



**Chere v Lake Basin Development Authority (Cause E002 of 2025)
[2025] KEELRC 1345 (KLR) (12 May 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1345 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E002 OF 2025**

JK GAKERI, J

MAY 12, 2025

BETWEEN

FREDRICK ONYANGO CHERE CLAIMANT

AND

LAKE BASIN DEVELOPMENT AUTHORITY RESPONDENT

RULING

1. Before the court for determination is the respondents Notice of Motion dated 18th March, 2025 seeking Orders that:
 1. The claimant’s Memorandum of Claim dated 24th January, 2025 be struck out.
 2. Costs of the application be provided for.
2. The Notice of Motion of Motion is expressed under Section 5 of the *Judicature Act*, Sections 3, 3A and 63 of the *Civil Procedure Act*, Rule 45 of the Employment and Labour Relations Court (Procedure) Rules and Article 159 of *the Constitution* of Kenya and is based on the grounds set forth on its face and the Supporting Affidavit sworn by Wycliffe Ochiaga on 15th March, 2025 who deposes that the claimant was summarily dismissed on 27th October, 2023 on account of gross misconduct by absenting himself from duty without leave.
3. That aggrieved by the decision the claimant filed ELRC JR No. E045 of 2023 seeking an order of certiorari to quash the decision and mandamus for reinstatement and was dismissed after considering the same on merits hence the instant suit is res judicata and the court has no jurisdiction to hear and determine the instant suit on account of res judicata and had expressed an interest to appeal the Judgment in ELRC JR No. E045 of 2023 and filed a Notice of Appeal.



Claimant's response

4. By a Replying Affidavit sworn on 8th April, 2025, the claimant deposes that the suit is not res judicata in that he discovered that mandamus was limited to specific legal rights and has no remedy to enforce and only dealt with legality of the process as opposed to merits and counsel inadvertently failed to share details of other reliefs for enforcement of his rights.
5. The claimant deposes that mistakes, faults or lapses ought not to be visited on an innocent litigant and he would have filed a claim had counsel shared the details.
6. The claimant cites Black's Law Dictionary to isolate the essentials of res judicata to aver that the burden of proof lay on the applicant to prove that his suit is indeed res judicata.
7. The claimant deposes that the instant suit was an opportunity for his case to be heard on merits.
8. That res judicata bars future suits when a case is resolved based on evidence and facts.
9. The claimant deposes that he did not issue instructions to his counsel to appeal and the Notice of Appeal on record was issued without his authority and it ought to be struck out.

Respondent's submissions

10. As to whether the claimant's suit is res judicata, counsel for the respondent cited the provisions of the *Civil Procedure Act* and the sentiments of the Court in *Kenya Commercial Bank Ltd V Benjoh Amalgamated Ltd* [2017] eKLR as well as *John Florence Maritime Services Ltd & Another V Cabinet Secretary Transport and Infrastructure & 3 Others* [2021] KESC 39 (KLR), to isolate the requirements of res judicata and urge that since the claimant sought reinstatement in ELRC JR No.E045 of 2023, the issues in this suit were directly and substantially in issue in that suit since the subject matter was the claimant's summary dismissal as was its illegality and unfairness.
11. Counsel urged that the court's decision upheld the decision of the respondent and all the elements of res judicata were satisfied namely; the issues, heard and finally determined between the same parties and court had jurisdiction to hear and determine the suit. Counsel submitted that the instant suit was a textbook case of res judicata and the claimant was inviting the court to arrive at a different finding from the previous finding and he ought to have appealed the decision.
12. Relatedly, the claimant could have sought compensation in the Judicial Review matter and was seeking the same and ought to have instituted the entire claim against the respondent and the court is barred from hearing and determining the instant suit.
13. Reliance was also placed on the sentiments of the court in *Kibisu V Republic* [2014] KESC 55 (KLR) and *Independent Electoral and Boundaries Commission V Maina Kiai & 5 Others* [2017] eKLR among others on the rationale of the principle of res judicata to urge that the claimants suit was untenable as the court had no jurisdiction to hear and determine it.

