

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA

(Before Hon. Lady Justice Monica Mbarũ)

CAUSE NO. E010 OF 2025

MARK McFARLANE.....CLAIMANT

VERSUS

EVERETT AVIATION (CHAPTER) LIMITED.....RESPONDENT

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The Claimant filed an application dated 24 November 2025 under the provisions of article 23(3), 35, and 159 of the constitution, Rules 42 and 45 of the Employment and Labour Relations Court (Procedure) Rules, sections 1A, 1B, 3A and 22(a) of the Civil Procedure Act, section 11, 20(2)(b) and (c), 39B and 46(1)(a) of the Civil Aviation Act, Regulations 155, 160(1) and 203(1)(d) and 6(3) and (4) and 6(d), and 8 of the Access to Information Act and seeking Orders:

- a) *This court be pleased to grant the Claimant orders compelling the Director of Aviation Safety, Security and Regulations of the Kenya Civil Aviation Authority (KCAA), Aviation House, JKIA, Nairobi to acquire and produce before court copies of Air Transport Pilot Licenses and Aircraft Maintenance Engineer Licenses issued by KCAA and the underlying*

medical certificates and foreign credentials pertaining to specific individuals for specific periods of time as set out in the Claimant's request for information dated 24 December 2025 filed as exhibit 'A' t the Supporting Affidavit of Mark McFarlane filed herein.

- b) The annexed draft of the Norwich Pharmacol Order be deemed as an Order of the court.*
- c) Costs be in the cause.*

The application is supported by the Claimant through his Affidavit and avers that the court has wide latitude to order discovery, including third parties where the circumstances permit and where it is in the interests of justice as long as the material sought is relevant to the dispute as confirmed by the High Court in **Palm Oil Transporters Ltd v Kenfreight E. A. Ltd Commercial Case E028 of 2020 [2022] KEHC.**

The rules of discovery were necessitated by equity to further due process and the fair administration of justice. Norwich Pharmacol is the authority for the proposition that it is possible to have discovery against persons against whom no suit for any relief (other than discovery) could be brought. The High Court in **Palm Oil Transporters** confirmed that three conditions must be satisfied:

- a) A wrong must have been carried out or arguably carried out by an ultimate wrongdoer.

- b) There must be a need for an order to enable action to be brought against the ultimate wrongdoer; and
- c) The persons against whom the order is sought must be mixed up in so as to be able or likely to be able to provide the information necessary to enable the ultimate wrongdoer to be sued.

The Claimant avers in his affidavit that it is necessary for the KCAA to provide the court, as part of his evidence preparation for trial, the confidential information of relevant personnel of the Respondent, as detailed therein. This will enable the court to have before it relevant evidence pertaining to the safety issues the Claimant raised with the Respondent, upon which the claim for unfair termination and wrongful dismissal is based. The information will demonstrate that licenses have been issued on the basis of fraudulent medical certificates and have been used on the basis of examinations that were not, in fact, undertaken. These are documents 27, 28 and 29 of the Claimant's documents.

The Claimant avers that he has a prima facie case of fraudulent licensing of the Respondent's pilots and aircraft maintenance personnel, raising serious safety concerns regarding the Respondent's operations. The KCAA has been requested to provide this information under the Access to Information Act, but has not responded.

The Claimant avers that the purpose of determining the issues in controversy is that the matter is due for hearing, and access to justice demands that the application for a Norwich Pharmacal order is allowed and expedited.

The application is based on a reasonable belief that serious safety issues are ongoing in the Respondent's operations, and accordingly, there are bona fide grounds for the application. Unless the application is allowed, there is a strong likelihood that the Claimant's case and the rule of law will be substantially prejudiced, thereby suffering grave injustice. If the orders sought are allowed, the court will effectively determine the issue in the Claimant's favour on the merits.

In his affidavit, the Claimant avers that he filed his claim herein on the basis that, during his employment with the Respondent as a Flight Safety Officer, he raised issues relating to aircraft safety and maintenance on many occasions. These safety incidents occurred in 2022 and 2023, and instead of addressing them, the Respondent issued warnings with the claim. Under the Occupational Safety and Health Act (OSH Act), the employer has a duty to maintain safety, health, and welfare in the workplace. The Respondent failed to provide such safeguards.

The Respondent is certified by KCAA as an air operator but has not maintained a safety culture. The Claimant kept an e-journal of his safety-related duties and recorded various incidents.

On 4 August 2021, compass swing checks were carried out by unauthorized persons and unsupervised by engineers.

Daily inspections were carried out by unlicensed engineers without licenced supervising engineers on duty;

The Respondent's maintenance practices were not in compliance with the aircraft manufacturer's instructions.

On 12 November 2021, the Claimant learned that there was no supervising engineer to sign off on the DI, and he was asked to do so, even though he had not performed the supervision.

On 9 February 2022, a training aircraft had an accident after the computer had been removed and tampered with by unqualified persons.

From 16 May to 6 July 2022, the Claimant was deployed to FOB Twiga twice, and during this period, he encountered a number of issues that he raised but which were not addressed.

