



Unilever Tea Kenya Ltd v Baruku & 24 others (Employment and Labour Relations Appeal E001 of 2023) [2024] KEELRC 13407 (KLR) (6 December 2024) (Judgment)

Neutral citation: [2024] KEELRC 13407 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
EMPLOYMENT AND LABOUR RELATIONS APPEAL E001 OF 2023**

**AN MWAURE, J
DECEMBER 6, 2024**

BETWEEN

UNILEVER TEA KENYA LTD APPELLANT

AND

**JOSEPH BARUKU & 24 OTHERS & 24 OTHERS & 24
OTHERS RESPONDENT**

(Being an Appeal from the Ruling of the Honourable (PM) Mr. B.R. Kipyegon delivered on 8th July 2022 in Kericho CMELRC No. 1 of 2019 consolidated with CMELRC 2-25 of 2019)

JUDGMENT

1. The Appellant being dissatisfied by the entire ruling of the Principal Magistrate Hon. B.R. Kipyegon delivered on 8th July 2022 filed this appeal vide a Memorandum of Appeal dated 13th February 2023 on the grounds that: -
 1. The Honourable Court has no jurisdiction to hear and determine the matters (CMELRC 1-25 of 2019) by virtue of the provisions of Gazette Notice No. 6024 of 2018, which expressly limit the Honourable Court's jurisdiction to determine employment claims arising from trade disputes.
 2. The Learned Magistrate erred in law and fact in holding that the Respondents' claims herein are not res judicata. The subject matter involving the Respondents and that have been litigated on in Nakuru Miscellaneous 1 of 2019 consolidated together with Nairobi ELRC Case No. 1578 of 2017 which suit was compromised by consent judgment filed on 24th February 2020 between the Respondent's Union and the Appellant and a Memorandum of Agreement dated 13th August 2019.



3. The learned Magistrate erred in finding that the court has jurisdiction to deal with matters despite them being “res judicata.”
 4. The learned Magistrate erred in law and fact in failing to appreciate that a consent judgment recorded before a court of law is a final decision of the Court and the issues of a consent judgment cannot be re-litigated once settled as the same qualify as res judicata.
 5. The learned Magistrate failed to consider that the Respondents cannot, in the circumstances, approbate and reprobate since the subject matter in their claims has been compromised.
 6. The learned Magistrate erred in law and in fact in failing to hold that the Respondent’s claims are bad in law and further failing to strike out the Respondents’ claims for want of jurisdiction.
2. The Appellant ask the court for orders that: -
- a. This appeal be allowed and the Appellant’s application dated 11th March 2021 be allowed.
 - b. The Ruling delivered on 8th July 2022 be set aside in its entirety.
 - c. The costs of this appeal and the costs of the Appellant’s application dated 11th March 2021 be paid by the Respondent.

Brief facts of the case

3. The Respondents were employees of the Appellants and joined the Kenya Plantation and Allied Workers Union (KPAWU) as unionisable members.
4. The Respondents’ Union had entered a collective bargaining agreement (CBA) with the Appellant from 2016 to 2017 which was due for review. The Appellant refused to make any counteroffer with regards to the said CBA which resulted in the Respondent’s Union issuing a strike notice dated 31st July 2017.
5. The Respondents’ Union informed its members not to report to work and the Appellant filed a suit in Nairobi ELRC Case No. 1576 of 2017, 1578 of 2017 and 1579 of 2017 seeking injunction orders in respect to the strike notice dated 31st July 2017 and orders were issued to that effect.
6. The Respondents did not report to work despite there being court orders issued, and the Appellant went ahead and issued dismissal letters to them.
7. In a judgment delivered on 17th January 2018, Lady Justice Mbaru reinstated the Respondents back to work. Dissatisfied with the judgment, the Appellant appealed vide Civil Appeal No. 49 of 2018, and the Court of Appeal set aside the orders of 17th January 2018.
8. The Respondents’ union filed a suit in Nakuru Miscellaneous Application 1 of 2019 seeking conservatory orders restraining the Appellant from evicting the Respondents from the Appellant’s staff premises and interim conservatory orders were issued to that effect. The substantive suit Nakuru Miscellaneous Application 1 of 2019 was consolidated with ELRC 1578 of 2017.
9. The Appellant and the Respondent’s union entered into a Memorandum of Agreement to reduce the Respondents summary dismissal to normal termination. Also, the Respondents were to be paid full terminal benefits per the CBA 2016-2017. Upon payment of the terminal dues, the Respondents were to vacate the Appellant’s staff premises.
10. A consent was filed marking as settled the Nakuru Miscellaneous Application 1 of 2019 was consolidated with ELRC 1578 of 2017 and the matter was fully settled.



