



**Kenya Engineering Workers Union v Kenya Marine Contractors (EPZ) Limited
(Cause E047 of 2023) [2023] KEELRC 3466 (KLR) (7 December 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3466 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E047 OF 2023
M MBARÚ, J
DECEMBER 7, 2023**

BETWEEN
KENYA ENGINEERING WORKERS UNION CLAIMANT
AND
KENYA MARINE CONTRACTORS (EPZ) LIMITED RESPONDENT

RULING

1. The ruling herein relates to Notice of Preliminary Objections filed by the respondent, Kenya Marine Contractors (EPZ) Limited dated 12 October 2023 on the grounds that the claim filed on 17 May 2023;
 1. The suit is res judicata as the issues raised have been substantively heard and determined vide claimant's application dated 16 October 2017 in ELRC Cause 152 of 2012 – KEWU v KMC (EPZ) Ltd where the court dismissed the same in a ruling issued on 22 April 2021.
 2. The claimant herein has also filed an application dated 24 July 2019 in the aforementioned suit which raise similar issues and prayers as the present suit, yet the claimant herein has abandoned the same in favour of filing a fresh suit herein in order to mislead the court.
 3. Consequently, the suit herein is a vexatious abuse of court's time and resources and the same must be dismissed with costs.
2. In reply, the claimant filed Grounds of Opposition to the Preliminary Objections on the grounds that the current suit is not similar to Application in ELRC Cause No.152 of 2012 between the parties herein as the application was seeking execution. The suit herein is in line with Section 59 of the Labour Relations Act, 2007 (the LRA) and the objections made should be dismissed with costs.
3. The claimant also filed the Affidavit of Wycliffe Nyamwata the general secretary and aver that the claimant did not invoke Section 62 of the LRA as the CBA is as a result of long litigation in ELRC



Cause No.152 of 2012 as Mombasa and Appeal Application No.28 of 2015 at Mombasa. The CBA was signed due to contempt proceedings having been filed against the managing Director of the respondent in ELRC No. 152 of 2012 Mombasa.

4. The respondent declined to forward the CBA for registration as required and when the claimant forwarded the same, when due for registration in court in ELRC CBA No. E107 of 2022, the respondent filed an application seeking to object to the registration.
5. Persons who do not obey court orders waste court, taking alternative dispute resolution under Section 62 of *LRA* is not mandatory.
6. The respondent filed written submissions on the objections and on the grounds that Section 7 of the *Civil Procedure Act* a party should not file suit in which the matter is directly and substantially in issue and has been directly and substantially been the subject of a former suit between the same parties. In the case of *Abok James Odera v John Patrick Macharia Civil Application No.49 of 2001* the doctrine of res judicata was applied and two application filed over the same matter found inappropriate. The court looked at the guidelines that;

There is a previous suit in which the matter was in issue;

The parties were the same or litigating under the same title;

A competent court heard the matter in issue; and the issue has been raised once again in a fresh suit.

7. The claim herein is on the grounds that the claimant is seeking execution of the CBA whereas the claim is filed pursuant to Section 59 of the *LRA*. But the claim filed in the year 2012 and the current suit arise from a complaint of non-payment of salary increments, service pay and pay in lieu of notice. These were the same issues in the previous suit and the court delivered its determination. The claimant has given the current suit a facelift and grievances already addressed in the earlier suit. Reference to Section 59 of LRA is superfluous in these proceedings.
8. The claimant has failed to acknowledge receipt of Ksh.10 million from the respondent by way of liquidated guarantee and is in court with unclean hands.
9. Both parties attended court and made oral submissions. These are analysed and the issue for determination is whether the instant claim is filed contrary to res judicata principles.
10. The Court of Appeal in addressing the doctrine of res judicata in *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* (2017) eKLR held that;

The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.

11. Indeed, as submitted by the respondent the doctrine of res judicata is addressed under Section 7 of the *Civil Procedure Act* and is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end.