From October 2022 to January 2023, the Claimant documented 17 tail rotor events during aircraft air tests.

The Claimant noted medical certification in the absence of examination. This is contrary to the KCAA regulations, which require an accredited medical

practitioner to undertake the examination and issue a certificate. He noted that his medical certificate had been renewed twice by the Respondent without examination.

The Claimant avers in his affidavit that unless his application is allowed, he will suffer great injustice and prejudice. The information sought to be produced regarding the licensing and certification of the Respondent's expatriate pilots and aircraft maintenance engineers by the KCAA is necessary in view of the Access to Information Act.

In reply, the Respondent filed the Replying Affidavit of Adrian Dearing, the chief finance officer, who avers that the Claimant filed suit and alleged his employment was terminated unlawfully by the Respondent. The responding party has since filed a response to the claim, denying the allegations and asserting that due process was not followed, and that the claim should be dismissed.

Dearing avers that the parties attempted to resolve the matter through mediation, but the attempt was unsuccessful. The matter was referred back to court, and a hearing date was allocated for 14 October 2025, when the Claimant sought an adjournment as he was not ready. Hearing was allocated for 3 December 2025 when he filed the instant application seeking discovery orders against a third

party, KCAA. This application is a calculated tactical manoeuvre aimed at delaying the hearing of the suit to the prejudice of the Respondent.

Whereas the Claimant genuinely believed that there was fraud in the issuance of medical certificates, he cannot explain why he continued to fly without objection or report to the relevant authorities. He never raised any concern during his employment with the Respondent. The issues raised only arise in this claim. This conduct demonstrates that it is an afterthought, not a bona fide safety concern.

Dearing avers that the Claimant's case is not prejudiced by the absence of the information sought. The material issued before this court alleges that the Claimant was terminated for raising safety concerns, which he did not. The information sought is unnecessary for the fair determination of the claim.

The information sought is not directly related to the pleaded cause of action. The Claimant has not raised any issue relating to medical certification prior to termination of employment and does not plead such matter. The present inquiry is therefore irrelevant and collateral to the issues in dispute. The application has no merit and should be dismissed with costs.

In his application, the Claimant submitted that he has raised issues relating to aircraft safety and maintenance, which occurred on many occasions. He has particularised the details, resulting in the Respondent terminating his

employment. The Respondent urged him not to ‘cock the boat’ and issued informal warnings until 3 October 2023, when he was officially reprimanded.

The information sought by the Claimant from the KCAA is necessary to demonstrate that the Respondent is in breach of its statutory duty in failing to ensure occupational safety and health for aircraft, including those operated by the Respondent. There is issuance of medical certifications in the absence of examination, and the Claimant kept a journal with the particulars, which are reiterated in his claim and written submissions. The production from the KCA is necessary and relevant to support the Norwich Pharmacol Order sought herein.

The Claimant submitted that he seeks material disclosure by the Respondent and KCAA in respect of persons in its service to enable the full and effectual hearing of the matters in dispute herein. The Claimant has written to the Respondent and KCAA for full disclosure without success. Under paragraphs 16, 41, 44, and 51 of the Memorandum of Claim, the Claimant has indicated that his employment was terminated due to questions raised, particularly protocol breaches.

The information asked for is necessary to allow the Claimant to prosecute his case on questions of safety protocols under the Norwich Pharmacol Order principle. The court held that even where a party is not enjoined in a suit, the court can order the production of necessary documents. An entity not party to a

suit may not be a Respondent. The production of the necessary documents herein by KCA will not prejudice the Respondent.

The Claimant filed a List of Authorities and relied on **Palm Oil Transporters Ltd v Kenfreight E.A. Ltd [2020] eKLR**.

The Respondent submitted that parties are bound by their pleadings. Issues for determination should flow from the pleadings. The Claimant has alleged unfair treatment in employment, not in regulatory or safety and health certification, in the aviation sector in Kenya. The Claimant's orders are public in nature and relate to a third party. The court cannot be invited to determine matters not pleaded.

The Respondent submitted that the Claimant is on a fishing expedition. Discovery

is a tool to support a case that is already pleaded, and in this application, the claim is outside the discovery rule. The orders sought are against third parties and affect personal rights, including the right to privacy protected under Article 31 of the Constitution and the Data Protection Act. The mechanisms for discovery addressed under Article 47 of the Constitution and the Fair Administrative Actions Act, with regard to access to information, require an appeal process, which the Claimant has not addressed; hence, the instant application is premature. The Access to Information Act requires exhaustion of

the available dispute resolution mechanism. The Claimant has not exhausted that process, and his application should be dismissed with costs.

Determination

At the heart of the instant application is discovery.

The Claimant is seeking orders compelling the Director of KCAA to acquire and produce before the court copies of Air Transport Pilot Licenses and Aircraft Maintenance Engineer Licenses issued by KCAA, as well as the underlying medical certificates and foreign credentials pertaining to specific individuals for specific periods of time.

