



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1353 OF 2018

(Before Hon. Justice Hellen S. Wasilwa on 23rd May, 2019)

FRANKLINE LUSEGA KIDULA.....CLAIMANT

-VERSUS-

KENYA AIRWAYS.....RESPONDENT

RULING

1. The Plaintiff/Applicant, Frankline Lusega Kidula filed a Notice of Motion application dated 05/06/2017 which was dismissed for lacking foundation because the suit had been dismissed on 15/06/2016 for want of prosecution.

2. The Plaintiff filed another Application dated 17/01/2018 and on 25/07/2018, Justice Mbogholi Msagha granted him orders to reinstate the suit and for the Application dated 05/06/2017 to be heard on priority basis at the Employment Court.

3. This Application is brought under *Order 11 Rule 3(2)(d) and Order 51 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act* against the Respondent/Defendant, Kenya Airways. He seeks for orders compelling the Defendant to produce and or avail certain documents for his inspection and photocopying, for the Court to set the date, time and venue for the inspection of the said documents and costs of the Application. The said documents are namely:-

1. *Plaintiff's Application letter submitted to Kenya Airways in response to advertisement in Daily Nation dated Wednesday 21/04/2004.*
2. *Part A of Kenya Airways (Operations Manual) 2007/2008.*
3. *Part D of Kenya Airways (Training Manual) 2007/2008.*
4. *Copy of Embraer training syllabus 2007/2008.*
5. *Total training cost up to the point of termination.*
6. *Kapla collective bargaining agreement covering the period 2007.*
7. *Route training records of Christine Chege, James Kigotho, Francis Ihure, Keva Kibiru, Vincent Ngeno and Njeru Kimotho.*
8. *List of crew on board airplane E170 on 24/06/2008 (Nairobi-Mombasa-Nairobi-Mombasa).*
9. *Minimum equipment list of E170 and the SOPA manual in force at the time.*
10. *1st Route training and 1st base training report by Capt. Fabio.*
11. *Progress assessment form by Kenya Airways (normally just one).*
12. *Capt. Graham's simulator report in 2007 (B-CHECK) done in G-CAT (Oxford Aviation) Crew: (a) David Oduda (b) Kidula Frankline.*

4. The Application is founded on the grounds that:-

a) Pleadings closed in the year 2010.

b) Defendant has refused to provide the Plaintiff/Applicant with the documents necessary to prove the Applicant's case in spite of many requests/demands.

c) The refusal to provide the Plaintiff/Applicant with the documents means parties cannot take a date for the pre-trial conference and directions.

d) This has consequently delayed prosecution and conclusion of this suit expeditiously.

e) Other grounds and reasons to be adduced at the hearing thereof.

5. In his Supporting Affidavit the Applicant avers that after perusing the Defendant's documents, he discovered it had not included key documents that were necessary for his case and thus requested for the same through his advocates. That as a result of the Defendant's refusal and delay to supply the said documents, he seeks the assistance of this Honourable Court for inspection or to be supplied with certified copies of the listed documents. That without these documents, this Court will be denied the chance to fully appreciate his case against the Defendant before rendering judgment in the case.

6. The Respondent filed a Replying Affidavit dated 18/01/2019 sworn by its Senior Legal Counsel, Laura Wandera who avers that the *Plaintiff's Application letter submitted to Kenya Airways in response to advertisement in Daily Nation on 21/04/2004* sought by the Applicant ought to be in his possession and that the Respondent cannot be compelled to produce the same.

7. That the Respondent's document storage and archiving policies is for a period of 10 years and so it cannot be in possession of the other listed documents as they all date back to 2007. That some of the documents contain information relating to third parties thus their disclosure would likely infringe on the individuals' right to privacy under **Article 31 of the Constitution** and that the Applicant has not provided a basis warranting disclosure of the said documents.

8. That the production of a *Minimum equipment list of E170 and the SOPA manual in force at the time* is subject to safety and security concerns in respect of its aircraft and that the Applicant has also not provided any basis warranting production of the same.

9. The Applicant filed a Further Affidavit dated 07/02/2019 wherein he avers that the submitted application letter he is requesting will prove that he applied to pursue a career as a pilot following the Defendant's advert and also identify his classmates/pilot trainees.

10. That the Defendant's claim that it cannot produce the documents because of an internal archive cut off policy is not true because the said Manuals Part A and Part D are a mandatory requirement by KCAA/IATA safety and operational audit and which are reviewed biannually.

11. Further, that he is asking for Captain Graham's report on him and not on crew David Odida and that together with Captain Fabio, the two captains were foreign expert examiners that trained at the stated time. That the people listed in 2(g) were fellow trainees who were treated in a similar manner as he in terms of the syllabus en route training and that it is therefore necessary to avail their route training records.

12. That in view of the foregoing, the issue of infringing Article 31 of the Constitution does not therefore arise and that SOPA manual should be availed to him and this Court because the Defendant has mentioned it.

Submissions

13. Parties made oral submissions in Court on 07/03/2019 with the Applicant's advocate stating that they have given the basis of the need for these documents in their two affidavits. That the issue of 10 years is a lie and he refers the Court to the Respondent's affidavit sworn by Laura Wandera dated 02/03/2018, which does not say anything about the 10 years. That paragraphs 6, 8, 9 and 12 of the said affidavit show they were angry with the Applicant's notice and that a year later the Respondent is talking of the issue of 10 years.

14. The Respondent's advocate on the other hand submitted that the Applicant is opposed to the affidavit sworn by Laura.

15. I have examined all the averments of the Parties herein. The main issue in this application is about the production of documents which the Applicant indicate that are necessary for proving his case.

16. The Respondents on the other hand insist that they no longer have some documents due to the 10 year rule archiving policy and that some documents relate to 3rd Parties who are not Parties in this case and therefore their rights to privacy will be infringed upon.

17. From the pleadings herein, the Response to the Claim in particular, I take note of the documents filed by the Respondents. Amongst them are the Claimant's appointment letter, which clearly show that the Claimant applied for the job and was interviewed and then given the appointment.

18. It is not clear how the letter applying for the job of trainee pilot would add value to the Claimant's case given that the Respondent acknowledged employing him following a recruitment process.

19. On the documents in respect of 3rd Parties – Document No.7 – since the Parties are not Parties to this Court, I am reluctant to order their production and I decline to allow the application to produce the said documents.

20. As for the other documents, they relate day to day operation of the Respondent including the CBA in force in 2007. The explanation that the said documents are archived after 10 years is not proved as there is no evidence of policy relied upon by the Respondent to archive such documents after 10 years as stated.

21. The Applicant has stated that he needs the said documents to prove his case. He had sought their production by the Respondent and the Respondent did not oblige him.

22. I find that he is entitled to have the documents as sought and therefore allow the application to produce documents listed as Nos. 2, 3, 4, 5, 6, 8, 9, 10, 11 and 12.

23. Costs of this application in the cause.

Dated and delivered in open Court this 23rd day of May, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of

Doha for Respondent – Present

Mutua holding brief Nabutete for Claimant