



**Walingo v Maasai Mara University & another (Cause E009 of 2020)  
[2023] KEELRC 268 (KLR) (2 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 268 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
CAUSE E009 OF 2020  
HS WASILWA, J  
FEBRUARY 2, 2023**

**BETWEEN**

**MARY KHAKONI WALINGO ..... CLAIMANT**

**AND**

**MAASAI MARA UNIVERSITY ..... 1<sup>ST</sup> RESPONDENT**

**MAASAI MARA UNIVERSITY COUNCIL ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Respondent filed an application dated 4<sup>th</sup> November, 2022, seeking for the Court to vary its Orders of 27<sup>th</sup> September, 2022, dismissing their application of 27<sup>th</sup> July, 2022 for non- attendance, on the basis that the date which was given to the parties in court was on 29<sup>th</sup> September, 2022 and not 27<sup>th</sup> September, 2022, therefore that the non-attendance was not deliberate.
2. In response to the said application, the Claimant raised a preliminary objection on the following grounds;
  1. This Court lacks jurisdiction to entertain, hear or determine the Motion Application as brought by the Respondents in view of the provisions of Order 25(1) of the Civil Procedure Rules, Cap 21 whereby upon the withdrawal of a suit the court ceases to have jurisdiction with respect to the matter.
  2. Similarly, the court lacks jurisdiction to hear and determine the Application as it has become functus officio having fully discharged its duty in the matter.
  3. The provisions of the Civil Procedure Rules, Cap 21 does not confer a right on the Respondents, once a matter has been withdrawn, to revoke the said withdrawal.
  4. The Application herein is res judicata, the issues raised therein having been conclusively decided on merit by the Public Service Commission via its decision dated 6<sup>th</sup> September, 2022.



5. That the Application is sub judice, the issues raised therein is currently before this Honourable Court between the same parties in ELRC Petition No. 007/2022 - Prof. Mary K Walingo –vs Maasai Mara University Council & Others.
6. In the premises, this Application is hopelessly incompetent, fatally defective and amounts to an abuse of the court process, the same ought to be dismissed forthwith.
3. Direction were taken for the Preliminary Objection to be disposed of first through written submissions. Therefore, this Ruling is in respect of the Preliminary objection.

### **Claimant's Submissions.**

4. The claimant submitted that this Court lacks jurisdiction to hear and determine the application of 4<sup>th</sup> November, 2022 in view of provisions of section 25 of the *Civil Procedure Act*, which deprives the court jurisdiction to hear any matter which has been withdrawn. It was argued that once a suit has been withdrawn, neither the defending party nor the Court have powers to reinstate such a suit.
5. It was submitted by the claimant that a similar application dated 16<sup>th</sup> June, 2022 had been filed by the Respondent, which raised similar issues, thus the application is res judicata. Furthermore, that the issue for determination have already been conclusively determined by Public Service Commission in its decision of 6<sup>th</sup> September, 2022. To reinforce this argument, the claimant relied on the case of *Raila Amollo Odinga & Another v IEBC & 2 others* [2017] eKLR where the supreme Court citing with approval an excerpt from an article by Daniel Malan Pretorius, in *The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law*, (2005) 122 SALJ 832 stated thus: -

“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”

6. It was submitted that the application herein is subjudice, the issues raised therein are before this Court in Petition number E007 of 2022; *Prof; Mary Walingo v Maasai Mara University Council and 4 others*. To support this argument they relied on the case of *Kenya National Commission on Human Rights V Attorney General; Independent Electoral and Boundaries Commission & 16 others (Interested parties)*[ 2020] eKLR where the Court held that;

“The term ‘sub-judice’ is defined in Black’s Law Dictionary 9<sup>th</sup> Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are



pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”

7. Accordingly, to entertain the application herein would be in breach of the subjudice rule and violation of the overriding objectives of this Court. The claimant submitted further that the application which the Respondent is seeking to reinstate is for reinstating the suit herein which they have withdrawn.
8. With regard to costs, the claimant submitted that costs follow events as provided for under section 27(1) of the *Civil Procedure Act*. On that basis, that since the Respondent has vexed the claimant with several applications in this claim, costs should be awarded to the claimant.

