



**Kenya Union of Journalist v Cabinet Secretary Labour and Social Broadcasting Corporation & 3 others; Simani & 54 others (Interested Party) (Petition E002 of 2022) [2022] KEELRC 1177 (KLR) (19 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1177 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E002 OF 2022**

**JK GAKERI, J  
JULY 19, 2022**

**BETWEEN**

**KENYA UNION OF JOURNALIST ..... PETITIONER**

**AND**

**CABINET SECRETARY LABOUR AND SOCIAL BROADCASTING CORPORATION ..... 1<sup>ST</sup> RESPONDENT  
KENYA BROADCASTING CORPORATION ..... 2<sup>ND</sup> RESPONDENT  
COMMUNICATION WORKERS UNION (COWU) ..... 3<sup>RD</sup> RESPONDENT  
ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**ZIPORA K SIMANI & 54 OTHERS ..... INTERESTED PARTY**

**RULING**

1. Before me for determination is an Application by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents dated 25<sup>th</sup> January 2020. The Applicant seeks orders that:
  - i. That the petitioner's petition and Notice of motion dated 5<sup>th</sup> January 2022 as against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents be struck out.
  - ii. That the cost of the petition and the application be awarded to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.
2. The application is based on the grounds set out on the face of the Notice of Motion Application and in the supporting affidavit of Benson Okwaro, the General Secretary of the 3<sup>rd</sup> Respondent sworn on the 24<sup>th</sup> January 2022.



3. The grounds advanced on the face of the application and the supporting affidavit arise from the reliefs sought by the petitioner in its petition dated 5<sup>th</sup> January 2022 that revolve around the Legal Notice No. 146 published in the Kenya Gazette Vol CXXXIII- NO. 168 of 20<sup>th</sup> August 2021.
4. The Applicant contends that the petitioner in filing the petition withheld a material fact that it had previously filed another suit at the Industrial Court against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent being Industrial Cause Number 1142 of 2014 seeking a declaration that it had a simple majority and is the right union to be recognized. It also sought for nullification of the recognition agreement between the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent and any Collective Bargaining Agreement signed.
5. The applicant further states that Industrial Cause Number 1142 of 2014 was dismissed by the court on 27<sup>th</sup> November 2018 and an application to reinstate it was also dismissed on the 27<sup>th</sup> March 2019 which facts the petitioner deliberately choose not to disclose to the court.
6. The applicant states that the order issued by the Cabinet Secretary for deduction of agency fee pursuant to Section 49 (1) of the *Labour Relations Court Act* was effected after a trade union has concluded a Collective Bargaining Agreement and registered it in court.
7. The applicant avers that the petitioner cannot legally contest an order issued under Section 49(1) in the absence of a dully registered Collective Bargaining Agreement.
8. The applicant avers that the petitioner's petition is presented as if is a breach of constitutional fundamental right but in reality, the petitioner is seeking to be recognized as a dominant trade union as against 3<sup>rd</sup> Respondent.

#### **Petitioner's case**

9. In response to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' application the petitioner filed a Replying Affidavit dated 9<sup>th</sup> May, 2022 sworn by Erick Odour the Secretary-General of the petitioner.
10. The affiant avers that the application seeks for the instant matter to be struck out on the grounds of res-judicata but the application is not supported by sufficient evidence.
11. The affiant avers that the application is founded on a misapprehension that what is before the court is a question of whether there is a violation of the constitution as well as the petitioners and interested parties' rights by the 1<sup>st</sup> respondents' order for the 2<sup>nd</sup> Respondent to deduct 2% of the employees' salaries.
12. The affiant states that the issues in respect of the Gazette Notice 146 of 2020 dated 21<sup>st</sup> August 2021 have never been raised before any court.
13. The affiant states that the documents attached to the application relating to case number 1142 of 2014 raised issues touching on the right of a union to recognition and collective bargaining on the basis of its numerical strength which is a continuous administrative process that depends on the membership of the union and cannot be estopped by dismissal of a previous suit.
14. The affiant states that the dismissal of cause No. 1142 of 2014 did not close the window for negotiations between the 2<sup>nd</sup> respondent and the 1<sup>st</sup> respondent towards the execution of a recognition agreement.
15. The affiant states that the applicant has mistaken the historical background of the instant matter to be the sole basis of the instant petition, he states the previous matter only sought the right of the claimant



to be recognized while the current suit is a constitutional reference on the actions of the 1<sup>st</sup> respondent which has breached the rights of the petitioner and the interested parties.

