

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT**  
**AT NAIROBI**

**ELRC PETITION NO. E191 OF 2021**

*(Before Hon. Lady Justice Hellen Wasilwa, J)*

**KENYA MEDICAL PRACTITIONERS,  
PHARMACISTS & DENTISTS' UNION  
(KMPDU).....PETITIONER**

**VS**

**MOI UNIVERSITY.....1<sup>ST</sup>  
RESPONDENT**

**CABINET SECRETARY, MINISTRY OF HEALTH..2<sup>ND</sup>  
RESPONDENT**

**AND**

**CABINET SECRETARY, MINISTRY OF LABOUR  
& SOCIAL PROTECTION.....1<sup>ST</sup> INTERESTED  
PARTY**

**RULING**

1 The Petitioner/ Applicant filed a Notice of Motion dated 16<sup>th</sup> January 2025 seeking orders **THAT**: -

- a. *This Honourable Court be pleased to adopt as a Decree and judgment of this Court the Return To Work Formula dated 11<sup>th</sup> February, 2022 and duly signed, filed and approved by Hon. Lady Justice Ngibuini Mwaure on 26<sup>th</sup> July, 2024 herein.*
- b. *This Honorable Court be pleased to Order Moi University to pay the arrears herein within Thirty (30) days from the date hereof.*

- c. *This Honorable Court be pleased to give directions hereof and further orders that it may deem fit to grant hereof.*
- d. *The costs of this Application and Petition be paid by the Respondent in any event.*

### **Petitioner/Applicant's Case**

- 2 The Applicant avers that by a Return To Work Formula (RTWF) dated 11<sup>th</sup> February 2022, which was duly signed, filed and subsequently approved by Hon. Lady Justice Ngibuini Mwaure on 26<sup>th</sup> July 2024.
- 3 It is the Applicant's case that the said court orders have never been varied, vacated or set aside, and the Respondent has never lodged any appeal against them.
- 4 The Applicant avers that the Respondent did not comply with the approved Return To Work Formula. Instead, the Respondent instead made many promises in court to comply but has since failed, neglected and refused to do so.
- 5 It avers that the Respondent has been changing its legal representation, thus causing delays.
- 6 The Applicant avers that this Court ought to adopt the Return To Work Formula dated 11<sup>th</sup> February 2022 and

make it a decree and judgment of the Court so that it may be executed expeditiously.

- 7 It further avers that this Court should order the 1<sup>st</sup> Respondent, to pay the arrears within 30 days from the date of the order.
- 8 The Applicant avers that on 27<sup>th</sup> July 2023, Hon. Lady Justice Ngibuini Mwaure granted the Applicant leave to pursue recovery proceedings through appropriate legal means.
- 9 It is the Applicant's case that the Court does not make orders in vain and that the court-approved Return To Work Formula ought to be enforced.
- 10 The Applicant contends that the Respondent has failed to comply with the said orders despite being fully aware of them. Such failure amounts to contempt of court apparent on the face of the record, particularly because the Respondent has failed to pay the arrears as stipulated in the consent order despite numerous directions of the Court.
- 11 The Applicant avers that courts are mandated to safeguard the rule of law and that such protection can only be achieved where orders of the court are obeyed by all parties appearing before it.

- 12 It is the Applicant's case that the application herein is urgent and ought to be determined expeditiously in the interest of justice so as to prevent impunity, abuse of power by the Respondent and to safeguard the rule of law.
- 13 The Applicant avers that the Constitution and the rule of law obligate the Respondent to comply with the court orders issued herein. Therefore, the Respondent's failure to comply with and implement the said court-approved Return To Work Formula is contemptuous, unlawful, unjust and unfair, and thus calls for the intervention of this Court.
- 14 The Applicant avers that unless the application is immediately heard and determined and the appropriate orders granted, the members of the Petitioner and the public will suffer grave prejudice, loss and damage.

### **Respondent's Case**

- 15 In opposition to the petition, the Respondent filed a Replying Affidavit dated 12<sup>th</sup> February 2025, sworn by Prof. Simeon Mining, the Acting Registrar Administration, Planning and Strategy, Moi University.
- 16 The Respondent avers that following the filing of the Petition in 2021, the Petitioner and the 1<sup>st</sup> Respondent entered into a Return To Work Formula dated 11<sup>th</sup> February 2022 which addressed all the issues that were the subject of the Petition.

