



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Case 598 of 200**

**WILLIAM KARIUKI .....PLAINTIFF**

**VERSUS**

**KENYA CIVIL AVIATION  
AUTHORITY.....DEFENDANT**

**JUDGMENT**

The Plaintiff herein moved to this Court vide a plaint dated 18<sup>th</sup> May 2005 and filed the same date. The salient features of the same are that:-

(1). The Plaintiff served in the employment of the defendant as a flights operations manager till he resigned there from with effect from 31<sup>st</sup> day of March 2005 vide a letter of resignation dated 16<sup>th</sup> march 2005 to enable him take up positions of Flight operations Inspector with the International Civil Aviation organization.

(2). That by a letter dated 11th March 2005 the defendant accepted the Plaintiffs resignation and required the plaintiff to remit an equivalent of 15 days salary in lieu of notice which the Plaintiff remitted amounting to Kshs 45,451.60 which the defendant acknowledged receipt.

(3). One month after the Plaintiff had tendered his resignation from the defendant's employment, the defendant wrote to the Plaintiff on 20<sup>th</sup> April 2005 purportedly dismissing him summarily.

(4). In consequence thereof the Plaintiff contends that the defendants purported dismissal is in bad faith, wrongful, malicious and solely intended to defame and bring the plaintiff into dispute and make it impossible for the plaintiff to be employed in the aviation industry in general and the international civil aviation organization in particular. Particulars of bad faith are given.

(5). That by reason of the matters aforesaid the plaintiff has suffered and continues to suffer loss and damage in consequence thereof he seeks an order for:-

(a) A declaration that the employment of the plaintiff with the defendant was terminated by way of resignation and not through the purported summarily dismissal.

(b) An order of injunction restraining the defendant, its employees, servants, officers or agents from publishing the purported summary dismissal of the plaintiff.

(c) A mandatory injunction compelling the defendant to remove the purported letter of summary dismissal from the plaintiff's employment records with the defendant.

(e) Costs.

(f) interest on (c) and (d)

(g) Any other relief that the court may deem fit and just to award.

It is on record that the plaint was accompanied by an interim application dated 18<sup>th</sup> May 2005 and filed on the same date. It is by way of chamber summons brought under order 39 rules 2 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act Cap.21 Laws of Kenya. The application sought 5 reliefs namely:-

(1) That this application be certified as urgent and its service be dispensed with in the first instance.

(2) This honourable Court be pleased to issue an order of injunction restraining the defendants, its employees, servants' officers or agents from publishing the purported summary dismissal of the plaintiff pending the hearing of this application.

(3) This honourable court be pleased to issue an order of injunction restraining the defendant, its employees, servants, officers or agents from publishing the purported summary dismissal of the plaintiff pending the hearing of the suit.

(4) This honourable Court be pleased to issue an order of a mandatory injunction compelling the defendant to remove the letter purporting to dismiss the plaintiff summarily from the defendant's employment, from the plaintiff's employment records.

(5) Costs of the application be provided for.

A perusal of the court record reveals that prayers 2 and 3 of the said chamber summon was allowed by consent of the parties on 15.7.05 temporarily and the same ordered to be heard on 13.10.05.

Further perusal reveals that on 12.3.07 the chamber summons was marked as settled. The settling of the chamber summons paved the way for the hearing of the main suit.

Meanwhile on the part of the defendant the defence entered appearance dated 16<sup>th</sup> June 2005 and filed on 17<sup>th</sup> June 2005. The defence is dated 29<sup>th</sup> June 2005 and filed the same date. The salient features of the same are as follows:-

(1) Denied that the contents of their letter dated 20<sup>th</sup> April, 2005 amounted to or are capable of being construed as a purported summary dismissal of the plaintiff and states that the purpose and intent of the said letter was only to convey to the plaintiff the conclusion of deliberations of the defendants Board of Directors for the plaintiffs information.

(2) That no where in the said letter dated 20<sup>th</sup> April 2005 is it as started by the defendants that the plaintiff is thereby being dismissed and the defendant shall at the time of hearing thereof crave for the courts proper interpretation or the tenor and effect of the said letter.

(3) Denied ever acting in bad faith, wrongfully, maliciously and with intention to defame or frustrate the plaintiff as alleged in paragraph 7 of the plaint on this account denied each and every particular of malice and bad faith set out there under and invited strict proof.

(4) Denied plaintiffs assertion that he had suffered and continued to suffer any loss and damage attributable to the defendant and further contends that the complaints and fears are speculative as they

have no factual grounding.

(5) In the alternative and without prejudice to the foregoing the defendant contended that the suit is incompetent, vexatious, and frivolous, discloses no reasonable cause of action and is otherwise an abuse of the due process of the Court.

(6) The defendant gave notice that at the hearing of the suit it would raise preliminary objection on points of law based on:-

(a) no or no valid notice of intention to institute the suit has been given as required under the civil Aviation Act as amended which is the statute which establishes the defendant.

(b) The orders sought if granted shall be in effectual and in capable of enforcement.

By reason of the above the defendant urged the court to dismiss the plaintiff's suit with costs.

The Plaintiff was the sole witness on his side. The salient features of the same are:-

(1) He is a Director of a company called Flight Safety as at the time of trial which deals with flying, training, aircraft maintenance and operations of commercial Aircrafts.

(2) He has been an employee of the defendant from 1981 – 2005 when he left at the vane of Flight Operations Inspector.

(3) Throughout his tenure of employment his working relationship with the defendant was good and earned him various letters of commendation among them those dated 27.7.93, 4.2.98, 29.6.00, 8,11.00 and 24.8.01 produced as exhibits 1,2,3,4,5.

