



Mbaja & 28 others v County Government of Migori & another (Cause E041 of 2023) [2025] KEELRC 1844 (KLR) (24 June 2025) (Judgment)

Neutral citation: [2025] KEELRC 1844 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E041 OF 2023**

JK GAKERI, J

JUNE 24, 2025

BETWEEN

SYMON AYORO MBAJA & 28 OTHERS & 28 OTHERS & 28 OTHERS CLAIMANT

AND

COUNTY GOVERNMENT OF MIGORI 1ST RESPONDENT

MIGORI COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT

JUDGMENT

1. The claimants commenced this suit by a statement of claim dated 19th June, 2023 filed on even date alleging unfair and unlawful termination of employment by the respondents on an undisclosed date in June, 2023.
2. The claimants allege that they worked for the respondents for periods ranging from 4 to 14 years drawing salaries at the end of each month and their continued description of casuals was an abuse of their rights.
3. They allege that the respondents had published a list of employees leaving out the claimants, thus constructively terminating their services.
4. That the respondents were in the process of employment of new employees in place of the claimants.

The claimants pray for: -

- a. A declaration that the publication of a list of employees on 15th June, 2023 violated their right and should be declared null and void.
- b. A declaration that termination of the Petitioner is in gross violation of Section 41, 45 and 47 of the [Employment Act](#) and unlawful.



- c. Reinstatement to their various capacities.
- d. An order compelling the respondents to employ the claimants on permanent terms.
- e. Costs of the suit.

Respondents case

5. Vide a response dated 10th July, 2023, the respondents aver that the claimants were employed under non-renewable fixed term contracts as follows:
 1. Abich Omondi Michael, 1st July to 30th September, 2014 and another from 2nd April, 2021 for 3 months.
 2. Jacob Ouma Nyambok, 1st July 2014 to 30th September 2014 and 5th November, 2020 to 5th February, 2021.
 3. Kennedy Ouma Orondo, 1st July, 2020 to 30th September, 2020, 1st March 2020 to 31st May, 2002 and earlier ones in 2014.
 4. Smith David John, 1st July, 2020 to 30th September, 2020, 1st March 2020 to 31st May 2020 and 2nd April, 2021 for 3 months.
 5. Maurice Akinyi Nyanguko, 2nd April, 2021 for 3 months.
 6. Ongere Daphros Akinyi, 1st July, 2014 to 30th September, 2014.
 7. Kennedy Odiwuor Panyako, 1st July 2014 to 30th September, 2014 and 2nd April 2013 for 3 months.
 8. Grace Akinyi Opondo, 1st July, 2014 to 30th September, 2014 and 1st October, 2014 to 30th December, 2014.
 9. Judith Akoth Nyamwaya, 1st July, 2020 to 30th September, 2020 and 1st October, 2014, 30th December, 2014 and 1st July, 2014 to 30th September, 2014.
 10. Harry Phillip Ogendo, 2nd April, 2021 for 3 months.
 11. Quiry Awuor Ouma, 1st July, 2020 to 30th September, 2020.
 12. Margaret Atieno Aol, 1st October, 2014 to 31st December, 2014.
 13. Robi Caroline, 2nd April, 2021 for 3 months.
 14. Maurice Okello Obonyo, 1st October, 2014 to 30th December, 2014.
 15. Benta Adhiambo Odira, 1st July, 2002 to 30th September, 2020.
 16. Ezekiel Opollo Onyango, 1st July, 2014 to 30th September, 2020.
 17. Samwel Ochieng Opiyo, 1st March, 2020 to 30th September, 2020.
 18. Rosa Achieng Odhiambo, 1st July, 2020 to 30th September, 2020.
6. According to the respondents, Dennis Abich, Joel Okuta, Isaiah Mwita, Maurice Odiere Swao, Daniel Odhiambo, Jane Ongola, Pamela Ngome, Caroline Ongalo and Denis Abuga worked for the 1st respondent under fixed term contracts which clearly spelt out the date of commencement and expiry.



