirement of hundreds of employees, a matter which is pending before the Court of Appeal;*
- (b) restructuring of routes which entailed closing of routes not making money;*
- (c) negotiations with existing suppliers to cap costs;*
- (d) negotiations through AFRA for fuel volume discounts and discounts on ground handling services;*
- (e) negotiation with hoteliers especially for crew and during missed connections.*

16. Reduction of meals by caterers and procurement of more economical packages.

It was the witness' evidence that all the matters entailed renegotiating existing contracts just like the Respondent had embarked to do with the Claimant before the developments were suddenly thwarted by non-cooperation of the Respondent

17. Global trend in the Aviation Industry

The witness painted a gloomy picture in the aviation industry since the advent of the Euro crisis. He told the court that the South African Airways had to be bailed out by the government to continue operations. Several Airlines in Africa had closed shop including Zimbabwe Air. Several others in Europe had also gone under receivership as outlined in paragraph 10 of the statement of claim.

The witness urged the court to find justification in the prayers sought and grant them accordingly. The remedies sought are in the nature of mandatory injunctions.

18. The witness was subjected to very close cross-examination by Mr. Mugochi for the Claimant and he stood his ground well on the matters he had covered in his evidence-in-chief.

He explained that the Respondent had posted losses in 2009 after taxation but in 2013, the enormous loss was before tax.

In the year 2010 the Respondent recovered well and made profits of close to four (4) billion.

19. He explained that though they had renegotiated various contracts with suppliers they have not resorted to court action as in this case.

He denied that management had received 24% salary increment in the year 2011 adding that the figures he was looking at were bonuses paid out across the board in the year 2010 - 2011.

He agreed that the International Air Transport Association (IATA) has projected favorable financial performance for airlines in the short term.

20. He also admitted that the gross pay of pilots produced in court reflected non salary items that were not recurrent.

He said fuel hedging which the Respondent was currently engaged in was a cost cutting measures as it protects the company from the volatility of fuel price. It involves risk taking. At times you lose at times you gain but overall it was a good risk management practice. Terms are often renegotiated based on future outlook.

21. The Respondent called **Captain Ronald Karauri** to testify in support of its case. He said he was presently a pilot flying Boeing 737 and was the General Secretary of the Pilots Associations.

He was trained from 2002 to 2004 as pilot. He became a Captain in the year 2010.

In 2009 he was the Assistant General Secretary and was elevated in 2012. The Association was affiliated to IFAPA since 1948.

He explained that KAPA was the professional arm of pilots.

They comprise 450 professional pilots in the Respondent's employ.

That they have several committees which include safety committee security and qualifications committee and CBA committee which negotiates terms of service.

22. The Association is also a trade union. He narrated the history of this dispute when the Respondent approached the Association to discuss cost saving measures following the losses incurred in the year 2013.

He referred the court to Appendix 9 stating that the invitation did not comprise a proposal to vary the CBA.

23. Various options were discussed and the Union proposed to defer the increment of 7.5 % which was due on 1st April 2010 as follows.

(a) 5% in October 2013; and

(b) 5% in April 2014.

The extra 2.5% was to compensate the employees for the late payment as interest.

This meeting took place on 26th February 2011. No other meeting followed until the 5th April 2013.

On that day, the Union retracted its earlier offer because it had been overtaken by events because the due date for the 7.5% increment had passed.

24. Secondly, the Respondent had not issued a 60 days' notice in terms of Clause 51 of the CBA which was a proper procedure to be followed by a party who intends to amend or modify the CBA during its tenure. The said notice should contain the proposed details of the intended change.

He told the court that it was only after receipt of the notice when negotiations to amend would commence. That the claimant had failed in this respect and cannot be heard to compel the Respondent to accept changes not introduced in terms of the said Clause 51 of the CBA.

25. Thirdly, the parties were privy to the CBA and no justifiable grounds have been preferred to persuade the court to review and or amend its terms.

The witness told the court that the Respondent is within its right to demand implementation of the CBA and urged the court to dismiss the claim and uphold the counter claim.

The witness denied that any of the meetings he attended were constituted for purposes of negotiating the CBA.

26. The witness was intensively cross-examined.

He acknowledged that the Respondent had experienced unprecedented loss of 10.3 billion but told the court that the intended savings from deferring the salary increments and freezing of future negotiations for two (2) years reflected less than 1% costs.

He said that there were better ways of cost saving as the Pilots Associations had done in the past especially on training costs by fast tracking of promotion of the pilots from one level to another.

The witness concluded that the suit by the Claimant is ill advised and therefore misconceived as no substantial saving would be derived from the intended measures which in effect amount to breach of agreement on the part of the respondent.

