



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT

NAIROBI

CAUSE NO. 729 OF 2019

KENYA AIRWAYS PLC CLAIMANT

VERSUS

KENYA AIRLINE PILOTS ASSOCIATION.....RESPONDENT

RULING

1. The claimant is a Public Limited Liability company registered in Kenya operating as an airline that provides transport and freight to millions of customers across the globe. On the other hand the respondent is a trade union within the meaning of section 2 of the Labour Relations Act and represents the claimants pilots who are registered as member of the union. The two parties have signed a Recognition Agreement and negotiated collective Bargaining Agreement (CBA).

2. The respondent brought the Notice of Motion dated 31.10.2019 seeking the following orders:

(a) Spent

(b) Spent

(c) the determination of the underlying dispute through conciliation or subsequent court process if need be pending the hearing and determination of the suit, a temporary injunction barring the respondent from injuncting her from hiring of pilots on contract basis for B737 fleet pending

3. The main ground for the application is that the claimant has a shortage of 120 pilots and she only intends to employ 20 contract captain on her B737 fleet in order to facilitate route expansion and leave coverage and also to enable the existing pilots undertake training to enable them take up the jobs after the contract pilots exit in accordance with the Kenyanization Memorandum of Understanding signed pursuant to the CBA between the parties herein.

4. According to the claimant, the hiring of contract pilots will not affect the existing pilots' normal promotions, employment and emoluments. She contends that if the order is denied her business will continue to make losses due to flight delays and cancellations and she may be forced to cede the ground to other airlines.

5. The claimant avers that due to disagreement between the parties on the matter of hiring contract pilots, the respondent reported trade dispute to the Cabinet Secretary in charge of Labour and Social Protection by the letter dated 10.10.2019 but no response was received about the intended conciliation process and the respondent sought "Mutual Assistance" from the Global Association of Pilots (IFALPA) with the aim of paralysing the airline's operations.

6. The respondent also filed the notice of motion dated 4.11.2019 basically seeking the following orders:

1. The application be certified urgent and that it be heard on priority basis.

2. Pending the inter parties hearing of this application, an interim injunction be issued restraining the claimant from recruiting, employing or in any manner whatsoever engaging and/or continuing to recruit and/or employ or in any manner whatsoever engage contract pilots for the B737 fleet or any other fleet other than the junior Embraer fleet.

3. Pending hearing and determination of this suit and /or the ongoing conciliation process, an interlocutory injunction be issued restraining the claimant from recruiting, employing or in any manner whatsoever engaging and/or continuing to recruit and/or employ or in any manner whatsoever engage contract pilots for the B737 fleet or any other fleet other than the junior Embraer fleet.

4. Pending the hearing and determination of this suit and/or the ongoing conciliation process, a mandatory injunction be issued compelling the claimant to fully comply with the provisions of the CBA dated 2nd August, 2017 including but not limited to clauses 37, 42 and Schedule VI on Seniority and Promotions Policy by inter alia;

(a) Employing only foreign contract pilots on junior fleets.

(b) Ensuring that any such recruitment is implemented under a Kenyanization program in similar manner as the MOU signed on 28th November, 2018

(c) Obtaining and sharing with the Respondent a letter of no objection from KCAA with regard to the authenticity of the relevant licensing requirements, not later than 7 days after the start of the recruitment process.

Sharing with the Respondent a summary of the selection process before the start of the recruitment process.

(d) Strictly adhering to the promotion policy by promoting qualified pilots to senior/higher fleets.

5. The costs for this application be borne by the claimant.

7. The main ground is that the claimant has blatantly breached the provisions of the CBA especially clause 37 and 42 by undertaking to recruit 20 contract pilots externally on higher fleet of B737, contrary to schedule VI of the CBA dated 2.8.2017 and the Kenyanization MOU dated 28.11.2018. According to the respondent suit, recruitment will deny promotion and by-pass Kenyan pilots on the Embraer fleet, who are qualified and have not yet attained retirement age.

8. The respondent contends that she has proved a prima facie case by showing that the recruitment of contract captains is in breach of the CBA and the MOU. That the recruitment will result into irreversible and irreparable damage to the respondent's members after being by-passed by external pilots. Finally, she contends that the balance of commerce is tilted in favour stopping the recruitment pending the conciliation process.

9. Each party has opposed the other parties' application for injunction.

ISSUES FOR DETERMINATION

10. There is no dispute that the claimant is experiencing shortage of pilots in all her fleets and that there is need to recruit 20 captains for her B737 fleet. There is also no dispute that Clause 37 and 42 of the CBA provides for employment contract pilots on contract basis in certain circumstances. There is further no dispute that the parties herein have signed a MOU to Kenyanize the claimant's pilots. The issues for determination are:

(a) Whether the respective applications have met the threshold for granting interlocutory injunction.

(b) Which orders should issue.

CLAIMANT'S APPLICATION DATED 31/10/2019

11. The claimant in effect, seeks to have the respondent from accessing court to obtain relief in relation to the intended recruitment of contract pilots. In her view, if the respondent obtains any court orders, barring the recruitment exercise, the airline will suffer hug loss and or cede business to other airlines. According to Mr. Ondati, learned counsel for the claimant, the airline is seeking an 'anti-suit injunction' which is a legal concept that protects a party from legal suit by their adversary, which might occasion losses to the applicant if allowed to file. In the counsels view an anti suit injunction is like an order for status quo.

12. The claimant contends that the recruitment of 20 B737 Captains does not target foreign pilots and as such denied that she has breached the CBA and the Kenyanization MOU. On the other hand, the claimant contends that Clause 37 of the CBA does not limit recruitment of contract pilots to Kenya Nationals only. She contends that the respondent is opposed to any recruitment of contract pilots even of Kenyan citizens. She contended that under Clause 37(b) of the CBA, she has a discretion on all matters pertaining to employment of contract pilots.

13. The Claimant has denied that she has breached the Kenyanization MOU and contended that where she has fallen back on promotion and training schedule, she has given her promise that she will implement the same. She maintained that recruitment of contract pilots will not affect promotion of the existing pilots because she is only recruiting 20 pilots against a short fall of 106 pilots. In addition she contends that the fixed contracts from the external pilots will last for only 2 years which is the period required for training of the existing pilots.

For interlocutory injunction to issue, the applicant must prove that the three principles espoused by **Giella v Cassman Brown & Co Ltd [1973] EA 358** namely:

(a) he has a prima facie case with probability of success.

(b) he stands to suffer irreparable harm if the injunction is not granted.

(c) If in doubt the court to decide the matter on balance of convenience.

15. In **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR** the Court of Appeal defined prima facie case as:

"So what is a prima facie case" I would say that in civil cases it is a case in which on the material presented to the 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."

16. Applying the foregoing definition of a prima face case to the facts of this case, I am of the view that the claimant has not proved any prima facie case with probability of success against the respondent. She has not proved that the respondent has breached or is about to breach any of her legal rights under the CBA, statue or the Constitution by seeking relief in this court in relation to the recruitment of contract pilots. Accordingly the claimants notice of motion dated 31.10.2019 is rejected for lack of merits. Without prove of a prima facie case, the court cannot grant the interlocutory injunction whether or not there is risk of a loss being incurred.

RESPONDENTS NOTICE OF MOTION DATED 4.11.2019

17. The respondent contends that the recruitment of 20 contract pilots will violate clause 37 and 42 of the CBA and also the Kenyanization MOU dated 28.11.2018. The claimant denies the alleged violations and contends that the existing pilots will not be affected by the recruitment of contract pilots. She further contends that the shortage of pilots is 106 as opposed to the intended 20 contract pilots. She further avers that she has a discretion in all matters of employment of contract pilots under clause 37 (b) of the CBA.

18. I have carefully considered the rival contentions by the two sides in relation to clause 37 of the CBA which states as follows:

“(a) The company may employ pilots on specific contract terms to facilitate route expansion, trading of current pilots and reduction of accumulated leave. Such contract will not prevent or interfere with the promotion or continued employment of any suitable national pilot in the employment of the company who has not attained retirement age. The company has discretion on all matters pertaining to the employment of the contract pilots. (Emphasis added).

(b) A Kenyanization program will be prepared for replacement of the said contract pilots together with KALPA.

(c) The contract pilots must meet the minimum recruitment requirements as per the seniority and promotion policy of this CBA.

(d) The company shall obtain a letter of no objection from KCAA with regard to the authenticity of the relevant licencing documents.

(e) A summary of the selection process, report will be shared with KALPA.”

