



REPUBLIC OF KENYA



KENYA LAW
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Gaichu v Tharaka Nithi County Government & another (Miscellaneous Cause E004 of 2022) [2023] KEELRC 444 (KLR) (20 February 2023) (Ruling)

Neutral citation: [2023] KEELRC 444 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
MISCELLANEOUS CAUSE E004 OF 2022
ON MAKAU, J
FEBRUARY 20, 2023

BETWEEN

DAVID KITHAKA GAICHU APPLICANT

AND

THARAKA NITHI COUNTY GOVERNMENT 1ST RESPONDENT

THARAKA NITHI PUBLIC SERVICE BOARD SERVICE

BOARD 2ND RESPONDENT

RULING

1. This ruling relates to the respondents notice of preliminary objection dated April 6, 2022 which seeks for striking out of the suit with costs for the following grounds:-
 - a. The court lacks jurisdiction to hear it.
 - b. The court is *factus officio* in view of its judgment delivered on December 2, 2019 in Meru ELRC cause No 30 of 2018.
 - c. The suit is *res judicata* in view of the above judgment.

Submissions

2. It was submitted for the respondent the objector herein raises pure points of law as was held in *Mukisa Biscuits v West End Distributors* (1969) EA 696.
3. It was further submitted that the applicant has placed reliance on proceedings in Meru ELRC No 30 of 2017 between the same parties herein but failed to disclose that the suit was heard and determined by this court by being dismissed. Accordingly, it was contended that this court is *functus officio* and lacks jurisdiction to hear the current application as doing so would mean sitting on appeal and determining the very issues it heard and determined in the previous suit.



4. For emphasis, reliance was placed on *Telkom Kenya Ltd v John Ochanda (sing on his own behalf and on behalf of 996 former employees of Telkom Kenya Ltd)* (2014) eKLR where the Court of Appeal held that where there is finality as to the proceedings, merits and decision in a matter, a court becomes *functus officio* and grievance thereon can only be escalated to the appellate court. In the instant case it was submitted that the applicants herein filed appeal against the decision in Meru ELRC No 30 of 2017 and the appeal is still pending, a fact they have concealed from this court.
5. As regards the issue of *res judicata* it was submitted that a copy of the judgment in Meru ELRC No 30 of 2017 is attached to the application herein and it confirms that the issues were heard and determined by this court and it cannot be asked to re-hear the same dispute.
6. Reliance was placed on section 7 of the *Civil Procedure Act* which provides for the doctrine of *res judicata*, and section 34 of the Act which provides that any question between parties to a suit in which a decree was passed or their representatives, relating to the executions is to be determined by the court executing the decree and not by a separate suit. Rule 32(2) of the *ELRC Procedure Rules 2016* provides that an order or decree of this court shall be executed in accordance with the *Civil Procedure Rules*.
7. On the other hand, it was submitted for the applicant that Ongaya J delivered a ruling on November 9, 2017 directing the applicants to resume work and continue working, and the respondent to pay their salaries/dues until the suit was heard and determined. The said ruling was never appealed against and it remains unchallenged in any way. It was therefore contended that the respondents are guilty of contempt of court.
8. It was further submitted that the issue of contempt has never been determined and it was never mentioned in the judgment by Nzioki J which was appealed against in the civil appeal No 107 of 2020. Consequently, it was submitted that the preliminary objection ought to be dismissed. Besides the issue of payment of salaries and dues as ordered by Ongaya J was never dealt with in the judgment by Nzioki J and therefore that issue is not *res judicata*.

Determination

9. The issues for determination herein are:
 - a. Whether the notice of preliminary objection herein raises a pure point of law.
 - b. Whether the grounds of the objection raised have been established.

Points of Law

10. In the case of *Mukisa Biscuits v West End Distributors* Newbold P held that:-

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertain or if what is sought is the exercise of judicial discretion.”
11. Law J.A in the same judgment stated that:-

“...a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation



or a submission that the parties are bound by contract giving rise to the suit to refer the dispute to arbitration.”

12. The objection herein is on grounds that the suit is *res judicata*, the court is *functus officio* and that the court lacks jurisdiction. Such points are pure points of law which clearly manifest themselves in the impugned application, response and parties submissions. Consequently I find and hold that the objection meets the legal threshold enunciated by the Court of Appeal in *Mukisa Biscuits case* above.

The Grounds Of The Objection

13. The respondents objects to the suit on grounds that the dispute was heard and determined by this court in Meru ELRC No 30 of 2017. The applicants are in denial and aver that the orders sought were not part of the judgment rendered in the said suit and they are not the subject matter in the appeal pending in the Court of Appeal.

14. I have carefully considered the material before the court and the rival submissions by counsel. I have also read the judgment by Nzioki wa Makau J delivered on December 2, 2019. The judgment dismissed the sit on grounds that the claimants violated section 77 of the [County Government Act](#) by filing the suit instead of going to the Public Service Commission.

15. The issues raised in the Meru ELRC No 30 of 2017 being unlawful termination of the applicants’ employment and the reliefs sought included unconditional reinstatement to employment, payment of salaries and allowances, payment of arrears at Kshs 23,392.00 per month plus all lawful and due increments until payment in full. The court never considered the merits of the claim and the reliefs sought. It went straight to the issue of jurisdiction and dismissed the suit guided by section 77 of the [County Government Act](#) and the Court of Appeal decision in [Republic v Secretary County Public Service Board ex parte Hulbai Gedi Abdille](#) (2015) eKLR that the applicant ought to have appealed to the Public Service Commission against the termination of their contracts by the respondent.

16. To that extent I would find that the dispute between the parties herein being termination of employment contract is yet to be determined on merits by a competent court or tribunal. However, the court has pronounced itself, on the issue of jurisdiction and the matter is now subject of a pending appeal. Until the outcome of the appeal, the obtaining position is that the court has no jurisdiction over the applicants claim for salaries and other benefits or to enforce any orders made by the court prior to the final judgment.

17. One more observation, even if the court had jurisdiction over the dispute, the application would still not be welcome because it offends section 34 of the [Civil Procedure Act](#) which provides that:

“(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.”

18. In conclusion I find that the objection has merits and allow it on ground that the court lacks jurisdiction to entertain the instant application by dint of section 77 of the [County Government Act](#). Further the application seeks to enforce orders made in another suit which is contrary to the express provisions of section 34 of the [Civil Procedure Act](#). Consequently, the notice of motion dated February 28, 2022 is hereby struck out with costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS 20TH DAY OF FEBRUARY, 2023.

ONESMUS N MAKAU



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 April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE

