



**Mbiuki v Laban (aka JL) Mutisya & another (Cause E957 of 2022)
[2023] KEELRC 2027 (KLR) (31 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2027 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E957 OF 2022
SC RUTTO, J
JULY 31, 2023**

BETWEEN

FELIX GITARI MBIUKI CLAIMANT

AND

JOSEPH LABAN (AKA JL) MUTISYA 1ST RESPONDENT

MACHAKOS COUNTY ASSEMBLY SERVICE BOARD 2ND RESPONDENT

RULING

1. The Respondents/Applicants have moved this Court by way of a Chamber Summons Application dated 6th February, 2023 seeking the following orders:
 - a. That the salaries and remuneration commission be enjoined as a 3rd Respondent to the Claim;
 - b. That the 1st Respondent be struck out for having been wrongfully sued in his personal capacity.
 - c. That the parties herein amend their pleadings accordingly and serve the intended 3rd Respondent.
 - d. That that costs be provided to the 1st and 2nd Respondents.
2. The application is supported by the following grounds and the supporting affidavit of the 1st Respondent. Briefly that: -
 - a. The 1st Respondent has been properly joined;
 - b. The Intended 3rd Respondent should be joined to these proceedings to enable this Honourable Court effectually and completely adjudicate upon and settle all questions involved in the Claim;



- c. The participation of the intended 3rd Respondent is necessary in order to enable the Court effectually and completely adjudicate upon and settle all questions involved in the claim;
 - d. The 1st Respondent has been sued in his person using his personal name and not his official capacity as the Clerk of the County Assembly of Machakos;
 - e. The office of the Clerk of the County Assembly of Machakos is a substantive office established under section 13 of the [County Governments Act](#), 2012 and such can sue and be sued;
 - f. It is just and proper that the name of the 1st Respondent be substituted with the name of the office he holds since it is that position makes him accountable and answerable as the accounting officer of the County Assembly of Machakos and secretary to the 2nd Respondent which office can even be occupied by another person during the subsistence of this Claim;
 - g. Further, the orders which the Claimant in the instant Claim seeks touch on the specific constitutional mandate of the Salaries and Remuneration Commission under article 230 (4) of [the Constitution](#) of Kenya thus making it necessary to enjoin them in the claim;
 - h. To avoid a multiplicity of Claims, it is necessary to enjoin the Salaries and Remuneration Commission in order to dispense with the issues definitely;
 - i. This Honorable Court is empowered to join a party to a Claim at any stage of the proceedings;
 - j. The Salaries and Remuneration Commission is best placed to guide the court on the issues of remuneration of public officers; and
3. Upon being served with the Application, the Claimant responded through a replying affidavit sworn on March 8, 2023 in which he avers that: -
- a. On or about February 25, 2013, he was employed by the defunct Transition Authority as the Interim Clerk of the Machakos County Assembly and the said appointment was substantively confirmed by the 2nd Respondent and the Machakos County Assembly on November 22, 2013;
 - b. On or around June 11, 2018, the Employment and Labour Relations Court sitting in Nyeri in ELRC Petition No. 6 of 2017: Kamau Aidi & 47 others vs. Salaries And Remuneration Commission issued a Decree dated June 4, 2018 which inter alia provided that the Salaries and Remuneration Commission erred in banding the Clerks of the County Assemblies in Band B & D of the Patterson Classification instead of Bank E3;
 - c. He was the 18th Petitioner in the above matter while the proposed Interested Party herein the Salaries and Remuneration Commission (SRC), was the sole Respondent in the matter;
 - d. The SRC being dissatisfied with the Judgment appealed against the same to the Court of Appeal and the said Appeal was dismissed by the Court of Appeal;
 - e. The Judgement of the Court caused changes to the Grading and salary structure of Clerks of County Assemblies, which express Orders were to be implemented forthwith by Accounting Officers of County Assemblies;
 - f. The Orders of the Court in ELRC at Nyeri Constitutional Petition No. 6 of 2017 and Nyeri Court of Appeal Civil Application No. 25 of 2019 are still in force against which there is no stay or further appeal;



