



**Katieno v University of Eastern Africa, Baraton (Cause  
E017 of 2022) [2023] KEELRC 1653 (KLR) (6 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1653 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
CAUSE E017 OF 2022  
MA ONYANGO, J  
JULY 6, 2023**

**BETWEEN**

**JEFF STEVE OGANGA KATIENO ..... CLAIMANT**

**AND**

**UNIVERSITY OF EASTERN AFRICA, BARATON ..... RESPONDENT**

**RULING**

1. By a Notice of Preliminary Objection dated 30<sup>th</sup> September 2022, the Respondent herein raised, the following three grounds of objection: -
  - i. The subject suit was filed and/or commenced on the basis of existing suit and/or proceedings namely Eldoret E&LRC Cause No E039 of 2021 which raises similar issues between the parties herein, consequently, the subject suit is barred and/or prohibited by the doctrine of Sub-judice. In the premises, the suit herein offends the provisions of section 6 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya.
  - ii. At any rate, the suit herein are clothed (sic) with massive concealment of material facts in regards to the pending court case between the parties herein over the same subject matter the suit herein is thus an abuse of the due process of the court.
  - iii. In the premises, the suit herein is legally untenable.
2. On 20<sup>th</sup> March 2023, the court directed that the Preliminary Objection be canvassed by way of written submissions. The Claimant filed his submissions on 5<sup>th</sup> April 2023 whereas the Respondent filed its submissions 19<sup>th</sup> June 2022.



### Respondent's Submissions

3. The Respondent submitted that the instant cause is sub judice by reason that the Claimant sued the Respondent challenging the disciplinary actions taken by the employer in Eldoret ELRC No E039 of 2021.
4. It is the Respondent's case that the parties herein are substantially the same as those in Eldoret ELRC No E039 of 2021 which is before a court of competent jurisdiction and has not been determined.
5. Counsel for the Respondent further submitted that the issues being raised in the instant cause are similar to the issues being raised by the Claimant vide Eldoret ELRC No E039 of 2021 the same having arisen from the same transaction and/or event, to wit, the disciplinary outcome undertaken against the Claimant.
6. The court was therefore urged to find that the Preliminary Objection dated 30<sup>th</sup> September 2022 as being meritorious.
7. The Respondent cited the followings cases in support of the Preliminary Objection; *Republic v Registrar of Societies –Kenya & 2 others Ex- parte Moses Kirima & 2 others* (2017) eKLR; *Kenya Bankers Association v Kenya Revenue Authority* (2019) eKLR; and *Kenya National Commission on Human Rights v Attorney General: Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* (2020) e KLR.

### Claimant's Submissions

8. The Claimant in his submissions averred that he instituted the instant claim against the Respondent seeking the following orders:
  - i. A declaration that the termination of the Claimant from employment is in gross violation of Sections 41, 45 and 47 of the *Employment Act* hence illegal and liable to pay damages;
  - ii. An order that the claimant be reinstated and/or allowed to resume his duties as a Tutorial Fellow with full pay;
  - iii. In the alternative to Prayer 2 above, payment of Kshs. 2,506,750 as compensation for unlawful termination;
  - iv. Certificate of Service; and,
  - v. Costs and Interest from the date of filing suit.
9. According to the Claimant, the instant suit was necessitated by the Respondent's action of redeploying him from a Tutorial Fellow to a Farm Manager without following the laid down procedure of redeployment and without involving the Claimant.
10. The Claimant submits that in Eldoret ELRC No E039 of 2021, he is seeking the following remedies against the respondent:
  - i. A declaration that the Claimant's rights to a fair hearing have been grossly violated by the respondent contrary to the laws;
  - ii. A declaration that the decision of Respondent to suspend the claimant and afterwards redeploy him to the position of a farm manager was just(sic), irregular and unprocedural;



