



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nyagah v County Government of Embu & 2 others (Cause 44 of 2019)  
[2022] KEELRC 3949 (KLR) (16 September 2022) (Ruling)**

Neutral citation: [2022] KEELRC 3949 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU  
CAUSE 44 OF 2019  
DKN MARETE, J  
SEPTEMBER 16, 2022**

**BETWEEN**

**JOHNSON MWANIKI NYAGAH ..... CLAIMANT**

**AND**

**COUNTY GOVERNMENT OF EMBU ..... 1<sup>ST</sup> RESPONDENT**

**MARTIN NYAGA WAMBORA ..... 2<sup>ND</sup> RESPONDENT**

**EMBU COUNTY PUBLIC SERVICE BOARD ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. This is an application by way of notice of motion dated December 16, 2021. It seeks the following orders of court;
  1. That this honourable court be pleased to strike out the amended statement of claim dated November 1, 2021 filed herein by the claimant against the respondents.
  2. That the 2nd respondent be struck out of these proceedings.
  3. That the costs of this application be borne by the claimant.
2. It is grounded thus;
  1. This court has no power under the law to entertain the present proceedings against the 2nd respondent by virtue of section 12 of the *Employment and Labour Relations Court Act*.
  2. That honourable court has no jurisdiction to hear and determine the suit filed herein by the claimant against the 2nd respondents as there is no contract of service entered between the parties whereby 2nd respondent agreed to employ the claimant at his personal capacity and/or where the claimant agreed to serve as personal employee of the 2nd respondent.



3. The 2nd respondent is not the employer of the claimant as clearly defined under section 2 of the [Employment Act](#), 2007. The claimant is not an employee of the 2nd respondent. Consequently, there is no employee-employer relationship capable of being adjudicated by this honourable court.
  4. By dint of section 133 of the [County Government Act](#), 2nd respondent enjoy protection against personal liability and this suit ought to be struck out on that basis alone.
  5. The present proceedings as against the 2nd respondent are hopeless, frivolous and vexatious and an abuse of the court process meant to achieve an ulterior motive.
  6. The claimant was given limited time by this court on July 19, 2021 to amend the claim but has filed claim dated November 1, 2021 out of time without seeking leave of the court or extension of time.
  7. Employment and labour disputes involving or relating to employees of the county governments such as county government of Embu are first referred to the Public Service Commission by dint of article 234 (2) of the [Constitution](#) of Kenya, section 99 of the [Public Service Commission Act](#), 2017 as read together with section 77 of the [County Government Act](#). If then, the claimant purports to be an employee, his recourse does not lie before this court but elsewhere.
  8. This is a just and fair case that deserves to be struck out in the wider interest of justice.
3. The claimant/respondent in a replying affidavit sworn on February 21, 2022 opposes the application.
  4. It is his case that between January 10, 2018 and December 10, 2019, he served as a chief of staff and head of governor's delivery unit of the 1st respondent.
  5. His further case is as follows;
    2. That between January 10, 2018 and December 10, 2019, I worked as chief of staff and head of governor's delivery unit in Embu county government.
    5. That the applicant has stated that this court has no power to entertain this suit by virtue of section 12 of the [Employment and Labour Relations Court Act](#), section 2 of the [Employment Act](#), section 88 of the [Public Service Act](#) and section 77 of the [County Government Act](#), which grounds my advocates advise are faulty for the reasons below;
      - a. The applicants have previously raised similar grounds. When the original statement of claim dated December 9, 2019 was served upon the 1st and 2nd respondents, the said respondents, in response to the claim filed a notice of preliminary objection to the claim on February 17, 2020.
      - b. That the said PO, which in addition raised factual issues can only be determined at the full hearing of the suit.
      - c. When I filed a notice of motion dated April 22, 2021 to reinstate the claim, the respondents opposed the said motion by way of grounds, which grounds consisted of similar objections. The said objections were overruled by court when it delivered its ruling on July 19, 2021.
      - d. This is the 3rd time that similar objections are being raised consequent to which I urge this honourable court to have the suit determined on merit so that peripheral matters



do not take away the attention of court.(copies of the PO and the grounds are marked as JMN-1.

