



**Mutyaene v KCB Bank Limited & 3 others (Employment and Labour Relations
Petition E241 of 2023) [2024] KEELRC 2443 (KLR) (3 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2443 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E241 OF 2023**

**MN NDUMA, J
OCTOBER 3, 2024**

BETWEEN

REUBEN KIOKO MUTYAENE PETITIONER

AND

KCB BANK LIMITED 1ST RESPONDENT

**BANKING INSURANCE & FINANCIAL INSTITUTION UNION 2ND
RESPONDENT**

KENYA BANKERS ASSOCIATION (KBA) 3RD RESPONDENT

THE. HON ATTORNEY GENERAL OF KENYA 4TH RESPONDENT

JUDGMENT

1. The petitioner Reuben Kioko Mutyaene filed a petition dated 19/12/2023 against the respondents seeking the following reliefs: -
 - i. A declaration that the 1st respondent violated the petitioner’s fundamental freedoms and constitutional rights to privacy and confidentiality, human dignity, access to information and to be accorded a fair hearing before dismissal from employment under Articles 25(c); 27; 28; 31; 33(3); 35(1)(b); 41(1); 47; 50 and 159(2)(b) of *the Constitution*.
 - ii. A declaration that the 1st respondent’s act of altering the concessional loan interest rate on the petitioner’s loan facilities from 3% to 27% per annum and demanding full loan repayment and listing of the petitioner in the negative database of CRB during pendency of the dispute at the ELRC was premature and contravenes the petitioner’s fundamental freedoms and constitutional right to fair labour practice, inherent dignity, freedom from degrading treatment and freedom from psychological torture, good reputation, economic and social



rights under Articles 19(2), 25(a); 28, 29(d)(f); 33(3); 35(1)(b), (2); 40; 41(1) and 43; 46(1)(c) and 47 of *the Constitution*.

- iii. A declaration that the 1st respondent's failure to pay the petitioner severance pay and/or gratuity; refund excess loan interest unlawfully paid on outstanding loan; re-calculate his terminal benefits to be in tandem with the applicable CBA; to refund litigation cost and incidental expenses incurred is in contravention of sections 12(3)(v), (vi), (viii) of ELRC Act: Rule 29(2) of ELRC (Procedure) Rules, 2016; sections 26, 35(5), 6(c); 40(1)(g); 49(4)(h),(i), (j) of the *Employment Act*: Clause A7 of CBA (2011-2013) and is a blatant infringement of the petitioner's labour and economic rights under Article 41(2)(a) and 43 of *the Constitution*.
- iv. A declaration that the petitioner is entitled to payment of severance pay and/or gratuity payable as per Clause A7 of the Collective Bargaining Agreement (2011-2013). Staff rationalization package – voluntary early retirement (VER) scheme of June 2011 and in line with sections 35(6)(c), 40(1)(g) and 49(4)(h) of *Employment Act*.
- v. A declaration that the 1st respondent occasioned to the petitioner unwarranted excess loan interest payment totaling to Kshs. 469,024.55
- vi. A declaration that the 1st respondent occasioned to the petitioner unwarranted litigation costs in ELRC Cause No. 859 of 2012 amounting to Kshs. 378,759.00.
- vii. A declaration that the Collective Bargaining Agreement (2011-2013) and the current CBA for 2020-2023 are illegal and unconstitutional in as far as Clause A5 on Termination of Employment does not incorporate sections 12, 41 or 43 of the *Employment Act* and sections 4 and 6 *Fair Administrative Action Act* on due process of hearing thus is inconsistent with Articles 10, 19, 20, 21(1), 23(3)(d), 25(c), 27, 35(1)(b), 41(1), 47, 50, 258 and 259 of *the Constitution* of Kenya.
- viii. A declaration that the petitioner's fundamental rights to fair hearing and fair administrative action envisaged under Articles 25(c), 27, 47 and 50 were prejudiced by the 1st respondent's application of defective provisions of CBA Clause A5 on Termination of Employment.
- ix. A declaration that the provisions of sections 49(4)(h), (i) (j) of the *Employment Act* are ambiguous, vague, inadequate, thus inconsistent with Articles 19; 27(1), (2), (3); 41(1), (2)(a); 43 and 48 of *the Constitution* in that after a finding and declaration of unlawful termination/dismissal by a labour officer or court of law, the Act does not expressly provide for mandatory payment of dues/emoluments owed or specify how or under what circumstances and within what time frame an employee may pursue/press for severance/gratuity available by contract of service or the law; the right to press claims or any unpaid wages; expenses or other claims owing to the employee; and any expenses reasonably incurred by the employee as a consequence of unlawful termination/dismissal from employment, but unconstitutionally affords discretion to the labour/judicial officer to decide whether or not to order payment of the mandatory emoluments are to be paid.
- x. A declaration that in contravention to Articles 22, 23(3)(d), 24, 25(c), 27, 41, 43 and 48 of *the Constitution*. Section 86(3) of the *Employment Act* is discriminatory, invalid, void and unconstitutional as it unreasonably denies deserving employees jurisdiction in court, thus denial of equal benefit of the law to institute secondary litigation for relief(s) remedies which may legitimately accrue or genuinely arise after court pronounces itself on the main issue in dispute thus unfairly tilts undue advantage to employers who end up illegally benefiting



