



**Kiiru v Ministry of Lands & Settlement & another (Cause 1560 of 2018)  
[2023] KEELRC 3218 (KLR) (7 December 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3218 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1560 OF 2018  
B ONGAYA, J  
DECEMBER 7, 2023  
(FORMERLY CMCC 5051 OF 2003 AT MILIMANI)**

**BETWEEN**

**NANCY WAMBUI KIIRU ..... PLAINTIFF**

**AND**

**MINISTRY OF LANDS & SETTLEMENT ..... 1<sup>ST</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The plaintiff/applicant filed a chamber summons application on October 24, 2023 through Guserwa & Company Advocates. The application was under sections 1A, 1B, and 3A of the *Civil Procedure Act*, order 8 rule 3 and rule 1 of the *Civil Procedure Rules* and all enabling provisions of law. The applicant is seeking the following orders:
  - a. That this matter be certified urgent and be heard ex-parte in the first instance.
  - b. That the Honourable Court be pleased to grant leave to the plaintiff/applicant to further amend the plaint dated April 16, 2002.
  - c. That the further draft amended plaint attached herewith be deemed as duly filed and served upon payment of the pre-requisite court fees.
  - d. That the cost of this application be provided for.
2. The application is supported by the affidavit of Judith Guserwa, Advocate and made on the following grounds:
  - a. That it has been necessary to amend and include the paragraphs 2, 2A, 2B, 5A (iii), 6 and prayers sought in the plaint prior to the hearing of the main suit.



- b. That no prejudice will be suffered by the defendants.
    - c. That it is in the interest of justice that this application be allowed.
  3. In turn the respondent's filed a notice of preliminary objection dated November 11, 2023 through the Attorney General's office and made upon the following grounds:
    - a. That the Honourable Court lacks the requisite jurisdiction to hear and determine the present application for reasons that the present application is bad in law and an abuse of court process in that similar suit ELRC Misc. Application No. 45 of 2017 touching on the same facts, orders and cause of action had been amended as proposed herein and later withdrawn by the claimant before Honorable Lady Justice Anne Ngibuini on 30.11.2022 on the basis that the issues under dispute herein had been finalized.
    - b. That the Honourable Court lacks jurisdiction to hear and determine the present application for reasons that one of the proposed amendments at paragraph 5A, the subject matter for determination before this honourable court is the pension amount due to the claimant.
    - c. That lack of jurisdiction of Employment and Labour Relations Court with regards to issues of pension had been determined to finality by the Supreme Court decision in *Albert Chaurembo Mumba & 7 other (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Port Authority Pensions Scheme)*[2019]eKLR.
    - d. That the Supreme Court clearly made a finding that Employment and Labour Relations Court does not have the jurisdiction to hear and determine claims concerning pension. The apex court stated as follows;

“We do not see how a pensioner falls within the listed categories of persons and parties that can make an application or institute proceedings before the court. From the foregoing it is thus clear that the Employment and Labour Relations Court had no jurisdiction to hear and determine a dispute that relates to trustees of a pension scheme and members of the scheme particularly where the said members no longer employees of the sponsor. Besides, the trust so established as a pension scheme retains autonomy from both the sponsor and the employees hence its regulation by the authority.”
    - e. That the suit is an abuse of the court process.
    - f. That the suit is incompetent and ought to be struck out with costs.
  4. The Court has considered parties' respective positions and returns as follows.
  5. To answer the 1<sup>st</sup> issue, the Court returns that the further amended plaint is a mixed grill referring to pensions claims and claims of malicious, wrongful, unfair and unlawful termination. The objection to allowing the amendment is that the claims on pension are outside the Court's jurisdiction. It appears that to make a determination on that issue the Court will need to look at the evidence to scope the pension claims and, in the circumstances, the objection fails as it is not based on a pure point of law with undisputed facts. In any event, the residual claims will stand. The preliminary objection as an opposition to the further amendment is declined.



6. To answer the 2<sup>nd</sup> issue, the Court is asked to find that a similar suit ELRC Misc. Application No. 45 of 2017 touching on same facts, orders and cause of action had been amended as proposed herein and later withdrawn by the claimant before Mwaure, J on 30.11.2022 on account that the issues herein had been finalised. There is no replying affidavit to support the line of submission made for the respondents. The Court returns that if the previous suit was withdrawn, then the withdrawal may not bar the instant suit unless an order to that effect is shown to be in place. Essentially, the withdrawal of the suit would not be a determination on merits.
7. The Court has observed that the suit has dragged in courts for a very long time of 20 years since 2003 and it should be determined at most priority.
8. In conclusion, the application is hereby determined with orders as follows:
  - a. Leave is hereby granted for the applicant to file a paginated bundle to be relied on at the hearing including the further amended plaint, list and copies of documents and witness statement and to serve by December 21, 2023.
  - b. The respondent to file a paginated bundle of the response to the further amended plaint, list and copies of documents, witness statements and to serve by February 1, 2024.
  - c. The hardcopies of the bundles filed in (a) and (b) be placed on file.
  - d. Hearing of the suit on February 29, 2024 at 9.30 a.m. or soon thereafter for 30 minutes.
  - e. Costs of application in the cause.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 7<sup>TH</sup> DECEMBER, 2023.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

