



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

MISC. APPLICATION NO. E060 OF 2021.

KENYA COUNTY GOVERNMENT WORKER UNION.....APPLICANT

VERSUS

KISUMU WATER & SEWERAGE CO. LIMITED.....RESPONDENT

RULING

1. Before court is a Notice of Motion Application dated 10th September, 2021, brought under Certificate of Urgency and pursuant to Article 159(1), 2(a) & (b) of the Constitution, Section 3A of the Civil Procedure Act and Section 5 of the Judicature Act. The Applicant seeks orders THAT: -

i. Spent

ii. The court makes an order that the Respondent is in contempt of court for disobedience of a court order issued in **KENYA COUNTY GOVERNMENT WORKERS UNION V KISUMU WATER & SEWERAGE COMPANY LTD CAUSE NO. 417 OF 2017** on 18th September, 2019 and upheld on 17th December, 2021.

iii. An order for committal to jail for contempt of court be issued against the Managing Director of Kisumu Water & Sewerage Co. Ltd for knowingly and intentionally disobeying orders of this Honourable court

iv. That the court makes an order that until the Respondent purges the contempt to the satisfaction of the court, the Respondent ought not to be heard by this court or participate in these proceedings.

v. The costs of this application be provided for.

2. The application is supported by the grounds on the face thereof and an affidavit sworn by **Roba S. Duba**. The application is premised on orders issued by the court on 18th September, 2019, declaring the dismissal of one **Mr. Solomon Oguta**, a member of the Applicant, unlawful and unfair.

3. The Applicant further avers that in the same judgment, the court ordered the Respondent to commence deduction of union dues; an order the Respondent has to date not obeyed, in violation of Section 48(2) and (3) of the Labour Relations Act, 2007.

4. The Applicant states that the orders of 18th September, 2019, were upheld by a ruling delivered in the matter on 17th December, 2021.

5. The Applicant avers that the Respondent has failed and/or refused to pay costs of the suit as directed by the court in the aforementioned ruling and judgment.

6. The application is opposed vide a Replying Affidavit sworn by Mr. Thomas Odongo on 18th October, 2021 and filed in court on even date.

7. The Respondent asserts that the instant application is *Res Judicata* owing to the fact that the Applicant had preferred a similar application dated 21st January, 2021 in the primary file being **Kisumu ELRC No. 429 of 2017** with similar prayers. The Respondent states that the application of 21/1/2021, was heard and determined by a court of competent jurisdiction and a ruling delivered on 26th May, 2021 dismissing the application.

8. The Respondent's further case is that the Applicant has never served her with a decree subject of this application and cannot therefor be

cited for contempt in respect of a decree that was irregularly extracted, and not served on the alleged contemnor.

9. The Respondent avers that the issue of Union dues was addressed in the ruling delivered on 26th May, 2021, and that the Applicant can only raise it on appeal or review.
10. The Respondent further states that the allegation that the she has failed to pay costs is baseless as the said costs have neither been taxed nor has a certificate of costs been issued.
11. The Respondent states that the Applicant has concealed material facts by their failure to disclose that they had earlier filed a similar application under **Cause No. 429 of 2017**, and that *Justice S. Radido* did deliver a ruling dismissing the application on 26th May, 2021.
12. The Respondent avers that the instant application is a blatant abuse of the court process and should be struck out.
13. Parties canvassed the application by way of written submissions.
14. Both parties filed their submissions and which have been dully considered.

Analysis and Determination

15. I have considered the application, the supporting affidavit, the Respondent's Replying affidavit and the submissions by both Parties. The issues for determination in the matter are:

- a. Whether the application is *Res Judicata*
- b. Whether the Respondent is in contempt of court
- c. Whether the Applicant is entitled to the orders sought.

Whether the application is *Res Judicata*

16. The Respondent's contention is that the application as filed is *Res Judicata* by dint of a previous application in **Kisumu ELRC Cause No. 429 of 2017 Kenya County Government Workers Union V Kisumu Water & Sewerage Company Ltd.**

17. The Applicant has not made any clarification and/or rebuttal on the Respondent's contention in this respect. The court is concerned that even after the issue of the application being *res judicata* being raised by the Respondent in her replying affidavit, the Applicant has not bothered to tell the court what formed the gist of the application in issue. This in the opinion of this Court, is a serious concealment of material facts.