Appellant's submissions

11. The Appellant submitted that through Gazette Notice No. 6024 of 2018, the Chief Justice appointed magistrates in the rank of senior Resident Magistrate and above, as special magistrates designated to hear and determine the following employment and labour cases:

Disputes arising from contracts of employment (excluding trade disputes under the *Labour Relations Act*, 2007) where employees gross monthly pay does not exceed KSh. 80,000.00 as commenced and continued in accordance with the Employment and Labour Relations Court (Procedure) Rules, 2016.

2. Matters relating to the following specific areas—
- (i) offences under the *Work Injury Benefits Act*, 2007
 - (ii) offences under the *Employment Act*, 2007
 - (iii) offences under the *Labour Institutions Act*, 2007
 - (iv) offences under the *Occupational Safety and Health Act*, 2007; and
 - (v) offences under the *Labour Relations Act*, 2007.

The conferment under Gazette Notice No. 9243 is revoked.

12. The Appellant submitted that the trial court found that the claim is related to an employment contract and not a trade dispute. A trade union is defined under *Labour Relations Act* as “a dispute or difference, or an apprehended dispute or difference, between employers and employees, between employers and trade unions, or between an employers’ organisation and employees or trade unions, concerning any employment matter, and includes disputes regarding the dismissal, suspension or redundancy of employees, allocation of work or the recognition of a trade union.”
13. In *Benta Achieng Odinyo V University of Nairobi* [2021] KEELRC 1768 (KLR) defined a trade dispute as collective grievance between a Trade Union and an Employer or between an Employers’ Organisation and a Union regarding the terms of a CBA under the *Labour Relations Act*.
14. The Appellant submitted that Gazette Notice No. 6024 of 2018 shows that the Magistrate’s court lacks jurisdiction over claims arising from trade disputes. The claims filed involve strike notices from 31st July 2017, and 11th October, 2017, as well as an unprotected strike on 18th October 2018, at the Appellant’s premises.
15. The Appellant submitted that the trial court did not identify the claim as a trade dispute. This dispute arose from strike notices issued by KPAWU on an alleged violation of the Collective Bargaining Agreement for 2016-2017. The Respondents acknowledged in their Statement of Claim and the documents submitted to the trial court that the dispute was indeed a trade dispute.
16. In *Barclays Bank for Kenya Ltd V Evans Ondusa Onzere*[2015] eKLR the Court of Appeal stated as follows:

“It is the duty of the trial court to consider and evaluate the entire evidence on record placed before it. (See *Wagude -v- R* (1983) KLR 569)... A relevant dictum is the case of *Choitram -v- Nazari*, (1984) KLR 327, where it was stated that admissions need not be in the pleadings; that admissions may be in correspondence or documents which are admitted or they may



even be oral. Had the trial court taken into consideration the evidence disclosed in cross-examination, we have no doubt that the court would have dismissed the respondent's claim."