7. The respondents further averred that none of the claimants had a contract after the end of July 2021 and only dealt with 27 employees as opposed to 29.
8. In his evidence Mr. Michael Omondi Abich testified that he was employed by the 1st respondent on 12th October, 2012 as a casual labourer until 19th February, 2013 and other short time contracts and the last written contract was dated 2nd April, 2021 for 3 months and remained in employment until 15th June, 2023 when he was dismissed from employment by word of mouth.
9. Mr. Abich Michael further testified that one CPA Marvin Omondi filed case number E024 of 2023 against the respondents and certain orders were made.
10. That the suit was filed on behalf of all casual employees of the respondents.
11. RWI Mr. Andrew Okach Ochola testified that the claimants were employed under fixed term contracts of 3 months which lapsed and had no renewal clauses and were paid.
12. On cross-examination RWI confirmed that he did not find any record of casuals in Migori County and it had no casual employees.

Claimant's submissions

13. Mr. Michael Omondo Abich submitted on six (6) issues, namely; employment status, unlawful and constructive termination of employment by the respondent, procedural compliance and due process, recruitment irregularities, violation of constitutional rights and the courts authority to grant the reliefs sought.
14. As regards employment status and classification, Michael Omondi Abich submitted that owing to the extended periods of service, the claimants ought to be regarded as term employees by operation of law by dint of Section 37(1) of the *Employment Act*.
15. That their classification as casual employees was inappropriate and relied on the sentiments of the Court of Appeal in Kenya Airways Ltd V Aviation Allied Workers Union Kenya [2014] eKLR.
16. On constructive dismissal Mr. Abich cited the decision in Kenya Commercial Bank Ltd V Kenya Commercial Finance Company Staff Union [2017] eKLR to urge that a termination of employment only passes as fair where the provisions of the *Employment Act* are complied with.
regarding constitutional violations, the claimants cited the decisions in Republic V Kenya National Examination Council Ex Parte Audrey Mbugua [2014] eKLR and Judicial Service Commission V Mbalu Mutava [2015] eKLR, to urge that the requirements of Article 27, 41, and 47 and 50 of *the Constitution* of Kenya ought to have been complied with but were not.
17. Strangely, the claimant submitted on what he styled as illegal recruitment process citing Section 59(1) of the County Government Act and the decision in CPA Marvin Omondi Ngei V Chief Officer Public Service Management and Devolution, Migori County Public Service Board; Interested Party which he styled as Ngei precedent, which quashed the respondents advertisements and prohibited it from implementing an irregular process.
18. Mr. Abich argued that the Ngei case was a public interest Judicial Review challenging the advertisements while the instant case related to an individualized fact specific employment dispute and the claimants herein were not parties to the suit and their grievance were not adjudicated and was relied upon in the instant case as persuasive reasoning on the invalidity of the recruitment process and res judicata could not apply.



19. According to Mr. Abich, the instant case presented a systematic violation of employment, statutory provisions and constitutional principles.
20. Puzzlingly, in his conclusion Mr. Abich submitted that the Ngei judgment involved identical respondents, identical issues and identical illegal advertisement and was a precedent in support of his case.

Respondent's submissions

21. As to whether the claimants were employees of the respondent and terms of service, counsel submitted that evidence showed that some of them serviced under fixed term contracts and the latest was produced by Mr. Abich which ended on 2nd July, 2021 and none of the contracts was renewable.
22. On termination of employment, counsel submitted that the claimant's fixed term contracts ended by effluxion of time and such contracts carry no expectation of renewal.
23. Reliance was placed on the decisions in Enid Nkirote Mukire V Kenya Yearbook Editorial Board [2022] eKLR and Margaret A. Achieng V National Water Conservation & Pipeline Corporation [2014] eKLR.
24. Counsel urged that the claimants bore the burden of proof that termination of his employment was unfair but failed to do so.
25. Reliance was placed on the decision in George Onyango Akuti V Security Services Kenya Ltd [2013] eKLR and Samuel Chacha Mwita V Kenya Medical Research Institute [2014] among others. Counsel urged the court to disallow the suit.

