



Kithokoi v Fuel Net Company Limited (Employment and Labour Relations Appeal E218 of 2023) [2025] KEELRC 1020 (KLR) (28 March 2025) (Judgment)

Neutral citation: [2025] KEELRC 1020 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E218 OF 2023**

**JW KELI, J
MARCH 28, 2025**

BETWEEN

FRANCIS NGATI KITHOKOI APPELLANT

AND

FUEL NET COMPANY LIMITED RESPONDENT

(Being an Appeal from the Ruling of the Honourable M.W Murage (SRM) delivered at Nairobi on the 20th May, 2022 in Nairobi CM CMEL 654 of 2020)

JUDGMENT

1. The Appellant being dissatisfied with the Ruling of the Honourable M.W Murage (SRM) delivered at Nairobi on the 20th May, 2022 in Nairobi CM CMEL NO. 654 of 2020) between the parties filed a Memorandum of Appeal dated 30th October, 2022 seeking the following orders:
 - a. That the Appeal be allowed;
 - b. That the Ruling delivered on 20th May, 2022 in Nairobi CM CMEL No. 654 of 2022 Francis Ngati Nthokoi -versus- Fuel Net Company Limited be set aside;
 - c. That the Claimant be allowed to prosecute on merit the claim in Nairobi CM CMEL No. 654 of 2022 Francis Ngati Nthokoi -versus- Fuel Net Company Limited
 - d. That the cost of this Appeal be provided for

The Grounds Of Appeal

2. That the Learned Magistrate erred in fact and In law in determining that the Claimant's suit was sub-judice by disregarding the fact that: -
 - a. The said parallel suit, being CMELRCNo. 6920 of 2019 was a non-existent suit to begin with;



- b. The trial court ignored the Claimant's irrefutable evidence and assertion regarding the non-existence of the suit;
 - c. The Claimant attempted to withdraw the said suit but the same could not be acted upon due to the non-existence of the court file;
 - d. That the said suit abated or ought to have abated after 1 year of no action.
3. That the Learned Magistrate erred in law and in fact in finding that the Claimant's suit was sub-judice and striking out the same.
 4. That the Learned Magistrate erred in law and in fact in ignoring the principles of sub-judice and striking out the Claimant's case thus denying him an opportunity to be heard on merit.
 5. That the Learned Magistrate erred in awarding costs of the suit to the Respondent.

Background Of Appeal

6. The Claimant filed claim against the Appellant/Respondent vide a Memorandum of Claim dated 14th August, 2020 seeking the following Orders:-
 1. A declaration that the Claimant's employment was unfairly and unlawfully terminated;
 2. A declaration that the Claimant was underpaid by the Respondent;
 3. An order directing that the Respondent to pay the Claimant the following:
 - i. An order directing the Respondent to pay the Claimant the following:
 - ii. Unpaid salary for December Kshs.12,000.00
 - iii. Salary in lieu of notice Kshs. 12,000.00
 - iv. Accrued leave days for 2013-2018(6 years) Kshs. 48,000.00
 - v. Severance (Kshs. 12,000 by 1/2 by 6 years) Kshs. 36,000.00
 - vi. Unfair and unlawful termination (Kshs. 12,000 by 12)Kshs. 144,000.00
 - vii. Underpayment of wages: Kshs. 152,634.00(2016) Kshs. 206,028.00(2017),Kshs. 206,028.00(2018) Kshs. 564,690.00
 - viii. Public holidays(54 days by Kshs. 400) Kshs. 21,600.00

Total Kshs. 838,290.00
 4. Certificate of service
 5. Cost of this suit
 6. Any other relief this Honourable court may deem fit and just to grant.
7. The Claimant filed his verifying affidavit, Witness statement and list of documents all of even date together with the bundle of documents (see pages 10-41 of ROA).
8. The claim was opposed by the Respondent who entered appearance and filed a Response to the Memorandum of Claim dated 9th October, 2020 (Pages 43-45 of ROA).



