



REPUBLIC OF KENYA

INDUSTRIAL COURT AT NAIROBI

CAUSE 1530 OF 2012

CLAIMANT: AVIATION AND AIRPORT SERVICES WORKERS UNION

RESPONDENT: KENYA AIRWAYS LIMITED

RULING

1. On 10 September 2012, the Claimant Union's Advocate on record Mr. Onyony applied to have the Cause withdrawn. He urged that the application should be granted without an order as to costs.
2. Mr. Amoko for the Respondent, Kenya Airways Ltd while not explicitly opposing the application to withdraw made a strenuous argument for the award of costs.
3. I made an *ex tempore* ruling accepting the application for withdrawal but reserved my ruling on costs. But before going into the merits of the costs application a bit of relevant background and context would be in order.

Background

4. On 30 August 2012, the Claimant Union, *Aviation & Airport Services Workers Union* filed a Memorandum of Claim against *Kenya Airways Ltd*. This Cause was registered as *Cause No. 1530 of 2012* [hereinafter the 2nd Cause]. Together with the Memorandum of Claim the Claimant filed a Motion application seeking admission to hearing during the Court vacation and various injunctive reliefs. The Motion was placed before the Duty Judge, Justice Ongaya who certified the Motion urgent and granted interim orders in terms of prayers (a), (b), (c), (d), (e), (f) and (g). He directed that the Motion be served for hearing *inter partes* on 6 September 2012.
5. On 3 September 2012, Mr. Amoko filed a Motion under Certificate of Urgency seeking to have the orders granted by Justice Ongaya set aside. This Motion by Mr. Amoko was placed before Lady Justice Onyango, who was the Duty Judge that week. This motion was *ex parte*, however it appears Mr. Onyony had got wind of it and placed himself on record to the chagrin of Mr. Amoko. The Motion had not been served on the Claimant.
6. During the proceedings before Lady Justice Onyango on 3 September 2012, Mr. Amoko immediately drew the attention of the Court to a *Cause No. 1360 of 2012* between a union called *Aviation and Allied Workers Union v Kenya Airways Ltd, Minister for Labour and Human Resource Development and the Attorney General*. [Hereinafter the 1st Cause]. This Cause had been filed in Court on 10 August 2012 by the *Aviation and Allied Workers Union* without involvement of any Counsel.

7. Consequent upon what transpired before Lady Justice Onyango on 3 September 2012, and to her attention being brought to the existence of the 1st Cause which had been filed on 10 August 2012 and in which injunctive orders had been issued, the Judge made a finding that both Causes had been brought by the same entity and seeking similar orders and therefore this amounted to an abuse of the Court process and the Judge therefore stayed the orders which had been granted by Justice Ongaya in the 2nd Cause. She further ordered that Mr. Amoko's application be heard on 10 September 2012. In the circumstances the hearing scheduled for 6 September 2012 by Justice Ongaya was never to be.

8. On the other hand when the 1st Cause was initially placed before the Duty Judge on 10 August 2012, Justice Onesmus Makau, the Judge certified the Motion urgent, admitted it to hearing during the vacation and also granted certain injunctive orders against Kenya Airways Ltd. And he set an *inter partes* hearing for 21 August 2012.

9. The 1st Cause, it appears did not proceed on 21 August 2012 when it was placed before Justice Rika. The reason being that the Claimant Union had now appointed an Advocate to handle the matter on its behalf. The matter was adjourned to 30 August 2012. On 30 August 2012, the file was placed before Lady Justice Mbaru. The Advocates for the Claimant Union and the 2nd and 3rd Respondents sought adjournment. The 1st Respondent opposed the applications for adjournment. It appears that in light of these circumstances Lady Justice Mbaru lifted the injunctive orders which had been given by Justice Onesmus Makau and adjourned the matter to 10 September 2012.

10. It is on this day, 30 August 2012 that parties in the 1st Cause were appearing before Lady Justice Mbaru that the 2nd Cause was filed under Certificate of Urgency and placed before Justice Ongaya!!

11. In the end result the injunctive orders stopping the retrenchment exercise at Kenya Airways Ltd had been nullified in both Causes before hearing *inter partes*!!

12. It is under this befuddled scenario that various applications in *Cause No. 1360 of 2012, Aviation and Allied Workers Union v Kenya Airways & 2 others [2nd Cause]* and *Cause No. 1530 of 2012, Aviation and Airport Services Workers Union [1st Cause]* reached me on 10 September 2012 when I commenced my stint as the Duty Judge.

Representations

13. I believe it is germane to the understanding the context, as urged by Mr. Amoko to indicate the representations/parties behind the 2 Causes as appears from the record.

14. In *Cause No. 1530 of 2012, Aviation & Airport Services Workers Union v Kenya Airways Limited*, the pleadings were supported by the affidavit of one **Bonne Nicholas Barasa** who swore that he is the General Secretary of Aviation & Airport Services Workers Union.

15. In *Cause No. 1360 of 2012, Aviation & Allied Workers Union v Kenya Airways Limited and 2 others [2nd Cause]*, the pleadings were supported by the affidavit of one Perpetua Mponjiwa, who referred to herself as the National Chairman of the Aviation and Allied Workers Union

16. The firm of Oraro & Co. Advocates were on record for Kenya Airways Ltd in both Causes.

17. Without making any finding on the legal personality or legitimacy of *Aviation & Airport Services Workers Union (K)* and *Aviation and Allied Workers Union*, it is apparent that the National Chairperson and the General Secretary of the 'two unions' were not acting in concert in reference to the retrenchment exercise which was underway at Kenya Airways Ltd though they were litigating over exactly the same subject and affected membership.

Proceedings on 10 September 2012

18. When the 2 Causes were called before me, Mr. Chacha-Odera drew my attention to the circumstances surrounding the 2 Causes and it immediately became clear to me that there were serious contestations on how the applications which were coming up should proceed. I therefore adjourned and directed the Advocates on record to address me in chambers on the best way forward, informally. Tempers flared and no consensus could be reached. Thus I further directed that the parties take time off and proceed at 3.00pm.

19. When the proceedings resumed at 3.00pm I had had the benefit of going through the previous proceedings in both Causes and I drew the attention of the parties to the finding by Lady Justice Onyango that the Claimant in both Causes was the same entity and that the subject matter of both Causes was similar.

20. Mr. Onyony then indicated that after consultations with his client he was ready to withdraw *Cause No. 1530 of 2912*, and he proceeded to make an application for withdrawal. I granted the application and reserved the determination on the issue of costs, which is now the subject of this ruling.

Parties Submissions: Claimant

21. It was the submission of Mr. Onyony that this is a Court of justice and equity and therefore no order should be made as to costs. The submissions of Mr. Onyony can be isolated as follows:

i) Costs should be determined or awarded solely on the basis of the Industrial Court (Procedure) Rules 2010 and not the Civil Procedure Rules which do not apply,

ii) The common law should not be applied and the common law principles apply only where there is a statutory deficiency.

iii) Article 2(5) of the Constitution on application of general rules of international law is a relevant consideration in award of costs before the Industrial Court.

22. Mr. Onyony made reference to the practices and precedents of the South African Labour Court but did not furnish the Court with any decided cases on the point.

23. Mr. Achiando, who appeared for the Claimant in the 1st Cause, on my invitation, submitted that the Court process had not been abused and that Employees should be allowed to ventilate and access the courts for expeditious disposal of their grievances. He supported Mr. Onyony that the Civil Procedure Rules on costs could not be invoked. In awarding costs, the Court should do justice and consider the economic status of the claimants.