Analysis and determination

26. Significantly, although the claimants intended to confer authority on Mr. Jacob Ouma Nyambo, Abich Omondi Michael and Symon Ayoro Mbaja, to swear and sign affidavits and pleadings on their behalf, the authority was not executed and there is no Letter of Authority on record.
27. Mr. Abich Michael Omondi acted in person and on his own behalf as had no authority to represent the other claimants whose cases remained unprosecuted and abated.
28. Documentary evidence on record shows that the claimant was engaged on short term basis effective 12th October, 2012, and by 17th September, 2013, the claimant had been working for the Migori County Government since January 2013 which was followed by the written contract dated 1st July, 2014 to 30th September, 2014, 1st October, 2014 to 31st December, 2014.
29. Another written contract effective 2nd April, 2021 was slated to last for 3 months till the end of July and no other written contract was issued.
30. Strangely, an unsigned letter allegedly by one Mr. Symon O. Obando, the Acting Sub-County Administrator, Nyatike suggested that the claimant was still working for the respondents on 14th March, 2023.
31. In addition, the Migori County Government stamp for Nyatike Sub-County used lacks authentication and date. Without any authentication, the letter dated 14th March, 2023 lacks any evidential value.
32. In a nutshell, there is nothing on record to show that the claimant was still in employment after 30th June, 2021.



33. The claimant complained that the respondent continuously referred to him and others as a casual employee yet he was not and his employment was terminated by word of mouth on an unidentified date.
34. One of the core issues for determination is whether the claimant was a casual employee.
35. Under Section 2 of the [Employment Act](#), casual employee means a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time.
36. Clearly, the claimant was not employed as a casual employee if the foregoing definition is anything to go by.
37. Moreover, even if he was a casual employee, the claimant's employment transitioned to term under the provisions of Section 37 of the [Employment Act](#) which provides-
- (1) Notwithstanding any provisions of this Act, where a casual employee—
 - (a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or
 - (b) performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the No. 3 of 1997. www.kenyalaw.org The [Employment Act](#), 2007 aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35 (1) (c) shall apply to that contract of service.
38. The contract of service of the casual employee shall be deemed to be one where wages are paid monthly and Section 35(1)(c) shall apply to the contract of service.
39. See *Nanyuki Water & Sewerage Co. Ltd V Benson Mwiti Ntiritu & 4 others* [2018] eKLR.
40. Concerning termination of employment, the claimant alleges that he was dismissed from employment by word of mouth. However, the date of termination is not identified nor by whom and how the alleged dismissal from employment took place.
41. Even assuming that all the claimants named in the statement of claim were dismissed from employment on the same day, how was the decision communicated, were they invited for a meeting or summoned individually and by whom?
42. As the respondents are not natural person, they think or act thorough responsible officers who make and communicate decisions and in this instance no wrong doing has been attributed to any of the responsible officers of the respondents.
43. Settling out the background and the circumstances in which the alleged dismissal from employment took place was critical to the claimant's case not only to counter the respondents testimony that the claimant was not dismissed and his contract lapsed, but also to demonstrate that it was the more plausible.
44. Significantly, 47(5) of the [Employment Act](#) are provides:
- For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.



45. This provision has been construed to mean that in cases of unfair termination or wrongful dismissal, the employee is required to lay a prima facie basis that his/her employment was terminated and that the termination or dismissal from employment was unfair or wrongful, the burden then shifts to the employer to demonstrate that the termination or dismissal from employment was justified in the circumstances and the procedure followed was fair.
46. Relatedly Section 107 of the *Evidence Act* provides:
1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 2. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person
47. Section 108 provides that:
- The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
48. Finally, Section 109 of the *Evidence Act* deals with the burden of proof of any particular fact. The burden lies on the person who wishes the court to believe in its existence.
49. Based on the evidence on record, it is the finding of this court that the claimant, Mr. Abich Omondi Michael has failed to establish a prima facie case showing that the respondents or any of them terminated his employment on any particular day and that the termination of his employment was unfair or unlawful.
50. During the hearing of the respondent's case on 4th June, 2025, in the course of cross-examination, Mr. Abich Omondi Michael, the claimant told the court that there had been an earlier case filed on behalf of all the "casual employees" of the respondents including all the claimants named in the statement of claim, Kisumu ELRC JR No. E024 of 2023 CPA Marvin Omondi Ngei V Chief Officer Public Service Management and Devolution Migori County Public Service Board; Interested Party and Judgment was delivered on 2nd May, 2024 and certain orders were made.
- Kisumu ELRC JR No. E024 of 2023 was filed on 22nd June, 2023 by one Marvin Omondi Ngei in the public interest and the court dismissed an objection that it had no jurisdiction to hear and determine the suit.
51. The suit was challenging certain decisions taken by the members of the Migori County Assembly, principally advertising for positions of security guards (200) ADVERT NO. CGM/PSMD/001/2023 dated 5th May, 2023 and deadline for application was 26th May, 2023 at 5:00pm and ADVERT NO. CGM/PSMD/002/2023 which was similar to the previous advertisement dated on even date.
52. Evidence in that case showed that the issue of casual employment by the Migori County Government had been investigated by an Adhoc Committee of the Migori County Assembly a report placed before the County Assembly and a resolution of pay outstanding dues to the casual workers passed.
53. The applicant sought the orders of certiorari to quash the decisions of the respondent as per the advertisements, prohibition from implementing, operationalizing validating or giving effect to the impugned decisions as per the advertisements and mandamus to recall the decisions by public notice and to implement the decision of the County Assembly respecting absorption of casuals and temporary employees as agreed and vacating any suppose dismissal or termination.