Claimant's submissions

14. Concerning res judicata, the claimant submitted that on reading the judgment of the Court in ELRC JR No. 045 of 2023, he learnt the mandamus was limited to specific legal rights and the instant suit seeks determination of disputed questions of fact and justice for the summary dismissal.
15. According to the claimant, res judicata only applies where facts and evidence are considered in the determination of a case.



16. Reliance was placed on the sentiments of the court in *Sanghani Investment, Ltd V Officer in Charge Nairobi remand and Allocation Prison* [2007] IEA 354 and *John Florence Maritime Services Ltd Case (Supra)* on the potential of *res judicata* to lock out a person from the doors of justice if the claim is disposed off without venturing into merits.
17. The claimant blames his counsel for the previous suit, submitting that counsel took advantage of him as a lay person by filing the Judicial Review.
18. Reliance was also made on the sentiments of the court in *Tana and Athi River Development Authority V Jeremiah Kimingho Mwakio & 3 Others* [2015] eKLR.
19. Finally, the claimant submitted that his counsel filed the Notice of Appeal without his consent. That the mistakes of counsel ought not to be visited on the client citing the sentiments of the court in *Pithon Waweru Maina V Thuki Mugina* [1982].

Analysis and determination

20. It is common ground that the claimant herein filed Kisumu ELRC JR No. 045 of 2023 seeking judicial review Orders of certiorari and mandamus to quash the respondent's termination letter dated, 27th October, 2023 and reinstatement to his previous position prior to the dismissal from employment.
21. After considering the Notice of Motion dated 26th February, 2024, the respondent's response and submissions by parties, the court found that
22. The applicant has not proved that the decision to dismiss him is tainted with illegality, irrationality or procedural propriety as to warrant grant of judicial review orders of certiorari that he seeks.
23. Further and as correctly submitted by the respondent the quashing of the decision to dismiss the *ex parte* application via the Judgment of this court rendered on 23rd March 2023, was not a bar to subsequent disciplinary proceedings against the applicant... In the end, I find the motion devoid of merit and is for dismissal. It is dismissed with costs to the respondent”.
24. Evidently, the foundation stone of the claimant's suit in Kisumu ELRC JR No. E045 of 2023 was the dismissal from employment vide letter dated 27th October, 2023 and the claimant blames his counsel for the suit.
25. The court is at a loss as to who instructed the advocate and what they agreed as the course of action in handling the matter.
26. It is equally not in dispute that the claimant filed the instant suit in person on 24th January, 2025.
27. The claim is grounded on unfair and unlawful termination of employment and violation of constitutional rights and seeks numerous reliefs including declarations, compensation for violation of constitutional rights, salary in lieu of notice, 12 months compensation withheld allowance and salary leave, forced leave, annual leave allowance for 4 years, general damages for violation of constitutional rights unremitted pension contribution and costs.
28. Whereas the respondent argues that the instant suit is *res judicata* ELRC JR No. E045 of 2023, and the court has no jurisdiction to hear and determine it, the claimant maintains that he was misled by his counsel and in any case the decision in Kisumu ELRC JR No. E045 of 2023 did not consider facts and evidence and Judicial Review cannot remedy all violations.



Is the claimant's suit res judicata Kisumu ELRC JR No. E045 of 2023?

28. 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.”

29. In *Kenya Commercial Bank Ltd V Muiri Coffee Estates Ltd* [2016] eKLR the Supreme Court of Kenya expressed itself as follows:

Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights. Such a perception has a basis in comparative jurisprudence; in the Ugandan case of *Hon. Norbert Mao V Attorney-General*, Petition No. 9 of 2002; [2003] UGCC3...

The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively...

30. Hence, whenever the question of res judicata is raised, a Court will look at the decision claimed to have settled, the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The Court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a Court of competent jurisdiction. This test is summarized in *Bernard Mugo Ndegwa V James Nderitu Githae & 2 Others*, (2010) eKLR, under five distinct heads:

- i. the matter in issue is identical in both suits;
- ii. the parties in the suit are the same;
- iii. sameness of the title/claim;
- iv. concurrence of jurisdiction; and
- v. finality of the previous decision.

31. The Courts have to be vigilant against the drafting of pleadings in such manner as to obviate the res judicata principle was judicially remarked in *E.T V Attorney-General & Another*, (2012) eKLR... (See also *I.E.B.C. V Maina Kiai & 5 Others* (supra).