19. The essence of the foregoing clause is that the claimant has discretion in recruiting contract pilots so long as in so doing, she does not prevent or interfere with the promotion or continued employment of any suitable national pilot in the employment of the airline. It follows therefore that if there is a citizen who is qualified and currently in service he shall be given priority in filling the vacancy. The foregoing is inconsonance with Clause 42 of the CBA on Kenyanization which provides:

“42. It is agreed in principle that whenever a vacancy occurs, the most senior suitable Kenya in terms of qualifications and experience would be appointed. Positions currently held by expatriates non – Kenyans would be reviewed regularly with a view to effectively filling the positions with qualified Kenyans.”

20. In this case the claimant has admitted that she has fallen back on some promotions and training of pilots and promised to implement the same. The respondent has given a breakdown of the promotion of pilots on all the claimants fleets which shows that there is a backlog of promotions of existing pilots. It follows therefore that appointing contract pilots on B737 fleet will present or interfere with the promotion of the existing pilots. If allowed to proceed, the airline will have breached both clauses 37(a) and 42 of the CBA.

21. It cannot be doubted that the essence of clause 37 and 42 of the CBA is to protect the career progression for retired pilots in the claimant airline from invasion by foreign pilots. In fact the Kenyanization concept in the CBA and the subsequent Kenyanization MOU was intended to phase out foreign pilots from the airline. It is therefore mischievous for the claimant to purport to go back to introducing foreign pilots to the airline under clause 37 (a) of the CBA so that after 2 years it can do what the 2017 CBA and 2018 Kenyanization MOU intended. She cannot be allowed to go down that long, bumpy and winding path.

22. Under section 58 of the LRA a CBA binds the parties for the period of the agreement in this case the CBA provided that it shall remain in force for one year starting 1.6.2017 but it shall remain in force till another CBA is negotiated and concluded between the parties.

23. It follows therefore that the claimant is bound by clause 37 and 42 of the CBA to Kenyanize the pilots by replacing the foreign pilots with Kenyan pilots especially through career progression under Part VI of the CBA. The discretion she enjoys under clause 37 (a) of the CBA in employment of contract pilots is determined by the requirement that the existing national pilots are not denied promotion or rendered redundant by recruiting contract pilots.

24. Although it was submitted that the claimant is not targeting foreign pilots to fill the vacancies for 20 contract pilots the truth is that only foreign pilots are targeted. The claimant’s letter to the respondent dated 12.9.2018 categorically stated that:

“ . . . there is also proposal for the airline to acquire additional wide body B737 aircraft. In order to conclude on negotiations of the extras fleet, we request to have in principle an agreement to :

1. Recruit foreign captain on the B737.

2. This will be in addition to the already agreed Embraer foreign contract Captains . . .”

25. After considering all the material presented to the court, I am satisfied that the respondent has made out a prima facie case with a probability of success. She has proved that the claimant is acting in breach of the legal rights of the respondent and their members by purporting to recruit foreign pilots in breach of clause 37 and 42 of the CBA.

26. I am also satisfied that if the order of injunction is denied the claimant will proceed to breach CBA and prevent the respondents' members from being promoted or worse still threatened continuation of their employment in the airline. We are not talking of one or two pilots being affected but many in a hierarchical ladder which presents a challenge of computing any damages which may be accrued by the denial of the order. The said situation may also prejudice the conciliation of the trade dispute that is pending before the labour office.

27. The foregoing notwithstanding, I have also weighed the motion before me and found that the balance of convenience tilts towards granting the order made otherwise failing to protect the substratum of the suit which 20 vacancies in the B737, the suit and even the trade dispute before the labour office will become moot if the vacancies are filled.

28. The grant of the injunction herein will however be aligned to the interim granted on 14.11.2019 that the claimant can recruit the 20 pilots from Kenya citizens who are suitable and qualified and experienced pending the hearing and determination of the suit herein.

CONCLUSION

29. The claimant's notice of motion dated 31.10.2019 is dismissed with costs.

30. The claimants notice of motion dated 4.11.2019 is allowed pending hearing and determination of the suit herein to the extent that the claimant is restrained from recruiting non- Kenyan nationals as contract pilots (Captains) on B737 fleet or above that fleet.

31. The parties are directed to urgently conclude their pleadings in order to fastback the trial.

Dated, signed and delivered in Nairobi in open court on this 17th day of January, 2020.

ONESMUS MAKAU

JUDGE



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