



**Mwaro v Judicial Service Commission & 3 others (Cause  
E093 of 2022) [2023] KEELRC 1721 (KLR) (29 June 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1721 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE E093 OF 2022**

**M MBARÚ, J**

**JUNE 29, 2023**

**BETWEEN**

**BENSON BAYA MWARO ..... CLAIMANT**

**AND**

**JUDICIAL SERVICE COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**CHIEF JUSTICE OF THE REPUBLIC OF KENYA ..... 2<sup>ND</sup> RESPONDENT**

**CHIEF REGISTRAR OF THE JUDICIARY ..... 3<sup>RD</sup> RESPONDENT**

**HUMAN RESOURCE MANAGEMENT ADVISORY COMMITTEE .... 4<sup>TH</sup>  
RESPONDENT**

**RULING**

1. This file is placed together with ELRC Petition No E019 of 2022 as the same relates to the similar parties and interrelated. The placing together is to allow the court appreciate the full issues and context of the Notice of Preliminary Objections filed by the respondents and dated 18 April 2023 the subject of the ruling herein.
2. The objections by the respondents are that;
  - a. The claimant's claim is sub judice, bad in law, vexatious, incompetent and an abuse of court process.
  - b. The claim is filed contrary to Section 6 of the *Civil Procedure Act* and the Court lacks jurisdiction to grant the orders prayed for.
  - c. The claim is a disguised attempt by the claimant to have the court adjudicate the issue of unfair and unlawful termination yet the same issue is being adjudicated in ELRC Petition 019 of 2022: Benson Baya Mwaro v Judicial Service Commission and 3 others.



- d. The claim is tantamount to trifling with the Court and is an abuse of court process.
3. The claimant was served with these objections and both parties attended court on 15 May 2023 for taking hearing directions. The claimant asked that both suit, ELRC Cause No E093 of 2022 and ELRC Petition No E019 of 2022 be consolidated and the instant cause be the main suit but the court directed that both files should remain separate but placed together taking into account the objections filed by the respondent and which should be heard first by oral submissions taking into account the claimant is acting in person.

A hearing date on the objections was allocated for 30 May 2023.

4. The claimant filed Notice of Motion dated 16 May 2023 seeking stay of proceedings pending determination of his petition in ELRC Petition No E019 of 2022. Hearing directions for this application were issued and the court preserved the hearing scheduled for the 30 May 2023 on the objections.
5. The respondents' Counsel submitted that the claim herein is sub judice contrary to Section 6 of the *Civil Procedure Act* as a similar suit already exists in ELRC petition No E019 of 2022 on the same subject matter between the same parties. Parties have already filed written submissions in the said petition. In the case of *Francis Kimutai Bii v Kaisungu (K) Limited* [2016] eKLR cited in *Michael Adib Azzam v Zakhem Construction (K) Limited* [2022] eKLR the court elaborated on the core contents of Section 6 of the *Civil Procedure Act* and that what is provided for under a statute should be adhered to. With regard to practice before this court, any lacuna under the Court Rules is addressed under the *Civil Procedure Act* and the Rules thereto. So that the sub judice rule applies *mutatis mutandis* in this court in terms of a party filing multiple suits as held in *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested parties)* [2020] eKLR.
6. The concept of sub judice exists in our judicial system to avoid the court with equal jurisdiction going into the merits and determination of a matter pending before the same court as held in *Republic v Paul Kihara Kariuki, Attorney General & 2 others ex parte Law Society of Kenya* [2020] eKLR. the claimant has admitted to filing ELRC Petition No E019 of 2022 which is similar to this cause and in the interests of justice, such suit should be dismissed with costs.
7. The claimant in his reply has admitted that both suits are similar confirming that he has initiated both suits over the same subject matter and between the same parties which is contrary to the sub judice rule and this claim should be dismissed with costs. The court lacks jurisdiction to determine the instant suit because it is being handled by another judge. The respondents have not disputed the fact that he was dismissed without due process and the substantive issues should be heard on the merit without application of technicalities.
8. The claimant submitted that his claim relates to the violation of his constitutional rights addressed under ELRC Petition No E019 of 2022 which is still pending determination and for the same of justice, proceedings herein should be stayed to allow him to address his petition first which was filed in good faith and should be heard on the merits.
9. The claimant also submitted that the objections by the respondents should be struck out because he has filed an application seeking stay of proceedings to have the court first hear ELRC Petition No E019 of 2022 on the merits and the respondents have not filed any responses to his application despite being served. He should be allowed to have the earlier suit filed heard first and proceedings herein stayed.



