



REPUBLIC OF KENYA



Mokua & 171 others v Nyamira County Public Service Board (Employment and Labour Relations Petition E013 of 2022) [2023] KEELRC 576 (KLR) (8 March 2023) (Ruling)

Neutral citation: [2023] KEELRC 576 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
EMPLOYMENT AND LABOUR RELATIONS PETITION E013 OF 2022**

S RADIDO, J

MARCH 8, 2023

BETWEEN

JANE WAMBUI MOKUA 1ST PETITIONER
JESCAH KERUBO ARAMA 2ND PETITIONER
IRENE MORAA GUTO 3RD PETITIONER
BENARD MOSE 4TH PETITIONER
JAMES MOSE 5TH PETITIONER
NAOMI NYASAINA NYAORE 6TH PETITIONER
GLADYS NYAMBEKI MOMANYI 7TH PETITIONER
MILDRED MORAA MONYANCHA 8TH PETITIONER
BILDAD MAYOGI 9TH PETITIONER
JANET KERUBO KABA 10TH PETITIONER
MARGARET NYASENGO 11TH PETITIONER
GRACE KWAMBOKA ONDIERE 12TH PETITIONER
DOMNIC AMBOGA NYAKUNDI 13TH PETITIONER
DUKE ROMBIN SAMSON 14TH PETITIONER
GLADYS NYANDUKO NYANG AUJ 15TH PETITIONER
BONEFACE OLTREVOR ONGWAE 16TH PETITIONER
FELISTER BASWETI OKOTI 17TH PETITIONER
ALICE OMORO 18TH PETITIONER
JERUSHA MOKAMBA 19TH PETITIONER



ONDIGO MORAA PRISCILLA 20TH PETITIONER
SOPHIA KERUBO NYANUMBA 21ST PETITIONER
DAMARIS OMWOYO 22ND PETITIONER

AND

JOSEPHAT KENG' ARA YOGOO EXPARTE

AND

PETER NYANDEGA MOKAYA 1ST PETITIONER
GRACE BOSIBORI ONSOMU 2ND PETITIONER
BENARD SIMBA 3RD PETITIONER
EVERLINE KWAMBOKA OMARI 4TH PETITIONER
DOUGLAS BOSIRE 5TH PETITIONER
DRUCILLA MORAA MOTURI 6TH PETITIONER
WYCLIFFE MORWANI OSORO 7TH PETITIONER
PHANICE KENYANSA MAUTI 8TH PETITIONER
HUDSON NYAMWAMU NYARIBO 9TH PETITIONER
HANNAH WAITHERA MWANGI 10TH PETITIONER
MARGRET KEMUNTO NYANG' AUJ 11TH PETITIONER
PRISCILLAH MORAA MAINA 12TH PETITIONER
ISABELLA MONG' ARE 13TH PETITIONER
VALERIA KERUBO MAINYE 14TH PETITIONER
PERPETUA MORAA OGATO 15TH PETITIONER
LYDIA BOYANI MAYAKA 16TH PETITIONER
EUNICE KERUBO NYABANDO 17TH PETITIONER
EVERLINE MAKANA 18TH PETITIONER
GLADYS ARISA 19TH PETITIONER
BENSON ONKOBA MOGAKA 20TH PETITIONER
LILIAN MOIGE 21ST PETITIONER
RUTH MORAA OTARO 22ND PETITIONER
LULU MABUKA 23RD PETITIONER
JUDITH BOSIBORI OMARIBA 24TH PETITIONER
EVERLYNE NYABOKE OGWECHÉ 25TH PETITIONER
DENIS OIMBO 26TH PETITIONER



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| LOISE KEMUNTO NYAUMA | 27 TH PETITIONER |
| WINFRIDA MORAA NYANG' AU | 28 TH PETITIONER |
| BIRITA MOKEIRA OSORO | 29 TH PETITIONER |
| NELLY KERUBO KENNEDY | 30 TH PETITIONER |
| ENOCK NYARIBO ONYANCHA | 31 ST PETITIONER |
| LYDIA BWARI MAKORI | 32 ND PETITIONER |
| JACKSON GICHANA | 33 RD PETITIONER |
| ESTHER NYABOE MORIASI | 34 TH PETITIONER |
| RONALD NYABWARI SOSSY | 35 TH PETITIONER |
| ZACHARIA KEROSI SINDIGA | 36 TH PETITIONER |
| LILIAN KEMUNTO OMETE | 37 TH PETITIONER |
| GRACE MORAA NYANTIKA | 38 TH PETITIONER |
| ABIGAEI MANOTI | 39 TH PETITIONER |
| JAMES MOKAYA | 40 TH PETITIONER |
| EDINAH ONYANCHA | 41 ST PETITIONER |
| VINCENT MOINDI | 42 ND PETITIONER |
| DORCAS ABUGA | 43 RD PETITIONER |
| ALPHAXARD MAGERE | 44 TH PETITIONER |
| FRIDAH NYAMOITA OROKO | 45 TH PETITIONER |
| MELLEN MANOTI | 46 TH PETITIONER |
| DUKE MONYANCHA | 47 TH PETITIONER |
| KENNEDY OMAORE OMARIBA | 48 TH PETITIONER |
| NANCY KWAMBOKA ONGERI | 49 TH PETITIONER |
| OLIVE NYANCHAMA NYACHIRO | 50 TH PETITIONER |
| CHARLES LANGAT | 51 ST PETITIONER |
| CATHERINE MAGARA | 52 ND PETITIONER |
| SALLY NYAMOKAMI NYABAYO | 53 RD PETITIONER |
| ABEL OGAO | 54 TH PETITIONER |
| NORAH MOKAYA | 55 TH PETITIONER |
| VANE MORAA NYAMACHE | 56 TH PETITIONER |
| DORCAS KIOI | 57 TH PETITIONER |
| SAMWEL NJAGI | 58 TH PETITIONER |



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| DAVIS KIAGE MAGETO | 59 TH PETITIONER |
| BETTY NYAMOITA NYAKUNDI | 60 TH PETITIONER |
| EVANS ONTIRO MAYAKA | 61 ST PETITIONER |
| CYPRINE MORAA MOINDI | 62 ND PETITIONER |
| IRINE NYARINGO | 63 RD PETITIONER |
| ANNETTE MORAA | 64 TH PETITIONER |
| LYDIA KIRIAGO | 65 TH PETITIONER |
| ERIC MEMBA | 66 TH PETITIONER |
| DISMAS MICHIEKA | 67 TH PETITIONER |
| MARY NYANGAU | 68 TH PETITIONER |
| JACKLINE MORAA ONCHWARI | 69 TH PETITIONER |
| JACKLINE GEKARA | 70 TH PETITIONER |
| CATHERINE BWARI GETONTO | 71 ST PETITIONER |
| EDINAH NYARANGI JUMA | 72 ND PETITIONER |
| CHRISTINE MUKAMI NYAGAH | 73 RD PETITIONER |
| JOSIAH ABUGA | 74 TH PETITIONER |
| VANE NYANGAU | 75 TH PETITIONER |
| JUDITH M. OKONGO | 76 TH PETITIONER |
| BRENDA AKINYI OPIYO | 77 TH PETITIONER |
| JULIANA MWENDE SIMON | 78 TH PETITIONER |
| DANVAS OMURWA OGORO | 79 TH PETITIONER |
| IRINE GITENYA | 80 TH PETITIONER |
| MARY LIAVULI | 81 ST PETITIONER |
| SAMSON MARIBA | 82 ND PETITIONER |
| JUSTIN MORIASI MORIASSI | 83 RD PETITIONER |
| EMMA MORAA MORIASI | 84 TH PETITIONER |
| DIANA BABU | 85 TH PETITIONER |
| PERISTERS NYAMOTA | 86 TH PETITIONER |
| GLADYS NYAENYA | 87 TH PETITIONER |
| LUCY ONYANCHA | 88 TH PETITIONER |
| MAULINE NYAMUSI MOSE | 89 TH PETITIONER |
| HELLEN GICHANA | 90 TH PETITIONER |



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| AGNETA MONTE | 91 ST PETITIONER |
| JUSTINE NYAMBANE | 92 ND PETITIONER |
| EUNICE OBONG'O | 93 RD PETITIONER |
| SCOLA JOHN | 94 TH PETITIONER |
| LUKAS AMISI | 95 TH PETITIONER |
| CONCEPTOR NYANGI | 96 TH PETITIONER |
| LILIAN KANEBA | 97 TH PETITIONER |
| EVANS MONANTIA OMBASA | 98 TH PETITIONER |
| JOSEPHINE MUTHONI YABESH | 99 TH PETITIONER |
| RODGERS MWANGI | 100 TH PETITIONER |
| SOPHIA NYANGANYI BUNDI | 101 ST PETITIONER |
| MARY NYABONYI OKIOGA | 102 ND PETITIONER |
| RICHARD ONDUSO NYAMOSI | 103 RD PETITIONER |
| INNOCENT NYAKUNDII | 104 TH PETITIONER |
| ABIGAEI MOTABORI NYAMBATI | 105 TH PETITIONER |
| LUCY SENDI | 106 TH PETITIONER |
| ELIZABETH KERUBO NYAMA O | 107 TH PETITIONER |
| NAOMI NYABOKE MAINYE | 108 TH PETITIONER |
| HELLEN OMBWORI | 109 TH PETITIONER |
| JANE KEMUNTO OGERO | 110 TH PETITIONER |
| MARY ICHWARA | 111 TH PETITIONER |
| ROBINSON MOKAYA ABUYA | 112 TH PETITIONER |
| JUMA KEMUNTO BATHSEBAA | 113 TH PETITIONER |
| DAISY NYANGWESO OMWEGAA | 114 TH PETITIONER |
| JOHNSTONE OKIOGI MOSE | 115 TH PETITIONER |
| ERIC OKERO NYAEGA | 116 TH PETITIONER |
| JUSTUS ONDIMU | 117 TH PETITIONER |
| LOICE KERAITA | 118 TH PETITIONER |
| ZALIMA KEMUNTO NYAMWARO | 119 TH PETITIONER |
| LINET KEMUNTO MAKORI | 120 TH PETITIONER |
| JANE KWAMBOKA OMWOYO | 121 ST PETITIONER |
| JERUSHA NYARURI | 122 ND PETITIONER |



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| LINET ONYANCHA MAKORI | 123 RD PETITIONER |
| RUTH MOMANYI | 124 TH PETITIONER |
| VERAH TEMU | 125 TH PETITIONER |
| FAITH KERUBO OMWOYO | 126 TH PETITIONER |
| CHARLES MOKAMBA | 127 TH PETITIONER |
| MARY MORAA MANGERA | 128 TH PETITIONER |
| LYDIA KERUBO MASAKI | 129 TH PETITIONER |
| JANE WAMBUI MOKUA | 130 TH PETITIONER |
| ANIEL KIBET KIBOR | 131 ST PETITIONER |
| EDINAH GEICHEMBA MAENGWE | 132 ND PETITIONER |
| AGNETA KWAMBOKA AGWATA | 133 RD PETITIONER |
| TERESIA NYAKERARIO NYAKUNDI | 134 TH PETITIONER |
| ZIPPORAH NYANDUKO | 135 TH PETITIONER |
| LEAH SIKOYA MULIRO | 136 TH PETITIONER |
| ERICK OBWOGO ANASI | 137 TH PETITIONER |
| CATHERINE MUTHONI | 138 TH PETITIONER |
| FREDRICK ANDIKA OCHANGO | 139 TH PETITIONER |
| VANICE KWAMBOKA KERINA | 140 TH PETITIONER |
| PAULINE NJOKI | 141 ST PETITIONER |
| PAUL OMWONO | 142 ND PETITIONER |
| ERIC CHWEYA MARAGA | 143 RD PETITIONER |
| LYDIA MANOTI BWANA | 144 TH PETITIONER |
| BONIFACE MOMANYI GUTO | 145 TH PETITIONER |
| EVELYNE AYIERA | 146 TH PETITIONER |
| JULIUS NYANG'AU | 147 TH PETITIONER |
| ESTHER MONYANGI AGONYA | 148 TH PETITIONER |
| MAOLINE NYASIMI | 149 TH PETITIONER |

AND

NYAMIRA COUNTY PUBLIC SERVICE BOARD RESPONDENT



RULING

1. The 172 petitioners sued the county public service board, Nyamira (the board) before the court sitting in Kericho on May 10, 2022, alleging breach of contract (failure to implement the terms of a return-to-work formula entered into by the Kenya National Union of Nurses and the County Government of Nyamira on August 7, 2018).
2. When the petition was placed before the court on September 21, 2022, it declined territorial jurisdiction and directed that it be transferred to this court.
3. On October 18, 2022, the board filed a notice of preliminary objection.
4. However, it was only on February 6, 2023 that the petition was placed before this court.
5. During the session, the court directed the board to file and serve a fresh preliminary objection together with submissions before February 20, 2023, and the petitioners to file their submissions before March 6, 2023.
6. The respondent filed the fresh notice of preliminary objection and submissions on February 17, 2023.
7. In the objection, the respondents contended:

'Take notice that the respondent will at the hearing of the petition /application or any other date as the same shall be adjourned to raise a preliminary point of law to be determined in imine that the petition/application and the entire petition be struck out and dismissed with costs for the following reasons:

 - i. That the petition is res judicata the same having been determined vide Kisumu ELRC Cause No 29 of 2019, Kenya National Union of Nurses v Nyamira County Public Service Board.
 - ii. That this court does not have jurisdiction under the provision of article 234(2) of the *Constitution*, section 87(2) of the *Public Service Commission Act* and section 77(2) of the *County Governments Act*.
 - iii. The petition is an abuse of the court process and a non-starter.
 - iv. The petition does not expressly disclose any infringement in the return-to-work agreement (formula) since parties are both a stranger to it.
 - v. The petition does not disclose any infringement of fundamental right to any of the petitioner by the respondent.
 - vi. The petition filed herein discloses a purely ordinary civil dispute and has no constitutional issues and is an abuse of the court process.'
8. The petitioners submissions were filed on March 6, 2023.
9. The court has considered all the materials placed before it.

Res judicata

10. The Kenya National Union of Nurses sued the board in Kisumu Cause No 29 of 2019, Kenya National Union of Nurses v County Public Service Board, Nyamira.
11. The union stated the issues in dispute in the cause as:



- i. Withheld salaries for July and August 2018.
 - ii. Breach of the return to work agreement.
12. The court heard the cause on the merits and in a judgment delivered on November 19, 2021, found it without merit. The cause was dismissed.
13. The instant petition is grounded on the same return-to-work formula which was the subject of litigation and which litigation was determined.
14. It is not open to the petitioners to now disown the litigation which was advanced on their behalf by the union and file the petition in their individual capacities.
15. Such a course of action is forbidden by the doctrine of res judicata and the court, therefore, upholds this ground of the notice of preliminary objection.

Abuse of the court process

16. The petitioners should have or ought to have known about the litigation commenced by the union on their behalf. They failed to make a disclosure of such previous litigation in the petition.
17. It is also noteworthy that the petitioners approached the court sitting in Kericho and not in Kisumu which has territorial jurisdiction. The decision to move the Court in Kericho could not have been inadvertent or a coincidence.
18. The court finds the petition an abuse of the court process.

Alternative dispute resolution

Labour Relations Act

19. The return-to-work formula upon which the petition is anchored was entered into between the Kenya National Union of Nurses on behalf of the petitioners and the County Government of Nyamira.
20. The failure by the County Government to implement the terms of the return-to-work formula constituted a trade dispute as contemplated by section 2 of the Labour Relations Act.
21. By dint of part VIII and more particularly section 62 of the Labour Relations Act and the recognition agreement between the union and the county government, the trade dispute should have been reported to the Cabinet Secretary, Labour and taken through conciliation.

Public service commission

22. The instant dispute concerns terms and conditions of service and alleged breach thereof by the respondents.
23. Article 234(2)(i) of the Constitution as read with section 77(2) of the County Governments Act and section 87(2) of the Public service commission Act demand that disputes arising from contracts of service with respect to terms and conditions of service should be channelled to the Public service Commission of Kenya.
24. The petitioners herein did not demonstrate that they had exhausted the appellate procedures set out in the aforesaid legal framework.
25. The petition was, therefore, also filed prematurely.



Conclusion and orders

26. The court not only finds the petition res judicata but an abuse of the court process and premature. It is struck out with costs to the respondent.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 8TH DAY OF MARCH 2023.

Radido Stephen, MCI Arb

Judge

Appearances

For Petitioners Chimei & Co. Advocates

For Respondent Abincha Mogambi Advocate, County Public Service Board Nyamira

Court Assistant Chrispo Aura