(4) In 2005 vide a letter dated 16.3.05 he resigned from the service of the defendant which resignation was acknowledged by the defendant, accepted on condition that the plaintiff paid 2 weeks salary in lieu of notice vide their letter of 21.3.2005 which he paid as shown by exhibits 6 and 7. The equivalent was Kshs 43,451.60 paid by cheque exhibit 8(a) and in respect of which the defendant issued a receipt exhibit 8(b). Therefore he wrote exhibit 8 (c) thanking the defendants for accepting his resignation and asking that he be cleared. He duly proceeded to the defendants premises to pick the clearance letter as well as certificate of service, when he met with a rude surprise of a letter dated 20.4.2005 whose contents are to the effect that him plaintiff had been summarily dismissed.

(5) The reasons for the summary dismissal are contained in the same letter namely demanding bribes, malicious, failing operators during his inspection if they fail to cooperate and direct payment of 500,000.00 into his bank account by an operator after the operator requested for the inclusion of an extra Aircraft in the AOC (Air Operators Certificate). The accusations had allegedly been gathered by a probe team that the KCA had appointed to receive and consider material evidence from stakeholders on allegations against some staff in the Flight safety Operations Division.

(6) Him Plaintiff testified that he was aware of the activities of the probe team which had in fact invited him in the month of February 2005 to appear before it and discussed points on some allegations which had been raised against him, which to him plaintiff appear to have arisen because of ignorance of what the Plaintiffs role was in the department. Him Plaintiff was not told as who had leveled those accusations, he was not confronted with any material evidence as regards those allegations. Neither were the specific allegations in the alleged letter of summary dismissal exhibit 9.

(7) It is his evidence that the content of exhibit 9 shocked him. He sought evidence with his lawyers who wrote a demand letter to the defendants on 26.4.2005 exhibit 10 to which the defendants replied vide their letter of 3.5.2005 exhibit 11 declining to withdraw the content of exhibit 11, as demanded by their letter of demand exhibit 10.

(8) It is the Plaintiffs evidence that the content of the defendants letter took him by surprise and it rendered him vulnerable as he could not utilize his good working record with them to secure employment with the International Civil Aviation who had been trying to locate him for a possible job placement in Kenya as shown by exhibit 12(a) (b) but he could not pursue that line to secure employment at the risk of summary dismissal being disclosed.

(9) It is his stand that the defendant's action has rendered him jobless as he does not have confidence to approach any potential employers for an employment as they will have to seek to refer to his past employment record with the defendant.

At the initial stage the Plaintiff gave his evidence as a formal proof as the defendants did not attend trial. After the Plaintiffs filed his written submission, the defendant applied to have the matter reopened for them vide their application dated 8.11.2007 which was allowed in terms of prayer 4 thereof whereby the defence was allowed to cross examine the plaintiff.

The cross-examination was brief and was to the effect that the defendant purported to summarily dismiss the plaintiff who in fact he had already resigned from their employment and his resignation accepted by them long before they wrote the said letter of the alleged dismissal. He also confirmed that the Advocates letter exhibit 10 is the only notice document that the lawyer gave.

The defence called no witnesses. Both parties filed written submissions.

The Plaintiffs reiterated the content of the plaint, plaintiff's evidence and exhibits and they stressed the following points which they assert are not in dispute.

(1) That the plaintiff was an employee of the defendant for a period of 23 years. First when the defendant was a department in the Ministry of transport and communication and later translated into the defendant authority.

(2) As at the time he left he was working as a pilot and flight operations inspector.

(3) That him Plaintiff had prospects of securing employment with the International Civil Aviation in March 2005 which fact prompted him, plaintiff to resign from his employment with the defendant which service he had rendered diligently and with a lot of dedication. The letter of resignation is dated 16<sup>th</sup> March 2005 which sought resignation with effect from 31<sup>st</sup> day of March 2005.

(4) There is no dispute that the defendant authority accepted resignation on condition that he paid them 15 day salary in lieu of notice which condition the plaintiff fulfilled and the resignation became effective on 31<sup>st</sup> March 2005.

(5) That despite what is stated above the defendants in a surprise letter dated 20<sup>th</sup> April 2005 purported to summarily dismiss the plaintiff from their employment.

(6) It is their assertion that the defendants action in number 5 above was activated by malice and done in bad faith as the same was calculated to bar the plaintiff from securing employment with the international civil aviation , which the plaintiff lost.

(7) It is their stand that in the wake of matters set out above, the plaintiff was entitled to move to this court present this action and in the interim seek interim orders restraining the defendants from maliciously destroying his career, which interim orders were granted on 15.7.05 and subsist to the present day and which the plaintiff seeks this court to confirm.

(8) They content that on the facts demonstrated herein the defendants action was unreasonable, done in bad faith, ill motivated, malicious and based on extraneous consideration contrary to the rules of natural justice and unlawful which action have led to the plaintiff suffering gross damages.

On issues for determination the plaintiffs counsel continued to submit thus:-

(a) That in law an employment can be terminated either by dismissal or resignation. It is their stand that there is no way an employee who has resigned and whose resignation has been accepted by the employer can subsequently be summarily dismissed as the act of resignation and acceptance of the same effectively terminates the employment. For this reason they urge the court to hold that for the reason given the defendant authority can therefore not in law and/or in fact purport to terminate employment contract which has ceased to exist, which fact is known to the defendant authority and that is why the defendant has denied dismissing the plaintiff in paragraph 4 of the defence.

(b) Since the defendants letter of 20<sup>th</sup> April 2005 was issued after the plaintiffs employment with the defendant had been effectively terminated upon resignation, this court is invited to rule that its purpose was solely for damaging the plaintiffs prospects of employment within the Aviation industry. As such the same was therefore maliciously and motivated by bad faith, intended to obliterate the plaintiff's chances of being employed and particularly to impede his employment as a Flight Operations Inspector with the International Civil Aviation Organization.

(c) That as regards the issue as to whether this suit is subject to section 7E of the Act they contend that it does not because of the following reasons:-

(i) before the creation of the defendants Authority in 2002 the Plaintiff was an employee of the Ministry of Transport and Communication which service was preserved by Section 21a of the same Act as read together with the second schedule. As such Section 7E only applies to direct appointees of the Director General under Section 5D of the Act.

