



Kenya Aviation Workers Union v Kenya Airports Authority; Attorney General (Interested Party) (Cause E105 of 2023) [2023] KEELRC 3079 (KLR) (16 November 2023) (Ruling)

Neutral citation: [2023] KEELRC 3079 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E105 OF 2023
M MBARÚ, J
NOVEMBER 16, 2023**

BETWEEN

KENYA AVIATION WORKERS UNION CLAIMANT

AND

KENYA AIRPORTS AUTHORITY RESPONDENT

AND

THE HON. ATTORNEY GENERAL INTERESTED PARTY

RULING

1. The ruling herein relates to two undated applications by the claimant. One filed on 18 September 2023 and the other filed on 29 September 2023.
2. The claimant, Kenya Aviation Workers Union (KAWU) filed application on 18 September 2023 under the provisions of Rule 17 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and Order 51 rule 1 and 4 of the Civil Procedure Rules and the substantive orders sought are that;

Pending the hearing and determination of this application and the main suit, the respondent is hereby restrained by themselves and/or agents from implementing the transfer of any of the applicant’s 55 shop stewards and officials from their current duty stations, or in any other way interfering with the applicant’s right to determine its own administration, programmes and activities and the right to organise.

3. The application is supported by the affidavit of Moss Ndiema the secretary general of the claimant and on the grounds that the parties have a Recognition Agreement which allow for consultations and negotiations of terms and conditions of employment. The Agreement recognises that no employee should be penalised on account of his union membership and activities. In this regard, the claimant informed the respondent of the names of its officials and representatives who are dully elected pursuant



to the provisions of Section 34 of the [Labour Relations Act](#), 2007 (the LRA). The notice included names of shop stewards representing employees in respective sections and stations.

4. In his affidavit, Mr Ndiema aver that contrary to the Recognition Agreement, the respondent has through letters dated 11 August 2023 transferred *en masse* the elected shop stewards and ten (10) union officials from Jomo Kenyatta International Airport (JKIA) with the sole intention of crippling, stifling, disabling and dismantling the administrative structures, programmes and activities of the claimant. The mass transfer of the shop stewards had greatly affected the claimant's lawful activities of representing its members at the shop floor in matters of grievances, disputes and disciplinary proceedings as provided in Section 41 of the [Employment Act](#), 2007.
5. The actions by the respondent are intended to deny the claimant its constitutional right to determine its own administration and activities and the right to organise in Article 41(4) of [the Constitution](#). The claimant is apprehensive that its members in the affected sections and especially JKIA will be left unrepresented and are likely to suffer from this exposure due to the denial of their right to participate in the activities of their union and membership protected under Article 36 of [the Constitution](#). The shop stewards play a critical role in the maintenance of a harmonious industrial relations at the workplace. They form the first line of responders and the first point of call in managing relations with the respondent. In the absence of the shop stewards and elected officials, the members of the claimant are denied representation in the disciplinary process and an infringement of their rights and removal results in discriminatory treatment contrary to Section 5 of the [Employment Act](#) and Article 27 of [the Constitution](#). unless the orders sought are issued, the claimant will suffer irreparable loss and damage.
6. In response, the respondent filed the Replying Affidavit of Anthony Njagi the general manager, human resource development and aver that the transfers subject to these proceedings are a normal occurrence in the aviation industry where security is of outmost consideration. Of the 355 employees affected by the transfer, they are drawn from the following sections;
 - a. Security supervisors 26;
 - b. 254 security wardens;
 - c. 8 ground flight safety supervisors;
 - d. 10 apron controllers;
 - e. 10 bird scout;
 - f. 2 fire supervisor;
 - g. 28 fire fighters;
 - h. 13 customer service assistants;
 - i. 2 housekeeping assistants; and
 - j. 2 marketing assistants.
7. These are highly sensitive and secured areas and for security reasons, staff are rotated regularly and those working in remote areas are not expected to stay in one station for more than 3 years. it is the policy of the respondent to transfer employees who have served in their terms of service in hardship areas to other stations. During Covid-2019 period, this was not effected due to cessation of movements as per the Ministry of Health guidelines.



