

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MOMBASA

CAUSE NO. E 013 OF 2021

PAUL KRIJNEN.....CLAIMANT

VERSUS

NAS AIRPORT SERVICES LTD.....RESPONDENT

JUDGMENT

1. By a Notice of Motion Application dated 28th March 2025, the Claimant/
Applicant seeks the following orders;

i. ***THAT there be immediate, unconditional stay of execution of:***

i. Judgment delivered herein on 29th September 2023,

ii. Ruling delivered herein on 16th May 2024,

iii. Any /All orders and processes consequential thereto.

ii. ***THAT an order do issue restraining the Respondent, whether by herself, her agents/employees/servants and or anyone whosoever laying claim through her, jointly and severally, from, harassing,***

intimidating, threatening the Claimant on account of his pursuit of his of terminal dues and/or interfering with the Claimant's pursuit of his terminal dues and or in any other manner whatsoever dealing with the said dues in a manner adverse to the Claimant's interest.

- iii. *THAT the orders subject of the prayers above be served upon the; Court Bailiff, Mombasa Law Courts; OCS, Moi International Airport Police Station, Mombas; for purposes or ensuring compliance, supervising the execution of the order, providing security, and ensure no public disturbance ensues, whilst maintaining law and order throughout and after the execution of the Order.*
- iv. *That the orders subject of the prayers above do persist until the hearing and determination of the instant application.*
- v. *THAT this Honourable Court be pleased to vary, review, and or set aside ex debito justitiae the portions of the;*
 - i. *Judgment delivered herein on 29th September 2023;*
 - ii. *Ruling delivered herein on 16th May 2024.*

In relation to:

- a) *Non- address Respondent's discriminative handling of the Claimant as regards severance pay;*

b) Tabulation of the Claimant's terminal dues on the basis of NET amounts pleaded in the Memorandum of Claim.

vi. THAT the Honuorable Court be pleased to re-open the Claimant's Case, purely for purposes of tendering evidence as regards;

i. Non-address Respondent's discriminative handling of the Claimant as regards severance pay;

ii. Tabulation of the terminal dues on the basis of Net amounts pleaded in the Memorandum of Claim.

vii. THAT the Honourable Court be pleased to call for examination and issue summons to witness Christine P. Lezen, the Claimant's witness in respect of the Claimant's claim on severance pay.

viii. THAT alternatively, and without prejudice to prayer [g] above, the Honourable Court be pleased to admit in evidence the witness statement sworn by Christine P. Lezen, the Claimant's witness in respect of the Claimant's claim on severance pay, without calling the deponent.

ix. THAT consequently, the Honuorable Court be pleased to render a determination as regards;

- i. The tabulation of the Claimant's severance pay as pleaded in the Memorandum of Claim.*
- ii. The tabulation of the Claimants terminal dues on the net amounts pleaded in the Memorandum of Claim.*
- x. THAT the costs of this Application be provided for.*

2. The application is premised on the grounds set out on the face of the application and the supporting affidavit sworn by the Claimant/Applicant on 27th March 2025. The Claimant/Applicant states that there is a grave, profound error on the face of the record and/or a travesty of justice in the judgment and ruling alluded to hereinabove.

3. By his Memorandum of Claim herein filed dated 12th February 2021, he sued the Respondent seeking the following reliefs;

- i. A declaration that the Claimant's dismissal was unfair, unlawful, and a nullity,**
- ii. Payment in lieu of leave days -KShs. 484, 271.00;**
- iii. Severance pay @ 25 days' salary a year for ten [10] years- KShs- 8, 071,185.83;**

- iv. **Physical and mental anguish due to discrimination and harassment -KShs. 10, 565, 916.00.**
- v. **24 months' Salary at 25% -KShs. 5, 241 600**
- vi. **Costs of the suit.**

4. Upon being served with the court process, the Respondent entered an appearance and filed an unconditional Rejoinder to the Memorandum of Claim. Subsequently, the parties were heard in their respective cases, and the Court pronounced itself on the matter through its Judgement dated 29th September 2023.

5. The Judgment found;

- i. That there existed an employer-employee relationship between the Respondent and the Claimant from 1st January 2020 to 23rd March 2023, when the Respondent unlawfully terminated the Claimant's employment contract.
- ii. The Claimant was entitled to the unpaid leave days, KShs. 484, 271, and 24 months' salary, KShs. 5, 241. 600.00.
- iii. In favour of the Claimant concerning the costs of the suit and interest on the sums awarded.

