



**Otieno & another v East African Center for Human Rights (EACHRIGHTS)  
(Cause E586 of 2022) [2023] KEELRC 3445 (KLR) (21 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3445 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E586 OF 2022  
NZIOKI WA MAKAU, J  
NOVEMBER 21, 2023**

**BETWEEN**

**MARTIN OTIENO & ANOTHER ..... CLAIMANT**

**AND**

**EAST AFRICAN CENTER FOR HUMAN RIGHTS  
(EACHRIGHTS) ..... RESPONDENT**

**RULING**

1. The Respondent/Applicant filed a Notice of Preliminary Objection dated 20<sup>th</sup> September 2022 seeking to have the Claimants' Statement of Claim dated 15<sup>th</sup> August 2022 struck out with costs to the Respondent, on the basis that this Honourable Court has no jurisdiction to hear and determine the matter.
2. In response, the 2<sup>nd</sup> Claimant/Respondent swore a Replying Affidavit dated 14<sup>th</sup> March 2023 averring that the Respondent's Notice of Preliminary Objection (hereinafter "the Respondent's P.O") was unfounded, an outright misrepresentation of facts and a waste of court time with no arguable and triable issues. That the Respondent's P.O was also defective as it did not disclose the law invoked and why this Court lacked jurisdiction to handle the matter. She averred that this Court has jurisdiction to handle this matter by virtue of Article 162(2) and 165(5) of *the Constitution* of Kenya and section 12 of the *Employment and Labour Relations Court Act*, 2011. Furthermore, there exists an employer-employee relationship between the Claimants and the Respondent. The 2<sup>nd</sup> Claimant's stance was that on 28<sup>th</sup> July 2022, together with the 1<sup>st</sup> Claimant, they filed a petition ELRC PET No. E136 of 2022 against the Respondent for them to be allowed to have legal representation during the internal hearing and for a declaration that their rights were being violated. That upon the Respondent being served with the said Petition on 4<sup>th</sup> August 2022, it issued the Claimants with termination letters following which they filed the suit herein for unfair termination. She asserted that the two files had since been consolidated to be heard together.



3. The 2<sup>nd</sup> Claimant further averred that the Claim herein was not res-judicata because the Petition was filed before the Respondent had terminated their employment and further, the Court has not declared any verdict/judgement on any of those matters. That in any case, the Respondent admitted to jurisdiction of this Court and filed a Counter Claim and was using the P.O as a delay tactic with the aim of wasting court time and frustrating them. She urged the Court to intervene in the interest of justice and protect them from vexatious and frivolous applications. She believed that the Respondent's P.O lacked merit and should be dismissed with costs.
4. In response, the Respondent/Applicant filed a Further Affidavit sworn on 6<sup>th</sup> June 2023 by Mr. Isaack Otieno Okero, who averred that the Respondent's P.O was merited as it clearly stated that this Honourable Court lacks the requisite jurisdiction to entertain the Claimants' suit. His reasoning was that there was already an existing suit, being Nairobi Employment and Labour Relations Court Constitutional Petition No. E136 of 2022 filed on 28<sup>th</sup> July 2022 between the same parties and based on similar facts and which was pending resolution before a Court of competent jurisdiction. That further, contrary to the 2<sup>nd</sup> Claimant's assertions, the said Nairobi ELRC Petition No. E136 of 2022 and Nairobi ELRC Cause No. E586 of 2022 have never been consolidated as alleged or at all and that the said assertions were thus a misrepresentation of material facts that this Court should disregard in toto. It was Mr. Okero's further averment that the Respondent's P.O was actually wholly premised on the doctrine of sub judice as more particularly pleaded hereinbefore.

#### **Respondent/Applicant's Submissions**

5. The Respondent/Applicant asserts that the issues for determination before this Court are whether the present matter is sustainable on account of the principle of sub judice; whether the present matter is an abuse of court process; and what are the appropriate orders in this Application. The Applicant submitted that whilst it is not in dispute that Article 162(2)(a) of *the Constitution* as read with section 12 of the *Employment and Labour Relations Court Act*, 2011 vests the Employment and Labour Relations Court (hereinafter "the ELRC") with jurisdiction to determine disputes relating to employment and labour relations, the operation of the principle of sub judice is sufficient to oust the Court's jurisdiction. That as defined in the Black's Law Dictionary 9<sup>th</sup> edition and under section 6 of the *Civil Procedure Act* Cap 21, 'sub judice' provides that a court is barred from proceeding with a trial in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties and where the former suit is pending in a court of competent jurisdiction.
6. The Applicant cited the case of Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR wherein Mativo J. (as he then was) succinctly enumerated the prerequisite principles that need to be present for one to successfully raise a preliminary objection on account of the doctrine of sub judice as follows:
  - a. There must exist two or more suits filed consecutively;
  - b. The matter in issue in the suits or proceedings must be directly and substantially the same;
  - c. the parties in the suits or proceedings must be the same or litigating under the same title; and
  - d. the suits must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.
7. The Respondent submits that additionally, the Court in the Republic v Paul Kihara Kariuki, Attorney General (supra) further stated that when the matter in controversy was the same, it was immaterial what further relief is claimed in the subsequent suit or suits. It was the Applicants' further submission that the Courts have severally sought to explain the rationale behind the doctrine of sub judice. For



