REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 2048 OF 2011

AVIATION AND ALLIED WORKERS UNION ……. CLAIMANT

VERSUS

KENYA AIRWAYS LIMITED ……..…… RESPONDENT

RULING

There are several applications herein pending for determination. The same will be outlined, their history and outline as they cover periods ranging from 2011, 2012 and 2013. The ruling will relate to all the pending applications.

Background

The applicant, the Aviation and Allied Workers union (AAWU) filed the application dated 2nd December 2011 under Certificate of Urgency which the court heard and gave interim orders on 6th December 2011 which in essence stopped the respondent from continuing with the disciplinary proceedings instituted against the grievants, members of the applicant, pending the hearing of the application, which was to be heard inter-parties on 17th January 2012.

On 17th January 2012, hearing could not take place as the respondents had just served the applicants with their response; there was adjournment and a new date given with the interim orders being extended. On this same date, by consent, both parties agreed to have the main suit heard on 14th February 2012 subject to the extension of the interim orders.

On 26th January 2012, the applicant returned to court under Certificate of Urgency and Notice of Motion dated 25th January 2012, on the basis that the respondent had abused the interim orders by dismissing the grienvants, members of the applicant. And the Court restated the previous interim orders issued on 6th December 2011 restraining the respondent from carrying out disciplinary action against the claimant/applicant and further that the respondent's letter dated 20th January 2012 issued to Ms Perpetua Mponjiwa was declared null and void and a hearing scheduled on 14th February 2012.

On 1st February 2012, the respondent filed their application dated 31st January 2012 under Certificate of Urgency with a Notice of Motion seeking for stay of orders issued on 26th

January 2012 noting that the orders were issued without disclosure of material facts and the court proceeded and granted a stay of execution of the orders issued on 26th January 2012 pending hearing scheduled on 14th February 2012.

Therefore, by 14th February 2012, three (3) applications had been filed, all under Certificate of urgency and all pending for hearing;

Application dated 2nd December 2011 by the claimant;

Application dated 25th January 2012 by the claimant; and

Application dated 31st January 2012 by the respondent.

By this date, there were several interim orders, orders issued on 6th December 2011 directing the respondents not to take disciplinary action against the claimants and the orders issued on 1st February 2012 staying the orders that had been issued on 26th January 2012 when the claimant/grievant had been issued with a letter of termination. This translates to the fact that as of 14th February 2012, the grievant Perpetua Mponjiwa had been issued with a letter of termination. The consent of 17th January 2012 was still subsisting where the parties had agreed to hear the main suit.

On 14th February 2012, both parties agreed to have the matter mentioned on 3rd May 2012 and the interim orders were extended. Hearing was further extended for the 3 pending applications for the 28th of May 2012. On this date, both parties proceeded with the hearing of the pending applications. Ruling was to be delivered on notice.

On 16th October the court directed that notice be issued for mention to the parties to take directions on 24th October 2012. There was no action on the file until 7th February 2013 when the court mentioned the matter again and the directed that both parties give brief submissions on the pending applications for the court to appreciate the current status of the matter noting that the judge who heard the submissions was different. Parties took another date for 18th February 2013. On this date the respondents advocate was attending to an election Petition and could not be available to highlight his submissions and this was scheduled to 27th February 2013, but parties could not proceed and another date was given for 18th March 2013. On this date, claimant advocate was held up in a different court and another date was taken for submissions on 28th March 2013, and again the claimant advocate was held up in a different court and the Court directed parties to take convenient dates at the registry.

The matter came up for mention On 9th May 2013, the claimant had instructed a new advocate and the respondents advocate was bereaved and another date was taken for 11th June 2013 and the Court noting the constant delays reduced the issues and directed the parties to attend the mention to confirm the current status of the issues pending for ruling as orders issued since 6th December 2011 had since not been extended and it had been over 2 years now and that parties should make their written submissions with a mention on 11th June 2013 to take a date for ruling.

On 11th June 2013, the parties had not filed their written submissions, the claimant advocate was held up at the Elections Petition Court in Machakos and the Court directed parties to file their submissions once ready, and then take a mention date at the registry.

On 22nd August 2013, Ms Perpetua Mponjiwa, filed an application under Certificate of Urgency with a Notice of Motion dated 20th August 2013, in person seeking that there are pending application herein that were heard on 26th May 2012 and no ruling has been delivered, this was a failure of the court and thus a violation of her rights, no party had pleaded for retrial and thus the stay orders granted tot eh respondent herein should be lifted.

These are the 4 pending applications that will herein be addressed.

1st application

The claimant application dated 2nd December 2011 was filed under the provisions of section 12 of the Industrial Court Act, sections 9, 10, 35 and 46 of the Employment Act, Article 41 of the Constitution, Article 1 of Convention 135, seeking for orders restraining the respondents from constituting a panel with a sole purpose of disciplining the grievants on the grounds of their participation in claimant's activities and a stay of proceedings and decisions arising from the disciplinary panel constituted by the respondent. This application was on the grounds that the grienvants were officials of the claimant pursuant to section 31 of the Labour Relations Act and that they were being disciplined contrary to the terms and conditions of service and the statement of initial particulars signed between the respondents and the grienvants which still remained in force. That a panel had been constituted by the respondent to discuss the claimant Union press release dated 18th November 2011 which the respondents had no mandate in law to discipline an official discharging lawful activities of the Union and the grievants being the claimant officials are allowed to participate in the claimant activities in accordance with section 4 and 8 of the Labour Relations Act, Article 1 of the ILO Convention 135 which prohibits any person to be disciplined on issues of participation on Union activities. Further grounds are that Kenya being a member state to the ILO and pursuant to Article 2(5) and (6) of the Constitution and Article 41, does recognise the rights of individuals and or officials to participate in Union activities. That if the court does not grant the orders as sought, the claimant would suffer irreparable loss and damage as the entire membership and officials would lose confidence in the law guiding the Trade unions.

