



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 306 OF 2009

**JOYCE CHERONO LABOSO (Suing as the administratrix of the Estate of
LORNA CHEPKEMOI LABOSO DECEASED).....PLAINTIFF**

-VERSUS-

KENYA CIVL AVIATION AUTHORITY.....DEFENDANT

RULING

1. The plaintiffs herein took out the motion dated 18th June 2018 whereof she sought for the following orders:

i. THAT this honourable court be pleased to admit the Air Accident Investigation Report dated 10th September 2008 in evidence as a Public Document under Section 68(1) (a) (ii), (e) and Section 79(1) (iii) of the Evidence Act without calling the makers thereof.

ii. THAT in the alternative, Witness Summons do issue to the Minister of Transport the time being, in charge of transport to produce or authorize the production of the Accident Investigation Report dated 10th September, 2018.

iii. THAT in the further alternative, witness summons be issued to any or all of the following Expert Authors of the Air Accident Investigations Report dated 10th September 2008 to attend court and produce the said Air Accident Investigation Report.

a. Eng. Enos Ndoli

b. Eng. Peter M. Wakahia

c. Capt. Anthony M. Kiroken

iv. THAT this honourable court do issue any further order for the ends of justice.

v. THAT the costs of this application be provided for.

2. The motion is supported by the affidavit and a further affidavit of Fred Athuok. When served the defendants filed the replying affidavit of Cyril S. Wayong'o and the affidavit of James Macharia to oppose the motion.

3. When the motion came up for interpartes hearing, learned counsels appearing in this matter recorded a consent order to have the application disposed of by written submissions. I have also considered the rival written submissions.

4. I have considered the grounds set out on the face of the motion and the facts deponed in the affidavits filed in support and against the motion. It is the submission of the plaintiffs/ applicants that the report they seek to be produced in evidence was prepared under the order and power of the Minister for Transport vide gazette notice no. 5962 of 12th June 2008. It was pointed out that the minister has declined to make the report public. The plaintiffs stated that they summoned two expert witnesses to attend court to testify on the report concerning the subject plane crash accident but the duo have declined to honour the summonses.

5. The plaintiffs pointed out that the report is a very important piece of evidence in support of their case. It is the submission of the plaintiffs that upon the appointment and gazettement of the makers of the report by the minister, the persons so duly appointed become public officers within the meaning of Section 79(iii) of the Evidence Act and therefore the said report authored by them become a public document.

6. The plaintiffs also pointed out that under Regulation 8(3) of the Civil Aviation Regulations, the minister is given the discretion to cause the whole or part of the report public in a manner he thinks fit. However in this matter the minister has not exercised that discretion. The plaintiffs urged this court to issue the orders since the aforesaid report is crucial to their case.

7. The 2nd defendant opposed the application stating that the orders sought are unenforceable in nature. It was argued that the procedure for making the report public is through a gazette notice notifying the general public of the outcome of the investigations and since the report has never been gazetted it does not qualify to be a public document hence it cannot be produced as such under the Evidence Act.

8. It was argued by the 2nd defendant that Kenya being a signatory to the Convention On International Civil Aviation, Kenya is required to adhere to all the standard issued by International Civil Aviation Organization (I.C.A.O) relating to civil aviation failure to which it may have adverse consequences.

9. Pursuant to standards set out in Annex 13 to the Convention On International Civil Aviation and Civil Aviation (Accident and Incident Investigation) Regulations, 2018, the sole objective of the investigations of an Aircraft Accident or incident shall be the prevention of accidents and incidents to avoid similar occurrences in future. The 2nd defendant pointed out that the legislation prohibits such an investigation report from apportioning liability which the plaintiff now seeks.

10. With respect, I agree with the submissions of the 2nd defendant that **Regulation 20(8) of the Civil Aviation (Aircraft Accident and Incident Investigation) Regulations, 2018** restricts the admission of the investigation report as evidence in court. To do so would be to put the report in an inappropriate use since the report can only be used for aviation safety. In fact Regulation 22(5) of the aforesaid Regulations provides that a recommendation for preventive action or safety recommendation **shall, in no case create a presumption of liability for an aircraft accident or incident.**

11. In the case of the **Attorney General & Another vs African Commuter Services Ltd (2009) eKLR** the Court of Appeal held *inter alia*

“The public Inquiry Recommendation for cancellation of the respondents Air Operation certificate went contrary to the principles and ideals enshrined in annex 13 of the International Convention On Civil Aviation as well as those of the parent convention which advocates equal treatment for all players in Civil Aviation industry and stress that the purposes of an investigation is not to apportion blame for the accident but to avoid future accidents.”

12. The 1st defendant substantially agreed with the submissions put forward by the 2nd defendant that the investigation report cannot be legally used in the manner sought by the plaintiff.

13. In the end, I find the plaintiffs motion to be bad in law and without merit hence it is dismissed. In the circumstances of this case, a fair order on costs is to order that costs shall abide the outcome of this suit.

Dated, Signed and Delivered at Nairobi this 31st day of May, 2019.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant