



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Ongiri v Lotee & 2 others (Petition E061 of 2021)
[2023] KEELRC 626 (KLR) (16 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 626 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E061 OF 2021
CN BAARI, J
MARCH 16, 2023**

BETWEEN

JARED OGECHA ONGIRI PETITIONER

AND

TITUS LOTEE 1ST RESPONDENT

**THE CHIEF EXECUTIVE OFFICER NATIONAL GOVERNMENT
AFFIRMATIVE ACTION FUND 2ND RESPONDENT**

THE HON. ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

1. The Petitioner's petition, is dated August 9, 2021, and filed on December 3, 2021. The Petitioner seeks the following reliefs:
 - i. A declaration that the Petitioner was entitled to the reliefs decreed by the Court in ELRC No 3 of 2018.
 - ii. A declaration that failure to honour the Court's judgment in ELRC No 3 of 2018, was illegal unlawful and unconstitutional.
 - iii. An order of mandamus compelling the Respondents to pay the Petitioner all salaries and allowances for the term of 3 years as per the contract Ref No NGAAF/1/2017.
 - iv. A declaration that the 1st Respondent infringed on the rights of the Petitioner, violated the constitution and is therefore unfit to hold public office.
 - v. General and exemplary damages for failure to comply with the judgment in ELRC No 3 of 2018.
 - vi. Cost of the suit and interest.



- vii. Any other relief this Court may deem just and expedient to grant.
2. The petition is premised on the following grounds:
- i. That at all material times to this petition, the Petitioner was by a decree of the court in ELRC No 3 of 2018, decreed to be the most successful candidate for appointment in the office of the 1st Respondent, and that the 2nd Respondent was ordered to issue a letter of appointment to the Petitioner having emerged as the successful candidate in the interview.
 - ii. That upon delivery of the judgment referred to herein, the 1st Respondent was subjected to contempt of court proceedings for disobeying the judgment and decree of the Court, but compromised the Applicant in that application to withdraw the said application for contempt in ELRC No 3 of 2018.
 - iii. That the Petitioner approached the Respondents to have the said judgment implemented, but the 1st Respondent being the Chief Executive Officer (CEO) of the 2nd Respondent declined to issue a letter of appointment as ordered by the court.
 - iv. That as a result of the refusal to comply with orders, the Petitioner was denied his right to serve the contract period of 3 years, as per the advertisement and the subsequent interview in which he emerged the victor.
 - v. That the Petitioner was additionally denied an opportunity of applying for any other employment based on the finding of the court that he was to be issued with a letter of appointment.
 - vi. That the Petitioner suffered loss and damage in terms of denial of his rights by the 1st Respondents, in failing to issue a letter of appointment as the court had decreed.
 - vii. That before the aforesaid interviews, the Petitioner served in the same capacity for a term of 3 years and was paid salary of Kshs 77,590.00 per month and was entitled to privileges and allowances of about Kshs 200,000.00.
 - viii. That the Petitioner suffered loss and damage due to the omission, collusion and/or conduct of the 1st Respondent, which are unconstitutional and infringes on his rights as determined by the court.
 - ix. That the Petitioner was therefore denied an opportunity to earn as per the contract and decree of the court, for the term of 3 years for the said contract which amount he now claims.
 - x. That the conduct of the Respondents in failing to honour the decree of the court, violated the rights of the Petitioner and ridiculed the image of the court.
 - xi. That the conduct of the 1st Respondent subjected this court and the rule of law into contempt and ridicule, and unless reprimanded by this court, the decisions by superior court will be subjected into the same manner by persons of the rights of the 1st Respondents.
 - xii. That the Petitioner's right to fair administrative action has therefore been abused, and continues to be abused unless protected by this court.
3. The Respondents replied to the petition vide replying affidavit, sworn on April 7, 2022, by Magdaline Kipkeni.

The Respondents' case is:



- i. That It is aware of Petition No.3 of 2018, filed by one Vincent Mariita Omas as a public interest case, touching on the same grounds, facts and more importantly touching on the rights and interest of the Petitioner herein.
- ii. That the Petition was heard fully and determined in favour of the Petitioner, and by extension in favour of the Petitioner in this case.
- iii. That the Petitioner in Petition 3 of 2018, did enter an out of court settlement of the decree, and indeed the same was settled and documents duly signed.
- iv. That the Petitioner having had his Constitutional rights vindicated, and settled, cannot be heard to again file this petition seeking to have implementation of the same judgment which has already been so settled to his own knowledge and consent.
- v. That the effect and import of the orders sought as aforesaid, means that the Petitioner be given appointment to serve in office and/or be paid for the entire period not served, when vide the consent, the Respondent had put in place a substantive County Coordinator for Nyamira County, and who is now serving.
- vi. That the substratum of the petition having been heard and determined fully, means that this present petition falls within the rule of res judicata as there is no new facts to be tried by this court, and or the petitioner is seeking to implement a courts judgment by way of a petition.
- vii. That the judgment in favour of the Petitioner was entered on July 11, 2018, and settlement filed on August 7, 2020 clearly (4) years since the entry of the said judgment, a conduct suggesting that the present Petition is an attempt at unjust enrichment.
- viii. That the Petitioner who was fully aware of the judgment, and did not seek to serve but chose to settle the matter otherwise cannot now come back to seek for an appointment letter for contract period which has expired.
- ix. That on November 9, 2018, during the pendency of the Petition No 3 of 2018, the Petitioner wrote to the Respondent seeking for his gratuity among other issues, acknowledging handing over to the new Coordinator serving in his place.
- x. That from various communication from the Petitioner indicating that he was not party to petition No. 3 of 2018, the Respondent reached a decision that indeed the Petitioner was desirous and had accepted the decision of the NGAAF not to renew his contract, and having acknowledged non-interest in the ongoing Petition No. 3 of 2018, proceeded to pay him all his dues and amicably ended the working relationship.
- xi. That it is from the foregoing that the Respondent feels and rightly so, that the Petitioner has filed this petition as an afterthought and after the expiry of the period that he was to serve.
- xii. That the petition before court neither raises any Constitutional issue nor meets the Constitutional threshold, and as such is an abuse of the special Constitutional jurisdiction of this Honourable Court, and pray that the same is dismissed and/or struck out.

The Petitioner's Submissions

4. It is submitted for the Petitioner that the judgment delivered in petition No. 3 of 2018 was timely, and the failure on the part of the Respondents to implement it has not been explained, hence they ought to pay the Petitioner the expected salary and benefits for the three years he would have served.



5. The Petitioner further submits that the Respondents casually handled the judgment which is the subject of this petition, and never bothered to do a letter of appointment as directed by the Court.
6. The Petitioner submits that the contempt proceedings claimed to have culminated in the settlement of the judgment in petition 03 of 2018, the Petitioner therein, one Vincent Omas Mariita, was acting on his own without the blessings of the Petitioner herein, and that even if he was acting as a proxy for the Petitioner, the judgment in petition 03 of 2018 remains unsettled.
7. The Petitioner submits that the Respondents never appealed the judgment in Petition 03 of 2018, and as such, they were bound to implement it fully.

The Respondent's Submissions

8. The Respondents submit that the Petitioner has admitted in his submissions and in the course of the proceedings, that indeed he was the subject matter of the Vincent Marita case, and that the suit arose from inadequacies of the 1st and 2nd Respondents in implementation of judgment of the previous petition that was entered in his favour.
9. It is submitted for the Respondents that it is undeniable that the judgment in the Vincent Marita case, already established the rights of the Petitioner herein, and by default declared that he is entitled to the reliefs sought, therefore, the issue was directly and substantially in issue and was the back bone of the claim.
10. The Respondents further submit that it was not necessary for the Petitioner to file another suit seeking establishment of the same reliefs already declared by another court.
11. The Respondents submit that the Petitioner has always been well informed of the court proceedings, but chose to do nothing only to re-surrect the claim 4 years down the line. The Respondents further submit that the Petitioner is estopped from doing so based on the doctrine of waiver, estoppel, and laches that dilutes the Petitioner's case. They sought to rely in [Rajnikantkhetshi Shabv Habib Bank A.G. Zurich](#) [2016] eKLR to support this position.
12. The Respondents finally submit that the Petitioner is not entitled to any of the reliefs sought, and seek that the petition be dismissed with costs.

Analysis and Determination

13. I have considered the petition, the reply by the Respondents and the submissions by both parties. The issues that fall for determination are:
 - i. Whether the petition is res judicata
 - ii. Whether the petition violates the principle of avoidance
 - iii. Whether the Petitioner deserves the reliefs sought

Whether the petition is res judicata

14. The doctrine of res judicata is spelt out under Section 7 of the [Civil Procedure Act](#) as follows:

“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 can claim, litigating under the same title, in a court



competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

15. In *Henderson vs Henderson* (1843-60) ALL E.R.378, the Court observed thus:

“...where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”
16. From the foregoing description, it follows that for a matter to be considered *res judicata*, the matters in issue must be similar to those which were previously in dispute between the same parties, and the issues have been determined on merit by a Court of competent jurisdiction.
17. The Petitioner herein, has submitted that the judgment in petition No. 3 of 2018, has not been settled, and that the instant petition arises from the Respondents’ failure to honour a decree of the court, and which is said to violate the rights of the Petitioner.
18. It is the Petitioner’s express submission that the judgment in petition No. 3 of 2018, is the subject of the instant petition, which in essence means that the Petitioner seeks to enforce a judgment of the court through yet another petition.
19. I do not consider the instant petition *res judicata* for the mere reason that the Petitioner is not seeking similar prayers to those sought in petition No. 3 of 2018. In the instant petition, the Petitioner seeks to enforce the judgment of the Court arising from the earlier petition by Vincent Omao being petition No. 3 of 2018.
20. The Petitioner does not deny that the issues between the parties have already been finally determined by a court of competent jurisdiction, and what he seeks under the instant petition is enforcement of the judgment arising from petition No. 3 of 2018, lodged by Vincent Mariita Omao as a public interest litigation, and on behalf of the Petitioner herein.
21. That said, it is my considered opinion that the approach taken by the Petitioner in filing a new petition to enforce orders from a previous petition, is improper. The Petitioner should instead, have sought the setting aside of the consent order, and thereafter pursue the contempt proceedings against the Respondents or commence execution of the decree therein.

Whether the petition violates the Principle of Constitutional Avoidance

22. The principle of avoidance requires that a Court will not determine a Constitutional issue, when the matter may properly be decided on another basis. (See *Communications Commission of Kenya & others vs Royal Media Services Limited & 5 others* [2014] eKLR).
23. In *Sumayya Athmani Hassan vs Paul Masinde Simidi & another* [2019] eKLR, the Court held thus: -

“The Article 41 rights are enacted in the *Employment Act* and the *Labour Relations Act*. The two Acts and the Rules made thereunder provide adequate remedy and orderly enforcement



mechanisms. The 1st Respondent filed a petition directly relying on the provisions of the Constitution for enforcement of contractual rights governed by the Employment Act without seeking a declaration of invalidity of the provisions of the Employment Act or alleging that the remedies provided therein are inadequate.

The petition did not raise any question of the interpretation or application of the Constitution.....”

24. The Petitioner contends that the Respondents offended and failed to adhere to the Constitution and the rule of law, and hence violated the Provisions of Article 10 and Article 232 of the Constitution of Kenya. The Petitioner has not proceeded to set out clearly and precisely how the constitutional provisions were violated.
25. It is not enough to cite Constitutional provisions; a party must show with precision how those provisions have been violated related to his case. Further, enforcement of court orders is a subject of statute and not one for Constitutional interpretation or application.
26. The Petitioner’s claim is for money he would have earned had his contract been renewed and/or issued with an appointment letter as ordered by the court. This in my view, is purely an employment issue and which should have been sought through a normal claim and not a petition.
27. I find and hold that the petition violates the Principle of Constitutional avoidance, is incompetent and is hereby dismissed in its entirety.
28. I make no orders on costs.
29. Judgment of the Court.

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

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Okemwa h/b for Mr. Nyambati for the Petitioner

Ms. Juma present for the Respondents