9. The Claimant subsequently filed a Reply to the Respondents Statement of Defence dated 19th November, 2020 (page 46 of ROA), Claimant’s List of issues of even date(Page 50 of ROA).
10. The Respondent filed a Preliminary Objection dated 11th May, 2021 to the Claimant’s suit on the following grounds:
 - a. That the cause of action in this suit relates to a similar suit being ELRC No. 6920 of 2020;
 - b. That the said ELRC No. 6920 of 2020 is between the same parties over the same subject matter; and
 - c. That the said ELRC No. 6920 of 2020 is active and is still pending hearing and determination and as such the same being in contravention of Section 6 of the *civil Procedure Act* is apparent want of prosecution.
11. The Claimant filed a Reply to the Preliminary Objection dated 29th July, 2021 responding to the Preliminary Objection(Pages 52-53 of ROA).
12. The Respondent filed a Notice of Motion Application dated 26th July, 2021 seeking the following orders from the Court(pages 59-84 of ROA):
 - a. That this cause be struck out;
 - b. That in the alternative this cause be stayed until this court’s Employment and Labour Relations cause Number 6920 of 2019 is heard and determined;
 - c. That the Claimant do pay costs of this application and the entire cause.
13. The Claimant responded to the Application by filing a Replying affidavit dated 10th November, 2021(see pages 85-86 of ROA).
14. The parties canvassed the Application dated 26th July, 2021 by way of written submissions. The parties complied.
15. The Trial Magistrate Court delivered the Ruling on the Respondent’s Application on the 20th May, 2022 finding that the Claimant’s suit is Sub-judicial therefore striking out the Claimant’s suit with costs (Ruling at pages 135-136 of ROA).

Determination

16. The appeal was canvassed by way of written submissions. Both parties complied.
17. This being a first appellate court, it was held in *Selle v Associated Motor Boat Co. Ltd*[1968] EA 123 that:- “The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”
18. The court is further guided by the principles on appeal decisions in *Mbogo v Shah* [1968] EA De Lestang V.P (as he then was) observation at page 94: “I think it is well settled that this Court will not



interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

Issues For Determination

19. The Appellant submitted the following issues for determination:-
 - i. Whether the lower court erred in law and fact in finding that the Appellant’s suit was sub judice;
 - ii. Whether the trial court’s decision to strike out the Appellant’s claim was unjustified and denied the appellant’s access to justice.
20. The Respondent submitted on the issue of whether the lower court erred by striking out the suit.
21. The court finds the issue for determination in the appeal is whether the court erred in finding the suit was subjudice.

Decision

22. The Respondent filed a Notice of Motion Application dated 26th July, 2021 seeking the following orders from the Court (pages 59-84 of ROA):
 - a. That this cause be struck out;
 - b. That in the alternative this cause be stayed until this court’s Employment and Labour Relations cause Number 6920 of 2019 is heard and determined;
 - c. That the Claimant do pay costs of this application and the entire cause.
23. The Appellant responded to the Application by filing a Replying affidavit dated 10th November, 2021(see pages 85-86 of ROA). The claimant/ appellant admitted to the existence of another suit CMEL No. 6920 of 2019 and annexed the summons to enter appearance, and the amended memorandum of claim between the parties as FNN1. The claimant contended that after filing the suit no action was taken and he attempted to file the amended memorandum of claim but the file could not be traced, that since filing of the suit CMEL No. 6920 of 2019 on 14th October 2019 no action had been taken and the said suit should have abated for want of prosecution. That he was advised by his advocate that initial filing was a mistake and he had redressed the same by filing a new suit.
24. The Trial Magistrate Court delivered the Ruling on the Respondent’s Application on the 20th May, 2022 finding that the Claimant’s suit was Sub-judicial therefore striking out the Claimant’s suit with costs (Ruling at pages 135-136 of ROA).

Appellant’s submissions

25. The appellant submitted that the ruling was on basis of the trial court having seen the pleadings in CMELRC 6920 of 2019. The appellant submitted that the question arises whether there was indeed a case founded on those pleadings and whether the case had been registered and placed before a court for adjudication. The Appellant submitted that he filed CMELRC No. 6920 of 2019 on 14th October 2019 and immediately sought to proceed with the matter. However, after multiple inquiries, the court registry informed the Appellant and his advocates that the file number was erroneously registered and



the records of such a file could not be found either in the physical records or in the Case Tracking System (CTS).

26. The Appellant submitted that he was advised by the registry that the file number CMELRC No. 6920 of 2019 had been erroneously allocated and that no such case existed in the court's system. That the Appellant subsequently retained counsel with the objective of addressing the issues arising in the matter. Efforts were made to map the case as an existing matter within the Case Tracking System (CTS) to facilitate the filing of an amended Memorandum of Claim through the e-filing portal. However, these attempts proved unavailing as the system persistently failed to retrieve any corresponding case details, indicating that the matter was not registered. Despite diligent follow-ups with the judiciary's backend technical support, no resolution was achieved. The Appellant, having acted in good faith and exercised due diligence in prosecuting the purported matter Identified as CMELRC No. 6920 of 2019, discovered that the suit was never properly registered, thereby rendering it a nullity ab initio.
27. The Appellant submitted that he was advised by his advocates that the failure to register the original suit meant no further action could be taken in that matter. To safeguard his legal rights and ensure the timely prosecution of his claim, the Appellant took the necessary step of filing a fresh suit. This decision was made with full knowledge of the statutory limitation period of three years under Section 90 of the Employment Act, which limits the filing of employment claims after three years. The Respondent raised a Preliminary Objection premised on the doctrine of sub judice, which the Learned Magistrate upheld through a ruling delivered on 20th May 2022. The basis of the ruling was the Magistrate's that 'I have seen the pleadings in 6920'. However, the question arises whether there was indeed a case founded on those pleadings, and whether the case had been registered and placed before a court for adjudication. It is on this ground that the Appellant filed the present appeal, submitting that the Learned Magistrate erred by relying solely on the Respondent's application and of sub judice or was properly before the court.
28. On whether the lower court erred in law and fact in finding that the Appellant's suit was sub Judice, for a matter to qualify as sub judice, it must meet the criteria outlined under Section 6 of the Civil Procedure Act, which states:-
- “No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties...” For the doctrine of sub judice to apply, there must be:
- i. Two or more suits running concurrently;
 - ii. The same parties involved in the suits;
 - iii. Substantially the same issues in both suits; and
 - iv. Both suits are pending before a competent court.
29. On the principle of the two suits pending before a competent court, the appellant submitted that a critical requirement for sub judice is that the earlier suit must still be pending before a court of competent jurisdiction. The appellant submitted that CMELRC No. 6920 of 2019 was never pending before any competent court due to procedural irregularities and relied on Kenya Planters Co-Operative Union United v Kenya Co-Operative Coffee Millers Limited & Another [2016] eKLR, where the Court held that sub judice cannot apply if the earlier suit has been dismissed, resolved, or is void. The Respondent contended that the appellant's suit violates the doctrine of sub judice however, the Appellant submits that CMELRC No. 6920 of 2019 cannot be considered as an existing suit because it was never properly registered. The Court has held in David Ndi & Others v Attorney General &



Others [2021] eKLR held that sub judice applies only when there are two or more valid suits addressing the same subject matter. A void suit cannot satisfy this requirement.

30. On the principle of whether suits involve the same parties or their representatives, the Appellant submitted that while the parties in both matters are the same, however, sub judice cannot apply in isolation of the other elements. The appellant submitted that since CMELRC No. 6920 of 2019 was never properly before a court, it cannot invoke the doctrine of sub judice, even if the parties overlap. While CMELRC No. 6920 of 2019 was purportedly filed earlier however, it lacked procedural validity as it was not registered in the judiciary's Case Tracking System (CTS). In *Macfoy v United Africa Co. Ltd* [1961] 3 All ER 1169, the court ruled that an act that is void ab initio has no legal effect. Thus, CMELRC No. 6920 of 2019 cannot be considered a properly instituted suit.
31. That the failure of the court registry to register CMELRC No. 6920 of 2019 is a crucial issue in this matter. The registry, as the custodian of court records, plays a central role in ensuring that suits are properly registered and given an official case number. In this case, after the Appellant filed the suit on 14th October 2019, the court registry confirmed that the file number allocated to the suit was erroneous and did not correspond to any active or registered file. The Appellant made repeated attempts to follow up on the case and file an amended Memorandum of Claim, in line with the procedural requirements. However, each of these efforts were all in vain by the fact that the original file could not be found in the court records. The registry's failure to properly allocate and register the file means that the case did not exist in the eyes of the court, thereby rendering it a legal nullity. Without registration, the suit was not valid, as the court system relies on registration of a case to create an official record for a case to be pursued and be place before a competent court and judicial officer for prosecution of the matter. That the absence of the suit in the court's Case Tracking System (CTS) meant that it could not be traced electronically or physically. The court registry's inability to provide an official record of the suit further solidified the conclusion that CMELRC No. 6920 of 2019 was non-existent, and the Appellant was left without a valid case to proceed to file a fresh suit before a competent court.
32. That as per the procedural requirements under the Civil Procedure Rules and the Employment and Labour Relations Court Rules, once a suit is filed and registered, the parties are allowed to take further steps such as amending pleadings, filing motions, and prosecuting the case. However, in this case, since the suit was never properly registered, the Appellant could not take any of these steps.