8. That striking out the amended statement of claim would be a draconian act and the court should be more inclined to granting parties a hearing and salvage cases that can be breathed life into;
11. That further, the prayer to seek the 2nd respondent be struck out from the proceedings should not be granted since the 2nd respondent is a necessary party for the following reasons
  - a. The 2nd respondent is the one who issued the claimant with the offer for appointment as a chief of staff and not the 1st and 2nd respondent. A copy of letter of appointment is attached and marked as JMN2;
  - b. The 2nd respondent is the one who terminated my services and not either the 1st and 2nd respondents. A copy of the termination notice is attached and marked as JMN 3.
  - c. That termination by the 2nd respondent deprived me the opportunity to appeal under the County Government Act;
13. That with regard to the issue of jurisdiction raised at ground 7 of the application, the same cannot be applied in this case as the 2nd respondent unprocedurally terminated my employment without reference to county board and thus the procedure under section 77 of the County Government Act cannot be applied.
19. That I am advised by my advocates on record, which advice I verify believe to be true that the timelines given by the court are important but the court still has power to admit an amended statement of claim as properly filed and served since the violation was not for statutory timelines.
6. The respondent/applicant invokes a case of res judicata and wishes to rely on the authority of Independent Electoral & Boundaries Commission v Maina Kiai & 5 others (2017) eKLR, where the court held thus;
  - a. “The suit or issue was directly and substantially in issue in the former suit.
  - b. That former suit was between the same parties or parties under whom they or any of them claim.
  - c. Those parties were litigating under the same title.
  - d. The issue was heard and finally determined in the former suit.
  - e. 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”

Further,

8. The claimant was granted leave to file and serve the amended claim within 21 days from July 19, 2021. This was after the ruling on record reinstating the suit that had been dismissed for want of prosecution. The claimant was thus to file the same by August 12, 2021. The claimant served the amended statement of claim dated November 1, 2021 upon the respondents on the November 10, 2021.

Again,



9. The claimant has admitted in paragraph 16 of his replying affidavit that he filed the statement of claim out of time.
7. The respondent/ applicant seeks to rely on section 6 with the County Government Act to debar case against the 2nd respondent. It is their case that matters relating to a county government shall be answered on the government's authority and not in person.
8. They further seek to rely on section 133 of the Act which also absorbs the county government and its governor from liability for acts done in good faith. They pray that the matter against the 2nd respondent be struck out.
9. The claimant/respondent admits that he filed the amended statement of claim out of time but submits that this was for good reason.
10. He further submits that the inclusion of the person of the governor, Embu county as a party to this suit is appropriate bearing in mind circumstances of this case.
11. This application calls for the exercise of this court's discretion in refusal or grant of the application. The claimant/respondent's case is a plea for allowance to pursue his claim which has long been delayed by the acts and determinations of this court out of his favour. The respondent/applicant faults admission of the amended statement of claim on grounds of *inter alia*, dalliance and filing out of time. The claimant deems all these as technicalities which should not be employed to strike out his claim.
12. I exercise this discretion in favour of the claimant/respondent. Before court is a matter that has not been heard on merit. It is the court's feeling that the issues raised in support of the application are good material for hearing and determination on trial of the claim. The claimant should be allowed to enjoy their fruits of equity in allowing a continuance of his claim and suit.
13. I am therefore inclined to dismiss the application with costs to the claimant/respondent.

**DATED AND DELIVERED AT NYERI THIS 16<sup>TH</sup> DAY OF SEPTEMBER 2022.**

**D.K.Njagi Marete**

**JUDGE**

**Appearances**

1. Mr.Kigen instructed by Wesonga, Mutembei & Kigen Advocates for the Respondent/Applicant.
2. Mr. Gachaga instructed by Githumbi Gachaga & Achoki Advocates for the Claimant/Respondent.

