



Daib v Kenya National Examination Council & 3 others; Ethics and Anti-Corruption Commission (Interested Party) (Petition 198 of 2022) [2023] KEELRC 1509 (KLR) (9 June 2023) (Ruling)

Neutral citation: [2023] KEELRC 1509 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
PETITION 198 OF 2022**

**AK NZEI, J
JUNE 9, 2023**

BETWEEN

ABDI MOHAMED DAIB PETITIONER

AND

KENYA NATIONAL EXAMINATION COUNCIL 1ST RESPONDENT

KENYA INSTITUTE OF STUDIES IN CRIMINAL JUSTICE 2ND RESPONDENT

KENYA METHODIST UNIVERSITY 3RD RESPONDENT

KENYA PORTS AUTHORITY 4TH RESPONDENT

AND

ETHICS AND ANTI-CORRUPTION COMMISSION INTERESTED PARTY

RULING

1. The petitioner filed the petition herein on December 2, 2022 and pleaded, inter-alia:-
 - a) that vide a letter dated June 5, 1995, the Petitioner was employed by the 4th Respondent to the post of Detective IV Grade PA10; and that by a letter dated October 21, 1997, the 4th respondent confirmed the Petitioner as having a permanent and pensionable status.
 - b) that the Petitioner rose through the ranks to the position of Assistant Training Officer, Grade HM4, earning a salary of ksh. 115,000.
 - c) that vide a letter dated February 17, 2015, the 4th Respondent alleged that the Petitioner had been employed on the basis of forged academic certificates allegedly presented by the Petitioner. That the Petitioner was required by the 4th Respondent to show cause within 72 hours why disciplinary action could not be taken against him for presenting false certificates to the effect:-



- (i) that the Petitioner sat for KCSE examination at St. Mary's High School [particulars withheld] in 1987.
 - (ii) that the Petitioner graduated at Kenya Institute of Studies in Forensic Psychology and Criminology.
 - (iii) that the Petitioner obtained a Bachelor of Business Administration (Entrepreneurship) Second Class Honours (Upper Division)
- d) that the Petitioner replied to the said show cause letter vide a letter dated 2nd July 2015 and stated that he had attended the aforesaid institutions and obtained the listed qualifications.
 - e) that the Petitioner was subsequently summoned to appear before a committee of inquiry appointed by the 4th Respondent to investigate the Petitioner's academic certificates on the three enumerated issues; and that the 4th Respondent recommended that the Petitioner be investigated by the Interested Party.
 - f) that the Petitioner was required to appear before the Interested Party vide a letter dated 4th September 2015, and was quizzed on his academic certificates and informed that he would be contacted after investigations into the matter.
 - g) that vide a letter dated 5th October 2015, the Petitioner was dismissed by the 4th Respondent, and was directed to surrender the 4th Respondent's house which he was occupying within 48 hours.
 - h) that subsequent to the dismissal by the 4th Respondent, the Interested Party absolved the Petitioner by confirming that he (the Petitioner) was holding genuine documents.
 - i) that the Petitioner caused letters to be sent to Kenya National Examinations Council, Kenya Methodist University and the Kenya Institute of Criminal Justice regarding the authenticity of his documents, and that it was confirmed that the Petitioner was holding genuine certificates.
 - j) that before his dismissal, the claimant was a part-time lecturer at Kenyatta University and JKUAT University, Mombasa Branch, but upon the Petitioner's dismissal by the 4th Respondent on account of his academic papers, the Petitioner lost his employment and he is not able to get an alternative employment on account of the 4th Respondent's allegations.
 - k) that on account of reports issued by the Ethics and Anti-Corruption Commission, Kenya National Examinations Council, Kenya Methodist University and the Kenya Institute of Criminal Justice, the Petitioner's documents are genuine. That it is necessary that the Court makes a declaration that the academic papers being held by the Petitioner are genuine so that the Petitioner may be in a position to get an alternative source of employment.
 - l) that the 4th Respondent violated the Petitioner's constitutional rights by failing to give a public statement in the same manner it did when it alleged that the Petitioner's academic documents were fraudulent.
 - m) that although the Petitioner was absolved by the Ethics and Anti-corruption Commission, the Kenya National Examination Council, Kenya Methodist University and the Kenya Institute of Criminal Justice, the fact that he lost his employment with the (4th) Respondent on the basis of academic certificates is a real threat to the Petitioner's right to work, to further education and his personal dignity.