The witness said that it was their constitutional right in terms of **Article 41** of the Constitution of Kenya read with the **Section 8** of Labour Relations Act to negotiate for salary increments and the right could not be enjoined as prayed by the Respondent.

27. The witness said that the pilots' salaries were not inordinately high as they were bench marked with their counterparts in IATA. He denied that the Respondent had reneged on any agreement to defer their salaries as no such agreement had been arrived at by the parties.

He acknowledged that the parties had engaged in consultations on the matter and many other matters in terms of the Recognition Agreement between the parties but the parties had not engaged in CBA negotiation yet to review the current CBA. He denied also that Respondent had taken the Claimant for a ride.

He also denied that there was an agreement to waive the notice period under **Clause 51** of the CBA with respect to the deferment of salaries and freezing of negotiations for two years.

By and large, the witness withstood cross-examination fairly well. The parties filed written submission on 17th July 2013 and 19th July 2013 respectively and the submission were highlighted on

25th July 2012.

28. The issues for determination are as follows:

- i. *Does the Honourable Court have jurisdiction to entertain the suit?*
- ii. *If so can the Court defer remuneration payments agreed upon by the parties in the CBA for the period 2012/2014 so that they are paid from 1st April 2014 with arrears. Instead of from 1st April 2013?*
- iii. *Can the Court order a freeze in the increase of remuneration for the period 2014 to 2016?*
- iv. *Wouldn't such deferment and the freeze in remuneration as sought in this suit amount to a breach of agreement and a violation of the Respondent's member's constitutional rights.*
- v. *Has the Claimant satisfied the prerequisite for the relief sought?*

29. **Whether the Court has jurisdiction to entertain the suit.**

It is clear that the suit before the Court emanates from an employer and employee relationship.

The Industrial Court is specially established pursuant to **Article 162 (2) (a)** of the **Constitution of Kenya 2010** as a Court with the status of the High Court to hear and determine disputes relating to Employment and Labour relations.

Section 12 (1) of the Industrial Court Act, 2011 clothes the Court “*with 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 the Act, or any other law which extends jurisdiction to the court relating to employment and labour relations...*”

On the other hand, **Article 165 (5)** denies the High Court jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated in **Article 162 (2)**.

There is no doubt that a dispute emanating from negotiations of a collective bargaining agreement between an employer and the union representing its employees is a matter contemplated by the aforesaid constitutional and statutory provisions as it relates to freedom of association as provided under the Constitution and collective bargaining governed by Labour Relations Act, 2007.

30. This position was explicitly laid out by Justice D.S Majanja in the matter of **United State international University (USIU) vs. Attorney General and 2 others High Court at Nairobi Petition No. 170 of 2012** where it was held:

“The Industrial Court as constituted under the Industrial Court Act 2011 is a Court with the status of the High Court, is competent to interpret the constitution and enforce matters relating to breach of fundamental rights and freedoms, in matters arising from disputes falling within the provisions of section 12 of the Industrial Court Act, 2011.

The Industrial Court having been established to deal with employment and labour matters, it follows that all employment and labour relations matters pending in the High Court, shall be heard by the Industrial Court which is a court of the status of the High Court. The High Court therefore lacks jurisdiction to deal with matters of employment and labour whether filed in the High Court before or after the establishment of the Industrial Court.”

KLR the Bench Bulletin issue 20 p. 156.

We answer this question in the affirmative.

31. **Can the Court vary the parties existing CBA for the period 2012/2014 in the manner sought or at all?**

To answer this question the court must first establish the legal

status of a CBA and whether a court may injunct part of its provisions from implementation at the instance of one of the parties.

Section 2 of the Employment Act, 2007 defines a “*Collective Agreement*” as a registered agreement concerning any terms and conditions of employment made in writing between a trade union and an employer, group of employers or employers organization.”

This definition is reiterated under **Section 2** of the Labour Relation Act, 2007.

32. **Section 57 (1) of the LRA provides**

“An employer group of employers or an employers’ organization that has recognized a trade union in accordance with the provisions of this part shall conclude at collective agreement with the recognized trade union setting out terms and conditions of service for all unionisable employees covered by the recognition agreement.”

33. **Section 59 (1)** on the other hand provides the effect of collective agreements as follows:

“A collective agreement binds for the period of the agreement –

- a. **the parties to the agreement**
- b. **all unionisable employees employed by the employer, group of employers or members of the employers organization party to the agreement; or**
- c. **the employers who are or become members of an employer’s organization party to the agreement, to the extent that the agreement relates to their employees.”**

34. **Section 59 (3)** is very instructive and reads as follows;

“The terms of the collective agreement shall be incorporated into the contract of employment of every employee covered by the collective agreement.”