17. The Appellant submitted that the Respondent's admission in its pleadings about the strike confirmed that the claim arose from a trade dispute between the Appellant and the Respondent's union. Consequently, the trial court erred in determining that it had jurisdiction to hear and resolve the Respondents' claim, as per the ruling on 8th July 2022.
18. The Appellant submitted that the Learned Magistrate erred in finding that the Claims before it were not res judicata. In the ruling, the trial court found that the matters were not res judicata because they did not relate to a trade dispute, referencing Nakuru Miscellaneous 1 of 2019 and Nairobi ELRC Case No. 1578 of 2017. However, the disputes in the claims do involve a trade dispute.
19. The Appellant submitted that it had filed a preliminary objection on the ground that the court lacked jurisdiction to hear and determine the matter, as it was res judicata due to the consent reached in Nakuru Miscellaneous 1 of 2019, which was consolidated with Nairobi ELRC Case No. 1578 of 2017.
20. In Nakuru Miscellaneous 1 of 2019 consolidated with Nairobi ELRC Case No. 1578 of 2017 Hon. Justice Onesmus Makau, dismissed the suit, stating that the claimant had admitted in open court on 16th October 2019, that an agreement negotiated by his union had reduced his dismissal to a normal termination with benefits. The claimant's complaint is that he should not have been evicted from the respondent's staff house until he received the agreed-upon benefits. This indicates that the dispute has already been resolved by a court of competent jurisdiction, and the claimant is now attempting to enforce that determination through a new lawsuit. Such action is not acceptable under procedural rules, as the issues had already been settled by consent between the claimant's union and the respondent, rendering the suit res judicata.
21. In *John Florence Maritime Services Limited & another V Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015) [2021] KESC 39 (KLR)*, the Supreme Court found that to prove res judicata, a party must demonstrate that:
 - (a) there is a former judgment or order which was final;
 - (b) the judgment or order was on merit;
 - (c) the judgment or order was rendered by a court with jurisdiction over the subject matter and the parties; and
 - (d) there must be identical parties, subject matter, and cause of action between the first and second actions.
22. The Appellant submitted that the Trial Court erred in finding that the claims were not res judicata, despite the evidence tendered before it and submissions made. Furthermore, the Appellant contended that the trial court lacked jurisdiction to hear and determine the claims and ought to have struck out.
23. The Appellant prays that this Honourable Court set aside the Ruling of the Trial Court and allow the Appeal as prayed.

Respondents' submissions

24. The Respondents submitted that the Statement of Claim against the Appellant concerned salaries that were below Kshs. 80,000/= as per the Gazette Notice No. 6024 of 2018, and therefore fell within the jurisdiction of the trial court.



25. The Respondent cited the case of Owners of The Motor Vessel “Lillian S v Caltex Oil (Kenya) Ltd [1989] KECA 48 (KLR) the court stated:
- “Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction... Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given”
26. The Respondents submitted that the trial magistrate had jurisdiction to deal with the issues raised in relation to the unlawful termination of their employment.
27. The Respondents submitted that the claim was not a trade dispute but for unlawful termination by the Appellant and defined a trade union as provided under section 2 of the *Labour Relations Act*.
28. The Respondent argued that the claim for relief against the Appellant regarding unlawful termination was not heard or determined on its merits by any court.
29. The Respondents submitted that the settlement in Nakuru Miscellaneous No. 1 of 2019 consolidated with Nairobi ELRC Case No. 1578 of 2017, is irrelevant because those disputes were between a trade union and an employer. The claim dispute from the trial court did not relate to these cases, as the Appellant had sought and received injunctive orders against the Respondent’s union regarding strike proceedings.
30. The Respondent submitted that termination was not determined on merit as the issue of unlawful termination was not prosecuted and the Appellant cannot claim that the subject matter of the suit was already dealt with.
31. The Respondents submitted that the consent between the Appellant and the Respondents’ union does not prevent them from filing a new suit against the Appellant for unlawful termination, as this issue was not addressed in Nakuru Miscellaneous No. 1 of 2019 consolidated with Nairobi ELRC Case No. 1578 of 2017.
32. The Respondent submitted that the Appeal be dismissed with costs.

Analylsis and determination

33. In John Teleyio Ole Sawoyo V David Omwenga Maobe [2013] eKLR the Court of Appeal stated that:
- “ This being a first appeal we have the duty to reconsider both matters of fact and of law. On facts, we are duty bound to analyse the evidence afresh, re-evaluate it and arrive at our own independent conclusion but must bear in mind that the trial court had the advantage of hearing the witnesses testify and seeing their demeanour and should make allowance for the same.”
34. The court has considered the pleadings as per the memorandum of appeal dated 13th February 2023 and the aforementioned submissions by the respective parties and finds the main issues for determination:
- a. Whether the court had jurisdiction to handle the suit.
 - b. Whether the issues raised in the Respondents claim are res judicata



