



Githinji & 131 others v Kenya Medical Research Institute & 6 others (Cause 1545 of 2018) [2023] KEELRC 2767 (KLR) (26 October 2023) (Judgment)

Neutral citation: [2023] KEELRC 2767 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1545 OF 2018
K OCHARO, J
OCTOBER 26, 2023**

BETWEEN

EDWARD GITHINJI & 131 OTHERS CLAIMANT

AND

KENYA MEDICAL RESEARCH INSTITUTE 1ST RESPONDENT

**DIRECTOR, KENYA MEDICAL RESEARCH INSTITUTE BOARD OF
MANAGEMENT 2ND RESPONDENT**

KENYA MEDICAL RESEARCH INSTITUTE 3RD RESPONDENT

SALARIES & REMUNERATION COMMISSION 4TH RESPONDENT

MINISTRY OF HEALTH CABINET SECRETARY 5TH RESPONDENT

NATIONAL TREASURY AND PLANNING 6TH RESPONDENT

HON. ATTORNEY GENERAL 7TH RESPONDENT

JUDGMENT

Introduction

1. The Claimants are all employees of the first Respondent, serving in various positions or job designations. Their positions range from Chief Research Officer R[MR14] to Principal Research Officer [MR13], Senior Research Officer Q[MR12], Assistant Research Officer M[MR9], Principal Engineer Technologist P [MR 11], Engineering Technologist II [MR.8/JG L] and drivers. Alleging that they have been subjected to pay discrimination, they through the Memorandum of Claim herein dated 16th November 2018, sued the Respondents jointly and severally seeking the following; -

- a. A declaration that the 1st Respondent, singly, and/or jointly with the 2nd and 3rd Respondents has discriminated against the Claimants in implementation and payment of the Emergency



Call Allowances, health services allowance, health risk allowance and Health Workers Extraneous allowance and Non-practice allowance.

- b. An order directing the 1st Respondent either alone and/or jointly with the 2nd and 3rd Respondents to pay every Claimant the following allowances: -Emergency call allowances in the sum of Kshs. 80,000/= per month, health services allowance (Kshs. 20,000/=) per month, health risk allowance/Medical risk allowance (Kshs. 20,000/=) per month, Extraneous allowance (Kshs. 30,000/=) per month, AND Non-practicing allowance (Kshs. 51,000/=) per month, until retirement.
 - c. A declaration that the discriminatory manner in which the payments of these allowances are currently being implemented by the 1st, 2nd and 3rd Respondents is in violation of Article 27 of the Kenya Constitution, Article 7 of the Universal Declaration of Human Rights and Article 3 of the African Charter on Human and People's Rights.
 - d. A declaration that the discriminatory manner in which the payment of these allowances is currently being implemented by the 1st, 2nd and 3rd Respondents is in violation of Article 73 (2) of the Kenya Constitution.
 - e. A declaration that the actions of the 1st to 3rd Respondents are in violation of the legitimate expectation of the Claimants under Articles 47 (1) of the Kenya Constitution, Articles 24,22 and 28 of the African Charter on Human and People's Rights and Article 3 of the Universal Declaration of Human Rights.
 - f. A declaration that the Claimants' rights to equality and freedom from discrimination as enshrined in *the Constitution* are grossly violated.
 - g. An order directing the 1st, 2nd and 3rd Respondents strictly not to victimize any of the Claimants in any manner or take any other action against each and every Claimant as a punishment against filing this suit in Court against the Respondents herein.
 - h. Costs of this suit and interests at Court rates.
 - i. Any other or further relief this Honourable Court may deem just and fit to award to the Claimants in the circumstances.
2. In addition to the Statement of Claim dated 16th November 2018, the Claimants filed:
- a. A Verifying Affidavit sworn by Eric Alelo on behalf of the other Claimants on 16th November 2018;
 - b. Documents under a list of Documents dated 16th November 2018;
 - c. Witness Statement of Eric Alelo dated 16th November 2018;
 - d. An executed Authority to act, by the Claimants in favour of Eric Lelo and Dr. Sabina Wachira.
 - e. Further Statement of Dr Eric Lelo dated 7th February 2019;
 - f. Further Affidavit sworn on 8th October 2021 by Eric Lelo in response to the 4th Respondent's Report dated 5th February 2020;
 - g. Replying Affidavit sworn by Eric Lelo on 4th March 2019 in response to the 1st, 2nd and 3rd Respondents Preliminary Objection;
 - h. Further List of Documents dated 1st February 2019.



