



**Musyoki v Kenya Airways Limited (Cause E644 of 2021)
[2024] KEELRC 402 (KLR) (28 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 402 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E644 OF 2021
JK GAKERI, J
FEBRUARY 28, 2024**

BETWEEN

MORRIS MUINDI MUSYOKI CLAIMANT

AND

KENYA AIRWAYS LIMITED RESPONDENT

RULING

1. Before the court for determination is the applicant's Notice of Motion dated 26th November, 2023 filed under Certificate of Urgency seeking orders that:-
 1. Spent.
 2. Court to subject the release and discharge documents filed by the Respondent and labelled as 54 to independent investigation through the Deputy Registrar.
 3. Court to subject the document mentioned as Kenya Certificate of Secondary Education Certificate No. 189207 in the name of Muindi Maurice Musyoka indicating Kagumo High School, Index 202502/064, year 2000, an order to release the said copy of the forged certificate, prove the originator and the origin and of the said certificate for independent investigation.
 4. Court to subject the details of Maingi Albert Musyoka for independent investigation (a) the origin of affidavit sworn in Machakos and which advocate, the certificate purportedly forged by myself and produced during recruitment which belongs to Maingi Albert Musyoka and the origin of the same, series of examination papers belonging to Maingi Albert Musyoka, the details of the national identification card belonging to Maingi Albert Musyoka which the Advocate of the Respondent and the Respondent claim I used to get employment with the Respondent during recruitment, I.D. No. 233XXXXX, the originator of the said ID and whether there is any of my government document like Kenya Revenue Authority, Pin Number called by names Maingi Albert Musyoka, any of my payslips called by Maingi Albert Musyoka,



is my ID 234XXXXXX by the said names Maingi Albert Musyoka, is there any of my bank statement by the names Maingi Albert Musyoka apart from Morris Muindi Musyoka.

5. Court to subject the Respondent to independent investigation on the originator of Maingi Albert Musyoka identification card which the Respondent forwarded to spectrum network international for investigation and what was the motive.
 6. Court to subject the Respondent to independent investigation on document labelled as 43 by Respondent, the originator and Respondent too be compelled to produce a copy of the same which he claims to have been furnished to Respondent by Claimant during recruitment, certificate Muindi Maurice Musyoka 2000 KCSE, this letter was done by hr Kenya Airways GQ/Certificate 28/06/A21.
 7. Court to subject the Respondent and all other suspicious documents, stamen and falsified information for independent investigation and court to allow me file all other fraudulent, falsified information, statement and document filed during mediation sessions and filed in the main case.
 8. Court to determine whether there are criminal acts based on the findings of all the above.
 9. Court to trush out all evidence adduced by the Respondent and his advocate.
 10. Court to find all evidence provided by the Respondent either by statement, documentation as falsified, forgeries and fraudulent.
2. The Notice of Motion is expressed under unidentified provisions of the penal code and all enabling provisions of law and is based on the grounds set out on its phase. No supporting affidavit was filed.
 3. It is the applicant's case that the Respondent made, forged or manufactured a release and discharged document during the court annexed mediation indicating that he was paid terminal dues and the document, though signed, had no name of the signatory and contained the purported Claimant's signature.
 4. Under Ground (a), the Claimant is challenging the documents filed during mediation which are not part of the Notice of Motion.
 5. Ground (b) and (c) are challenging the contents of the statement by Danson Muchiri dated 28th December, 2022 which is yet to be adopted as evidence by the maker.
 6. Under Ground (d), the applicant argues that the Respondent and its counsel were misleading the court by having obtained fraudulent information from Spectrum International Number 37 and Kenya National Examination Council, document No. 43 on the list of documents.
 7. Finally, the applicant posits that he only provided the KCPE Certificate for Muindi Maurice Musyoka, Muindi Maurice Musyoki and Maingi Albert Musyoka which the Respondent did not file and the Respondent had obtained misleading statements from Machakos School, Kigumo High School, DCI Office (JKIA) and the Kenya National Examination Council.

Respondent's response

8. The Respondent's counsel filed grounds of opposition dated 22nd January, 2024 stating that the Claimant's application herein is an abuse of the court process made in bad faith and is incompetent as it relies on the provisions of the Penal Code applicable in criminal matters.



9. That although the documents filed in this case have been on record since the discovery phase, no objection was raised.
10. It is the Respondent's case that the Release and Discharge document dated 4th October, 2018 bears the Claimant's signature which is consistently used in all his documents including the affidavit dated 15th March, 2018, Job application dated 27th July, 2017 and the Application dated 26th November, 2023 among others.
11. That since the Respondent is not the maker of the Kenya Certificate of Secondary Education (KCSE) certificate complained of or the report provided by KNEC, nothing prevented the applicant from summoning the makers to court to confirm or deny their authenticity.
12. The Respondent posits that the alleged falsification of documents is not supported by any criminal complaint to the relevant authorities.
13. That the court is a neutral and independent arbiter and cannot aid one party in investigations against another which would risk its mandated independence and impartiality.
14. That the claim made can be dealt with and determined at the trial and the instant application is an unnecessary delay in having the suit concluded.
15. Finally, the Respondent objects to the reference to the mediation process as it is confidential and not admissible in court and prays for dismissal of the application with costs.

