



**Kenya Engineering Workers Union v Steel Structures Ltd; Kenya Building Construction Timber & Furniture Employees Union (Interested Party)
(Cause E016 of 2023) [2023] KEELRC 1572 (KLR) (22 June 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1572 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E016 OF 2023
BOM MANANI, J
JUNE 22, 2023**

BETWEEN

KENYA ENGINEERING WORKERS UNION CLAIMANT

AND

STEEL STRUCTURES LTD RESPONDENT

AND

KENYA BUILDING CONSTRUCTION TIMBER & FURNITURE EMPLOYEES UNION INTERESTED PARTY

RULING

Introduction

1. Through this action, the Claimant union seeks for orders that the Respondent be compelled to accord it recognition in accordance with the relevant provisions of the *Labour Relations Act* for purposes of collective bargaining. Further, the Claimant seeks for orders that the Respondent be compelled to deduct union dues from employees of the Respondent who are members of the Claimant and to remit such dues to the Claimant.
2. Upon the matter being filed, the Interested Party applied to be made a party to the action. The application was allowed by agreement of the parties.
3. Shortly thereafter, the Interested Party filed a Notice of Preliminary Objection to the action. In the objection, the Interested Party avers that the action is *res-judicata* the parties having litigated over the same matter through cause number ELRC 2103 of 2016 and the court having rendered a final judgment on the dispute.



4. The parties agreed to have the preliminary objection canvassed through written submissions. The Claimant and Interested Party have filed their submissions. On its part, the Respondent indicated that it will rely on the submissions by the Interested Party.

The Preliminary Objection

5. The gist of the objection is that the question of recognition of the Claimant by the Respondent was raised in cause number ELRC 2103 of 2016 and in a decision rendered on April 23, 2020, the court pronounced itself on why the Claimant was not entitled to such recognition. The Interested Party contends that: the parties to the action in ELRC 2103 of 2016 were the same as the parties in the current action; the parties were litigating under the same title as in the current action; the subject matter of the dispute was the same as the subject matter in the current suit; and the court heard the cause in ELRC 2103 of 2016 and rendered a judgment on merit. Consequently, the issues in the current action are res-judicata and this court has no jurisdiction to reopen them.
6. In response, the Claimant contends that the current dispute relates to a fresh process. The Claimant argues that the fresh pursuit for recognition is pegged on a fresh recruitment of members from among the employees of the Respondent around the year 2022. It is the Claimant's case that this time, it focused its recruitment process on a department of the Respondent which comprises of employees who fall within the Claimant's jurisdictional mandate. Therefore, the fresh attempt to secure recognition by the Respondent through this case is not *res-judicata*.

Analysis

7. The law on res-judicata is now well settled. A court of law is not entitled to re-adjudicate a matter which has been the subject of litigation before another court of competent jurisdiction (or the very same court) if the matter involves the same parties litigating under the same title and the other court has rendered a decision on the issue on its merits (*Kennedy Mokua Ongiri v John Nyasende Mosioma & Florence Nyamoita Nyasende* [2022] eKLR).
8. It is clear to me that the parties in ELRC 2103 of 2016 are the same parties in the action before me. It is also apparent that they are litigating under the same title as they did in ELRC 2103 of 2016.
9. The principal issues in dispute in ELRC 2103 of 2016 were: whether the Claimant was entitled to recognition by the Respondent for purposes of collective bargaining; and whether the Respondent was bound to deduct union dues from members of the Claimant and remit the dues to the Claimant. These two issues are also raised in and form the foundation of the dispute before me.
10. It is true as the Claimant submits that there is a variance in the facts informing the two disputes. However, the variance only relates to the fact that whilst the attempt by the Claimant to gain recognition through ELRC 2103 of 2016 arose from a membership recruitment that took place before institution of the said action the current attempt is premised on a recruitment that occurred in 2022.
11. The above variance notwithstanding, the Claimant has to contend with the fact that the court in ELRC 2103 of 2016 denied it recognition on account of, inter alia, the fact that the Respondent's trade falls in the civil engineering sector where the Interested Party, unlike the Claimant, is mandated to cover. The court expressed itself on the matter as follows:-

“For a trade union to qualify for recognition by an employer, it must prove that according to its constitution it is authorized to do so. The Claimant did not provide a copy of its constitution to prove that it is mandated to represent employees in the civil engineering sector.....”