16. The affiant states that the basis of the current case is the requirement that the petitioner's members pay an agency fee on an account of a collective bargaining agreement that was illegally procured and concealed from the staff.
17. The affiant urges the court to dismiss the application as it has not met the threshold for dismissing the instant suit on grounds of res-judicata.

### **Applicant's Submissions**

18. Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> applicants submits that from the petitioners replying affidavit it does not deny that it filed Cause No. 1142 of 2014 and it was dismissed
19. The applicants submit that the petition amounts to an abuse of the court process as the petitioner failed to succeed in Cause Number 1142 of 2014 in demonstrating that it was entitled to enter into a recognition agreement and compel the 2<sup>nd</sup> respondent to sign a collective bargaining agreement and the petition is founded on the assumption that there is a subsisting recognition agreement and collective bargaining agreement which is not true.
20. The applicant submits that the petitioner has no legal standing to institute a petition pursuant to an action undertaken by the 1<sup>st</sup> respondent in relation to section 49(1) of the labour relations court Act.
21. The applicant relies on the holding in *Union of Kenya Civil Servants v Kenya Medical Research Institute and union of Natural Research Institutes staff of Kenya*, ELRC Cause no. E367 of 2020 where the court held;

“...even if this was the case the agency fees would still be payable as long as the employers were benefiting from the CBA negotiated by the 2<sup>nd</sup> Respondent until such a time that the claimant would itself negotiate its own CBA and become entitled to agency fees. In such eventuality, the claimant would then be the one charge the agency fees against the 2<sup>nd</sup> respondent's members benefiting from the CBA.”

22. The applicant submits that it is clear from the above decision that the court affirmed the legal position that a claim under Section (49)(1) must be based on a subsisting CBA which is not the case in the petition herein.
23. The applicant urges the court to allow the application as prayed.

### **Petitioners Submissions**

24. The petitioners submit that the application has not met the criteria and the test as fairly settled and partly laid down under section 7 of the *Civil Procedure Act* which provides:

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.



25. It further relies on the court of Appeal decision in *Kenya Commercial Bank Ltd vs Benjob Amalgamated Ltd* [2017] eKLR where the court isolated five elements which must be assessed conjunctively rather than disjunctively as follows:
- i. The suit or issue was directly and substantially in issue in the former suit.
  - ii. That former suit was between the same parties or parties under whom they or any of them claim.
  - iii. Those parties were litigating under the same title.
  - iv. The issue was heard and finally determined in the former suit.
  - v. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.
26. In *John Florence Maritime Services Limited & another v Cabinet Secretary, Transport and Infrastructure & 3 others* [2021] eKLR the Supreme Court of Kenya affirmed this criterion.
27. The Supreme Court however held that even where all the elements of res-judicata are satisfied, the Court may still in the exercise of its discretionary powers exempt a suit from the effects of the doctrine. It stated as follows:
- “However, though the doctrine of res judicata lends itself to promote the orderly administration of justice, it should not be at the cost of real injustice. In the Danyluk Case from Canada the court cited the dissenting opinion of Jackson J.A., in *Iron v. Saskatchewan (Minister of the Environment & Public Safety)*, 1993 CanLII 6744 (SK CA), [1993] 6 W.W.R. 1 (Sask. C.A.), at p. 21 where he stated:
- “The doctrine of res judicata, being a means of doing justice between the parties in the context of the adversarial system, carries within its tenets the seeds of injustice, particularly in relation to issues of allowing parties to be heard.”
- “Just as the Court of Appeal in its impugned decision noted that rights keep on evolving, mutating, and assuming multifaceted dimensions it may be difficult to specify what is rarest and clearest. We however propose to set some parameters that a party seeking to have a court give an exemption to the application of the doctrine of res judicata. The first is where there is potential for substantial injustice if a court does not hear a constitutional matter or issue on its merits. It is our considered opinion that before a court can arrive at such a conclusion, it must examine the entirety of the circumstances as well address the factors for and against exercise of such discretionary power.
- In the alternative a litigant must demonstrate special circumstances warranting the Court to make an exception.”
28. The petitioner submits that the applicant has not provided any context to the annexed pleadings it seeks to rely on therefore it has not provided the court with anything that the court can make a finding of res-judicata.
29. The petitioner submits that the 1<sup>st</sup> Respondent whose actions are subject to the instant petition, the 4<sup>th</sup> Respondent who is the advisor, and the interested parties were not parties to the previous suit.
30. It submits that the mere presence of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents in the alleged previous proceedings is not conclusive evidence of sameness of parties such as to satisfy that limb of the doctrine of res-judicata.