This application was supported by the annexed affidavit of Perpetua Mponjiwa, one of the officials of the claimant as the National Chairperson where she supported the application and noted that on 18th November 2011 the claimant issued a press statement at 680 Hotel where several issues were raised by the claimant. In attendance at this press briefing were several officials of the claimant specifically Jackson Akenga, branch secretary of the Cabin Crew.

Following this press release, the respondents issued a show cause letter to the grievants [Ruth Kioko and Jackson Akenga] inclusive of the Ms Mponjiwa on 25th November 2011, to which they gave a response denying the allegations levelled against them and on the belief that they had not contravened any of their terms and conditions of employment with the respondents stipulated in a CBA for 2010 to 2012 between them and on the fact that they cannot be disciplined on matters related to the activities of the claimant as the registered national officials. That they had also not abused the terms of the contracts of employment with the respondents.

Ms Mponjiwa further states in her affidavit that the respondent by hurriedly convening the disciplinary panel was mischievous as this was meant to ambush and deny the grienvants an

opportunity to file their written submissions on the matters in question and this was an infringement on their rights and hence this action was meant to coerce, intimidate and instil fear on the members and officials of the claimant from participating or carrying out lawful activities. That the disciplinary action was meant to rid out officials of the claimant who were addressing bad labour practices and disregard of procedures of the disciplinary process as provided in the CBA and the Recognition Agreement.

That by this time, the grievants were aware that the respondent had dismissed the claimant embers unlawfully and hence they were not ready to sit and discuss issues as provided under the recognition agreement where it was clearly stated that all matters touching on terms and conditions of service were negotiable and the purpose of registering trade union is to advance the causes of their members in terms of advocacy, education, mobilisation and representation and when the grievants herein acted, it was in their elected capacity.

On 5th December 2011, the Court allowed the claimant to file a Supplementary affidavit, sworn by Perpetua Mponjiwa noting that on 2nd December 2011, the respondents constituted a disciplinary panel where she appeared together with Jackson Akenga as the grievants in this case, but this was adjourned to 5th December 2011. That the respondents were keen to discipline the grievants on account of undertaking claimant's activities. That the European Transport Workers Union where the Africa region was affiliate had written to the respondent that by taking a disciplinary action against the grievants would be illegal as they were undertaking union activities. That this disciplinary action as contemplated would put the grievants families and children into jeopardy and their rights as protected under the ILO Conventions, Constitution and the labour laws would be infringed.

To this application, the Respondent filed their Replying Affidavit on 16th January 2012 sworn by Alban Mwenda the respondent Group Human Resource Director, being conversant with the claimant's application. He stated that the respondents had a recognition agreement with the claimant Union dated 18th December 2008 which formed the basis of their relationship.

The respondent has in place a Disciplinary Handling Procedure (DHP) in force which was drafted by representatives of the claimant and the respondent. Further to this DHP, the respondent has the staff rules regulating conduct of staff, and under the recognition agreement at clause III (h) provides that the DHP and staff rules form part of this agreement and the effect of this is that all parties must observed by all members of the claimant, inclusive of its officials while advancing their mandate. Apart from these provisions as between the parties herein, they are also regulated by the labour laws in force regarding labour relations and anything contrary to the law is null and void and the claimant officials are not exempt from observing applicable laws and contractual obligations regulating their relationship with the respondent.

Mwenda further states in his affidavit that the respondents is engaged in a highly competitive business of commercial air transport and during the last few years the industry has witnessed sporadic rise in operational costs occasioned by rise in fuel prices; threats of terrorism and currency fluctuations and established operators now threatened by new investor low costs air transport which offer cheap air transport packages devoid of traditional luxurious benefits. To remain afloat, established airlines are now in the trend incorporating subsidiary air transport

companies to compete with the low costs carriers while at the same time running their conventional luxurious air transport business for customers who can afford it. So as not be left out of the dynamism of air transport competition, sometimes in 2011 the respondent decided to float a wholly owned subsidiary company called Jambonet Limited to provide low cost air transport services in Kenya and the region.

To maintain good industrial relations and to avoid the unwarranted misinformation on the new venture the respondent has held consultations with the claimant officials on this issue and the grienvants attended one such consultative meeting as employees as well as Union officials. The grievants were therefore aware that;

> These meetings were consultative;
>
> If they needed further explanation they had every opportunity to contact the Management;
>
> The issues involved were not negotiable under the recognition agreement; and
>
> The issues involved could not be a subject of a trade dispute or a strike as per the parties understanding.

Mwenda further stated that despite being aware of the provisions of the recognition agreement and the terms of consultations which were in progress, on 18th November 2011, the grievants called and participated in a press conference which was addressed by Perpetua Mponjiwa, one of the grievants in which alarming irresponsible, defamatory and insubordinate statements were made to the effect that the respondent established a subsidiary company, Jambonet Limited with an intention of getting rid of its employees and that the directors and management had colluded with politically connected leaders to auction the airline and that there was mismanagement and they should resign. At the press conference it was also stated that the respondent management team was drawing salary amounting to Kshs.8 billion which was a drain tot eh company and that management had conspired with certain unknown persons to have the company's shares at the Nairobi Stock Exchange drop from Kshs.52/- to kshs.19/-. Those employees would proceed on strike within 7 days unless the management took measures to discontinue its low cost air transport operation venture. That the grievants would be engaging in negative media campaigns against the company on a weekly basis.