Applicant's submissions

16. The applicant maintained that the Respondent's officials manufactured, forged and fabricated statements from institution and private firms such as DCI, Kagumo High School, Machakos School, Kenya Prisons and Private Companies such as Spectrum International.
17. According to the applicant, some of the documents filed by the Respondent are questionable and the issues arising relate to;
 - i. Whether the Respondent and its advocate have committed criminal acts by forging, faking, manufacturing or authored or filed documents to mislead the court.
 - ii. Whether there is need for an independent investigation.
 - iii. Whether the Claimant provided copies of the ID bearing his name, KCSE certificate, filing of witness statement and whether Dan Muchiri was a real witness in this case, criminal prosecution of the Respondent and its advocate and expunction of the evidence challenged herein. In total the applicant catalogue 20 issues and relies on unidentified Acts of Parliament.
18. In his argument, the applicant accuses Mr. Danson Muchiri and the Respondent's counsel, Joy Impano for having knowingly manufactured, forged and filed documents before the Mediator and in particular, the Release and Discharge document but there was a partial settlement and all parties to the mediation process appended their signatures.
19. The applicant argues that the Respondent did not file ID. No. 233XXXXXX under the name Albert Musyoka Maingi and its counsel was untruthful during the mediation process.
20. The applicant further submitted that the affidavit purportedly filed during recruitment had no author and the advocate's name and the Respondent had not shown that it came from him.



21. The applicant accuses the Respondent for having written to the Kenya National Examination Council (KNEC), Spectrum International and handing over his personal employment file to the DCI seeking information to mislead the court.
22. The applicant submitted that Mr. Danson Muchiri was not a real witness as he joined KQ after the applicant had left the company.
23. The applicant invites the court to grant the orders sought.

Respondent's submissions

24. Counsel submitted on whether the application was an abuse of the court process, premature, incompetent and reference to mediation proceedings.
25. On the first issue, counsel submitted that the application was an abuse of the court process as the applicant had not availed concrete evidence to substantiate the allegations that documents were falsified and relies on the sentiments of the court in *Faustina Njeru Njoka V Kimunye Tea Factory Ltd* (2022) eKLR and *Joseph Amisi Omukanda V Independent Electoral and Boundaries Commission & 2 others* (2017) eKLR on the applicant's burden of proof to establish the allegations and urge that the application was an abuse of the court process as explained in *Muchanga Investments Ltd V Safaris Unlimited (Africa) Ltd & 2 others* (2009) KLR 229 and *Stephen Somek Takweyi & another V David Mbutia Githare & 2 others* (2009).
26. Counsel further submitted that the court was being called upon to make a finding on matters of alleged forgery and impersonation which were outside the court's jurisdiction as held in *Olivia Milycent Atieno V Mombasa Aviation Training Institute* (2019) eKLR that the Employment and Labour Relations Court is not a criminal court.
27. That the documents the applicant is complaining about were filed on 16th January, 2023 and the instant application was filed on 26th November, 2023, almost one (1) year later.
28. As to whether the application was premature, counsel submitted that it was as the applicant had time to summon all the witnesses he requires to testify on the alleged forged or falsified documents and cites the sentiments of Ndolo J. in *Olivia Milycent Atieno V Mombasa Aviation Training Institute* (Supra) to urge that the proper form to challenge the authenticity of documents was during the trial as the applicant could summon witnesses.
29. Counsel submitted that the matter being raised can be dealt with at the hearing.
30. As to whether the application was incompetent, counsel urged that was as it relied on the *Penal Code* applicable to criminal matters and was legally infirm and cited sentiments of the court in the Tanzanian case of The High Court of the United Republic of Tanzania (*In The District Registry of Arusha in Misc. Labour Application No. 10 of 2023 (Origination From Commission For Mediation And Arbitration Application No. CM A/Ars/182/2020)*) to urge that the Claimant's Notice of Motion is incompetent.
31. On reference to mediation proceedings, counsel submitted that Rule 25 of the *Civil Procedure (Court-Annexed Mediation Rules, 2022*, provided for confidentiality and the proceedings were inadmissible in on-going or subsequent legal proceedings. Breach of confidentiality amounts to contempt of court.
32. Reliance was also made on the sentiments of Muchelule J. (as he then was) and Odunga J. (as he then was) in *Re Estate of BM (Deceased)* (2019) eKLR and *Lepapa Ole Kisotu V Ntulele Group Ranch & another* (2017) eKLR respectively on the confidentiality of mediation, analysis and determination.



