



**Maro v Teachers Service Commission (Employment and Labour Relations
Claim E001 of 2021) [2022] KEELRC 3853 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 3853 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI
EMPLOYMENT AND LABOUR RELATIONS CLAIM E001 OF 2021
BOM MANANI, J
JULY 28, 2022**

BETWEEN

ATHMAN ADE MARO CLAIMANT

AND

TEACHERS SERVICE COMMISSION RESPONDENT

RULING

Introduction

1. The Claimant has filed this claim against the Respondent seeking, among other reliefs, an order that the Respondent reinstates him back into employment. The Respondent has resisted the claim through its defense filed on 30th May 2022.

The Facts

2. The brief facts of the case are that at the time of his termination, the Claimant was an employee of the Respondent serving as a teacher and the head of Ganda Secondary School within Kilifi County. On 17th June 2017, the Claimant is alleged to have forced a student at the said school into a sexual encounter with him in contravention of the code of conduct for teachers. This accusation resulted in the Claimant's interdiction.
3. The Claimant was subsequently taken through an internal disciplinary process which led to his termination. Meanwhile, the Claimant was also charged with the offense of rape of the student but was subsequently acquitted.
4. Following his acquittal, the Claimant commenced the current case. Through it, he seeks, *inter alia*, that he be reinstated to employment and that he be paid his salary arrears.
5. On its part, the Respondent has maintained that it received credible information that the Claimant had indeed lured the student into a room within Watamu area of Kilifi where he sexually assaulted



her. That following this information the Respondent constituted an investigatory committee which confirmed the veracity of the information whereupon the Claimant was interdicted.

6. It is the Respondent's position that after the interdiction, it formally charged the Complainant before its disciplinary committee with the offense of engaging in immoral behavior. That the Claimant was afforded a chance to defend himself before the panel. That after hearing all the witnesses, the panel found the Claimant guilty and recommended for his termination from service and removal of his name from the register of teachers.
7. That in undertaking the process, the Respondent observed all the rules of fair trial as required by law. This was by informing the Claimant of the accusations against him, allowing him to respond to the accusations through a written statement, convening a hearing where the Claimant fully participated and promptly informing the Claimant of the outcome.
8. The Respondent contends that it is an autonomous body entrusted with the power to regulate teachers and its processes are independent of judicial proceedings in courts of law. The Respondent asserts that decisions of a court do not oust its powers to discipline teachers who fall under it.

The Preliminary Objection

9. Together with the statement of defense, the Respondent filed a Notice of Preliminary Objection challenging the competence of the claim. The preliminary objection is three pronged to include the following: -
 - a. That the suit is an abuse of the court process, devoid of merit and bad in law and should be struck out.
 - b. That the claim is *sub-judice*.
 - c. That the claim is statute barred.
10. The gist of the second and perhaps first grounds of objection is that around 17th March 2021, the Claimant filed a constitutional petition before the High Court sitting at Malindi against the Respondent arising from the same set of facts as the current claim. That the said petition is still pending for determination before the trial judge. Therefore, in terms of section 6 of the [Civil Procedure Act](#), this claim is bad in law for offending the rule against filing of proceedings that are substantially the same as proceedings that are still pending before another court of competent jurisdiction and which involve the same parties.
11. That the suit is otherwise an abuse of the court process. It ought to be struck out with costs to the Respondent.
12. In response to the preliminary objection, the Claimant filed a replying affidavit introducing the pleadings that originated Constitutional Petition No. 3 of 2021 that is the basis of the Respondent's objection.

Analysis and Determination

13. The parties agreed to prosecute the preliminary point of law through written submissions. Both have since filed their submissions on the matter and which I have considered.
14. From the submissions filed by the Respondent, it is clear to me that the limb of the preliminary point of law relating to whether the claim is time barred has since been abandoned. Therefore, this ruling will focus on the other two points of law which are intertwined.



15. I should perhaps start by setting out what I understand to be the law on the two concepts of *sub-judice* and abuse of the court process as pleaded by the Respondent’s counsel in the preliminary objection.

16. As rightly pointed out by the Respondent, the sub-judice rule is provided for under section 6 of the *Civil Procedure Act*. Mativo J in *Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya* [2020] eKLR says this of the rule: -

“...it simply means that no court ought to proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding; and or the previously instituted suit or proceedings is between the same parties; and or the suit or proceeding is pending in the same or any other court having jurisdiction to grant the reliefs claimed.”