- g. The attempt to enjoin the SRC in the instant matter as an interested party is tantamount to inviting this Court to reopen the matter afresh and litigate the same on the issues that were satisfactorily and conclusively determined and thus the same is Res Judicata;
 - h. To open the window to re-litigate the issues in Elrc Petition No. 6 Of 2017: Kamau Aidi & 47 Others Vs. Salaries And Remuneration Commission will be prejudicial to not only the Claimant herein who was the 18th Petitioner in the aforesaid matter but to other parties (46 Petitioners) who are not Parties before this Honourable Court;
 - i. It is highly likely that the SRC who have always opposed the aforesaid Petitions will take advantage of this particular case and side with the Respondents who are now in a fresh twist of events opposed to the implementation of the Decree issued by this Court in Elrc Petition No. 6 of 2017;
 - j. The 2nd Respondent at a meeting held on 27th July, 2021 resolved that the 2nd Respondent do implement the Judgement and Decree of the ELRC at Nyeri Constitutional Petition No. 6 of 2017 and Nyeri Court of Appeal Civil Application No. 25 of 2019;
 - k. The 2nd Respondent directed the Office of the Clerk of the County Assembly and the Secretary to the Board to implement the judgment in line with the Court directions and relevant SRC Circulars;
 - l. The Staff Advisory Committee at its meeting of September 27, 2021 (which was Chaired by the 1st Respondent) recommended that he (claimant) be remunerated as per the Court Orders and in conformity with SRC Circulars Ref No. SRC/ADM/CIR/1/13 Vol III (127) dated 18th December 2014 that assigned salary scale Band E3, with a consolidated fixed salary at Kshs.404,250.00 per month with a subsequent Circular SRC/TS/CAF/3/61/49 (46) recommending a consolidated fixed salary of Kshs.404, 250.00 per month;
 - m. Prior to leaving Office, the said arrears in salaries and allowances had been processed and he had raised the necessary exchequer requisition for the payments and the exchequer was duly released to the County Assembly Recurrent Account by Central Bank of Kenya immediately after he left Office.
 - n. For strange and unknown reasons, the County Assembly Director of Finance & Accounts Department and the 1st Respondent deliberately and maliciously refused to make the payments to the Claimant and to date, they continue to maliciously withhold and refuse and/or decline to release the said arrears to the Claimant.
 - o. Consequently, the 1st Respondent is a proper and necessary party to this Claim in his individual capacity for reasons and particulars well enumerated and articulated in the Memorandum of Claim and he should be allowed to remain as a 1st Respondent to the Claim.
4. The Chamber Summons Application was canvassed by way of written submissions which I have considered.

Analysis and Determination

5. Flowing from the chamber summons application, the response thereto and the rival submissions, the issues falling for the Court's determination are: -
- 1. Whether the 1st Respondent is a proper party to this suit;



2. Whether the Salaries and Remuneration Commission should be joined as a party to the suit.

Whether the 1st Respondent is a proper party to this suit

6. It is notable that despite the Claimant stating at paragraph 2 of the Memorandum of Claim that he has sued the 1st Respondent in his individual capacity, he has not disclosed the cause of action he has against him. Further, it is apparent that the Claimant has not sought any specific reliefs against the 1st Respondent.
7. As a matter of fact, the main dispute appears to be between the Claimant and the 2nd respondent, his previous employer as it relates to payment of salary arrears and allowances. As it is, any order that may issue cannot be effected against the 1st Respondent in his individual capacity. I am also in agreement with the Respondents that the Office of the Clerk of the County Assembly of Machakos, which the 1st Respondent holds, is a substantive office in terms of section 13 of the County Governments Act. Therefore, it was not necessary for the claimant to sue the 1st Respondent in his individual capacity.
8. In view of the foregoing, I find that the 1st Respondent is not a proper party to the instant claim and consequently, he is struck out from the suit herein.

Whether the Salaries and Remuneration Commission should be joined as a party to the suit

9. The respondent has sought to join the Salaries and Remuneration Commission (SRC) to this dispute arguing that its participation is necessary in order to effectually and completely adjudicate upon and settle all questions involved in this claim. The respondents further contend that the orders sought by the claimant in the claim touch on the specific constitutional mandate of the SRC.
10. The guiding principles for determination whether or not to join a party in proceedings were restated in the case of *Kingori vs Chege & 3 others* [2002] 2 KLR, thus:
 1. He must be a necessary party.
 2. He must be a proper party.
 3. In the case of the defendant there must be a relief flowing from that defendant to the plaintiff.
 4. The ultimate order or decree cannot be enforced without his presence in the matter.
 5. His presence is necessary to enable the Court effectively and completely adjudicate upon and settle all questions involved in the suit.
11. And further, in *Departed Asians Property Custodian Board vs Jaffer Brothers Ltd* [1999] 1 EA 55, it was held as follows:

“A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involve in the suit. A party may be joined in a suit, not because there is a cause of action against it, but because that party’s presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involve in the cause or matter...For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be



shown that the orders, which the plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such a person joined so that he is bound by the decision of the Court in that suit.”

12. From a cursory look at the claim, it is evident that the claimant’s case is hinged on the determination of the court in Nyeri ELRC Petition No. 6 of 2017; Kamau Aidi & 47 others vs Salaries and Remuneration Commission as well as Circulars issued by the SRC over time. Therefore, it is evident that the SRC stated its position in the aforementioned case. Further, it is my view, that the SRC Circulars sought to be produced by both parties in evidence, constitute sufficient material to guide the Court in arriving at its determination. It is therefore my position that the input of the SRC is not necessary in this case.
13. In any event and applying the determination in Departed Asians Property Custodian Board vs. Jaffer Brothers Ltd [supra], it is my considered view that if SRC is to participate in the proceedings, it can only do so as an Interested Party as opposed to a Respondent.

Orders

14. The total sum of my consideration is that the Chamber Summons Application dated February 6, 2023 is partly allowed and the 1st Respondent is struck out from the suit. The prayer to join the Salaries and Remuneration Commission as a Respondent is declined.
15. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JULY, 2023.

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STELLA RUTTO

JUDGE

Appearance:

Mr. Ngwele for the Claimant

Mr. Muuo for the Respondents/Applicants

Abdimalik Hussein Court Assistant

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 had 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 *Civil 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.

STELLA RUTTO

JUDGE