That these unwarranted statements were published to the members of the public through both electronic and print media between 18th and 19th November 2011 and caused panic amongst the respondent's shareholders, customers, stakeholders and members of the public. This publication also cause cancellation of travel arrangements by would be customers who felt that industrial action was in the offing at the respondent's establishment and travel agents started advising their clients to take alternative flights as opposed to those of the respondent. That these publications cause embarrassment to respondents directors who are influential persons and hold similar directorships in leading corporations in the country especially when they are accused of colluding with politicians to sell the airline and that they were mismanaging the airline with a view to selling it cheaply. The directors were being blamed of

being instrumental through their underhand dealings, for poor performance of the respondent's shares at the Nairobi Stock Exchange.

The party's recognition agreement was based on mutual and reciprocal respect acknowledging the need for maintenance of discipline and respect for the rule of law by employees of the respondent, members and officials of the claimant and thus the respondents undertook investigations into the incident. These investigations involved establishing whether the grievants conduct violated their contractual obligations to the respondents and in this regard notice to show cause were issued to the grievants and by initiating the disciplinary process the respondent intended to give them an opportunity to justify their action by showing that the adverse statements they made against the respondent were legitimate, to show that if these statement were not legitimate then they were immune from being disciplined by the respondent, to show that these statements did not amount to misinformation to member of the Union or other employees and members of the public and that it did not constitute to a state of despondency at the respondents establishment. That by the issuance of the notice to show cause, the grievants were being given an opportunity to show that they acted in good faith and did not use their positions in the Union as camouflage for being insubordinate and that by Perpetua Mponjiwa calling for industrial action on expiry of 7 days if her demands were not met by the respondent, it is important to establish that she was acting within her powers as a union official.

Conducting a disciplinary process is in itself not disciplining an employee and only upon conclusion of such procedure that an employee may be disciplined or exonerated of the accusations against them. The grievants responses to the show cause letters were inadequate and it for that reason that the respondents constituted a panel to further interviews them. The respondent disciplinary procedure has a hallmark of fair hearing as required by law and the grienvants have three levels of appeal before the process is finally exhausted and a final decision made at the respondent's level. This procedure does not violate any written law nor does it violate the Constitution or the ratified Conventions.

Mwenda further stated in his affidavit that the orders being sought by the claimant and the grievants if granted would amount to reducing the Court to the level of micromanaging the relationship of the parties which is not the role of the court. That the parties have been in Court due to the claimant's penchant for ignoring labour laws, the recognition agreement, industrial relation machinery and decorum and that the dispute herein has been instituted by the claimant to legitimise its deliberate mission to disregard the law and violate any other instruments regulating the parties' relationship and thus pray that the application be dismissed and the orders granted set aside.

Second application

After this application, the claimant filed the application dated 25th January 2012 in a Notice of Motion under the provisions of section 12 and 13 of the Industrial Court Act seeking orders of injunction directed at the respondent restraining them from constituting a panel to discipline the grievants and a stay of any of the proceedings or decisions arrived therefore and the same de declared null and void and of no legal consequence. The claimant also sought leave to begin contempt proceedings against Mr Nicholas Korir, the in-flight performance

manager and Tom Shivo, head human resource relationship, servants of the respondent and be committed to civil jail. Other orders sought were for the Court to declare and direct that the respondent's purported dismissal letter dated 20th January 2012 against Perpetua Mponjiwa is null and void as it contravened the Court orders issued on 6th December 2011 and were extended on 17th January 2012 and thus the grievants should continue receiving their salaries until this matter is determined.

This application was on the grounds that upon this Court issuing orders dated 6th December 2011 stopping the respondents from constituting any panel for the purpose of disciplining the grievants herein, the respondents went ahead and disobeyed and issued notice to show cause letter to one of the grievants, subject to this claim and that if this panel is allowed to proceed and transact the proceedings, the claimant's application before court will be rendered nugatory. Other grounds are that pending the hearing of the application as directed by the court, the respondents have issued summary dismissal letter to one grievant which was in contempt of court orders herein and thus unless a stay is granted the grievant will suffer irreparable loss and damage.

This application was supported by the affidavit of Perpetua Mponjiwa who stated that when she filed the claim dated 2nd December 2011 the court granted interlocutory orders on 6th December 2011 which were served upon the respondent restraining them from constituting a disciplinary panel to institute disciplinary proceedings against her and Jackson Akenga and when both parties appeared in court on 17th January 2012 it was by consent agreed that these orders would be extended to 14th February when hearing would commence but that Mr. Korir, an officer of the respondent issued the grievants with another show cause letter directed at Perpetua Mponjiwa who is the subject of the claim. That this show cause letter was maliciously issued to circumvent the claim and to render the same nugatory as the respondents is determined to would the deponent at all costs as the allegations raised against her are tools in witch-hunting.

She further stated that the issues being raised by the respondent are within their knowledge and have been addressed through various correspondence between the parties herein as there were emails exchange with annexure that indicate that Perpetua Mponjiwa had a medical report and could not attend a training and that she had not been placed on the duty roster but that there are variances on the duty roster, which indicate malice on the part of the respondent.

She also stated that the respondents had received her medical report and acted upon the same and when she reported back to work the respondents failed to put her on duty roaster and despite several complaints and being on duty, she was assigned training sessions to which she attended to and was issued with a certificate and when she responded to the notice to show cause, on 21st January 2012 at 12.00 am received a letter from the respondent purporting to dismiss her from duty and that these documents are null and void on the face of the Court orders subsisting at this time.

The actions of the respondents were malicious and a bad labour practice and therefore the Court should intervene to redress the issue as the respondent's aim is to silence the claimant officials from speaking in defence of the claimant's interests. That the disciplinary process is unprocedural as the grievant cannot be disciplined in her absence and the orders of the court

to preserve the status quo by having Perpetua Mponjiwa remain on her job and have the disciplinary proceedings stopped should be the case until the claim is concluded but the respondents have opted to circumvent the cause of justice and thereby acting in contempt of court orders herein. The claimant's prayers in the application should therefore be granted.

