



**Otieno v Export Processing Zones Authority & 2 others (Petition
E034 of 2022) [2023] KEELRC 880 (KLR) (5 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 880 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E034 OF 2022
AN MWAURE, J
APRIL 5, 2023**

BETWEEN

EZEKIEL OWUOR OTIENO PETITIONER

AND

EXPORT PROCESSING ZONES AUTHORITY 1ST RESPONDENT

**THE CABINET SECRETARY, MINISTRY OF INDUSTRIALISATION, TRADE
& ENTERPRISE 2ND RESPONDENT**

THE HON ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

1. The Petitioner is a male adult of sound mind residing and working in Kenya.
2. The 1st Respondent is a State Corporation under the Ministry of Industrialisation, Trade and Enterprise whose mandate is to promote and facilitate export-oriented investments and to develop an enabling environment for such investments.
3. The 2nd Respondent is a statutory body established under section 3 of the *Export Processing Zones Act* No. 12 of 1990
4. The 3rd Respondent is the Cabinet Secretary responsible for Industrialisation, Trade and Enterprise appointed under Article 152 (2) of *the Constitution* of Kenya 2010.
5. The Petitioner avers that the 1st Respondent placed an advertisement in the local daily newspapers for the position of the Chief Executive Officer of the Authority wherein it set out the qualifications and requirements for any interested persons who intended to fill the vacancy.



6. The Petitioner generally met the minimum requirements and competencies for the position as advertised by the 1st Respondent and being interested in the position, he submitted his application for the job as per the guidelines set out in the advertisement.
7. Following the interview, the 1st Respondent informed the Petitioner on the 12th August, 2021 that he was the successful candidate for the position and that his appointment would be subject to the appointment by the 2nd Respondent.
8. The Cabinet Secretary without giving any reasons for her actions, re-appointed one Henry Obino to the position of acting CEO of the Authority.
9. The Petitioner says he is aware that one Okiya Omtatah filed a petition in this Honourable Court in Nairobi ERLC Petition No E 133 of 2021 challenging the 2nd Respondent's re-appointment of Henry Obino as acting CEO of the Authority. Parties have filed and exchanged their written submissions and the matter is pending determination by this court.
10. Despite the pending recruitment process and the outstanding appointment of the Petitioner to the position of the Chief Executive Officer of the Authority, the 1st Respondent has now re advertised the position signalling a parallel recruitment process.
11. The Petitioner is consequently apprehensive that the new recruitment exercise threatens and will only serve to infringe upon his rights to fair labour practices and the right to fair administrative action, including his right to be given written reasons why he is yet to be appointed by the 2nd Respondent.
12. The Petitioner prays for the following remedies;
 - a. A declaration that the re-advertisement of the position of Chief Executive of the Export Processing Zones Authority infringes on and violates the Petitioner's rights and is, therefore, unconstitutional, null and void.
 - b. A declaration that the fresh recruitment exercise to recruit the Chief Executive Officer of the Export Processing Zones Authority infringes on and violates the Petitioner's rights and is therefore, unconstitutional, null and void.
 - c. A declaration that failure to communicate the outcome of the initial recruitment exercise have infringed on the Petitioner's right to fair labour practices and fair administrative action under Article 41 (1) and 47 of *the Constitution* of Kenya 2010.
 - d. An order of judicial review in the nature of certiorari quashing the advertisement by the 1st Respondent for the position as the Chief Executive Officer of the Authority
 - e. An order of judicial review in the nature of prohibition restraining the Respondent from carrying on with the recruitment exercise of the Chief Executive Officer of the Authority arising out of the re-advertisement of the position of the Chief Executive Officer of the Export Processing Zones Authority.
 - f. An order of Judicial Review in the nature of Mandamus compelling the 2nd Respondent to appoint the Petitioner as the Chief Executive Officer of the Export Processing Zones Authority;
 - g. Any other order that this Court deems fit and just in the circumstances; and
 - h. Costs consequent upon this Petition be borne by the Respondents.



13. The Respondent in the Replying Affidavit deposed to by the acting Legal Manager, Winnie Sang says that under section 3 of the *Export Processing Zones Act*, 1990 (‘the EPZ Act’) the 2nd Respondent ‘may on the recommendation of the Authority, appoint a chief executive of the Authority whose conditions and terms of employment shall be determined by him’.
14. That following the authorization by the States Corporation Advisory Committee, the 1st Respondent placed an advertisement in national newspapers inviting suitably qualified persons to apply for the position of the 1st Respondent’s CEO.
15. The 1st Respondent received applications, of which three, including that from the Petitioner, were shortlisted by the 1st Respondent’s Board and those applicants were invited for interviews, in line with section 6 of the EPZ Act, the 1st Respondent’s Board recommended to the 2nd Respondent the appointment of the Petitioner as the 1st Respondent’s CEO. The 1st Respondent’s letter to the Petitioner notifying him of such recommendations was explicit that his application was successful subject to the approval of the Minister i.e. the 2nd Respondent.
16. By his letter dated the 4th August 2021, the 2nd Respondent declined to act on the recommendation as the resolutions did not include any details on the candidates besides names. The 1st Respondent was further asked to halt the entire recruitment process until appropriate guidance was provided.
17. Thereafter, on the 5th August 2021, the 2nd Respondent wrote to the Board Chairperson of the 1st Respondent informing him that a team had been appointed to conduct an audit of the recruitment process. The 2nd Respondent granted the 1st Respondent the approval to undertake the re advertisement vide the letter dated 10th January 2022, and the 1st Respondent proceeded to do so.
18. The 2nd Respondent in the replying affidavit deposed to by Betty C. Maina says that sometimes last year, the 1st Respondent undertook a recruitment exercise to fulfil the vacant position of the Chief Executive Officer. However, before the process could be finalized, it emerged that there were irregularities in the process thus necessitating an audit to be undertaken to look into the queries. The 2nd Respondent directed the recruitment exercise to be halted in the interim and extended the term of the acting CEO which had lapsed while the review was still ongoing.
19. That the audit results revealed that there were indeed irregularities in the recruitment process and in the circumstances a proposal was made to repeat the exercise. The Petitioner, who had been recommended by the Board for appointment following the irregular recruitment process could not be appointed in the circumstances.
20. Petition No E133 of 2021 is pending determination before the Honourable Justice Nduma Nderi and has been slated for judgment on 29th July 2022. The determination of Petition E133 will resolve the issues raised in the instant Petition as they involve same facts and issues thus the instant Petition is subjudice and should therefore be struck out for being an abuse of the court process.
21. There are subsisting interim orders issued in ELRC Petition E 133 of 2021 suspending the CEO advert published on the 18th January 2022 until the said Petition is determined. Thus, the prayers sought by the Petitioner seeking to quash the said advert are a duplication, an academic exercise, an abuse of the court process and a waste of judicial time. The case poses a danger of conflicting decisions.
22. The respondent state there is no legitimate expectation that can arise from an irregular or illegitimate process and thus the allegation by the Petitioner that his right to legitimate expectation was violated is clearly unfounded.



23. The 2nd Respondent has not issued any appointment letter to the Petitioner herein and therefore he lacks the locus standi to bring this matter before court. The Cabinet Secretary is not just required to rubber stamp the nominee forwarded by the Board but can decline a recommendation where she is satisfied there are substantial grounds to do so. Further there is no employer employee relationship between the Petitioner and the Authority and that this suit cannot fall within the purview of section 12 of the *Employment and Labour Relations Court Act* to warrant the jurisdiction of the court.
24. The Petitioner submits that the law on sub judice is to be found under section 6 of the *Civil Procedure Act* which provides that no Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceedings between the same parties or between parties under whom they or any of them claim, litigating under the same title where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.
25. The Petitioner relied on the case of *Munawar Shuttle County Government of Kilifi & 2 Others 2018 eKLR* where the court said that the purpose of section 6 is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter. It is meant to avoid abuse of the court process and diminish the chances of courts with competent jurisdiction issuing conflicting decisions over the same dispute. 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. The conditions to be met by a party who seeks to stay suit (res sub judice) under section 6 of the CPA is that there must be two suits or more. One suit should have been instituted previously and other instituted subsequently. Both suits should be pending before courts of competent jurisdiction and must be between the same parties or their representatives. The subject matter of the suit should be the same.
26. The Petitioner submitted that the ELRC Petition Number E 133 of 2021 is fundamentally different from the instant Petition in that while the former has been filed by one Okiya Omtatah and challenges the re-appointment of one Henry Obino as acting Chief Executive Officer of the 1st Respondent herein and the failure by the Cabinet Secretary to appoint the Petitioner to the Position, the instant Petition challenges the re-advertisement of the position of the Chief Executive Officer and fresh recruitment thereto. Moreover, Okiya Omtatah is not a party to this Petition and the Petitioner therein was only an interested party to the ELRC Petition No E 133 of 2021.
27. On the question of locus standi the Petitioner relies on, inter alia, in the matter of *Khalef El Busaidy vs Commissioner of Lands & 2 others 2002 eKLR* where it was held that:
- “For an individual to have locus standi, he must have an interest either vested or contingent in the subject matter before court, which interest must be legal one. Such interest must be above that of other members of the public in general. “
28. The Petitioner has an interest in the present dispute and therefore has locus standi in this matter contrary to the assertions of the 2nd Respondent. The Petitioner generally applied for the job as per the guidelines set out in the advertisement, attended an interview and learnt of the 1st Respondent’s recommendation to the 2nd Respondent for his appointment as the substantive Chief Executive of the Authority. This was communicated by the 1st Respondent to the Petitioner on the 12th August, 2021, informing him that he was the successful candidate for the position following the job interview and culmination of the competitive recruitment exercise. However, the respondent had indicated that his appointment would be subject to the appointment by 2nd Respondent.



29. The Petitioner relied, inter alia, on the case of Communications Commission of Kenya and 5 Others vs Royal Media Services and 5 others where the Supreme Court stated that

“Legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. Therefore, for an expectation to be legitimate, it must be founded upon a promise or practice by public authority.”

30. The Petitioner submits that Article 41 (1) of *the Constitution* provides that every person has the right to fair labour practices and relied on the case of Kenya County Government Workers’ Union vs County Government of Nyeri & Another (2015) eKLR where it was held that:

“Secondly, it is the opinion of the Court that the right to ‘fair labour practices’ encompasses the constitutional and statutory provisions and the established workplace conventions or usages that gives effect to the elaborations set out in Article 41 of *the Constitution* or promote and protect fairness at work. These include provisions for basic fair treatment of employees, procedures for collective representations at work, and of late, policies that enhance family life while making it easier for men, women and persons with disabilities to go to work.”

31. The Petitioner avers that having emerged the top candidate on merit for the position after the competitive recruitment process, and having been recommended to the 2nd Respondent for appointment, it consequently follows that it would only be fair under *the Constitution* that the Petitioner is appointed by the 2nd Respondent to the said position.

32. The 1st Respondent relied on the case of Benard Murage vs Fine Serve Africa Ltd & 3 others 2015 eKLR for the proposition that the:

“Mere fact that *the constitution* is cited or invoked is not enough to elevate the matter to a constitutional matter. Mere allegation of breach of rights- and the citation of inapplicable provisions of *the Constitution* including *the constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2014) does not elevate a matter falling within the purview of private, civil law to a public interest constitutional matter.

33. The earlier proceedings in the ELRC Petition No E133 of 2021 Okiya Omtatah Okoiti vs the Board Export Process Authority & 3 others also challenges as unconstitutional the failure of the 2nd Respondent to appoint him as the 1st Respondent’s CEO. The ultimate aim of that Petition is the same as the present one ie to secure the appointment of the Petitioner as the 1st Respondent’s CEO. The 1st proceedings have been fully briefed and judgment had been reserved for delivery on the 29th July 2022. The judgment was delivered as scheduled and the Petition was successful and the 2nd Respondent was directed to gazette the Petitioner’s appointment. However, that does not change the fact that these proceedings are an abuse of the process of this Honourable Court which is not permissible. And that this is the kind of conduct that drew severe censure by the Court of Appeal in Parag Bhabwanjigi Savani vs Jitu Tribhovanshai Savani and 2 Others 2017 e KLR where the court held that:

“We have recently had occasion to decry the tendency of parties to engage in a game of gambling? And probably forum shopping by the filing of a duality or multiplicity of suits over the same subject matter in the hope of landing a successful punch somewhere by a process of spreading their suits and hedging their bets’. In the circumstances, these proceedings are an abuse of the court process and should be struck out with costs on an indemnity basis. “



34. The 1st Respondent relied on the Communications Commission of Kenya & 5 others vs (2014) eKLR, where the Supreme Court stated that ‘the principle of avoidance entails that a court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in S vs Mhlungu, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows: “I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed. That similarly in Ashwander vs Tennessee Valley Authority, 297 U.S 288 347 (1936) the U.S Supreme Court declined to decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of.
35. The 1st Respondent further argued that the Petitioner has not in any way demonstrated how the 1st Respondent infringed on its constitutional rights as such the Petition should be dismissed as the Petitioner has not pleaded the violations with precision as required.
36. As to whether the Petitioner had a legitimate expectation which should have been fulfilled by the 1st Respondent, the 1st Respondent cites the case of Communications Commission of Kenya and 5 others vs Royal Media Services & 5 others where it was stated that:
- “Legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. Therefore, for an expectation to be legitimate, it must be founded upon a promise or practice by public authority that is expected to fulfil the expectation.”
37. The petitioner says in the instant Petition, the 1st Respondent had no power to fulfil this expectation, and this is clearly evident in the letter dated 12th August 2021, which stated that: “this is to convey the decision that you were successful subject to the confirmation by the Cabinet Secretary...”as such, it was not up to the 1st Respondent to fulfil the appointment, the question on whether the Petitioner would be appointed or not was to be confirmed by the 2nd Respondent. Further, that from the aforementioned letter there was no promise, the letter was clear that the appointment was subject to confirmation by the Cabinet Secretary, therefore the expectation was not founded on any promise at all.
38. The 2nd and 3rd Respondents did not file any pleadings or submissions in the Petition.

Issues for Determination

39. I have carefully considered the Pleadings and the rival submissions in the case. The issues which arise for determination are the following;
- a. Whether the instant Petition is sub judice ELRC No. 133 of 2021
 - b. Whether the Petitioner has locus standi to institute the proceedings
 - c. Whether the Petitioner had legitimate expectation that should have been fulfilled by the 1st Respondent;
 - d. Whether the actions of the 2nd Respondent have violated the Petitioner’s right to fair labour practices.

Whether the Petition is sub judice

40. The 1st Respondent says that the earlier proceedings filed in August 2021 before this honourable court in Nairobi ELRC Petition No E 133 of 2021 Okiya Omtatah Okiya vs the Board Export Process



Authority & 3 Others also challenged the constitutionality of the failure of the 2nd Respondent to appoint him as the 1st Respondent's CEO.

41. In *Darren Mutinda v Kisii University, Kisii University Council, Fredrick Wanyama, C.S. Ministry of Education & Attorney General* [2022] eKLR the court cited the Supreme Court in *Kenya National Human Rights vs the Attorney General, Independent Electoral and Boundaries Commission and 16 others*, the Supreme Court expressed itself as follows: "The term sub judice is defined in Black's law Dictionary 9th 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 was 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 re 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". There is no dispute that there is more than one suit pending before courts of competent jurisdiction and specifically Eldoret ELRC JR E004 of 2021 which is seeking the same reliefs as this petition namely, order of Certiorari to quash the decision by the University Council which approved the renewal of the 3rd Respondent's contract as DVC-ARSA on 27.10.2021. The petitioner has also acknowledged that there is an appeal pending in Kisumu CA No. 216 of 2021 which challenges the interpretation of section 35 of the [Universities Act](#) by this court in Kisumu ELRC JR 15 of 2021. 24. The Petition herein deals with subject matter raised in Eldoret ELRC JR E004 of 2021 and Kisumu CA No. E216 of 2021. The said suits were filed earlier than the instant petition. The parties involved are basically the same because in all the cases, the applicants or petitioner are not suing for their personal benefits but under the banner of public interest litigation. They are in the public's interest and therefore the parties are essentially the same. For the foregoing reasons I agree with the 3rd respondent that the petition herein is sub judice and it should not take precedence over the suits filed earlier. I see no need for considering the issue whether or not the suit is an abuse of the court process because the answer is obvious considering the above finding. Therefore, I uphold the objection by the 3rd respondent but instead of striking out the petition, I direct that the petition be and is hereby stayed pending the hearing and determination of Eldoret ELRC JR E004 of 2021."
42. The High Court in *Republic vs Paul Kihara Kariuki, Attorney General & 2 Others Ex parte Law Society of Kenya* [2020] eKLR held that:

"The uncompromising manner in which courts have consistently enforced the sub judice rule was best explained in *Thiba Min Hydro Co. Ltd vs Josphat Karu Ndwiga*, which held that:

"It is not the form in which the suit is framed that determines whether it is sub judice, rather it is the substance of the suit, and that, there can be no justification in having the two cases being heard parallel to each other.

I find no justification to sustain the instant suit. Mr. Ochiel's argument is that the instant suit is filed under Article 22 of [the Constitution](#) and that it raises constitutional issues. A simple test would be whether this court can determine the issues raised in this case and allow or decline the prayers sought in these proceedings without delving into the issues pending in HCJR 010 of 2020 and that if the prayers sought are granted in the said case, whether they will have an impact on the instant suit. For instance, if the court in the earlier suit up holds the applicant's challenge on the legality and constitutional validity



of the impugned decision, res judicata can apply to the issues raised in this suit which also challenges the legal and constitutional validity of the same decision. The second ground upon which Mr. Ochiel's argument collapses is that the principle of sub judice does not talk about the "prayers sought" but rather "the matter in issue." The matters in issue in the two suits are substantially the same, hence, my finding that res judicata would apply if one suit is determined."

43. It is clear that there is a related Petition E133 of 2021 that was pending before Hon Justice Nduma Nderi. The present Petition deals with the same subject matter raised in the earlier Petition and the said Petition was filed earlier than the current one that is in 2021. The Parties are also essentially the same as for the most part they have been brought under public interest and the Petitioner in the present petition was also a person of great concern in the previous petition. The orders sought in the previous petition cannot also be granted without impact on the present petition. The court therefore agrees with the 1st Respondent that the Petition herein is sub judice and should not be superseding over the previous petition E133 of 2021.
44. The petitioner is attempting to differentiate the E133 of 2021 to this one as he says this one prays for halting advertising for recruitment of the chief executive officer of the 1st respondent. The earlier one he says prayed inter alia against re-appointing of one Henry Obano as acting Chief Executive Officer. It has been brought to the court's knowledge that the same petition had a prayer for appointment of the petitioner to the position of chief executive officer.
45. Even if the prayers may have been coached differently in the twin petitions the court finds no doubt they are similar and the objective is appointment of the petitioner as the chief executive officer. The problem of filing multiplicity of suits on similar issues is that the outcome by different courts as can happen and end up really embarrassing the various courts. This is why filing multiple suits on similar subject matter should be looked upon with disdain by the courts.
46. The 1st respondent in his submissions states that the judgment in petition 133/2021 was delivered on 29th July 2022 and court directed the petitioners to be gazetted for the appointment.
47. The court is surprised why the petitioner filed this application on 22nd February 2023 and there was an ongoing petition and judgment was delivered on 29th July 2022. He could have gone for other applications to get orders to enforce the judgment once it was delivered and could have halted this petition. It is a waste of precious court's time to have proceeded with such an application. The court has not been briefed on the outcome of the re-advertisement of the position in January 2022. This application may have been overtaken by events.
48. The Court of Appeal could not have put it any better pertaining to the matters of filing multiple suits in various courts as it stated in case of Parag Bhabwanjighai Savani vs Jitu T. Savani & 2 Others (2017) eKLR where it was held:

"We have recently had occasion to decry the tendency of parties to engage in a game of gambling and probably forum shopping by filing of a duality or multiplicity of suit over the same subject matter in the hope of landing a successful punch somewhere by a process of spreading their suits and hedging their bets."
49. By now it is clear what court feels about filing multiple similar suits in different courts and as earlier observed this is to the embarrassment and confusion of courts which must not be allowed by the courts.
50. The court at that point will not spend more precious time handling issues on whether this is a case of constitutional or public interest and whether the petitioner has locus standi to file this petition. These are now issues of mere academic exercise since the court has firmly found the suit is subjudice.



51. In view of the foregoing the court finds the petition dated 24th February 2022 is subjudice as a similar case was heard and determined in another court of concurrent jurisdiction being petition No E133 of 2021 and so the petition is dismissed in its entirety.
52. The petitioner is free to follow the legal avenues to ensure the judgment of E 133 of 2021 is implemented.
53. The court therefore finds this petition is subjudice and so is waste of precious judicial time and orders the petitioner to pay the costs of this petition.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 5TH DAY OF APRIL 2023.

ANNA NGIBUINI MWAURE

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 March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