(ii) The Plaintiffs employment having been preserved by virtue of the provisions of Section 21A of the Act, they can only be altered if the minister concerned so directs.

(iii) It is their stand that Section 7E of the Act only applies to employees of the defendant who have been appointed by the Director under Sections 5D of the Act of which the Plaintiffs is not one.

(iv) It is their stand that had the legislature intended to bestow the right to interfere with the terms of employment for employees already on board on the Director of the defendant, it could have said so under section 21A of the Act. Instead that right was bestowed on to the minister concerned.

(v) Alternatively they argue that since the letter of 20<sup>th</sup> April 2005 was issued long after the defendant had accepted the plaintiffs resignation it can not amount to an act done in pursuance of execution or intended execution of this Act or any public duty or authority more so when the defendants concedes that it did not summarily dismiss the plaintiff.

(d) Despite the defendants concedes that it did not summarily dismiss the plaintiff.

(e) Despite this Court, reopening the matter for the defendant to be heard, the defendant has not tendered any evidence to show that its purported act of summary dismissal of the plaintiff was an act done in pursuance or execution or intended execution of this Act or any public duty or authority or in respect of any alleged neglect or default in execution of this Act or in any such duty or authority.

(ii) The only reasonable conclusion to be drawn from the defendant's refusal to adduce evidence is that the act was done maliciously and in bad faith.

(e) It is their stand that Parliament expects an Authority such as the defendant vested with power to act reasonably and within the law in exercising their stand that acting maliciously unreasonably and in bad faith renders an authority's action ultra vires, null and void.

(f) They also contend that to purport to summarily dismiss an employee who ceased to be an employee a month ago can be reasonably described as an act which is so outrageous in its defiance of logic or

accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

(g) It is further their sand that the defendant authority had the burden of proving that its challenged act herein was an act lawfully undertaken in good faith in pursuance of the Act or in performance of the public duty under the Act which the defendant has failed to prove by refusing and or neglecting to produce any evidence whatsoever to contradict the plaintiffs evidence that the defendants authority's action was maliciously, in bad faith and ultra vires, the Civil Aviation Act Cap.394 Laws of Kenya and as such it is disentitled from relying on the provisions of that Act.

On the basis of the afore set out assertions, the plaintiffs counsel urged the court to issue the orders sought in prayers (a) (b) and (c) to protect the plaintiffs career and professional reputations on account of irregularities, malice and utter bad faith set out above. They also urge the Court to award general damages to compensate the plaintiff for the loss suffered as a result of the defendant, authority's malicious, irregular and unlawful action.

The defendant's counsel on the other hand in response to the plaintiffs case, evidence, and counsel submission, reiterated their pleading and then stressed the following points:-

(1) That in response to the Plaintiffs request for a declaration that his employment with the defendant ended with his resignation and not a summary dismissal by the defendant, a restraining order to restraint the defendant from publishing the said purported dismissal, request for the issuance of a mandatory injunction to compel the defendant to remove the purported letter of summary dismissal and last as request for general damages, they defendants' stand by their pleading that they have demonstrated that it does not say that it dismissed the plaintiff summarily. They do not dispute that the Plaintiff resigned and was not dismissed.

(2) Their major contention is that the case has been brought in flagrant disregard of the clear provisions of the Civil Aviation Act namely Section 7E of Cap. 394 Laws of Kenya which the Plaintiff has conceded that he has not complied with.

(3) The Court is urged to reject the Plaintiffs contention that Section 7E of the Act does not apply to his employment for the following reasons:-

(Section 7E does not spell out the class of litigants that must give notice and as such the defence contend that it applies to all litigants who move against the defendant.

(ii) The terms under which the Plaintiff was employed and by whom employed then are of no importance, what is of importance is that he has sued.

(iii) They contend that since the plaintiffs action is based on the defendants letter of 20<sup>th</sup> April, 2005, which was written in pursuance to a report of a committee the defendant had set up to look at the performance and operations of its employees, it was intrinsically connected with the performance of the defendant and as such it cannot be said not to have been written in pursuance of the defendants action in pursuance of powers conferred it under the Act.

(iv) The Court is urged to fortify the stand of the defendant by the consent to the affidavit of one Stephen Rangar a Senior Human Resources Officer in response to the applicant's application for the interim relief which is already on record and this court is not precluded from taking note of the same as it is part of the record.

(5) They contend that the claim of general damages cannot lie as it is not clear whether the same have been claimed in tort for defamation or for unlawful dismissal and the court is urged to dismiss the same. More so when no evidence has been adduced as regards alleged defamation.

Both parties referred the Court to case law namely **OWAGA VERSUS TRANSOCEAN (V) LTD**

**(1990) KLR 197** where it was held inter alia that:-

- (1) *Resignation related to conduct on the part of an employee in which he voluntarily decides to terminate his employment with his employer either with or without notice.*
- (2) *Dismissal is a move by an employer or master terminating the services or employment of his employee or servant summarily or without notice.*
- (3) *Termination of an employees services with due notice does not ordinarily give rise to legal liabilities except as may be stipulated in the contract of employment where there is one or as provided by any relevant statute where one does exist in that regard.*

The case of **REPUBLIC VERSUS COMMISSIONER OF CO-OPERATIVES EXPARTE KIRINYAGA TEA GROWERS CO-OPERATIVE SAVIGNS AND CREDIT SOCIETY LTD** [1999] 1 E.A. 245 where the Court of Appeal of Kenya held inter alia that, *“the commissioners exercise of his undoubted powers under Section 61 was unreasonable, in the circumstances of the case. The Commissioner was clearly abusing his statutory powers because he is not allowed to order an inquiry on the application of only one member.*

*(2) The commissioner’s decision to institute an inquiry into the appellant’s affairs was made mala fides since he was aware of the dispute pending in the high court. If he was acting in good faith, he would have sought to settle the dispute pending in the high Court.”*

There was also reference to Black Law Dictionary eighth Editions by Thomson West page 1336 on the definition of the word resignation. It is defined as *“The act or an instance of surrender or relinquishing an office, right or claim. A formal notification of relinquishing an office or position.”*

The case of **REPUBLIC VERSUS SPEAKER OF THE NATIONAL ASSEMBLY AND ANOTHER exparte ABOUBAKAR** (2002) 2 KLR 225 which dealt with issues of resignation of a member of Parliament either expressly or by implication from a political party.