“The other issue raised by the Respondent and Interested Party which has not been addressed by the Claimant is whether the Claimant can recruit employees in the civil engineering sector.

Civil engineering is by definition the discipline that deals with the design, construction and maintenance of physical and naturally built environment including public works as roads, bridges, canals, dams, airports, sewerage systems, pipelines and structural components of such buildings and structures. These therefore would fall under the building sector, that of the Interested Party and not the engineering sector covered by the Claimant.”

12. What I understand the court to have been stating in the foregoing paragraph is that the Respondent’s trade falls under civil engineering. That whilst the Interested Party was entitled to represent employees in this sector, the Claimant had not shown that it had the mandate to do so.
13. Based on this observation and in view of the various other reasons set out in the judgment, the court declined to allow the Claimant’s request for recognition. Thus, the Claimant’s case was lost on this issue on merits.
14. The Claimant now tells me that it has changed its approach to the matter and recruited members from the department of the Respondent that falls under the Claimant’s jurisdiction. I think that the Claimant cannot circumvent the court’s judgment in this manner. To begin with, that judgment did not suggest that the Respondent’s enterprise has departments other than those that fall under civil engineering. The court’s judgment proceeded on the assumption that the Respondent’s works are entirely civil engineering works. This issue having been determined by the court, it is not permissible for the Claimant to invite me to vary the decision in ELRC 2103 of 2016 by now holding that the Respondent’s enterprise has more departments than civil engineering.
15. Once the court in ELRC 2103 of 2016 made the above pronouncement disqualifying the Claimant from purporting to represent workers in the Respondent’s enterprise on account of the fact that the Respondent’s trade fell outside the jurisdiction of the Claimant, the Claimant ought to have appealed the decision or sought its review if it was unhappy with it. There is no evidence that the Claimant did either of this.
16. Having failed to challenge that decision, the issue whether the Claimant can recruit members from the Respondent’s enterprise, being one of civil engineering works, became closed. It cannot be reopened merely on the grounds that the current attempt at recognition is based on fresh membership recruitment allegedly targeting one department of the Respondent that does not deal with civil engineering works when the Claimant never contested the court’s finding suggesting that the Respondent’s enterprise only deals with civil engineering works.
17. In the case of *Kennedy Mokuia Ongiri v John Nyasende Mosioma & Florence Nyamoita Nyasende* [2022] eKLR, the court emphasizes that once a pronouncement is made on a matter by a court of competent jurisdiction and the pronouncement is not challenged by way of appeal or review, the issue is considered as closed and cannot be reopened. It is immaterial whether the reasoning leading to the earlier decision is contestable. The decision will be considered as final for purposes of the rule on *res-judicata*.

Determination

18. The upshot is that the court in ELRC 2103 of 2016 having determined that the Claimant cannot represent employees of the Respondent on, inter alia, the ground that the Respondent enterprise deals in civil engineering works which falls outside the mandate of the Claimant, that matter cannot be



reopened through this action. It is *res-judicata*. Therefore, the current action to determine whether the Respondent ought to grant the Claimant recognition to represent a portion of the Respondent's employees in collective bargaining is not open for reconsideration.

19. In the premises, the preliminary objection is upheld with the consequence that the claim is struck out with costs to the Respondent and Interested Party.

DATED, SIGNED AND DELIVERED ON THE 22ND DAY OF JUNE, 2023

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

.....for the Respondent

.....for the Interested Party

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