To this application the respondents filed their Grounds of Opposition under the provisions of section 16(6) of the Industrial Court Procedure Rules on the grounds that the claimant had withheld from court material facts relevant to the case and deliberately misled the court into issuing the exparte mandatory injunctive orders in that there was no order restraining the grievant but there was an order restraining the respondent from proceeding with a specific disciplinary process against the grievant on account of the grievants utterances made at the press conference on 18th November 2011. The disciplinary process which led to the grievants summary dismissal arose out of the grievants absenteeism and insubordination.

Other grounds in opposition to the application were that the there was an error apparent on the face of the court's record that the interim orders issued violated the respondent's constitutional right to fair hearing and these orders had been overtaken by events as the court could not restrain that which had already happened and the application before court would involve the court into micromanaging the affairs of the parties. That the claimant has alternative remedies to pursue before coming to court and thus the application by the claimant does not satisfy the threshold set in the case of Giella versus Cassman Brown & Co. Limited case.

3rd Application

On 31st January 2012 the respondents filed their application by Notice of Motion under the provisions of section 16 of the Industrial Court Act, Rule 32(1) of the Industrial Court Procedure Rules and Article 50(1) of the Constitution for orders that the ex-parte interim orders staying the execution of orders issued by the court on 26th January 2012 pending the hearing of the claimant's s application dated 25th January 2012 scheduled for hearing on 14th February 2012. Further the respondents sought a review of the court orders of 26th January 2012 on the grounds that the claimants in their application dated 25th January 2012 withheld material facts relevant to the matter before court and deliberately misled the court as to the true facts pertaining to the suit and therefore there was an error apparent on the face of the record and the orders issued breached the respondent's fundamental constitutional right to a fair hearing and the court orders as issued breached the rules of natural justice.

This application was supported by the Affidavit of Lucy Muhiu, the respondent's Employee Relations Manager and this being an application seeking to set aside the orders granted following the claimant's application dated 25th January and the orders made on 26th January 2012, the deponent stated that the claimant misled the Court and withheld material information from Court so as to take undue advantage over the respondent.

Muhiu further states that in the claim, the claimant stated that the respondent initiated disciplinary procedure to discipline Perpetua Mponjiwa the chairperson of the claimant also the grievant herein for acts allegedly committed by her in the course of her union activities and together with the claim filed the Notice of Motion dated 2nd December 2011 where the grievants sought for orders restrain the respondent from constituting a panel with a sole

purpose of disciplining the grievants on the grounds of their participation in the claimant's activities. The grounds for which these orders were sought were that the said panel constituted was to discuss the subject of the claimant's union press release dated 18th November 2011 which the respondent was said not to have mandate under the law for purposes of disciplining an official discharging lawful activities of the union. That when the Court heard this application on 6th December 2011, the claimant was granted ex-parte orders restraining eh respondent from continuing with the disciplinary proceedings against the grievants pending the hearing of their application and that the proceedings and decisions arising from the disciplinary panel constituted by the respondent be stayed pending the hearing of their application. This application was set for hearing on 14th February 2012.

That the respondent did not continue with the disciplinary proceedings in question as cited in the claimant's application dated 2nd December 2011 as directed by the court and did not implement any decisions made thereto and thus fully complied with the court orders. That the grievant was for all purposes an employee of the respondent but continued to act in breach of the code of conduct, the company rules and the CBA by remaining absent from duty and failing to follow lawful orders as and when issued and arising from this on 17th January 2012 the grievant was issued with a show cause letter in respect of her misconduct and called upon to provide appropriate explanation why disciplinary action should not be taken against her to which she gave a written response.

That the respondent was not satisfied with the grievants response and thus convened a disciplinary panel hearing as per procedure, the grievant was given an opportunity to appear for the hearing but declined despite evidence indicating that various officers tried to reach her through phone and email and thus having failed to avail herself for the disciplinary process, her services were summarily dismissed by the respondents on 20th January 2012 on account of her absenteeism and insubordination and if the grievant is not satisfied with the summary dismissal, she had the right to appeal as set out under the disciplinary procedure rules. That this summary dismissal was not in contravention of the Court orders issued on 6th December 2011 as this related to events not related thereto or the claim filed in Court.

The complaint in court has been overtaken by events as the grievant has been dismissed from the employment with the respondent and the only recourse is to appeal against the summary dismissal and upon applying this right of appeal and is still not satisfied, then the matter can be reported as appropriate.

Muhiu further states that no leave has been granted to commence contempt proceedings against respondent officers Nicholas Korir and Tom Shivo and by seeking injunctive orders in the application dated 25th January 2012, the respondent was restrained from constituting any panel for purposes of disciplining the grievants, while the earlier injunctive orders were restraining the respondent from continuing the disciplinary proceedings which were in progress and staying decision which had been made in those proceedings as at 6th December 2011. That the decisions and proceeding complained of related to a press conference which had been held by the grievant and thus the orders issued by the court on 26th January 2012 do not relate to the subject matter in dispute in this claim and the orders were thus issued without affording the respondent a hearing the therefore violates their constitutional right. This was irregular for the court to nullify a dismissal letter issued to the grievant and to order that

contempt proceedings be commenced against persons who are not parties to the dispute without hearing the alleged contemnors. That a mandatory injunction cannot be issued ex-parte without going into the merits of the case before court.

The respondents thus seek that the Court orders issued on 26th January 2012 should be reviewed.

