



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KERICHO

ELRC PETITION CAUSE NO. E010 OF 2021

DARREN MUTINDA.....PETITIONER

-VERSUS-

KISII UNIVERSITY.....1ST RESPONDENT

KISII UNIVERSITY COUNCIL.....2ND RESPONDENT

PROF FREDRICK WANYAMA.....3RD RESPONDENT

C.S. MNINISTRY OF EDUCATION.....4TH RESPONDENT

HON ATTORNEY GENREAL.....5TH RESPONDENT

RULING

1. This ruling relates to the 3rd Respondent's preliminary objection dated 2.12.2021, which seeks to have the suit struck out with costs on grounds that the Suit is *Sub Judice* and an abuse of court process.

2. The Preliminary Objection was canvassed by written submissions. The 3rd respondents submits that the suit involves matters which are directly and substantially in issue in the following suits:

a. Kisumu ELRC JR E15 of 2021 R v Kisii University, Kisii University council and prof Fredrick Wanyama ex parte William Ogato.

b. Kisumu ELRC JR E013 of 2021, R v Kisii University, Kisii University Council and Prof Fredrick Wanyama ex parte William Ogato.

c. Eldoret ELRC JR E004 of 2021, R v Kisii University, Kisii University Council and Prof Fredrick Wanyama ex parte Jacob Bitok.

d. Kisumu CACA No. 216 of 2021 William Ogato v Kisii University Council & Prof Fredrick Wanyama.

3. The 3rd respondent contends that the matter in issue in all the above 4 suits concerns law on the appointment of Vice Chancellor and the question whether the university council was proper in its decision made on 27/9/2021 approving the renewal of the contract for the 3rd Respondent as the Deputy Vice Chancellor (Academic Research and Student Affairs) and the letter appointment dated 4.10.2021 signed by the Chairperson of the second Respondent. He therefore prays for the suit to be struck out for being *sub judice*.

4. The 3rd Respondent placed reliance on **Thiba Mini-Hydrol Co. Ltd v Joshat Karu Ndwigwa [2020] eKLR** where the court held that it is the substance rather than the frame of the suit that determine whether it is *Sub judice*. Further reliance was placed on **Kenya Bankers Association v Kenya Revenue Authority [2021] eKLR** where the court discussed the principles that underpin the doctrine of *sub judice*.

5. The 3rd respondent further submits that the matter of interpretation of the law on appointment of Deputy Vice Chancellor Kisii University was dealt with in **ELRC JR E015 of 2021, supra**, which was dismissed.

6. The 3rd Respondent further submits that filing of a multiplicity of suits amounts to abuse of the court process leading to conflicting decisions, waste of judicial time and resources, and must be avoided. Reliance was placed on the decision of the High Court of **Nyanza Garage v Attorney General & others [2016] UGHCEBD (18 NOVEMBER 2016)** where the elements of *sub judice* were discussed.

7. The Petitioner has opposed the preliminary objection by his written submissions dated 29.11.2021. He confirms that the dispute in his petition concerns the appointment of the 3rd Respondent as the DVC Academics, Research and Students Affairs (ARSA).

8. He contends that the 3rd respondent was first appointed to the said position on 1/12/2016 and his term of 5 years was to expire on 30/11/2021. The contract was renewed for a further 5 years vide a letter by the 2nd respondent dated 4/10/2021. The renewal followed the application by the 3rd respondent on 28/5/2021 and approval by the Council on 27/9/2021. The petitioner acknowledges that the council has the mandate to recruit a DVC- ARSA for the university.

9. The petitioner further acknowledges that **Kisumu ELRC JR E 013 of 2021** was filed by Mr. Ogato to bar the 1st and 2nd respondent herein from deliberating the renewal of the 3rd respondents' contract. The leave was granted but directions that it the leave operates as stay was rejected and therefore the contract was renewed.

10. The petitioner also acknowledges that on 4/10/2021 Mr. William Ogato filed **Kisumu ELRC JR E015 of 2021** seeking leave to apply for order of Certiorari to quash the decision of the 2nd respondent which approved the renewal of the 3rd respondent's contract as DVC-ASRA. The **Kisumu JR E013 of 2021** was withdrawn on 18.10.2021 but **JR E 015 of 2021** was heard on the application for leave and instead of a ruling, the court rendered judgment on 18.11.2021 dismissing the whole application.

11. The Petitioner further acknowledged that, on 13.10.2021 Mr. Jacob Bitok filed **Eldoret ELRC JR 004 of 2021** and he was granted leave to apply for Judicial Review but the leave was not to apply as stay.

