



**Mugiira v National Biosafety Authority; Kinyamario (Perjurer);
 Inspectorate of State Corporations (Interested Party) (Cause E524 of 2024)
 [2024] KEELRC 13517 (KLR) (20 December 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13517 (KLR)

**REPUBLIC OF KENYA
 IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
 CAUSE E524 OF 2024
 SC RUTTO, J
 DECEMBER 20, 2024**

BETWEEN

DR. ROY B. MUGHIRA APPLICANT

AND

NATIONAL BIOSAFETY AUTHORITY RESPONDENT

AND

PROFESSOR JENESIO KINYAMARIO PERJURER

AND

INSPECTORATE OF STATE CORPORATIONS INTERESTED PARTY

RULING

1. By way of a Notice of Motion Application dated 5th December 2024 brought under Section 5 of the Judicature Act, Rule 39 of the High Court (Organization and Administration) (General) Rules, 2016, Sections 1A, 1B, 3A of the Civil Procedure Act, Sections 3, 12, 20 (7) of the Employment and Labour Relations Court Act, Section 108 of the Penal Code, Rule 17 of The Employment and Labour Relations Court (Procedure) Rules, 2016 and Order 51 Rule 4 of the Civil Procedure Rules and all enabling provisions of the law, the Claimant/Applicant seeks the following orders:
 1. Spent.
 2. This Honourable Court be pleased to Stay the Proceedings in relation to the Notice of Motion Application dated 11th October 2024 pending the inter-partes hearing and determination of this Application.



3. This Honourable Court be pleased to cite PROFESSOR JENESIO KINYAMARIO for Perjury.
 4. Upon citing Professor Jenesio Kinyamario for Perjury this Honourable Court be pleased to Convict the said Professor Jenesio Kinyamario for Perjury and find him liable to a fine of Kenya Shillings One Million or to Imprisonment for a term not exceeding two years or both.
 5. The costs of this application be borne by the Perjurer.
2. The Application is premised on the grounds on the face of it and on the Supporting Affidavit sworn by the Claimant on 5th December 2024. Grounds in support of the Application is that Prof. Kinyamario swore a Replying Affidavit in proceedings before this Court in answer to the Notice of Motion Application dated 11th October 2024.
 3. That Prof. Kinyamario swore the said Replying Affidavit both as a Respondent and in his capacity as the Chairman of the Respondent which is a public entity and he was at all material times a Public Officer.
 4. That as a Public Officer Prof. Kinyamario is enjoined by the Public Officers Ethics Act to carry out his duties in accordance with the Law and in responding to the matter before this Honourable Court, he was enjoined not to knowingly give false or misleading information to the public on matters touching on his role as a public officer.
 5. That in his aforesaid Replying Affidavit sworn on oath, Prof. Kinyamario knowingly and deliberately made statements which he knew to be false and misleading.
 6. The Claimant avers in his Affidavit in support of the Motion that in Paragraphs 5 to 7 of his Replying Affidavit, Prof. Kinyamario lies and perjures himself with reckless abandon and impunity by stating falsely that during a Special Board Meeting held on 19th September 2024 the Respondent's Board was briefed on his suspension and informed that there was a Court Order which was in place and there was no need for any further action by the Board and that should a need arise the Chairman (himself) would address the situation accordingly; and that it was upon his return to work on Monday 7th October 2024 that he immediately issued him with a letter extending his suspension.
 7. The Claimant contends that the foregoing statements by Prof. Kinyamario are manifestly false because he was invited to attend the meeting of 19th September 2024 and he received the Notice and Agenda of the said meeting and the same did not include the discussion of his suspension.
 8. It is the Claimant's further contention that the statements at Paragraphs 6 and 7 of the Replying Affidavit of Prof. Jenesio Kinyamario are utterly false and deliberately so because he reported back to work on Monday 7th October 2024 and did so very peacefully and was ushered to the Respondent's Boardroom.
 9. The Claimant has further averred that the letter of 7th October 2024 was in fact emailed to him on Sunday 6th October 2024 to his email address roybmugiira@gmail.com. This was before he reported back to work.
 10. The Claimant further avers that the letter sent via email was post-dated in order to give the false and misleading information that the letter which is written on the letterhead of a public body, was authored on 7th October 2024 yet in fact it was authored long before. In the Claimant's view, this in itself is a falsification of public documents.