3. In response to the Memorandum of Claim, the 1st, 2nd and 3rd Respondents filed a Memorandum of Defence dated 7th February 2019; Documents under a list of Documents dated 7th February 2019, Witness Statements by one Margaret Rigoro dated 7th February 2019, and Daniel Saruni dated 18th November 2019.
4. The 4th Respondent filed a Report on the Dispute dated 5th February 2020 signed by the Commission Secretary, Anne. R. Gitau.
5. On their part, the 5th, 6th and 7th Respondents filed a Reply dated 11th January 2019 to the Memorandum of Claim. They denied the Claimants' cause of action and entitlement to the reliefs they have sought.
6. On 1st March 2019, the Interested Party herein filed a Memorandum of Interest dated 27th February 2019, a List of documents under a list of Documents dated 27th February 2019, and a Witness Statement of one Zachariah Achacha dated 26th November 2019.
7. The matter was subsequently certified as ripe for hearing. The Claimants presented three witnesses who testified on their behalf. The 1st witness, Edward Githinji testified on 16th October 2019, when he was stood down for further cross-examination on 3rd December 2019, he gave his further testimony under cross-examination, and subsequently in re-examination. On the same day the Claimants' second witness, Dr Elizabeth Kigundu, testified. The matter got adjourned to the 6th of February 2020, however, on this date, it didn't proceed as the Court was informed that the parties were engaged in out-of-court negotiations. They were hoping that an agreement would be reached compromising the matter. Apparently, the negotiations failed, and the parties had to get back for further proceedings before the court.
8. On the 9th November 2021, the above-named second witness further testified under, cross-examination re-examination. On the same day the Claimants' 3rd Witness, Eric Lelo also testified. The last Claimants' witness to testify was Gabriel Onsongo, who testified on the 8th of December 2021.
9. On the 3rd March 2022, the matter came up for a defence hearing, the 1st 2nd and 3rd Respondents availed one witness, Rowhand Muyeshi, the Director of Human Resources, at the 1st Respondent institution, to testify on their behalf. The 4th, 5th 6th and 7th Respondents opted to close their respective cases without calling witness[es].
10. Following the Court's directions on the filing of written submissions, the parties filed their respective submissions on various dates and Authorities.

Claimants' case

11. The Claimant's case is not difficult to comprehend. They contend that at all material times to this suit, they were and are employees of the 1st Respondent serving in various positions under variant job groups.
12. They assert that they are entitled to various monthly allowances to wit; emergency allowance in the sum of KShs. 80,000; health services allowance KShs. 20,000; health risk/ medical allowance KShs. 20,000, extraneous allowance KShs. 30,000, and non-practicing allowance KShs. 51,000.
13. The Claimants contend further that though they are entitled to the above-stated allowances, they aren't earning the same due to the 1st, 2nd and 3rd Respondents' pay discriminatory tendencies. Out of the 1st Respondent's workforce of 931 employees, only 268 are paid the allowances. Therefore, 663 do not enjoy the benefit.



14. The Claimants further stated that though research scientists carrying out their tasks are as exposed to risks as Medical Doctors, the latter earn the above-mentioned allowances, while the research scientists do not. They argue that this affronts the principle, of equal remuneration for work of equal value for all employees.
15. The 1st 2nd 3rd Respondents by perpetuating the pay discrimination, the subject matter of this claim, have breached the leadership principles of objectivity, impartiality, and honesty, encapsulated under Article 73 of *the Constitution*, and fouled the Claimants' legitimate expectation under Article 47[1]. The Respondents' actions have violated their right under Article 27 of *the Constitution* not to be discriminated against.
16. The Claimants contend that the 1st Respondent's workforce is made up of Medical Doctors, Veterinary Doctors, Laboratory technologists, Research Scientists, Accountants, Drivers, Cooks and Administrators. Further, all workers at the Centre for Clinical Research -Nairobi are paid extraneous and risk allowances, while the workers at the other eleven Centres across the Country are not paid.
17. The Claimant's 1st witness testified that he is employed by the 1st Respondent as a Medical Research Scientist. At the material time, he was in Job Group P [MR 11]. At all material times to the instant suit, the 1st Respondent had a total of 931 employees out of whom only 268 were enjoying the allowances, the subject matter of this suit, as employment benefits. The remaining 663 were not.
18. According to the witness, the Claimants and the others who were earning the allowances were doing the same work as those who were enjoying the benefit. Describing what his job entailed, he deals with and cultures parasites. His medical colleagues deal with parasites in patients. Comparatively, they both are exposed to a risk, however, as a researcher he is more vulnerable than his medical counterparts.
19. Explaining the risks involved in carrying out the tasks related to his job, the witness testified that in the course, he collects samples including urine, faeces, blood and mucus from communities or schools, for laboratory analysis. The samples are normally picked from animals or Human beings. These expose researchers like him to risks, some of the greatest being, bacteria, viruses, protozoa and fungi, infections.
20. There aren't any justifiable reasons why the 1st Respondent is not paying the researchers the allowances that it pays to their Counterparts in the medical space.
21. The witness further testified that some of the Claimants are medical engineers. The engineers annually calibrate the machines that Research scientists use. They in the process get exposed to risks. Owing to the exposure to risks they should earn the allowances like those of other employees of the 1st Respondent who earn.
22. The Claimants have placed their pay slips before this court for two purposes, first to demonstrate that they aren't earning the allowances, the subject matter herein, and second, to enable this Court to carry out a comparison between their earnings and those of their counterparts who enjoy the allowances benefit. Looking at the slips for Dr. Eric Lelo a Research Scientist Job Group 13 and Dr. Elizabeth Kigondu, a Senior Research Scientist, reveal that the two were not earning the allowances.
23. He stated that on or about the 20th of November 2018, the 1st Respondent issued a circular concerning the allowances to all members of staff. However, not all the members started earning the allowances. Only a few did. This marked the genesis of the claim herein.
24. Cross-examined by Counsel for the 1st to 3rd Respondents, the witness reiterated his Job Group, and that he is a Medical Research Scientist. He further testified that though the Claimants have alleged that 268 employees of the 1st Respondent were being paid the allowances and that 663 were not, they had