17. With respect to the purpose of the rule, the learned Judge quotes the Supreme Court of Kenya as indicating the following: -

“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 is 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 *res 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.”

18. Finally with regard to the conditions for applying the principle Mativo J in the foregoing case had this to say: -

“.....for the doctrine of sub judice to apply the following principles ought to be present:- (a) There must exist two or more suits filed consecutively; (b) The matter in issue in the suits or proceedings must be directly and substantially the same, the parties in the suits or proceedings must be the same or must be parties under whom they or any of them claim and they must be litigating under the same title, the suits must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

19. In relation to what is intended by the term “the matter in issue” the learned judge, while sharing the views from other decisions, had this to say: -

“... the key words in applying *sub judice* rule is that “the matter in issue is directly and substantially in issue in the previously instituted suit.” The test for applicability of the *sub judice* rule is whether on a final decision being reached in the previously instituted suit, such decision would operate as *res-judicata* in the subsequent suit.”

“...we do not think that the word ‘matter’...means a legal proceeding, but rather the subject matter for determination in a legal proceeding. In our opinion there can be no matter... unless there is some right, duty or liability to be established by the determination of the Court...”



20. On the other hand abuse of court process according to the *Black's Law Dictionary* is wrongful use of the judicial process. Abuse of court process is said to occur when a party engages in the improper use of a legitimately issued court process to obtain a result that is either unlawful or beyond the scope of the process.
21. In *Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 others* Civil Appeal No. 25 of 2002 (2009) e KLR 229, the Court of Appeal, quoting with approval the Nigerian decision in *Sarak v Kotoye* (1992) 9 NWLR 9pt 264) 156 stated as follows regarding the phrase;-
- “The concept of abuse of judicial process is imprecise. It implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice ...”
22. The court then went ahead to give illustrations of abuse of the judicial process as contemplated in the *Sarak v Koyote* case. These include the following: -
- a) Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.
 - b) Instituting different actions between the same parties simultaneously in different courts even though on different grounds.
 - c) Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent's notice.
 - d) Where there is no iota of law supporting a Court process or where it is premised on frivolity or recklessness.
23. In *Stephen Somek Takwenyi & another vs. David Mbutia Githare & 2 Others* (Milimani) HCCC No. 363 of 2009 (unreported), the trial court was emphatic that courts of law have a duty to prevent abuse of their processes whenever this happens. In relation to the issue, the learned Judge expressed himself as follows: -
- “But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract res judicata rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it.”
24. The foregoing, in my view provides a comprehensive guide on what constitutes abuse of the court process and what the sub-judice rule entails. It is from this dimension that I propose to address the preliminary point of law taken up in this cause.
25. The question for determination before me is whether the termination of the Claimant by the Respondent was unlawful given that the Claimant has been cleared of the allegation of rape of one ZKK by the court in Chief Magistrate's Sexual Offenses Case No. 25 of 2017 which was the basis of the Respondent's disciplinary case against the Claimant. Corollary to this question are questions: whether the Claimant was given a fair hearing before the Respondent's disciplinary committee that terminated him in view of the verdict by the court in the criminal case; and whether the verdict of the court in



