

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS
COURT AT KERICHO

CAUSE NO. E032 OF 2024
(Before Hon. Lady Justice Anna Ngibuini Mwaure)

WILLIAM KIPCHIRCHIR.....

.....CLAIMANT

VERSUS

**PAUL SIMBA ARATI, GOVERNOR KISII
COUNTY..... 1ST
RESPONDENT**

**THE COUNTY GOVERNMENT OF KISII..... 2ND
RESPONDENT**

**THE COUNTY PUBLIC SERVICE
BOARD OF KISII..... 3RD
RESPONDENT**

RULING

Introduction

1. The Claimant filed a Memorandum of Claim dated 24th October 2024 seeking the following orders that:

- a. That the Respondents jointly and severally be ordered to pay in full all unpaid salary arrears, Employer's Provident Fund contribution, National Social Security Fund (NSSF) contribution and house allowance***

**due to the Claimant, totalling
Kshs.7,746,516.50**

b. Payment of leave allowance, payment in lieu of leave days that were due but not taken, including any other benefit due to the Claimant

c. Payment of costs of the Claimant.

2. The Respondent filed a Preliminary Objection dated 19th February 2025 on the following grounds that:

1. This Honourable Court lacks jurisdiction to try this matter as it offends the provisions of section 15 of the Civil Procedure Act, Cap 21, as read with Rule 6 of the Employment and Labour Relations Court(Procedure) Rules, 2024.

2. This claim offends the provisions of section 7 of the Civil Procedure Act, Chapter 21.

3. Parties canvassed the Preliminary Objection by way of written submissions.

Respondent's submissions

4. The Respondent invoked **Section 7 of the Civil Procedure Act**, arguing that the current suit is barred by the doctrine of res judicata, as the issues raised were previously litigated and determined in

ELRC No. 107 of 2015 and ELRC Claim No. 91 of 2018. In support, the Respondent cited the case of ***John Florence Maritime Services Limited & Another v Cabinet Secretary Transport & Infrastructure & 3 Others [2021] KESC 39 (KLR)***, where the Supreme Court emphasized a broad interpretation of res judicata, requiring identical or substantially similar issues and parties, and a competent court's determination.

5. The Respondent submitted that the Claimant's allegations of unjust dismissal from Kisii County Government and entitlement to retirement benefits and salary dues were previously dismissed as fraudulent and vexatious. Additionally, in ***Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) E. A 696***, the Respondent raised a preliminary objection on grounds of geographical jurisdiction, noting logistical challenges in hearing the matter in Nakuru instead of Kisii, which has a competent ELRC.
6. Consequently, the Respondent seeks to have the suit struck out with costs.

Claimant's submissions

7. The Claimant submitted that the suit was properly filed at the Kericho Employment and Labour Relations Court (ELRC) under **Rule 6(1)(a) of the ELRC (Procedure) Rules, 2024**, which permits filing where the cause of action arose or where the Claimant resides or works for gain. Despite the Respondents being based in Kisii, the Claimant resides and worked in Kericho following his reinstatement in Kericho ELRC No. 107 of 2015 and subsequent retirement in 2017.
8. The Claimant submitted that the Respondents' Preliminary Objection fails to cite the specific sub-rule and lacks merit, especially given the ELRC's nationwide jurisdiction under **section 12 of the Employment and Labour Relations Court Act, 2011**. The Claimant also references prior related cases, Kericho ELRC No. 107 of 2015 and No. 91 of 2018, as precedent.
9. On the issue of *res judicata*, the Claimant contends that it requires factual analysis and cannot be raised via P.O, citing the cases of **Mukisa Biscuits Manufacturing Co. Ltd V West End Distributors Ltd [1969] EA 696** and **George Kamau Kimani & 4 others V County Government of Trans-Nzoia & Another [2014] KEELC 104 (KLR)**, which affirm

that preliminary objections must be based on pure points of law and not require factual ascertainment. The Claimant urges dismissal of the P.O. with costs and requests that the matter proceed to a full hearing.

Analysis and determination

10. The court has considered the Preliminary objection together with the submissions; the issue for determination is whether the preliminary objection is merited.

11. In ***Mukisa Biscuits Manufacturing Co. Ltd V West End Distributors Ltd (supra)***, Law, JA wrote that: -

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which, if argued as a preliminary point, may dispose of the suit.”

