



**Pktai & another v Cloud Factory Kenya Limited; Adanga (Interested Party)
(Civil Suit E006 of 2023) [2024] KEELRC 1328 (KLR) (30 May 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1328 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
CIVIL SUIT E006 OF 2023**

**JW KELI, J
MAY 30, 2024**

BETWEEN

MILLER CHEMONGES PKTAI 1ST CLAIMANT

VINCENT OTIENO OOKO 2ND CLAIMANT

AND

CLOUD FACTORY KENYA LIMITED RESPONDENT

AND

MILDRED MUHAMBI ADANGA INTERESTED PARTY

RULING

1. The Claimants alleging termination of employment by the Respondent filed a petition of claim dated 1st November 2023. The interested party was alleged to be the spouse of the 2nd Claimant.
2. The 1st Claimant sought payment of outstanding benefits under the separation and exit agreement which included 12 months gross salary, service pay, severance pay for 4 years, payment in lieu of accrued leave days, 1-month notice pay, Contractual damages/ compensation under the separation and exit agreement, anniversary award pursuant to the Respondent’s anniversary award, exgratia payment, general damages for loss of reputation, exemplary damages for mental anguish resulting attributed to economic and time loss, costs of the suit, interest at court rates from date of filing suit, a letter from Mark and a Trophy to be presented at CF Global Culture Awards and other relief the court may deem fit to grant.
3. The 2nd Claimant jointly with the interested party (described as spouse) sought from the Respondent award of 12 months gross salary, service pay, severance pay for 5 years, payment in lieu of 35 accrued leave days, 1 month notice pay, special damages utilized towards emergency medical care, damages for violation of constitutional rights and discrimination, anniversary award pursuant to the Respondent’s



anniversary award, special damages paid to Maria Immaculata Hospital for the interested party, contractual damages / compensation under the separation and exit agreement. In the alternative contractual damages / compensation under the separation and exit agreement, a letter from Mark and a Trophy to be presented at CF Global Culture Awards, general damages for loss of reputation and mental anguish, aggravated damages for inconvenience cause and time loss, exgratia payment assessed by the Court towards the claimant's maintenance of issues ad providence of the highest attainable health care , costs of the suit, interest at court rates from date of filing suit and any other relief the court may deem fit to grant.

4. The claim was verified by the affidavit of the claimants and accompanied by their list of documents of even date and the bundle of the documents.
5. The claim was opposed by the Respondent vide the replying affidavit of Peninah Kimani sworn on the 9th February 2024 and annexing bundle of documents relied on.

Notice of Motion Application

6. The Respondent on the 6th February 2024 filed Notice of Motion applications dated 3rd February 2024 seeking the following orders:-
 - a. That the Honorable Court be pleased to strike out the claim instituted by the 2nd Claimant against the respondent through the petition of claim dated 1st November 2023 on grounds that the said claim is sub-judice, the 2nd claimant having filed another suit on the same facts in Nairobi CM ELRC No. E1832 of 2023 *Vincent Ooko v Cloud Factory Kenya Limited.* ;
 - b. That this Honorable Court be pleased to strike out the interested party in the claim filed herewith; and
 - c. That the costs of this application be provided for.
7. The application was premised on the grounds that the claim by the 2nd claimant was sub-judice as the main issue raised and pleaded by the 2nd claimant against the respondent in the instant petition of claim, specifically the alleged unfair termination of the 2nd claimant's employment contract by the respondent, is an issue that is directly and substantially in issue in another suit namely:- CMELRC No. E1832 OF 2023 *Vincent Ooko v Cloud Factory Kenya Limited* filed before Chief Magistrates court at Nairobi by the 2nd Claimant against the Respondent vide memorandum of claim dated 5th October 2023 seeking similar prayers. The said suit is ongoing and pending for hearing and determination before the Magistrate's court and had a mention date of 15th February 2023. That the interested party ought to be struck off as before the court was a cause arising from the employment relationship between the respondent and the 2nd Claimant hence the interested party was an unnecessary party.
8. The Respondent filed affidavit of Festus Kiragu sworn on the 5th day of February 2024 in support of the application. Annexed and marked as 'CF' was a copy of the memorandum of claim filed at Nairobi Milimani Magistrates court by the 2nd Claimant.
9. The application was opposed by the Claimants who filed grounds of opposition dated 6th February 2024 through their advocates. The court finds the germane of the opposition to the application to be in paragraph 11 of the grounds, to wit:-'Without prejudice to the above, this Honorable court, having coordinate jurisdiction with the High Court, has supervisory powers over all subordinate courts and thus could instead of striking out parties, issue orders staying the suit in CMELRC No. E 1832 of 2023, *Vincent Ooko v Cloudfactory Kenya Limited* pending the determination of the instant petition.'



Written submissions

10. The court directed the application be canvassed by way of written submissions and the parties complied. The Respondent's/ Applicant's written submissions dated 13th March 2024 drawn by the law firm of Iseme, Kamau & Maema Advocates were received in court on the 14th March 2024. The Claimants' written submissions dated 15th March 2024 drawn by the law firm of Matekwa & Co. Advocates were received in court on the 17th March 2024.

Decision on the Application

11. The court opined that the issues raised by the parties in the application for determination were as follows:-
- a. Whether the claim by the 2nd Claimant offends the doctrine of subjudice
 - b. Whether the interested party was a necessary party to the suit.
 - c. Costs of the application
12. The court on consideration of the grounds of opposition and especially paragraph 11 to wit: ' Without prejudice to the above, this Honorable court, having coordinate jurisdiction with High Court, has supervisory powers over all subordinate courts and thus could in the stead of striking out parties , issue orders staying the suit in CMELRC NO. E 1832 of 2023, *Vincent Ooko v Cloudfactory Kenya Limited* pending the determination of the instant petition.' Finds that the fact of existence of a similar suit by the 2nd claimant before the Magistrate court in Nairobi was not disputed.
13. The court then is invited to answer the question of whether the claim by the 2nd Claimant offends the doctrine of sub-judice?

What is the doctrine of sub-judice?

14. The applicant submits that the doctrine is captured under section 6 of the [Civil Procedure Act](#) to wit:- '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 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 or any other court having jurisdiction in Kenya to grant the relief claimed.'
15. The applicant relied on several cases upholding the doctrine of sub-judice of which the court noted. In the decision of the Supreme Court in [Kenya National Commission of Human Rights V Attorney General; Independent Electoral & Boundaries Commission & 16 Others \(interested parties\)](#)2020 e KLR the doctrine of sub-judice was explained at paragraph 67 of the decision.
16. 2nd Claimant relied on the same decision but took the position that the Supreme Court position was that the latter case ought to be stayed to await the determination in the other suit. That none of the authorities cited by the applicant was to effect the suit be struck out for being sub- judice.
17. The court finds that it was not in dispute the instant claim by the 2nd claimant was sub-judice as the matter in Nairobi Milimani CMELRC NO. E 1832 of 2023, *Vincent Ooko v Cloudfactory Kenya Limited* was on the same cause of action of termination of contract and seeking compensation as the instant petition.



18. Having found the suit by the 2nd Claimant is sub-judice what is the appropriate recourse by this court? The claimant contended the Supreme Court position was that the later suit, like the instant one, should be stayed pending determination of the earlier suit.
19. Section 6 of the *Civil Procedure Act* reads :- ‘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 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 or any other court having jurisdiction in Kenya to grant the relief claimed.’ The import of the provision is that this court cannot proceed with the suit of the 2nd Claimant as it is sub-judice. The envisaged decision from the Magistrates’ Court is subject to appeal to this court. The court takes the position that it is superfluous to stay the suit by the 2nd claimant when the issues in dispute are subject of determination in another court. The court finds that in *Leonard Omullo v National Land Commission* (2021)e KLR, Justice Nzioki wa Makau having found the petition was sub-judice proceeded to strike out the same.
20. The court read the Supreme Court decision in *Kenya National Commission of Human Rights case* (ibid) where in paragraph 67 the Court defined the term sub-judice as follows:-

“[67] The term ‘sub-judice’ is defined in *Black’s Law Dictionary* 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.” The Court found that the final decision on the reference before the Supreme Court was that it was sub-judice. At paragraph 73 of the decision the Supreme Court stated:- ‘Guided therefore by these principles, and in exercise of our discretion, we decline to exercise our jurisdiction under Article 163(6) of the *Constitution*. This reference is sub-judice and this Court will not usurp the High Court’s jurisdiction under Article 165(3).’ By majority decision, the reference was dismissed(paragraph 108).
21. The court guided by the foregoing decision and having found there was no dispute that the 2nd Claimant is before Nairobi Milimani Magistrates court in CMELRC NO. E 1832 of 2023, *Vincent Ooko v Cloudfactory Kenya Limited* for the same cause of action, the Court holds that the 2nd Claimant’s suit before this Court offends the doctrine of sub-judice. The 2nd Claimant is struck off the instant suit. The 1st Claimant’s suit remains.

Whether the interested party was a necessary party to the suit.

22. The interested party was described in the claim a female adult known to the 2nd claimant as husband and spouse since August 2020 in accordance with Luhya and Luo customs.
23. The applicant submits that the interested party was not a necessary party in the suit as the claim arose from its employment relationship with the 2nd claimant of which the interested party was not privy to.



24. The 2nd claimant's advocates in the submissions relied on the version of what he called the good book that no man shall lay asunder whatever the Lord has conjoined.
25. The court need not waste judicial time applying its mind on this issue as the cause of action arose from an employment contract between the 2nd claimant and the Respondent of which the alleged spouse (interested party) was not privy to. The Judge in the determination of disputes is not part of the clergy to apply biblical scriptures and related practices in its decisions. The court is guided by the Constitution and the written law.
26. The court having struck out the said husband(2nd claimant) of the interested party out of the instant suit the said wife/spouse faces a similar fate. The interested party's name is struck off the suit.

Costs of the application.

27. It is trite costs follow the event. The applicant has succeeded in its application and is entitled to costs of the application. The applicant will have costs of the application against the 2nd Claimant.
28. In Conclusion the Application by way of notice of motion dated 3rd February 2024 is allowed as follows:-
 - a. The Court hereby strikes out the claim instituted by the 2nd Claimant against the Respondent through the petition of claim dated 1st November 2023 having held that the said claim is sub-judice, the 2nd Claimant having filed another suit on the same facts in Nairobi CM ELRC No. E1832 OF 2023 Vincent Ooko v Cloud Factory Kenya Limited ;
 - b. The court strikes out the name of the interested party from the claim filed herewith for being an unnecessary party.
 - c. Cost of the application awarded to the Respondent/Applicant as against the 2nd Claimant.
29. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 30TH DAY OF MAY 2024.

J.W. KELI

JUDGE

In the presence of:-

C/A – Macheso

For Applicant/ Respondent:- Ms. Athman h/b Munyu

For Respondent / Claimants and Interested Party:- Andole