The defence cited the case of **LANGAT VERSUS KENYA POSTS AND TELECOMMUNICATIONS CORPORATION** [2000] 1 E.A. 149 where the Plaintiffs claim was faulted on appeal because *“the appellant had not discharged his duty to show that the statutory one months notice had been served on the Respondent and that the suit had been brought within one year after the cause of action arose.*

*(ii) The applicants claim fell within Section 109 of the KENYA POSTS AND TELECOMMUNICATIONS CORPORATION ACT AND THE SECTION had not been satisfied.”*

The case of **KITUI COUNTY COUNCIL VERSUS MWAKINI RANCHING (D.A.) Co Ltd** Nairobi CA No. 221/1997 in which the appeal was struck out for being incompetent.

The case of **DANIEL N. NGUNIA VERSUS K.G.G.C.U. LIMITED NAKURU** C.A. 281 OF 1998 where the Court of Appeal upheld the superior courts order upholding a summary dismissal of an employee by an employer.

On the Courts assessment of the facts herein it is apparent upon perusing the Court record that parties herein never filed either agreed issues or each filed their own. What parties have submitted on are issues drawn by the plaintiff in the cause of preparing their written submissions. Due consideration has been given to them by this Court and the Court finds that they are in line with the pleadings on record and as such there is no harm in adopting them for purposes of the record herein as issues for determination in an attempt to dispose off the issues in controversy between the disputants herein and so the Court will adopt them.

For purposes of the record these issues are:-

(1) Whether or not the plaintiff resigned from the employment which defendant authority if so could the defendant thereafter lawfully summarily dismiss the plaintiff from its employment?. As gathered from the content of the plaint, plaintiff's evidence and the plaintiff's counsel's submissions, their stand is that the plaintiff resigned from the employment of the defendant. There is no dispute that upon receipt of the defendant's subject letter of 20.4.05 exhibit 9 the Plaintiff became aggrieved and instructed his lawyers to demand a withdrawal of the said letter vide their letter dated 26.4.05 exhibit 10. There is no dispute that the defendant reiterated their stand in their letter dated 3<sup>rd</sup> may 2005 exhibit 11. When it came to pleadings, they softened that stand. Also at the trial as no cross-examination was undertaken on the issue of whether the plaintiff's employment was terminated through resignation or dismissal. During submissions the defence crowned their soft stand by submitting that they stand by their pleading in paragraph 3 and 4 of their defence these read:-

*"3. In reply to paragraph 6 of the plaint the defendant denies that the contents of its letter dated 20<sup>th</sup> April, 2005 amounted to or are capable of being construed as a purported summary dismissal of the plaintiff and states that the purpose and intent of the said letter was only to convey to the plaintiff the conclusion of the deliberation, of the defendant its Board of Directors for the Plaintiffs information.*

*4. Further to what is stated in paragraph 3 above, the defendant avers that no where in its letter dated 20<sup>th</sup> April 2005 is it asserted by the defendant that the Plaintiff is thereby being dismissed and the defendant shall at the hearing of this suit crave for this honourable courts proper interpretation on the tenor and effect of the said letter".*

For better appreciation of the tenor and effect of the said letter, it is better to set out its content herein. It reads:-

*"Mr. William M. Kariuki*

*P.O. Box 54512 – 00200*

*NAIROBI*

*Dear Sir,*

*RE: RESIGNATION*

*You are aware of the appointment of a probe team in December, 2004 by the Kenya Civil Aviation Authority Board of Directors to receive and consider material evidence from stake holders on the allegations against some staff in the flight Safety Division you being one of the members of staff implicated and interviewed by the above – mentioned team, have to be informed of the Board, decision with regard to the outcome of the above investigations which was duly concluded in April, 2005.*

*Management recognized the fact that your resignation letter of 16<sup>th</sup> March was acknowledged and a no objection formally given to your request vide our letter ref. Conf/per/618130650 dated 21<sup>st</sup> March 2005. However, we would like you to take note of the fact that at the time, the probe report had not been concluded, hence management could not determine the extent to which your actions had damaged KCAA'S image and credibility.*

*The allegations made against you, amongst others include:*

- Demanding bribes and maliciously failing the operators during inspection when they did not co-operate.*
- Direct payment of Kshs 500,000.00 into your account by an operator after the operator requested of inclusion of an extra aircraft type in the AOC and approval of weight and balance from which constituted bribery.*

*The above allegations are extremely serious and damaging to the image of KCAA. Further, your actions as reported contravenes Section 11(2) (A) 1 – III of the Public Ethics Act 2003. The accusations reflect gross misconduct and therefore warrant your summary dismissal from employment.*

*The board therefore decided to dismiss you from service with loss of all your benefits.*

*Take note that even without the decision conveyed, your resignation automatically denied you the right to your benefits as stipulated in section 6 of the pensions Act Cap.189.*

*You will recall that you have to date not been cleared by the Authority. Consequently you are required to surrender all KCAA assets in your possession within 14 days of the date of this letter failure to which further serious action will be taken against you.*

*Yours faithfully.*

*Chris A. Kuto*

*Director-General”*

In construing the content of the said letter in so far as the issue of resignation and dismissal are concerned, the court makes an observation that the content of paragraph 2 confirms that indeed the plaintiff had tendered a letter of resignation which had been acknowledged. This is synified by the following words:-

*“Management recognizes the fact that your resignation letter of 16<sup>th</sup> March was acknowledged and a no objection formally given to your request vide our letter ref. Conf/per/618/20650 dated 21<sup>st</sup> March 2005.”*

It is however to be noted that in the same paragraph 2 there is mention that by the time they gave a no objection to the plaintiffs resignation the probe team had not concluded its work. Paragraph 3 lists certain accusations which had been leveled against the plaintiff during the probe. Paragraph 4 of the said letter invited the plaintiff to note or bring to his notice that the accusations mentioned reflect gross misconduct and warrant summary dismissal from employment. Then paragraph 5 goes ahead to state that the Board therefore decided to dismiss the plaintiff from service with loss of all his benefits. The words used are *“The Board therefore decided to dismiss you from service with loss of all your benefits”*.