#### **Applicant/ Respondent’s Submissions.**

9. The Applicant submitted from the onset that the notice of preliminary objection is devoid of any merits and falls short of the threshold held in locus classicus case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* (1969) EA 696. It was argued that for a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. On that note, it was submitted that the Preliminary objection does not meet the threshold set above because the Court will need to ascertain some issues by fact finding before arriving at a conclusion. He then relied on the case of *Avtar Singh Bhamra & Another vs Oriental Commercial Bank* Kisumu HCCC No. 53 of 2004.
10. It was submitted further that the Preliminary Objection filed herein is defective as it does not cite concisely the provisions of law being offended and cited the case of HCCC Appeal No. 34 of 2005 (Msa) *Guinness Construction and Housing Co. v Abdul Masor* where the court was of the view that failing to cite the provisions of the law, makes a preliminary objection fatally defective. Additionally, that the applicant seeks to basically reinstate its application which was erroneously dismissed for non-attendance when the proper date that was slated for mention was 29<sup>th</sup> September, 2022 and not 27<sup>th</sup> September, 2022.
11. Based on the foregoing, the Applicant submitted with regard to the application being res-judicata and subjudice that for the Court to determine whether an application is caught by the principle of sub-judice or even res judicata especially where the Applicant is alleging the matter was heard by another court or body, evidence has to be adduced to ascertain that fact. A mini trial would need to be conducted in seeking to establish whether the issues raised in the instant application and the suit serialized as Nakuru ELRC Petition No. 007/2022 are the same or not, which will require the tabling of evidence and as such this ground cannot be said to raise a pure point of law. To support this argument the Applicant relied on the decision by Munyao Sila, J, in the case of *Leputei Ole Koros & Another -v- Attorney General and 3 others* (2016) eKLR where he stated:-

“Where facts are not contested, the court is able to make a determination of law on the preliminary objection, but where facts are in contest, then automatically, the issue falls out of the ambit of a preliminary objection. It would be improper for a court to make a contested determination of fact within a preliminary objection.”
12. On whether the application is sub-judice, the applicant cited the case of *Thiba Mining Hydro Co.ltd- vs-joseph Karu Ndigwa* [2013] eKLR which stated as follows;

‘it is not the form in which the suit is framed that determines whether it is sub-judice. Rather it is substance of the suit...’



13. Accordingly, it was submitted that the nature of the suit pending before the Court in Nakuru ELRC Petition No. 007/2022 is substantially different from the nature of the application herein. There is no commonality of parties, cause of action or relief to form a basis for the holding that the doctrine of Sub-judice should apply.
14. On the issue of jurisdiction, it was submitted that the instant application dated 7<sup>th</sup> November, 2022 does not in any way seek to interfere with the withdrawal of the claim by the Claimant but rather only seeks for reinstatement of the dismissed application dated 27<sup>th</sup> July, 2022, so that the said application can be heard on merits. It was argued that the application to be reinstated is seeking interalia for payment of costs on withdrawal of suit as provided for under Order 25 Rule 3 of the Civil Procedure Rules and to defend its counterclaim which was yet to be determined.
15. The Applicant also submitted that the objection as filed herein falls short on all the aspect required for a preliminary objection to stand as Enunciated in the celebrated case of Mukhisa biscuits because as demonstrated hereinabove some of the issues and/or facts raised have to be ascertained through evidence whereas the other grounds are without merit and only meant to mislead this Honourable Court. He added that the issue that the application is either sub judice and/or res judicata as submitted hereinabove does not hold water because the instant application has never been determined before and in any case it only seeks for reinstatement of the earlier application dated 27<sup>th</sup> July, 2022.
16. In conclusion, the Applicant submitted that the Preliminary objection is lacking in merit and should be dismissed with costs to them to pave way for the hearing and determination of their application dated 7<sup>th</sup> November, 2022 on merit.
17. I have examined the averments and submissions filed before me. Despite the applicants filing this application, they failed to file any submissions.
18. The applicants had cited that they failed to attend court on 27/9/2022 because the date allocated was 29/9/2022. That is not true according to my court record.
19. In any case, the claimants withdrew their case and there is therefore no basis upon which this court can proceed and grant any other orders.
20. In the circumstances, I find the preliminary objection not merited and is dismissed accordingly.

**RULING DELIVERED VIRTUALLY THIS 2<sup>ND</sup> DAY OF FEBRUARY, 2023.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:-**

Chumo holding brief for Manwa for claimant/Respondent – present

Lawrence Karanja for respondent – present

Court Assistant – Fred