8. Mr Njagi aver that the staff transfers at JKIA was informed by a multi-agency team from Immigration, Kenya Airport Police Unit, General Service Unit, Kenya Airways and other airlines, Kenya Civil Aviation Authority, Port Health, Kenya Defence Forces, Kenya Revenue Authority as a way to enhance staff performance. There is therefore nothing untoward in the transfers and there is no contempt of court as alleged. The four officers, Jonathan Ruto, Susan Terkin, Goefrey Ogola Thomas and Paul Kwede officially wrote to the respondent indicating their names were used without their approval. For other officers, Dominic Talam, Daniel Osukulu, Isaiah Lusweti and Ebu Loter have reported to their stations. The 355 employees transferred have already reported to their new stations and a substantial number has not reported citing the Court Order, a matter that exposes the respondent to various risks such as loss of revenue for both cargo and insecurity and the orders sought should not issue and the application be dismissed with costs.
9. In the Replying Affidavit of Mohamed Daghar, Principal Secretary, State Department for Transport, Ministry of Roads and Transport in support of the respondent aver that the letters of transfer to the 55 shop stewards is an administrative action the respondent is allowed to undertake. The respondent as state corporation under State Department of Transport is allowed to organise its operations.
8. The claim herein is concerned with security operations of the state at entry and exit points which are not to be disrupted or compromised in any way as such would negatively impact the country. transfers are normal occurrence in the working life of an employee. The policy of the respondent allows transfers and through a multi-agency teams, these matters were addressed and approved to enhance efficiency and performance. A total of 355 employees were affected as part of the operational requirements of the respondent and the instant application should be dismissed.
9. The claimant filed the Further Affidavit of Moss Ndiema and who aver that the respondent in reply has tried to justify the transfers of the shop stewards and union officials which is premature and without merits and should be reserved during the main hearing. This means the respondent has since defied the court orders subsisting. The 3 shop stewards alleged to have disassociated themselves from the suit were coerced by the respondent to move after being threatened that their September salaries would not be paid and disciplinary action. The other 4 were enticed with transfer to favourable stations after the initial transfer letters were revoked. No notices have issued from these shop stewards to the claimant indicating their no longer want to be part of the suit. None have come to the attention of the claimant as alleged by the respondent.
10. Mr Ndiema also aver that the respondent is keen to create disunity among claimant's members using enticement, coercion and other forms of intimidation. The respondent was served with court orders herein and have not demonstrated why there is no compliance.
11. In total, 27 officials and shop stewards have been forced to move to new locations after the court orders issued;
 - a. Jared M Masinga, the National Trustee was moved from isiolo to JKIA;
 - b. Daniel Yatich was moved to Lodwar from JKIA but he remains on annual leave; Various shop stewards have been affected after the court orders issued.
12. Application filed on 29 September 2023 is seeking for orders that;

This court to find and hold that the respondent herein, Kenya Airports Authority, through its Acting Managing Director & CEO Mr. Henry Ogoye and the General Manager, Human Resource Development Mr. Anthony Njagi have defied, disobeyed and/or ignored the



Court Order on 19th September 2023 and issued on 20th September 2023 and the two be subsequently committed to civil jail for a term not exceeding six (6) months.

The court be pleased to deny the respondent audience in this matter until and unless they purge contempt of court committed herein.

13. The application is supported by the Affidavit of Moss Ndiema, secretary general for the claimant on the grounds that on 19 September 2023 the court granted the orders that;

In the interim, to allow service upon the respondent and attendance, the respondent is hereby restrained from implementing the transfer of the 55 shop stewards and officials of the claimant from their current duty stations.

14. The respondent and its officers were served with these orders especially the Acting Managing Director and CEO Henry Ogoye and who specifically went ahead to direct that all union officials and shop stewards who had been issued with letters of transfer to immediately proceed not later than 28 September 2023 and that anyone who failed to comply should have their salary stopped and to face disciplinary action. The general manager, human resources development Anthony Njagi personally made calls to heads of departments to reiterate the CEO directions and pressurising the managers and officers to expedite the transfer process. These two officers of the respondents went further and summoned shop stewards and instructed them to report to their new work stations not later than 28 September 2023.

