



**Union of Metal Workers v Pelican (Cause 317 of 2019)  
[2022] KEELRC 3968 (KLR) (13 September 2022) (Ruling)**

Neutral citation: [2022] KEELRC 3968 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 317 OF 2019  
MA ONYANGO, J  
SEPTEMBER 13, 2022**

**BETWEEN  
AMALGAMATED UNION OF KENYA METAL WORKERS ..... CLAIMANT  
AND  
PELICAN SIGNS LIMITED ..... RESPONDENT**

**RULING**

1. Before me for determination is the respondent's notice of motion application dated September 20, 2021 seeking the following orders that:
  - (i) This application be certified urgent and heard on priority basis.
  - (ii) The entire proceedings herein be stayed generally pending hearing and final determination of this application.
  - (iii) The direction by Lady Justice Maureen Onyango given on May 28, 2021 to the effect that the matter be dispensed with by way of written submissions be set/aside and/or varied.
  - (iv) The Executive Director of Kenya Federation of Employers Ms Jacqueline Mugo do appoint an officer of senior rank to take over the conciliation process that had been initiated and was nearing completion under an FKE Senior Officer Mr M L Kariuki (now retired).
  - (v) Upon prayer 4 hereinabove being granted, the appointed Conciliator of the Federation of Kenya Employers do file a conciliation report in court within 60 days upon completion of the conciliation process.
  - (vi) Simultaneously the Kenya Federation of Employers to produce in court all typed and duly signed conciliatory proceedings that had so far been conducted by Mr M L Kariuki (now retired)



- (vii) The injunctive order dated May 17, 2021 be set aside varied and/or discharged unconditionally forthwith.
  - (viii) This application be heard together with the respondent's notice of motion dated May 23, 2019.
  - (ix) In the alternative, the matter do proceed for full hearing in open court by way of *viva voce* evidence.
  - (x) The costs of this application be provided for.
2. This application is premised on the grounds on the face of the notice of motion application as further supported by the Affidavit deponed by Samuel Ngugi Ndinguri, the Chief Executive Officer of the respondent on September 20, 2021.
  3. He depones that the *status quo* orders which were confirmed by this court in its ruling of May 17, 2021, are equivalent to reinstatement of the grievants who in the respondent's view were lawfully terminated.
  4. That the affiant sought through its application dated May 23, 2019 to inter alia have the *ex parte status quo* orders set aside as the orders were issued through concealment of material facts.
  5. That on June 10, 2019 this court did direct the parties to attempt out of court settlement and as a result the respondent did not proceed with the prosecution of its application dated May 23, 2019.
  6. The affiant depones that this matter remains the subject of active conciliatory proceedings with the report yet to be prepared and handed over. That as a result of the negotiations the parties have reached a suitable consent with respect to seven (7) grievants and the agreed amounts have been paid out to the seven (7) grievants marking their claims as fully settled.
  7. The respondent maintains that it is keen to have this matter amicably settled as evidenced by the partial settlement and that there have been no complaints of any delay on its part.
  8. That during the conciliation proceedings one Mr Ondiege Odera, an officer of the claimant tabulated the terminal dues payable to all 27 grievants totalling to Kshs 2,076,806/- out of which the respondent has paid a sum of Kshs 410,149/- with respect to 7 grievants.
  9. The affiant states that the respondent was later served with the tabulated amounts which had escalated from Kshs 2,076,806/- to Kshs 24,866,676/-.
  10. It is on this basis that the respondent urges this court to find merit in its application and allow it in terms of the orders sought.
  11. In response to the application the claimant filed a replying affidavit sworn by Rose Omamo, the claimant's Secretary General, on October 14, 2021. She deposes that the deponent of the respondent's supporting affidavit who is the current Chief Executive Officer of the respondent lacked the capacity to swear an affidavit on behalf of the respondent given that he was not in the respondent's employment at the time this dispute arose. She therefore urges this court to disregard the affidavit.
  12. The above notwithstanding, the deponent confirms that parties went through conciliation and the process was in fact concluded on November 5, 2019 prior to the conciliator, Mr Kariuki proceeding on retirement. That the parties had reached a joint agreement.
  13. She depones that there is no report to be handed over to the court given that the conciliator's appointment was neither done by this court nor the Ministry of Labour under the provisions of section 62(1)(a) and (b) of the [Labour Relations Act](#). She argued that the conciliator agreed upon by the parties



is in fact a stranger to both the court and the Ministry of Labour and is therefore not bound to deliver any report to the court.