- iii. An order to reinstate the claimant to his former position of a Tutorial Fellow with immediate effect;
  - iv. An order for restitution of the half (1/2) salary retained by the Respondent as the suspension for two months was unfair;
  - v. A declaration that the Respondent's actions were in breach of the rights to fair labour practices and fair administrative action;
  - vi. A declaration that the Respondent was bound to observe and adhere to the provisions of Article 41 and 47 of *the Constitution* of Kenya the unlawful disciplinary process commenced, the unlawful recommendation for summary dismissal of the Claimant, then followed by unlawful suspension and finally unlawful redeployment of the Claimant was unconstitutional, unlawful, irregular and null and void abinitio;
  - vii. An order directing the Respondent's Vice Chancellor to seize and desist from insinuating that the Claimant is fighting him on tribal grounds;
  - viii. Costs and interests of the suit
11. The Claimant submitted that during the pendency of Eldoret ELRC No E039 of 2021, and after orders of injunction had been issued, the Respondent terminated the Claimant's employment unprocedurally and that it is the said decision by the Council that is the subject of the instant suit.
  12. The Claimant submitted that the issues in the instant cause and Eldoret No E039 of 2021 are not the same and that the causes of action are different and distinct.
  13. It is the Claimant's submission that a casual look at the prayers sought in the two claims confirms they are distinct. Reliance was placed on the case *Michael Mwawai Mjomba v Central Electrical International Limited* (2019) eKLR to buttress that position.
  14. The Claimant further submitted that the Preliminary Objection as presented does not amount to a preliminary objection because for one to deal with the issues raised therein, an inquiry into facts which are not before court has to be made. Counsel for the Claimant cited the case of *Njowabu Kenya Limited v Jinit Mohanlal Shah* (2020) eKLR in support of this position.

### **Determination**

15. I have carefully considered the preliminary objection, the parties' rival submissions, the law as well as the cases cited. The issue for determination is whether the causes of action in the two suits filed by the Claimant against the Respondent are the same.
16. From the submissions of both parties herein, it is not in dispute that there is an existing cause in this court, being Eldoret ELRC no. E039 of 2021 between the parties herein.
17. What is in contention is whether the issues raised in the said suits are the same. The Respondent argues that the instant suit raises similar issues as those raised in ELRC E039 of 2021 while the Claimant on the other hand, insists that although the parties in both suits are similar, the issues in the said suits are totally different and distinct.
18. The import of the Sub judice doctrine is discussed in *Black's Law Dictionary* 9th Edition as follows: -
 

“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 is 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 res 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”

19. Section 6 of the *Civil Procedure Act* provides as follows:

“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.”

20. As explained by the Claimant, the two causes of action, although having the same parties and dealing with the same set of facts, were filed at different times to address two separate causes of action, one contesting what the Claimant refers to as his unprocedural disciplinary action while the other challenging what he refers to as the termination of his employment without any valid reason and without giving him notice of any wrong-doing.

21. A scrutiny of the prayers sought in the two suits discloses that the first suit contested the suspension and subsequent redeployment of the Claimant from the position of Tutorial fellow to Farm Manager, while the second suit contests the termination of his employment.

22. Although the Claimant could have amended the first claim to include the cause of action in the second suit, I would agree with him that the causes of action in the two suits are distinct and separate. The prayers are also distinct and separate with the first suit concentrating on the lifting of the suspension and reinstatement to his position as Tutorial fellow while the second suit seeks reinstatement back to his employment as Tutorial Fellow or compensation for unlawful termination of employment.

23. The import and purpose of the above provision of law on sub judice is to prevent the courts from simultaneously entertaining and adjudicating upon two parallel litigations in respect of the same cause of action, same subject matter and the same relief with the risk of two different determinations being made on the same subject matter. The two suits herein having arisen from two separate causes of action at two different situations, do not fall under the doctrine of sub judice.

24. The Claimant raised an issue whether the preliminary objection as presented by the Respondent meets the threshold as was propagated in *Mukbisa Biscuit Manufacturing Co. Limited v West End Distributers Limited* by Sir Charles Newbold JA when he stated:

“... 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 that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and on occasion, confuse the issue.”



25. When a court finds that a matter is sub-judice, as is provided in section 6 of the *Civil Procedure Act*, that finding alone does not lead to the striking out of the second suit. What is provided by the section is the stay of the second suit. The prayer by the Respondent for striking out of this suit on grounds that it is sub judice is therefore unwarranted.
26. The upshot is that the preliminary objection has not been proved and is accordingly dismissed with costs.

**DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 6<sup>TH</sup> DAY OF JULY, 2023**

**MAUREEN ONYANGO**

**JUDGE**