Whereas section 59 (5) provides:

“A collective agreement becomes enforceable and shall be implemented upon registration by the Industrial Court and shall be effective from the date agreed upon by the parties.”

In short, a collective agreement is a contract of service containing terms and conditions of service of all unionisable employees entered into between a union and an employer which becomes enforceable upon registration by the Industrial Court.

It is a contract between parties that is elevated into an order of the court to enhance its effectiveness and enforceability.

35. Part VII of the LRA which covers recognition of trade union and collective agreements has no provision relating to variation or review of collective agreements.

36. The CBA itself, was concluded on 16th August 2011 and it came into force on 1st April 2012 and the same in terms of Clause 51 “shall remain in force for a period of two (2) years.”

Clause 51 provides further as follows:

- a. *For clause 10 basic salary will be increased by 7.5% from April 2012 to March 2013 and thereafter increased by 7.5% from April 2013 to March 2014.*

- b. *House/owner occupier allowance will be increased by 10% from April 2012 to March 2013 and thereafter increased by 10% from April 2013 to March 2014.*
- c. *Transport allowance will be increased by 10% from April 2012 to March 2013 and thereafter increased by 10% from April 2013 to March 2014.*
- d. *Monthly productivity will be increased by 20% from April 2012 to March 2013 and thereafter increased by 20% from April 2013 March 2014.*
- e. *Training and checking allowance will be increased by 7.5% from April 2012 to March 2013 and thereafter increased by 7.5% from April 2013 to March 2014*
- f. *Adjustment of provident fund shall be effected in accordance with the provident fund scheme Rules.*
- g. *For all other allowances, the effective date will be April 2012.*

37. This is immediately followed by an amendment clause couched as follow:

“During this period, either party may amend or modify the agreement by giving the other sixty (60) days written notice and at the same time giving proposed details of the intended change. Both parties would then enter into negotiations on the proposed terms.”

38. From the evidence adduced before the court, the Claimant did not issue a notice in terms of Clause 51 of the CBA but alleges that the Respondent waived its right to receive a 60 days’ notice by engaging with the Claimant for the deferment and freezing of salaries and allowances in the various meetings referred to in the pleadings and the testimony of the two witnesses who appeared before Court.

39. It is the Claimant’s case that the Respondent made the Claimant to believe that the notice period had been waived by making proposals for deferment. That the Respondent is estopped from renegeing on the commitments it had made in the meeting that took place.

That both parties are in agreement that the Claimant is in financial dire straights and required all available cost cutting measures to rehabilitate its financial status in the short term.

40. That the Respondent would be engaged in a denial exercise if it refused to co-operate in this respect, especially when the management staff and other staff not under the Respondent union had not received any remuneration increment for the past two years.

Respondent while agreeing that radical measures needed to be taken to improve the financial situation of the Claimant is unwilling to have its members’ salary and allowances deferred and further negotiations frozen for two years. It insists on the pound of fresh as it were stating that the parties were bound by the terms of the CBA and its terms should be enforced forthwith as the due date of 1st April 2013 had since lapsed.

41. It is further submitted for the Respondent that **Article 36(1)** of the Constitution of Kenya provides:

“Every person has the right to freedom of association which include rights to form, join or participate in the activities of an association of any kind”

and

Article **41 (1)** and **(2)** reinforce this right as follows:

“(1) Every person has the right to fair labour practices;

(2) Every worker has the right;

a. to fair remuneration;

b. to reasonable working conditions;

c. **to form, join or participate in the activities and programmes of a trade union; and**

d. **to go on strike.”**

42. With respect to the counsel for the Respondent, this dispute need not be elevated into a constitutional matter.

From the facts of the case, the pilots employed by the Claimant who comprise the bulk of the members of the Respondent are some of the highest paid persons in the country. Their terms of service are benchmarked to international standards and the remuneration they receive presently is very competitive.

43. That these employees collectively, and severally, by dint of the provisions of the Labour Relations Act have concluded a contract of employment with their employer with specific terms and conditions of service which include specified salary and allowance increments with specific dates of implementation.

44. This is purely a contractual matter. The contract has provided a specific manner in which those terms may be varied which has clearly not been followed by the Claimant at the time of coming to this court.

Can the Court intervene by:

- i. Injuncting the employee from demanding the remuneration provided in his contract of service or
- ii. Varying the terms of remuneration in the said contracts of service?