Following this application, the Court granted the respondent herein a stay of the orders issued on 26th January 2012 on the 1st of February 2012 and directed parties to attend hearing on 14th February 2012.

4th Application

On 22nd August 2013, the grievant Perpetua Mponjiwa filed her application dated 20th August 2013 with a Notice of Motion under the provisions of section 8 and 9 of the Ad judicature [Judicature] Act, (Rules of the High Court), section 12 of the industrial Court Act, Rule 27 of the Industrial Court Procedure Rules on the grounds that the applications herein were heard on 26th may 2012 and ruling has not been delivered. That the court directed that the matter be heard afresh and the delay in the delivery of the ruling is hurting the grievants and the failure by the court to act expeditiously is violating the rights of the grievants noting that no party has pleaded for a retrial.

This application was supported by the affidavit of the applicant Perpetua Mponjiwa who stated that the Court had directed for the retrial of the application which had been heard inter-parties and the stay herein continue to adversely affect her as the orders made on 1st February 2012 stopped her from working for the respondent. A retrial will prolong her suffering and violate her rights as she is unable to provide for her family and live a decent life and that an order stopping a right must be sparingly given and in any case must be fast tracked and dealt with expeditiously. That unless the court reverses that direction and make a ruling, she will suffer irreparable loss and damage.

Submissions

In submission on 28th May 2012, the respondent's advocate stated that they were forced to file their application dated 31st January 2012 after the claimant was granted ex-parte injunctive orders on 26th January 2012 on the basis that the respondent had initiated disciplinary proceedings meant to victimise the grievant due to Union activities. Earlier the court had issued other ex-parte orders from the claimant's application dated 2nd December 2011 where the respondent was restrained from continuing with disciplinary proceedings on interim basis, the respondent did suspend those proceedings.

That the genesis of the matter before court was the claimant application where the grievant Perpetua Mponjiwa was to appear before a disciplinary panel due to a press release of the claimant Union of 18th November 2011 the details of which are outlined in the supporting affidavit of Perpetua Mponjiwa. The issue was the release of the press statement. The Memorandum of Claim refers to the press statement and the subsequent panel hearing of 2nd December 2011 and the Court order was with respect to these proceedings which the respondent stayed pending the hearing inter-parties. The respondents filed their detailed response to this application but the grievant was caught up with another violation of her terms

of service as outlined in the respondent application dated 31st January 2012. She was issued with a show cause letter on failure to attend trainings, absenteeism yet she had no evidence of sickness or permission for days off.

In the court orders of 6thdecember 2011, the court did not stop all the other disciplinary proceedings. Thus when the grievant committed other acts that were found to warrant disciplinary action, she was invited to attend, she filed a response but this was found to be unsatisfactory. She was dismissed.

In the application dated 25th January 2012, the grievant failed to disclose material facts to court and thus the court was misled that the orders made were violated. Perpetua led the court to believe that her dismissal was on account of the press conference whose proceedings had been stayed. That the process leading to the grievant dismissal had nothing to do with her press conference.

The respondent thus seeks the court to review its orders made on 26th January 2012. The application was seeking contempt proceeding against two employees of the respondent and in law to commence such proceedings, the cited persons must be served with such an order which was not done in this case and therefore the orders granted were irregular.

That the disciplinary proceedings that had been commenced by the respondent were investigative implemented under the provisions of Article 41 of the Constitution which call for fair labour practices developed form ILO Convention 158. The respondent has not violated the orders of court which restrained specific disciplinary procedure. The subject resulting to summary dismissal was on absenteeism and insubordination.

On the other part, the advocate for the claimant submitted that a party who is in contempt of court has no right of audience until the same is purged. That the respondent has opted to misinterpreted the court orders and where they felt there was clarification needed, they should have come back to court before dismissing the grievant noting that the 2nd order restrain disciplinary action of whatever nature against eh grievant were ignored by the respondent. That the respondent never indicated that there were other disciplinary proceedings against the grievant and only issued a notice to show cause without reference to the orders issued and the only option that the respondent had was to obey the orders or come for their review or go on appeal to the Court of Appeal.

That the respondent cannot take it upon themselves to interpret the court orders the way they have done or in a manner to defeat justice and their disciplinary proceedings on 20th January 2012 cannot stand. The show cause letter issued on 17th January 2012 was with disregard to the existing court orders and the dismissal 2 days later is suspect as the respondent was trying to circumvent the orders and undermine the proceedings before court. That when the claimant came to court, the main prayer was to maintain the grievant in employment pending the hearing of the case and the dismissal of the grievant was in contempt of court and amounts to undermining the proceedings which must be obeyed by the weak and strong in equal measure. A party cannot choose which orders to obey.

The claimant's advocate further submitted that the application for review should not be granted as no grounds have been advanced as to why this should be done. Such an application

must be done under the provisions of Rule 32 of the Court Rules and in this case there is no new matter raised to warrant review of the orders. There is no mistake or error pointed out. No breach of any written law or need for clarification has been indicated. What has been stated is a defence to the application for contempt. The orders were served upon the respondent and thus had control of their officers not to disobey it and thus the 2nd disciplinary proceedings was not a new issue which came after court appearance on 17th January 2012 and only ongoing from the events that brought the claimant to court on 2nd December 2011. This was a bad labour practice and an abuse of the court process.

That even if the proceedings related to something different, the order in force was wide enough to cover any other proceedings of the same nature. The show cause letter issued to the grievant show that she was being disciplined on account of attending a Union meeting.

Court must ensure its orders are not issued in vain. The respondent application should therefore be dismissed, the stay granted to them set aside and the orders issued on 26th January 2012 be confirmed and the claim be set for hearing on merit.