35. In Owners of The Motor Vessel “Lillian S V Caltex Oil (Kenya) Ltd (supra) the Court of Appeal dealt with the issue of jurisdiction.
36. The Chief Justice vide Gazette Notice No. 6024 (CXX No. 74) of 22nd June, 2018 granted magistrates ranked as Senior Resident Magistrate and above, the authority to hear and resolve disputes related to employment contracts, provided the employee’s salary does not exceed 80,000/=. However, it does not include trade dispute cases filed under the *Labour Relations Act*.
37. In this particular case, the Respondents filed respective individual claims for unfair termination of employment against the Appellant and these had different earnings which were under Kshs.80,000/=.
38. In *Ondego & 55 Others V Weihai International Economic Technical Cooperative Company Limited* [2024] KEELRC 1040 (KLR) the court held that in a suit with multiple claimants, the pecuniary jurisdiction of the court is not determined by the total sum claimed by all the claimants put together but the sums sought by the individual claimants.
39. On the face of the suits they related to unfair termination under the *Employment Act*. On that score the court holds the trial magistrate was right in declaring he had jurisdiction to try the suit.
40. In view of the foregoing, the trial court had jurisdiction to hear and determine the claims filed by the Respondents.
41. On the issue of res judicata, it was settled in the case of *John Florence Maritime Services Limited & Another V Cabinet Secretary Transport & Infrastructure & 3 Others* (supra) that set out the elements of res judicata which was listed earlier above.
42. In this instant case, the Respondents were unionisable members of KPAWU who were represented in Nakuru Miscellaneous 1 of 2019 consolidated together with Nairobi ELRC Case No. 1578 of 2017 by their union. Thereafter, the Respondents’ union entered into a Memorandum of Agreement consenting that the summary dismissal of the Respondents be reduced to normal termination and they be paid their terminal dues. Upon the payment of the terminal dues, they were to vacate the Appellant’s staff premises.
43. The issues raised in Nakuru Miscellaneous 1 of 2019 consolidated together with Nairobi ELRC Case No. 1578 of 2017 are similar on unfair termination to the claims filed by the Respondents in the trial court in these suits. The Respondents were fully represented by KPAWU in Nakuru Miscellaneous 1 of 2019 consolidated together with Nairobi ELRC Case No. 1578 of 2017. The parties in the said suits were fully settled when the consent was filed and was thus binding upon the Respondents as they were members of KPAWU who represented their interests on their behalf. The consent dated 13th August 2019 was filed in court and adopted as a judgment of the court on 24th February 2020.
44. In *Asanyo & 3 Others V Attorney General* [2018] KESC 15 (KLR) the Supreme Court cited the case of *Star Paper Mill Ltd & Anor V. Bashiru Adetunji & Ors* (2009)7 iLAW/SC.292/2002 the Supreme Court of Nigeria gave its rationale on consent judgment as follows:

“It must be pointed out that it is one of the cardinal principles of our judicial system to allow parties to amicably resolve the disputes between them. By doing so, the otherwise hostile relationship between the parties would be amicably resolved and cemented. It is this amicable resolution of disputes by the parties that is called settlement. When the terms of such settlements are reduced into writing, it is now called ‘terms of settlement’, when the terms of settlement are filed they are called, and made the judgment of the court. It is then crystallised into ‘consent judgment’. When consent judgment is given, none of the parties has



the right of appeal, except with the leave, of court. Hence, consent judgment, is a contract between the parties whereby rights are created between them in substitution for order of consideration of the abandonment of the claim or claims pending before the court. This is intended to put a stop to litigation between the parties just as such as a judgment which results from the decision of the court.”

45. A similar matter was raised in Cause 52 of 2019 and the Judge also ruled that that suit was res judicata to ELRC E 1578/2017 and 1/2019. This ruling was delivered on 30th March 2022.
46. The court finds the Respondents are trying to have their cake and eat it as the saying goes. The Respondents were by consent paid their terminal dues when their summary dismissal was varied to normal termination. Their representatives executed the consent. They want this court to compensate them for 12 months equivalent of their salary as compensation for unlawful termination.

The court finds there is not proof of unlawful termination and also finds this suit is res judicata to ELRC 1/2019 and E 1578/2017.
47. The court therefore holds that the appeal hereby is successful and is therefore allowed and the ruling delivered on 8th July 2022 is set aside.
48. This is a case where court will exercise its discretion and order each party to all meet their respective costs of the appeal.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAKURU THIS 6TH DAY OF DECEMBER, 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