This Courts construction of the above set out words is that the said words speak for themselves. Despite the defendant having accepted the plaintiff’s resignation which they did before receiving the contents of the probe committee report which had been received in April long after the resignation had taken effect. According to the defendant the allegations leveled against the Plaintiff would have justified a dismissal. And in fact went ahead to purport to dismiss the plaintiff from its service with loss of all benefits.

As conceded by the defence this was a mistake, because the plaintiffs resignation having been accepted and taken effect the contractual relationship of an employer, employee had thereby been severed and so there was nothing to dismiss. The said alleged dismissal was therefore a purported dismissal.

2. The second issue for determination is whether or not the defendants Authority’s action to purport to summarily dismiss the Plaintiff and publish its letter dated 20<sup>th</sup> April, 2005 within the Aviation Industry is unlawful, malicious and in bad faith, if so has the plaintiff suffered damages there from.

It is common ground that indeed the defendant Authority set up probe Committee to probe the conduct of staff in the flight Operations department. It is common ground that the Plaintiff worked in this department. He was one of those to be probed. It is on record from his own evidence that indeed he appeared before this probe Committee in February, 2005 and questions were put to him which he answered satisfactorily. By the time he left the defendants employment no show cause letter had been written to him. It is also common ground that when the Plaintiff tendered his resignation and the same was accepted by the defendant, there was no reservation made by the defendant , to the effect the

acceptance was subject to the findings of the probe committee on the plaintiffs conduct. After receipt of the said report at no time did the defendant attempt to recall and or revoke the acceptance of the plaintiff's resignation. Neither was he given notice of the contents of the said report, invited to make any comment on them before any contemplated action was taken against him.

It is this courts' finding that on the facts demonstrated above the defendant's letter of 20.4.2005

(a) was unlawful because in law the relief of summary dismissal could only lawfully be available to an employer in law if the action is taken while the relationship still subsists. Herein, the relationship had ceased on 31.3.05. By 20.4.05. The cord had been severed and there was nothing to dismiss.

(b) Malicious and in bad faith because having accepted the plaintiffs resignation, it meant that the plaintiff's employment record had to remain in the condition it was. This court takes judicial notice of the fact that as contended by the plaintiff potential employers would have sought reference from the previous employer. Though this court does not have the privilege of receiving the defence evidence as regards the report in question which was not even tendered in evidence, evidence as to why exhibit 9 the letter of 20.4.2005 was written and no explanation having been given as to why no evidence was tendered and no steps were taken by the defendants to defente their action firstly for writing the said letter, and secondly for failing to withdraw the same when called upon to do so by the content of exhibit 10, the only reasonable inference to be drawn from their conduct was that they were malicious and the same had been written in bad faith with a view to trying to block the plaintiff's chances of employment with potential employers. This is further in confirmed by the content of their response in exhibit 11 to the plaintiff's lawyer's letter of demand exhibit 10. further their defence, they did not intimate that they were willing to expunge the offensive sentence or paragraphs. This has been mentioned in Counsel's submissions which is evidence from the bar which cannot be accepted as this will be contrary to rules of procedure on reception of evidence in such trials.

Further evidence of the defendant's malice and bad faith is demonstrated by their conduct of not putting the content of the probe report to the plaintiff and inviting him to defend himself on it before any action is taken against him. In the absence of such a move having been taken on their part, and in view of their failure to tender evidence on the same, there is nothing on record to show that indeed those allegations were made against the Plaintiff by any stake holders, or that the same are contained in the said report. More so when the plaintiff has stated on oath and in respect of which he was not challenged in cross-examination that none of the allegations contained in exhibit 9 were put to him when he appeared before the probe committee. The proceedings of the said Committee were not also availed to confirm that such allegations were indeed made against the plaintiff.

As regards the suffering of damage, there is an assertion that the content of the letter was published in the Aviation industry. A reading of the letter exhibit 9 reveals that it is not copied to anybody. No other evidence has been tendered from any quarter to the effect that they had sight of the said content.

There was further contention that it prevented the plaintiff from seeking employment with other potential employers. This may be true. It means that the value of the loss is the financial loss of earnings from the potential employer. Such loss within this courts' judicial wisdom, would normally be classified as special damages. It is trite law that in order to qualify for compensation for such a loss, one has to particularize the loss and then go ahead to prove the same. Herein the plaintiff has neither particularized the loss or gone ahead to prove the same and so he cannot seek and rightfully be awarded compensation for the same.

3. The 3<sup>rd</sup> issue is whether or not the provisions of section 7(E) (a) of the Civil Aviation Act, Chapter 394 Laws of Kenya as amended apply to the plaintiff's suit herein. The Plaintiff assertion is that those provisions do not apply. Where as that of the defendant is that they do. Each sides reasons for so asserting are already set out herein and as such there is no need to repeat them here. Extracts of the Act have been annexed to the Plaintiffs submissions. The provisions submitted upon are as set out here under.