15. Mr Ndiema aver that in the case of a shop steward based at Eldoret International Airport, Ibrahim Noor, he was summoned by the regional airport manager, Walter Agong on 26 September 2023 and served with a released letter to proceed to Kisumu International Airport by 25 September 2023. Despite his pleas that there was a court order, Noor was told that there were orders from the CEO and the general manager, human resources development.

16. All other shop stewards are faced with similar situation.

17. The respondent is known to disobey court orders with reckless abandon and unmeasured impunity and particularly in this case, despite being served with orders of 19 September 2023 they have proceeded to disobey and should be held in contempt of court.

18. In reply, the respondent filed the Replying Affidavit of Anthony Njagi, general manager, human resource development and aver that the respondent has a transfer policy which was not applied due to Covid pandemic and following a multi-agency meeting with key stakeholders it was found necessary to make transfers to enhance efficiency and address complacency. The transfers are necessitated by operational need and have applied to over 55 employees who include the claimant members. The decision of the claimant to rush to court to stop internal operations of the respondent without seeking to have the matter resolved through conciliation as required under the Recognition Agreement is not only disruptive but done in bad faith.

19. Mr Njagi aver that the court orders have substantially disputed operation since a number of employees have not reported to their new stations. The aviation sector is highly regulated and nay lase can lead to significant effect on the country.

20. The letters the claimant has alleged to have been written by the CEO and himself directing claimant members to proceed on transfer have not been produced. There is no record of any contempt of court. four officers, Jonathan Ruto, Susan Terkin, Geoffrey Ogola Thomas and Paul Kwede officially wrote to the respondent indicating that their names we reuse din these proceeding is without their approval.



- Others such as Dominic Talam, Daniel Osukuku, Isaiah Lusweti and Ebu Loter have reported to their new stations.
21. Parties attended and made oral submissions. The respondent filed its skeleton written submissions.
 22. The issues which emerge for determination at this stage are whether the respondent should be restrained from implementing the transfer of the 55 shop stewards and officials of the claimant from their current duty stations to new stations and whether there is contempt of court orders issued on 19 September 2023.
 23. On the question of contempt, an analysis of the first application filed on 19 September 2023 will shed light on the matter. However, what is clear to the court at this instance, since the orders of 19 September 2023, there have been various changes at the shop floor, some arising from the claimant's members offering to report to new stations as directed and others offering to disassociate themselves from these proceedings. Majority of others are holding onto the court orders afraid of what will happen to them. On the one hand, keen to preserve their employment and on the other hand confident that there exists rule of law and an order of the court is sufficient shield. These category of employees serving the respondent should not be victimised for trusting that justice is their true shield and defender.
 24. On the orders sought to restrain the respondent from transferring union officials and shop stewards, the claimant's case is that 55 shop stewards and officials have been transferred by the respondent from their current duty stations and which has interfered with its programmes and activities and the right to organise.
 25. In the Supporting Affidavit of Moss Ndiema dated 18 September 2023 and the Memorandum of Claim thereof he has attached a list of 55 persons affected in the transfer.
 26. Of interest is the extract of the union officials as at 26 February 2021 which comprise the following;
 - a. Walter Mocha Onger, chairperson;
 - b. Oscar Salim, vice-chairperson;
 - c. Moss Kapwemo Ndiema, Secretary General;
 - d. Danstone Mukhobi Muteshi, Deputy Secretary General;
 - e. Loyford Muthomi Nkonge, Treasurer;
 - f. Daniel Kemboi Yatich, Assistant Treasurer;
 - g. Jared Mongare Masinga and Bernard Owiti Ongode as Trustees.
 27. Of these officials, those affected by the transfer include;
 - a. Daniel Kemboi Yatich, Assistant Treasurer from JKIA to Moi International Airport [this changed to Lodwar Airstrip] from the written submissions;
 - b. Jared Mongare Masinga a Trustee.
 28. The respondent's case is that the prerogative to transfer employees should not be interfered with, this is to address operational needs, there exists a transfer policy to address employees' performance and avoid complacency and following a multi-agency team meeting, it was found necessary to effect the transfers. The respondent operates in a sensitive sector and with entry and exits within the Republic and the transfers have affected 355 employees including the members of the claimant. The claimant has members in all the stations and its interests will be catered for. It is also the respondent's case that