- n) that the Petitioner filed Mombasa ELRC Cause No. 760 of 2015 (Abdi Mohammed Daib - vs- Kenya Ports Authority) seeking to challenge his dismissal, but the case was dismissed by the Court on 2nd December 2016. That the Petitioner filed appeal No. 13 of 2017 against the aforesaid dismissal (Abdi Mohammed Daib v Kenya Ports Authority) which was dismissed by the Court of Appeal.
- o) that in both the aforesaid case and appeal, the Court held that the 4th Respondent's decision to terminate the Petitioner could not be faulted on account of material which the Petitioner obtained after the 4th Respondent's disciplinary committee had determined the Petitioner's matter.
- p) that the Petitioner filed Mombasa High Court Constitutional Petition No. 30 of 2019 (Abdi Mohammed Daib v Kenya Ports Authority & Others) seeking, among others, to challenge the decisions in Mombasa ELRC Cause No. 760 of 2015 and Mombasa Court of Appeal Civil Appeal No. 13 of 2017; but the petition was struck out by the Court of appeal in Mombasa Court of Appeal Civil Appeal No. E008 of 2020 (Kenya Ports Authority v Abdi Mohammed Daib & Others).
- q) that the Petitioner is satisfied with the decisions of the Employment and Labour Relations Court (ELRC) and the Court of Appeal, and is no longer interested in working for the (4th) Respondent and /or challenging his termination; but since the authenticity of his academic documents was questioned through both electronic and print media, and alleged to be fraudulent, it is necessary that the Court evaluates the same and makes appropriate declaratory orders.

2. The Petitioner seeks the following orders in his petition herein:-

- a) a declaration that Certificate Registration Number KICJ/XXXX issued on 24th November 2006 awarding the Petitioner a Higher Diploma in Forensic Psychology & Criminology is genuine.
- b) a declaration that Kenya National Examinations Council KCSE Certificate No. XXXX is genuine.
- c) a declaration that Degree Certificate Registration Number BUS XXXX 2006 awarding the Petitioner a Bachelor of Business Administration (Entrepreneurship) Second Class Honours (Lower Division) is genuine.
- d) costs of the petition.
- e) such orders and directions as the Court may deem fit to meet the ends of justice.

3. The petition is supported by an affidavit sworn by the Petitioner on December 2, 2022 which, to a great extent, replicates the averments made in the petition herein. Documents annexed to the said affidavit include the Petitioner's letter of appointment dated 5/6/1995, a show cause letter dated 17/2/2015, the Petitioner's response to the show cause letter dated 2/7/2015, summons to the Petitioner to appear before the EACC in Mombasa dated 4/9/2015, the Petitioner's statement recorded on 8/10/2015, the Petitioner's dismissal letter dated 29/9/2015, petition documents filed in Mombasa High Court Constitutional Petition No. 30 of 2019, an application for a statement of examination results (Kenya National Examinations Council), a statement of examination results, school leaving certificates (St. Mary's High School Lushangonyi), academic transcript (Kenya Institute of Studies in Criminal Justice), Higher Diploma in Forensic Psychology & Criminology, Bachelors



of Business Administration Degree (Kenya Methodist University) and academic transcripts, KCSE certificate, Court of Appeal Judgment in Civil Appeal No. 13 of 2017(Mombasa), High Court's Ruling dated 27/5/2020 in Mombasa Constitutional Petition No. 30 of 2019 and Court of Appeal Judgment delivered on 4/11/2022 in Civil Appeal No. E008 of 2020, setting aside the High Court's Ruling delivered on 27/5/2020 and striking out the petition filed in the High Court for being res judicata.

4. The 4th Respondent, Kenya Ports Authority, filed a detailed replying affidavit in response to the petition, sworn by Ali B. Masemo, the 4th Respondent's Senior Human Resource Officer, on January 23, 2013. The 4th Respondent further filed a Notice of Motion dated January 20, 2023 seeking orders:-
 - a) That the petition filed by the Petitioner against the 4th Respondent commenced by way of a petition dated 2/12/2022 and filed in Court on 7/12/2022 together with the ensuing proceedings be struck out on account of being res-judicata to Mombasa ELRC Cause No. 760 of 2015 (Abdi Mohammed Daib v Kenya Ports Authority), Civil Appeal No. 13 of 2017 (Abdi Mohammed Daib v Kenya Ports authority), Constitutional Petition No. 30 of 2019 (Abdi Mohammed Daib v Kenya Ports Authority & 4 others) and Civil appeal No. E008 of 2020 (Kenya Ports Authority v Abdi Mohammed Daib)
 - b) that the petition dated 2/12/2022 be struck off for being an abuse of the process of court.
 - c) that costs of the application and of the petition be awarded to the 4th Respondent.
5. The application is based on a supporting affidavit of Paul Munyao Advocate sworn on January 20, 2023, to which copies of pleadings filed, and judgment delivered in the aforementioned ELRC Cause No. 760 of 2015, Court of Appeal civil Appeal No. 13 of 2017, Ruling in High Court Constitutional Petition No. 30 of 2019 and Court of Appeal's Judgment in Civil Appeal No. E008 of 2020 are annexed.
6. Further, the 4th Respondent filed a Notice of Preliminary Objection dated January 23, 2023, stating that:-
 - a) the petition is res-judicata as the substantive issues raised in it have been determined by a Court of competent and equal jurisdiction in Mombasa ELRC Cause No. 760 of 2015 (Abdi Mohammed Daib -vs- Kenya Ports Authority) and consequently affirmed by the Court of Appeal in Civil Appeal No. 13 of 2017 (Abdi Mohammed Daib v Kenya Ports Authority).
 - b) the petition is *res-judicata* as the substantive issues raised in it have further been determined by a Court of competent and equal jurisdiction in Constitutional Petition No. 30 of 2019 (Abdi Mohammed Daib v Kenya Ports Authority & 4 Others) and consequently determined in Civil Appeal No. E008 of 2020 (Kenya Ports Authority v Abdi Mohammed Daib & 4 Others).
 - c) that this court has no jurisdiction to superintend, supervise, direct, shepherd and/or review a mistake; real or perceived because matters in issue have been determined by a court of competent jurisdiction.
 - d) that the petition is frivolous, misconceived, bad in law and an egregious abuse of the Court process.



7. In striking out High Court Constitutional Petition No. 30 of 2019, the Court of Appeal in Civil Appeal No. E008 of 2019 (Kenya Ports Authority v Mohammed Daib & Others) stated:-

“29. There is no question that Mr. Daib’s grievances before the ELRC and this Court stemmed from an employer-employee relationship which he asserted was unfairly and unlawfully terminated, while KPA maintained that his dismissal from employment was on account of gross misconduct following findings that his academic certificates were not authentic. Indeed, the issues as framed by the ELRC were: whether the reasons cited by KPA for dismissing Daib were valid and just; whether the procedure followed in terminating his employment was fair; and what orders should be made based on findings on those issues. Those issues were resolved in favour of KPA by the ELRC and affirmed by this Court on appeal. In his subsequent petition before the High Court, Mr. Daib’s complaints were again raised in connection with his employment with KPA albeit introducing the dimension of infringement of constitutional rights and adding new parties and the contention that the judgment of the ELRC and of this Court are per incuriam.”

8. In Appeal No. E008 of 2019 (supra) the Court of Appeal referred to the decision of the Supreme Court of *Kenya in John Florence Maritime Services Ltd v Cabinet Secretary, Transport, Infrastructure & 3 others* [2021] eKLR where the Supreme Court endorsed the words of Wigram, V-C in *Henderson v Henderson* [1843] 67 E.R.313, that:-

“...where a given matter becomes the subject of litigation in, and 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-judicate applies, except in special cases, 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 matter of litigation, and which the parties; exercising reasonable diligence, might have brought forward at the time.”

9. In the *John Florence Maritime Services Case (supra)*, the Supreme Court of Kenya stated:-

“(54) the doctrine of res judicata, in effect allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party conclusively.”



10. It is to be noted that one of the reliefs sought by the Petitioner in Mombasa High Court Constitutional Petition No. 30 of 2019, filed by the Petitioner against the Respondents and the Interested Party herein, was:-

“a declaration be and is hereby made that the Petitioner holds valid certificates from the Kenya National Examinations Council, Kenya Methodist University and the Kenya Institute of studies in Criminal Justice System.”

11. Basically, the foregoing relief is what is being sought in the present petition but as separate reliefs as set out in paragraph 2 of this Ruling.

12. On January 24, 2023, I directed that the 4th Respondent’s application dated January 20, 2023 and the preliminary objection be heard together.

13. The Petitioner opposed the application vide grounds of opposition dated February 9, 2023 and stated:-

- a) that the application dated January 20, 2023 is incompetent as it is supported by an incompetent supporting affidavit.
- b) that an advocate cannot swear an affidavit on behalf of his client on contentious issues, and that the supporting affidavit of Paul Munyao is unsustainable in law.

14. Written submissions were filed on behalf of the 4th Respondent/Applicant and the Petitioner, which I have considered.

15. As already stated in this Ruling, the 4th Respondent’s Notice of Motion dated January 20, 2023 and the preliminary objection dated January 23, 2023 are before me for consideration. The two are being considered together. The 4th Respondent/Applicant prays that the Petitioner’s petition herein be struck off for being *res judicata* as substantive issues raised in it have previously been determined by this Court in Mombasa ELRC Cause No. 760 of 2015, and in Court of Appeal Civil Appeal No. 13 of 2017, High Court Constitutional Petition No. 30 of 2019 and Court of Appeal Civil Appeal No. E008 of 2020.

16. The doctrine of *res judicata* is well founded and anchored in the statute section 7 of the [Civil Procedure Act](#) provides:-

“No Court shall try any suit or issues 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 are or any of them 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 in such Court.”

17. In [C.K. Bett Traders Ltd & 2 others v Keneddy Mwangi & another](#) [2021] eKLR, the Court stated:-

“32.....The doctrine of *res-judicata* may be pleaded by way of estoppel so that where a judgment has been given, further and future proceedings are estoppel. The rationale for the doctrine of *res-judicata* exists to protect the public interest so that a party should not endlessly be dragged into litigation over the same issue or subject matter that has otherwise been conclusively determined by a Court of competent jurisdiction.

33. *Res judicata* is normally pleaded as a defence to a suit or cause of action that the legal rights and obligations of the parties have been decided by an earlier



judgment, which may have determined the questions of law as well as of fact between the parties.

In other words, res judicata will successfully be raised as a defence if issues in dispute in the previous litigation or suit were between the same parties as those in the current suit, the issues were directly or substantially in issue in the previous suit as in the current suit and they were conclusively determined by a Court of competent jurisdiction.”

18. As already stated elsewhere in this Ruling, the issues raised in the petition herein were directly and substantially in issue in Mombasa ELRC Cause No. 760 of 2015, Court of Appeal Civil Appeal No. 13 of 2017, High Court constitutional petition No. 30 of 2019, and were conclusively determined by the Court of Appeal in Civil Appeal No. E008 of 2020, vide the said Court’s judgment delivered on 4th November 2022. It is my finding that the petition herein is res judicata.
19. Consequently, the 4th Respondent’s Notice of Motion dated 20th January 2023, is hereby allowed in the following terms:-
 - a) the petition dated 2/12/2022 and filed herein is res judicata, and is hereby struck off for being an abuse of this court’s process.
 - b) each party will bear its own costs of the proceedings herein.
20. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 9th JUNE 2023

AGNES KITIKU NZEI

JUDGE

ORDER

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

..... **for Petitioner**

..... **for Respondent**