12. The claim herein filed on 19 May 2023 is on the grounds that the claimant is a trade union and has a Recognition Agreement and a CBA with the respondent. The subject CBA effective date is 1st August 2012 and was signed on 20 November 2020. The CBA is as a result of ELRC Cause No.152 of 2012 (Mombasa) and Civil Appeal No. 28 of 2015. The respondent declined to forward the CBA for registration and while parties waited for the hearing of the matter on appeal, the respondent dismissed 100 employees, members of the claimant.
13. The grievance is that the respondent has refused to pay members of the claimant salary arrears and terminal benefits as per the CBA.
14. The orders sought herein are that;
 - a. The court deems fit and declare the action of the respondent of refusal to implement duly registered CBA is unlawful, unfair and in bad faith.
 - b. The court deems fit and Order against the respondent to pay the claimant all the same arrears of Kshs. 21,764,098.11 and service gratuity of Kshs. 12,580,046 as tabulated at Appendix WAN 4 of this memorandum of Claim totalling Kshs. 34,344,144.11 and an additional amount yet to be tabulated for the six (6) employees due to lack of their details since we are yet to reach them as they were terminated.
 - c. The court do issue an Order against the responding to pay the interest at court rate to the entire amount the court allows from the effective date of the CBA being 1st August 2012.
15. With regard to ELRC Cause 152 of 2012 – KEWU v KMC (EPZ) Ltd, the issue in dispute was the failure by the respondent to conclude CBA on 9 issues and which related to;
 - a. Basics wage;
 - b. General wage increase;
 - c. House allowance;
 - d. Annual leave;
 - e. Compassionate leave;
 - f. Termination of employment;
 - g. Permanent transfer;
 - h. Redundancy; and
 - i. Effective date.
16. Judgment was delivered on 23 May 2014 with an award of 11% general wage increase from 1st August 2012 and 11% wage increase effective 1st August 2013 with the other terms of presented for determination to be in accordance with the statutory minimums. The court also directed parties to sign a CBA within 30 days.
17. The matter went on appeal, Civil Application No.28 of 2015 (Mombasa) and in a ruling delivered on 10 March 2017 the court held that there was delay in moving the court and the court could not turn a blind eye to a litigant who comes to court determined to obstruct and delay the cause of justice at every corner whilst expecting reprieve from the same court. ... the applicant's conduct throughout the proceedings leading to the instant application has been to delay by whatever means the finalisation of



the dispute. There is no good faith at all in the applicant's conduct and this court should not be seen to aid the applicant in its intransigence by allowing the application.

18. There is ELRC CBA No. E107 of 2022 (Nairobi) that came for registration and in a ruling delivered on 7 December 2022, the court allowed for the registration of the CBA dated 20 November 2020.
19. From the foregoing, the cause of action under ELRC No.152 of 2012 though between the same parties is different and separate from herein. One related to terms and conditions of employment and registration of a CBA while the current suit relates to the facts that while the claimant was waiting for the registration of the CBA, the respondent terminated the employment of its 100 members without payment of their salary arrears and terminal dues per the CBA.
20. This then forms a different and separate cause of action between the same parties. The res judicata rule does not apply in this new context.
21. Objections are also that the claimant filed application dated 24 July 2019 with regard to similar grounds as herein. This particular application is not attached to the proceedings herein. Even in a case where this application was available, which is not the case, the claim herein is premised on a CBA signed on 20 November 2020, a period of over a year since the referenced application dated 24 July 2019.
22. Parties have since been before court with regard to ERLC CBA No. E107 of 2022 (Nairobi). Further on 22 April 2021 the court in ELRC No.152 of 2012 (Mombasa) delivered a ruling with regard to claimant's application dated 16 October 2017 relating to tabulations of Ksh.10 million securing the matter on appeal and alleged contempt of court. The allegations that the respondent has since paid the claimant Ksh.10 million, in the given background, taking accounts should clarify such matter.
23. Cumulatively, the court finds no matter res judicata in the instant suit. The words of Judges of the Court of Appeal on 10 March 2017 resonate in these proceedings. The objections herein are just but another delay. The court will hear the claim on the merits.
24. Accordingly, objections herein through notice dated 12 October 2023 are found without merit and are hereby dismissed. The respondent shall pay the claimant costs assessed at Kshs. 50,000 within 14 days after which the same shall accrue interests at court rates until paid in full.

DELIVERED IN OPEN COURT AT MOMBASA THIS 7TH DAY OF DECEMBER 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

