

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT**  
**NAIROBI**  
**ELRC CAUSE NO. E378 OF 2022**

**JOSEPH                      RWAMBA                      MWAI.....**  
**.....CLAIMANT**

**VERSUS**

**CMA CGM.....1<sup>ST</sup> RESPONDENT**  
**CMA CGM KENYA LIMITED.....2<sup>ND</sup> RESPONDENT**  
**JEAN-BAPTISTE LONGIN.....3<sup>RD</sup> RESPONDENT**  
**MAX                      KITSANGA                      SINIMORI.....4<sup>TH</sup>**  
**RESPONDENT**  
**BETH MUGO.....5<sup>TH</sup> RESPONDENT**

**RULING**

The Claimant/Applicant filed applications dated 14/2/2025 and 16/4/2025 whereas the Respondent filed an application dated 18/3/2025. The respondent seeks to have the arbitral award adopted as an order of the court whereas the Claimant/Applicant seeks to set aside the Arbitral rulings dated 6<sup>th</sup> December 2024 and 29<sup>th</sup> January 2024.

The Claimant/Applicant seeks a finding that he was represented by M/S. Joseph Mwai Advocates and M/s. Manyara R. Advocates and that the Respondent be held to bear the costs of the Arbitration. That the Arbitrator erred in fact and in law by finding that the Claimant acted in person while

he was represented by the two Advocates hence wrongly denied the Claimant/Applicant costs.

In the application dated 14/2/2025, the following orders are sought;

- (a) Allow its appeal and set aside the arbitrator's additional award of 6<sup>th</sup> December, 2024 and final direction of 29<sup>th</sup> January 2025;
- (b) The bill of costs, dated 27<sup>th</sup> December 2021, be referred for taxation in accordance with the Advocates Remuneration order.
- (c) The costs of the appeal and application be borne by the Respondent.

In the application dated 16/4/2025 the Claimant/Applicant seeks the court to:

1. Allow the application and set down the matter for hearing and determination of Claimant's issues of discrimination and harassment.
2. That the matter be set down for hearing and determination of issue of discrimination and harassment.
3. The Respondent bear the cost of the application.

The applications are opposed vide replying affidavits of Jane Christine Gundo dated 18/3/2025 and 15/5/2025 respectively.

The Respondent raises the defence of *res judicata*, *sub judice* and *functus officio* to the two applications.

## **Background**

The Claimant filed suit in ELRC 378 of 2022, Joseph Mwai versus CMA CGM and others alleging unfair termination, discrimination and harassment.

Following discussions by the parties, the parties agreed to refer the dispute to arbitration on 23<sup>rd</sup> January 2023 with the Respondent paying throw away costs of Kshs. 30,000.00.

The parties entered into an arbitration agreement dated 30/3/2023 appointing a single arbitrator and stating that the decision by the arbitrator shall be final and binding.

On 19/3/2024, the arbitrator issued an award in favour of the Claimant granting compensation for unfair termination and costs of the arbitration. The award was subsequently corrected to reduce the damages awarded to Kshs. 1,137,785.00 following noting of an arithmetical error on the face of the record.

The Claimant filed his bill of costs with the arbitrator dated 27/9/2024. The Claimant sought costs of Kshs. 4,932,287.40

The parties made submissions on the bill of costs and the arbitrator awarded costs of Kshs. 400,000.00 and a refund of the paid portion of the arbitration fees of Kshs. 126,800.00.

The Respondent complied with the awards paying the Claimant damages, the apportioned share of the arbitration fees and costs.

The issues for consideration are whether the court lacks jurisdiction to determine the applications brought by the Claimant for reasons of *res judicata, functus officio and sub judice*.

The court has noted that by a ruling of this court per C. N. Baari J. dated 7/11/2024, the court considered an ex parte applicant's chamber summons dated 14<sup>th</sup> June 2024 in which the Respondent/Applicant sought the following orders:

- i. Spent
- ii. That parties are bound by their consent dated 23<sup>rd</sup> January 2023, adopted as a court order on 31<sup>st</sup> January 2023 before the Honourable Justice James Rika, where they agreed to have the dispute referred to arbitration.
- iii. That parties are further bound by their contract titled Arbitration Agreement dated 24<sup>th</sup> March 2023 where they agreed to have the dispute referred to arbitration. Clause 1 of the contract succinctly stated. "The parties agree that the dispute shall be referred to and finally resolved by arbitration under the rules of the Chartered Institute of Arbitrators (Kenya Branch) Rules 2020 and the Arbitration Act No. 4 of 1995 (as amended from time to time)."
- iv. That the matter be referred to the Chartered Institute of Arbitrators as agreed to appoint another Arbitrator to determine the issues on discrimination and harassment.
- v. That the honourable Arbitrator determined the termination was unfair but erred in law and in fact by determining that the Arbitral Tribunal did not have jurisdiction to determine the issues of

- discrimination and harassment as they raised issues of Article 27(4) of the Constitution.
- vi. That the Honourable Arbitrator erred in law and in fact by not determining if judgment on admission under Order 2 Rule 11 and Order 13 Rule 2 of the Civil Procedure Rules should be entered against the Respondent on the issues of discrimination and harassment.
  - vii. That the honourable Arbitrator erred in law and in fact by not determining if the Respondent justified the discrimination and harassment as provided by section 47(5) of the Employment Act.
  - viii. That the Honourable Arbitrator erred in law and in fact by not determining if the Respondents had discharged the burden of proof for discrimination and harassment as provided by section 5(7) of the Employment Act.
  - ix. That the honorable Arbitrator erred in law and in fact by not determining if the Respondents breached: 1. the employment contract; 2. the CMA CGM Employee Regulations and 3. CMA CGM Code of Ethics on the issues of discrimination and harassment.
  - x. That the Honourable Arbitrator erred in law and in fact by not determining if the Respondents breached the contract guarantees provided in the CMA CGM Code of Ethics on the issues of discrimination and harassment.
  - xi. That the honourable Arbitrator erred in law and in fact by not determining if the Respondents breached the contract undertakings provided in the CMA CGM Code of Ethics on the issues of discrimination and harassment.

- xii. That the matter be referred to the Chartered Institute of Arbitrators to appoint an Arbitrator to determine issues of discrimination and harassment
- xiii. That the costs of this application be borne by the Respondent

The court per Baari J. found that,

***“Regrettably, this court does not have the authority to make an assessment on the merits of the arbitral award. The jurisdiction of the court is limited to what is permissible under section 35 of the Arbitration Act. Any other intervention by the court is expressly prohibited under section 10 of the Act.***

***The parties in submitting their dispute to arbitration, made their bed and have now to lie on it.***

***In the final analysis, I find the Claimant’s application and the reliefs sought therein, are outside the purview and jurisdiction of this court and the court will not reopen the issues already heard and determined by the Arbitrator.***

***In light of the foregoing, I find the application lacking in merit and is accordingly dismissed with no orders on costs.”***

The court having considered the proceedings before Baari J. which culminated in the ruling of the court dated 7/11/2024, is of the unequivocal view and finding that all the issues raised by the Claimant/Applicant in the two applications dated 14/2/2025 and 16/4/2025 were conclusively determined and wholly pre-empted by the learned Judge in her ruling dated 7/11/2024. The subject matter of the arbitral award cannot be raised again in this court by clever changes of reliefs sought by the Claimant/Applicant

based on the same cause of action that was by consent of the parties placed before an arbitrator who dealt with the cause of action as filed in ELRC Cause No. 378 of 2022 and conclusively determined by an award of the Arbitrator on both merits and costs.

Accordingly, the court finds that the matters raised in the two applications are *res judicata*, this court is *functus officio* and lacks jurisdiction to hear and determine the matter afresh.

The Respondent has satisfied the Arbitral award on the merits and costs and so this matter has been conclusively settled and the court decrees it as such with no orders as to costs.

Dated at Nairobi this **20<sup>th</sup> Day of November 2025.**



**Mathews Nduma**  
**JUDGE**

**Appearance:**

Joseph Mwai in person

Ms. Muhindi for Respondent

Mr. Kemboi – Court Assistant