11. The Claimant further avers that no "need had arisen" to warrant Prof. Kinyamario to author the letter extending his suspension on Sunday 6th October 2024 and it follows that either Prof. Kinyamario was acting on a frolic of his own on Sunday 6th October 2024 without basis and without the authority of the Respondent's Board or there was in fact no resolution granting him power to act on his suspension when the "need arises".
12. The Claimant further avers that Prof. Kinyamario is lying to this Court in order to mislead it as to the reasons for and the circumstances under which he wrote the letter extending his suspension from work.
13. That in making the false statements before this Court, Prof. Kinyamario inter alia: was aware that the same was being relied on in judicial proceedings; acted deliberately knowing his statements were false and; was aware that his statement was material to the Court's proceedings.
14. The Application is opposed through the Replying Affidavit sworn on 13th December 2024 by Prof. Jenesio Kinyamario, the Chairman of the Respondent's Board of Directors and the alleged Perjurer.
15. At the outset, Prof. Kinyamario reiterates the contents of his Replying Affidavit sworn on 23rd October 2024 in response to the Claimant's Application dated 11th October 2024.
16. He asserts that the Claimant is outrightly misrepresenting facts, misleading and lying to the court. That during the Special Board meeting of 19th September 2024, the Claimant was invited to participate in Agenda item 1-6 only pursuant to his suspension letter.
17. That the Claimant and five (5) other invitees were excused from the meeting immediately after Agenda item number 1-6 of the meeting had been deliberated and the Board members continued with their deliberations on the remaining Agenda items as set out in the notice of the meeting.
18. Prof. Kinyamario avers that it is during the deliberation of Agenda item number seven (7) on management brief that the Acting Chief Executive Officer briefed the Board, for noting, on various operational issues including the latest position regarding the Claimant's suspension and the instant case. The Board agreed there was no need for further action in light of the court orders of 25th July 2024 in place however the Chairman would take necessary action where need arises.
19. It is Prof. Kinyamario's assertion that since the Claimant proceeded on suspension for a period of three (3) months commencing 5th July 2024 and to lapse on 4th October 2024, on 4th October 2024, because he (Prof. Kinyamario) was travelling to Naivasha on other Board Matters on the week of 7th October 2024, he proactively wrote the letter dated 7th October 2024 and gave it to the Respondent's Corporation Secretary to hand it over to the Claimant in case he showed up in the office on 7th October 2024.
20. That he was informed by the Respondent's Corporation Secretary that he in turn handed over the letter to the Chief Executive Officer's Secretary with instructions to give the letter to the Claimant on 7th October 2024 in case he appeared in the office.
21. According to Prof. Kinyamario, it has now come to his attention that the letter was forwarded to the Claimant on 6th October 2024 as alleged via the email info@biosafetykenya.go.ke which email by his own knowledge as Board Chairman is managed by the Chief Executive Officer's Secretary.
22. He further contends that the Claimant is being mischievous and hence he questions why he (Claimant) stormed the office on 7th October 2024 if indeed he received the letter dated 7th October 2024 through the email dated 6th October 2024.