- 17 The Respondent avers that under the said agreement, the parties further agreed to withdraw the present Petition together with other cases and suits pending before the Court touching on the issues settled in the Return To Work Formula.
- 18 The Respondent avers that it fulfilled its obligations arising from the Return To Work Formula dated 11<sup>th</sup> February 2022; it implemented the agreed terms including, but not limited to, termination of disciplinary proceedings that had been initiated against members of the Petitioner, payment of allowance arrears and payment of withheld salaries. The Respondent refers to a payment voucher dated 3<sup>rd</sup> March 2022 as evidence of the said payments.
- 19 The Respondent further avers that the Petitioner subsequently filed a Notice of Motion dated 5<sup>th</sup> February 2024 seeking, inter alia, orders that the Court adopt the Return To Work Formula dated 11<sup>th</sup> February 2022 as an order of the Court, that Moi University be ordered to pay arrears within thirty (30) days, and that the Court issue further directions as it deemed fit.
- 20 It is the Respondent's case that the prayers sought in the said application are the very same prayers sought in the instant application.

- 21 The Respondent avers that this Court heard the application dated 5<sup>th</sup> February 2024 and delivered its ruling on 26<sup>th</sup> July 2024 through Hon. Lady Justice Anna Ngibuini Mwaure, wherein the Court granted the orders sought.
- 22 The Respondent avers that in the said ruling the Court ordered that the Return To Work Formula be adopted as an order of the Court, that Moi University do pay the arrears within 30 days, and that the Petitioner would be at liberty to proceed with execution should the Respondent fail to settle the decretal sum within 60 days.
- 23 The Respondent avers that it complied with the orders issued by the Court on 26<sup>th</sup> July 2024 and made the requisite payments towards the Petitioner's arrears as demonstrated in the evidence annexed to the application.
- 24 The Respondent further avers that the Petitioner thereafter attempted to garnishee the 1<sup>st</sup> Respondent's bank accounts through an application dated 8<sup>th</sup> November 2024, premised on the same Return To Work Formula adopted as a court order. The said garnishee application was dismissed by the Court on 16<sup>th</sup> January 2025.
- 25 The Respondent avers that the Petitioner having previously sought and obtained orders for adoption of the Return To Work Formula through the Notice of Motion

dated 5<sup>th</sup> February 2024 is estopped from seeking the same reliefs again. Therefore, the application is barred under the doctrine of *res judicata*.

- 26 The Respondent further avers that this Court having already adopted the Return To Work Formula dated 11<sup>th</sup> February 2022 as its order on 26<sup>th</sup> July 2024; it cannot re-adopt the same agreement as another order of the Court as sought in the present application.
- 27 It is the Respondent's case that by virtue of the ruling and orders issued on 26<sup>th</sup> July 2024, the present application seeking similar orders is spent, barren and that the Court is divested of jurisdiction to entertain it under the doctrine of *res judicata*.
- 28 The Respondent avers that the filing of the instant application amounts to an abuse of the process of the Court since the Petitioner had previously sought and obtained the same orders through the application dated 5<sup>th</sup> February 2024 which culminated in the ruling delivered on 26<sup>th</sup> July 2024 by Hon. Lady Justice Anna Ngibuini Mwaure.
- 29 The Respondent avers that the Petitioner/Applicant is not entitled to the reliefs sought in the present application in light of the foregoing factual and legal position.

30 The Respondent further filed a Notice of Preliminary Objection dated 12<sup>th</sup> February 2026 on the following grounds:

1. *THAT the Notice of Motion herein is res judicata the ruling of this Court of 26<sup>th</sup> July, 2024 delivered by Hon. Lady Justice Anna Ngibuini Mwaure and this Petitioner/Applicant herein is estopped from re-litigating on the same issues between the same parties that were the subject of the aforesaid that determined the Petitioner/Applicant's Notice of Motion dated 5<sup>th</sup> February, 2024 that sought the same orders as sought in the instant Notice of Motion;*
2. *THAT the Notice of Motion herein being res judicata the ruling of this Court of 26<sup>th</sup> July, 2024, this Court is divested of jurisdiction to hear and determine the present application that has already been heard and determined through the aforesaid ruling;*
3. *THAT the Notice of Motion herein is frivolous and scandalous, flippant attempts and kicks of the surrogates of abusers of Court processes and it is for striking out and/or dismissal with costs to the 1<sup>TM</sup> Respondent; and*
4. *THAT it is meet and in furtherance of the overriding objectives of Article 159(2) of the Constitution and the Rules made thereunder for the timely disposal of proceedings that this Court peremptorily strikes out the Notice of Motion herein as an abuse of the*