The true purpose of discovery is to level the playing field, expedite the hearing, reduce costs, and allow parties to gauge the case they will face at trial. This is reiterated in **Leslie Okudo Akumu v National Bank of Kenya Ltd [2015] KEHC 6718 (KLR)**, the court held:

“The function of the discovery of documents is to provide the parties with the relevant documentary material before the trial so as to assist them in appraising the strength or weakness of their relevant cases, and thus to provide the basis for the fair disposal of the proceedings before or at the trial. Each party is thereby enabled to see before the trial or to adduce in evidence at the trial relevant documentary material to support or rebut the case made by or against him, to eliminate surprise at or before the

trial relating to the documentary evidence and to reduce the cost of litigation.”

However, discovery must refer to the necessary documents in a given case as held in **Safaricom Plc v East Africa Data Handlers Limited [2022] KEHC 12979 (KLR)**.

In **Concord Insurance Co. Ltd v NIC Bank Ltd [2013] eKLR**, the court emphasised that in an application for discovery, a party has to ensure that the documents sought are “necessary” to the cause of action before or pending trial before the Court.

Discovery is therefore limited solely to the matter in contention. The Court, in exercise of its discretion to issue such orders as to discovery, will be guided by the relevance of the documents that the applicant seeks, in relation to the pleadings.

Hence, the court in the **Safaricom Plc case**, cited above, held that Relevance must be tested by the pleadings and particulars, and when particulars have been served which limit a particular issue, then discovery on that issue is limited to the matter raised in the particulars. And that:

“Despite the utility of discovery in achieving fairness in line with the overriding objective, it must not be forgotten that discovery is not

intended to be a fishing expedition. The court may decline to order discovery which is oppressive and outside the scope of what is in dispute. Discovery is confined to documents in the knowledge and possession of the party which are relevant to the cause of action. Hence the relevance must be determined by the pleading and issues in contention.”

A request for particulars, such as dates, names and details, must relate to specific provisions of the Memorandum of Claim, response or other pleading. See **Habiba Ali Mursai and 4 others v Mariam Noor Abdi [2021] eKLR**.

In this case, in the Memorandum of Claim, the Claimant is seeking orders that the termination of his employment was both substantively and procedurally unfair, and that it was wrongful, discriminatory, malicious, and in bad faith. The Claimant is thus seeking a salary increment from April to December 2023, severance pay for 4 years and compensation for unfair termination of employment.

Unlike the case of **Palm Oil Transporters Ltd v Kenfreight E.A. Ltd [2022] KEHC 14327 (KLR)**, where the court granted the principles upon which a ‘Norwich Pharmacol order’ should issue, in employment claims such as herein, the employee is insulated under section 47(5) of the Employment Act (the Act). Upon a claim of alleged wrongful, unlawful or unfair termination of employment, all the employee needs to do is to discharge the burden of proof on him by placing before the court *prima facie* evidence suggesting that a

termination has occurred and that the said termination lacks a substantive justification and/or is procedurally flawed.

Once the employee makes a prima facie case, the burden of proof shifts onto the employer to justify the termination of employment. In **Josephine M. Ndungu & others v Plan International Inc [2019] eKLR**, the court said this of the foregoing: -

“Under section 47(5) of the Employment Act, the burden of proving unfair termination lies with the employee. The said burden is discharged once he establishes a prima facie case that, the termination did not fall within the four corners of the legal threshold set out by section 45 of the Act.”

This position is reiterated in **Galgalo Jarso Jillo v Agricultural Finance Corporation [2021] KEELRC 323 (KLR)**. Indeed, the overall design of the law is that the employer has the duty to provide evidence to establish the validity of the termination in terms of sections 43 and 45 of the Act, absent which a presumption of fact arises in favour of the unlawfulness of the termination. Commenting on the interplay between sections 43 and 47(5) of the Act, the Court of Appeal in **Muthaiga Country Club v Kudheiha Workers [2017] eKLR** said the following:

“The grievants having denied, through their witness, the reasons given for their dismissal, discharged their obligation under Section 47(5) of the

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Act by laying the basis for their claim that an unfair termination of employment had occurred. This brought into play Section 43(1) and 47(5) of the Act that places the burden upon the appellant to prove the alleged reasons for termination of the grievants' employment, and justify the grounds for the termination of the employment."

Reference must also be section 10(6) and (7) of the Act. The employer has the duty to produce records necessary as required under section 43 of the Act. The discovery sought by the Claimant from third parties in view of the pleadings herein becomes unnecessary.

With regard to claims that there is discriminatory treatment, section 5 of the CT prohibits discriminatory treatment at the shop floor. In this regard, section 5(7) places the burden of proof upon the employer, such as the Respondent herein.

(7) In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory act or omission is not based on any of the grounds specified in this section.

Thus guided, the orders sought against the KCAA regarding third-party information for the Claimant to apply in his case become unnecessary.

The parties attended court for a directions hearing, which has since closed. The matter was scheduled for a hearing on two occasions, but was frustrated by the instant application. To ensure both parties address the issues as analysed above, pleadings shall close within the next 14 days.

Accordingly, the application dated 24 November 2025 is without merit and is dismissed. Costs to the Respondent. Pleadings shall close in the next 14 days.

Delivered in open court at Nairobi, this 30th day of April 2026

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Catherine and Omar

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