



Mohamed v Judicial Service Commission (Employment and Labour Relations Cause E645 of 2022) [2025] KEELRC 99 (KLR) (24 January 2025) (Ruling)

Neutral citation: [2025] KEELRC 99 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E645 OF 2022
AN MWAURE, J
JANUARY 24, 2025**

BETWEEN

BISHAR ADAN MOHAMED CLAIMANT

AND

JUDICIAL SERVICE COMMISSION RESPONDENT

RULING

Introduction

1. The Claimant/Applicant filed a Notice of Motion dated 30th July 2024 seeking the following prayers that: -
 1. Spent
 2. The Court reviews, discharges and or vacate the orders issued on 28th June 2024 dismissing the Application dated 8th December 2023 and the same be reinstated and the same be allowed.
 3. Costs be provided for.

Claimant/Applicant's case

2. The application is supported by the affidavit of Bishar Adan Mohamed, the Applicant.
3. The Claimant/Applicant avers that through his advocates filed an application dated 8th December 2023 under certificate of urgency.
4. The Claimant/Applicant avers that the said application contained errors which resulted in withdrawing the application vide a notice of withdrawal dated 8th December 2023 at 3:12 pm.
5. The Claimant/Applicant avers that on the same date, another application was filed at 4:12 pm which was different to the application which was withdrawn at 3:12 pm.



6. The Claimant/Applicant avers that he explained the two different applications vividly in his supplementary application dated 25th March 2024.
7. The Claimant/Applicant avers that on 28th June 2024, this Honourable Court dismissed the application dated 8th December 2023 filed at 4:12 pm on the ground that it was withdrawn.
8. The Claimant/Applicant avers that in the interest of justice, this Honourable Court reviews and sets aside the orders issued by allowing the application dated 8th December 2023 as prayed.

Respondent's replying affidavit

9. In opposition to the application, the Respondent filed a replying affidavit dated 30th September 2024 sworn by the Respondent's Chief Registrar, Hon. Winfrida Mokaya.
10. The Respondent avers that the application dated 8th December 2023 was seeking orders to compel the Respondent to furnish the Claimant/Applicant with Human Resource Disciplinary Committee proceedings and recommendation of the said committee both dated 21st September 2021, minutes of proceedings held on 9th December 2021 and proceedings or minutes of 30th May 2022 dismissing the Claimant/Applicant's appeal.
11. The Respondent avers that the Claimant/Applicant had sought an order to compel the Respondent to furnish the Human Resource Disciplinary Committee proceedings of 22nd September 2021 vide an application dated 16th February 2023.
12. The Respondent avers that the court dismissed the application in a ruling dated 17th November, 2023, on the grounds that the supporting affidavit was defective and that the Claimant/Applicant failed to provide evidence demonstrating the relevance of the witnesses to the case.
13. The Respondent further avers that the application dated 8th December 2023 was dismissed vide a ruling dated 28th June 2024 on the ground that the application was withdrawn through a notice of withdrawal dated 8th December 2023 through the Claimant/Applicant's advocates.
14. The Respondent avers that the application was an afterthought, a waste of time and a way to revive the two dismissed applications.
15. The Respondent avers that the information the Claimant/Applicant is seeking is privileged and cannot be released to him.
16. The application was canvassed by way of written submissions.

Claimant/Applicant's submissions

17. The Claimant/Applicant submitted that the application dated 8th December 2023 was filed at 10:12 am which was withdrawn on the same day at 3:12 pm vide a notice of withdrawal.
18. The Claimant/Applicant submitted that he had the right to file a different application on the same day which he had explained in the supplementary affidavit dated 25th March 2024.
19. The Claimant/Applicant submitted that the court omitted the supplementary affidavit dated 25th March 2024 noting that the application dated 8th December 2023 filed at 4:12 pm was a separate and distinct application.



20. The Claimant/Applicant relied on Order 25(1) of the Civil Procedure Rules which provides as follows:
- “At any time before the setting down of the suit for hearing the plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action.”
21. The Claimant/Applicant submitted that the Respondent did not challenge the contents of the supporting affidavit and relied on the case of *Grace Akinyi V Gladys Kemunto Obiri & another* [2016] eKLR citing the case of *National Bank of Kenya Limited V Ndungu Njau* [1997] KECA 71 (KLR) where the court stated that a review may be granted to correct a clear and obvious error or omission by the court that does not require complex arguments. A review is not justified simply because another judge might have decided differently or due to a misunderstanding of the law.
22. The Claimant/Applicant also relied on section 80 of the *Civil Procedure Act* which gives the court unfettered discretion to review its order.
23. The Claimant/Applicant prays that the instant application be allowed as prayed.

Respondent’s submissions

24. The Respondent cited Order 25 Rule 1 of the Civil Procedure Rules which deals with the withdrawal or discontinuance of suits. The Respondent submitted that when a party files a notice to withdraw a suit or application before the hearing, it is automatically considered withdrawn without the need for further court action, aside from marking it as withdrawn and addressing the issue of costs. The party who filed the notice loses their standing before the court and becomes a stranger to the suit.
25. The Respondent submitted that once a suit is withdrawn, the court does not have jurisdiction to hear and determine the matter, as the suit is no longer in existence.
26. The Respondent relied on the Indian case of *Smt. Raisa Sultana Begam and Ors. vs Abdul Qadir and Ors.* AIR1966ALL318 where the court held that when a plaintiff withdraws a suit, they cease to be a plaintiff before the court. If the entire suit is withdrawn, it ends completely, and the court no longer has jurisdiction over it. If one part of the suit is withdrawn, that part is removed from the court’s jurisdiction. The plaintiff cannot file a new suit on the same subject matter once it is withdrawn, and they cannot revoke the withdrawal. The court becomes *functus officio*, meaning it has no further authority over the withdrawn suit, and no further proceedings can be taken in it.
27. The Respondent also relied on the case of *Charles Kiptarbei Birech V Paul Waweru Mbugua & another* [2021] eKLR where the court noted the following:
- “In arriving at the finding above, the learned Judge relied on the excerpt by Stuart Sime in his book “A Practical Approach to Civil Procedure”, 9th Edition where the learned author stated: ‘Notice to discontinue takes effect and brings the proceedings to an end as against each defendant, on the date it is served upon the defendant.’”
28. The Respondent argued that once an application has been withdrawn, the same cannot be reinstated as the court does not have jurisdiction to handle the said application as there is no existence of such an application before the court.
29. The Respondent submitted that there is no application for reinstatement before the court, as the effect of the notice of withdrawal rendered the court out of reach.



30. The Respondent submitted that costs follow the event citing section 27 of the *Civil Procedure Act* which states as follows:

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

31. The Respondent relied on the case of Cecilia Karuru Ngayu V Barclays Bank of Kenya & another (2016) eKLR where the court held that it has discretion regarding the issue of costs. The general principle is that costs follow the event, meaning that the unsuccessful party is responsible for paying the costs. However, this principle is intended to compensate the successful party for their efforts, rather than to punish the unsuccessful party.

32. In conclusion, the Respondent prays that this Honourable Court disallows the instant application dated 8th December 2023 since the court does not have jurisdiction to handle a non-existent application. The Respondent also prays for award of costs.

Analysis and determination

33. The court has considered the motion on record, the affidavits and submissions by both parties, and the main issue for determination is whether the application is merited before this Honourable Court.

34. The discontinuance or withdrawal of a suit has been reiterated above under Order 25 Rule 1 of the Civil Procedure Rules.

35. In *Salat V Independent Electoral and Boundaries Commission & 7 others* [2014] KESC 12 (KLR) the court held that a party’s right to withdraw a matter before the court cannot be taken away. A court cannot prevent a party from withdrawing his case. The only action the court can take is to issue an order regarding costs if it is deemed appropriate.

36. Section 7 of the *Civil Procedure Act* provides for res judicata as follows:

“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.”

37. In *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* (2017) eKLR the Court of Appeal held that:

“... the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;



- a. The suit was directly and substantially in issue in the or issue 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 title.
- d. The issue was heard and finally determined in the former suit.
- 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.

The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”

38. In this instant case, the Claimant/Applicant filed an application dated 8th December 2023 and it was withdrawn vide a notice of withdrawal on the same date. This Honourable Court allowed the notice of withdrawal on 14th December 2023. Hence that application was therefore no longer existent.
39. The Claimant/Applicant filed another application on the same date. The prayers for the first application which he withdrew are as hereunder:
 1. That the Application be certified urgent and service hereof be dispensed within the first instance.
 2. That the Honourable Court do direct and compel the Respondent unconditionally release to the Claimant’s Human Resource Disciplinary Committee proceedings of 22nd September 2021 together with the accompanying report pursuant to the said proceedings.
 3. That the Honourable Court be pleased to grant leave to the Claimant to file in court the proceedings in paragraph (2) above and any other documents before the suit herein comes for pretrial on 26th June 2023.
 4. That the Honourable Court be pleased to allow the Applicant file statements of witnesses of Hassan Lakicha and Purity Gakii Muranguri.
 5. That costs be provided for.
40. The prayers for the current application are however as hereunder:
 1. That the Application be certified urgent and service hereof be dispensed within the first instance .
 2. That the Honourable Court do direct and compel the Respondent to unconditionally release to the Claimant’s Human Resource Disciplinary Committee Proceedings of 22nd September 2021.



3. That the Honourable court do direct and compel the Respondent to unconditionally release to the Claimant the recommendation of the said human Resource Disciplinary Committee Proceedings of 22nd September 2021.
 4. That the Honourable Court do direct and compel the Respondent to unconditionally release to the Claimant the Proceedings or minutes to the Judicial Service Commission meeting held on 9th December 2021 dismissing the claimant from service.
 5. That the Honourable Court do direct and compel the Respondent to unconditionally release to the Claimant minutes or proceedings of Judicial Service Commission of 30th May 2022 dismissing the Claimant's Appeal.
 6. That the Honourable Court be pleased to grant leave to the Claimant to file in court the Proceedings in Paragraph 2, 3, 4 and 5 above and the documents before the suit comes up for Pre-Trial.
 7. That costs be provided for.
41. The orders requested are more or less the same except in the withdrawn application there was prayer 4 which is not in the second application.
 42. The court finds the prayers sought are basically to do with production of human resource disciplinary committee proceedings of the diverse dates as well as the minutes of the applicant's dismissal from employment and dismissal of his appeal.

Those are save for semantics the same in both application except the prayer for calling for statements of Purity Gakii Muraguri and Hassan Lakiche which prayer as earlier stated was not included in the current application.
 43. The court has once again considered carefully the applicant's supplementary affidavit dated 25th March 2024 and still finds the two applications are more or less similar. The court would be at risk of dealing with an appeal of its own ruling by purporting to review its ruling which was delivered on 28th June 2024.
 44. The court therefore finds the principles applicable in reviewing its judgment are not satisfied and so holds there are no grounds to review its orders delivered on the aforesaid date.
 45. The application dated 30th July 2024 is therefore dismissed as it lacks merits.
 46. Costs will be in the cause.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 24TH DAY OF JANUARY, 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 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

