



**Teachers Service Commission v Simatei & another (Appeal E031 of 2022)  
[2025] KEELRC 3442 (KLR) (27 November 2025) (Judgment)**

Neutral citation: [2025] KEELRC 3442 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
APPEAL E031 OF 2022  
MA ONYANGO, J  
NOVEMBER 27, 2025**

**BETWEEN**

**TEACHERS SERVICE COMMISSION ..... APPELLANT**

**AND**

**ABRAHAM K SIMATEI ..... 1<sup>ST</sup> RESPONDENT**

**KENYA COMMERCIAL BANK LIMITED ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Ruling of the Principal Magistrate's Court at ITEN  
in PMCC No. E005 of 2022 (Hon. Charles Kutwa delivered on 15th June 2022))*

**JUDGMENT**

1. This Appeal arises from a ruling delivered by the trial court in Iten SPMC No. E005 of 2022 on the 15<sup>th</sup> June 2022.
2. The brief background of the matter is that vide a Complaint dated 26<sup>th</sup> January, 2022, the 1<sup>st</sup> Respondent instituted proceedings against the Appellant and the 2<sup>nd</sup> Respondent seeking a refund of Kshs 164,565.35, which was wired into his account on 25<sup>th</sup> September 2018 and subsequently reversed by the 2<sup>nd</sup> Respondent on 28<sup>th</sup> September 2018.
3. The 1<sup>st</sup> Respondent claimed that during his employment with the Appellant from 16<sup>th</sup> January 2018 to 21<sup>st</sup> March 2019, he only received two months' salary in August and October 2018, each of Kshs 25,096.85.
4. In its Statement of defence, the 2<sup>nd</sup> Respondent contended that the amount paid into the 1<sup>st</sup> Respondent's account was salary for September 2018 but reversed by the 2<sup>nd</sup> Respondent pursuant to the Appellant's instructions as the 1<sup>st</sup> Respondent was under suspension.



5. The Appellant entered appearance through a Memorandum of Appearance dated 15<sup>th</sup> February 2022. It thereafter filed a Notice of Preliminary Objection dated 3<sup>rd</sup> March 2022, contending that:
  - i. The suit is misconceived, premature, bad in law, incompetent, unmerited, an afterthought, misadvised, baseless, frivolous, scandalous, vexatious and solely intended to besmirch the 2<sup>nd</sup> Defendant.
  - ii. The entire suit amounts to a gross abuse of the Court process in that a similar suit with similar cause of action and parties has been filed ELRC No. E04 of<sup>nd</sup> Defendant (the Appellant herein) and seeking similar prayers is still pending determination before a Court with competent jurisdiction. Instituting multiplicity of actions on the same subject matter, against the same Party ought not to be countenanced by the Honourable Court. The same is tantamount to sub judice and offends the provisions of section 6 of the *Civil Procedure Act*.
  - iii. The suit as against the 2<sup>nd</sup> Defendant is frivolous and amounts to gross abuse of the court process since the same has not raised any justifiable issue and/or<sup>nd</sup> Defendant hence there is apparent Misjoinder of the Commission as a party herein reasonable cause of action against the 2
6. The trial court directed that the preliminary objection be canvassed by way of written submissions, which both parties duly filed. Upon considering the submissions, the learned trial magistrate, in a ruling delivered on 15<sup>th</sup> June 2022 dismissed the preliminary objection with costs, holding that the issues in SPMCC No. E005 of 2022 were not relevant to ELRC No. E004 of 2021.
7. Aggrieved by the said ruling, the Appellant lodged the instant appeal through a Memorandum of Appeal dated 29<sup>th</sup> June 2022 raising the following grounds:
  - a. That the Learned Magistrate misdirected himself on the evidence and the law on the matters before him consequently making a wrong and erroneous decision in law and fact particularly that the subject matter and/or the cause of action in ELRC No. E004/2021 and SPMCC No. E005/2022 are not directly and substantially in issue hence not the same.
  - b. That the Learned Magistrate erred in law and fact when he failed to find that filing of SPMCC No. E005/2022 offends the provisions of section 6 of the *Civil Procedure Act* hence tantamount to sub judices.
  - c. That the Learned Magistrate erred in law and fact when he failed to find that the parties in ELRC No. E004/2021 and SPMCC No. E005/2022 are the same and that the mere addition of a party or parties does not alter the pith and substance of the suit.
  - d. That the Honourable Court misdirected itself when it failed to find that the issues raised against the Appellant in SPMCC No. E005/2022 ought to have been and/or were adjudicated in ELRC No. E004/2021.
  - e. That the Learned Magistrate erred in law and fact when he failed to consider that all of the prayers sought in SPMCC No. E005/2022 he had already granted in ELRC No. E004/2021.
  - f. That the Learned Magistrate erred in law and fact when it failed to find that allowing the subsequent proceedings before it amounts to double jeopardy against the Appellant.
  - g. That the Honourable Court misdirected itself in giving consideration to irrelevant matters and/or failed to give consideration to relevant matters in arriving at its decision.