Respondent's submissions.

33. The Respondent relied on the provisions of Section 6 of the *Civil Procedure Act*, which bars courts from proceeding with a matter if a similar issue is already under determination in another suit. This statutory provision embodies the doctrine of sub-judice, a legal principle aimed at preventing:
 1. Multiplicity of proceedings: The concurrent handling of similar cases wastes judicial resources and creates unnecessary confusion.
 2. Conflicting judgments: Without a safeguard, different courts could issue contradictory rulings on the same subject matter.
 3. Abuse of the court process. These principles are well elaborated in *David Ndi & Others v Attorney General & Others* [2021] eKLR and the Supreme Court Advisory Opinion Reference No. 1 of 2017 (*Kenya Natamal Commission on Human Rights v Attorney General*). The rationale behind sub-judice is to protect the administration of justice by safeguarding judicial resources, preventing duplication of effort. and ensuring consistent outcomes.



34. The Respondent submitted that the suit that led to the present suit that is, ELRC No. E654 of 2020, offended the sub-judice rule. The following points illustrate this violation:
1. Existence of two suits:
 - a) ELRC No. 6920 of 2019 was filed on October 14, 2019.
 - b) ELRC No. E654 of 2020 was filed on August 26, 2020.
 - c) Both suits involve the same parties, facts, and allegations of unfair termination of employment.
 2. Identity of parties:
 - a) The Claimant and Respondent are the same in both cases. The parties are litigating under the same legal titles and in their respective capacities as employer and employee.
 3. Substantial similarity in subject matter:
 - a) Both suits allege the same wrongful conduct-unfair and unlawful termination of employment.
 - b) The reliefs sought were nearly identical. As demonstrated by documents annexed to the Respondent's affidavit in the primary suit the claims and supporting facts are practically indistinguishable.
35. Jurisdictional competence: a) Both suits are before the Chief Magistrate's Court at Milimani, a court with jurisdiction to handle employment-related disputes under the Employment and [Labour Relations Act](#). The Respondent submitted that the Courts have consistently held that any suit offending the doctrine of sub-judice should be struck out to preserve judicial efficiency and fairness.

Decision

36. The court on perusal of the documents annexed by the appellant in his replying affidavit to the Notice of Motion found the summons to enter appearance and receipt on filing dated 14th October 2019. The summons were signed by the executive officer. The case number was clearly indicated as 6920 OF 2019. The claimant never attached any prove of having made complaint of the file as missing. He took the easy route of filing another suit or was it the advocate who misled him? The court finds that once a case is given a case number upon payment of the requisite fee it cannot be said it just evaporated and was no longer in existence. There was no evidence from the court itself that the case did not exist. The claimant did not even write a letter to the executive officer, who signed the summons for assistance. He just stated that it was assumed after a year of inactivity the suit abated. The appeal was hopeless. The court upheld the authority cited by both parties in *David Ndii & Others v Attorney General & Others* [2021] eKLR to hold that the suit No. E654 of 2020 was a duplicate hence subjudice. The appellant had a parallel suit before the trial court ELRC No. 6920 of 2019 filed on October 14, 2019. The court is further guided by the principles on appeal decisions in *Mbogo v Shah* [1968] EA De Lestang V.P (as he then was) observation at page 94: "I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion." The court did not find any basis to interfere with the ruling by Hon M.W. Murage (SRM) of 20.5.2022 and the same is upheld. The appeal is held to be without merit and is dismissed.



37. To temper justice with mercy, each party is to bear its own costs in the appeal.

38. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 28TH DAY OF MARCH, 2025.

J.W. KELI,

JUDGE.

In The Presence Of:

C/A Otieno

Appellant : -Muli

Respondent:- Ms Cherono h/b Onyango