Section 3 deals with the establishment of the defendant as a body corporate with power among others to

sue and be sued and to enter into contracts. Section 5 D, on the other hand gives the Director general power to appoint such staff of Authority as are necessary for the proper discharge of the functions of the Authority under the Act upon such procedure, terms and conditions of service as the board may determine. There is also donated power to review salaries wages and other terms and conditions of service of the staff of the Authority from time to time. As submitted by the Plaintiffs Counsel Section 5D does not donate automatic power to the Director General to appoint employees who were serving under the Directorate of Civil Aviation which was before then a department of the Ministry of Transport and Communication. It would therefore appear and it is safe to conclude that this power applies to the appointment of staff by the Director General after the commencement of the Act. As to whether this power donation applies to employees already on board will depend on the courts construction of the Section dealing with employees already on board as at the time of the commencement of the Act.

Section 7E deals with limitation of Actions. It reads:-

*“7E. where an action or other legal proceedings is commenced against the Authority for any act done in pursuance, or, execution or intended execution of this Act or any public duty or authority, or in respect of any alleged neglect or default in the execution of this Act, or of any such duty or of authority the following provisions shall have effect:-*

*(a) the action or legal proceedings shall not be commenced against the authority until at least one month after written notice containing the particulars of the claim and of the intention to commence the action or legal proceedings has been served upon the Director –General by the plaintiff or his agent;*

*(b) the action or legal proceedings shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect, omission or default complained of or in the case of a continuing injury or damage, within six months next after the cessation thereof”.*

This court has duly read the Section, understood it and its construction of the same is that the paramount ingredient in this section is that it operates *“where an action or other legal proceedings I s commenced against the Authority for any act done in pursuance or execution or intended execution of this Act”*. It therefore follows that in order for the plaintiff to succeed, he has to demonstrate that the defendants act of writing the grieving letter of 20.4.2005 namely exhibit 9 was an *“act”* outside the pursuance of acts in execution of the Act. Whereas in order for the defendant to take shield under the section, it has to be demonstrated that the writing of exhibit 9 was within action done in pursuance or execution of actions mandated to the Managing Director under the Act.

As mentioned earlier on, the power donated to the Director in relation to staff affairs in section 5D appear to be donated for purposes of staff being brought on board after the establishment of the Authority. There appears to be no donation of a retroactive power to deal with staff who were serving under the department of Directorate of Civil Aviation, then a department in the Ministry of transport and Communication who were already on board.

However the Plaintiff’s counsel, went further and referred this court to the reservation in section 21 A of the Act. From its heading, it shows clearly that it concerns employees of Directorate of Civil Aviation. It reads:-

*“21A subject to section 7K (5) the employees of the Directorate of Civil Aviation may at the commencement of this Act, become employees of the Authority in accordance with the second schedule”.*

The central command here is found in the word *“may”*. It means that there is an election for such employees to elect to serve under the authoritys’ terms or terms given by the Directorate of Civil Aviation.

The operation of Section 21A is subject to the provisions of section 7 K (5). Its heading reads *“transfer of government assets and liabilities and certain staff to the Authority”*. It reads

*“7K (5) notwithstanding any other provisions of this Act, to the contrary , any person who as at the 31st March 2002 was an employee of the Directorate of Civil Aviation, shall upon the commencement of this Act be deemed to be an employee of the Authority”. The operative words under this section are”*

*“not other provisions of this Act to the contrary”.* This courts construction of this provision is that this section 7K(5) overrides Section 21A of the same Act. It means that the election given by Section 21A to an employee of the Directorate to elect to translate his/her services to the Authority or not is eroded by the mandatory provision of Section 7K(5) since the operation of Section 21A is subject to the operation of section 7K (5). The only condition that one has to meet under Section 7 K (5) is that, one must have been an employee of the Directorate of Civil Aviation as at 31<sup>st</sup> March 2002. It is from the Plaintiffs own evidence, as at the time of resignation, he had put in 23 years of service. It means that as at 31.3.2002 he was in the service of the Directorate of Civil Aviation and as such effective from that date he is to be deemed to have become an employee of the Authority and therefore subject to the Act.

These provisions are also said to be subject to the Second schedule made under Section 21A. These read:-

*“second schedule*

*(1) in this schedule the expression “vesting day” means the date of commence of this Act.*

*(2) Every person who at the commencement of this Act is an employee of the former Directorate of Civil Aviation, shall on the vesting day become an employee of the Authority on the same or improved terms and conditions of service as may be specified by the minister provided-*

*(a) any employee of the Directorate of Civil Aviation may retire on the basis of abolition of office in accordance with the existing regulations; and*

*(b) any employee of Directorate of Civil Aviation may remain in the service with mutual consent of any such employee and the governments.”*

A reading of Section 21A, 7K(5) and the second schedule reveals that the translation of services from the Directorate of Civil Aviation to the Authority was automatic come 31.3.2002. It was not true that this had to be sanctioned by some act to be done by the minister concerned as submitted by the Plaintiffs counsel.

After 31.3.2002 any former employee of the Directorate of Civil Aviation had an election to retire if the position held by such an employee had been abolished or remain in the office by mutual consent of the employee and the government. There is no specification on how this mutual consent was to be synified. In this courts opinion such mutual consent could be signified either expressly or by conduct. Herein the Court was not told that the plaintiff signified the mutual consent in writing. Hence the conclusion that the mutual consent was by conduct as the plaintiff remained an employee from 31.3.2002 up to 31.3.2005.

As stated earlier on herein, it is common ground that the plaintiff resigned from his employment with the defendant which resignation was accepted and it became effective on 31.3.2005. This courts reading of the provisions of Section 7E, 21A, 7K(5) and the second schedule (1)(2) it is clear that it talks about the relationship between the employees and the Authority. The question that this Court has to answer is whether the action complained of herein was an act done in pursuance of or in execution or intended execution of the Act.

The Act complained of as noted earlier on is the defendants act of writing the content of their letter dated 20<sup>th</sup> April 2005 exhibit 9 to the plaintiff. The content of the same has already been set out herein. It is intend and purports have also been set out herein. In this court’s opinion the tone of the same and its general appreciation of the content, reveals that, there is no doubt that it was written by the defendant, In its capacity as the then employer to bring to the Plaintiffs notice the contents from the finding of a probe committee on employees in the flight safety operations department where the plaintiff then worked. It intimated to the Plaintiff that the allegations that had been leveled against him were capable of

demonstrating gross misconduct on his part which was injurious to both the image and credibility of the defendant. The defendant went further to state that such gross misconduct would warrant one earning a summary dismissal and then went ahead to purport to dismiss the plaintiff from the defendant's service with loss of all benefits.