10. On 30 November 2022 the claimant filed ELRC Petition No E019 of 2022 against the same respondents herein. His petition is that he was suspended from duty on 27 February 2019 and directed to show cause why his employment should not be terminated for various allegations of misconduct. on 7 November 2019 the claimant was invited to a disciplinary hearing and on 8 January 2019 he was issued with letter of summary dismissal. His petition comprises several prayers for a declaration that his suspension be held null and void, the disciplinary proceedings be found null and void, his interdiction be found to have been issued contrary to Regulation 25(2) of the Third Schedule to the [Judicial Service Act](#), the summary dismissal be held null and void and that an order of judicial review be issued setting aside his dismissal with a finding that the entire disciplinary process was unfair. The claimant ultimately sought for an order of reinstatement in his petition.
11. The claimant filed this cause on 19 December 2022 on the same subject matter of his suspension, disciplinary hearing and summary dismissal and the substantive orders sought are that of reinstatement back to his position.
12. In his Replying Affidavit at paragraph (6), the claimant admits that indeed he has filed these suits against the same respondents on the matters addressed herein. In this notice of motion dated 15 May 2023 he is seeking that this suit be stayed so that his petition can be heard first. Even though this application is still pending, its relevance to the objection herein become crucial to mention.
13. It is noteworthy that the claimant has previously filed ELRC Cause No097 of 2021 this suit has since been withdrawn.
14. The Notice of Preliminary Objections dated 18 April 2023 therefore becomes crucial to determine first because, where a legal principle is highlighted by any party and which, if addressed is likely to determine the entire suit, becomes a priority as held in the celebrated case of *Mukhisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696, where the court defined what constitutes a preliminary objection and how it should be addressed;

A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.

15. The issue of law raised must be heard first as it has the potential of disposing of the suit. the point of law should arise from the facts as pleaded and the assumption they are correct.
16. In this case, the claimant admitted that he has filed this suit after filing ELRC Petition No E019 of 2022 hence this becomes relevant with regard to sub judice principles. The concept of sub judice is one that bars a Court from trying a matter that is in one way or other before another Court of competent jurisdiction by way of a previously instituted suit as long as it is between the same parties canvassing it under the same title. In essence, if both Courts were to proceed with the matters on merit and determine them, without deference to the former, they would arrive at similar or different results on the same rights claimed by the same parties and there would be a duplication of the relief or a conflict of them, which would be a recipe for confusion and chaos in the legal system. In the alternative of the scenario immediately above, where one of the Courts determined the matter before it the one



still pending would be res judicata. Section 6 of the Civil Procedure Act therefore bars any court from engaging in matters sub judice before them. It 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 proceeding 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.

17. As outlined above, under ELRC Petition No E019 of 2022 filed first and still pending determination, the facts and substantive orders sought by the claimant against the same respondents as herein is the order of reinstatement. By filing this claim, even though the claimant is acting in person, he cannot be excused from the obvious violation of the sub judice rules.
18. So far the claimant has filed ELRC Cause No 097 of 2021 and withdrew it.
19. The claimant has filed ELRC Petition No 019 of 2022 which is still pending.
20. In this suit, coming after the back as above, it stands foul and contrary to the provisions of Section 6 of the Civil Procedure Act for being sub Judice and cannot be cured with a stay of proceedings so as to allow the earlier suit filed to proceed for hearing.
21. The claimant, well aware of the various suits he has initiated ought not to have filed this Cause. To do so is in clear abuse of court process, which is a term generally applied to a proceeding which is wanting in bona fides and is frivolous vexations and oppressive. It also means abuse of legal procedure or improper use of the legal process. It creates a factual scenario where a party is pursuing the same matter by two court process. In other words, a party by the two-court process is involved in some gamble, a game of chance to get the best in the judicial process, as held in Ephraim Miano Thamaini v Nancy Wanjiru Wangai & 2 others [2022] eKLR.
22. The matter of abuse of judicial process is aptly captured by the Court of Appeal in the case of Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 others Civil Appeal No 25 of 2002 (2009) eKLR 229, with a finding that;

The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding, which is wanting in bonafides and frivolous, vexatious or oppressive.
23. The claimant has filed a petition in ELRC Petition No E019 of 2022 and also filed this cause. He attended before Court No2 (Before Her Ladyship Hon. Agnes Kituku Nzei) for hearing directions and is now before Court No1 with his claim. One has to give way to avoid an embossing scenario of the same court issuing conflicting orders over the same matter between the same parties but couched as a petition and a claim so as to appear different.
24. This is abuse of court and judicial process. The claimant shall pay due costs herein.
25. Accordingly, objections by the respondents dated 18 April 2023 are found with merit. The claim herein is sub judice and in abuse of court process. The suit is hereby dismissed. costs of the suit awarded to the respondents.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 29 DAY OF JUNE, 2023.**



**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet

..... and .....

