REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 377 of 2012

AVIATION & ALLIED WORKERS UNION (K) ……CLAIMANT

VERSUS

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

RULING

The application before me is the Notice of Motion by the Claimant dated 3-10-2012. It seeks basically the varying and setting aside of my ruling dated 28-9-2012. It is founded upon the grounds on the body of the Motion and the Supporting Affidavit by Sally Kililo 3-10-2012 and 12-10-2012.

The application is opposed and the respondent vide affidavits by Lucy Muhiu dated 19-10-2012 and 22-10-2012.

Both parties have filed written submissions and asked me to make my ruling.

I have carefully considered the application and the replying affidavits filed in support and in opposition to the application. I have also considered the written submissions and the authorities cited including both statute and case law. The issue for determination is whether the application before me has met the threshold for granting the review orders sought.

To answer the said question, I have referred to rule 32(1) which sets out the grounds for granting review of an award, judgment or ruling which include:-

(a) Discovery of new and important matter or evidence which after the exercise of diligence, was not within the knowledge of the applicant or could not be produced by the applicant at the time when the decree was passed or order made; or

(b) On account of mistake or error apparent on the face of the record; or

(c) On account of the award, judgment or ruling being in breach of any written law; or

(d) If the award, judgment or ruling requires clarification; or

(e) Any other sufficient reasons.

The Claimant in his submission has contended that his application for review is grounded on law

and discovery of new materials. That however, is not true because the said ground is not pleaded in the Notice of Motion. The only ground pleaded and which is a kin to what is provided for under Rule 32(1) (c) talks of the decision under review being in "breach" of written law and not being one where this court erred in law.

As regards the issue of a new material, the Claimant has not cited the same, leave alone proving that it was important and not within her knowledge as at the time when the order under review was made.

I am, therefore satisfied that the applicant has failed to prove any of the grounds for granting a review required under rule 32(1) of this court's rules of procedure.

Before ending this ruling however, I have thought it wise to have a glance at the original application dated 8-3-2012 that I have dismissed and also considered whether the Claimant has the *locus standing* to sue for the grievants in this case.

The application sought the following orders:-

"1. That this Honourable Court be pleased to certify this application urgent, service be dispensed with in the first instance and the same be heard *ex-parte*.

2. That this honourable court be pleased to issue orders of injunction restraining the Respondent from proceeding with a panel to hear Ms. Sally Wangari Githae, George Mepukori Kesh and Sally Mkawira Kilili for purposes of conducting a discipline on them on 7th or 8th March, 2012 or any other date until this application is heard and determined.

3. That this honourable court be pleased to stay any decision of the hearing panel or its proceedings constituted for the purpose of disciplining any of the grievants or all the grievants pending the hearing and determination of the application.

4. That costs be on course."

I have taken the pain of quoting the application verbatim so as to explain the fact that the original application dated 8-3-2012 was a self defeating one. Even if I was to grant it as prayed, the orders sought were all meant to be in the interim pending the hearing and determination of the same application *interpartes*. There was no substantive prayer sought to stop the disciplinary process pending the hearing and determination of the suit. To that extent, I find that even if the threshold of granting review was met in the present application, nothing would be changed by me granting the review order. There would be no interlocutory order to stop the disciplinary process pending the determination of the main suit. In that regard it is my considered view that the argument by the applicant that the suit will become nugatory if review is denied as baseless.

I conclude by considering the issue of *locus standi* on the part of the Claimant to file the case herein on behalf of the grievants. The pleadings before me and the documents before me show that the grievants were suspended towards the end of February, 2012 for misconducts whereof they were to stand disciplinary hearing. That while the hearing was going on the claimant filed the present suit on 8-3-2012 and obtained interim orders or injunction which stopped the disciplinary hearings until I dismissed the application.

The question which arises is how was this court's jurisdiction involved? Was it through Section 73(3) of the Labour Relations Act in which case the Claimant could have *locus standi* under Industrial Court Act and the Rules of Procedure of this Court? The answer regrettably is in the negative. As I have held elsewhere, a Trade Union lacks *locus standi* to bring suits in its own name and on behalf of its members unless the dispute is one which emanates from conciliation proceedings before the Minister under Section 60 of the Labour Relations Act 2007.

Consequently, I dismiss the application for review dated 3-10-2012 with no order as to costs.

I will again say that if the grievants shall feel aggrieved by the disciplinary process by the Respondent they will be free to move this court in the appropriate manner and time.

Orders as above stated.

DATED and **DELIVERED** at Nairobi this 16th day of November, 2012.

Onesmus N. Makau

JUDGE