



**Wekesa v Kenya Airways PLC (Cause E059 of 2024)  
[2024] KEELRC 13454 (KLR) (17 December 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13454 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE E059 OF 2024  
M MBARŪ, J  
DECEMBER 17, 2024**

**BETWEEN**

**HUMPHREY WAKOLI WEKESA ..... CLAIMANT**

**AND**

**KENYA AIRWAYS PLC ..... RESPONDENT**

**RULING**

1. The respondent, Kenya Airways Plc filed an application dated 10 September 2024 under the provisions of Rule 11 of the Employment and Labour Relations Court (Procedure) Rules, Order 5 Rule 1, Order 47 Rule 6 of the Civil Procedure Rules seeking orders;
  1. This court be pleased to strike out the suit herein for failure to take out and serve summons to Enter Appearance.
  2. In the alternative, the court be pleased to transfer the suit to the Employment and Labour Relations Court in Nairobi for hearing and disposal.
  3. The costs of the suit together with this application be awarded to the respondent.
2. The application is supported by the affidavit of Patrick Rono, Manager of Employee Relations and Staff Welfare. He avers that on 28 June 2024, the claimant filed the suit over the respondent's alleged unfair termination of employment. On 4 July 2024, the respondent was served with the Memorandum of Claim and Verifying Affidavit, but no summons to appear were served or complete pleading. On 7 August 2024, the respondent entered an appearance under protest.
3. In his affidavit, Rono avers that despite the claimant filing his claim, he has failed to serve the respondent with the summons. He filed his claim in Mombasa, whereas the cause of action arose in Nairobi, the place of business where the respondent is based. The employment contract was executed in Nairobi,



and the respondent will incur costs in availing witnesses if the matter is heard in Mombasa instead of Nairobi. In the interests of justice, the matter should be struck out or transferred to Nairobi.

4. In the Further Affidavit by Moses Ombokh, the senior manager of industrial relations and staff welfare, the respondent's case is that the claimant served the respondent with the summons to appear at the Mombasa office on 18 September 2024 despite the respondent having entered an appearance through its advocates herein. The service of summons was meant to circumvent the instant application, whereas the cause of action arose in Nairobi, and the contract of service was executed in Nairobi.
5. In reply, the claimant filed his Replying Affidavit and aver that summons were issued by the court and have since been served upon the respondent on 18 September 2024 at the Mombasa office. The court has jurisdiction to hear any employment dispute, and a transfer to Nairobi will not achieve justice for the claimant based in Mombasa.
6. Both parties attended and agreed to address the application through written submissions and further oral submissions.
7. As the applicant, the respondent submitted that under Order 5 Rule 1 of the Civil Procedure Rules, upon the claimant taking out summons, these should have been served within 30 days. These provisions are mandatory, and there was no compliance. In the case of *Karoki v Stepwise Inc* [2024] eKLR, the court held that where summons are not served, they are required under Order 5 rule 1, and there is no valid invitation to defend the suit. The failure to take out summons is fatal to the claim, which should be struck out as held in *Pecker Woods Limited v Bank of Africa Kenya Limited* [2021] eKLR.
8. The respondent submitted that in addition to the orders sought, the suit should be transferred to Nairobi, where the cause of action arose, and the contract of employment executed. The respondent will be prejudiced and forced to incur unnecessary costs if the suit is retained in Mombasa instead of Nairobi, where the cause of action arose, and its witnesses are all in Nairobi.
9. In reply, the claimant submitted that a summons has since been obtained from the court and served upon the respondent at the Mombasa office. He resides in Mombasa, and it is only fair that the matter is heard in Mombasa, where the respondent has an office, as held in *Swiss Deli Trade (PNAMA) Inc v Privammnuts EPZ Kenya Limited* [2020] eKLR. Under Article 159 of *the Constitution*, the court should apply substantive justice, not technicalities.

### **Determination**

10. The claim herein was filed on 3 July 2024.
11. The applicable rules for the Employment and Labour Relations Court were the Employment and Labour Relations Court (Procedure) Rules, 2016 (the Rules).
12. Under the Rules, upon filing a claim, the court issues a summons to the claimant for service upon the respondent under Rule 11.
13. Under Rule 11(2) and (3), summons should be served upon the respondent together with the statement of claim once issued and remain valid for 6 months.
  - (2) A claimant shall serve the summons issued under paragraph (1) to the respondent together with the statement of claim.
  - (3) Summons shall be valid in the first instance for six months beginning on the date of its issue, and the Court may extend the validity from time to time if satisfied that it is just to do so.



14. It is, therefore, premature to file and serve a claim without extracting summons as required under Rule 11(1) of the Court Rules. As correctly submitted by the respondent, a claimant should obtain the summons before serving the statement of claim upon the respondent. This will allow a respondent to respond to the claim under Rule 13.
15. In this case, the pleadings served upon the premature respondent cannot be sanitized backwards by the claimant serving summons at the Mombasa office on 18 September 2024. This rush practice is to be abhorred. The rules of procedure have assisted parties in many instances and apply to secure each party at the seat of justice. They are designed to ensure that all parties are treated fairly and that the proceedings are conducted in a just manner. These cannot be circumvented by the application of Article 159 of *the Constitution*. Rules exist for a purpose. Article 159 of *the Constitution* is not a panacea which heals every sore in litigation, neither is it a licence to parties to ignore or contravene the law and rules of procedure as held in *Said Sweilem Gheithan Saanum v Commissioner Of Lands (Being Sued Through The Attorney General), Municipal Council of Mombasa, Norman Taherali Dawoodbhai, Hassan Taherali Dawoodbhai, Ali Ramandhan Mwatsau & Mohamed Naman Mohamed [2015] KECA 284 (KLR)*.
16. Where rules of procedure exist, they provide access to justice and foster the principles of the rule of law. The claimant should appreciate the gravity of the lapse in extracting summons and serving documents without extracting summons. The protests by the respondent are justified. Strict adherence to procedural rules is crucial in maintaining the integrity of the legal process and ensuring fair treatment for all parties involved.
17. In the place of the filing suit, under the Court Rules, the court is given original jurisdiction without limitations within the Republic. This is clarified under the Employment and Labour Relations Court (Procedure) Rules, 2024, under Rule 6 thereof and provides that;
  6.
    - (I) Proceedings before the Court shall be instituted at the Court's registry or sub-registry with respect to the county where—
      - (a) the claimant, petitioner or applicant, at the time of commencement of the proceedings, actually and voluntarily resides or carries on business or personally works for gain;
      - (b) the cause of action, wholly or in part, arises
18. Quite distinct and separate from Order 5 of the Civil Procedural Rules applicable before other courts. This should be appreciated as the primary rule of procedure for the court. Where there is a lacuna, the *Civil Procedure Act* and the rules apply. In this case, the claimant is within the applicable rules and should not be faulted.
19. Save, under Rule 6(2) of the Court Rules, 2024;
  - (2) The Court may, on its own motion or upon application, for recorded reasons, transfer any proceeding to the most convenient court station for hearing and determination.
20. The parties have attended these proceedings virtually. The respondent has demonstrated no prejudice so far. Save for the invalid pleadings for lapse of serving summons together with the statement of claim, the place of filing suit is proper.



21. The application dated 10 September 2024 is with merit. The premature service of pleadings is invalid and is hereby struck out. Costs to the respondent.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 17 DAY OF DECEMBER 2024.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet

..... and .....