Parties Submissions: Respondent

24. Mr. Amoko submitted that the Court should consider the context within which the withdrawal was being made in making an award of costs. He further submitted the fact that the interim orders were discharged was relevant. He reiterated the costs should be borne by the party which instituted the Claim and that litigation is expensive and not awarding costs would amount to further abuse of process.

Issues for determination

25. From the above, the issues which arise for determination can be stated to be first, whether the Industrial Court Act, 2011 fully provides for the award of costs in the Industrial Court and what would be the status of the Civil Procedure Rules and common law principles on the award of costs and second, what order as to costs should be made in this particular case.

Statutory framework

26. Within the civil procedure regime in Kenya, the award of costs is primarily governed by Section 27 of

the Civil Procedure Act which provides:

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen percent per annum, and such interest shall be added to the costs and shall be recoverable as such.

27. Within the employment and labour relations statutory framework, the starting point of course must be Section 12(4) of the Industrial Court Act, 2011 which provides:

In proceedings under this Act, the Court **may**, subject to the rules, make such orders as to costs as the Court considers **just**. (emphasis mine).

28. The provision should not be read or interpreted without keeping in mind the provisions of Rule 27(1) (e) of the Industrial Court (Procedure) Rules 2010, which provide:

Provided that subject to these Rules and to any other written law, the Court may at any time in the conduct of proceedings issue-(e) an order for payment of costs;....

29. The parties did not address me on the practice of the Industrial Court which preceded the present court. I have not been able to get hold of any writings by practitioners in that Court or academics on the issue of costs. However, I have looked at a couple of awards and decisions of that Court and it seems the default rule regarding costs was that there were no orders as to costs. But my decision does not in any way turn on the practice of that Court.

Analysis

30. Under the civil procedure regime, case law is replete with decisions where costs have always followed the event and this position was restated by the Court of Appeal in *Mombasa Civil Appeal No. 85 of 2006, Supermarine Handling Services Ltd v Kenya Revenue Authority*. The general principle has been that a successful party is entitled to costs. By awarding costs within this regime, the court attempts to indemnify the party who has succeeded for the expense he/she has been put through the initiation or defense of the action.

31. However a reading or comparison of section 27 of the Civil Procedure Act and section 12(4) of the Industrial Court Act, 2011 reveals a material difference. Unlike under the civil procedure regime, the Industrial Court Act, 2011 places an obligation on the Court to consider what is just in making an order on costs. The Court must take into account what is just in making a costs order. The Act however does not define what is 'just' and I will return to this aspect shortly.

32. Without losing sight of the overall scheme of the Constitution regarding access to justice, I can distill the following core requirements as relevant in guiding the Industrial Court in making an award of costs. First, the award of costs in proceedings brought under the Industrial Court Act, 2011 is discretionary. This flows from the use of the word '**the Court may**' in section 12(4) of the Industrial Act, 2011. This is similar with the general principle under the civil procedure that the award of costs is discretionary. This approach was adopted by the Court of Appeal in *Eldoret Civil Appeal No. 211 of 2005, Joseph Chirchir Kosgei v the Chairman, Board of Governors, Eldoret Polytechnic*.

33. But it appears that is where the similarities end and this leads me to the second requirement of making a costs order which is **'just'**. As I have stated above the Industrial Court Act, 2011 has not defined what is 'just'. Black's Law Dictionary, 9th edition defines 'just' as **'legally right; lawful; equitable'**. Since the Industrial Court Act, 2011 has given the Court the power to make a costs order, the order must have a basis in law. In the case of proceedings before the Industrial Court, the law is Section 12(4) of the Industrial Court Act, 2011 as read with rule 27(1)(e) of the Industrial Court (Procedure) Rules 2010.

34. The Court therefore, in making a costs order must consider what is legally right, lawful and equitable. Equity connotes justice and right. And this would lead to the question of what would be legally right, lawful and equitable within the parameters/context within which the contests before the Industrial Court is played. I therefore attempt to specify some of the considerations which this Court should keep in mind to make a 'just' costs order.