instance, in the case of *Kinatwa Co-operative Savings & Credit Society Limited v Kinatwa Prestige Ltd* [2021] eKLR, the Court intimated that the doctrine of sub judice was meant to prevent the possibility of having conflicting orders emanating from two or more different courts over the same subject matter whilst in *Republic v Paul Kihara Kariuki, Attorney General* (supra), the Court opined that it sought to prevent wastage of resources and frivolous litigation especially in a judiciary overburdened with a large number of pending cases and facing a stark lack of resources. The Applicant's submission was that in the instant case, the Claimants' suit filed vide the Statement of Claim dated 15<sup>th</sup> August 2022 is indeed sub judice because:

- a. Two suits have been instituted against the Respondent, that is, Nairobi ELRC PET No. E136 of 2022 and Nairobi ELRC Cause No. E586 of 2022;
  - b. The matter in issue in both suits are directly and substantially the same in that they seek to challenge the propriety/lawfulness of the disciplinary process employed by the Respondent against the Claimants/Petitioners;
  - c. The parties in both suits are the same being Martin Oloo and Judith Oloo v The East African Center for Human Rights; and
  - d. Both suits are pending before the Nairobi ELRC, which has the jurisdiction to hear and determine the dispute pitting the Claimants and the Respondent.
8. The Applicant submitted that the mere fact the Claimants were seeking additional reliefs in this matter did not in any way negate the operation of the sub judice principle as was held in the *Republic v Paul Kihara Kariuki, Attorney General* case (supra), and that the Court should so find. On the issue of abuse of court process, the Applicant submitted that in the case of *Republic v Paul Kihara Kariuki, Attorney General* (supra), the Court held that pursuing two processes at the same time constituted abuse of court/legal process. That in *Ephraim Miano Thamaini v Nancy Wanjiru Wangai & 2 others* [2022] eKLR, Wabwoto J. succinctly discussed what may amount to an abuse of court process as follows:

"Abuse of judicial process is a term generally applied to a proceeding which is wanting in bona fides and is frivolous vexations and oppressive. It also means abuse of legal procedure or improper use of the legal process. It creates a factual scenario where a party is pursuing the same matter by two court process. In other words, a party by the two-court process is involved in some gamble, a game of chance to get the best in the judicial process."

9. It was the Applicant's submission that there was simply no justification for the Claimants to file the matter herein whilst ELRC PET No. E136 of 2022 was still pending hearing and determination. That if there was any change, the Claimants' only recourse would have been to seek to amend their pleadings to reflect not only the change in circumstances but also incorporate any additional reliefs. It thus urged this Court to find that the Claimants' decision to file another suit based on the same subject matter in the same Court is not only fatal and bad in law but also an abuse of the Court process. The Applicant submitted that under section 1A as read with section 1B of the *Civil Procedure Act*, Cap 21, courts are obligated to uphold the overriding objective of the *Civil Procedure Act*, which is to facilitate inter alia, the expeditious resolution of disputes and to ensure the efficient use of the available judicial and administrative resources. That to give effect to this objective, the Court is empowered under section 3A of the *Civil Procedure Act* as read with Order 2, rule 15(1)(d) of the Civil Procedure Rules, 2010 to make such orders as may be necessary for the ends of justice or to prevent abuse of Court process, including striking out any pleading that it deems to be an abuse of court process. The Applicant argued that there is also ample precedent on the issue such as in the cases of *Republic v Paul Kihara Kariuki, Attorney General* (supra) and *Ephraim Miano Thamaini* (supra) wherein the Courts made a finding that subsequent suits were filed in abuse of Court process and proceeded to strike them out in line with



the principle of sub judice. It urged this Court to exercise the powers vested upon it under section 1A as read with sections 1B and 3A of the *Civil Procedure Act* Cap 21 and Order 2, rule 15(1)(d) of the Civil Procedure Rules, 2010 to dismiss the matter herein and award costs to the Respondent for having been put to great labour and expense of defending the suit. In this regard, the Applicant invited the Court to take cognisance of the provisions of section 27(1) of the *Civil Procedure Act* that costs follow the event, as further underscored in the case of *Delilah Kerubo Otiso v Ramesh Chander Ndingra* [2018] eKLR.

### **Claimants/Respondents' Submissions**

10. According to the Claimants/Respondents, when Nairobi ELRC PET No. E136 of 2022 came up for mention before Mbaru J. on 27<sup>th</sup> February 2023, she directed that the files be mentioned together for consolidation. That further on 7<sup>th</sup> June 2023, Nduma J. directed the Claimants to withdraw one matter and proceed with Statement of Claim. That subsequently on 5<sup>th</sup> July 2023, the Claimants filed and served a Notice of Withdrawal of Nairobi ELRC PET No. E136 of 2022 that was duly filed. That the Claimants had therefore withdrawn the Petition and only had the Claim herein as their active case. As to whether the Claim offends the principle of sub judice, the Claimants/Respondents submitted that the principle obtains legal underpinning under section 6 of the *Civil Procedure Act*. That the Court in the case of *Kenya National Commission of Human Rights v Attorney General & others* [2020] eKLR set out the factors to consider in determining whether a suit is sub judice as follows: 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. The Claimants affirmed that the purpose of the sub judice rule was 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. According to the Claimant, the import of the foregoing position is that in such scenario, the matter filed later ought to be stayed and await determination to be made in the earlier suit. It was their submission that as hereinabove submitted, the only pending case between parties herein was the Statement of Claim before this Court as they had withdrawn the subject Petition. That the current Claim did not thus offend the principle of sub judice.
11. The Claimants submitted that it was in the interest of justice that the Respondent's P.O is dismissed there being no other pending suit between the parties in any competent court and further because they wished to proceed with the current Claim to conclusion. They submitted that they would be prejudiced if the matter was not heard and determined considering they had already withdrawn the Petition that had been filed before the Respondent unfairly terminated their employment.
12. The Respondent, in its Further Written Submissions, submitted a rejoinder that the Claimants had mistakenly submitted that the Court had previously held that in instances where two similar matters have been filed in a court of competent jurisdiction, the Court seized of the matter would stay the latter matter until disposal of the previous one. It argued that the correct holding of the Court in respect to instances where the principle of sub judice was found to apply was that the latter suit would be dismissed on account of the same amounting to an abuse of court process, and not staying of the latter suit as the Claimant would want this Court to believe. The Respondent further submitted that the Claimants had also mistakenly submitted that Petition No. E136 of 2022 had already been withdrawn and that therefore the Respondent's P.O that was premised on the principle of sub judice had been overtaken by events. It denied that the said Petition had been withdrawn, asserting that whilst the Petitioners had indeed filed the withdrawal notice, the Court seized of the said matter was yet to give any orders and/or directions regarding the withdrawal and issue of payment of costs to the Respondent. It urged the Court to be guided by the finding in the case of *Shadrack Silla Muthama v Kebaso Wycliffe*



Maengwe [2021] eKLR where Nyukuri J. held inter alia that although a party had an unfettered right to withdraw a suit, the same could not be done without permission of court and subject to just terms such as payment of costs, especially when the respondent had filed their documents. The Respondent submitted that this Court ought to find that in the absence of a Court Order acceding to the Petitioners' quest to withdraw Petition No. E136 of 2022, two similar suits are still active in court and therefore offend the doctrine of sub judice.

13. The Court is being invited to determine a preliminary objection. The Respondent asserts that the Claimants have another suit pending before this Court being Petition No. E136 of 2022. The Claimants assert that they have withdrawn the said Petition per their notice of withdrawal on 5<sup>th</sup> July 2023 in the said matter. In law, sub judice which in Latin literally means "under a judge", means that a particular case or matter is under trial or being considered by a judge or court. Is a matter that has been withdrawn under consideration by a judge? The Respondent mischievously failed to indicate to the Court that a notice of withdrawal had been filed in PET No. E136 of 2022. It is trite that parties do not need the leave of court to withdraw a suit and neither does the notice of withdrawal require a court order to give effect to the withdrawal. The previous suit having been withdrawn, the principle of sub judice cannot apply to this case. As such the preliminary objection is misplaced and a complete waste of precious judicial time. it is accordingly dismissed with costs to the Claimants.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF NOVEMBER 2023**

**NZIOKI WA MAKAU**

**JUDGE**