Determination

33. It is common ground that the Claimant's Notice of Motion dated 26th November, 2023 is challenging the Respondent's documentary evidence on record, and seeks their expunction from the record and direct that they be subjected to investigation by an independent investigator.
34. The court is also invited to determine whether criminal acts were committed by the Respondent and its counsel on record and find as much.
35. Finally, the applicant is also challenging the Respondent's witness and witness statement.
36. The singular issue for determination is whether the instant application is merited.
37. Firstly, the Notice of Motion dated 26th November, 2023 is expressed under the [Penal Code](#), Cap 63, Laws of Kenya and "all enabling provisions of law".
38. The applicant is thus moving the court under this Penal Code.
39. It is common knowledge that the Penal Code is an Act of Parliament that deals with criminal offences and criminal matters only.
40. No doubt this court has been improperly moved by the applicant.
41. In determining this issue, the court is guided by the persuasive sentiments of the Tanzanian High Court in the High Court of The Republic of Tanzania (*The District of Arusha in Misc. Labour Application* (Supra) cited by the Respondent's counsel as follows;

 ". . . Much as it is plain that this court has been improperly moved then. What is next for consideration is the way forward. This court is well aware of the principle of overriding objective which enjoins the court to do away with legal technicalities and decide cases justly. Nevertheless, it should be noted that the requirement of the applicant to cite the provision of the law upon which the court can be moved to grant the relief sought is not decoration, it goes to the jurisdiction of the court. As we all know, the jurisdiction of the court is basic in every application or motion advanced before the court. Courts grant prayers because there is a provision of the law empowering them to do so. In this case, as properly submitted by the applicant, the chamber summons cited the provisions which do not empower this court to give the order sought . . ."
42. In the Tanzanian case, the court upheld the Preliminary Objection and struck out the application after declining the invitation to invoke the principle of overriding objective.
43. Closer home, Article 159(2)(c) of [the Constitution](#) of Kenya, 2010 enjoins courts in mandatory tone, to administer justice to all, expeditiously, and "without undue regard to procedural technicalities".
44. Whereas this constitutional requirement is not a license for courts to ignore all procedural requirements, as procedure is invariably the hand-maiden of substantive law, and creates order, uniformity, consistency and expedition in dispute resolution, it directs the court not to pay disproportionate or excessive attention to procedural technicalities.
45. Is the citation of the provisions of law under which the court is being moved a procedural technicality?
46. The court is satisfied that it is as only those who have received training in civil procedure or learnt experientially are aware of its essence and place in applications.



47. As the applicant has not professed to have had any training in law or experiential learning of civil practice of law, the court is persuaded that invoking the persuasive Tanzanian decision, above, vis-a-vis Article 159(2)(c) of *the Constitution* of Kenya, 2010 would disadvantage the applicant and it is only fair that the requirement ought not to be accorded undue regard in the determination of this application.
48. Flowing from the foregoing, it is the finding of the court that the Claimant’s Notice of Motion dated 26th November, 2023 is not incompetent.
49. As to whether the application is an abuse of the process of the court, the court is persuaded that it is for the following reasons.
50. As properly submitted by the Respondent’s counsel in *Mushanga Investments Ltd V Safaris Unlimited (Africa) Ltd* (Supra), the Court of Appeal explained the phrase abuse of court process as follows;

“The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding, which is wanting in bona fides and is frivolous, vexatious or oppressive . . . The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. It’s one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice. Examples of the abuse of the judicial process are . . .

- (iv) where there is no iota of law supporting a court process or where it is premised on frivolity or recklessness.”

51. Similarly, in *Stephen Somek Takwenyi & another V David Mbutia Githare & 2 others* (Supra), Kimaru J. expressed himself as follows;

“ . . . The court has an inherent jurisdiction to preserve the integrity of the judicial process. When a matter is expressed in negative tenor, it is said that there is inherent power to prevent abuse of the process of the court.

. . . An instance of this is when it is diverted from its proper purpose and it is used with some ulterior motive for some collateral one or to gain some collateral advantage which the law does not recognize as a legitimate use of the process . . . ”

52. The court is guided accordingly.
53. The instant Notice of Motion is the 4th filed by the Claimant under Certificate of Urgency since 25th October, 2021. The others were filed in August and December 2022.
54. For those filed in 2022, the court persuaded the applicant to compromise them to facilitate the hearing of the suit as he maintained that he had been suffering since dismissal by the Respondent and he agreed and he testified on 26th April, 2023 but was not present for the hearing slated for 12th October, 2023 and filed the instant Notice of Motion before the mention scheduled for 29th November, 2023.