- the criminal case should upstage the Respondent's decision against the Claimant at the disciplinary session aforesaid.
26. Central to the questions above is the question whether the judgment of the Chief Magistrate in Sexual Offenses Case No. 25 of 2017 has primacy over the decision of the Respondent against the Claimant in the disciplinary case and whether as a consequence, the Respondent's disciplinary decision should be considered of no legal effect with the consequence that the Claimant resumes his duties. This, in my view constitutes the cause of action in the suit before me. It is so to speak, the issue for determination in the current proceedings.
 27. I have looked at the Petition in Constitutional Petition No 3 of 2021 before the High Court, Malindi. The said Petition was triggered by the Respondent's disciplinary action against the Claimant arising from the same set of facts as the current case. The parties in the Petition are the same as those in the current case save for the addition of the Attorney General and the Cabinet Secretary Ministry of Education in the Petition.
 28. The question the court was asked to determine in the Petition was whether regulation 139(3) & (4) of the *Teachers Service Commission Code of Regulations for Teachers, 2015* was constitutional in so far as it permitted the Teachers Service Commission to overlook the decision of the Chief Magistrate in Sexual Offenses Case No. 25 of 2017 clearing the Petitioner of accusations of rape. Corollary to this question were the questions: whether the Claimant could be said to have been accorded a fair trial before the Respondent's disciplinary committee: whether in view of the fact that the court cleared the Claimant of the alleged rape, the Respondent's committee acted unconstitutionally in continuing to uphold his guilt based on the provisions of the code of conduct for teachers aforesaid.
 29. In effect, the central question in the Petition before the High Court was whether the trial court's decision in the criminal case took primacy over the decision of the Respondent's disciplinary verdict against the Claimant. And whether to the extent that regulation 139 of the code of conduct for teachers aforesaid permitted the Respondent to overlook the legal reality that the judgment in the Criminal Case was supreme, the said regulation was unconstitutional. This, in my view was the subject matter for determination in the Petition before the High Court. It was so to speak, the cause of action.
 30. The above analysis demonstrates that in the two cases, the proponent has asked the court to determine the legitimacy and or legality and or constitutionality (generally the lawfulness) of the purported primacy of the Respondent's disciplinary verdict over the decision of the Chief Magistrate in Sexual Offenses Case No. 25 of 2017. And if the court finds that it is unlawful to hold that the disciplinary verdict is supreme as against the decision in the criminal case, it should proceed in the Constitutional Petition to declare the regulation that permits this state of affairs unconstitutional. And for the employment claim, the court should, if it finds as above, proceed to overturn the disciplinary decision and reinstate the Claimant.
 31. Therefore, the reality of the foregoing is that in both the Constitutional Petition and the current claim, the two courts are invited to consider the central question of the supremacy and or primacy of the judgment of the Chief Magistrate in the criminal case over the disciplinary verdict by the Respondent's disciplinary committee. It is possible that the two courts, differently constituted, could make pronouncements that are at variance with each other on the aforesaid question.
 32. Despite of the fact that the orders sought in the two cases are different, the two courts are called upon to determine whether or not to grant these reliefs based on their finding on which one between the magistrate's court decision and the administrative decision of the Respondent takes precedence. In my considered view, to the extent that this is the primary question in the two cases, the latter litigation runs



- the risk of being an abuse of the court process in so far as it threatens to infringe on the *sub-judice* or *res-judicata* doctrines depending on whether or not a final decision has been reached in the earlier case.
33. In the previously cited decision of *Republic v Paul Kibara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya* [2020] eKLR, the court said as follows of the issue I raise here: -
- “.....in determining whether or not *sub judice* applies, it is the substance of the claim that ought to be looked at rather than the prayers sought.”
-the mere invocation of a constitutional provision simply because it was not expressly cited in the earlier suit cannot be a basis to justify multiplicity of suits.”
34. In the decision of *Thiba Min Hydro Co. Ltd v Josphat Karu Ndwiga*, the court observed as follows on the matter at hand: -
- “It is not the form in which the suit is framed that determines whether it is *sub judice*. Rather it is the substance of the suit...”
35. Just to emphasize the point further in Constitutional Petition Number 307 of 2021, the Petitioner alleged that the Respondent elected to commence and prosecute disciplinary proceedings against him notwithstanding that there was a pending criminal case before the magistrate’s court arising from the same set of facts. That despite the pendency of the criminal case, the Respondent went ahead to pronounce the Petitioner guilty based on the code of regulation for teachers. And even after the court cleared the Petitioner of the accusations, the Respondent has, based on the code of conduct for teachers, refused to set aside its decision that was based on the same set of facts. That this manner of processing the case by the Respondent was unconstitutional. Based on the totality of this set of facts, the Petitioner contended before the High Court that he was not granted a fair hearing before the Respondent’s disciplinary committee.
36. In the current case, the Claimant sets out these very same set of facts as the basis for his attack of the decision of the Respondent. This can be seen from paragraphs 8 to 14 of the Memorandum of Claim.
37. In its decision in the Constitutional Petition delivered on 23rd June 2022, the High Court said the following: -
- “I am of the opinion that the Petitioner has failed to demonstrate to this court how the stated regulations by the 1st Respondent offends the provisions of article 50..... of the *Constitution*.....”
38. Article 50 of the *Constitution* addresses the right to a fair trial. The Claimant relied on this provision to advance the case before the High Court that he was denied a fair trial before the Respondent’s disciplinary committee. And the court has pronounced itself on the question.
39. By his pleadings before me, the Claimant now seeks to have this court determine the very same question whether his right to fair trial was violated by the Respondent. I doubt that it is open to me to do so.
40. Further, at paragraph 21 of the Statement of Claim before me, the Claimant invites the court to hold that the verdict of the trial court in the criminal case takes precedence over the administrative decision of the Respondent. At paragraph 15 of the Petition before the High Court, the Petitioner invited the court to reach the same conclusion.



