



REPUBLIC OF KENYA



**Kiarie v UAP Holdigns Ltd (Employment and Labour Relations Cause  
1091 of 2018) [2023] KEELRC 3417 (KLR) (18 December 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3417 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1091 OF 2018**

**K OCHARO, J**

**DECEMBER 18, 2023**

**BETWEEN**

**DOMINIC KIARIE ..... CLAIMANT**

**AND**

**UAP HOLDIGNS LTD ..... RESPONDENT**

**RULING**

**Introduction**

1. On the 5<sup>th</sup> of October 2022, this Court on an application by Counsel for the Claimant ordered witness summons to be issued to, Dr Joseph B. Wanjau and Ms Susan Githuku. The summons was consequently issued and served on the two. Pursuant to the summons, Ms Susan Githuku, attended court and testified on the 26<sup>th</sup> of May 2023.
2. A day before the hearing date above mentioned, the other proposed witness filed a Notice of Motion Application dated 24<sup>th</sup> May 2023, which was expressed to be under Order 51 Rule 1, Order 16 Rule 5 of the *Civil Procedure Rules* 2010, and Section 3A of the *Civil Procedure Act*, seeking;
  - I. That the witness summons issued herein on the 5<sup>th</sup> October 2022 and thereafter extended by this Honourable Court requiring Dr Joseph Barrage Wanjui to personally attend Court and testify on behalf of the Claimant herein, be lifted.
  - II. That the Claimant does bear the costs of this Application.
3. The application is premised on the grounds set out on the face of the application and the supporting affidavit sworn by one Joseph Wanjui on the 24<sup>th</sup> May 2023.
4. The Claimant resisted the application through a replying affidavit sworn on the 21<sup>st</sup> of August 2023.
5. Following this Court's directions, the application was canvassed by way of written submissions.



## **The Application**

6. It is contended that the proposed witness is 90 years old, frail and in need of constant medical care. Consequently, he will not be able to personally attend Court.
7. It is further stated that the dispute herein relates to corporate matters that took place 8 years ago hence it is not necessary for the Applicant/ Proposed witness to personally attend court to testify.
8. The Applicant argues that he stands to suffer serious prejudice by attending Court and that the justice of this matter demands that the orders sought in the instant application be granted.

## **The Response**

9. The Claimant/ Respondent states that the affidavit in support of the application has been sworn by an alleged son of the proposed witness. The matters deponed to in the affidavit could only be by the proposed witness. The deponent of the affidavit did not have locus standi to swear the affidavit.
10. The Claimant/Respondent further states that the allegation that the proposed witness is 90 years old is not supported by any evidence. Further, it was contended that the proposed witness as of 23<sup>rd</sup> May 2023 was admitted in the hospital, however, the Applicant is not clear whether or not he is currently in or out of the hospital.
11. The Claimant further contends that the Applicant has failed to disclose his medical condition to enable this Court to assess whether as a result of the specific medical condition, he is permanently unable to attend court to testify. Further, the mental capacity of the proposed witness is not in doubt as there are no assertions made that his memory and capacity to communicate is impaired in any way.
12. Court sessions are conducted virtually, the proposed witness, Dr. Wanjui, will not be required to physically come to court. Indeed, the witnesses that have thus far testified in this matter have done so virtually.
13. The Claimant argues that the medical report dated 23<sup>rd</sup> of May 2023, which suggests that the proposed witness is not medically fit to attend any court matters should not be allowed to influence the decision of this Court. The Applicant/Proposed witness recently filed an action concerning a shareholder dispute regarding a listed company, Limuru Tea PLC. He was active in a recent matter on shareholding of the Company as can be discerned from an article in the Business Daily of 13<sup>th</sup> June 2022 and Nation Newspaper dated 7<sup>th</sup> March 2023.
14. He further asserts that as much as the health reasons have been presented as the primary reason for lifting of the summons, it seems contrived to frustrate his case. Further, non-attendance by Dr. Joe Wanjui continues to hinder the expeditious disposal of this case.
15. The Claimant states that pursuant to the Court's directions issued on the 12<sup>th</sup> May 2023, his Counsel provided a scope of evidence that the Applicant is required to testify on. Further, his advocate did issue a cheque for Kshs. 10,000 to take care of the witness's court attendance expenses, but the cheque was returned by his Counsel.
16. It is alleged that the Applicant as recently as April 2022 made a television appearance on Citizen TV where he eloquently spoke on the legacy of His Excellency Hon. Mwai Kibaki as his close friend and associate. He spoke on matters that happened several years ago, a testament to his capacity to remember and communicate appropriately.



17. Based on the documents so far tendered as evidence by CW1 and CW2, the Applicant is a critical witness for the Claimant who will shed light on the circumstances giving rise to the termination of his employment. The Court must note that under Section 47[5] of the Employment Act, he has a legal burden of proving that an unfair termination of employment or wrongful dismissal occurred.

### **Submissions**

18. This Court has keenly considered the submissions filed herein. Considering the ground upon which the instant application fails as shall come out shortly hereinafter, I find it unnecessary to bring out in detail the submissions, in this ruling.

### **Determination**

19. I have carefully considered the instant application, the manner it is couched, the grounds in support thereof and the supporting affidavit. Considering the circumstances of this matter and the nature of the order sought to be set aside, I do not hesitate to conclude that the only appropriate application that could be made for consideration by this Court is an application for review of the order, under the provisions of Section 80 of the Civil Procedure Act, and Rule 33 of this Court's Procedure Rules. The Applicant has not invoked the jurisdiction.

20. Rule 33 provides:

- “ 1. A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling-
- a. If there is discovery on new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;
  - b. on account of some mistake or error apparent on the face of the record;
  - c. if the judgment or ruling requires clarification; or
  - d. for any other sufficient reason.....”

21. From the provision of the law cited above, it is clear that the discretion to review an order or judgment is a fettered one. It is only exercisable in favour of the person seeking an order of review, where he or she demonstrates the existence of any of the specific factors envisioned therein. Blurred by the manner he has approached this Court, the Applicant did not at all strive to establish the existence.

22. By reason of the premises, it is my view that the Applicant improperly approached this Court. Further, he hasn't established any factor that can attract an order for review by this Court. The instant application is for rejection.

23. In the upshot, the Applicant's application is hereby dismissed.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 18<sup>TH</sup> DAY OF DECEMBER, 2023.**

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**OCHARO KEBIRA**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 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.

A signed copy will be availed to each party upon payment of Court fees.

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**OCHARO KEBIRA**

**JUDGE**

