



**Nyolo v Kenya Railways Corporation & another (Cause 50 of 2019)
[2023] KEELRC 411 (KLR) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 411 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 50 OF 2019
CN BAARI, J
FEBRUARY 16, 2023**

BETWEEN

JOSEPH OTIENO NYOLO CLAIMANT

AND

KENYA RAILWAYS CORPORATION 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

RULING

1. Before Court is a notice of motion application dated November 18, 2022, and filed on November 21, 2022, by the 1st Respondent. The application is brought pursuant to Section 3 of the [Employment and Labour Relations Court Act](#), Rules 17 & 38 of the [Employment and Labour Relations Court \(Procedure\) Rules](#) and Order 2 Rule 15 of the [Civil Procedure Rules](#).
2. The 1st Respondent/Applicant seeks that the Claimant's suit be struck out on the basis that it does not disclose a cause of action against the Respondents. The 1st Respondent further states that the Claimant's suit is frivolous, vexatious and an abuse of the Court process.
3. The application is supported by grounds on the face and the affidavit of Stanley Gitari. The Applicant avers that the Claimant filed and successfully prosecuted its case against the 1st Respondent in Nakuru ELRC Cause No 161 of 2013, and the dispute on the Claimant's termination was settled.
4. It is the 1st Respondent/Applicant's position that there no longer exists an employment relationship between the parties for determination and that the pending issue in Nakuru ELRC Cause No 161 of 2013, is one of execution which should be prosecuted through an alternative process, and hence there is no reasonable cause of action disclosed herein.
5. The Claimant/Respondent opposed the motion vide a replying affidavit sworn on December 13, 2022. The Claimant admits having filed suit on the issue before, but further avers that what he seeks under



this suit is for the Court to find the relationship between Kenya Railways Corporation and Rift valley Railways symbiotic.

6. The Claimant avers that the court is empowered under Section 12 of the *Employment and Labour Relations Court Act*, to make a declaratory order. He further sought to rely in the holding in *Corporate Insurance Company Ltd v Elias Okinyi Ofire* Civil Appeal No 12 of 1998 to buttress this position.
7. Parties canvassed the application by way of written submissions. The Applicant/1st Respondent and the Claimant filed submissions and which have been duly considered.

Determination

8. The issue subject of this suit concerns jurisdiction of the Court to determine the matter herein. Jurisdiction is at the core of every suit before a Court and as was clearly set out in *Owners of Motor Vessel Lilian "s" v Caltex Oil(K) Limited* (1989) KLR 1, jurisdiction is everything and without which, a Court must down its tools.
9. The 1st Respondent/Applicant's position is that the issue subject of this suit was already finally determined and the current suit as filed, does not disclose a reasonable cause of action. A glimpse at the judgment rendered by this Court (Byram J) in Nakuru ELRC Cause No 161 of 2013, shows that the Court made a declaration that the Claimant was unfairly terminated, following which it issued an order that the Claimant be paid Kshs. 1, 093,029.34/-
10. The Claimant's contention is that he is now before this court for a declaratory order that the body responsible to pay him his dues, is the 1st Respondent/Applicant.
11. The Claimant/Respondent in his replying affidavit, acknowledges that the 1st Respondent/Applicant is the successor of the now defunct Rift Valley Railways (K) Limited. He however states that his effort to execute against the 1st Respondent has not bore fruits for reason that the 1st Respondent/Applicant has declined to honour the decree in the premise that Rift Valley Railways (K) Limited, is a different Company, even when it is clear that the 1st Respondent is the successor of the defunct Rift Valley Railways (K) Limited.
12. The issue for this Court is whether this suit discloses a cause of action and further whether the Court is functus officio in as far this matter is concerned.
13. As correctly submitted by the 1st Respondent/Applicant, the issues in this matter were prosecuted and a judgment rendered, and hence the conclusion by the Applicant that the Court is functus officio. In *Chembe Katana Changi v Ministry of Lands & Settlement & 4 Others* (2014) eKLR, the court spelt out exceptions to the general rule of functus officio to include suits filed in execution of decrees, an application for review filed under Order 45 of the *Civil Procedure Rules*, an application for stay of execution pending appeal under Order 42 and an application for stay of execution pending appeal filed under Order 22 Rule 22 of the *CPR*.
14. The suit herein is not an application for stay of execution nor is it an application for review. The question is whether this renders the suit functus officio? In my view, the claim now before court is not a replica of the suit in Nakuru ELRC Cause No 161 of 2013.
15. The instant suit arises from the 1st Respondent/Applicant failure to honour the Claimant's decree on the basis that it is not the Respondent in Nakuru ELRC Cause No 161 of 2013. Further, the prayers in the current suit are in my view different from those in the previous suit.



16. In *DT Dobie & Co. (K) Limited v Muchina* (1982) KLR, the Court of Appeal held thus: -

“.....no suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, (emphasis mine) provided it can be injected with real life by amendment, it ought to be allowed to go forward...”

17. That the Claimant/Respondent herein cannot execute his decree for reason that the employer against whom the decree was issued is now defunct and succeeded by one who disowns the decree on account of a difference in names, is in my view a semblance of a cause of action and for which the Claimant should be allowed his day in Court.

18. It is also my considered view that this suit though filed as a normal cause, is one that can be salvaged by amendment in the interest of justice.

19. In the upshot, I find the 1st Respondent/Applicant’s application dated November 18, 2022, lacking in merit and is hereby dismissed with costs to the Claimant/Respondent.

20. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 16TH DAY OF FEBRUARY, 2023.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Omondi present for the Claimant/Respondent

Ms. Moraa present for the 1st Respondent/Applicant

N/A for the 2nd Respondent

Christine Omollo- C/A