The plaintiff has maintained throughout, right from the issuance of the demand letter, plaintiff evidence and submissions that it is the purported dismissal from the service which grieved him. The Sections of the Act set out herein show that matters pertaining to relationship of staff and the defendant in their capacity as employee/employer are matters governed by the Act. It therefore follows that in order for the defendant to take refuge under the said provisions, the purported dismissal of the plaintiff from the defendant's service must have been possible in the circumstances.

In this court's opinion, the plaintiff having resigned from the defendant's employment and the defendant having accepted that resignation which fact was being acknowledged in the letter complained of, the relationship of employer/employee had been thereby severed. As such the plaintiff having ceased being an employee of the defendant from 31.3.2005 he was incapable of being dismissed. Since he was incapable of being dismissed the defendant's act of purporting to dismiss him, which the defendant would have been ordinarily entitled to exercise, had the findings of the probe committee been presented to the defendant during the pendency and or continuance, of the plaintiff's service with the defendant, had such circumstances have been subsisting and or prevailing, the defendant would have been perfectly in order to bring the content of the probe committee to the notice of the plaintiff, invite his representations in defence of the same and then decide either to dismiss or not to dismiss, and then take any other appropriate disciplinary action against the plaintiff. However since the letter of 20.4.2005 exhibit A was written when the relationship of employer/employee had been severed and yet it purports to be written in execution of an official mandate in this court's opinion an exercise of official function in pursuance of an official mandate in a vacuum. This court has judicial notice that exercise of official function in line with one's official mandate is required to be exercised within the law and for purposes specified by the law.

The purposes specified by the law subject of this judgment is that it covers staff matters. By staff, is meant those appointed by the defendant in accordance with the powers conferred by Section 5D and those taken on from the service of the former Directorate of Civil Aviation in terms of Section 21A, 7K (5) and the second schedule. Anybody outside that is not a staff.

By resigning and his resignation being accepted effective 31.3.2002 the Plaintiff had excluded himself as a staff of the defendant. It therefore follows that any dealings that the defendant purported to deal with the plaintiff as a staff in addition of being an exercise of that power in a vacuum it was also an exercise in futility as well as an illegality. It amounted to an exercise in futility because as at the time it was written, there was no staff to be disciplined, through summary dismissal. It amounted to an illegality because the defendant could only discipline and dismiss a staff by way of summary dismissal if the staff was within his employment and under their control. By that time the plaintiff was neither under their control nor within their employment. Once declared an illegality it ceases to be protected by the provisions of the Act. Once it ceases to benefit from the protection of the Act, an outsider affected by such an action cannot be called upon to comply with any of the provisions of the said Act.

Likewise the defendant through its agent having acted outside the provisions of the said act by purporting to act in the manner it did through its Director general, cannot take refuge under the protection of the Act. In this Court's opinion once an illegality is established a Court of law should not hesitate in saying so. It should not perch itself on a fence, fold its arms, akimbo and let the illegality to be nurtured and flourish.

This court would borrow its own reasoning in its own ruling delivered on 28<sup>th</sup> day of July 2008 in the case of SAMINA INVESTMENTS VERSUS LEO INVESTMENTS LTD AND 4 OTHERS, NAIROBI HCCC NUMBER 293/2008. At page 27-29 this court made observation that it had borrowed the reasoning of Nyamu J. in his ruling delivered on 6<sup>th</sup> day of June 2008 in the case of REPUBLIC VERSUS THE BUSINESS PREMISES RENT TRIBUNAL AND 2 OTHERS, NAIROBI MISC. APPLICATION NO. 562 OF 2007. Observation made by this court at page 28-29 of the said ruling on

how the court of law should treat nullities are as follows:-.

- (i) A nullity is a nullity and always remains a nullity.*
- (ii) If nullities are condoned by our law they are capable of clogging our justice systems, erode effectiveness and respect of the law and ultimately rule of law.*
- (iii) Refusing to act in the circumstances would be a serious abdication of the seat of justice.*
- (iv) The principle to be observed is the principle that no litigant should be allowed to benefit from illegalities or nullities since these would be against the policy of the law.*
- (v) Nullities are defects and cobwebs in our legal systems which if allowed to remain would discredit, litter or devalue the administration of justice in accordance with the law.*
- (vi) It would be unjust for the Court not to interference in the face of nullities.*

Applying that reasoning to the facts herein, this court, is of the opinion that if it were to uphold the defence arguments that the plaintiffs suit, is faulted due to failure to comply with the provisions of section 7 E of the Cap.39 4 Laws of Kenya, It would be in essence be upholding and protecting both a nullity and an illegality. It is an illegality because the defendant sagent had power and authority to discipline and even dismiss an employee who is still on board, that is who is still within their employment. Any purported exercise of power and authority in a vacuum by virtue of the move being made against a non existent employee was exercise of that power in futility. It is a nullity in that the subject matter of the exercise of that power namely the existence of an employee in the name and style of plaintiff, and a right to dismiss that employee from the employment of the defendant were non existent.

It therefore follows that the exercise of that power not only ought not to have been exercised, but it was not exercised. And since it was not exercised, there is no basis for requirement on any party to comply with the provisions of law which provisions are required to be complied with in fact and not in a vacuum. By reason of the above the court makes a finding that the plaintiff was not required to comply with section 7E of Cap.39 4 Laws of Kenya and on that account he is not none suited. The suit is valid and properly before this court.

Before dealing with the last issue as to whether the plaintiffs prayers are to be granted or not, there was issue raised by the defence and which was objected to by the plaintiff relating to the issue as to whether this court can resort to affidavit evidence in support of the defence case. In this courts opinion and after due consideration of the rival arguments on the same, the court is of the opinion that there is no order on directions on the record to the effect that evidence from the plaintiff be by way of viva voce evidence, where as that from the defence be by way of pleading and affidavit. In the absence of such an order, there is no way this court can embark court fishing spree for affidavit evidence. What is not being dealt with at this stage is the substantive hearing and not interim hearing. Further in the absence of an order, on record, if this court were to resort to affidavit evidence at this juncture, the court would be yielding to such invitation from the bar and that will be irregular. The court therefore rejects the invitation for it to consider affidavit evidence.

Turning to the last issue as to whether the orders sought are to be granted or not, the court is of the opinion that this issue is to be answered in the affirmative in view of the reasoning herein in so far as prayers (a) (b) (c) (e) and (f) are concerned.

Prayer (d) for general damages is to be answered in the negative because from the plaintiffs pleading, evidence and submissions, his complaint is that the letter complained of prevented him from accessing employment with other potential employers in the civil Aviation Industry. In other words it is a claim based on loss of earnings. In this courts own pinion such a claim would fall into the category of claims properly referred to as special claims.

In this court's own ruling delivered on 3<sup>rd</sup> day of August 2007 in the case of SUPERIOR HOMES (K) LTD VERSUS FIRST AFRICA (E.A.) LTD AND ANOTHER, NAIROBI HCCC NO. 381 OF 2007 had occasion to deal with the subject as to what is meant by general damages, and special damages. This is discussed at page 8-10 of the said ruling. In summary the principles set out were quoted with approval by this court from the decisions of Cheson J. (as he then was) in the case of OUMA VERSUS NAIROBI CITY COUNCIL [1970] KLR 297. In this case the learned judge as he then was had occasion to cite Clerk and Lindsell on Torts 11<sup>th</sup> Edition pg.165 and the English cases of STROMS BRUKS AKTIE BOLAG VERSUS JOHN AND PETER HUTCHINSON [1905] A.C. 515 and RATCLIFFE VERSUS EVANS [1892] 2QB524.

In summary:-

*(a) General damages are such damages that the law will presume to be the direct natural and or probable consequences of the act complained of.*

*(b) Special damages on the other hand means the particular damages beyond the general which results from the particular circumstances of the case and of the plaintiffs' claim to be compensated for which he ought to give warning in his pleadings, in order that there may be no surprise at the trial. For special damages to be awarded, they must be pleaded and proved. Special damages are such that the law will not infer from the act. They do not follow in ordinary course. They are exceptional in their character and therefore they must be claimed specifically and proved strictly.*

Thus for a plaintiff to succeed on a claim for special damages, he must plead with sufficient particulars, also prove it by evidence. The character of the acts themselves which produce the damage and the circumstances under which these acts are done must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on both pleading, and proof, of damages as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done.

In other words the two heads, they are identifiable by their characteristics in relation to liability, proof, and pleadings.

Applying the foregoing to the facts herein, the court is of the opinion that loss of earning can only fit the special damages sacked and not the general damages sacked, because the plaintiff would be required to state how much had been offered to him as earnings and for how long. These cannot be termed to be flowing from consequences of the defendant's action so as to be left at the discretion of the court to determine.

Issue was also raised as to whether the general damages could be for defamation. As submitted by the defence, if the plaintiff intended to seek damages for defamation then he should have complied with the provisions of order VI rule 6A (1) CPR

*“ which provides, “ where in an action for libel or slander the plaintiff alleges that the words or matters complained of were used in a defamatory sense, other than their ordinary meaning, he shall give particulars of the facts and matters on which he relies in support of such sense”.*

In the absence of such compliance the action for libel or slander does not lie. Likewise no damages can flow from such a pleading in favour of an aggrieved party.

For the reasons given in the assessment above the court, makes a finding to the effect that the plaintiff's claim in terms of prayers (a) (b) (c) (e) and (f) is allowed and disallows prayers (d) thereof and proceeds to make the following orders:-

(1) An order be and is hereby made to the effect that it be declared and it is so declared that the employment of the plaintiff with the defendant was terminated by way of resignation and not through the purported summary dismissal of the defendant vide their letter dated 20.4.2005.

(2) An order of injunction be and is hereby granted and issued restraining the defendant, its employees, servants, officer or agents from publishing the purported summary dismissal of the plaintiff.

(3) An order of a mandatory injunction be and is hereby granted and issued compelling the defendant to remove and expunge from the plaintiffs employment, record with the defendant the purported letter of summary dismissal.

(4) The claim for general damages be and is hereby disallowed because:-

(i) since the said purported letter of summary dismissal is alleged to have prevented the plaintiff from taking up employment in the Civil Aviation Industry, it can only reasonably be taken to have prevented the plaintiff from accessing earnings from the said civil aviation industry. Loss of earnings can be quantified with certainty in terms of, amount or figure and time namely the period of its duration. By virtue of these, the claim is removed from the class of general damages which flow from consequences of acts of the defendant and which the court is left to determine into the category of special damages which the law requires that they be specifically claimed and strictly proved. The plaintiff herein neither specifically claimed the lost income, nor strictly proved the same

(ii) If the same were intended to cover claims of defamation, the same cannot be awarded as the plaintiff failed to comply with the provisions of order VI rule 6A (1) CPR as regards the mode of pleading such claims.

(5) The defendants request to the court, to consider affidavit as evidence was disallowed because there was no order for the court to proceed by way of affidavit evidence. The order was for the court to adduce viva voce evidence. The defence were given an opportunity to call evidence to support their case but failed to do so and so they cannot purport to adduce evidence through the bar (submission).

(6) The Plaintiff will have costs of the suit paid by the defendant.

(7) Costs will attract interest at court rates from the date of judgment till payment in full.

DATED, READ AND DELIVERED AT NARIOBI THIS 26<sup>TH</sup> DAY OF SEPTEMBER, 2008.

**R. N. NAMBUYE**

**JUDGE**