- h. That the Honourable Court failed to appreciate and consider the submissions and arguments, and the authorities filed by the Appellant on the issues, which failure has occasioned a miscarriage of justice.
  - i. That the Learned Magistrate has not provided legal and/or reasoned justification on the Ruling he delivered and orders issued.
  - j. That the Learned Magistrate erred in failing to consider that allowing the Respondent's claim on the issue would greatly prejudice the Appellant.
  - k. That the Ruling and Order of Court issued on 15<sup>th</sup> June, 2022 is erroneous in law and fact, contrary to equity, judicial precedent and a gross miscarriage of justice.
8. Consequently, the Appellant sought orders that: -
- i. The appeal be allowed
  - ii. The Ruling delivered by the Honourable Court on 15<sup>th</sup> June 2022 be overturned and the Respondent's claim as against the Appellant be dismissed with costs
  - iii. The costs of the appeal and of the proceedings before the lower court be borne by the respondent
  - iv. Such other orders be made to meet the ends of justice as the Honourable Judge may deem appropriate
9. Pursuant to the directions issued on 24<sup>th</sup> February 2025, the appeal was disposed of by way of written submissions. The Appellant's submissions are dated 15<sup>th</sup> April 2025, the 1<sup>st</sup> Respondent's submissions are dated 6<sup>th</sup> May 2025 and the 2<sup>nd</sup> Respondent's submissions are dated 26<sup>th</sup> April 2025.
10. In its submissions, the Appellant canvassed the grounds of appeal under the following three grounds: -
- i. The learned magistrate erred in law and fact when he failed to find that filing of SPMCC No. E005 /2022 offends the provisions of section 6 of the Civil Procedure Act hence tantamount to sub judice
  - ii. The learned magistrate erred in law and fact when he failed to find that the parties in ELRC No. E004/2021 and SPMCC No. E005/2022 are the same and that the mere addition of a party does not alter the pith and substance of the suit
  - iii. That the Honourable court misdirected itself when it failed to find that the issues raised against the Appellant in SPMCC No. E005/2022 ought to have been and/ or were adjudicated in ELRC No. E004 /2021.
11. On the first ground, the Appellant submitted that from the facts of the two cases before the court, it is clear<sup>st</sup> Respondent wherein the 1<sup>st</sup> Respondent prayed for damages for alleged unfair termination of his employment and unpaid salary. The amount claimed against the Appellant in the subsequent suit was salary arrears which had already been sought in the employment matter.
12. The Appellant submitted that it was improper for the 1<sup>st</sup> Respondent to commence two concurrent suits against the Appellant before the same court with competent jurisdiction. Awarding the prayers in the two suits would definitely amount to double jeopardy as the amount claimed in both suits was the same. The relationship between the Appellant and the 1<sup>st</sup> Respondent was purely employment in nature and the amount claimed was salary arrears. In support of this position, the Appellant cited the case *David Ndi & others v Attorney General & Others 2021 eKLR*



13. The Appellant thus urged the court to find that the learned magistrate erred in law and fact when he failed to find that the filing of Iten SPMCC No. E005/2022 while ELRC No. E004/2021 was still pending determination offends the provisions of section 6 of the *Civil Procedure Act*
14. On the second ground, the Appellant submitted that the parties in both suits were the Appellant and the 1<sup>st</sup> Respondent save that in the subsequent suit, the 1<sup>st</sup> Respondent included the Kenya Commercial Bank Limited, being the bank where the 1<sup>st</sup> Respondent's salary was paid.
15. While citing the case of Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex Parte Law Society of Kenya [2020] eKLR, the Appellant submitted that the trial Court ought to have found that the parties in ELRC No. E004/202 and SPMCC No. E005/2022 are the same and that the mere addition of Kenya Commercial Bank Limited in the subsequent suit does not alter the pith and substance of the suit.
16. It is the Appellant's submission that the common substance of both suits was salary arrears emanating from an employment dispute between the 1<sup>st</sup> Respondent and the Appellant herein which employment dispute was conclusively determined by the Honourable Court and it was found that the 1<sup>st</sup> Respondent does not deserve any of the prayers sought.
17. Lastly, on the third ground, the Appellant submitted that the claims in both suits emanate from dismissal of the 1<sup>st</sup> Respondent by the Appellant and salary arrears. According to the Appellant, since the issue in dispute is the same in both cases, the matter ought to have been determined as one suit as opposed to being litigated in piecemeal. It is submitted that it is not proper for the 1<sup>st</sup> Respondent to claim for salary arrears in both suits disguised under different prayers.
18. The Appellant maintained that the Honourable Court misdirected itself when it failed to find that the issues raised against the Appellant in SPMCC No. E005 /2022 ought to have been and/or were adjudicated in ELRC No. E004/2021 hence the amounted to sub judice.
19. Consequently, the Appellant urged this Court to find that it had proved all the grounds raised in the appeal and to allow the appeal with costs.
20. In his submissions, the 1<sup>st</sup> Respondent submitted that the suit that is the subject of this appeal is not in contravention of section 6 of the *Civil Procedure Act* as there is no other suit pending in court over the same subject matter.
21. According to the 1<sup>st</sup> Respondent, the said suit is not an employment and labour claim but a civil claim where the substratum is the sum of Kshs 164,565.35 that was released from the 1<sup>st</sup> Respondent's bank account without his consent.
22. The 1<sup>st</sup> Respondent thus submitted that the trial court made a proper finding that the issues in the instant suit are not in issue in E004 of 2021 and as such, the appeal ought to be dismissed with costs.
23. The 2<sup>nd</sup> Respondent in its one-page submission fully associated itself with the Appellant's written submissions dated 15<sup>th</sup> April 2025 and urged the court to allow the appeal.