12. The petitioner, acknowledged again that Mr. Ogato was aggrieved by the judgment in **Kisumu JR E015 of 2021** and filed said **Kisumu Civil Appeal No. 216 of 2021** and sought stay pending appeal but the same is still pending.

13. The petitioner contends that on 28.9.2021 all the members of the University Council were summoned to the ministry of education Head Office where they were advised to withdraw the letter renewing the 3rd respondent's contract since the ministry was not consulted before the renewal.

14. The petitioner submitted that for a matter to become *sub judice*, there must be two or more suits filed consecutively, the matter in issue in the suits must be directly or substantially the same, the parties in suits must be the same or litigating under the same title, and the suits must be pending in the same court or any other court in Kenya with jurisdiction to grant the relief sought. He placed reliance on **Kenya National Commission of Human Rights v Attorney General & others [2020] e KLR** which set out the factors to consider in determining whether a suit is *sub judice*.

15. He contended that the 3rd respondent is misleading the court in raising the preliminary objection because the other suits mentioned as the basis of the objection were not about the same subject matter as in this petition and they concern other parties not himself.

16. He denied that the matter of interpretation of the relevant law was fully decided by the judgment in JR E015 of 2021 contending that the judgment was irregular since the substantive application had yet been filed. Consequently, he submitted that the suit herein is not *res judicata* as there was no final judgment in **Kisumu ELRC JR E015 of 2021**. For emphasis, he relied on the case of **John Florence Maritime services Ltd v Cabinet Secretary, Transport and in fracture and 3 others [2021] e KLR** where the Supreme Court set out the elements for *res judicata*.

17. In conclusion, the petitioner submitted that his petition raises substantial issue of law and the best order the court should give is to direct the respondent to apply for consolidation.

Issues for determination

18. I have carefully considered the pleadings, the notice of preliminary objection and the rival submissions. The issues for determination are:

- a. **Whether the suit herein is sub judice,**
- b. **Whether the suit is res judicata**
- c. **Whether the suit is an abuse of the process of the court.**

Whether the petition is Sub judice

19. The 3rd respondent contends that the petition herein is *sub judice vis-a-vis* **Kisumu ELRC JR E 013 of 2021, Kisumu ELRC JR E015 of 2021, Kisumu CA No. 216 of 2021** and **Eldoret ELRC JR E004 of 2021**. In his view the instant petition should be struck out because the substance of all the said suits relate to the renewal of his contract as DVC – ASRA.

20. The petitioner is in denial although that the substance of the suit is the same as in the other mentioned suits. He contends that the parties

to the suits are different.

21. In **Kenya National Human Rights** case Supra, the Supreme Court expressed itself as follows:-

“The term sub judice is defined in Black’s law Dictionary 9th Edition as “Before the court or Judge for determination”. The purpose of the sub judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that was filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of re sub judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives”

22. There is no dispute that there is more than one suit pending before courts of competent jurisdiction and specifically **Eldoret ELRC JR E004 of 2021** which is seeking the same reliefs as this petition namely, order of Certiorari to quash the decision by the University Council which approved the renewal of the 3rd Respondent’s contract as DVC-ARSA on 27.10.2021.

23. The petitioner has also acknowledged that there is an appeal pending in **Kisumu CA No. 216 of 2021** which challenges the interpretation of section 35 of the Universities Act by this court in **Kisumu ELRC JR 15 of 2021**.

24. The Petition herein deals with subject matter raised in **Eldoret ELRC JR E004 of 2021** and **Kisumu CA No. E216 of 2021**. The said suits were filed earlier than the instant petition. The parties involved are basically the same because in all the cases, the applicants or petitioner are not suing for their personal benefits but under the banner of public interest litigation. They are suit filed in the public’s interest and therefore the parties are essentially the same.

25. For the foregoing reasons I agree with the 3rd respondent that the petition herein is *sub judice* and it should not take precedence over the suits filed earlier. I see no need for considering the issue whether or not the suit is an abuse of the court process because the answer is obvious considering the above finding. Therefore, I uphold the objection by the 3rd respondent but instead of striking out the petition, I direct that the petition be and is hereby stayed pending the hearing and determination of **Eldoret ELRC JR E004 of 2021**.

26. For avoidance of any doubt, the Conservatory Orders granted on 30.11.2021 were never extended on 8.12.2021 and therefore they lapsed automatically on that day. The petitioner is condemned to pay the costs of the preliminary objection to the 3rd respondent in any event.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 3RD DAY OF FEBRUARY, 2022

ONESMUS N. MAKAU

JUDGE

Order

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE