



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT UASIN GISHU

COURT NAME: ELDORET LAW COURT

CASE NUMBER: ELRC.PET/4/2018

**CITATION: FRANCIS CHEMWOR PSOKUMEN AND PSO MUKEN AND TWO OTHERS VS
THE SPEAKER TRANZOIA COUNTY AND COUNTY ASSEMBLY AND THREE OTHERS**

RULING

ON 2021-11-19 BEFORE HON. JUSTICE J. N. ABUODHA

1. By a Motion dated 14th June, 2021 the Respondent sought orders among others that

(i) THAT the court be pleased to stay the proceedings in KITALE CMELRC NO .3 of 2021 pending hearing and determination the application.

(ii) THAT the court be pleased to call for the proceedings in KITALE CMELRC NO 3 OF 2021 and make a finding that the said proceedings are improperly before the Kitale Chief Magistrate Court and thus issue a permanent injunction against the respondents' proceedings with the said suit or instituting a similar suit against the applicants herein

(iii) THAT the court be pleased to interpret its judgment that was delivered on 30th October, 2021 and make a finding that the proceedings in KITALE CMELRC NO 3 OF 2021 is res judicata.

2. The application was based on the ground that the Court delivered judgement on 30th October, 2020 and that the applicants in compliance with the said judgement informed the respondents that the Court had quashed the decision of the County Assembly Service Board to employ them and that they were no longer employees of the County Assembly and their positions had to be advertised afresh.

3. The respondents then filed a claim and application under certificate of urgency for stay of the advertisement and recruitment of employees in the Chief Magistrate Court at Kitale being Kitale CMELRC No 3 of 2021 claiming they had been unfairly unlawfully and unprocedurally constructively terminated by the applicants and a stay was issued.

4. The petitioners filed a Replying Affidavit through one Timon Kimaru Samoei who deponed among others that:

(i) THAT I am advised by my Advocates on record, which advice I verily believe as true that the orders sought by the 1st and 4th Respondent herein only aims at perpetuating an ancient and untenable injustice perpetrated by the applicant by resorting to seemingly endless streams of legal maneuvers.

(ii) THAT court in this matter is functus officio having delivered its judgement on 30th October, 2020 and does not have powers to grant the prayers sought in the application at hand. No appeal has been preferred against the judgement to date and the review sought by some of the respondents was dismissed.

(iii) THAT out of the 5th to 48th respondents, 36 Instituted Kitale ELCMCC NO. 3 of 2021 Timon Kimaru & 35 Others vs. Trans Nzoia County Assembly and Others.

5. By Petition dated 31st July,2019 the Petitioners sought orders among others that a declaration do issue that the appointment of 5th to 48th respondents on 1st July, 2016 as employees of the 2nd respondent on permanent and pensionable terms to the exclusion of the 6 other employees who were also employed on contract terms was discriminatory and was influenced by nepotism, favoritism and corrupt practices involving members of the 1st respondent.

6. The Court heard the petition and on 30th October, 2020 delivered a judgement in which the Court decreed among others that the appointment of 5th to 48th respondent on 1st July, 2016 as employees of the 2nd respondent on permanent and pensionable terms to the

exclusion of the six employees was discriminatory and amounted to unfair labour practice. The Court further issued an order of certiorari quashing proceedings and decision of the 4th respondent's Public Service Board of 27th June, 2016 to employ the 5th to 49th respondents on permanent and pensionable terms.

7. From submission by Counsel for the applicant the Court understands that the respondent in obedience to the order of the Court rescinded the appointments.

8. The respondent then proceeded to advertise the positions left vacant. This triggered Kitale CMELRC No. 3 of 2021 in which interim orders were issued stopping the advertisement and recruitment to positions left vacant as consequence of the judgement of this Court delivered on 30th October, 2020.

9. The applicants raised a preliminary objection to the suit on the grounds that the issues raised in CMELR Kitale No 3 of 2021 were substantially in issue in the petition herein and over which the Court pronounced itself on 30th October, 2020. The Chief Magistrate Court dismissed the objection

10. Counsel for the respondent/applicant further stated that in order to fast track Kitale CMELRC NO.3 OF 2021 both parties entered into a consent to maintain status quo and fast track the suit since the prayers sought in the application and the many suits were similar.

11. Counsel for the respondents Mr. Kirwa has objected to the application and contended that it was unknown to law and this Court became functus officio upon delivering its judgement on 30th October, 2020. Counsel further submitted that what was before me was not an appeal from the subordinate Court but an application that sought to challenge the decision of the subordinate Court of 4th May, 2021.

12. Mr. Kirwa further submitted that the issue in Kitale CMELRC NO 3 of 2021 were different from the issues that this Court decided by its judgement of 30th October, 2020.

13. It is settled law that no court should entertain a fresh, a matter which was substantially in issue between the same parties and over which a Court of competent jurisdiction has made a final determination over the same.

14. The application before me is very difficult to entertain since it asks of the Court to stay proceedings before the CM's Court in Kitale. It is also asking me to call for the proceedings in Kitale CMELRC and make a finding that the said proceedings are improperly before the CM's Court and issue a permanent injunction against the respondents from proceeding with the suit. The question which therefore arises is that if the stay order is granted, it will be pending which consequent action?

15. This Court has power to call for proceedings before a subordinate Court and review the same but this power can only be exercised under judicial review powers of the Court. The application before me is not a judicial review application.

16. If my advice be sought, I think the proper course to be taken by the applicant is either to appeal against the decision of the lower court dismissing the preliminary objection or move this court for Judicial Review Orders.

17. In the circumstances the Court dismisses the application dated 14th June, 2021 with no order as to costs.

18. It is so ordered.

DATED AT ELDORET THIS 7TH DAY OF JANUARY, 2022

GIVEN UNDER MY HAND AND SEAL OF THIS COURT ON 2022-01-07 21:03:15

SIGNED BY: HON. JUSTICE J. N. ABUODHA (ADMINISTER JUSTICE)

THE JUDICIARY OF KENYA.

ELDORET ELRC

EMPLOYMENT AND LABOUR RELATIONS COURT

DATE: 2022-01-07 21:03:15