6. The Court made no reference to the unfair and discriminatory treatment the Respondent subjected the Claimant to during his employment, or to his entitlement to severance pay, both of which formed part of his claim, per his pleadings.
7. Aggrieved by the judgment, the Claimant filed a Notice of Motion Application dated 8th November 2023, seeking, inter alia, a review of the judgment to the extent that it did not address the Claimant's discrimination at the hands of the Respondent.
8. Through its ruling dated 16th May 2024, the Court struck out the Claimant's application in its entirety, despite the uncontroverted evidence on record, including the fact that, when the Court took the Claimant's evidence, the hearing proceedings were conducted exclusively physically, which irredeemably disadvantaged the Claimant, as his said witness on the issue of severance pay was unable to travel to Mombasa to attend the Court session owing to her mother's illness, a fact that was brought to the Court's attention.
9. The Claimant further asserts that this is a glaring error, evident on the face of the record, and a travesty of justice. The error goes to the root of the suit.

10. Buoyed by the error, the Respondent has resorted to causing the Claimant untold mental anguish and suffering by taxing his terminal dues awarded by the Court and discriminatorily withholding his duly earned severance pay.

11. The Respondent opposes the application through a replying affidavit sworn by Samuel Gathogo, its Human Resources Manager, sworn on 24th April 2025. They further filed a Notice of preliminary objection dated 24th April 2025.

12. The Respondent states that the Claimant is urging this Court to vary, review, and/or set aside portions of both the Judgment and Ruling delivered on 29th September 2023 and 16th May 2024, respectively. This Court cannot do so, as it would amount to sitting on appeal and to a further review of the Judgment and Ruling, which would amount to a miscarriage of justice.

13. That Lady Justice Nzei, in her Judgment, awarded the Claimant/Applicant a sum of KShs. 5, 725, 817, together with costs and interest. The Respondent had vigorously opposed the claim. Through his letter, the Claimant's then Advocate computed the decretal sum at KShs. 7, 721, 981, payable by the

Respondent. The amount was subsequently settled, net of statutory deductions, at KShs. 5,418,509, timeously by way of 6 cheques, which were forwarded to the Claimant through his then Advocates. The Claimant has deliberately failed to disclose this in his application. All the cheques were paid.

14. The breakdown of the payment was also communicated to the Claimant through his then Advocate when the Claimant erroneously alleged interest had not yet been paid. It is therefore, wholly untrue, and totally in bad faith, and malicious for the Claimant to state that the Respondent has never made good a portion of the Claimant's claim.

15. The Claimant, despite reaping the fruits of his judgment, thereafter caused to be filed a review application culminating in the Court's ruling dated 16th May 2024, dismissing the application in its entirety.

16. As the Judgment has long been satisfied, there is nothing to stay. This Court cannot issue orders in vain.

17. The Respondent states that it is wholly untrue that there has been any victimisation, harassment, intimidation or threats to the Claimant. In fact, it is the Claimant who has unreasonably persisted in harassing and

bombarding the Respondent with ceaseless, unwarranted correspondence. Indeed, the Claimant has not identified any specific instance of the alleged harassment, intimidation or threats.

18. It is further stated that the Claimant seeks to reopen the case to argue alleged discrimination and to claim severance pay, even though both issues were raised in the main suit, expressly canvassed by both parties, and upon which the Court made a finding in its judgment at paragraph 36. The Court did not, therefore, overlook any evidence but instead rejected the Claimant's prayers, finding that they were not substantiated by the evidence.

19. The Claimant also asserts significant and substantive errors apparent in the record, specifically within the Judgment and Ruling issued on 16th May 2024. Nevertheless, in the application, the subject matter of the Ruling, he requested a review of the judgment on the same grounds that underpin this current application. Consequently, these matters are *res judicata*, having already been adjudicated on the merits by this Court.

20. A disgruntled litigant cannot purport to file the very same review application, using different counsel and different wording, seeking the very same prayers when the review application was substantively handled and finally determined.

21. It is further stated that the Claimant had the option of appealing the Ruling delivered on 16th May 2024, which he failed to exercise, thereby squandering the legal avenue open to him. This instant application is an afterthought brought in bad faith to vex the Respondent.

22. The Claimant, in the instant application, has admitted to filing the review application to attempt to introduce the evidence of one Christine P. Lezen post-Judgment, on the very same arguments he presented in the dismissed review application and the exact point he is attempting to reargue before this Court.

23. The Court already pronounced itself on the relief sought in respect of Christine Lezen in its Ruling dated 16th May 2024, specifically in paragraphs 9 and 10 of the Ruling, declining to reopen the case to allow her to testify and as such, the matter has been finally determined and cannot be further reviewed by this Court as sought.

24. The orders sought in the instant application would require this Court to re-appraise the evidence and re-analyse the Court's decision to determine whether the Claimant has proved the alleged discrimination, which is beyond the scope of the Court's jurisdiction at this stage.

25. The Judgment having been fully settled, and the review application having been finally determined, the court is now *functus officio*.

26. The Claimant himself pleaded that his employment was unfairly terminated.

Analysis and Determination

27. I have carefully considered the Claimant's application, the grounds upon which it is based, the supporting affidavit, the further affidavit, the Respondent's Notice of preliminary objection, the replying affidavit, and the respective submissions by the parties' counsel, and the following issues emerge for determination;

- a) Whether the instant application is *res judicata* and an abuse of the Court process.

b) If the answer to [a] above is in the negative, is the application merited?

c) Who should bear the costs

Whether the instant application is *res judicata* and an abuse of the Court process.

28. The doctrine of *res judicata* is a fundamental principle of law that promotes finality and certainty in judicial decisions. Derived from the Latin maxim “*res judicata pro veritate accipitur* [a matter adjudged is accepted as true], it signifies that once a competent court has rendered a final decision on a matter between the same parties, that matter cannot be re-litigated in subsequent proceedings.

29. In essence, *res judicata* prohibits parties from reopening disputes that have previously been conclusively resolved by a court with competent jurisdiction. It applies when the prior decision was final, made on the merits, and involved the same parties [or their privies] and the same cause of action or issues. Upon satisfying these criteria, the prior judgment or decision constitutes a conclusive determination of the parties' rights.

30. It is important to emphasize that the purpose of the doctrine is threefold.

First, it ensures finality in litigation, thereby preventing perpetual legal battles over the same issue. Second, it shields individuals from vexatious or repetitive lawsuits or actions, thus safeguarding judicial integrity. Third, it promotes judicial economy and efficiency, conserving court resources and maintaining the stability of legal relationships. By preventing inconsistent decisions and reinforcing respect for court judgments, *res judicata* serves as a fundamental pillar of an organised and dependable legal system.

31. Ultimately, the doctrine reflects the broader public interest in bringing an end to litigation. Once a dispute has been fairly heard and determined, the law requires that the matter rest, ensuring certainty, fairness, and confidence in the administration of justice.

32. Section 7 of the Civil Procedure Act provides for the doctrine of *res judicata*, thus;

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under

whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

33. In the case of **Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017]**, cited by counsel for the Claimant, the Court of Appeal, on *res judicata*, stated;

“The practical effect of the res judicata doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it - not even by consent of the parties - because it is the court itself that is debarred by a jurisdictional injunct, from entertaining such suit.”

34. The Claimant's application, in my view is convoluted. It seeks numerous prayers that appear to be repetitive and are couched in a manner that makes it difficult to discern which grounds support which specific prayer. However, doing the best I can to distil the substance of the application, I understand it to seek the following;

a) A review of the judgment herein is sought on two grounds, namely that the Court failed to consider the discrimination and severance aspects of the Claimant's case, and that it should allow new evidence to be introduced to establish these two aspects.

b) A review of the Court's ruling on the Claimant's application for review, dated 8th November 2023.

35. There is no dispute that the Claimant, through his application dated 8th November 2023, sought a review of the Judgment herein, and that the application was ultimately disposed of by the Court through its Ruling dated 28th March 2025. Looking at the Ruling of the Court, the application was dismissed in its entirety, not struck out, as the Claimant wants this court to believe.

36. I have carefully considered the earlier application and note that in the application, the Claimant sought the following principal orders.

a) That the Claimant has new and important evidence to tender in this matter, which could not readily or easily be produced by him at the time when the order was made.

- b) That the judgment delivered on 29th September, 2023, be reviewed on account of new evidence placed before the court to show the apparent discrimination the Claimant faced after his termination by the Respondent, denying his terminal gratuity/ service pay.
- c) Costs of the application.

37. I have further considered the instant application, the earlier application, and the Court's ruling. There is no doubt that the Claimant sought a review of the judgment herein on the same grounds as those on which his instant application is anchored, and that the Court dismissed the application after duly considering those grounds. I have no hesitation in pointing out that all the Claimant did in the instant application was to change the language of the application, hoping that the similarity in the issues, the basis of the two applications, and the fact that they were determined duly on merit would not be detected.

38. The instant application is an abuse of the court process to the extent that the relief sought in the earlier application is now sought, but mischievously under a rephrased form of words.

39. Having found as I have herein above, I deem it unnecessary to delve into considering the 2nd issue identified for determination.

40. By reason of the foregoing premises, I find the application is *res judicata*, and further that it is an abuse of the Court process. It is hereby dismissed with costs.

Read Signed and Delivered this 19th Day of February 2026.

OCHARO KEBIRA

JUDGE