12. Sir Charles Newbold, P, in his concurring opinion, added, in part, that: -

“A preliminary objection is in the nature of what used to be called a demurrer. It raises a pure point of law, which is argued on the

assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

13. In ***John Florence Maritime Services Limited & Another V Cabinet Secretary Transport & Infrastructure & 3 Others (Supra)***, the Supreme Court stated as follows:

“For res judicata to be invoked in a civil matter, the following elements had to be demonstrated:

- a. there was a former judgment or order which was final;***
- b. the judgment or order was on merit;***
- c. the judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and***
- d. there had to be between the first and the second action identical parties, subject matter and cause of action.***

The doctrine of res judicata was based on the principle of finality, which was a matter of public policy. The principle of finality was one of the pillars upon which the judicial system was founded and the doctrine of res

judicata prevented a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensured that litigation came to an end, and the verdict duly translated into fruit for one party, and liability for another party, conclusively.”

14. In this case, the Claimant had previously filed Kericho ELRC Case No. 107 of 2015, where Justice D.K. Njagi Marete, on 19th July 2016, entered judgment in his favour by declaring the interdiction letter dated 21st May 2013 (Ref: KISII/C/15(1)) null and void from the outset, and ordered the Claimant to resume duty on 20th July 2016. Subsequently, in Kericho ELRC Claim No. 91 of 2018, Justice Onesmus Makau dismissed the case with costs on 22nd September 2022, citing the Claimant’s failure to specify or quantify the reliefs sought in his pleadings, and emphasized that the court cannot grant unpleaded remedies. However, the court clarified that the Claimant remains entitled to pursue his contractual benefits, including pension and salary.

15. The Claimant's case was dismissed by the High Court vide Claim No. 91 of 2018 by the judgment dated 22nd September 2022. The Claimant took another two years to bring this case afresh. It is only unfortunate the Respondents did not avail the judgments referred in the previous suits being case No. 107/2015 and Cause No 91/2018. The court has nothing to compare with the present suit in order to determine if the same is *res judicata*.

16. Indeed, the case of *res judicata* should be interrogated by examining the case in issue from the previous one and whether the same have the same subject matter and same parties. These matters cannot be clearly interrogated through a Preliminary objection which we well know handles pure points of law as well stated in the case of ***Mukhisa Biscuits Manufacturing Co. Ltd -VS- West End Distributors Ltd (1969) EA*** where Lord Newbold stated that a proper Preliminary objection constitute a pure point of law.

17. In the case ***of George Kamau Kimani & 4 Others - VS- County Government of Trans Nzoia and Another (2014) eKLR*** the court held:-

"I have considered the points raised by the first defendant. All those points can be

argued in the normal manner. They do not qualify to be raised as Preliminary Points. One cannot raise a ground of res judicata by way of preliminary objection. The best way to raise a ground of res judicata is by way of notice of motion where pleadings are annexed to enable the court to determine whether the current suit is res judicata. Professor Sifuna only annexed a ruling in respect of a case which was struck out. This is not a proper way of raising the issue of res judicata. The other points raised in the preliminary objection are issues which require ascertainment of facts by way of evidence. They cannot be brought by way of preliminary objection. In this regard I adopt the words of Sir Charles Newbold P. in Mukisa Biscuit case (Supra) which are applicable in the present circumstance. I find that the preliminary objection by the first defendant lacks merits. The same is hereby dismissed with costs to the plaintiffs and the second defendant.”

18. To be fair for the ends of justice to be met, the court would rather invest its time to hear either an application to determine if the particular case has been litigated and determined before in order to invoke the doctrine of *res judicata* or in the alternative to hear the suit in its entirety.

19. The Preliminary objection therefore does not meet the tenets required to qualify finding justification in a Preliminary objection.

It is dismissed and parties are ordered to proceed to hearing as appropriate.

20. Costs will be in the cause.

Orders accordingly.

Dated, Signed and Delivered virtually at Nakuru this 11th Day of November, 2025.

ANNA NGIBUINI MWAURE
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 15th March 2020 and subsequent directions of

21st 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 Civil 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.

ANNA NGIBUINI MWAURE
JUDGE