45. As said earlier, the Employment Act, 2007 and the Labour Relations Act 2007 make no provision for such interference by the court with regard to contract of employment freely and voluntarily entered into.

46. **Has the threshold for mandatory injunction been satisfied?**

Rather than seek the court to intervene by way of varying the terms of the contract for reasons known in the law of contract, the Claimant has sought equitable relief to wit a mandatory injunction against the Respondent.

47. In the case of **Giella Cassman Brown (1975) EA** the requirement to grant interim injunction were set out as follows:

- a. the applicant must establish a *prima facie* case with a probability of success;
- b. the applicant must demonstrate that he will suffer irreparable harm which cannot be adequately compensated by an award of damages; and
- c. if the court is in doubt it should decide the application on the balance of convenience.

48. The Court of Appeal in **Mrao V. First American Bank Limited and 2 others (2003) KLR** defined a *prima facie* case to mean:

“...A case which on the material presented to court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter...”

49. In the present case, not only is a mandatory injunction sought, but the same is final in nature in that it will take away from the Respondent rights already accrued by fact of a contract between the parties which has not been impugned or impeached on any grounds by the Claimant.

50. It is the court's considered view that at this stage of the suit, rather than establish a *prima facie* right

to the relief sought the Claimant must establish a clear right to the relief sought.

A clear right is one, whose existence is well established on a balance of probabilities in terms of our law of evidence.

51. Considering the facts of this case, in my view, the Claimant had fallen short of this threshold.

In other words, the Claimant has not established that it is entitled to a variation of the terms of the CBA except only by agreement of the parties to the CBA, which agreement has not been obtained. The procedure to obtain that agreement has not been followed; the statutory dispute resolution mechanism under the Labour Relations Act, 2007 has not been followed and the CBA has not been impugned on any grounds known to law.

52. It may be as well that it is in the interest of both parties to explore reasonable but lawful measures to cut operational costs of the Claimant to guarantee its viability as a going concern but this cannot be obtained through otherwise discretionary relief by the Court.

53. The principle of Estoppel by deed, advanced by the Claimant relying on the case of **Jemabai Sachoo and Another vs. Shamsa Binti Hamud Bin Shamsa and Another** in the High Court of Zanzibar **Civil Case No. 15 of 1956** does not avail the Claimant.

The Claimant has fallen short of establishing that by its conduct, the Respondent had made the Claimant believe that it had agreed to a variation of the terms and conditions of the CBA and that the Claimant has acted, relying on the conduct of the Respondent to its loss and detriment.

54. The principle was well set out in **Combe vs. Combe 195 1 (1) All England Law Reports 766 at 770** by Denning LJ as follows:

“The principle as I understand it is that where one party has, by his words or conduct made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced even though it is not supported in point of law by any consideration, but only by his word.”

55. Is this the scenario presented by the Claimant? With respect to the able submissions made by Mr. Oreo Obura for the Claimant, the conduct by the Respondent Union fell far short of this requirement from the facts of the case.

Various cost cutting measures were discussed by the parties in the various meetings but had not crystallised to a level to warrant the court to invoke the principle of Estoppel by conduct in favour of the Claimant.

56. With regard to the International Labour Organization (ILO) Interim Report No. 318, November 1999 Case No. 176 (Zambia) complaint of 17 July 1998 the Committee concluded as follows with regard to the matter of compatibility for the wage restraint measure itself with collective bargaining principles:

“The committee has acknowledged that where for compelling reasons of national economic interest and as part of its stabilization policy a government considers that it is not possible for wage rates to be fixed freely through collective bargaining any restrictions should be imposed as an exceptional measure and only to the extent that this is necessary without exceeding a reasonable period, and should be accompanied by adequate safe guards to protect workers living standard.”

57. This is a principle that may be adopted for reasons of necessity and in the Kenyan situation only through legislation that meets the criteria established under **Article 24** of the Constitution of Kenya 2010, in as far as the measure is intended to limit enjoyment of rights and fundamental freedoms of employees in the country.

58. This scenario is not relevant to the present case, where the Claimant is still in full control of its affairs and has not been placed under statutory receivership. The Claimant should therefore continue to engage the Respondent with a view to reach amicable solution that will ensure sustainability of the Claimant while securing the employment of the Respondent's members.

59. Accordingly the court will not interfere in a matter which is purely in the province of the parties to the CBA within the confines of applicable National and International Law.

The suit is dismissed in its entirety with costs to the Respondent.

It is so ordered.

Dated and delivered at Nairobi this 27th day of September, 2013.

MATHEWS N. NDUMA

PRINCIPAL JUDGE