



Biiy v Panyako & 2 others; Laptrust & another (Interested Parties) (Employment and Labour Relations Cause 12 of 2017) [2023] KEELRC 2494 (KLR) (13 October 2023) (Ruling)

Neutral citation: [2023] KEELRC 2494 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 12 OF 2017
AN MWAURE, J
OCTOBER 13, 2023**

BETWEEN

JOHN K. BIY CLAIMANT

AND

SETH PANYAKO 1ST RESPONDENT

REGISTRAR OF TRADE UNIONS 2ND RESPONDENT

KENYA NATIONAL UNION OF NURSES 3RD RESPONDENT

AND

LAPTRUST INTERESTED PARTY

LAPFUND INTERESTED PARTY

RULING

1. The claimant/applicant filed a notice of motion dated March 8, 2022 seeking the following orders that:
 - a. service of this application be dispensed with in the first instance and the same be heard on a priority basis.
 - b. the honourable court be pleased to grant leave to the claimant to amend his memorandum of claim
 - c. the draft amended memorandum of claim be deemed as properly filed subject to payment of requisite court fees.
 - d. the claimant be granted leave to file and serve a supplementary affidavit.
 - e. the costs of this application



2. The application is grounded on the affidavit of John K. Biiyand or the grounds on the face of the application.

Claimant's Case

3. The claimant states that he filed this claim on January 6, 2017 and subsequently amended it on January 27, 2017.
4. The claimant avers that on April 6, 2017, this court gave orders that he was to continue receiving his allowance until he lawfully exits office and the same was served upon respondents
5. The claimant avers that despite service the 1st and 3rd respondent stopped paying his allowance from June 2017 to April 2021 when elections were conducted and the new officials of the 3rd respondent took office.
6. The claimant avers that at time of the order he was earning a responsibility and airtime allowance of Kshs 80,000 and Kshs 5,000 respectively.
7. The claimant avers that at the time of filing the claim he never contemplated that the 1st and 3rd respondent would stop paying his allowances hence the claim was not included in the amended memorandum of claim.

1st and 3rd Respondents' Case

8. 1st and 3rd respondents oppose the claimant's application by a replying affidavit sworn by the 1st respondent who was the general secretary of the 3rd respondent.
9. The respondents aver that the purported cause of action arose in February 2017 and in application of section 90 of the Employment Act and section 4(1) of the Limitation of Action the cause of action is outside the limitation of time.
10. The respondents aver that the issue of responsibility and airtime allowances was considered by the court in Kericho ELRC Cause 13/2020 between the same parties and the claimant was awarded Kshs 2,040,000.
11. The respondents aver that the claimant ought to appeal against the judgment and not seek amendments in a different court of concurrent jurisdiction seeking different answers on the same questions and/or issues that have already been determined.

Analysis and Determination

12. The main issue is whether the claimant's proposed amendments in the amended memorandum of claim are res judicata.
13. The respondent submitted that the issue of responsibility and airtime allowances with effect from February 2017 to July 2019 was considered by the court in case no Kericho ELRC Cause No13/2020 between the parties.
14. The respondent further submitted that the court in the aforesaid suit also considered and rendered itself as to when the claimant exited office as the National Chairman of the 3rd respondent. At paragraph 39 and 47 of the said Judgment the court determined expressly when the claimant exited office as National Chairman wherein it said the claimant exited office July 3, 2019 and accordingly awarded the impugned allowances up to that date.



15. On the other hand, the claimant in his supplementary affidavit deponed that the judgment in the Kericho case, limited the award to the period ending July 3, 2019 contrary to the orders dated April 6, 2017 which were to the effect that he was to continue receiving payment of allowances until he lawfully exits office of National Chairman of the 3rd respondent which was to be effective until a new chairman was elected to office. And new officials of the 3rd respondent including the chairman took office after elections on April 14, 2021.

16. The general principle of res judicata is captured in section 7 of the Civil Procedure Act which provides as follows: -

“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.”

17. In Joseph Kaguthi & 11 others v Permanent Secretary Ministry of Interior & Co-ordination of Government & another [2021] eKLR the court observed:

“The key elements that would give rise to *res judicata* were identified in the case of *Uburu Highway Development Ltd v Central Bank of Kenya* [1999] eKLR to include;

- “(a) the former judgment or order must be final;
- (b) the judgment or order must be on merits;
- (c) it must have been rendered by a court having jurisdiction over the subject matter and the parties; and
- (d) there must be between the first and the second action identity of parties, of subject matter and cause of action.”

18. In Joseph Tama Ndua & 10 others v Jacaranda Hotels (MSA) Ltd t/a Jacaranda Indian Ocean Beach Resort [2019] eKLR, the Court of Appeal explained Section 7 as follows:

“Therefore, in order for *res judicata* to arise, the following elements must be present.

- (a) The suit or issue was directly and substantially in issue in the former suit.
- (b) That former suit was between the same parties or parties under whom they or any of them claim.
- (c) Those parties were litigating under the same title.
- (d) The issue was heard and finally determined in the former suit.
- (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”



19. The claimant in Kericho ELRC Cause No 13 of 2020 raised the issue which is the basis of the proposed amendment and the court clearly pronounced itself on the issue of responsibility and airtime allowance and when his employment was lawfully terminated. Paragraph 47 of the judgment read:

“As regards the prayer for monthly allowances, I see no reason for denying the claimant the unpaid sum of Kshs. 85000 per month from June 2017 to the day he lost his employment and his position as the Chairman of the respondent’s NEC. He did not state when he lost his job after the union wrote the letter dated 3rd July 2019. I will treat the termination date as 3rd July 2019 and award the claimant the arrears of his allowances up to that date being 24 months x Kshs.85,000 equalling to Kshs 2,040,000.”

20. The case is also overtaken by time as the court in ELRC 13/2020 clearly rules the termination date was July 9, 2019. The application to amend the memorandum of claim was filed on March 8, 2022. The claimant was within the time from July 7, 2019 to March 8, 2022 but nevertheless it is clear the subject matter giving raise to this application for amendment of the claim was fully litigated and judgement rendered as per Kericho case No 13/2020. He was awarded arrears of his allowance at kshs 2,040,000/-. The court ordered claimants allowances be paid up to July 3, 2019.

21. The court cannot re-open the matter and if the claimant was not satisfied with the court’s ruling the only solution was to file an appeal.

22. Having said so the court holds the claimants proposed amendments of his claim cannot be entertained as is already dealt with by a court of concurrent jurisdiction with this court.

23. The applicant’s application is therefore dismissed.

24. Each party to meet their respective costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 13TH DAY OF OCTOBER, 2023.

ANNA NGIBUINI MWAURE

JUDGE

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.

ANNA NGIBUINI MWAURE

JUDGE