35. First, it is incumbent upon the Court to consider the parties who ordinarily appear before it when setting the principles on award of costs. It is not in doubt that most of the players in the Industrial Court are the unions and the employers. These are parties who have entered into mutually beneficial relations pursuant to the constitutional right to organize, associate and bargain. They have an ongoing or continuous relationship signified by collective bargaining agreements voluntarily entered into which do not end with the determination of any one particular dispute. They are social partners.

36. It is also true that a significant number of those who have been granted audience before the Courts are not Advocates who have been admitted to practice before the superior Courts. Some are union officials who have audience by virtue of their status as officials of their authorizing unions. I have also noticed a sizeable number of Claimants who appear in person.

37. Second, the Industrial Court has been established as a specialist court to entertain disputes between parties who are referred to as social partners with a view to the settlement of employment and industrial disputes, furtherance, securing and maintenance of industrial peace and stability and this is one of the reasons for granting audience to persons who are not Advocates.

38. Third, of course when determining what just the Court should consider the conduct of the parties before it, both before court action and during litigation.

39. The Industrial relations statutory framework in Kenya envisages and indeed promotes negotiations, conciliation and settlement to solve any disputes between the social partners. This is exemplified in Section 15 of the Industrial Court Act, 2011, Sections 10, 58, 62, 66, 67, 68 and 70 of the Labour Relations Act, Sections 41, 47, 49 and 87 of the Employment Act. Whether and how the parties conducted pre-litigation resolution processes is a relevant factor.

40. In the instant case, persons who claim to be bona fide union officials instructed different firms of Advocates who initiated litigation over the same subject matter, retrenchment at Kenya Airways Limited. It was brought to the attention of the Court that there are pending Causes before other judges of this Court, relating not only to the legitimacy of the officials but also the legitimate union because of what may have transpired at the offices of the Registrar of Trade Unions. On top of these wrangles two different Causes seeking similar orders were brought before the Court. This filing of multiple Causes over the same matter though not attributable to the Advocates on record is regrettable and is conduct which this Court will not entertain. The Advocates were instructed by persons who claim to be legitimate officials of the union albeit different factions. It would be open to this Court to condemn such parties to pay the costs. In such circumstances the Court can make a costs order ensure its process is not abused.

41. Fourth, the Court should consider whether the Cause is frivolous or filed *mala fides*. A frivolous or *mala fides* Cause would justify an order of costs against the party who commenced the Claim.

42. The considerations I have attempted to list above are not exhaustive and each case may need to be determined on its own peculiar circumstances.

43. However, I note that the foundation of the 2 Causes was a retrenchment exercise at Kenya Airways Ltd and it is a matter which affected not only the rights of the union membership but their very livelihood. The Causes were not brought to harass or embarrass the Respondent. The Causes were not frivolous or filed *mala fides*. Of course a frivolous or *mala fides* Cause would justify an order of costs.

44. I have also taken into consideration that the Cause was withdrawn at a point where both parties had agreed to commence with *inter partes* hearing. Apart from restating the oft quoted '*litigation is expensive*' the Respondent did not argue that it had incurred significant legal costs by the time the Cause was withdrawn.

Conclusion

45. In the final result, considering the material differences in the provisions of the Civil Procedure Act and the Industrial Court Act, 2011 and the specialist nature of the Court, I do uphold the contention by the Claimant that the provisions of the Civil Procedure Act regarding the award of costs is not applicable in the Industrial Court. I do not make any findings on the applicability of the principles of the common law and international practices in awarding costs because the parties did not sufficiently address me on the same.

46. Considering that this Cause was withdrawn before the Motion seeking various injunctive reliefs was heard and determined *inter partes*, the Court holds that a 'just' order to make is that there is no order as to costs.

Dated and delivered at Nairobi this 5th day of October 2012

Justice Radido Stephen
Judge