



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF**  
**KENYA AT NAIROBI**  
**CAUSE NO 1889 OF 2017**

**CAPTAIN BHUPINDER SINGH KALSI.....1<sup>ST</sup> CLAIMANT**

**CAPTAIN KENNETH NJAU KIMANI.....2<sup>ND</sup> CLAIMANT**

**VERSUS**

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

**RULING**

1. By a motion dated 15<sup>th</sup> December, 2017 the respondent sought orders among others that:

*a. That all the documents, pleadings, proceedings, evidence and material filed in this matter be granted the status of 'confidential' and off limits for publishing or circulation by any person or media house and the proceedings in this matter be conducted in camera until hearing, determination and conclusion of the matter.*

*b. That the claimants be and are hereby restrained from publishing, either by themselves, agent, Advocate, employee or any other person howsoever receiving or being in possession of any pleadings, documents, evidence, proceedings, and all material filed or adduced in this matter until hearing, determination and conclusion of the matter.*

*c. That all media and including media houses and companies, individuals and social media, be and are hereby barred and restrained from obtaining and/or sharing any pleadings, documents, evidence, proceedings and all material filed or adduced in this matter with third parties, publishing or in any way causing to be published all the said pleadings, documents, proceedings and all material filed or adduced in this matter until the hearing, determination and conclusion of this matter.*

2. The application was based on grounds inter alia that:

*a. The respondent is undergoing a Capital Optimization process, which process is meant to turn around the performance and operations of the respondent and return it to profitability.*

*b. To a large extent, this matter will revolve around the competence of the claimants as former pilots of the respondent. In the course of proceedings, the court will be called to determine matters of capacity of the claimants as pilots.*

*c. The respondent will produce confidential documentation in its defence against the claim for unlawful termination and all the allegations made in the statement of claim.*

*d. The information which will be adduced by witnesses will also be of a highly confidential nature, and is not information that the respondent wishes to be published in the public domain.*

*e. The ongoing capital optimization process is extremely delicate and therefore requires that the respondent to be protected by this honourable court from any publicity which may jeopardize the process.*

*f. The documents filed in this matter, the proceedings, all evidence and material obtained in the continuance of this case, if published would gravely endanger the ongoing capital optimization process.*

*d. Without granting the respondent the prayers prayed herein, the respondent will be unable to fully defend itself and the proceedings will therefore defeat the precepts of natural justice.*

3. The application was further supported by the affidavit of Hellen Mathuka, the respondent's Ag Chief Financial Officer who reiterated in the affidavit the grounds upon which the application was brought and annexed a copy of the brief on respondent's capital optimization process.

4. The claimants opposed the application and filed grounds of opposition contending that the court is bound by the National values and principles of Governance enshrined under article 10 of the Constitution requiring the exercise of transparency during the hearing of suits filed before it. Claimants further contended that under article 50 of the Constitution they have a right to have their dispute resolved in a public hearing before a court.

5. According to the claimants the alleged optimization process being undertaken by the respondent relates in no way to the suit at hand as the suit involves the unfair termination of the claimants' employment. According to the claimants the documents the respondent intend to produce touch on claimants' expertise as pilots and these cannot be deemed to be confidential in any way as they impute on the claimants' capacity as pilots.

6. In the submissions in support of the application, Mr Munyaka stated that the basis of the matter revolves around the competence of the claimants who were former pilots of the respondent. This meant in the course of the proceedings the course will determine matters regarding capacity of the claimants as pilots and this was a very sensitive issue to all stakeholders of the respondent's optimization process. There was likelihood that the process will be negatively affected if the information the respondent intends to use is carelessly broadcasted to the press.

7. According to counsel the respondent will be required to produce confidential information in its defence against the claim for unfair termination as well as other allegations raised by the claimants. This information according to Mr Munyaka ought not to be published in the public domain as it relates to public safety of the two claimants. According to counsel, the information is likely to be sensational and would negatively affect the respondent. Counsel further submitted that the respondent had lately been in the media and the reporting had been mostly biased against it.

8. According to counsel, the respondent lacked the capacity to police the media or seek corrections where the media has misrepresented or has been biased. In support of the submission and the application generally, counsel relied on the case of **Senator Johnstone Muthama Vs Tanathi WSB & 2 Others** where Justice Odunga observed that the court has discretion to direct in appropriate circumstances that certain parts of the evidence be heard in camera. This was however an exception to the general rule and ought to be exercised as at when circumstances dictate. Counsel further relied on the case of **Advtech Resourcing (Pty) Ltd Vs Kutin 2007(4) ALL SA** which gave criteria to be applied before information can be classified as confidential. That is to say the information must involve and be capable of application in the trade and industry that is it must be useful, second, the information must not be public knowledge and public property. It must be known to a restricted number of people or to a closed circle. Thirdly the information must be of economic value to the person seeking to protect it.

9. Mr Change for the claimant submitted that court proceedings unless for extremely defined specifications in law are supposed to take place in the open and the right to public hearing is provided for under article 50 of the Constitution. Counsel however acknowledged that under article 50(8) a private hearing can take place but anybody including the respondent who seeks a private hearing ought to make a case for it based on article 50(8) which only recognizes protection of witnesses or vulnerable persons, morality and public order or national security. According to counsel, the respondent has failed in its bid to make out a case for a private hearing that meets the threshold set under article 50(8) of the Constitution. In support of the submissions counsel relied on the case of **Miller Vs Miller (No 2) 1988 KLR and Lelano J Salano Vs Intercontinental Hotel**.

10. As rightly submitted by both parties, court proceeding unless special circumstances delimited under article 50 (8) have been met, ought as a matter of transparency and integrity of the court process, be conducted in open court. The acknowledgement that proceedings can be conducted in camera is more of an exception than a general rule. It is an exception which ought to be invoked sparingly and in exceptional cases. Good cause must be shown why a standard constitutional requirement should be excepted.

11. The applicants have averred that this dispute concerns the competence of the claimants as pilots and in defending the claim, they will be required to file sensitive documents which might jeopardize the ongoing optimization process of the respondent. Apart from the circular to shareholders in respect of the proposed restructuring of the respondent's debts and equity together notice of proposed special resolution to be made at the respondent's extra ordinary meeting, the respondent has not exhibited with the application either a redacted version of the documents it claims are sensitive or provided an executive summary of the alleged sensitive documents or information to enable the court be sufficiently informed of the nature of the documents or information in order to decide if they indeed merit the invocation of an in camera hearing in line with article 50(8) of the constitution.

12. Whereas the court would be willing to appreciate the respondent's concern from the standpoint of an airtime, the court must not lose sight of the requirement that to exercise such a far reaching jurisdiction it must be sufficiently convinced that indeed on the material laid before it an in-camera hearing is merited. Mere allegation not backed by evidence would not be sufficient to qualify a basic constitutional requirement that all court proceedings be in open court. In the case of **Senator Muthama Vs Tanathi WSB & 2 Others** relied on by the applicant, they stated in the relevant part as follows:

*“However just like in litigation the court has the discretion to direct in appropriate circumstances that certain parts of evidence be heard in camera”*

13. What this implies is that the exclusion of information considered sensitive cannot be done in advance. That is to say a court cannot throw a general fact of secrecy before the matter is set for hearing. It is appreciated that the rules of this court and civil litigation generally now requires that pleadings are filed together with supporting documents. This could understandably be the respondent's concern that once the documents or information it considers sensitive are filed without a court order barring their disclosure to third parties who have nothing to do with the suit, they stand exposed to prejudice. This fear however can be resolved by other means that a blanket order on secrecy.

14. In the circumstances the court will decline the orders sought in the application and direct that the respondent files and serves a response to the claim within 14 days of this ruling however, such response where necessary will make reference only to the documents or information concerned if deemed sensitive by the respondent without having to attach copies of the said documents.

15. The claimant shall however have the right to inspect and take notes from such documents for the purpose of prosecuting their claim before the court. Either party shall however in an appropriate case have the liberty to apply for any order or direction concerning production or otherwise of any document or information necessary for the conducts of the proceedings.

16. It is so ordered.

**Dated at Nairobi this 7<sup>th</sup> day of December, 2018**

**Abuodha Jorum Nelson**

**Judge**

**Delivered this 7<sup>th</sup> day of December, 2018**

**Abuodha Jorum Nelson**

**Judge**

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.