



**Mwaura v Safaricom PLC (Cause E496 of 2021)  
[2023] KEELRC 2392 (KLR) (5 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2392 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E496 OF 2021  
BOM MANANI, J  
OCTOBER 5, 2023**

**BETWEEN**

**FRANCIS MWAURA ..... CLAIMANT**

**AND**

**SAFARICOM PLC ..... RESPONDENT**

**RULING**

**Background**

1. Before me are two applications. They have been separately filed by each of the two disputants.
2. The first application is dated February 10, 2023. Through it, Safaricom PLC (hereafter referred to as the Respondent) has moved the court seeking to have the witness statement by one Cyrus Wanjohi dated January 27, 2021 struck out. It is the respondent's case that the said witness statement is sub-judice.
3. The respondent also prays that the further list of documents filed by Francis Mwaura (hereafter called the claimant) on January 27, 2023 be struck out. It is the respondent's case that the basis for introduction of the impugned additional documents has not been demonstrated. And neither is it clear what the relevance of the documents is.
4. It is the respondent's case that attempts by the claimant to introduce the witness statement and the additional documents is an abuse of the court's process. Therefore, the two instruments ought to be struck out. The respondent also prays that costs of the application be shouldered by the claimant.
5. The second application is dated February 27, 2023. In the application, the claimant prays that this action be consolidated with cause ELRC No. E012 of 2022 in order to obviate the need to strike out the witness statement by Cyrus Wanjohi.



## Analysis

6. The basis for the application dated February 10, 2023 is that the matters that Cyrus Wanjohi alludes to in the impugned witness statement relate to his pending case against the Respondent in ELRC Cause No. E012 of 2022. The matters have nothing to do with the case between the claimant and respondent.
7. It is the respondent's position that the case between it and Cyrus Wanjohi (ELRC Cause No. E012 of 2022) is still pending resolution. Therefore, attempts by the Claimant to introduce the impugned witness statement in this cause and have the court pronounce itself on it amount to an invitation to the court to determine the case between Cyrus Wanjohi and the Respondent outside the pending proceedings in ELRC Cause No. E012 of 2022. That such action amounts to an abuse of the court's process and is sub-judice as it is tantamount to asking this court to determine (through this action) issues that are pending in a separate cause.
8. In reaction to the application to strike out the aforesaid witness statement, the claimant filed the application dated February 27, 2023. In the application, the claimant now prays that the pending suit between the said Cyrus Wanjohi and the Respondent (ELRC Cause No. E012 of 2022) be consolidated with the current action.
9. I have studied the witness statement by the said Cyrus Wanjohi filed in this action. It is clear to me that in the statement, the said Cyrus Wanjohi dwells at length on matters that touch on the pending dispute between him and the Respondent. At the tail end of the statement, the said Cyrus Wanjohi suggests that the treatment that he was subjected to and which triggered the decision by him to file the pending case against the respondent is the same treatment that the claimant was subjected to.
10. Undoubtedly, through this witness statement, the claimant and the said Cyrus Wanjohi are indirectly inviting the court to pronounce itself on matters that are in dispute between Cyrus Wanjohi and the Respondent which are the subject of a separate pending case. It is improper for the claimant and this witness to try to have the court to make findings that touch on the case between the respondent and Cyrus Wanjohi through these proceedings and then require it to apportion culpability on the respondent in this action on the basis of those findings. If the court were to adopt the approach aforesaid, that will certainly amount to abuse of its process.
11. If Cyrus Wanjohi wishes to testify in this action, he is free do so. However, his evidence must be strictly confined to matters that are between the claimant and the Respondent and which are connected to the cause of action in this suit. Such matters must be within his personal knowledge. He must not attempt to litigate his case through this cause.
12. As such, the witness statement by the said Cyrus Wanjohi filed on January 27, 2021 infringes, albeit indirectly, on the principle against sub-judice. Importantly, the attempt to introduce the witness statement in its current form constitutes and abuse of the court's process. I will therefore grant the order to strike it out.
13. As regards the relevance of the documents proposed for introduction through the claimant's list of documents filed on January 27, 2023, it is premature for the court to seek to determine this matter at this stage. This is a matter that can only be addressed during trial to evaluate the relevance and probative value of the impugned documents. As a result, the prayer to strike out the said further list of documents is rejected.
14. Regarding the application for consolidation, the principles upon which the court may consolidate suits are now well settled. Such order can only issue where the actions sought to be consolidated raise the same questions of fact and law.



15. The reasons that informed the respondent's decision to terminate the contracts of service for the claimant and Cyrus Wanjohi may relate to their alleged poor performance. However, this does not make the facts of the two cases the same.
16. As submitted by the respondent, the contracts of service between it and the two employees were distinct. Therefore, the performance evaluation of the two was individual based.
17. In the premises, there is no way that grievances emanating from these two processes can properly be the subject of the same trial. The mere fact that the two former employees suffered the same fate following their individual performance evaluation cannot be reason enough to consolidate their suits.
18. In the premises, the court finds that the two actions are unsuitable for consolidation. Accordingly, the application for consolidation is declined.

### **Determination**

19. Ultimately, the court issues the following orders: -
  - a. The witness statement by Cyrus Wanjohi dated January 27, 2021 is struck out.
  - b. The court declines to strike out the claimant's further list of documents dated January 27, 2023.
  - c. The court declines to consolidate this action with ELRC Cause No. E012 of 2022.
  - d. Costs of the two applications are granted to the respondent.

**DATED, SIGNED AND DELIVERED ON THE 5<sup>TH</sup> DAY OF OCTOBER, 2023**

**B. O. M. MANANI**

**JUDGE**

**IN THE PRESENCE OF:**

..... **FOR THE CLAIMANT**

.....**FOR THE RESPONDENT**

**ORDER**

**IN LIGHT OF THE DIRECTIONS ISSUED ON 12<sup>TH</sup> JULY 2022 BY HER LADYSHIP, THE CHIEF JUSTICE WITH RESPECT TO ONLINE COURT PROCEEDINGS, THIS DECISION HAS BEEN DELIVERED TO THE PARTIES ONLINE WITH THEIR CONSENT, THE PARTIES HAVING WAIVED COMPLIANCE WITH RULE 28 (3) OF THE ELRC PROCEDURE RULES WHICH REQUIRES THAT ALL JUDGMENTS AND RULINGS SHALL BE DATED, SIGNED AND DELIVERED IN THE OPEN COURT.**

**B. O. M MANANI**