This is the outline of all the applications that are pending before court. These application though relating to the same parties, they refer to different matters but due to the connectedness herein, the court will incorporate a ruling on all of them instead of making different and separate orders herein.

The following issues stand out for determination in this application:

1. **Whether the orders of 6th December 2011 restraining the respondent from undertaking disciplinary proceedings against the grievants restrained all other disciplinary proceedings thereof;**

2. **Whether the respondent as an employer could commence new disciplinary proceedings against the grievants for any other misconduct;**

3. **If they did, whether they were in contempt of court orders of 6th December 2012;**

From the onset, I need to outline the role of trade unions as set out under the provisions of section 4(2) of the Labour Relations Act;

> *(2) Every member of a trade union has the right, subject to the constitution of that trade union to -*

a. *Participate in its lawful activities*

b. …..

Thus being a member of a Union is a fundamental right, and beyond having this right, such a member or an official must as of law, participates only in its lawful activities. This

fundamentally translates that, there can be 'lawful' and 'unlawful' activities, but the law as set out in this section of the Labour Relations Act, dictates to such a member of a trade union that they can only participate in the Union lawful activities only.

Section 5 (2) (c) of the Labour Relations Act goes further to give more protections for an employee and state as follows;

> *… No person shall do, or threaten to do any of the following –*
>
> *(c) Dismiss or in any other way prejudice an employee or a person seeking employment:-*
>
> *(I) because of past, present or anticipated trade union membership;*
>
> *(ii) For participating in the formation or the lawful activities of a trade union;*
>
> *(iii) for exercising any right conferred by this Act or participating in any proceedings specified in this Act; or*
>
> *(iv) For failing or refusing to do something that an employee may not lawfully permit or require an employee to do.*

Once such rights are asserted, a Trade Union and its members are allowed to undertake lawful activities in pursuance to the provisions of section 8(1) (b) of the Labour Relations Act, by being able to plan and organise its administration and lawful activities. Therefore any employer who prevents any employee, being a member of a Trade union or its official thereof, from undertaking lawful, planned activities, violates the law.

To strengthen these provisions of the law, the practice and the law as between employee and employers where there is a Trade Union representing the interests of the employees, formulate a Recognition Agreement and outline various interests and further register a Collective Bargaining Agreement (CBA) setting out the duties and responsibilities of each party and do recognise the applicable procedures and processes for various mandates especially in disputes resolution mechanisms to be applicable as between themselves. Further to these recognition agreement and CBA, employers do make provisions for work place regulations by putting in place policies and guidelines or Manuals as to govern relations at the work place.

I find the parties herein had a Recognition Agreement made on 18th December 2008 and a registered CBA covering the period of 2010 to 2012. The respondents had the Human Resource Manual, 2009, which as attached to the Respondent Replying Affidavit sworn by Alban Mwenda sworn on 16th January 2012, indicate that the Disciplinary Handling Procedures were formulated from drafts by the AAWU Union Management Committee on Disciplinary Procedures.

Beyond these provisions as with regard to how they are to be guided in their relationship between the employer and the employees as represented by their Union, AAWU, there are also laws that outline the fundamental protections due to both employer and employee in matters of disputes resolution. I take cognisance of the Employment Act and the Labour Relations Act that protect the fundamental rights of an employee and the fundamental principles on unionisation of employees for the collective good as outlined in both these laws.

Beyond the statutes, the Constitution now create as part of the rights and fundamental freedoms, the right to fair labour relations outlined under Article 41(1) of the Constitution.

As I have stated in the case of *Elizabeth Washeke and 62 Others versus Airtel Networks (K) Ltd et al, Industrial Cause No. 1972 of 2012, 24;*

> *By having Article 41 of the Constitution, 2010 protecting labour relations/practices, it was a constitutional declaration with the purpose of ensuring that the legislative framework governing labour relations in Kenya was in accordance with the Bill of Rights. This sets the right to fair labour practices in the equity jurisdiction of the Industrial Court, in a changed constitutional dispensation.*

Fair labour practice entail each party treating the other is a manner that is just, legitimate and reasonable as fundamental practices envisaged in a society that is open and democratic where transparency and accountability must be guaranteed. The freedom to join a trade union and carry out lawful activities thereto is one of the fundamental aspects of freedom of association as affirmed under Article 2 of the ILO Convention No. 87 and Article 2 of the ILO Convention No. 98. In addition, the right to join or form a trade union has been described as a fundamental right brooking no derogation under international law. In 1975, the ILO's Committee on Freedom of Association determined that member countries are;

> *"… bound to respect a certain number of general rules which have been established for the common good . . . among these principles, freedom of association has become a customary rule above the Conventions."*[1]

Further to these principles, the ILO in 1998 adopted the landmark *Declaration of Fundamental Principles and Rights at Work*[2]. The declaration covers freedom of association, forced labor, child labor, and discrimination. The declaration says expressly:

> "All members, *even if they have not ratified the Conventions in question*, have an obligation arising from the very fact of membership in the Organization, to respect, to promote, and to realize, in good faith and in accordance with the [ILO] Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely: (a) freedom of association and the effective recognition of the right to collective bargaining; . .

Therefore, in my reading of all these provisions, the claimant Union and its officials, are by law entitled to carry out lawful activities, follow out agreed-upon regulations as outlined in their CBA and other policy manuals regulating their relationship as well as the laws relating to labour relations within a fair and equitable environment that respect fair labour practices.

Within this conceptual framework of things, there remained a fundamental position that an employer retained the right to discipline any employee who had a case of misconduct, that employee being unionised or not, that employee being an official of a union or nor, the duty to discipline remained with the employer at all material times. In this respect, where an employee, unionised or an official of a union committed went ahead and committed acts that were established to warrant a disciplinary action, then such an employee cannot be found to find support from the sanctuary of the ILO Convention provisions, or the statutes application

or Article 41 of the Constitution, to bar an administrative disciplinary process. This is so as these very provisions as under the ILO, statutes and the Constitution require all parties to act in good faith and to ensure they undertake their mandate as an employee or employer in the spirit of fair labour practices.