18. The doctrine of *res judicata* is set out in the Civil Procedure Act at Section 7 as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

Explanation. (1)—The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. (2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. (4)—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. (5)—Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. (6)—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

19. To enable this court make a determination of whether or not the instant application is *res judicata*, the court must evaluate the application dated 21st January, 2021 filed by the Applicant herein under **Kisumu ELRC Cause No. 429 of 2017 Kenya County**

Government Workers Union V Kisumu Water & Sewerage Company Ltd.

20. The doctrine of *res judicata* implies that for a matter to be *res judicata*, the matters in issue must be similar to those which were previously in dispute between the same parties and the same have been determined on merits by a Court of competent jurisdiction.

21. The application of 21st January, 2021 read as follows: -

“REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU CAUSE NO. 429 OF 2017

KENYA COUNTY GOVERNMENT

WORKERS UNION.....CLAIMANT

v

KISUMU WATER & SEWERAGE

CO LTD.....RESPONDENT

RULING NO. 2

1. For determination is a Motion dated 21 January 2021 by the Kenya County Government Workers Union (the Union) seeking orders:

(i) ...

(ii) THAT the Chief Executive Officer of the Respondent be summoned before this Honourable Court to show cause why he should not be committed to civil jail for blatantly failing to comply with the judgment delivered on 18 September 2019.

(iii) THAT on failing to show cause, the said officer be committed to prison for a maximum period of six (6) months for contempt of this Honourable Court's judgment delivered on the 18 September 2019.

(iv) THAT Officer Commanding Kisumu Police Station do execute Order 3 herein.

(v) THAT the Respondent be barred from addressing this Honourable Court in this matter unless and until it has purged itself of contempt.

vi) Any other or further orders as this Honourable Court deems fit and appropriate.

ii) THAT the costs of this application be borne by the Respondent.”

22. The basis of the application dated 21st January, 2021 and determined vide a ruling delivered on 26th May, 2021, was in relation to a judgment delivered on 18th September, 2019, where the Applicant therein (who is the same as the Applicant in the instant application) sought the committal to civil jail of the Managing Director of the Respondent for alleged disobedience of the court orders from the judgment of 18th September, 2019. In the instant application, the same applicant seeks exactly the same orders it sought in the application of 21st January, 2021.

23. The court in a ruling rendered on 26th May, 2021 in the Applicant's application of 21st January, 2021, made the following finding: -

“Conclusion and Orders: -

25. From the foregoing, the Court finds no contempt of court orders of 18 September 2019, but in the spirit of good faith in industrial relations and fidelity to the rule of law, Mr. Solomon Oguta should report to the Respondent forthwith for deployment and in any case within 7- days.”

24. There is no doubt that the parties in the instant application and in the application dated 21st January, 2021, herein above captioned, are the same. The judgment subject of the earlier application is the same judgment giving rise to the instant application and lastly, the orders sought in the two applications are principally the same orders.

25. This court agrees with the holding in the case of *Kennedy Oduru Nyarumba v Orange Democratic Movement Party & 2 Others (2017) eKLR*, where the court stated:

“The application having been heard by a court of competent jurisdiction and a ruling delivered dismissing the same, it is indeed an abuse of the court process for the applicant to file a similar application. If he felt aggrieved by the decision rendered by the court, he ought to have either appealed or applied for review of the orders and not file a similar application.....”

26. I find and hold that the Applicant’s application dated 10th September, 2021 is *res judicata* as both the matters in issue and the parties involved are the same as those in the application dated 21st January, 2021 filed under **Kisumu ELRC Cause No. 429 of 2017 Kenya County Government Workers Union V Kisumu Water & Sewerage Company Ltd** and the same having been determined on merit by a Court of competent jurisdiction.

27. The other two issues fall by the way side and are not worthy of determination.

28. The application is bad in law, vexatious and an abuse of the court process, and is hereby dismissed in its entirety with costs to the Respondent.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 10TH DAY OF FEBRUARY, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

N/A for the Applicant

Ms. Otieno Present for the Respondent

Christine Omollo- C/A