- no evidence to demonstrate this. The 132 Claimants are not members of the Union of Research and Allied Institutes Staff of Kenya [UNRISK]. However, whenever the union successfully negotiated for a benefit with the 1st Respondent, he would enjoy the benefit. He was being deducted agency fees.
25. He further testified that his training was in Zoology and Botany. Some of those who were earning allowances were lab technologists and Entomologists.
 26. Referred to the pay slip exhibited by the Claimants on page 138 of the Claimants' documents, the witness asserted that the slip was issued by the Ministry of Health. He wouldn't tell to whom it belonged. However, the slip had a risk allowance item of KShs. 2000.
 27. Referring to one of the pay slips tendered by the Claimants [see page 128 of their documents], the witness testified that the employee, owner of the pay slip was earning a medical risk allowance of Kshs. 20,000. He went on to explain that the employee's number and name on the slip had been masked to ensure confidentiality.
 28. CW1 drew the Court's attention to the pay slips of Dr. Lelo (11th Claimant) and Dr. Elizabeth Kigonda (97th Claimant). They reveal that the two were not earning the allowances. However, when one compares their earnings with those reflected on the pay slip of one Sylvia Mugalla, it is clear that she was earning the allowances whilst the two weren't. Clearly, this demonstrates pay discrimination.
 29. In his evidence under cross-examination by Counsel for the Respondents, CW1 stated that notwithstanding their allegations that only 268 employees of the 1st Respondent, the Claimants do not have any documentary evidence to show that. Further, the Claimants did not have a comprehensive list of the 663 employees whom they alleged were not enjoying the allowances benefit.
 30. He testified that none of the Claimants was a member of the Interested Party Union.
 31. Most of the pay slips produced by the Claimants for comparison purposes lacked many details, including the owners' names, employee numbers, and employee job descriptions. The pay slips could therefore be unhelpful for one to ascertain the work that the owners were employed to do.
 32. Further, the pay slips bear various names of employers, such as KMTC, NASCOP, and the Ministry of Health. Referring to the pay slip on page 141, the witness stated that the job description of the owner is shown as Deputy Chief Radiation Protection Officer. Such an officer would be exposed to risk in the course of his employment. He was entitled to the risk allowance he was earning.
 33. The witness contended that the pay slip on page 140 shows that the owner thereof is a Senior Medical parasitologist. Apparently, he earns a risk allowance. CW1, whose job entails dealing directly with parasites in the process of collecting samples and therefore exposed to a similar risk, does not earn a risk allowance.
 34. In his evidence under re-examination, the witness notably clarified that the copies of pay slips produced by the Claimants deliberately do not reveal the names of the employees they belong to, for fear of victimization. However, they show the centre of employment and department. He stated that he is an employee of KEMRI and the Ministry of Health. That KEMRI is a department of the Ministry of Health. He works at KEMRI facilities, particularly in the laboratory. He is exposed to risks of being infected both while working in the laboratories and when collecting samples.
 35. He further stated that he has never applied to join the membership of UNRISK, but was being deducted agency fees.
 36. CW2 Elizabeth Kigonda testified that she is the 97th Claimant in the instant matter. Referring the Court to her pay slip for September 2018, the witness testified that it is clear therefrom that she did



- not earn any of the allowances claimed. In contrast, some of her colleagues, such as the one whose pay slip is attached on page 131 of the Claimant's Bundle of Documents get the allowances.
37. She testified that she is not a member of the interested party Union. However, she pays them agency. It is regularly deducted from her salary. She stated that the Union has never approached her urging her to join its membership nor has she signed any forms indicating her desire to join it. She has not engaged the said Union at all.
 38. The witness testified that she is a Senior Research Scientist, who carries out research on medical plants. She works both in chemistry and biology laboratories. As such a researcher, she handles dangerous chemicals and solutions. The chemicals are corrosive and flammable. They also have fumes which can cause organ failure. In biology laboratories, she grows organisms such as parasites. In her work, she is exposed to risks, therefore.
 39. In her evidence under cross-examination, she testified that on some of the pay slips tendered before the court, the names and Bio-data of the owners had been deliberately concealed. The owners feared victimization. She emphasized, however, that the pay slips are genuine. Reinforcing her point on allowance discrepancy, she referred the court to one of the pay slips for a Radiation Protection Officer and that he gets the allowances that the Claimants are claiming.
 40. The pay slip on page 130, shows that the owner earns an extraneous allowance of KShs. 20,000. Considering her [CW2] job group, her extraneous allowance should be KShs. 30,000.
 41. The witness further testified that she was a principal research scientist, stationed at the Centre for Traditional Medicine. By virtue of her job, she is a public servant. She is well aware that the 4th Respondent plays an advisory role over the 1st Respondent on matters of remuneration and benefits of employees. The 4th Respondent might have advised the 1st Respondent on the allowances in issue.
 42. The circular attached to the affidavit by one Ann Gitua [the author of the circular], was addressed to the Principal Secretary Ministry of Health, all County Secretaries, and County Public Service Boards. The letter spoke to; emergency call allowance; extraneous allowance; and uniform allowance; However, the allowances were applicable to workers within the Ministry of Health Facilities, therefore not to KEMRI. The Claimants had no circular specifically addressed to KEMRI, on the allowances.
 43. The witness testified further that the Claimants' pleadings have specified the persons who are supposed to benefit from this claim. They include drivers. The Claimants have no documentary proof to support the claim that even the drivers are entitled to draw the allowances in issue. The Claimants have not sought any specific relief against the 4th Respondent in the reliefs section of the Memorandum of Claim.
 44. Cross-examined by Ms Kinyua, the witness confirmed that she is neither a pharmacist nor a Medical Doctor. Further, her station of work is the Centre for Traditional Medicine.
 45. Referred to the pay slip on page 134, the witness confirmed that it reflects the working station as Centre No. 10. Centre 10 is one of those Centres for Clinical Research. The Researchers at this station do the same work as those at the Centre where she is based.
 46. In her evidence under re-examination, the witness asserted that KEMRI is a medical facility. The allowances ought to be availed to its workers, just like those in the Public Health Services who are not serving in Hospitals but access the allowances.