*process of this Court with costs to the 1<sup>st</sup> Respondent.*

### **Petitioner/Applicant's Submissions**

- 31 The Applicant's submissions are that this Court is clothed with jurisdiction to hear and determine the present matter. The jurisdiction of the Court is grounded in Articles 159, 162 and 165(4) of the Constitution, read together with Articles 22, 23 and 24; which confer upon the Court the authority to determine disputes and grant appropriate reliefs where constitutional rights and legal obligations arise.
- 32 It was submitted that the Court, in exercising its jurisdiction, has wide powers to grant appropriate remedies including interim or permanent preservation orders such as injunctions, prerogative orders, damages, compensation, specific performance, restitution, declarations and costs. The Court also has the mandate to issue judicial review orders in respect of administrative actions undertaken by public bodies.
- 33 The Applicant submitted that courts have consistently held that a Return To Work Formula constitutes a binding agreement. In ***Thakrar v Cir CitteroMenswear plc (in administration), (2002) EWHC 1975 (ch)***, the English High Court held that a mediated settlement was an enforceable contract.

34 The Applicant further relied on **Kenya Plantation & Agricultural Workers Union V Maji Mazuri Flowers Ltd[2012]eKLR**, where Nduma J held: “ .....One of the primary objectives of the Labour Relations Act, 2007 as derived from the preamble is “promotion of orderly and expeditious dispute settlement”.

Section 68(1), titled ‘Dispute resolved after conciliation’ provides:- “If a trade dispute is settled in a conciliation the terms of the agreement shall be:- (a) recorded in writing, and (b) signed by the parties and conciliator.”

The Return to Work Formula dated 5<sup>th</sup> August, 2011 satisfied all the requirements of Section 68 of the Industrial Relations Act, 2007..... The Respondent clearly reneged on the Return to Work Formula even before the ink had dried on the paper it was concluded. This is a bold display of lack of good faith and portends very badly on the Industrial Relations between the Claimant and the Respondent..... Taking all the factors into consideration, especially the blatant breach of dispute resolution Agreement, the Court finds that the conduct of the Respondent was inimical to dispute resolution between the parties and in the Country at large and the same was not just and equitable.”

35 The Applicant further submitted that judicial authority empowers courts to examine the actions of the legislative, executive and administrative arms of government to

determine whether such actions are consistent with the law and the Constitution. It cited ***Nyandoro & Company Advocates v National Water Conservation & Pipeline Corporation; Kenya Commercial Bank Group Limited (Garnishee) [2021] eKLR.***

- 36 With regard to the preliminary objection, the Applicant submitted that a preliminary objection must be purely on points of law and what constitutes a preliminary objection is set out in ***Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696***: “A Preliminary Objection ..... 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 had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”
- 37 It was submitted that the Respondent’s objection lacks merit and ought to be dismissed with costs.
- 38 The Applicant submitted that justice must come to an end. The Respondent has never appealed against the decree, thus, the application is justified and meritorious.

39 It was further submitted that the Respondent's conduct violates Article 10(2) of the Constitution, which binds all persons to uphold the national values and principles of governance including the rule of law, transparency, accountability and good governance.

### **Respondent's Submissions**

40 It is the Respondent's submissions that for the doctrine of *res judicata* to apply, there must exist adjudication which conclusively determines the rights of the parties with regard to the matters in controversy as affirmed by the Court of Appeal in ***Suleiman Said Shabhal v Independent Electoral & Boundaries Commission & 3 others [2014] eKLR.***

41 It was submitted that a comparison between the present application and the one dated 5<sup>th</sup> February 2024 demonstrates that the two applications are similar, seeking the same orders word for word both filed by the Petitioner/Applicant.

42 The Respondent submitted that by its ruling and order delivered on 26<sup>th</sup> July 2024, this court adopted the Return to Work Formula dated 11<sup>th</sup> February, 2022 as the order of the Court and granted 30 days within which the 1<sup>st</sup> Respondent was to pay the arrears. These are the same orders now sought in the instant application.

- 43 It is the Respondent's submissions that the instant application is *res judicata* the ruling of 26<sup>th</sup> July 2024 which allowed a similar application as the instant one. It is an abuse of the process of this Court for the Petitioner to file the instant application seeking orders that were the subject of its yet another application dated 5<sup>th</sup> February, 2024 and allowed by this Court.
- 44 The Respondent placed reliance in the Court of Appeal decision on a similar issue **Accredo AG & 3 others v Stefano Uccelli & another [2019] eKLR**: *"Likewise, addressing our minds on the orders sought in the Application, we concur with the learned Judge, that regardless of the terms or words employed thereunder, the same were touching on the shareholding, management and control of the 2<sup>nd</sup> appellant company which, in our view, had been conclusively determined by the ruling dated 30<sup>th</sup> April, 2015 and the judgment of this Court dated 15<sup>th</sup> December, 2017. In other words, the injunctive orders and the prayer for transfer of the shareholding back to the 3<sup>rd</sup> and 4<sup>th</sup> appellants were tantamount to the appellants seeking both a review and an appeal against the orders dated 30<sup>th</sup> April, 2015 and this Court's judgment in dated 15<sup>th</sup> December, 2017, which jurisdiction the learned Judge correctly appreciated he lacked. Therefore, the issue of the 2<sup>nd</sup> appellant's shareholding and management was directly and substantially in issue in the ruling dated 30<sup>th</sup> April, 2015*

