



**Mose & 4 others v Foam Mattress Limited (Cause E086 of 2025)
[2025] KEELRC 3427 (KLR) (2 December 2025) (Ruling)**

Neutral citation: [2025] KEELRC 3427 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E086 OF 2025
JK GAKERI, J
DECEMBER 2, 2025**

BETWEEN

JOSEPH NYARIKI MOSE & 4 OTHERS CLAIMANT

AND

FOAM MATTRESS LIMITED RESPONDENT

RULING

1. Before the court for determination is the respondent's Notice of Motion dated 28th October 2025 seeking Orders that:
 1. The Honourable Court be pleased to dismiss the suit for being Res judicata as all issues raised herein were adequately addressed in the claimant's claim in Kisumu ELRC No. E023 of 2024 whose Judgment was delivered on 16th December 2024.
 2. Costs of this application and/or claim be borne by the claimants/respondents.
2. The Notice of motion is expressed under Section 3A and 6 of the *Civil Procedure Act* and Order 51 Rule I of the Civil Procedure Rules and is based on the grounds set out on its face and the Supporting Affidavit of Mr. Job Aloo sworn on 29th October 2025.
3. The applicant's case is that the parties in this case were the same parties in KISUMU ELRC NO. E023 of 024 instituted prior to the instant suit and the issues were directly and substantially the issues in the earlier suit which was decided by a court of competent jurisdiction.
4. That the only difference between the two suits was that the earlier suit was filed by the Kenya Chemical Workers Union and judgment was delivered on 16th December 2024.
5. That the applicant/Respondent stood to suffer double jeopardy if the instant suit stands.



Respondent's case

6. The respondents/Claimant's case was simply that Kisumu ELRC No. E023 of 2024 held that procedural deficiencies of the union did not extinguish their rights to sue individually and could do so.
7. It is their case that the instant suit was not res judicata.

Applicant's submissions

8. According to counsel, in the instant case the five claimants Mr. Joseph Nyariki Mose, John Kibore Motoka, Augustino Aulo Nyadimo Mohammed Abduba and Titus Maina Atsewa state that their cause of action arose from unlawful and unfair termination of employment under the guise of redundancy and the earlier suit filed by the union was dismissed for want of standing by the union.
9. That the computation of union dues availed in this case was not availed in the earlier suit where they claimed pay in lieu of notice, leave, severance pay, gratuity and terminal dues for lawful retirement and the earlier suit was non-payment of terminal dues to 7 employees.
10. Counsel urged that Kisumu ELRC No. E023 of 2024 was filed on behalf of the claimants/respondents herein and the instant suit was res judicata.
11. Reliance was placed on the provisions of Section 7 of the *Civil Procedure Act* and the decision in Independent Electoral & Boundaries Commission V Maina Kiai & 5 others [2017] eKLR to urge the 5 elements of res judicata and submit that the issues in the two cases were similar and related to termination and payment of terminal dues, the parties were the same but for the earlier suit being filed by a union.
12. Reliance was also placed on the sentiments of the court in John Florence Maritime Services Ltd & another V Cabinet Secretary for Transport and Infrastructure & 3 others [2021] KESC 39 (KLR) to urge that res judicata was a jurisdictional issue.
13. Counsel urge that in Kisumu ELRC NO. E023 OF 2024, the court held that representation by the union had not been challenged and analysed the issue raised and made findings and the grievants testified about terminal dues and RWI admitted that terminal dues were computed in accordance with the CBA and payments were made. Counsel submitted that the issues had been determined and it was inconsequential that some of the grievants did not testify.
14. Counsel submitted that allowing the instant suit to continue would be tantamount to according the grievants a second bite at the cherry which was prejudicial to the applicant.

Claimants/Respondents submissions

15. Counsel submitted that KISUMU ELRC NO.E023 of 2024 was not heard and determined on merit and res judicata did not apply and the grievants had the right to sue individually.
16. That the earlier case was instituted by the union on behalf of certain employees and was dismissed for want of standing by the union hence the issue of termination was not canvassed and the claimants were suing in their individual capacities asserting their personal rights and res judicata did not apply to the instant case.
17. Reliance was placed on cases similar to those relied upon by the applicants counsel to urge that the court did not determine the issue of terminal dues and the suit ended on a procedural ground and the issue of legality of termination was unresolved.



18. Reliance was placed on the sentiments of the court in Tee Gee Electrics & Plastics Co. Ltd V Kenya Industrial Estates Ltd [2005] KLR 97, to urge that only Judgments grounded on substantive merits could trigger res judicata and did not apply in this case and the individual claimants are entitled to a hearing.

