



**Esevwe v University of Nairobi (Cause E458 of 2022)  
[2023] KEELRC 3221 (KLR) (7 December 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3221 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E458 OF 2022  
B ONGAYA, J  
DECEMBER 7, 2023**

**BETWEEN**

**FRANK ESEVWE ..... CLAIMANT**

**AND**

**UNIVERSITY OF NAIROBI ..... RESPONDENT**

**RULING**

1. The Claimant filed a notice of motion application dated 28.08.2023 through Omongo Gatune & Company Advocates. The application was under section 3A and 63(e) of the [Civil Procedure Act](#) cap 21 laws of Kenya and order 11 rule 3(h) of the [Civil Procedure Rules](#). The applicant is seeking the following orders:
  - a. That the mentioned suits (Nairobi ELRC E458 of 2022 and Nairobi ELRC E378 of 2023) be consolidated and thereafter be carried on as one action.
  - b. That the honourable court do give all necessary and proper directions as shall be necessary for the conduct of the said consolidated action.
  - c. The costs of the above-named suits including the costs of and incidental to this application be costs in the said consolidated action.
2. The application is supported by the supporting affidavit of Frank Esevwe and further supporting affidavit of Omer Maurice Owino and made on the following grounds:
  - a. Similar questions of law and fact are involved in the above-noted suits which are both pending before the Court.
  - b. Consolidation of the above-noted suits is necessary to avoid duplication of proceedings and multiplicity of suits.



- c. It would therefore be just, convenient and expedient for all parties involved if the above-noted suits were consolidated and heard as one.
3. The respondent filed the replying affidavit of Harrison Shimanyi Akala, the Deputy Registrar, Industrial Relations for the respondent sworn on September 22, 2023 and filed through C.S Collins F. Omondi, Director Legal & Corporate Board Services and argued as follows:
    - a. That the claim herein stems from the judgment in Frank Esevwe & 57 others Vs. University of Nairobi, wherein on May 19, 2022 the court made the following findings:
      - i. That the applicable rate for house allowance is 15% of the basic wage.
      - ii. That a house allowance above 15% of the basic wage is not lawful and not justified.
      - iii. That there was no evidence that the salary and remuneration commission had approved erroneous house allowance paid to the claimants
      - iv. That payment of house allowance in error shall suffice and revert to a house allowance at 15% of the due basic wage unless revised under a collective bargaining agreement.
    - b. That in a ruling dated October 27, 2022, the court found as follows:
      - i. It is not in dispute that the claimant/applicant was the architect of ELRC No. 51 of 2016 Frank Esevwe and 57 others vs. the University of Nairobi whose judgment was delivered on May 19, 2022.
      - ii. Intriguingly, apart from some minor modifications the reliefs sought in 2016 are subsequently similar to the reliefs sought in the instant application and suit.
      - iii. As regards the increase of house allowance for the claimants, the learned judge was categorical that the respondent could not unilaterally do so without the advice of the Salaries and Remuneration Commission.
      - iv. That the minimum wage payable under the Regulation of Wages (General) (Amendment) Order is subject to a house allowance as a benefit as ordained by section 31 of the Employment Act, 2017 and payable in kind or monetary allowance at the rate of 15% of the basic salary.
      - v. That it is clear that issue of the hearing of the instant suit appear similar to the issue that the court dealt with in ELRC Cause No. 511 of 2016; and
      - vi. In light of the decision in ELRC Cause No. 511 of 2016, the probability of the success of the claim is doubtful as the main suit will turn on the principle of res judicata.
    - c. The respondent by a memorandum of defence filed on September 2, 2022, the respondent denied the jurisdiction of the Honourable Court and stated that the claim is `{{term{refersTo |title Already heard and determined on merits by a competent court and therefore may not be pursued further by the same parties;`

a cause of action may not be relitigated once it has been judged on the merits; finality.} res judicata}} and an abuse of court process and sought for the same to be dismissed.
    - d. On August 4, 2023, the court rendered its ruling on the question of res-judicata and dismissed the preliminary objection by stating that the letter of June 21, 2022 constituted a new cause of action which even with due diligence would not have been subject of the earlier suit or judgment.



- e. Being dissatisfied with the said ruling, on August 9, 2023, the respondent filed a notice of appeal and also requested for copies of certified proceedings and decree in the matter.
- f. The respondent has proceeded to prepare the draft memorandum of appeal and records of appeal challenging the ruling of the Court.
- g. That the notice of appeal dated August 9, 2023 coupled with request for the decree from the ruling delivered on August 4, 2023 as well as typed and certified proceedings and undertakings to pay necessary charges is a clear indication of live appeal pending.
- h. That pursuing a Court of Appeal process simultaneously with a High Court consolidation is an abuse of the court process.
4. The Claimant filed his submissions, while the respondent is yet to file its submissions as at the time of writing this ruling. 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 suits can be consolidated if they raise issues for determination arising out of the same transaction. The applicant says that the two suits are about the same cause of action being the letters dated June 21, 2022 and June 22, 2022 reducing the claimants' house allowance in accordance with a court order said to be non-existent. The applicant says that consolidation is in the interest of judicial efficiency and to avoid any potential duplication of efforts by the Court. The cases share same cause of action out of same facts. When consolidated, there will be avoidance of inconsistent findings or judgments; judicial efficiency; and convenience and fairness. In absence of material by the respondent to rebut the applicant's case, the Court returns that the applicant has established a case for consolidation.
6. To answer the 2<sup>nd</sup> issue, the Court returns that in absence of an order staying proceedings, the respondent's preferred appeal against the ruling delivered herein on August 4, 2023 would not operate as a bar to an order for consolidation and in light of the satisfaction of the preconditions for consolidation.
7. In view of the prevailing divisional judicial docket management system, the suits shall be consolidated and cause E378 of 2023 having been filed after implementation of the Divisions, E378 of 2023 shall be the lead file and the suits as consolidated shall be heard and determined before the Court E378 of 2023 is allocated in the Claims and Labour Relations Division.

In conclusion, the application is hereby determined with orders:

1. That ELRC Cause E458 of 2022 and ELRC Cause E378 of 2023 both at Nairobi are hereby consolidated with the lead file being E378 of 2023.
2. That Cause E378 of 2023 having been filed after implementation of the Divisions, E378 of 2023 shall be the lead file and the suits as consolidated shall be heard and determined before the Court E378 of 2023 is allocated in the Claims and Labour Relations Division.
3. Parties to take appropriate steps in view of the foregoing orders (1) and (2).
4. The costs of the 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**