On the other hand, an employer who commences disciplinary proceedings must ensure due process, fair hearing and due regard to natural justice within the context of fair labour practices. These principles must be exercised in a reasonable and fair manner.

The 1st show cause letter issued to the grievants [specifically Ms Perpetua Mponjiwa] and dated 25th November 2011 stated:

…

RE: SHOW CAUSE

On 18th November 2011, you and other known persons convened, attended and addressed a media press conference at 680 Hotel Nairobi where you proceeded to attack and disparage both Management and business policies of the Company.

…

The show cause goes on to outline the specific accusations arising from this press conference where the grievant was accused of attack and disparage.

The second show cause issued and dated 17th January 2012 tot eh grievant, Ms Perpetua Mponjiwa stated;

RE: SHOW CAUSE

Your resumed duty from leave on 31st Oct, 2011. You were issued with rosters for the month of November 2011 and January 2012 which showed your scheduled training and other duties during this period.

…

The show cause related to events outlined with regard to duty rosters, training and other duties.

From the proceedings herein, as of 2nd December 2011 when the claimant for the grievants came to Court and obtained the orders dated 6th December 2011, the only show cause that the grievants were responding to and subject of the disciplinary proceedings related to the press conference of 18th November 2011 the alleged attacks and disparage of the respondent. The response that the grievants attached to their responses similarly relate to the press conference. From these events the court made orders, which I find specific, that;

1. …

2. *The respondent, its agents, or servants be and are hereby restrained from continuing with the disciplinary proceedings against the grievants pending the hearing of this application inter-parties*

3. *The proceedings and decisions arising from the disciplinary panel constituted by the respondent be and are hereby stayed pending the hearing of this application inter-parties*

4. …

The facts before court as of 6th December 2011 for the issuance of these orders related to the application dated 2nd December 2011, and I find that the restraint on the respondent was with regard to the show cause letter and proceedings then and not futuristic as the second notice to show cause of 17th January 2012 had not yet been issued. The allegations in this second notice to show cause letter had not been formulated.

The court restrained the respondent from '*…continuing with disciplinary proceedings'* and a stay of '*… disciplinary panel constituted'* as of 6th December 2011. There was no way that the Court could issue blanket interim orders in anticipation to other acts not complained of at this time. Even if this was meant to be so, the same would have been a misapplication of the very principle of granting interim orders with a view of allowing all parties to attend hearing upon good notification of what was against them and in consonance with fair labour practices.

The grievant being and employee of the respondent grievant, Perpetua Mponjiwa was the national chair, was bound by the company rules and regulations as well as provisions of the recognition agreement concluded between the parties in this cause. The claimant and the respondent have also agreed upon a disciplinary procedure dated December, 2009. The disciplinary procedure binds the grievant.

Where there was an alleged misconduct, these disciplinary procedures were applicable to any employee. The procedure to give an employee the opportunity to be heard at this first instance before the disciplinary panel is commensurate with the constitutional provisions as under Article 51 on fair hearing and the tenets of natural justice. Where one is alleged to have committed an act that warrants disciplinary action, the first step is to apply the mechanism as agreed between the parties. However nothing stops any such party, being aggrieved by that mechanism as applied against them to challenge the fairness of it before this Court which has the jurisdiction to hear labour disputes. Parties are encouraged to undertake all means possible to resolve disputes at the shop floor as the disciplinary process is investigative and meant to verify the allegations made against the employee for punishment to be imposed if the allegations are proved and for the employee to be exculpated if the allegations are not proved. These internal mechanisms are the core of ILO Convention 153, where an employee should be heard by the employer before employing external disputes resolution mechanism.

On the first issue, I find that the respondent was entitled to commence the disciplinary process applicable to its staff, those under the union and those outside a union. In making this finding the court has carefully considered the provisions of the collective and recognition agreement, the applicable law and the provisions of Article 41 of the Constitution. Where the CBA provides that the grievances will be handled in accordance with the provisions of the recognition agreement. The recognition agreement then provides for an elaborate procedure for handling both the individual and collective grievances. Such grievances do not necessary mean a sanction but an effort at arriving at a harmonious employment relationship but where

there is proof of gross misconduct the parties have set out various sanctions that *may* be applied in the circumstance of each case.

This court has the original jurisdiction to hear all labour claims where the court decides to make preservative orders, the court does not thereby usurp or participate in the right of the employer to discipline the concerned employee nor does the court thereby become part of the administrative disciplinary process. The court in such an instance would be exercising its constitutional and statutory judicial powers. Where a party dissatisfied at the end of the administrative disciplinary process decided to move the court in that regard, then the court can proceed and review the procedures applied or the substantive issues addressed and make a finding. This would ensure that the disciplinary process applied against an employee if fair and in compliance with agreed procedures and the applicable law.

The court in exercising the jurisdiction to intervene in an administrative disciplinary procedure must proceed with caution so as to protect the employer's right to fairly terminate the employment relationship. In ***Miguna Miguna – versus- Permanent Secretary, Office of the Prime Minister and the Attorney General (2011)*** **eKLR** the High Court held that the employer was entitled to commence disciplinary proceedings against the employee and it was the duty of the employee to justify in the administrative disciplinary process the continuation of his employment. The court further stated that its duty would be to stop a process started with ulterior motive or one based on outright illegality or one which is defective *ab initio*. In ***Muthusi and 2 others -versus- Gathogo and 2 others (1990) KLR 90*** the High Court held that it would be futile for the court to involve itself in the day to day running of a union which had its own governing rules. Thus, similarly this court would be reluctant to involve itself in a disciplinary process commenced by the employer unless in an appropriate case it is established that the disciplinary process has been commenced or is continuing unfairly.