*hence could not be raised again, even with the use of judicial craftsmanship, as we find was the case in the Application whose ruling gave rise to the instant appeal..... It follows therefore, that the preliminary objections raised by the respondents were based on pure points of law, that is, jurisdiction and the doctrine of res-judicata, and did not require additional evidence to substantiate the objection.”*

- 45 It is the Respondent’s submission that the issues in the present application are all similar word for word with the issues in the application dated 5<sup>th</sup> February, 2024 which this Court determined in its ruling of 26<sup>th</sup> July, 2024. as such, the instant application is res-judicata and this Court lacks requisite jurisdiction to rehear it.
- 46 It was further submitted that the preliminary objection herein is on a pure point of law and no other evidence of facts are required to be ascertained as held in ***Mukisa Biscuits Manufacturing Ltd v West End Distributors Ltd. [1969] E. A. 696.***
- 47 The Respondent submitted that having found that the application herein is *res judicata* the ruling of this Court of 26<sup>th</sup> July, 2024 and thus divested with jurisdiction, this Court ought to down its tools for want of jurisdiction as jurisdiction is everything and without it, a Court has no power to make one more step as held by the Court of

Appeal in ***Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR.***

- 48 The Respondent submitted that pursuant to this Court's order of 26<sup>th</sup> July 2024, the Petitioner/Applicant attempted to execute the decree by filing a garnishee application dated 8<sup>th</sup> November 2024, which was dismissed by the Court on 16<sup>th</sup> January 2025. Therefore, the Petitioner/Applicant cannot feign ignorance of these circumstances.
- 49 It was submitted that pursuant to the said order, the 1<sup>st</sup> Respondent paid the arrears to the members of the Petitioner/Applicant and which was the basis of calling off the strike. This was deposed in the Affidavit which was not controverted by the Petitioner/Applicant and as such, they are unchallenged. The 1<sup>st</sup> Respondent attached evidence of payments which was not challenged. The Court cannot again make an order that the said arrears be paid within 30 days; it will be acting in vain and such an order will not be enforceable as against the 1<sup>st</sup> Respondent or at all.
- 50 It is therefore the Respondent's submissions that the instant application is an abuse of the process of this Court preying on scarce judicial time for orders already dealt with by this Court. This Court lacks luxury of that time and the application ought to be struck out and/or dismissed with attendant costs to the 1<sup>st</sup> Respondent.

51 I have considered the averments and submissions of the parties herein. The applicants have sought orders from this court to have the court adopt the return to work formula dated 11/2/2022 as a decree and judgment of this court.

52 The respondents on their part aver that the application has been made previously and by an order of this court (Mwuaire J) dated 26<sup>th</sup> July 2024 the orders sought were granted.

53 I have looked at the court's ruling of 26<sup>th</sup> July 2024 in which ruling the court allowed the following prayers;-

**(a) That this honourable court be pleased to adopt the return to work formula (RTWF) dated 11<sup>th</sup> February 2022 as an order of this honourable court hereof.**

**(b) That this honourable court be pleased to order Moi University to pay the arrears herein within thirty (30) days from the date hereof.**

and directed that the petitioners proceed to institute execution proceedings if the respondents do not settle the decretal sum within 60 days hereof as far as is hereby applicable in view of the passage of time.

54 It is apparent then that the return to work formula was adopted as an order of this court. The respondents also aver that they complied with the said order by

implementing the return to work formula. Whether the return to work was complied with or not depends on the evidence that needs to be presented before court.

55 The applicant now seek adoption of the return to work formula dated 11<sup>th</sup> February 2022 as a decree and judgement of the court. Given that the parties in principle agreed that the return to work formula was agreed upon and it was to resolve this petition to its fullest, it would be in the interest of justice to allow this application and adopt as a judgment of this court the return to work formula dated 11<sup>th</sup> February 2022 and duly signed filed and approved by Hon Justice Ngibuini Mwaure on 26<sup>th</sup> July 2024 herein. The applicants are therefore free to execute any part of this judgment that has not been adhered to.

56 Costs of this application shall be in the petition.

**Dated, Signed and Delivered Virtually at Nairobi  
this 18<sup>th</sup> Day of March, 2026.**

**HELLEN WASILWA  
JUDGE**