



Kenya Union of Domestic Workers, Hotels, Educational Institutions and Hospital Workers Union (KUDHEIHA) v BOM Salvation Army Kolanya Girls National (Cause E003 of 2024) [2024] KEELRC 1688 (KLR) (26 June 2024) (Ruling)

Neutral citation: [2024] KEELRC 1688 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
CAUSE E003 OF 2024**

**JW KELI, J
JUNE 26, 2024**

BETWEEN

**KENYA UNION OF DOMESTIC WORKERS, HOTELS,
EDUCATIONAL INSTITUTIONS AND HOSPITAL WORKERS UNION
(KUDHEIHA) CLAIMANT**

AND

BOM SALVATION ARMY KOLANYA GIRLS NATIONAL RESPONDENT

RULING

(On the Notice of Motion Application dated 21st February 2024 by the Respondent /Applicant)

1. The ruling is on application by way of a Notice of Motion application by the Respondent/Applicant (herein “Applicant”) dated 21st February 2024 brought under the provisions of Order 51 rule 1 of the [Civil Procedure Rules](#) and Sections 7 and 8 of the [Civil Procedure Act](#), seeking the orders: -
 - a. The Claim dated 26th January 2024 be struck out with costs.
 - b. Costs of the application be provided for.
2. The Notice of Motion was premised on the grounds on the face of the application and the grounds in the supporting affidavit sworn by Dr. Tabitha Okama, (secretary to the BOM of the respondent), on 28th February 2024 as follows: -
 - i. The claimant filed a previous claim against the respondent in Bungoma ELRC Cause No. E006 of 2023 over the same subject matter and issue in the present suit in 2023, which is the failure to sign a recognition agreement.
 - ii. The Court made a decision on 30th November 2023 dismissing the claimant's suit for being premature and directed parties to proceed for conciliation(TO1). That the parties appeared



before the conciliator who made a report and yet the Claimant has sued the Respondent again for failure to sign the recognition agreement.

- iii. That suit filed herein is Resjudicata the decision in Bungoma ELRC Cause No. E006 of 2023 and thus offends the provision of section 7 of the Civil Procedure Act.
 - iv. That once a suit is dismissed, it is a bar to further litigation and the claimants are estopped from bringing up the issues again.
 - v. The Court lacks jurisdiction to hear and determine the claim and the claim is an abuse of the Court process and ought to be struck out.
3. The application was opposed by the Claimant who filed a response dated 8th April 2024 and filed on an even date, affirming that aside from the claim for refusal to sign a recognition agreement, their claim had new issues like the refusal by the management to deduct and remit union dues.
 4. That in their previous suit, the Court observed that their suit was premature and directed parties to proceed to conciliation on 16th December 2023.
 5. That the conciliator rescheduled the meeting for 20th December 2023, and the conciliator gave a report indicating that whoever was not dissatisfied could go to court. The claimant complied with the court's directions, questioning the findings reported by the Conciliator, and approached the Court for interpretation.
 6. The Claimant's members continue to suffer considering the respondent's hostility and to end the stalemate the Court should hear and determine the suit.
 7. That the dismissal of the claim will place the claimant's members in a precarious position and as per Article 159(2) b of the Constitution, justice ought not to be delayed, and there should be no regard for procedural technicalities but to protect the principles and purpose of the Constitution

Written Submissions

8. The Court directed that the application be canvassed by way of written submissions. The parties complied. The Applicant's written submissions dated 11th April 2024 were filed by Senior State Counsel, Gilbert Tarus, of the office of the Attorney General office. The Claimant/Respondent's written submissions dated 23rd April 2024 were filed by Justin Kamuye of the Claimant Union on an even date.

Determination

Issues for determination.

9. The Claimant submitted globally asking the Court to dismiss the respondent's preliminary objection and to proceed to determine the claim as the Claimant had complied with the orders of the Court to go to conciliation and is now before the Court having been dissatisfied with the conciliation process.
10. The Respondent/ Applicant addressed the following issue in their written submissions: -
 - a. Whether this claim is resjudicata the decision in Bungoma Employment and Labour Relations Cause Number E006 of 2023 and should be struck out.
11. The Court will proceed to address the question of whether this claim is res judicata the decision in Bungoma Employment and Labour Relations Court Cause Number E006 of 2023 and ought to be struck out.



12. The application was premised on the ground that the cause of action was the same as in Bungoma Employment and Labour Relations Cause Number E006 of 2023 hence *resjudicata*.
13. In Bungoma Employment and Labour Relations Court Cause Number E006 of 2023 the claimant sought for recognition agreement and for order to stop harassment, intimidation, and coercion of its members on account of union membership. In that case, the Court considered that the parties had invoked conciliation and the same was pending. The Court declared the claim to be premature and dismissed the same at the same time ordering parties to proceed to conciliation. (T01 was the judgment produced by the Applicant)
14. The parties proceeded to conciliation. The report of the Conciliator Agripina Ouma was produced by the Claimant. On page 45 of the claimant's bundle of documents was the recommendation of the conciliator. There was no agreement. There were recommendations on the way forward and among them was any party not satisfied with the recommendation of the conciliator to refer the dispute to court.
15. The question of whether or not the claimant had met the threshold of recognition appears not to have been agreed on.
16. What is *resjudicata*? The doctrine of *resjudicata* in Kenya is under section 7 of the [Civil Procedure Act](#) to wit: - '7. *Res judicata* 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.'" Applying the forgoing provision of the law, the Court holds that having not determined on merit the suit in Bungoma Employment and Labour Relations Court Cause Number E006 of 2023, the instant claim is not *resjudicata*.
17. Any party not satisfied with the recommendation of the conciliator is entitled to file a dispute in Court under the provisions of section 73 of the [Labour Relations Act](#) to wit:- '73. Referral of dispute to Industrial Court (1) If a trade dispute is not resolved after conciliation, a party to the dispute may refer it to the Industrial Court in accordance with the rules of the Industrial Court. (2) Notwithstanding the provisions of subsection (1), if a trade dispute— (a) is one in respect of which a party may call a protected strike or lockout, the dispute may only be referred to the Industrial Court by an aggrieved party that has made a demand in respect of an employment matter or the recognition of a trade union which has not been acceded to by the other party to the dispute; or''
18. In the upshot, the claim herein is held not to be *resjudicata* and the application by way of Notice of Motion dated 21st February 2024 is therefore dismissed with costs in the cause.
19. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 26TH DAY OF JUNE 2024.

J.W. KELI

JUDGE

In the presence of: -

Court Assistant: Brenda

Respondent/Applicant: - Tarus



Claimant: Absent