and unjustly enriching themselves from unclaimed employee's benefits/dues/emoluments/remuneration, an act which out rightly amounts to unfair labour practice.

- xi. A declaration that section 90 of the *Employment Act* is discriminatory, contradictory, invalid, void and unconstitutional in its entirety as it unfairly curtails employee's constitutional right and fundamental freedom to access justice, seek redress and hearing under sections 47(3) &(4) and 87(1) of the *Employment Act*, Rule 7 of the ELRC (Procedure) Rules, Articles 22, 23(3) (d), 24 25(c), 27, 41 and 48 of *the Constitution* thus unreasonably denies employees equal protection and benefit of the law and is openly inconsistent to the cardinal objective of the Act which to declare and define the fundamental rights of employees, to provide basic conditions of employment of employees.
- xii. A declaration that section 90 of the *Employment Act* is discriminatory, punitive, void and unconstitutional in its entirety as it unfairly curtails employees' constitutional rights and fundamental freedom to economic right under Article 19, 27(3), 35(2) and 43 of *the Constitution*, thus unfairly tilts undue advantage to employers who end up illegally benefitting and unjustly enriching themselves from unclaimed employees' benefits/dues/emoluments/remuneration, an act which out rightly amounts to unfair labour practice.
- xiii. A declaration that failure by the 1st respondent to issue the petitioner with a certificate of service as stipulated in section AB 27 of the CBA (2011-2013) and section 51 of the *Employment Act* amounts to unfair labour practice and is brazen denial and breach of the petitioner's right to life, human dignity, access to information and fair administrative action under Articles 25(b), 26, 28, 33(1)(a), 35(1)(b), 41(1) and 47 of *the Constitution* and that the said omission is in contravention of *the Constitution* thus invalid.
- xiv. An order for compensation of the petitioner's human rights and fundamental freedoms under Articles 19; 21(1); 25; 26; 27; 28; 29(d),(f); 30; 31(d); 33(1)(a),(3); 35; 41; 43; 47; 50(1) and 159(2)(a),(b) of *the Constitution*
- xv. An order to the 1st respondent to calculate and pay the petitioner severance pay and/or gratuity payable as per staff rationalization package – voluntary early retirement (VER) scheme of June 2011 plus compound interest of 20% per annum calculated since 29th April, 2011 upto the date of judgment of the petition.
- xvi. An order to the 1st respondent to refund loan interest totaling to Kshs. 469,024.55 plus compound interest of 20% per annum calculated since 30/3/2013 upto the date of judgment of the petition.
- xvii. An order to the 1st respondent to reimburse the petitioner litigation costs of Kshs. 378,759.00 plus compound interest of 14 % per annum calculated since 11th July 2016 upto the date of judgment of the petition.
- xviii. An order to the 1st respondent to re-calculate and pay the petitioner unpaid terminal benefits plus compound interest of 14% per annum since 10/10/2011, based on reviewed basic salary of Kshs. 147,506/= and leave allowance Kshs. 7,250/= (as per CBA 2011-2013) INSTEAD OF Kshs. 135,327/= and Kshs. 6,137/= (CBA 2009-2011) respectively used in calculation dated 10/10/2011.
- xix. An order for compensation to the petitioner arising from the 1st respondent's application of defective, illegitimate and unconstitutional CBA Clause A5 on termination in dismissing the petitioner from employment.