The intervention in disciplinary process by employers will be entertained by the court rarely and in clear cases where the process is likely to result into unfair imposition of a punishment against the employee. The court will intervene in an administrative disciplinary procedure if it is established that the procedure relied on by the employer offends fairness or due process by not upholding the rules of natural justice, or, if the procedure is in clear breach of the agreed or legislated or employer's prescribed applicable policy or standards, or, if the disciplinary procedure were to continue it would result into manifest injustice in view of the circumstances of the case. The court will normally not intervene if it is established that there exist mechanisms between the employer and the employee such as appeal or revision or review that the employee could invoke internally to remedy the dissatisfaction that would otherwise justify the court's intervention and, the employee has not exhausted such internal mechanisms.

The issue for determination is whether in the present case the applicant has met the threshold set out above to justify the court's intervention through issuance of an interim order stopping disciplinary process by the respondent against the grievant pending the hearing and determination of this cause. The claimant, and by extension the grievant herein have not demonstrated that the disciplinary proceedings commenced by the respondent in the first instance and the second instance were commenced with an ulterior motive, were unfair or failed the natural justice principles where due process must be applied. By responding to the show cause letters, the grievants were aware of the allegations against them and cannot be

found to say that due process was ignored in this case. The grievants being union representatives were aware of the review and appeal mechanisms in place where any disciplinary action was taken by the respondent against them following the show cause notices they had received. These mechanisms are still available to date. They have not been exhausted.

The court finds that the submission of the applicant that the disciplinary process should be stopped in the interim on account of the fact that they were officials of the claimant pursuant to section 31 of the Labour Relations Act and that they were being disciplined contrary to the terms and conditions of service and the statement of initial particulars signed between the respondents and the grievants still remained in force are grounds that do not meet the threshold set out earlier in this ruling. Likewise The orders sought to stay the decision or the respondent in their letter dated 20th January 2012 against the grievant, Perpetua Mponjiwa, and that contempt proceedings against the respondent officer should commence for contravening the Court orders issued on 6th December 2011 and, do not form the same series of events as outlined by the claimant in their application dated 2nd December 2011 and the orders issued therein.

The court finds that such, and other arguments for exculpation advanced in this case can be properly advanced and decided in the disciplinary process. Where the respondent has made a decision, there exists a review and appeal mechanism that the claimant can apply. The disciplinary panel in which the claimant is represented will be in a good capacity to hear and make a proper determination. The applicant has therefore failed to establish the necessary threshold for the court to order the temporary orders as prayed for.

While making this finding, the court notes that when the court orders dated 6th December 2011 were issued, the grievants were still in employment pending of the application for interim orders before the court and administrative disciplinary proceedings before the respondent, the grievants remained on duty and in the employment of the respondent. Being so employed and required to undertake such duties as allocated by the employer, such duties were to be undertaken with due diligence and in compliance with laid down requirements. Nothing prevented the grievant from performing their duties. If any other subsequent misconduct or other allegations arose, nothing prevented the respondent as the employer from addressing them.

I therefore find the show cause letter issued to Perpetua Mponjiwa on 17th January 2012 as forming a distinct and different disciplinary proceedings that required a response from her. This was not in the same series as the earlier allegations subject of the claimant's application dated 2ed December 2011 and the basis of the court orders granted thereon on 6th December 2011. These were separate and distinct issues. If dissatisfied with the employer decision thereon, there is a review or appeal mechanism available to the claimant.

On the last application made by the grievant, Perpetua Mponjiwa dated 20th August 2013, as outlined above, there are no directions herein for parties to commence fresh hearing, submissions or retrial, the claim herein is still pending not prosecuted. The directions given herein by the court were directed at establishing the current status of the matter to enable the court make a rational decision noting the long duration pending the ruling herein. The

application as outlined by the applicant, Perpetua Mponjiwa is with disregard to these directions

I find that this application was unwarranted, had the applicant found time to establish the true nature of directions herein, this application should not have been filed. Where a party finds court directions not well outlined, the practice is to place the matter for mention and the court will proceed and ensure justice is achieved to any party desirous of getting directions as regards any pending matter before court. I however do appreciate that the ruling with regard to the applications herein have long been due and the applicant may have become anxious.

The court finds that in view of the complex legal issues raised in this cause, the allegations made against the grievants and subject of show cause notices leading to this cause was responsible and with good foundation. Accordingly, the court makes the following orders:

1. **With regard to the claimant's application dated 2nd December 2011, the grievant shall remain in the employment and duty of the respondent until the conclusion of the disciplinary process occasioning the commencement of this cause unless otherwise lawfully disciplined on account of substantially different and proven misconduct.**
2. **The orders issued on 26th January 2012 are hereby vacated subject to the claimant being permitted to apply review or appeal mechanisms available to address any grievance outstanding with due regard to the applicable disciplinary procedures of the respondent.**
3. **The application dated 20th August 2013 is hereby dismissed.**
4. **Parties to bear their own costs of the application.**

Delivered in open Court this 16th day of September 2013.

M. Mbaru

Judge

In the presence of

……..

……..

……

[1] See Fact Finding and Conciliation Commission on Chile, International Labour Organization, Geneva, Switzerland (1975), Para. 466 (emphasis added).

[2] The text of the *Declaration of Fundamental Principles and Rights at Work* is available online at: http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static_jump?var_language=EN&var_pagename=DECLARATIONTEXT. Accessed on 2nd September 2013.