31. The petitioner further submits that the instant petition challenges the actions of the 2<sup>nd</sup> respondent deducting a sum of 2% from inter-alia members of the petitioner and remitting the same to the 3<sup>rd</sup> Respondent was not an issue contested in the previous suit as the same only occurred in 2021, the previous suit sought to enforce the right to recognition.
32. Reliance is made on the holding of the Supreme Court in *John Florence Maritime Services Limited & another v Cabinet Secretary, Transport and Infrastructure & 3 others* [Supra] where the court expressed itself as follows:

“We arrive at the inescapable conclusion that the High Court in determining a judicial review application, exercises only a fraction the jurisdiction it has to determine a constitutional petition. It therefore follows that a determination of a judicial review application cannot be termed as the final determination of issues under a constitutional petition. The considerations are different, the orders the court may grant are more expanded under a constitutional petition and therefore the outcomes are different.”
33. The petitioner urges the court to find that the issues in the present suit have never been litigated in any previous suit and the gazette notice subject of the instant petition was published in 2021.
34. The petitioner urges the court to dismiss the application.

#### **Analysis and determination**

35. I have carefully considered the application, evidence filed therewith, and submissions before me. The issues for determination are whether the Application herein meets the threshold for striking out of the Petition and Notice of Motion application on the grounds of res judicata and if the Applicant is entitled to the orders sought.
36. The doctrine of res judicata is a prescription of the *Civil Procedure Act*.
37. Section 7 provides:

“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 can 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.”
38. The *Civil Procedure Act* also provides explanations with respect to the application of the res judicata rule. Explanations 1-3 are in the following terms:

“Explanation. (1) —The expression “former suit” means that 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 the 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.”



In, essence, therefore, the doctrine 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 having been determined on merits by a court of competent jurisdiction.

39. In *Henderson Vs Henderson* (1843-60) ALL E.R.378, the court observed thus:

“...where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in the contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in the special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”

40. For a matter to satisfy the doctrine of res-judicata, the issue must have been substantially litigated between the same parties and heard by a competent court and a decision made. The doctrine or principle of res judicata has been addressed in legions of decisions as the parties submissions here have undoubtedly demonstrated.

41. In *Judicial Service Commission v Sheikh Abubakar & another* (2019) eKLR the Court of Appeal explained the essence of res judicata as follows;

“The essence of res judicata is to ensure that litigation comes to an end and to prevent a party from re-litigating over the same issue.”

42. This was reiterated by the Supreme Court in the case of *Kenya Commercial Bank Ltd v Muiri Coffee Estates Ltd & another* (2018) eKLR as follows;

“The doctrine of res judicata in effect allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title from returning to court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits which would ordinarily clog the courts, a part from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party conclusively.”

