



Republic v County Executive Committee (CEC) Member for Water and Natural Resources, Bungoma County & 3 others (Judicial Review Application 3 of 2021) [2022] KEELRC 3854 (KLR) (28 July 2022) (Ruling)

Neutral citation: [2022] KEELRC 3854 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
JUDICIAL REVIEW APPLICATION 3 OF 2021**

JW KELL, J

JULY 28, 2022

FORMERLY BUNGOMA HIGH COURT JUDICIAL REVIEW APPLICATION NO 2 OF 2018

IN THE MATTER OF APPLICATION SEEKING JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE COMPANIES ACT (NO. 17 OF 2015), THE CIVIL PROCEDURE RULES, FAIR ADMINISTRATIVE ACTION (NO. 4 OF 2015)

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA

BETWEEN

REPUBLIC APPLICANT

AND

COUNTY EXECUTIVE COMMITTEE (CEC) MEMBER FOR WATER AND NATURAL RESOURCES, BUNGOMA COUNTY 1ST RESPONDENT

COUNTY EXECUTIVE COMMITTEE (CEC) MEMBER FOR WATER AND NATURAL RESOURCES, TRANS-NZOIA COUNTY 2ND RESPONDENT

COUNTY GOVERNMENT OF BUNGOMA 3RD RESPONDENT

COUNTY GOVERNMENT OF TRANS-NZOIA 4TH RESPONDENT



RULING

1. The ruling is on the Notice of Motion application dated March 21, 2022 seeking substantive orders for review of court ruling delivered on March 7, 2022 which determined the instant suit to be *res judicata*. The instant application seeks the following orders:-
 - (a) That this application be certified as urgent and the same be heard *ex parte* in the first instance.
 - (b) That the honourable court be pleased to grant leave to the *ex parte* applicant to appoint Simba & Simba Advocates to take over the conduct of these proceedings in place of the current advocates on record.
 - (c) That the honourable court be pleased to review the ruling and orders of the Hon Justice J W Keli which was delivered on March 7, 2022 dismissing the application dated January 27, 2018 for being *res judicata*.
 - (d) That in particular the honourable court be pleased to reverse the dismissal orders and reinstate the judicial review proceedings pending before the court prior to the dismissal order.
 - (e) That the honourable court be pleased to make such further orders as are necessary for the ends of justice.
 - (f) That the honorable court be pleased to make the necessary provision for the costs of this application.
2. The Notice of Motion application is premised on the grounds stated therein being:-
 - i. That the applicant's former advocate was appointed a judge,
 - ii. The applicant's motion application dated January 27, 2018 was dismissed with costs on March 7, 2022 on the grounds of being *inter alia res judicata* on account of Kisumu ELRC no 188 of 2018
 - iii. The court concluded the matter was *res judicata* the dismissal having been determined in the Kisumu proceedings,
 - iv. That the suit in JR no 3 of 2021 question whether the respondents did have powers and whether they could exercise the powers of an employer over the applicant whereas the proceedings in Kisumu ELRC no 188 of 2018 questioned whether the termination of employment of the applicant by the interested party was fair and lawful.
 - v. That the substantive parties and the issues for determination before the court and the Kisumu court were dissimilar and different hence *res judicata* cannot arise.
 - vi. That therefore there is error apparent on the face of record as well as sufficient cause that warrants the court to review the dismissal orders made by the court on March 7, 2022 and consequential order of costs.
3. The application is supported by the affidavit of the applicant and among others produced the judgment in Kisumu no 188 of 2018. The applicant states there is an appeal in relation to contempt in these proceedings of which the respondent appealed in Appeal no 28 of 2019 but does not annex the ruling appealed from, states that unless application is heard and determined he will have lost a lawful cause



- and will stand exposed to costs of the proceedings with no fault arising from him, he moved the court without delay and it is in interest of justice the application be allowed.
4. The application is opposed. The interested party filed a replying affidavit sworn by Patricia Caroline Okello on April 21, 2022 and received in court on April 27, 2022.
 5. The interested party states that the court found the instant suit was *res judicata* upon counsel submitting orally. The interested party avers that the judicial review application orders sought are not available to the *ex parte* applicant as against the interested party for the reason he is enjoying benefits of the judgment in Kisumu HC 188/2018.
 6. The interested party avers through the said Patricia that it defeats logic and fairness that the *ex parte* applicant desires to re-litigate this matter the same cause of action having been the subject of determination in Kisumu 188 of 2018 hence the suit is *res judicata*.
 7. The interested party avers that the *ex parte* / applicant has other matters pending in court being Bungoma HC Petition no 2 of 2019 between Patrick Wanyonyi Munialo v NZOWASCO. That the same was pending decision as they have filed Notice of Preliminary Objection on same ground of matter being *res judicata*. That the *ex parte* applicant has vide a letter dated March 21, 2022 sought to have the suit withdrawn('PCO-1')
 8. That the application is thus vexatious, frivolous and devoid of merit and a waste of court's judicial time.
 9. The 2nd to 4 respondents filed Replying affidavit sworn by Aggrey Chemonges dated April 27, 2022 and received in court on April 28, 2022.
 10. The 2nd and 4th respondents oppose the application on grounds that the *ex parte* applicant employment with the 1st interested party was terminated in 2018 whereupon he filed two suits almost at same time namely, Bungoma JR no 3 of 2018 and Kisumu ELRC Cause no 188 of 2018. That the two suits arose from decisions on the *ex parte* applicant's employment and that the issues between the applicant and the respondent and interested party were employee employee related. That initially the matter was before High Court which held it had no jurisdiction and transferred the matter to this court.
 11. The 2nd and 4th respondents' further aver through the affidavit of Chemonges that the applicant had split the claim into two a move that is legally prohibited 'res-subjudice'. That it is not in dispute that the two suits arose from the same cause of action (termination of employment)or transaction, the suits are by same claimant seeking reliefs against the same respondents /defendants, the reliefs sought are similar /related in nature and the issues involved can be determined in the same forum. The respondents in summary say the court in Kisumu is the same in Bungoma and has found for the claimant in terms of compensation for unlawful termination, the issues of concerning his former employment are settled and he has no further claims against the employer. That hearing the case in JR no 3 of 2019 would be tantamount to opening up claims under the employer employee relationship which are already settled.
 12. The application is canvassed by way of written submissions. The *ex parte* applicant's written submissions are dated April 26, 2022 drawn by Simba and Simba Advocates and were received in court on April 28, 2022. The interested party and the respondents did not file written submissions.

Determination

Issues for determination

13. The applicant identified the following issues for determination:-



- a. Whether applicant's advocate should be granted leave to come on record for the *ex parte* applicant
 - b. Whether the court should grant an order for review, reverse the dismissal order and reinstate the judicial review proceedings pending before the court.
14. The court finds the issues appropriate in the instant application and adopts them as the issues for determination under this ruling.

Whether applicant's advocate should be granted leave to come on record for the *ex parte* applicant

15. The applicant seeks leave to appoint Simba and Simba Advocates to take over from the current advocates on record on basis that his previous advocate was appointed as a judge.
16. The court on perusal of record finds there was notice of change of advocates dated January 21, 2022 from the said judge's law firm known as Annet Mulamasi to Ibrahim Alubala received in this court on January 24, 2022. The said advocate appeared for the applicant in this case and submitted before the court on March 7, 2022 when the impugned order was issued. The court notes the lack of candor in the non-disclosure of these facts and declines to grant leave as sought. There is already another advocate on record and the Applicant should utilize the normal procedure of changing advocates if he so wishes. There is no basis of involving the court.

Whether the court should grant an order for review, reverse the dismissal order and reinstate the judicial review proceedings pending before the court.

17. The application is brought under article 159 of the *Constitution* of Kenya, sections 1A, 1B, 3A and 80 of the *Civil Procedure Act*, order 45 rule 1, 2, 3, and order 51 rule 1 of the *Civil Procedure Rules*.

The relevant law on review

18. Section 16 of the *Employment and Labour Relations Court Act* no 20 of 2011 provides for review of the orders of the court as follows:- "the court shall have power to review its judgment, awards, orders or decrees in accordance with the rules."
19. The 2016 rules of the court then provides under rule 33 for review procedure as follows:-
- (i) "A person who is aggrieved by a decree or an order from which an appeal is allowed, but from which no appeal is preferred or from which appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling.
 - (a) If there is discovery or new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or order made.
 - (b) On account of some mistake or error apparent on the face of the record.
 - (c) If the judgment or ruling requires clarification or
 - (d) For any other sufficient reason."
20. The applicant relies on the provision of section 80 of the *Civil Procedure Act* and order 45 of the Civil Procedure Rules on Review which provisions of the law are similar in content with the above cited Employment & Labour Relations Court Act and the rules (*supra*). The court will apply



the Employment & Labour Relations Court Act and the rules (2016) for purposes of the instant application.

21. The term *res judicata* under the *Black's law Dictionary* (10th Edition) by Bryan A Garner is defined as an issue that has been definitely settled by judicial decisions. The said dictionary states that there are three essential elements of *res judicata* namely:-
 - (i) In an earlier decision same issues were raised.
 - (ii) A final judgement on merits and
 - (iii) the involvement of same partes or parties in privity with the original parties.
22. Section 7 of the *Civil Procedure Act* Cap 21 Laws of Kenya on *res judicata* states as follows:-

