



Universities Academic Staff Union (UASU) v Kenyatta University (Employment and Labour Relations Petition E173 of 2022) [2024] KEELRC 858 (KLR) (12 April 2024) (Ruling)

Neutral citation: [2024] KEELRC 858 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E173 OF 2022**

AN MWAURE, J

APRIL 12, 2024

BETWEEN

UNIVERSITIES ACADEMIC STAFF UNION (UASU) PETITIONER

AND

KENYATTA UNIVERSITY RESPONDENT

RULING

1. The Respondent/Applicant filed a Notice of Motion dated 18th April 2023 seeking the following orders: -
 1. spent
 2. spent
 3. this Honourable Court be pleased to strike out the entire Application and Petition both dated 6th October 2022.
 4. upon grant of order (3) hereinabove the suit herein be dismissed with costs to the Respondent.
 5. in the alternative, this Honourable Court be pleased to order a stay of proceedings in this Petition, pending the hearing and determination of ELRC Petition No. 153 of 2022 *Dr Wilfrida A. Itolodo -v- Kenyatta University*.
 6. the costs of this Application be borne by the Petitioner, in any event.

Respondent/ Applicant's Case

2. The Respondent/Applicant avers that the factual and legal issues raised in this Petition are currently the subject matter of Milimani ELRC Petition No. 153 of 2022 Dr. Wilfrida A. *Itolodo -v- Kenyatta University*.



3. The Respondent/Applicant avers that the Petitioner in ELRC Petition No. 153 of 2022, Dr. Wilfrida A. Itolodo is an employee of Kenyatta University and a member of UASU and official or former official of UASU (KU Chapter).
4. The Respondent/Applicant avers that the issues raised in ELRC Petition No. 153 of 2022 are similar to those raised in the Petition herein and if allowed to proceed, is likely to cause prejudice to the Respondent and embarrassment to this court.
5. The Respondent/Applicant avers that this suit amounts to wastage of precious judicial time and resources.
6. The Respondent/Applicant avers that this Application will not prejudice the Petitioner in any way.
7. The Respondent/Applicant avers that the Petition in ELRC Petition No. 153 of 2022 was filed earlier than this Petition and has progressed substantially hence there is no justification for filing or prosecution of this later suit.

Petitioner/Respondent's Case

8. In opposition to the Application, the Respondents filed a replying affidavit dated 22nd November 2023.
9. The Petitioner/Respondent avers that the instant Petition involves the Union suing the University on behalf of its members whereas ELRC Petition No. 153 of 2022, is an individual suing the Vice Chancellor of Kenyatta University in his individual capacity. An individual has no capacity to represent the academic staff and cannot articulate on behalf of UASU.
10. The Petitioner/Respondent avers that the subject matter of the two cases are different as the instant suit revolves around implementation of a new academic staff workload without UASU's involvement and ELRC Petition No. 153 of 2022 is about restructuring and reforms and has nothing to do with the workload.
11. The Petitioner/Respondent avers that the two petitions are different and none relates or relies on the other.
12. The Petitioner/Respondent avers that the Applicant is abusing the court process by mischievously misleading this court as a way of delay tactics to hinder the administration of justice.

Respondent/Applicant's Submissions

13. The Respondent/Applicant submitted that the legal and factual matters in issue are directly and substantially the same with those raised in ELRC Petition No. 153 of 2022, which is an earlier suit.
14. The Petitioner in the earlier suit sought stay orders against implementation of the Respondent's alleged Report on Reforms and Restructuring of the University whose effect would be to vary the workload of the lecturers by increasing the units taught. This alleged report varies workload touching academic staff covered under the CBA between Kenyatta University and UASU.
15. Whereas, in this suit, the Petitioner sought vide its application dated 06.10.2022, conservatory orders against the Respondent's memo dated 08.09.2022 which would vary the lecturer's workload by increasing units taught. The Petitioner further asserts it was not consulted in the decision despite its varying the CBA.



16. It is the Respondent/Applicant's submission that in determining whether sub judice applies, the substance of the claim ought to be looked at rather the prayers sought. It is evident that both suits raise identical issues couched in different terms.
17. The Respondent/Applicant submitted that mere fact that the Respondent in the earlier suit is the Vice Chancellor of Kenyatta University and the Respondent in this suit is the University does not change the circumstance of the suit. The Vice Chancellor has been sued on behalf of the University over the same subject matter and identical issues.
18. The Respondent/Applicant submitted that it will be prejudiced immensely as the Respondent will be forced to instruct counsel at great expense to defend 2 suits and multiple application raising similar issues.
19. It is the Respondents submission that by allowing this application, the court will be preventing a multiplicity of suits between the parties which would prevent prejudice to the Respondent and would be at the best interest of the parties as minimum time and money would be spent litigating the matter.