54. The court granted the orders of certiorari quashing the respondents decision as reposed in the two advertisements and prohibited the respondents from implementing, operationalizing, validating and/ or giving effect to the decisions reposed in the public advertisements dated 5th May, 2025.
55. The court has deliberately captured the background and decision in KISUMU ERLC JR NO. E024 of 2023 in order to ascertain whether the instant suit is res judicata that decision.
56. 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.
57. In *Christopher Kenyariri V Salama Beach* [2017] eKLR, the court identified the prerequisites of res judicata as follows:
- ... the following elements must be satisfied ... in conjunctive terms;
- a) The suit or issue was directly and substantially in issue in the 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.
 - 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.”
58. The rationale of res judicata has been elucidated in a catena of decisions including by the Court of Appeal in *Independent and Electoral Boundaries Commission V Maina Kiai & 5 Others* [2017] eKLR where the court stated:
- "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”.
59. In the instant case, the claimants filed the instant suit and acquiesced to the filing of Kisumu ELRC JR No. E024 of 2023 three (3) days later, in the same court and did not raise the issue before the court for further directions and the same court was handling the two matters simultaneously.
60. Notably, it is not coincidental that in both cases the respondents filed Notices of Preliminary Objection dated 10th July, 2023 and 15th September, 2023 on the principle of exhaustion and the former was not prosecuted until 13th November, 2024 and after the judgment in *Kisumu ELRC JR NO. E024/2023*, on 2nd May, 2024, only the claimant, Mr. Abich Omondi Michael and Mr. Summon Ayoro Mbaja were



interested in the case and Mr. Abich Omondi Michael sought to appear in person and significantly contributed to the long delay in having the suit concluded on account of non-attendance.

61. The claimant informed the court that KISUMU ELRC JR No. E024 of 2023 was filed on behalf of all casuals and opted to proceed with the instant suit because the orders decreed on 2nd May, 2024 were not honoured.
62. However, he adduced no evidence as to what had transpired since then including the reason why he was the only claimant in the instant suit.
63. In the court's view, since the two cases related to the vexing question of casuals employed by the Migori County Government and their future and in particular decisions taken on 5th May, 2023 advertising the positions for casuals which the court quashed including any termination or dismissals arising there from, facts the claimant admits, the parties are the same and litigating under the same title and the court had jurisdiction to hear and heard both suits, the ingredients of res judicata are present.
64. The court finds and holds that the instant suit is res judicata Kisumu ELRC JR No. E024 of 2023 CPA Marvin Omondi Ngei V The Chief Officer, Public Service Management and Devolution and Migori County Public Service Board: Interested Party.
65. This suit ought to have been withdrawn following the decision in Kisumu ELRC No. E024 of 2023 which restored the status quo on the decisions dated 5th May, 2023.
66. Having found that the claimant Mr. Abich Omondi Michael has failed to prove that termination of his employment, if any, was unfair or unlawful as by law required, and having further found that the instant suit is res judicata Kisumu ELRC JR No. E024 of 2023, the court is satisfied that the instant suit is unsustainable and it is accordingly dismissed with no orders as to costs.

It is so Ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 24TH DAY OF JUNE, 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