32. As correctly submitted by the Applicant, the principle of res judicata serves a practical purpose as it ensure that there is an end to litigation. It prevents parties from re-litigating similar issues in concurrent courts and facilitates judicious utilization of judicial resources.



33. See *Kibisu V Republic (Supra)*, *I.E.B.C. V Maina Kiai & 5 Others (Supra)* and *John Florence Maritime Services Ltd Case (Supra)*, *James Njuguna Chui V John Njogu Kimani [2017] eKLR* and *Uhuru Highway Development Ltd V Central Bank of Kenya [1996] eKLR* among others.
34. In *Henderson V Henderson [1843] 67 E.R 3B* the court stated as follows:

...where a given matter becomes the subject of litigation in and adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of the matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time”.
35. The court is further guided by the sentiments of the court in *George W. M. Omondi & another V National Bank of Kenya Ltd*, where the court held:

The doctrine of *res judicata* would apply not only to situation where a specific matter between the same persons litigating in the same capacity has previously been determined by a court of competent jurisdiction, but also situation where either the matters which could have been brought in were not brought in or parties could have been enjoined were not enjoined. Parties cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action in a subsequent suit. They are bound to bring all their cases at once. They are forbidden from litigating in instalments”
36. The foregoing sentiments apply on all fours to the circumstances of this case.
37. In *Kisumu ELRC JR No. E045 of 2023*, the substantive motion dated 26th February, 2024 and filed on 27th February, 2024 was challenging the respondent’s letter dated 27th October, 2023 which terminated the claimant’s employment, the second summary dismissal in about 13 months.
38. Similarly, the claimant’s Supporting Affidavit sworn on 27th February, 2024 is clear on the cause of action. The claimant questioned the reason and process of dismissal from employment.
39. In a Replying Affidavit sworn by the respondent’s Managing Director on 15th April, 2024, the deponent catalogues the circumstances that led to the claimant’s dismissal from employment for misconduct and in particular absenting himself from duty without leave.
40. In sum, the issue before the court in *Kisumu ELRC JR No. E045 of 2023* was the claimant’s summary dismissal by the respondent, and after hearing both sides the court found the motion unproved and dismissed it with costs to the respondent.
41. It is common ground that the claimant’s Memorandum of Claim dated 24th January, 2025 is indeed challenging his dismissal on 27th October, 2025, which he characterises as unlawful and unfair.
42. In the court’s view, the issue in both suits was the same, so were the parties, litigating under the same title and the court that heard *Kisumu ELRC JR No. E045 of 2023* was competent to hear and determine the instant suit.



43. The claimant places the blame squarely on his counsel's desk for having filed a Judicial Review as opposed to a cause.
44. Needles to belabour, the remedy of reinstatement sought in Kisumu ELRC JR No. E045 of 2023 was also available under an ordinary claim.
45. The argument that his counsel made the decision to file a Judicial Review cannot avail the claimant for the simple reason that it was his case and the advocate is an agent only execute the authority conferred by the principals save the customary or usual authority of a practitioner.
It is trite law that a case belongs to the litigant not the advocate.
See Savings and Loans V Susan Wanjiru Muritu HCCS No. 397 of 2002.
46. In the case the advocate did not make any mistake. The claimant and his advocate agreed on the course of action.
47. However, contrary to the claimant's submission that judicial review does not involve contested matters of evidence it does, and evidence is by affidavit with annexures as appropriate, analogous to a cause.
48. Whereas claims are characterised by viva voce evidence, it is not a legal requirement and the law allows determination of such suits on the basis of the documents and submissions.
49. In any event, whether or not a Judicial Review is merited or not turns on the congruency of the evidence adduced by the applicant vis-à-vis the countervailing evidence.
50. Flowing from the foregoing, the court is satisfied that the respondent's Notice of Motion dated 18th March, 2025 is merited and the claimant's Memorandum of Claim dated 24th January, 2025 and filed on 27th January, 2025 is hereby struck out for being res judicata Kisumu ELRC JR No. E045 of 2023.
Parties shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 12TH DAY OF MAY, 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.