- xx. An order to the 1st respondent for compensation to the petitioner for failure to issue the petitioner with a certificate of service for over 12 years.
- xxi. An order to the 2nd and the 3rd respondents to review and/or modify the impugned CBA Clause A5 on termination of employment to conform/align with the [Employment Act](#) and [the Constitution](#)
- xxii. An order to the 4th respondent to urgently initiate legislative probes to review, modify, amend and/or repeal the impugned sections 49(4), 87(3) and 90 of the [Employment Act](#), 2007 to conform/align with [the Constitution](#) of Kenya, 2010 as same affects all employees in the Republic of Kenya.
- xxiii. Any other further relief, orders, declarations, writs and directions that this honourable court may deem appropriate, fair and just in the circumstances to meet the ends of justice.
- xxiv. The 1st respondent to bear the cost of the petition.

Facts of the matter as set out in the petition.

- 2. The petitioner was employed by the 1st respondent as a clerical staff rising to level of section head. He worked continuously until 29/4/2011 when the petitioner was dismissed from employment.
- 3. The petitioner filed suit against the 1st respondent by a statement of claim dated 10/5/2012 being ELRC Cause No. 839 of 2012 for wrongful dismissal. The matter was heard and determined by a judgment delivered on 11/7/2016 where the court found that the claimant's summary dismissal was unlawful, un-procedural and unfair and the court awarded the claimant compensation for unlawful dismissal comprising of the equivalent of twelve (12) months gross salary; two months half-salary withheld during the period of suspension and one month salary in lieu of notice.
- 4. The claimant/petitioner was dissatisfied with the award by the court and filed an application for review of the judgment of the court dated 11/7/2016 and the application was found by the court to be without merit in a ruling dated 30/5/2018.
- 5. The claimant/petitioner further filed an appeal to the Court of Appeal being Civil Appeal No. 399 of 2018 against the ruling of the court in the review application. The appeal was also unsuccessful and was dismissed for lack of merit.
- 6. The petitioner has filed this petition seeking to impugn provisions of the [Employment Act](#) 2007 including sections 90 thereof as illegal, vague, void and unconstitutional being contrary to Article 48 and 50(1) of [the Constitution](#) of Kenya 2010.
- 7. Section 87(3) of the [Employment Act](#) as being contradictory to section 47(3) and 47(4) of the same Act and Rule 7(3) of ELRC (Procedure) Rules, 2016 for denying litigants secondary litigation to the main issue in dispute. That the same section 87(3) contradicts Article 22, 24, 25(c), 27, 47 and 50(i) of [the Constitution](#) for denying litigants jurisdiction to institute secondary litigation to seek further reliefs that may generally arise from the main dispute.
- 8. That the said provisions having been enacted before [the Constitution](#) 2010 must be interrogated and subjected to the dictates of Article 24 of [the Constitution](#).
- 9. That as a result the 1st respondent failed to pay the claimant/petitioner additional terminal benefits as set out in the petition arising from Clause 70 – parties CBA including gratuity or severance pay without discrimination and to provide the claimant/petitioner with a certificate of service to his loss and detriment hence the reliefs sought.



Response and preliminary objection.

10. In the response to the petition, the 1st respondent states in the replying affidavit sworn to on 31/5/2023 that this suit is res judicata since it arises from a dispute between the petitioner and the 1st respondent the subject of ELRC Cause No. 859 of 2012 between Reuben Kioko Mutyaene versus Kenya Commercial Bank in which the claimant/petitioner sought the following reliefs against the 1st respondent:
- i. A declaration that the claimant's termination from his employment was wrongful and unlawful;
 - ii. The claimant be reinstated to his previous employment without loss of benefits and continuity of service and all salaries and allowances due to him during the period of suspension and dismissal be restored to him;
 - iii. In the alternative to (ii) above the claimant be paid his full terminal dues for unfair dismissal;
 - iv. The respondent be ordered to compensate the claimant for wrongful termination at the equivalent of twelve (12) months gross salary – $12 \times 145,327 = 1,743,924/=$
 - v. The honorable court do issue such orders and give such directions as it may deem fit to meet the ends of justice;
 - vi. The respondent to pay the cost of this claim
 - vii. Interest on the above at court rates.
11. That upon a full hearing of the suit on merits by the court, the claimant/petitioner was successful and was granted by the court the following reliefs in a judgement dated 11/7/2016: -
- i. The claimant prayed for several remedies. His prayers for reinstatement could not be granted as it was more than 3 years since he was dismissed and according to section 12 of the [Employment and Labour Relations Court Act](#) the remedy of reinstatement is only available within 3 years of termination.
 - ii. Secondly the [Employment Act](#) provides at section 49(4) that the remedy of reinstatement should only be ordered in very exceptional circumstances which the claimant had not demonstrated to the court.
 - iii. The claimant in the alternative to reinstatement prayed for payment of terminal dues for unfair dismissal. In the written submissions the claimant prayed for half salary withheld for the month of March and April 2011 in the sum of Kshs. 157,506/= one months' salary in lieu of notice in the sum of Kshs. 157,506/=, performance bonus for 2010 in the sum of Kshs. 200,000/= and employee share ownership scheme (ESOP).
 - iv. No evidence was adduced in respect of performance bonus and ESOP.
 - v. The claimant was however entitled to any salary withheld as a result of the circumstances leading to his dismissal and to pay in lieu of notice as provided in section 49(1) of the [Employment Act](#). The respondent did not contest the sums prayed for and he was awarded Kshs. 147,506/= being withheld salary for March and April 2011 and a further Kshs. 147,506/= being one month's salary in lieu of notice.



