



**Njihia v Oscar & Associates Advocates (Cause E004 of 2025)
[2025] KEELRC 1056 (KLR) (3 April 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1056 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E004 OF 2025**

JK GAKERI, J

APRIL 3, 2025

BETWEEN

FREDRICK KANYORA NJIHIA CLAIMANT

AND

OSCAR & ASSOCIATES ADVOCATES RESPONDENT

RULING

1. By a plaint dated 6th February, 2024, the claimant instituted proceedings against the respondent claiming Kshs.83,963 as court award balance, Kshs.197,245 being costs awarded by the court, Kshs.87,877 as interest for 15 months at 25% per annum, punitive damages and costs.
2. The claimant avers that he filed suit ELRCC No. E020 of 2023, after his employment was terminated and was represented by the respondent advocate and Judgment was delivered on 4th October, 2023.
3. The court awarded compensation and costs and the respondent remitted part of the award and retained the balance and efforts to recover the same had not yielded any result hence the instant suit.
4. The claimant's plaint catalogues the efforts he has made to secure the balance including, reporting the respondent to the Law Society of Kenya.
5. As its response to the suit, the respondent filed a Notice of Preliminary Objection dated 14th March, 2025 urging that the court lacks jurisdiction to hear and determine the instant suit by virtue of Section 12(1) and (2) of the *Employment and Labour Relations Court Act*.
6. The respondent maintains that between the parties there exists an advocate/client relationship as opposed to an employment relationship as the claimant was claiming legal fees and the suit is res judicata Misc. Application No. E073 of 2024, Oscar Associate Advocate V Fredrick Njihia Kanyora.



Respondent's Submissions

7. As to whether the Notice of Preliminary Objection is merited, counsel relied on the sentiments of the Court in *Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd* [1969] EA 696 to urge that the Notice raised the issue of jurisdiction and res judicata.
8. On jurisdiction, reliance was placed on the sentiments of Nyarangi JA in *Owners of Motor Vessel "Lillian S" V Caltex Oil Kenya Ltd* [1989] eKLR as well as Article 162(2)(a) of *the Constitution* of Kenya and the decisions in *Nick Githinji Ndichu V Clerk Kiambu County Assembly & Another V Savannah Cement* [2022] eKLR, *Kamau V Gichana & Another* [2023] KEELRC (KLR) and *Aseda V Mesh Plus Plus Ltd* [2022] KEELRC 1650(KLR), to submit that the court had no jurisdiction to hear and determine the suit for want of an employment relationship between the parties.
9. On res judicata, reliance was placed on the decision in *John Florence Maritime Services Ltd & Another V Cabinet Secretary Transport and Infrastructure & 3 Others* [2021] KESC 39(KLR), on the essence and elements of the principle of res judicata to urge that the instant suit is res judicata.

Claimant's submissions

10. The claimant's submissions dated 1st April, 2025 provide a recap of the suits that he and the advocate had filed in court, to urge that the instant suit was filed for the court to enforce its Orders issued in ELRCC No. E020 of 2023 as he did not receive the full award as ordered by the court.
11. The claimant submits that since the instant suit relates to the original employment matter, ELRCC E020 of 2023, the court had jurisdiction to hear and determine it.
12. As the Notice of Preliminary Objection raises issues of the jurisdiction and res judicata which are points of law, and the issue has not been contested, the court is satisfied that it meets the threshold in *Mukisa Biscuit Manufacturing co. Ltd V West End Distributors Ltd* (Supra) as Law JA as follows:

“...A Preliminary Objection consists of a pure point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.
13. The foregoing sentiments were further amplified by the sentiments of Sir Charles Newbold P.
14. In *G4S Security Services (K) Ltd V Joseph Kamau & 468 Others* [2018] eKLR, the Court of Appeal stated:

“The test to be applied in determining whether the Preliminary Objection met the threshold as in the Mukisa Case (Supra) which are whether the Preliminary Objection raises a pure point of law that there is a demonstration that all facts pleaded by the other side are correct and that there is no fact that needs to be ascertained”.
15. As emphasized in legions of decisions, a Preliminary Objection raises a threshold question that requires disposal at the earliest possible instance owing to its potential to dispose of the suit before hearing and determination.
16. In the instant suit the respondent argues that the court has no jurisdiction to hear and determine the matter before it for want of an employer/employee relationship.



17. As correctly submitted by the respondent's Advocate jurisdiction is a foundational requirement in litigation. A party can only invoke a court's jurisdiction where the court has the jurisdiction being invoked at the commencement of the suit.
18. The often cited rendition of Nyarangi JA in Owners of Motor Vessel "Lillian S" V Caltex Oil Kenya Ltd (Supra) are spot on:

“...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.
19. Similarly, in Samuel Kamau Macharia & Another V Kenya Commercial Bank Ltd & Others, [2012] eKLR, the Supreme Court stated:

“A court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law. The issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere technicality. It goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings...”
20. The Employment and Labour Relations Court derives its jurisdiction from the provisions of Article 162(2)(a) of *the Constitution* of Kenya and Section 12 of the *Employment and Labour Relations Court Act*.
21. Whereas Article 162(2)(a) of *the Constitution* of Kenya mandated parliament to establish a superior to hear and determine disputes relating to employment and labour relations, the provisions of Section 12(1) of the *Employment and Labour Relations Court Act* exemplify the various types or categories of disputes the court can hear and determine.
22. However, the list of disputes under Section 12(1) of the *Employment and Labour Relations Court Act* is not exhaustive as the court's jurisdiction extends to all matters that fall within the four corners of the phrase “employment and labour relations” as held in *Aseda V Mesh Plus Plus Ltd* (Supra).
23. In the instant suit the claimant has neither alleged that he was an employee nor that the respondent was his employer.
24. Indeed, he admits that the respondent advocate represented him in the suit against his employer in 2023 and is now pursuing part of the court award allegedly held by his advocate.
25. He admits that the relationship between him and the respondent is one of Advocate/Client and confirms having reported the advocate to the Law Society of Kenya.
26. The provisions Section 12(1) of the *Employment and Labour Relations Court Act* do not envision a dispute between an advocate and his or her client as falling within the rubric of employment and labour relations for purposes of the court's jurisdiction.
27. Similarly, the provisions of Section 2 of the *Employment Act* are explicit as to who an “employee” and “employer” are and what constitutes a “contract of service”.
28. Finally, the claimant's submission that the court ought to hear the instant suit because it relates to the original case of unfair termination of employment ELRCC No. E020 of 2023 appears to ignore



the reality that the instant suit is a suit against an advocate, not his capacity as an employer but qua advocate, having represented the claimant in ELRCC No. E020 of 2023 and the court must satisfy itself that it has jurisdiction to hear and determine his new case.

29. The upshot of the foregoing is that the court is satisfied that it has no jurisdiction to hear and determine the instant suit for want of an employer/employee relationship between the parties.
30. Having found as above, the issue whether the instant suit is res judicata falls by the way side.
31. Consequently, the court hereby downs its tools and Orders that the claimants suit dated February 6, 2025 be and is hereby struck out for want of jurisdiction with no Orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 3RD DAY OF APRIL, 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