Analysis and determination

19. It is common ground that the Kenya Chemical Workers Union filed Kisumu ELRC No. E023 of 2024 on 28th March 2024 on behalf of 7 grievants namely; Joseph Nyariki, John Kibor Motoko, Nyandimo Augustine, Mohammed Abduba, Mathias Kiprop Too, Daniel Thomas Sure and Titus Ateswa Maina and they sought severance pay, gratuity and retirement benefits as per the CBA, maximum compensation and costs.
20. Only Mr. Nyariki and Kibor testified on their own behalf.
21. In the instant suit, only 5 claimants are suing in their individual capacities claiming salary in lieu of notice, leave pay, severance pay, gratuity and terminal benefits and none was claiming compensation for unlawful termination.
22. While the applicant averred and submitted that the instant suit was res judicata KISUMU ELRC No. E023 of 2024, the respondent/claimants averred and submitted that the suit was not res judicata.
23. The only issue for determination is whether the claimant's suit is res judicata Kisumu ELRC no. E023 OF 2024.
24. The principles that govern res judicata as are well settled.

Section 7 of the *Civil Procedure Act* provides:

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

25. The elements or requirements of res judicata have been captured in countless decision.
For a suit to be adjudged as being res judicata an earlier decision, it must be demonstrated that:
 - a. The suit or issue was directly and substantially in issue in the former suit.
 - b. That former suit was between the same parties or parties under whom they or any of them claim.
 - c. Those parties were litigating under the same tittle.
 - d. The issue was heard and finally determined.
 - e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

These elements must all be satisfied as they are rendered in conjunctive terms.

See Karia & another V Attorney General [2005] IEA 83 Kamunye & others V Pioneer General Assurance Society [1971] EA 263.



26. Res judicata is a bar to subsequent proceedings involving the same issue as had been finally and conclusively decided by a competent court in a prior suit between the same parties or their representatives. See *John Florence Maritime Services Ltd V Cabinet Secretary Transport and Infrastructure & 2 Others* [2015] KECA 472 (KLR).
27. In addition, the principle of res judicata applies to all cases and is not a technicality.
28. In *Independent Electoral and Boundaries Commission V Maina Kiai & 5 others* [2017] eKLR, the court stated;

... Res judicata is a matter properly to be addressed in limine as it does possess jurisdictional consequences because it constitutes a statutory preemptory preclusion of a certain category of suits...”

See *Uhuru Highway Development Ltd V Central Bank of Kenya* [1999] eKLR.

29. Applying the foregoing principles to the circumstances of the instant application it is clear that the issue in KISUMU ELRC NO. E023 of 2024 and KISUMU ELRC NO. E86 OF 2025 are substantially the same as both related to separation and payment of terminal dues as well as gratuity, severance pay, leave and pay in lieu of notice among others.
30. As regards the parties they were the same in that the Kenya Chemical Workers Union Instituted Kisumu ELRC No. E023 of 2024 in a representative capacity on behalf of the claimants and were litigating under the same title.
31. As regards competency of the court to hear and determine the earlier and the subsequent case or issue, the Employment and Labour Relations Court heard the former suit and is competent to hear and determine the instant suit.
32. Finally, as regards hearing and final determination of the suit it is decipherable that the court heard two witnesses, the grievants, and proceeded to isolate three issues, namely;
 - i. Whether the grievants were members of the claimant union.
 - ii. Whether the grievants employment was terminated or they retired.
 - iii. Whether the grievants were entitled to gratuity.
33. The court analysed the first issue and found that the claimant union had failed to demonstrate that the grievants were its member and as such the claimant union had no standing to institute the suit and the same was dismissed on that ground alone.
34. It requires no belabouring that the other issues were not determined conclusively and as submitted by the respondents/claimants’, counsel the suit was dismissed before it was finally and conclusively determined.
35. The fundamental issues of whether the grievants retired or were unlawfully terminated from employment and their entitlements were not determined for the instant suit to be adjudged res judicata Kisumu ELRC No. E023 of 2024.
36. Having found that Kisumu ELRC No. E023 OF 2024 was an incompetent suit, it follows that the plea of res judicata was inapplicable in this instance.
37. The upshot is that the applicant’s Notice of Motion dated 28th October 2025 is devoid of merit and it is accordingly dismissed.



Parties shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 2ND DAY OF DECEMBER 2025.

DR. JACOB GAKERI

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.

DR. JACOB GAKERI

JUDGE