- vi. The claimant also prayed for maximum compensation of Kshs. 1,746,072/=. Taking into account the fact that his dismissal was unfair and that he had worked for the respondent for about 20 years, he was awarded compensation of 12 months gross salary.
 - vii. The dismissal of the claimant was found to be unfair and he was awarded a total of Kshs. 2,041,084/=
 - viii. The respondent was to pay costs of the suit. The decretal sum was to attract interest at court rates from the date of judgment.
12. That the petitioner dissatisfied with the remedies awarded to him in the said judgment filed a review application dated 15/5/2017 seeking the following reliefs:
- i. That there was mistake/error in calculating the award
 - ii. That the award and judgment was in breach of law as far as gratuity or service pay was not considered in the award
 - iii. That the Hon. Judge failed to consider all facts and evidence in making her decision.
 - iv. That the Hon. Judge did not consider violation of the claimant's fundamental rights including discrimination at place of work.
 - v. That the award of Kshs. 2,041,084.00 was not commensurate/ proportionate with the claimant's legitimate expectations.
 - vi. That the lawsuit occasioned unwarranted legal costs and expenses totaling to Kshs. 38,759.00
 - vii. That in ordering the award the judge did not take into account all relevant factors stipulated in the *Employment Act* section 49(4)
 - viii. That justice was delayed
 - ix. That the Collective Bargaining Agreement applicable was defective, illegal and unconstitutional in as far as the termination and suspension clauses are concerned
 - x. That the respondent's failure to issue certificate of service is wanting and detrimental to the claimant.
13. The court in a ruling dated 30/5/2018 dismissed the application for review for lack of merit with costs. The court also found that failure to award damages for violation of fundamental rights including discrimination at work, was an issue that was appealable and could not be handled as review.
14. The petitioner not satisfied with that outcome instituted an appeal at the Court of Appeal, Civil Appeal No. 399 of 2019 Reuben Kioko Mutyaene versus KCB Bank Limited.
15. The Court of Appeal in its judgement dated 17/3/2023 found that the appeal lacked merit and dismissed it.
16. The Court of Appeal in its decision faulted the manner in which the petitioner had approached the courts in his numerous litigations.
17. The respondent concludes that this petition though clothed as a constitutional petition seeks to re-litigate issues arising from the terminated employee-employer relationship between him and the 1st respondent which issues were heard and determined on merit in the aforesaid claim; application for



review and appeal. Therefore, the issues raised and canvassed in the petition are res judicata and those issues that were not raised thereto, ought to have been so raised.

18. That the petition has not satisfied the threshold set out in Communications, Commission of Kenya and 5 others versus Royal Media Services and 5 others [2014] eKLR on establishing the link between him and the provisions of *the Constitution* alleged to have been contravened.
19. The respondent acceding to the notice to produce, produced three documents requested by the claimant though stating some have no bearing or relevance to this case including letter dated 13/6/2011 on voluntary exit; KCB Group PLC Code of Ethical Conduct and KCB Bank Employee Code of Conduct Guide Book.
20. That this petition is vexatious and abuse of court process and taking up precious judicial time unreasonably. That the same be dismissed with costs.

Determination.