Petitioner/Respondent's Submissions

20. The Petitioner/Respondent maintain that the individual suing in ELRCPET/153/2022, Dr. Wilfrida Itolondo has no capacity to represent the academic staff and cannot articulate on behalf of UASU as she is an official.
21. The Petitioner/Respondent submitted that Dr. Wilfrida Itolondo swore the supporting affidavit in ELRCPET/153/2022 in her capacity as a Kenyatta University employee on her own behalf and on behalf of other employees as key stake holders of the university and the general public. Further, she did not attach any authority from Kenyatta University employees allowing her to act on their behalf.
22. The Petitioner/Respondent submitted that the parties in the two petitions are different this the petitions are different.
23. The Petitioner/Respondent submitted that the instant petition is concerned with one specific memo dated 08.09.2022 Ref KU/DVCACAD/CLR/VOL.7 not mentioned in the other case. The documents relied on are different thereby distinguishing ELRCPET/E173/2022 from ELRCPET/153/2022.
24. It is the Petitioner/Respondent's submission that the subject matter of the two petitions are different thus the petitions are different.

Analysis and Determination

25. Having considered the application, affidavits and submissions on record, the issue for determination is whether the instant suit is sub judice ELRCPET/153/2022.
26. The provisions of Section 6 of *Civil Procedure Act* defines the doctrine of sub judice as follows:

“..... No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim litigating under the same title, where such suit or proceeding is pending in the same court or any other court having jurisdiction in Kenya to grant the relief claimed.”



27. The doctrine of sub judice is discussed in the case of *Heritage Insurance Company Limited v. Patrick Kasina Kisilu* [2015] eKLR. There the court stated that:

“To prevent abuse of the court of process where parallel proceedings are had before two different courts with concurrent jurisdiction or before the same court at different times, section 6 of the *Civil Procedure Act* requires that the latter application be stayed to allow the hearing and determination of the earlier proceedings.”

28. Further, in the case of *Barclays Bank Of Kenya Ltd v. Elizabeth Agidza & 2 Others* [2012] eKLR, the learned Judge held that:

“...the entire subject matter in the subsequent suit must be covered by the previously instituted suit. That proposition of law is informed by the extract from the learned text in *Judicial Hints on Civil Procedure Vol. 1* by Justice Kuloba where at page 42 it is stated:-

‘Authorities are clear that ‘matters in issue’ does not mean any matter in issue in the suit but has reference to the entire subject matter in controversy, it is not sufficient that one or some issues are in common. The subject matter of the subsequent suit must be covered by the previously instituted suit and not vice versa. Sir Newnham Worly, VP, in *Jadna Karsan –v- Harnam Singh Bhogal* (1953) 20 EACA 74 at 76 (10th March, 1953).

... if a substantial part of the matters in issue of controversy in the subsequent suit is covered by the previous suit, Section 6 should be invoked to save the previous judicial resources.”

29. As submitted by the Petitioner/Applicant, the instant suit and ELRC Petition No. 153 of 2022 clearly refer to different subject matter as the latter is pegged on a Report on Reforms and Restructuring at Kenyatta University and the instant suit on the University’s memo dated memo dated 08.09.2022 Ref KU/DVCACAD/CLR/VOL.7 to do with varying workload of lecturers.

30. The petition NO 153 of 2022 refer to a report handling the restructuring and reforms of staff of the university. The petitioner Dr Wilfrida Itolondo did not annexe the report as she says the Vice Chancellor refused to avail the same to her. As it is she says she read a news item in the nation newspaper on 8/5/2022 referring to laying off of about 100 members of staff of Kenyatta University. The court is therefore not clear what the reform exactly referred to.

31. As for this current petition it refers specifically to implementation of a memo dated 8th September 2022 referenced as KU/DUCACAD/CLR/vol 7 and is specific is about revision of staff work load which was to be implemented without inclusion of the petitioner who is the union (UASU).

32. Having considered the available information the court finds the two petitions seem to raise totally different issues and so finds the doctrine of subjudice does not apply in this instance. The petition of reform was around April 2022 and the one on workload was as late as September 2022.

33. The application therefore via notice of motion dated 18th April 2023 is not merited and is dismissed with costs to the petitioners as the two petitions raise different issues and so the two should proceed separately.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 12TH DAY OF APRIL, 2024.



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