“No court shall try an 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 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 the court”.
23. The court in its decision of March 7, 2018 found that the interested party had been sued twice under the same cause of action. That the court had already determined the matter for dismissal in Kisumu ELRC no 188 of 2022 hence the suit in Bungoma JR no 3 of 2018 was *res-judicata*. The interested party was awarded costs for being sued twice on same cause of action.
24. The applicant submits there is error apparent on face of record. The applicant submits that the proceedings before Court JR no 3 of 2021 are questing whether the respondents did have the requisite mandate and consequently whether they could purport to exercise powers of employer over the applicant whereas the proceedings in Kisumu ELRC 188 OF 2018 questioned whether termination of employment of the applicant by the interested party was fair and lawful and states this is the basis of the application for review on grounds of mistake and error apparent on the face of record.
25. The applicant relies on the decision of the Court of Appeal in *Nyamogo & Nyamogo v Kogo*(2001) EA174 where the court held an error apparent on the face of record cannot be defined precisely and must be left to be determined judicially on the facts of each case.
26. The applicant submits that the error can be ascertained by looking at the respective pleadings before court in Kisumu 188 of 2018 as well as the judgment and proceedings. That in the judicial review application the applicant questioned the capacity of the respondent sitting as shareholders on the interested party board to make a decision to terminate his employment hence purporting to act as employers of the applicant and this cannot be said to be *res-judicata*.
27. The interested party avers that the judicial review application orders sought are not available to the *exparte* applicant as against the interested party for the reason he is enjoying benefits of the judgment in Kisumu ELRC no 188/2018 which determined the termination of his employment which is same issue under the instant judicial review case.
28. The 2nd and 4th respondents' further aver through the affidavit that the applicant had split the claim into two a move that is legally prohibited 'res-subjudice'. That it is not in dispute that the two suits arose from the same cause of action (termination of employment)or transaction, the suits by same claimant seeking reliefs against the same respondents /defendants, the reliefs sought are similar /related in nature and the issues involved can be determined in the same forum. The respondents in summary submit



that the issues in the court in Kisumu are the same in Bungoma. That court at Kisumu found for the claimant in terms of compensation for unlawful termination and the issues concerning his former employment are settled and he has no further claims against the employer. That hearing the case in Bungoma JR no 3 of 2019 would be tantamount to opening up claims under the employer employee relationship which are already settled.

29. In order to establish if there was error or mistake apparent on record of the court in the impugned decision, the court looked into the judgment in Kisumu 188 of 2018 delivered by Lady Justice Christine N Baari and established the following:-
 - a. The claim was filed at Kisumu ELRC on May 10, 2018 while the instant case filed January 30, 2018 was pending in court. The claimant sought declaration of unlawful dismissal, reinstatement, salary arrears and compensation for unfair termination.
 - b. The claimant's case was that he was terminated from employment contrary to the terms and conditions of employment which decision was made when there was an order barring disciplinary action against him.
 - c. The court at Kisumu in paragraph 47 of its judgment referred to the said order under Judicial Review Cause no 1 of 2018 on January 25, 2018 and stated that the respondent therein was joined in the suit as an interested party and cited one of the interim orders in the said judicial review application as follows, ' that the grant of leave do operate as a stay of implementation of the impugned decision and all subsequent steps arising and in particular the applicant remain in his position pending the hearing and determination of the substantive motion.'". This order is at page 40 of the dismissed suit.
 - d. At paragraph 50 the court found and held that the disciplinary process that culminated in the dismissal of the claimant , was unlawful and unfair for the reason of there being in force court orders barring the process.
30. From the foregoing, the court finds that the court in Kisumu ELRC no 188 of 2018 relied on the proceedings and order in the Bungoma JR no 3 OF 2021 case dismissed for being *res judicata*.
31. The Court finds that the respondent in the Kisumu case was a party to the dismissed judicial review case and was indeed punished on basis of the order under the JR case. The court does not act in vain. The orders sought under the JR case ultimately sought to stop the termination of the employment of the applicant for non compliance with the law and Memorandum of Articles of the interested party by the respondents. While the case was pending the interested party then terminated the applicant's employment. The claimant was compensated for the termination of his employment in Kisumu ELRC no 188/2018.
32. The court having considered the decision in Kisumu ELRC 188 of 2018 is of the opinion that all the applicant's claims as employee of the interested party are settled. There is no further issue for determination by the court. That the orders sought in the dismissed JR case are overtaken by events following the determination in 188 of 2018 and it will be academic exercise to hear the JR case which would be tantamount to the court acting in vain.
33. The court has looked into the decision cited by the applicant and finds nothing contrary to its decision. In the *Invesco Assurance Company Limited & 2 others v Auctioneers Licensing board & Another* doctrine of *res judicata* is expounded and the court upholds the decision on the factors to be proved. The applicant has underlined the factor of that the former suit was between the same party or parties under whom they or any of them claim. Applying that factor, in the dismissed suit the respondent in Kisumu 188 of 2018 is the interested party in the dismissed JR case. The judgment finding is in favour of the



claimant, the applicant herein, the judgment is hinged under the interim order issued in the JR Case (page 40) where the court made adverse finding under paragraph 50 against the interested party for failure to obey the order. The applicant has not appealed on that finding. Indeed he is enjoying the benefit of the finding under the judgment.

34. The court finds that there is no error or mistake in its order of March 7, 2022.
35. The Notice of Motion application dated March 21, 2022 is without merit and an abuse of the court process and is dismissed with costs.
36. It is so ordered.

DATED, SIGNED AND DELIVERED THIS 28TH DAY OF JULY 2022 IN OPEN COURT AT BUNGOMA

J W KELI

JUDGE

In the presence of:-

Court assistant:- Brenda Wesonga

For applicant:- Ms Ojina holding brief for Maruti

For respondents:- absent

For interested party:- absent