21. The petitioner filed supplementary documents in support of the petition and written submissions and the respondents filed submissions which the court has fully considered and the issues for determination are: -
 - i. Whether the petition is res judicata.
 - ii. Whether the petitioner has satisfied the threshold for a constitutional petition.
 - iii. Whether the petitioner is entitled to the reliefs sought.
22. In the Independent Electoral and Boundaries Commission v Maina Kiai and 5 others [2017] eKLR the Court of Appeal restated the res judicata principle as follows:

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 substantially in issue in the former suit.
 - b. The 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 was raised.”
23. The Black Law Dictionary, Ninth Edition define res judicata as an affirmative defence barring the same parties from litigating a second lawsuit on the same claim or any other claim arising from the same transaction or series of transactions and that could have been – but was not raised in the first suit.
24. In order for the defence of res judicata to succeed, Halsbury’s Law of England third edition Volume 15 states that it is necessary to show not only that the cause of action was the same but also that the plaintiff has had an opportunity of recovering and but for his own fault might have recovered in the first action that which he seeks to recover in the second.



25. In the Kenya Judicial system, res judicata is embodied under section 7 of the *Civil Procedure Act*. The section states that: -
- “No court shall try any suit or issue which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between parties or between parties under whom they or any of them claim litigating under the same title in court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally determined by such court.”
26. In the present matter, the petitioner was the claimant and the 1st respondent was respondent in ELRC Cause No. 859 of 2012. The parties were the same in the review application in Cause No. 859 of 2012 and in the Civil Appeal No. 399 of 2018.
27. The 2nd, 3rd and 4th respondents named in this petition have not participated in this case and the petitioner has not framed any particular issues to be addressed by the 2nd, 3rd and 4th respondents nor are any reliefs sought specifically as against the 2nd, 3rd and 4th respondents.
28. All the issues raised in the petition arises from the employment relationship between the petitioner and the 1st respondent. Almost all the issues raised and reliefs sought were raised or ought to have been raised in the claim; review application and appeal by aforesaid petitioner and were fully heard and determined or could have been fully heard and determined in the previous suits.
29. The challenge of the constitutionality of section 49(4)(h)(i)(j); 87(3) and 90 of the *Employment Act*, 2007 for being ambiguous, vague, inadequate, discriminatory, invalid, void and unconstitutional are matters that directly arise from the employment relationship between the petitioner and the 1st respondent and are matters that should have been raised in ELRC Cause No. 859 of 2012; the Review Application and the Appeal.
30. The allegations that the 1st respondent violated the petitioner’s fundamental freedom and constitutional rights; altered the concessional loan interest from 30% to 27% per annum, did not pay severance pay and/or gratuity to the petitioner in terms of collective bargaining agreement (2011-2013) and staff rationalization package – voluntary early retirement (VER) scheme of June 2011; unwarranted litigation and costs and grant of certificate of service are all matters arising in the employment relationship between the petitioner and the 1st respondent which matters were raised or ought to have been raised in ELRC Cause No. 859 of 2012; the Review Application and the Appeal.
31. The petitioner was successful in his claim but was aggrieved that he did not get all the reliefs sought in the claim. Matters not raised in that claim now raised in this petition are an afterthought and ought to have been properly raised at the time.
32. The issues regurgitated in the petition were heard and determined in the former suit and the court that heard the former suit and determined the issues had jurisdiction to determine all the issues raised and all those that were not raised but ought to have been raised in that suit, application and appeal.
33. The court finds that both the petitioner and the 1st respondent were litigating under the same title. The 3rd, 4th and 5th respondents have just been roped in to guise this suit as different from the former suit. Having found that no issues raised in this petition specifically relate to 3rd, 4th and 5th respondents and no specific relief is sought against the 3rd, 4th and 5th respondent the court finds that this petition meets the bill of a suit litigated by same parties under the same title.



34. This court has no alternative but to abide by the dictates of section 7 of the *Civil Procedure Act* which is couched in mandatory terms that

“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 former suit in which such issue has been subsequently raised and has been heard and finally decided by such court.”

35. Accordingly, this court is bound to decline to hear and determine this petition and strikes the same as res judicata and an abuse of the court process.

36. The court has taken note of the observations made by the Court of Appeal in its judgment and is left with no doubt that this is an attempt by the petitioner to re-litigate issues that were heard and determined not once but thrice by a court of equal jurisdiction and by the appeal court.

37. The finding of the court on the issue of res judicata makes it unnecessary to consider the other issues framed in the judgment. The petition lacks merit therefore in its entirety and is dismissed.

38. Considering the history of the suit aforesaid, the court orders the petitioner to pay the costs of the suit for engaging the 1st respondent in unmeritorious and vexatious litigation which constitute abuse of court process.

DATED AT NAIROBI THIS 3RD DAY OF OCTOBER, 2024

MATHEWS NDERI NDUMA

JUDGE

Appearance:

Petitioner in person

Mr. Mungai for respondent

Mr. Kemboi – Court Assistant