47. The 3rd Witness to testify was Dr. Eric Lelo. The witness presented himself as a Principal Research Officer, working for the 1st Respondent and based in Nairobi, Centre for Biotechnology Research and Development.
48. In his witness statement the witness described the 1st Respondent as a national body mandated to carry out human health research in Kenya on behalf of the Ministry of Health, hence its activities are geared towards the improvement of healthcare and achievement of universal health care coverage [including prevention, promotion, treatment, rehabilitation and pollution] through research.
49. About the pay slip on page 137 of the Claimants' Bundle of documents, he stated that it has an item for an extraneous allowance of Kshs. 25,000/-. From the slip, the owner wasn't earning an emergency call allowance. Why the allowance was not being earned is a thing he wouldn't explain. On the pay slip on page 138 where the name of the employee has been redacted, the extraneous allowance is Kshs. 30,000/- and the health risk allowance is Kshs. 2,000/-. The pay slip on page 139 is from NASCOP. It does not contain an emergency call allowance.
50. As a rejoinder to the 4th Respondent's Report dated 5th February 2020, the Claimants filed a Further Affidavit sworn on 8th October 2021 by Eric Lelo. The deponent asserted that the Report places reliance on government circulars released from time to time. The circulars have no relevance to their case as it is fundamentally based on the discriminatory manner in which the claimed allowances have been paid and are continuously paid by the 1st to 3rd Respondents.
51. The Claimants contend that Research Scientists and Medical Doctors at the 1st Respondent Institution all have the same job description and are exposed to the same risks. However, some Research Scientists are paid the claimed allowances while others are denied.
52. The witness further contended that vide a letter dated 27 September 2019, Exhibit "EK1", the Respondents admitted to the discrimination. Consequently, they sought the Court's authority to negotiate the matter out of court. The negotiations failed to achieve any fruit.
53. It is the Claimant's position that the 1st Respondent would not have sought authority to pay Kshs. 473 Million to the Claimants if they did not deserve the said allowances.
54. The witness further contended that the 4th Respondent's own Exhibit No. 2 attached to the Report shows that the Claimants were never involved in any discussion regarding the allowances. The act was discriminatory.
55. The Respondent's assertion that the Claimants and other Members of staff in the service of the 1st Respondent were excluded from the benefit [the allowances], as they serve in a non-hospital environment is not founded. The material before the court discounts this. The allowances are paid to staff in the service of agencies like NASCOP, RADIATION BOARD, KMTC, MOH, NATIONAL PUBLIC HEALTH LAB SERVICES, and RADIATION PROTECTION OFFICERS, which are non-hospital entities.
56. A close perusal of the 1st Respondent's Human Resource Policy and Procedure Manual clause (4.14) shows that it provides for payment of Risk Allowances to the Claimants. However, in breach of the right to the benefit, the same is not being paid.
57. Cross-examined by Counsel Masese, the witness asserted that the Claimants' claim was founded on pay discrimination. He testified that he was neither a Medical practitioner nor a Clinical Officer. However, he does clinical research.



58. The Claimants are subject to the authority of the Salaries and Remuneration Commission, just like the Medical Practitioners and Clinicians. The latter get employment benefits to the extent directed by the Commission. Their employer, the 1st Respondent is implementing the directions in a discriminatory manner.
59. Further, the Claimants have not given to the Court details and job descriptions of the 268 employees of the 1st Respondent who are allegedly drawing the subject allowances, for comparison purposes.
60. The witness alleged that Researchers just like Clinicians and Medical Practitioners interact with patients for instance during the COVID-19 period. The researchers are as exposed to risk as are the Medical Practitioners and Clinicians.
61. He has never been a member of the Interested Party Union. However, the 1st Respondent has at all material times been deducting agency fees from his salary for transmission to the Union. The Collective Bargaining Agreement between the Interested party and the 1st Respondent expired in 2017. Whenever there were any successful negotiations between the interested party Union and the 1st Respondent, he would enjoy the fruits thereof. He is not aware of case No. 1315 of 2013, instituted by the Union. If there was any judgment in the matter, he never benefited from it.
62. Cross-examined by Counsel Wahome, Dr. Lelo reiterated that the Claimants' case was all about pay discrimination. The Salaries and Remuneration Commission has not discriminated against them.
63. The 1st Respondent Human Resource Manual provides for employees' allowances and benefits. Emergency call allowance is not in the catalogue. The manual however provides for Health services allowance, Health risk allowance, Extraneous allowance, and Non-practicing allowance.
64. None-practicing allowance is limited to Medical Doctors, Vet Doctors, Pharmacists, and legal officers. They are members of registered professional bodies.
65. Cross-examined by Ms Kinyua, the witness stated that in public service, allowances paid to employees depend on one's job group. The criteria used to determine the allowances is a matter he was not able to testify on.
66. A pay slip cannot bring forth an employee's job description.
67. In his evidence under re-examination, the witness stated that in their pleadings, the Claimants have clearly stated that the 1st Respondent has many centres across the Country. Employees attached to some stations earn the allowances, while others in other stations don't. The Human Resource Manual is meant to benefit all employees equally. In the instant case, though the Manual provides for the allowances, the 1st Respondent pays the same discriminatorily.
68. The 4th Witness was Gabriel Onsongo Oknondo. The witness testified that the substance of their claim was pay discrimination against them.
69. The Copies of pay slips tendered by the Claimants for comparison purposes belong to employees of the 1st Respondent, working in its various stations.
70. The witness alleged that the job description for the 1st Respondent's Medical Doctors and Research Scientists are the same. Surprisingly, the Medical Doctors earn allowances while the Researchers do not.
71. The witness stated that at all material times, the Government has been willing to pay them the subject allowances.