55. In *Mushanga Investments Ltd V Safaris Unimited (Africa) Ltd*, the Court of Appeal inter alia cited the sentiments of *Roskill and Templeman in Ashmore V Corp of Lloyds* (1992) 2 ALLER 486 at 488 as follows;

“In our view, the often quoted principle that a party should have his day in court should not be taken literally. He should have his day only when there is something to hear. No party should have a right to squander judicial time . . .

Litigants are not entitled to the uncontrolled use of a trial judge’s time. Other litigants await their time. Litigants are only entitled to so much of the trial judge’s time as is necessary for the proper determination of the relevant issues . . .

Unless a trial is on discernible issues, it would be farcical to waste judicial time on it.”

56. The court is in agreement with these sentiments.

57. First, the Respondent filed its documents on 16th January, 2023 and the Claimant testified in support of his case on 26th April, 2023.

58. The instant application was filed on 26th November, 2023 more than 10 months later and 7 months after the Claimant/Applicant testified in court.

59. The delay in the filing of the instant application is in the court’s view inordinate and unjustifiable.

60. Second, the applicant is seeking orders which this court has no jurisdiction to make. This court cannot direct the Deputy Registrar to engage an independent investigator to examine an affidavit, KCSE certificate, Identity Card, or unnamed authors of allegedly forged or false documents.

61. It is common knowledge that Kenya has legally established state bodies whose mandate is to carry out investigations whenever allegations of criminal or other nature are made by any person.

62. The applicant is seeking orders to have the Respondent’s evidence subjected to investigation at the tax payers expense to enable him prosecute his case which the court finds untenable as was the case in *Olivia Milycent Atieno V Mombasa Aviation Training Institute* (Supra).

63. It is trite law that the Employment and Labour Relations Court is not a criminal court.

64. More significantly, the matters to be investigated by the purported independent investigator are of a criminal nature, patently beyond the jurisdiction of this court and the applicant has not adduced any scintilla of evidence to prove that he made a complaint to the Directorate of Criminal Investigations (DCI) and no action was taken.

65. An OB number would have demonstrated that the Claimant/Applicant’s application is actuated by good faith.

66. Third, the applicant makes what the court can only describe as spurious allegations against the Respondent and its counsel, an officer of this court. He accuses them of having faked, forged, manufactured and/or authored false documents without placing before the court evidence as to when and how the alleged forgeries and manufacturing of the documents took place.

67. The allegations that the Respondent and its counsel on record acted fraudulently is undoubtedly a very serious accusation and requires cogent supportive evidence which the Claimant/Applicant has not availed.



68. The sentiments of the court in *Faustina Njeru Njoka V Kimunye Tea Factory Ltd* (Supra) are spot on i.e
“allegations of fraud are deemed as serious allegations which require to be strictly proven. It is trite law that when one raises an allegation of fraud they have a duty to particularize such allegations and prove it . . .”
69. (See also *R.G. Patel V Lalji Mukanji* (1957) EA 314, *Central Bank of Kenya V Trust Bank Ltd & 4 others* (1996) eKLR and *Vijay Marjoria V Nansingh Madhusingh Dardar & another* (2000) eKLR).
70. The applicant tendered no evidence of the alleged forgery or false documents, a requirement of the law. (See *Ndolo V Ndolo* (2008) KLR 742).
71. The provisions of Section 107, 108 and 109 of the *Evidence Act* are unambiguous as to whom the burden of proof of any particular fact lies and in this case it lay on the applicant.
72. As counsel for the Respondent correctly submitted, although the Claimant testified on 26th April, 2023, he is not precluded from making an application to call witnesses in support of his case or contradict the Respondent’s evidence at the hearing of the Respondent’s case.
73. It is common ground that since the Respondent has not tendered its evidence in court, the applicant has time and facilities to rebut such evidence during trial on cross-examination and availment of witnesses.
74. Finally, the applicant prays that the court determines whether there are criminal acts or not.
75. The simple response to this prayer is that this court has no jurisdiction to do so.
76. As for the prayer to expunge all the evidence adduced by the Respondent and his counsel, although the Respondent has filed documents, it is yet to table the evidence in court and its counsel has not adduced any evidence.
77. More significantly, however, the applicant has not placed any material before the court to justify expunction of the documents at this stage.
78. As to the finding that the evidence provided by the Respondent was falsified, forgery and fraudulent, the applicant has not placed any material on the basis of which the court could make such a finding.
79. Flowing from the foregoing, it is discernible that the applicant’s Notice of Motion dated 26th November, 2023 is for dismissal and it is accordingly dismissed with costs.
80. Costs shall be in the cause.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 28TH DAY OF FEBRUARY 2024

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments



and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