### **Analysis and Determination**

24. Upon carefully considering the grounds of appeal, the rival submissions and the authorities cited by both parties, the main issue for determination in this appeal is whether the subject matter and issues in ITen Spmcc No. E005 Of 2022 Abraham K. Simatei V Kenya Commercial Bank Limited (the 1<sup>st</sup> Respondent Herein) And Teachers Service Commission (the 2<sup>nd</sup> Respondent herein) were directly and



substantially in issue, or ought to have been in issue, in Iten Elrc No. E004 Of 2021 Abraham Kosgei Simatei.

25. Section 6 of the *Civil Procedure Act* provides: -

“No court shall proceed with the trial of any suit... in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties... pending in the same or any other court having jurisdiction to grant the relief claimed.”

26. The existence of Iten SPM ELRC No. E004 of 2021 is not disputed. It is averred that in that suit the 1<sup>st</sup> Respondent sued the Appellant challenging the termination of his employment and sought compensation and payment of his terminal dues arising from the employment contract.

27. From the Record of Appeal, the claim in SPMCC No. E005 of 2022 relates to the refund of monies deposited by the Appellant into the 1st Respondent’s bank account held in the 2nd Respondent Bank (KCB). The 1<sup>st</sup> Respondent contends that the said sum represented his salary for September 2018 and that its reversal by the 2<sup>nd</sup> Respondent Bank was undertaken pursuant to instructions issued by the Appellant.

28. Both claims thus arise from the employment of the 1<sup>st</sup> Respondent by the Appellant and should have been litigated in one suit. The claim in SPMCC No. E005 of 2022 is linked to the same employment relationship that forms the subject matter of SPMC ELRC No. E004 of 2021 as the sum alleged to have been deposited and subsequently reversed represented part of the salary earned during the course of that employment.

29. The 2<sup>nd</sup> Respondent (KCB) in its Defence in SPMCC No. E005 of 2022 attached a letter dated 26<sup>th</sup> September, 2018 from the Appellant (TSC) instructing it to withhold the salary of Abraham Kosgei Simatei, the 2<sup>nd</sup> Respondent. The Appellant explained that it instructed the bank to withhold the salary for September 2018 following the suspension of the 2<sup>nd</sup> Respondent.

30. The withheld salary was therefore an issue or ought to have been claimed as part of terminal benefits by the 2<sup>nd</sup> Respondent in SPMC ELRC No. E004 of 2021.

31. Whether the 1<sup>st</sup> Respondent was entitled to that sum is therefore directly and substantially in issue in SPMC ELRC No. E004 of 2021. It cannot be separated from the employment dispute already pending before the court. The mere framing of the claim as a “refund” and the inclusion of the bank as an additional party does not create a separate cause of action. The joinder of the 2<sup>nd</sup> Respondent did not create a new or independent cause of action.

32. I therefore find that the issues in SPMCC No. E005 of 2022 were directly and substantially in issue, or ought to have been in issue, in SPMC ELRC No. E004 of 2021. The learned magistrate thus erred in law and in fact in holding that the two matters were distinct and unrelated.

33. Consequently, I find merit in the appeal and allow the same. The ruling of the Honourable Hon. Charles Kutwa (Senior Principal Magistrate) delivered on 15<sup>th</sup> June 2022 in ITEN in SPMC ELRC No. E005 of 2022 is hereby set aside and substituted with the following orders: -

- i. The Notice of Preliminary Objection dated 3<sup>rd</sup> March 2022 is hereby upheld.
- ii. The Statement of Claim dated 26<sup>th</sup> January 2022, is struck out for being sub judice.
- iii. Each party shall bear its own costs of the proceedings before the trial court and in this appeal

34. Orders accordingly.



**DATED, DELIVERED AND SIGNED THIS 27<sup>TH</sup> DAY OF NOVEMBER, 2025.**

**M. ONYANGO**

**JUDGE**

