



Mohamed v Judicial Service Commission (Employment and Labour Relations Cause E645 of 2022) [2024] KEELRC 1694 (KLR) (28 June 2024) (Ruling)

Neutral citation: [2024] KEELRC 1694 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E645 OF 2022**

AN MWAURE, J

JUNE 28, 2024

BETWEEN

BISHAR ADAN MOHAMED CLAIMANT

AND

JUDICIAL SERVICE COMMISSION RESPONDENT

RULING

1. The Claimant/Applicant filed a Notice of Motion dated 8th December 2023 seeking the following orders:
 1. spent
 2. The Honourable Court do direct and compel the Respondent to unconditionally release to the Claimant its Human Resource Disciplinary Committee proceedings of 22nd September 2021.
 3. The Honourable Court do direct and compel the Respondent to unconditionally release to the Claimant the recommendation of the said Human Resource Disciplinary Committee proceedings of 22nd September 2021.
 4. The Honourable Court do direct and compel the Respondent to unconditionally release to the Claimant the minutes or proceedings of the Judicial Service Commission of 30th May 2022 dismissing the Claimant's appeal.
 5. The Honourable Court be pleased to grant leave to the Claimant to file in court the proceedings in paragraph 2,3,4 and 5 above and other documents before the suit comes up for pre-trial.
 6. costs be provided for.



Claimant/Applicant's Case

2. The Claimant/Applicant avers that on 30/11/2023, his advocate served the Respondent's advocates with a Notice to produce documents under Section 69 of the Evidence Act and sought a reply within 7 days. However, there has been no response hence necessary to make the instant application.
3. The Claimant/Applicant avers that he was not provided with cogent reasons for his dismissal and needs the documents for the conduct of this case.
4. The Claimant/Applicant avers no prejudice shall be occasioned if the orders sought are granted.
5. The Claimant/Applicant avers that he made a similar application which was declined by the court for the reason that the supporting affidavit was not properly commissioned and the same was not decided on merit hence the application is not res judicata.

Respondent's Case

6. In opposition to the application, the Respondent filed a replying affidavit dated 7th March 2024.
7. The Respondent avers that the court is divested of jurisdiction to entertain this application as it was withdrawn through a Notice of Withdrawal dated 08/12/2023.
8. The Respondent avers that the matter is res judicata as it is similar to the Claimant's application dated 16/05/2023 which was heard and determined and a ruling dismissing the same delivered on 17/11/2023.

Analysis and Determination

9. The first issue for this court's determination is whether the instant application is res judicata.
10. The doctrine of res judicata is set out in Section 7 of the Civil Procedure Act and further provides explanations with respect to its application as follows:-

“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.

Explanation. — (1) The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. — (2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. — (3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. — (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. — (5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.



Explanation. — (6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

11. Further, res judicata was deduced in *Nicholus Kiura v Njiru M. Riumba & Dominic Kathuri Njiru* [2019] eKLR as follows: -

“The doctrine of res judicata as stated in the said Section has been explained in a plethora of decided cases. In the recent case of The *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, Nairobi CA Civil Appeal No. 105 of 2017* ([2017] eKLR), the Court of Appeal held that:

“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but 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 in the former suit.
- 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.”

My understanding of the res judicata principle is that it is meant to lock out from the court system a party who has had his day in a court of competent jurisdiction from re-litigating the same issues against the same opponent.”

12. The ruling of this court delivered on 17th November 2023 only delved on the defectiveness of the supporting affidavit of the application dated 16/05/2023 and relevance of the additional witness. Therefore, the instant application is not res judicata as the matter herein has not been litigated before and hence that suit is not re judicata in its entirety as only the defective supporting affidavit was dealt with by his court in the former application.
13. The second issue for determination is whether this court lack jurisdiction to hear this application by virtue that the same was withdrawn vide a letter by the Claimant/Applicant’s advocate dated 8th December 2023.
14. In the case of *Priscilla Nyambura Njue v Geovhem Middle East Ltd; Kenya Bureau of Standards (Interested Party)* [2021] eKLR it was held:-

“As acknowledged by the above cited decisions, the right provided under Order 25 Rules 1 & 2 (1) is not fettered by any conditions; it is an absolute right which a plaintiff can exercise at his sweet will at any time before the judgment is delivered. In *Allah Baksh v Niamat Ali*[20] the court described the right as “absolute” and capable of being exercised “without any permission from the court’. However, under the third category, withdrawal requires permission of the court but the plaintiff does not need consent of the defendant.

Withdrawal of a suit is itself its end. The right of a plaintiff to withdraw his suit is not a divine right but a right expressly conferred upon him by Order 25 and no right is similarly



conferred upon him to revoke or rescind the withdrawal. So long as he remains the plaintiff, he may do any act which he may do in that capacity; he cannot, after withdrawal of the suit resulting in the loss of the capacity, do an act which can be done only in that capacity. Put differently, there is no provision conferring the right to revoke the withdrawal and there is no justification for saying that the right to withdraw includes in itself a right to revoke the withdrawal. Certain consequences arise from the withdrawal which prevent a party from revoking the withdrawal. The withdrawal is complete or effective as soon as it takes place. The right to revoke the withdrawal can only be allowed by the legislature by expressly providing so in the rule and not by the courts. In the same vein, the rules do not confer the court with power to reinstate a suit once withdrawn. Order 25 Rule 1 provides that the withdrawal shall not be a defence to any subsequent action. Before me is not a subsequent action, but the same suit.

15. Given this background, it is evident that the Claimant/Applicant at his own accord filed a notice of withdrawal dated 08/12/2023 referenced, “ Notice Of Withdrawal of The Notice of Motion Application Under Certificate of Urgency Dated 8th December 2023”. The same was presented to the court the same day and the day this honourable court gave an order to confirm withdrawal of the suit on 14th December 2023.
16. Indeed the court is clear this application cannot be pursued as the claimant through his advocate Wamwayi & Co advocates made an application to withdraw this application vide the notice of motion applicant dated 8th December 2023. Hence the application dated 8th December 2023 cannot be pursued and hence is dismissed accordingly.
17. The court orders each party to meet their costs of the application.
18. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 28TH DAY OF JUNE, 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