43. It is also worth noting “. . . the doctrine of res judicata applies in respect of matters of all categories.” See *Kenya Commercial Bank Ltd V Muiri Coffee Estate Ltd & another* (Supra). It is settled that for res judicata to be effectively raised and upheld on account of a former suit, the following elements as outlined under section 7 of the *Civil Procedure Act* must be satisfied, as they are rendered not in disjunctive but conjunctive terms . . .”

44. The essential elements have been reiterated in numerous Court of Appeal decisions including *Hosea Sitienei v University of Eldoret & 2 others* (2018) eKLR, *Joseph Tama Ndua & 10 others v Jacaranda (Msa) Ltd t/a Jacaranda Indian Ocean Beach Resort* (2019) eKLR, *Independent Electoral & Boundaries Commission V Maina Kiai & 5 others* (2017) eKLR, *Kenya Commercial Bank Ltd v Benjob Amalgamated Ltd* (2017) eKLR and others.



45. In *John Florence Maritime Services Ltd & another v Cabinet Secretary, Transport & Infrastructure & 3 others* (Supra), the Supreme Court of Kenya expressed itself as follows:

“We restate the elements that must be proven before a court may arrive at the conclusion that a matter is res judicata. For res judicata to be invoked in a civil matter the following elements must be demonstrated:

- i. There is a former Judgment or order which was final;
- ii. The Judgment or order was on merit;
- iii. The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
- iv. There must be between the first and the second action identical parties, subject matter, and cause of action.”

46. Applying the above principles to the instant case, the court is of the view that the petition herein is not res judicata. This is so because the issue in dispute in Cause No. 1142 of 2014 is not directly and substantively in issue in the petition.

47. Although Cause No. 1142 of 2014 involved the petitioner and the 2<sup>nd</sup> and 3<sup>rd</sup> respondents which satisfies one of the requirements of the doctrine of res judicata, the pith and substance in that case was recognition of the petitioner by the 2<sup>nd</sup> respondent as well as the relationship between the 2<sup>nd</sup> and 3<sup>rd</sup> respondent who were negotiating a Collective Bargaining Agreement at the time.

48. Contrary to the Applicants submissions, the main issue in the petition herein is Legal Notice 146 of 2021 which mandated the 2<sup>nd</sup> respondent to deduct 2% of the Interested Parties, who are members of the Petitioner, salaries and remits the same to the 3<sup>rd</sup> respondent.

49. Needless to emphasize, Legal Notice 146 of 2021 was not part of Cause No. 1142 of 2014 and all the reliefs sought relate to the Legal Notice.

50. In its submissions, the 3<sup>rd</sup> respondent is in agreement with the court that in Cause No. 1142 of 2014, it tendered evidence to show that the Petitioner was seeking orders to be recognized by the 2<sup>nd</sup> respondent and negotiate a Collective Bargaining Agreement. This submissions clearly shows that the issue in Cause No. 1142 of 2014 was different from the issues raised by the Petition.

51. For the above reasons, it is the finding of the court that Legal Notice 146 of 2021 published in the Kenya Gazette No. CXXXIII No. 168 of 20<sup>th</sup> August, 2021, the subject matter of the petition, has not been litigated before by the same parties and does not as such meet the threshold of the doctrine of res judicata.

52. It is not in doubt that the requirements that the former judgement or order be final and on merit is not satisfied.

53. The applicant states that Cause No. 1142 of 2014 was dismissed as was the application for its reinstatement. It is unclear at what point the suit was dismissed and for what reasons.

54. Without a judgment or order, it is problematic to surmise that the issues raised were heard and finally determined in the former suit.

55. Finally, there is no dispute that the court that heard and determined the former suit is competent to hear and determine the petition herein.



56. In the upshot, since the requirements of the doctrine of res judicata are conjunctive not disjunctive, the Applicants have not successfully invoked the doctrine of res judicata and the Application dated 25<sup>th</sup> January, 2022 is dismissed with no orders as to costs.

57. The Notice of Motion and the Petition herein shall be heard and determined on merit.

58. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 19<sup>TH</sup> DAY OF JULY 2022**

**DR. JACOB GAKERI**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the [Civil Procedure Act](#) (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**