41. On this, the High Court pronounced itself as follows: -

“I wish to observe that a professional misconduct does not necessarily have to amount to a criminal offense. While the standard of proof in criminal cases is high, beyond reasonable doubt, in a disciplinary process it may be lower, on a balance of probabilities. An acquittal in a criminal case does not therefore automatically mean that there are no grounds for a related incident, disciplinary process.”

42. If I understand him correctly, the learned Judge was simply saying that the decision of the magistrate’s court in Chief Magistrate’s Sexual Offenses Case No. 25 of 2017 could not enjoy primacy over the verdict by the Respondent in the disciplinary case against the Petitioner for the various reasons he cited in his judgment. In other words, these two processes and the attendant decisions flowing from them were mutually exclusive and one does not necessarily impact on the other.

43. Clearly, the question whether the decision of the magistrate in Sexual Offenses Case No. 25 of 2017 took precedence over the administrative decision of the Respondent has been determined in the Constitutional Petition. Therefore, it is no longer open for me to decide on it.

44. I take note of the fact that at the time of filing the response and the preliminary objection to this claim, proceedings in Constitutional Petition No. 3 of 2021 were still pending before the High Court. And hence the mention by the defense of the concept of *sub-judice*. However, as I have said in this ruling, the Petition was heard and judgment delivered in it on 23rd June 2022. Consequently, the concept of sub-judice is no longer of relevance to this dispute.

45. That said, the observations by Mativo J in [Republic v Paul Kibara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya](#) [2020] eKLR on the relationship between the concepts of *sub-judice* and *res-judicata* is quite pertinent to this cause. This is what he had to say: -

“.....the key words in applying *sub judice* rule is that "the matter in issue is directly and substantially in issue in the previously instituted suit." The test for applicability of the *sub judice* rule is whether on a final decision being reached in the previously instituted suit, such decision would operate as *res-judicata* in the subsequent suit.”

46. By this statement, I understand the learned Judge as saying that the parameters for determining whether a matter is *sub-judice* or *res-judicata* are really the same save that in the former instance the cases in issue must still be pending determination on their merits whilst in the latter case, the suit previously instituted must have been determined on its merits. The current claim transited from the *sub-judice* scenario to the *res-judicata* scenario before the preliminary objection was urged. Thus, whilst it may not fall victim to the *sub-judice* rule because of the foregoing reasons, it certainly is a candidate for application of the concept of abuse of the court process.

47. Another matter I wish to address is the scope of the rules of sub-judice and *res-judicata*. These rules also operate so as to bar a litigant from filing new proceedings to raise matters which ought to have been the subject of a previously instituted suit but which, for some reasons, were left out (see [Benjamin Koeb v Baringo County Government & 2 others; Joseph C. Koeb \(Interested Party\)](#)).

48. The essence of this is to ensure that matters that are capable of being determined in one case are so determined. This prevents the risk of litigation in installments. It also: prevents the likelihood of forum shopping; prevents the filing of a multiplicity of suits; save judicial time; and minimizes the chances of conflict in decisions by different courts over the same subject matter.



49. Constitutional Petition No. 3 of 2021 arising from an employer-employee relationship could have been properly filed before the Employment and Labour Relations Court (ELRC). For reasons that are not clear, the Petitioner elected to file it before the High Court. Had the cause been presented before the ELRC, nothing would have prevented the Petitioner from raising in the same case the issues he now seeks to raise by way of the current cause. In my view therefore, the rules aforesaid bar him from filing a fresh case to litigate on issues that ought to have been included in the previously instituted matter. For this reason and for the other reasons set out in this ruling, the present claim is a typical case of abuse of the court process.

50. Accordingly, I strike out the entire Petition. I ward costs of the Petition to the Respondent.

DATED, SIGNED AND DELIVERED ON THE 28TH DAY OF JULY, 2022

B. O. M. MANANI

JUDGE

In the presence of:

Otara for the Claimant

No appearance for the Respondent

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 Ruling 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.

B. O. M. MANANI

JUDGE