72. The witness testified that his job designation was Principal Engineering Technologist. As well as an Audio Institute Engineer. His main duty was to ensure that bio-medical equipment were serviced and maintained in good condition. The exposure to risk of Engineers is like that of Scientific Researchers. At some point, the 1st Respondent directed that all its employees be vaccinated. This indicated that all employees alike face the same exposure to risks.
73. Cross-examined by Counsel Masese, the witness stated that he worked for the 1st Respondent for 19 years. His job description is different from that of a Medical Doctor. He has never been a member of the Interested Party, Union. His colleague Engineers were not either.
74. Like any other agency under the Ministry of Health, the 1st Respondent is regulated. In matters of Human Resources and their employees' salaries and remuneration, it works in collaboration with the 4th Respondent. The Commission at some point advised the 1st Respondent to pay them the allowances.
75. Cross-examined by Counsel Wahome the witness contended that the documents they have placed before the Court, indicate that there were correspondences numerous between the 1st Respondent and the Commission on the subject allowances. The Commission advised that the allowances be paid to them.

1st, 2nd and 3rd Respondent's case

76. The 1st, 2nd and 3rd Respondents availed one witness, Rowland Munyeshi, to testify in support of their defence against the Claimants' case. The witness presented himself as the Acting Human Resource Manager at the 1st Respondent's, and substantively its Principle Human Resources Officer. He testified that the 1st Respondent's core mandate is research.
77. He stated that broadly the 1st Respondent's employees are in three categories; Researchers; Technologists; and Support/Administrative staff. Under research, are Clinical Researchers and Research Scientists. Their academic backgrounds are not the same. Clinical Researchers have a degree in either Medicine, Dentistry, or Pharmacy.
78. The instruments governing the employer-employee relationship between the 1st Respondent and those employees under the various categories mentioned are the same; the Human Resource and Procedure Manual; the Collective Bargaining Agreement; and instructions from the parent Ministry from time to time.
79. The witness further stated, that the Claimants are unionisable employees and therefore the terms and conditions of the Collective Bargaining Agreement apply to them. Normally, the 4th Respondent guides the 1st Respondent during collective bargaining processes. The Claimants' instant claim dwells on matters[allowances] negotiated and covered by the Collective Bargaining Agreement. Benefits for the 1st Respondent's employees are governed by SRC and the Ministry of Health. The 1st Respondent has no mandate therefore to unilaterally fix benefits for its employees.
80. The Witness testified further that non-practicing allowance is only payable to those employees who are registered members of professional bodies. The Claimants didn't belong to any professional body. They could not be entitled to the allowance, therefore.
81. According to the witness, the issue of the allowances was the subject matter in an earlier suit [cause No. 1315 of 2013] that the Interested Party filed against the 1st Respondent. The Court determined the



matter conclusively. The Court ordered the 1st Respondent to implement payment of the allowances in terms of the circulars that had been issued by the 4th Respondent.

82. After the judgement, the parties entered into a consent agreement dated 4th February 2019, concerning the implementation of the payment of the allowances. The consent has not been effected due to a lack of budget approval by the National Treasury. If the consent is implemented, the dispute in this matter shall automatically settle.
83. Cross-examined by Counsel Ms. Wanjiru, the witness testified that employees of the 1st Respondent are Public Servants. Their salaries are fixed and approved by the 4th Respondent.
84. Cross-examined by Counsel Jaoko for the Claimants, the witness stated that the 1st Respondent has 14 research centres. It has 870 permanent and pensionable employees. The allowances that some of these employees are earning are based on Government circulars issued from time to time. Other employees do not earn the allowances particularized in the statement of claim as a result of the provisions of the circulars.
85. The 1st Respondent's Human Resource Manual provides for payment of risk allowance to all its employees. Payment of the same to its employees does not require any approval by another party.
86. The witness testified that from the pay slips tendered by the Claimants in evidence, it is clear that some owners thereof earn medical risk allowance, on-practice allowance, and emergency call allowance while others do not. This might appear discriminatory.
87. The Claimants deserve to be paid the allowances. Through its letter dated 27th September 2019, the 1st Respondent sought for authority from the 4th Respondent to pay the allowances.

4th 5th 6th and 7th Respondents case

88. These Respondents didn't present any witness to testify for and on their behalf

Interested Party's case

89. The Interested Party too didn't present any witness to testify on its behalf.

Issues for Determination

90. I have carefully considered the pleadings, the oral and documentary evidence, submissions and authorities filed by the parties. I distil the following issues as those that present themselves for determination, thus;
 - a. Whether the Claimants' suit herein is res judicata.
 - b. Whether the claims by the 37 Claimants identified by the 4th Respondent as having failed to execute the authority to act, should be struck out.
 - c. Whether the Claimants did establish a cause of action against the 4th, 5th, 6th and 7th Respondents.
 - d. Whether the Claimants have proved to the requisite standards that they have been subjected to pay discrimination.



Submissions Analysis and Determination

a. Whether the Claimants' suit herein is res judicata.

91. The 5th, 6th and 7th Respondents argue that the Claimants' suit herein is res judicata and or an abuse of the court process. That there have been cases over the same issues raised before this court and judgments rendered therein. They contend that the issues were duly adjudicated upon and judgment delivered in Union of National Resource and Allied Institutes Staff of Kenya (UNRISK vs. Kenya Medical Reserve Institute (2017) eKLR. In this matter parties entered into a consent for KEMRI (the 1st Respondent in the instant suit) to implement the 2 circulars issued by the Salaries and Remuneration Commission regarding payment of the allowances, the subject matter in the instant suit.
92. Counsel for the 1st, 2nd and 3rd Respondents added voice to the above-mentioned submissions but further submitted on the principle of subjudice, and placed reliance on the case of TSS Grain Millers vs. NIC, High Court Civil Suit No. 13 of 2018 which was cited with approval the decision by the High Court of Uganda in Nyanza Garage Ltd vs. Attorney General HCC No. 450 of 1993.
93. Counsel for the 5th, 6th and 7th Respondents further submitted that this court was presented with a case touching on the same issues as are in the instant matter, in the case of Okiya Omutatah Okioti & Another vs. KEMRI Board of Management, Director & 4 others; Salaries and Remuneration Commission (Interested Party) (2019) eKLR, in which Justice Radido concluded;
 - “ 33. In the present case, it was asserted that the employees on whose behalf the Petitioners had purportedly invoked *the Constitution* had instituted legal proceedings in respect of the legal questions advanced in the instant Petition, being Cause No. 1545 of 2018, Edward Githinji & 131 Others v Kenya Medical Research Institute.
 34. The Petitioners did not make any response to the assertion that the employees had moved Court in Cause No. 1545 of 2018, Edward Githinji & Others v Kenya Medical Research Institute & Others (incidentally, that suit is before this Court and it raises the same legal questions posed by the Petitioners herein).
 35. In the view of the Court, the institution of two legal proceedings on the same cause of action is more likely to occasion judicial embarrassment when inconsistent decisions are made and should not be condoned.
 36. Such a move amounts to an abuse of the Court process.
 37. To exacerbate the abuse, the Court has noted that the Petitioners have in the supplementary affidavit of Okiya Omtatah Okioti filed in Court on 8 February 2019 made reference to the judgment of this Court in Union of National Research & Allied Institutes Staff of Kenya (UNRISK) v Kenya Medical Research Institute (2017) eKLR.
 38. The Court has looked at the judgment. At the centre of the dispute was the implementation of the 2 Circulars now in contention.
 39. The Court, in the judgment directed the 1st Respondent to implement the 2 Circulars.



40. If indeed there has been no implementation as stated in paragraphs 17 to 20 of the supplementary affidavit, the law has set out very clear avenues of enforcing compliance.
41. The Court has already alluded to the role of organized labour in setting terms and conditions of service.
42. It is not in dispute that there is a Union already involved with the 1st Respondent on the issue of allowances for all unionisable employees of the 1st Respondent, on behalf of whom this Petition was filed.
43. The Union litigated on the same issues and got a favourable judgment and it should move to execute in terms of the applicable Rules so that the Court is saved the time and resources of addressing legal questions already decided upon.
44. Res judicata, though not raised appears to be lurking in the horizon.
45. It is the view of the Court, because of the imperative of optimal use of scarce judicial time and resources and the need to avoid possibility of inconsistent decisions, it would be against public policy to ask the Courts or for the Courts to condone/consider the same legal issues by invoking different procedures and litigants in moving the Court.”

94. The Claimants’ counsel in response to the submissions by counsel for the above-mentioned Respondent argued that the Claimants were not at any time members of the Interested Party Union. Their relationship with the Union was only that they were being deducted agency fees from their salaries in favour of the Union courtesy of a ministerial order.
95. It was further submitted that the Claimants being non-members of the Union, were not parties to the suit and that they did not benefit from the judgment in the stated matter. These submissions seem to ignore, the evidence of CW3 and CW4 under cross-examination. They admitted that they were aware of the judgment. Further, wherever the Interested Party had successful negotiations with the 1st Respondent on terms and conditions of employment, they could benefit.
96. The question that this court has to answer at this point is, why do unionisable employees who are not members of a trade union which has a Recognition Agreement and Collective Bargaining Agreement with their employer have to pay Agency fees to the Union?
97. Agency fees is paid by the employee to the Union pursuant to section 49 of the *Labour Relations Act, 2002*.

“Deduction of agency fees from unionisable employees covered by collective agreements.

49.

- (1) A trade union that has concluded a collective agreement registered by the Industrial Court with an employer, group of employers or an employers’ organisation, setting terms and conditions of service for all unionisable employees covered by the agreement may request the Minister to issue an order requiring any employer bound by the collective agreement to deduct an agency fee from the wages of each unionisable employee covered



by the collective agreement who is not a member of the trade union. (emphasis added).”

98. The provision aforementioned does not provide an answer to the question, why agency fees? The other provisions of the Act too.

In the view of this court, the fee is paid for the work done to advance the interest of workers through collective bargaining without compelling free riders to join the trade union.