23. That he is informed by the Respondent's Corporation Secretary that when the Claimant went to the office on 7th October 2024, in order to manage the situation that was developing, the Corporation Secretary personally spoke to the Claimant on phone and informed him of the Board's position that the court order of 25th July 2024 remains in force until his application is heard and determined as directed by the court and therefore the Board did not expect him to report on duty on 7th October 2024.
24. Prof. Kinyamario further states that he was informed by the Respondent's Corporation Secretary after the discussion with the Claimant, that the letter dated 7th October 2024 was handed to him following which he (Claimant) left the Respondent's office.
25. According to Prof. Kinyamario, he has not in any way lied and or made false statements to this honourable Court/judicial proceedings.
26. He is advised by the counsel on record which advice he verily believes to be true and correct that the Claimant has not met the threshold for perjury.
27. He is also advised by the counsel on record which advice he verily believes to be true and correct that the issue of perjury is res judicata as the Court on 28th November 2024 after hearing an oral application by the Claimant seeking to cross-examine him for perjury on the contents of his Replying Affidavit sworn on 23rd October 2024, dismissed the said application upon finding that there was no proper basis for the cross-examination.
28. That following the said court ruling of 28th November 2024, the Claimant filed a Notice of Appeal dated 5th December 2024.
29. In his view, the Claimant is thus seeking an appeal against the ruling of this honourable Court through the backdoor which is not tenable.
30. He is further advised by the counsel on record which advice he verily believes to be true and correct that the Claimant's actions are tantamount to forum shopping and an abuse of the court process as he has not exhausted the appellate process he has chosen to pursue.
31. In rejoinder, the Claimant filed a Further Affidavit sworn on 18th December 2024 in which he avers that the matter of perjury was not the subject of the ruling of this Court issued on 28th November 2024 which ruling only held that he was not permitted to cross-examine Prof. Kinyamario on the basis of his Affidavit.
32. The Claimant contends that this Court has not made any finding on the matter of perjury and the claim of res-judicata is not available in defence.
33. He reiterates that the matter in question was not on the Agenda of the meeting as set out in the Notice of Meeting and therefore could not lawfully have arisen for deliberation at the meeting.
34. It is the Claimant's assertion that there is reasonable basis to believe that the Respondent's Board did not authorize Prof. Kinyamario to write the letter dated 7th October 2024.
35. It is the Claimant's view that the letter dated 7th October 2024 was the brainchild of Prof. Kinyamario written in anticipation of his return to work.
36. He further avers that this act of perjury by Prof. Jenesio is quite separate and distinct from any other matter arising before this Court and in fact, there has been no determination by this Court as to whether Prof. Jenesio has committed an act of perjury.



Submissions

37. Pursuant to the orders issued by the Court on 9th December 2024, the application was canvassed by way of written submissions. All parties complied and I have considered their respective submissions.

Analysis and Determination

38. The Court has carefully considered the application, Prof. Kinyamario's Replying Affidavit as well as the rival submissions and is of the view that the issues falling for determination are;

- a. Whether the issue of perjury is res judicata;
- b. Depending on (a) whether Prof. Kinyamario committed perjury in his Replying Affidavit sworn on 23rd October 2024 in response to the Claimant's Application dated 11th October 2024.

Res judicata?

39. Prof. Kinyamario has contended in his Replying Affidavit that the issue of perjury which is the subject of the instant Application, is res judicata.

40. The doctrine of res judicata is provided under Section 7 of the [Civil Procedure Act](#), 2010 as follows-

“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.”

41. The principles to be established by a party relying on a plea of res judicata were laid down by the Court in the case of *Abok James Odera v John Patrick Machira* Civil Application No. Nai. 49 of 2001 as hereunder:

- i. a previous suit in which the matter was in issue;
- ii. the parties were the same or litigating under the same title;
- iii. a competent court heard the matter in issue; and
- iv. the issue had been raised once again in a fresh suit.”

42. Prof. Kinyamario has averred that the issue of perjury is res judicata on the basis that on 28th November 2024, the Court dismissed an oral application by the Claimant in which he had sought to cross-examine him (Prof. Kinyamario) for perjury on the contents of his Replying Affidavit sworn on 23rd October 2024.

43. The Claimant has disputed this position and has argued that there has been no decision before this court on whether the person accused of perjury has committed perjury or not.

44. The record bears that the Court's decision rendered on 28th November 2024, was limited to the Claimant's application to cross-examine Prof. Kinyamario on the averments contained in his Replying Affidavit sworn on 23rd October 2024. As such, the Court was not called upon to cite Prof. Kinyamario for perjury and hence there was no determination on that issue.

45. Therefore, a plea of res judicata cannot be successfully raised by Prof. Kinyamario in that regard.



Whether Prof. Kinyamario committed perjury in his Replying Affidavit sworn on 23rd October 2024 in response to the Claimant's Application dated 11th October 2024

46. It is the Claimant's contention that Prof. Kinyamario has committed perjury and has lied to this court about why and when he issued the letter dated 7th October 2024 purporting to extend his unlawful suspension.
47. The Claimant avers that Prof. Kinyamario was acting on a frolic of his own on Sunday 6th October 2024 without basis and without the authority of the Respondent's Board. In the same vein, he contends that there was in fact no resolution from the meeting of 19th September 2024 granting Prof. Kinyamario power to act on his suspension when the "need arises". He further avers that the issue of his suspension was not on the Agenda of the meeting as set out in the Notice of Meeting and therefore could not lawfully have arisen for deliberation at the meeting.
48. Whereas Prof. Kinyamario has admitted that the Claimant was invited to the Special Board meeting of 19th September 2024, he contends that his participation was limited to Agenda items 1-6 only. According to him, the Claimant and five (5) other invitees were excused from the meeting immediately after Agenda item number 1-6 of the meeting had been deliberated and the Board members continued with their deliberations on the remaining Agenda items.
49. That it is during the deliberation of Agenda item number seven (7) on management brief that the Acting Chief Executive Officer briefed the Board, for noting, on various operational issues including the latest position regarding the Claimant's suspension and the instant case. According to Prof. Kinyamario, the Board agreed there was no need for further action in light of the court orders of 25th July 2024 in place however the Chairman would take necessary action where need arises.
50. In support of this position, Prof. Kinyamario annexed to his Affidavit, a copy of the extract of the minutes of the Special Board meeting held on 19th September 2024. Under MIN/NBA/07/SBM/49/2024: MANAGEMENT BRIEF, it is recorded that:
- "Pursuant to the suspension of Dr. Roy Mugiira, he had filed in court a case challenging his suspension. Management explained that Dr. Mugiira had filed the case in the Employment and Labour Relations Court in Nairobi under certificate of urgency seeking conservatory orders against his suspension. It was clarified that Dr. Mugiira's application does not challenge his disciplinary case. Management informed the Board that whereas Dr. Mugiira obtained orders temporarily stopping his disciplinary case pending the hearing of his application, the court upheld his suspension until the case is heard determined. The import of the court order was that Dr. Mugiira would remain on suspension and his disciplinary case would be pended until further orders of the court. His three months' suspension would therefore not apply as the matter was now before the court. The duration of his suspension would now depend on when further orders of the court are served on the Authority. The Board agreed that in light of the brief any emerging issues in the intervening period would be handled by the Chairman."
51. Notably, the Claimant has not indicated nor suggested that he doubts the authenticity of the said minutes. His only contention is that there was no basis upon which the Respondent's Board of Directors would have been discussing the matter of his unlawful suspension as the same was not part of the Agenda items for the said meeting. Indeed, there is no evidence before the court to discount the authenticity of the said minutes and specifically, the said resolution.



52. In light of the foregoing, the Court is not persuaded by the Claimant's assertion that there is reasonable basis to believe that the Board of the Respondent did not authorize Prof. Jenesio Kinyamario to write the letter dated 7th October 2024.
53. The other issue raised by the Claimant with respect to the Affidavit by Prof. Kinyamario is the manner in which the letter dated 7th October 2024 was authored and issued to him. Specifically, the Claimant avers that the letter dated 7th October 2024 was not written on 7th October and was not written on account of his return to work on 7th October 2024. He further contends that the letter was not written on the basis of information by the Respondent's Corporation Secretary that he (Claimant) had reported back to work.
54. In support of his Application, the Claimant has annexed to his Supporting Affidavit, a copy of an email dated 6th October 2024 addressed to him, forwarding a copy of the letter dated 7th October 2024.
55. On the other hand, Prof. Kinyamario has denied the allegations of perjury and avers that he proactively wrote the letter dated 7th October 2024 as he was travelling to Naivasha on the week of 7th October 2024. That he gave the said letter to the Respondent's Corporation Secretary in the event the Claimant showed up in the office on 7th October 2024. That he was informed by the Corporation Secretary that he had handed over the letter to the Chief Executive Officer's Secretary with instructions to give the letter to the Claimant on 7th October 2024. According to Prof. Kinyamario, it has now been brought to his attention that the letter was forwarded via email which is managed by the Chief Executive Officer's Secretary.
56. From the record, Prof. Kinyamario avers in paragraph 6 of his Replying Affidavit sworn on 23rd October 2024, that the Claimant without notice and in blatant disobedience of the Court Order, stormed the Respondent's office on 7th October 2024 and demanded to be facilitated to discharge his duties as the Chief Executive Officer.
57. Prof. Kinyamario further avers at paragraph 7 of the said Affidavit that following the Claimant's conduct and upon notification of the new developments by the Respondent's Corporation Secretary, he immediately issued the letter dated 7th October 2024 in compliance with the Court Order of 25th July 2024, to manage the situation in the circumstances.
58. What clearly manifests from the foregoing new set of facts, is that the letter dated 7th October 2024, was dispatched to the Claimant via email on Sunday, 6th October 2024 by the Respondent's Chief Executive Officer's Secretary. It is thus evident that the said letter had been authored by Prof. Kinyamario before 7th October 2024.
59. Evidently, the information above is at variance with the averments contained in the Replying Affidavit sworn by Prof. Kinyamario on 23rd October 2024 to the effect that upon being notified by the Respondent's Corporation Secretary that the Claimant had stormed the Respondent's office on 7th October 2024, he immediately issued him with the letter dated 7th October 2024, to manage the situation in the circumstances.
60. Further, Prof. Kinyamario's assertion in the Replying Affidavit dated 13th December 2024 to the effect, that it has now been brought to his attention that the letter was forwarded via email which is managed by the Chief Executive Officer's Secretary is far from the truth. Why do I say so? A scrutiny of the said email reveals that it was copied to a number of people among others, Prof. Jenesio Kinyamario; jkinyamario@gmail.com and Moses Sande; msande@biosafetykenya.go.ke.



61. Notably, Prof. Kinyamario has not disowned the said email address and has not denied receiving the said email on Sunday, 6th October 2024. Therefore, his submission that the Respondent's Chief Executive Officer's Secretary inadvertently forwarded the email to the Claimant on 6th October via the email info@biosafetykenya.go.ke does not hold water.
62. Perjury is defined in Black's Law Dictionary, 9th Edition at page 1254 as –
“The act or an instance of a person's deliberate making material false or misleading statements while under oath.”
63. Section 108 (1) (a) of the Penal Code provides for the offence of perjury as follows-
(1)(a) Any person who, in any judicial proceeding, or for the purpose of instituting any judicial proceeding, knowingly gives false testimony touching any matter which is material to any question then pending in that proceeding or intended to be raised in that proceeding, is guilty of the misdemeanour termed perjury.
64. In the case of *James Mulinge v Freight Wings Ltd, Vegpro (K) Ltd, Simba Colt Motors Ltd & High Class Auctioneers* [2016] KEELRC 11 (KLR), the Court identified the elements of the offence of perjury as follows; that a person;
- a. being a lawfully sworn witness or interpreter;
 - b. in judicial proceedings;
 - c. deliberately makes a material statement which is false; and
 - d. knowing that it is false or not believing it to be true.
65. In light of the foregoing, it is evident that Prof. Kinyamario was not being truthful by stating in his Replying Affidavit sworn on 23rd October 2024 that he immediately issued the Claimant with the letter dated 7th October 2024 upon being informed by the Respondent's Corporation Secretary that he had stormed the Respondent's office on 7th October 2024 and demanded to be facilitated to discharge his duties as the Chief Executive Officer. He was further not being truthful when stating that he has now come to learn that the letter of 7th October 2024 was forwarded via email which is managed by the Chief Executive Officer's Secretary.
66. The Court is persuaded that Prof. Kinyamario knew that this information was not true seeing that he is the author of the letter dated 7th October 2024.
67. To this end, I cannot help but find and hold that Prof. Kinyamario has committed perjury, which in itself is a criminal offence under the Penal Code.
68. Be that as it may, the court declines the invitation by the Claimant to issue order no. 4 of the Application with respect to the conviction of Prof. Kinyamario on account of the fact that, being a criminal offence punishable under the Penal Code, such conviction is within the province of the criminal justice system hence falling outside this court's jurisdiction.
69. Ultimately, the Application dated 5th December 2024 succeeds, and, consequently, paragraphs 6 and 7 of Prof. Kinyamario's Replying Affidavit sworn on 23rd October 2024 are hereby expunged from the record.
70. The Claimant shall have the costs of the Application herein.



DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2024.

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STELLA RUTTO

JUDGE

In the presence of:

Mr. Marete for the Claimant/Applicant

Ms. Mbilo for the Respondent, Interested Party and Perjurer

Millicent Court Assistant

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 had 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.

STELLA RUTTO

JUDGE

