



**Esevwe v University of Nairobi (Cause E458 of 2022)  
[2023] KEELRC 2016 (KLR) (4 August 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2016 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E458 OF 2022  
B ONGAYA, J  
AUGUST 4, 2023**

**BETWEEN**

**FRANK ESEVWE ..... CLAIMANT**

**AND**

**UNIVERSITY OF NAIROBI ..... RESPONDENT**

**RULING**

1. The claimant filed the Memorandum of claim on June 29, 2022 in person. The claimant prayed for judgment against the respondent for:
  - a. Declaration that the respondent's cause of action, letter dated June 21, 2022, and by reducing claimant's house allowance amounts to unfair labour practice. The same unlawful wrongful, irregular and the same actions violated section 5 and 31 of *Employment Act*, 2007, as such, the said cause of action constitutes unauthorized house allowance reduction, therefore, flawed, invalid, null void, ab initio.
  - b. Declaration that the respondent's cause of action letter dated June 21, 2022 and by reducing claimant's house allowance amounts to victimization and discrimination in workplace.
  - c. That an order be issued and is hereby issued, directing the respondent to refund to the claimant all monies in difference in reduction of claimant's house allowance since June 2022.
  - d. That an order be issued, and is hereby issued directing the respondent to restore the claimant's house allowance accordingly.
  - e. That the honourable court to issue a permanent order of injunction barring the respondent from adjusting claimant's house allowance in an intention to reduce the same, save for claimant's house allowance upward review.



- f. That the honourable court to issue an order, directing the respondent to pay the claimant general damages as the court may assess, and for breaching claimant's valid contract.
  - g. Any other order as the court may deem fit to grant, and for the ends of justice to materialize.
  - h. That costs of the suit and interest at court rate to be met by the respondent.
2. The response to the memorandum of claim was filed on September 2, 2022 through CS. Fredrick Collins Omondi Advocate. The respondent denied the jurisdiction of the court and stated that the claim is res judicata or an abuse of the court process and ought to be dismissed. The respondent outlined the particulars of res-judicata and stated thus, matters of law and fact in NBI ELRC Cause No. E358 of 2022 (Frank Esevwe vs. UoN) and NBI ELRC Cause No, 511 of 2016 (Frank Esevwe & 57 others – vs- UoN) are:
- a. Directly and substantially in issue
  - b. Claimant is the same or proxy claiming the same issue,
  - c. Litigated under the same title,
  - d. Courts have the competent/concurrent jurisdiction,
  - e. Matter is issue heard and finally decided in the former suit.
3. The claimant swore a further affidavit on September 19, 2022 in response to the Respondent's memorandum of response, and stated as follows:
- a. That a perusal on the judiciary e-filing portal, I found that the respondent's memorandum of response dated September 2, 2022 and replying affidavit dated September 5, 2022 were both filed on September 14, 2022 without leave of the honourable court and no explanation has been advanced over the late filing of such responses to my claim contrary to court directions issued on July 14, 2022.
  - b. That a perusal on the judiciary e-filing portal indicates that the respondent did not pay for annexure and exhibits accompanying her responses, and there is no evidence to the contrary, as such, the papers are of no legal value or use and should therefore be expunged from the court records.
  - c. That the respondent's response having been filed outside the time granted by this court as leave to file a response, then, they should too be struck out from court records.
  - d. That the respondent's replying affidavit by Harrison S. Akala dated September 5, 2022 has not denied having issued a letter dated June 21, 2022 purportedly reviewing his house allowance on account of orders of this court issued under NBI ELRC Cause no 511/2016 Frank Esevwe & 57 others vs. University of Nairobi which orders I have annexed in my case. The respondent's responses to my case does not deny the fact that this matter is only challenging the respondent's cause of action letter dated June 21, 2022 which is reviewing my house allowance unfairly, unlawfully and discriminatively.
  - e. That the respondent's cause of action, letter dated June 21, 2022 was not the subject of litigation in NBI ELRC Cause no. 511/2016 Frank Esevwe & 57 others Vs. University of Nairobi. In any case, the record shows that the dispute was about house allowance increment to Kshs.20,413/= in accordance with the RTWF formula signed on 19.3.2014 and not reduction of house allowance from Kshs.17,013/= to Kshs.10,371/=.



- f. That it is trite law that parties are bound by their pleadings or position taken. It is an act of judicial malice for the respondent to refuse or ignore the fact that the cause of action in dispute letter dated June 21, 2022 is explicitly referring to a decision of this honourable court, under Nbi Elrc Cause No 511/2016, Frank Esevwe & 57 other vs. University of Nairobi and purporting to implement the same.
- g. That the contents of the respondent's reply to my claim and replying affidavit to my notice of motion is a manifestation of a public institution which discourages its employees from bringing their employment and labour disputes to the Court, which is the proper forum for adjudication of such disputes. I am wondering where else does the respondent expect me to report my grievances to, once I feel that my rights are being violated by the respondent action like reducing my house allowance because I took her to court over another past dispute?
- h. That the respondent is insinuating that because yesterday the claimant sued her before the court on another dispute, then he has no right of suing her again over another dispute – that he has no right of suing her again over another dispute. Such reasoning is not supported by any fact or law, and therefore, the allegation that my action amounts to an abuse of a court process is simply misplaced and should be disregarded in toto.
4. The claimant filed his submissions on May 31, 2023 through Omongo Gatune & Co Advocates while those of the respondent are dated May 25, 2023. The court has considered parties' respective positions and returns as follows.
5. It is submitted for the respondent that NBI ELRC Cause no. 511/2016 Frank Esevwe & 57 others vs. University of Nairobi was decided by the judgment delivered on May 19, 2022. In the present case the claimant's cause of action is based on the respondent's letter dated June 21, 2022 being long after the earlier judgment. It appears to the Court that the letter of June 21, 2022 would constitute a new cause of action which even with due diligence would not have been subject of the earlier suit or judgment. Further, if the issues in the letter were capable of being resolved or actually resolved in the earlier suit amounts to a dispute which will require evidence at the hearing so that the preliminary objection fails to pass the trite and settled law that a proper preliminary objection is a pure point of law based on undisputed facts.
6. As submitted for the claimant and as per the tabulated details in the respondent's submissions, the Court must look at facts and documents and make an in-depth inquiry which can only be done at full hearing and not by way of the preliminary objection.
7. The preliminary objection will fail and the costs in the cause,
- In conclusion the preliminary objection will fail with costs in the cause and parties to take directions for further steps towards expeditious determination of the main suit.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 04TH AUGUST, 2023.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