- several members of the claimant have disassociated themselves with this suit and proceeded to report to their stations of transfer. Others have not been able to comply following the court orders herein which has exposed the respondent in its operations.
29. Whereas the employer has the prerogative to transfer its employees as part of its administrative functions, where the employer is bound in a Recognition Agreement with a trade union, the provisions of Article 41(4)(a) and (b) of *the Constitution* are also binding;
- (4) Every trade union and every employers' organisation has the right—
- a. to determine its own administration, programmes and activities;
- b. to organise; and ...
30. A trade union representing employees should not be interfered with in terms of undertaking its administrative functions, programmes and activities or the right to organise within its ranks.
31. Further, these constitutional protections are given meaning under Section 4, 6 and 8 of the LRA all cumulatively meant to allow a trade union to plan and organise its administration and lawful activities. Additionally, the *Employment Act*, 2007 give an employee who is engaged in union activity the protection against victimisation under Section 46(d);
- (d) the participation or proposed participation of an employee in the activities of a trade union outside working hours or, with the consent of the employer, within working hours;
32. Hence, in recognition of these protections under *the Constitution* and the law, the listed officials of the claimant ought and should be allowed to serve under their mandate without far-reaching disruptions. The shop stewards being representatives of the claimant at various points of their duties, these positions not being part of the national listed officials with key tasks such as being a trustee or assistant national treasurer like Jared M Masinga and Daniel Yatich respectively, their current locations for the purpose of undertaking their national mandate for the claimant should suffice pending the hearing and determination of the claim herein.
33. The respondent's case is that some shop stewards and claimant's members have since disassociated themselves from the claim herein and proceeded to report to their new stations. Others have not reported following the court orders herein.
34. In his Further Replying Affidavit, Mr Ndiema asserted that there is no member of the claimant who has written to him disassociating with the claim herein.
35. It would be necessary for the court to get evidence on the current status of the matters now contested by both parties. The nature of transfers, those who have voluntarily reported, those coerced to report and the operational needs of the respondent. The contestations through the affidavits do not offer sufficient material for the court to make a substantive order in this regard.
36. To secure all parties pending the hearing of the main claim, the claimant officials Jared Masiga being the National Trustee was moved from Isiolo to JKIA and Daniel Yatich was moved to Eldoret and then Lodwar from JKIA shall retain their positions in their current stations as at 19 September 2023.
37. All other persons transferred to new locations and stations shall comply as directed without any victimisation and under the protection of Orders herein issued on 19 September 2023 pending the hearing of the main claim herein. These employees hence secured shall be allowed 14 days to comply as lawfully directed by the respondent.



38. The court brings to the attention of the respondent the provisions of Section 46(h) of the [Employment Act](#), 2007;

- (h) an employee's initiation or proposed initiation of a complaint or other legal proceedings against his employer, except where the complaint is shown to be irresponsible and without foundation; or

39. The communications referenced by the respondent arising from the claimant's members with regard to any alleged disassociation with the matters herein shall be brought to the claimants' attention in terms of Section 59 of the LRA. As parties are bound to secure fair labour relations, the respondent is required to notify the claimant of any matters brought to its attention in good faith and to foster peaceful industrial relations. Any matters negating the recognition of the claimant by the respondent is to undermine these relations. Equally the claimant has a duty to check on its members through its ranks.

40. Parties bound under a Recognition Agreement, there will be no order on costs.

41. Accordingly, at this stage the court finds no contempt of court orders of 19 September 2023; on application filed on 18 September 2023, the following orders are hereby issued;

- a. The following officials of the claimant shall retain their current locations and positions;
 - i. Jared M Masinga, the National Trustee was moved from Isiolo to JKIA;
 - ii. Daniel Yatich was moved to Lodwar from JKIA but he remains on annual leave;Unless there is a mutual agreement between the parties
- b. All other persons issued with letters of transfer shall abide as directed and given 14 days to comply;
- c. No member of the claimant addressed (a) and (b) above shall be victimised with regard to matters addressed herein and in terms of Section 46(h) of the [Employment Act](#), 2007;
- d. Each party to bear own costs.

Taking into account the above, hearing directions shall issue.

DELIVERED IN OPEN COURT AT MOMBASA THIS 16TH DAY OF NOVEMBER 2023.

M. MBARŪ

JUDGE