99. It is my further view that in providing for agency fees, the law takes cognizance of the fact that collective bargaining processes, require time, effort and money. Benefits accruing from the processes would normally benefit Union members and other unionisable employees who are not members. It would be unfair to permit non-members to enjoy benefits without contributing to the costs.
100. No doubt a trade union which has concluded a Collective Bargaining Agreement, which agreement has been registered by the court under the provisions of the *Labour Relations Act*, 2007, has the authority to advance the interests of both its members and other unionisable employees of the employer. In advancing the interests, the Trade Union, can, in my view, negotiate with the employer or an employers’ union, initiate litigation, and or engage other legal avenues.
101. Having stated as I have hereinabove, I am not persuaded by the Claimants’ argument that since they were not members of the Interested Party Union, the Cause No. 1315 of 2013 did not apply to, and, benefit them.
102. Important to state that all the Claimants’ witnesses who testified, stated that they were being deducted agency fees. There was no evidence placed before me to suggest that some or all of the other Claimants were not paying the agency fees. I hold the view that they were paying.
103. As shall be demonstrated shortly hereinafter, the above-stated litigation by the Interested Party bore benefits, which benefits the Claimants cannot purport to waive. In any event, they admitted in their evidence that they at all material times benefited from the efforts of the Interested Party Trade Union. Enjoyment of the benefits derived from the litigation cannot be an exception.
104. I am persuaded that the suit applied to the Claimants as submitted by Counsel for the Respondents.
105. Having concluded as I have, I now turn to consider whether the suit herein is res judicata. The doctrine of res judicata is provided for under section 7 of the *Civil Procedure Act*, thus:

“No court shall try any suit or issue 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 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 by such court.”

106. The Act also provides explanations regarding the application of the doctrine;

Explanation. (1)—The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. (2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to the right of appeal from the decision of that court.



Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. (4)—Any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. Explanation.

- (5) —Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused. Explanation.
- (6) —Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

- 107. The doctrine of res judicata provides a bar to re-litigation on an issue of fact or law that has been conclusively decided by a court of competent jurisdiction. The rule of res-judicata is anchored on two principles; there must be an end in litigation and a party should not be vexed twice over the same cause of action – see Nairobi High Court Constitutional Petition No. 212 of 2011 – E. T. vs. The Attorney General & J.N.K. (2012) eKLR.
- 108. On the essence of the doctrine, the Supreme Court of Kenya, in the case of Kenya Commercial Bank Limited vs. Muiri Coffee Estate Limited & Another No. 42 of 2014 (2016) eKLR, confirmed in its subsequent decision in John Florence Maritime Services Limited & Concern Cargo Forwarders Ltd vs. Cabinet Secretary Transport and Infrastructure & 3 others, elaborately stated;

“(52) Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights. Such a perception has a basis in comparative jurisprudence; in the Ugandan case of Hon. Norbert Mao v. Attorney-General, Constitutional Petition No. 9 of 2002; [2003] UGCC3, the petitioner brought an action on behalf of 21 persons from his constituency, for declarations under Article 137 of the Uganda SC PETITION NO. 17 OF 2015 Page 26 of 64 Constitution, and for redress under Article 50 of that Constitution. The matter arose from an incident in which officers of the Uganda Peoples Defence Forces attacked a prison, and abducted 20 prisoners, killing one of them. Unknown to the petitioner, another action had already been filed under Article 50, seeking similar relief; and Judgment had been given in Hon. Ronald Reagan Okumu v. Attorney-General, Misc. Application No.0063 of 2002, High Court HCT 02 CV MA 063 of 2002. The Constitutional Court dismissed the petition, on a plea of res judicata, declining the petitioner’s pleas that certain important constitutional declarations now sought, had not been accommodated in the earlier Judgment.”



109. In John Florence Maritime Services Ltd (supra) the Supreme Court held:

“ 54. The doctrine of res judicata, in effect, accords 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 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.”

110. For a party to successfully raise a plea of res judicata, it must be demonstrated that, first, the issue in the first suit must have been decided by a competent court. Second, the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar. Third, the parties in the former suit should be the same parties or parties under whom they or any of the claim, litigating under the same title. (see the ET vs. The Attorney General Case (supra).

111. There is no doubt in my mind that in Cause No. 1315 of 2013 – Union of National Research and Allied Institutes Staff of Kenya (UNRISK) vs. Kenya Medical Research Institute (KEMRI)[the earlier suit] (supra), there was a judgment rendered by this court. It was a final determination by a competent court, over the issues that were presented by the parties.

112. Having noted as I have hereinabove, I now turn to consider the issues that were for determination in the earlier suit and those that are in the current suit. Put in another way, the substance of the suits. I have carefully considered the material before me and conclude that the subject matter in the earlier suit was the allowances payable to the employees of the 1st Respondent. The court notes that the allowances that the Union was pursuing, are the same allowances that the Claimants are pursuing in the instant matter, namely on call, emergency allowance and extraneous allowance.

113. It is imperative to state that the court in the earlier suit concluded:

“ 11. The co-opted committee in its recommendations noted that the respondent was a Health Parastatal mandated to carry out Human Health-related Research. Further, the respondent handled patients and clinical specimens as well as highly infectious disease outbreaks. It therefore cannot be gain said that the respondent’s core staff for carrying out its mandate are doctors and health workers. The two circulars over which this dispute is about concern allowances for doctors and public health workers.

12. The fact that the parent Ministry did not communicate the application of the circulars to the respondent’s employees is an administrative omission which cannot be used as a reason to deprive the respondent’s workers of benefits enjoyed by their compatriots in the same industry.

13. The court therefore directs that the respondent implements the two Government circulars on its employees affected by the circular and further that the accrued arrears be budgeted for and paid in the succeeding financial year in line with the Treasury’s fiscal policy and financial apportionments for other Government’s recurrent expenditure.”



114. I agree with Justice Radido’s holding in the Okiya Omutatah Okoiti & Another vs Kemri Board of Management & 4 others [supra] that the only avenue available to the Claimants is to pursue enforcement of the judgment in the earlier case and not pursue a re-litigation over the allowances.

115. By raising the plea of res judicata, the Respondents inclusive of the 1st Respondent are saying and acknowledging that the earlier case applied equally to the Claimants and the benefits accruing therefrom are there for them to enjoy.

116. In the affidavit sworn on the 8th October 2021, CW3, Eric Lelo deponed:

“That vide a letter dated 27th September 2019, which was about 1 year and 10 months after this Claim was filed in Court, KEMRI [the 1st Respondent] noted this discrimination and sought the Authority to pay the allowances claimed therein. This culminated in a request by the Advocates for the 1st, 3rd and 4th Respondents on 6th February 2020, after the 2nd Claimant’s witnesses had testified on the 16th October 2019, and 13th December 2019, to the Court to allow them to pay off the allowances claimed by the Claimants herein.”

117. The letter by the 1st Respondent delivered to the Chief Executive Officer of the 4th Respondent, reads in part:

“RE: Authority to pay extraneous and risk allowance

KEMRI received a total of Ksh. 473 million from the exchequer on the 4th July 2019 to cater for payments of extraneous and risk allowances for Health Workers as well as all the other staff employed in the institute. The award followed an appeal through our letter to the Treasury dated November 2018. A Consent Agreement dated 4th February 2019 was deposited in court. This Agreement was negotiated between the Union of National Research Institute staff of Kenya [UNRISK] and KEMRI Management which was subsequently approved by the KEMRI Board of Management.

The consent Agreement specifically addressed payments of extraneous allowances to all KEMRI Staff and emergency allowances to all scientific staff [see attached copies]. In this regard, having been awarded this money by the Treasury, we are seeking Authority from the Salaries and Remuneration Commission [SRC] to pay this money to the staff of KEMRI.”[Emphasis added].

118. The consent referred to in the letter was filed in Court on the 6th of February 2019 in cause No. 1315 of 2013, it reads:

“By consent of both parties and, subsequent to the meeting held on the 4th of February 2019, it is agreed as follows:

- a. Extraneous allowance will be payable to all employees in service i.e. [Job Group KEMRI-KEMRI 1-12].
- b. Emergency call allowance will be payable to all Research Scientists and Clinical Officers.
- c. That the allowance payable be budgeted for in the succeeding financial year in line with the Treasury’s Fiscal policy and financial apportionment.



- d. The effective date in respect of the implementation of the two allowances be 1st July 2019.
- e. The Respondents to seek approval from the Government Authorities.
- f. Implementation will be subject to approval and funding by the relevant Government Authorities.
- g. The contempt of Court Application dated 12th June 2018 and proceedings therein be and is hereby withdrawn from the Court.
- h. Each Party to bear its own costs.”

119. Undeniably, the letter, the 1st Respondents Board meeting’s minutes of 3rd August 2018 (which I have carefully read), and the Consent Agreement, leave no residual space for imagination or argument that the issue of the allowance, the subject matter was not conclusively handled in the earlier suit, and what was left was something beyond drawing of fruits therefrom by the employees of the 1st Respondent, in the course of the 1st Respondent implementing the outcome of the negotiations that were in the judgment and the consent.

120. The Claimants have boldly argued that they were not parties in the earlier suit and that this matter is all about discrimination and has nothing to do with the circulars and the allowances that were mentioned therein. However, I have not lost sight of the fact that in his evidence under cross-examination CW4, clearly stated that the circulars were the genesis of the instant suit. Further, I find no difficulty in concluding that in the earlier suit, the Claimants herein litigated under/through the Interested Party Union.

121. At this point it becomes imperative to heed the caution sounded in E.T vs. The Attorney General and Another (supra), thus:

“ 57 The courts must always be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in the form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi vs. National Bank of Kenya Limited and Others (2001) EA 177, the court held that ‘parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.’ In that case, the court quoted Kuloba J., in the case of Njangu vs. Wambugu and Another Nairobi HCcc No. 2340 of 1991 (unreported) where he stated, ‘if parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic facelift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata’

122. Imperative to state that this decision is not a determination as to whether the Claimants are entitled to the allowances, the subject matter herein. What I have rendered myself on in this decision is whether the Claimants can bring this claim despite the existence of the judgment and consent in the earlier suit.

123. By reason of the foregoing premises, it is my view, that the Claimants’ claim herein is an attempt to run away from a binding judgment and consent order for reasons one cannot easily fathom. However, this court cannot be off the mark in inferring from the circumstances of the case that the attempt



has been stirred by a desire to push for more allowances like non-practice allowance even for drivers. This is in ignorance of the scope of the doctrine of res judicata. The plea of res judicata applies not only to points upon which the court was actually required by the parties to form an opinion on and pronounce judgment but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time – see Henderson vs. Henderson (1843) ER 313. I resist sanctioning this attempt.

124. By reason of the premises, I come to an inescapable conclusion that this claim is res judicata and strike it out.
125. Having found as I have hereinabove, I find it not necessary to proceed to render myself on the other issues framed.
126. Each party to bear its own costs.

Read signed and delivered this 26th day of October, 2023.

OCHARO KEBIRA

JUDGE.

In presence of:

Mr. Jaoko for Claimants

Mr. Okeche holding brief for Mr. Ouma for 1st, 2nd and 3rd Respondents

No appearance for other Respondents

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 has 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 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.

A signed copy will be availed to each party upon payment of court fees.

OCHARO KEBIRA

JUDGE