14. The affiant stated that the respondent's counsel on record has been contacting the grievants personally requesting them to go pick payments from the advocates offices some of whom have declined any payments after it became apparent that the amounts offered were less than the agreed amounts.
15. In response to the claim for Kshs 24,866,676/- as claimed by the respondent, the claimant contends that it is accumulated unpaid salary arrears pursuant to the court order on maintaining *status quo*.
16. The affiant maintains that the instant application is an abuse of the court process as it is an attempt by the respondent/applicant to reopen this claim afresh for hearing and determination as opposed to proceeding as directed by filing their respective submissions and taking a date for judgment.
17. She depones that the respondent/applicant has failed to file its own computation despite being accorded a chance to do so by the court. The claimant urged this court to grant it a judgment date.
18. By a further affidavit sworn by Samuel Ngugi Ndinguri, the respondent's Chief Executive Officer on October 29, 2021 he states that he is conversant with the facts in this matter having been under the respondent's employment from the year 2017.
19. He maintains that the out of court negotiations and conciliation process had not concluded as contended by the claimant and that in fact the respondent's representative who attended the said meeting did not at any time execute any document with respect to terminal benefits. He maintained that the issue is yet to be agreed upon and the respondent has applied to be furnished with typed copies of the negotiations and conciliation proceedings as well as the conciliation report.
20. He argued that the documents attached to the replying affidavit as annexure 1 and 2 respectively are not legally binding as there was no consensus between the parties and the claimant cannot purport to rely on the two documents to support its case against the respondent.
21. The affiant denied personally approaching the grievants in this matter with a view of settling the claims as contended by the claimant. He states that the grievants voluntarily accepted the amounts as captured in the settlement deeds as full and final settlement of their respective claims.
22. That there have been discrepancies in tabulation of the dues as prepared by the claimant with the sum being Kshs 2,076,806/- as tabulated by Mr Ondiege Odera and shared with the respondent.
23. That the amount later rose to Kshs 9,298,891/- as at January 10, 2020 and Kshs 24,866,2676/- as at July 1, 2020, which amounts the respondent maintains are without basis and the therefore the need for this court to conduct a full hearing in this matter before giving its final decision.

### **Respondent/Applicant's Submissions**

24. Parties were directed to proceed with the application by way of written submissions. At the time of preparing this ruling only the respondent had filed its submissions in support of the application dated September 20, 2021.
25. In its submissions the respondent/applicant states that it has met the threshold for the grant of the setting aside orders as set out in rule 17 (7) of the [\*Employment and Labour Relations Court \(Procedure\) Rules, 2016\*](#). To buttress this argument the respondent relied on the case of [\*Edney Adaka Ismail v Equity Bank\*](#) [2014] eKLR which cited the case of [\*CMC Holdings Limited v Nzioki\*](#) (2004) 1 KLR 173.



26. The respondent/applicant submitted that the *ex parte* orders of *status quo* issued were given with material non-disclosure of all material facts and should therefore be set aside and/or varied by this court.
27. It is further submitted that the orders issued greatly prejudice the respondent and have caused it substantial loss.
28. The respondent maintains that it has a right to fair hearing as provided under article 50 of the [Constitution](#) of Kenya and should therefore be allowed to proceed with the matter by way of *viva voce* evidence despite the fact that the court directed that the matter proceeds by way of written submissions. For emphasis the respondent relied on the court findings in the case of [Pinnacle Projects Limited v Presbyterian Church of East Africa, Ngong Parish & Another](#) [2018] eKLR where the court held that parties should be accorded an opportunity to present their case and have a fair hearing before a decision against them is made by a judge or a magistrate.
29. With regard to the conciliation process the respondent submitted that the same is provided to under article 159(2)(c) of the [Constitution](#) of Kenya as read with rules 5, 15 and 19 of the [Employment and Labour Relations Court \(Procedure\) Rules, 2016](#) and that it has always been willing and ready to engage the grievants in alternative dispute resolution mechanisms as evidenced by the fact that it has already settled 7 of the grievants' claims and is ready to engage the remaining 21 grievants with a view of settling the matter out of court.
30. In conclusion the respondent/applicant submitted that its application dated September 20, 2020 is merited and ought to be allowed in terms of the reliefs sought therein.
31. The claimant did not file any submissions in respect of the application.

### **Analysis and Determination**

32. I find the prayers sought in this application absurd. In the first place, it was this court's initiative to send the parties for conciliation. In their own wisdom, the parties chose to go to the Mr L W Kariuki of the Federation of Kenya Employers (FKE) to assist them resolve this matter out of court. During the process they signed two agreements that did not resolve the issue in dispute.
33. When parties appeared before court on February 27, 2020 the respondent reported that parties had reached partial settlement and sought a further 60 days for the parties to finalise the out of court settlement. The claimant's representations however disagreed and informed the court that the conciliation process had been concluded.
34. In light of the foregoing and taking into account the partial settlement agreements by the parties, the court directed the parties to compute the terminal dues for the employees affected (the grievants) and submit to court for final determination.
35. When the parties next appeared in court on June 15, 2020 they had not complied and they were given a further 21 days to record consent at their request.
36. At the next court appearance on July 15, 2020, the court was informed that the respondent had filed a notice of preliminary objection, which was later withdrawn.
37. The respondent thereafter filed an application dated July 17, 2020 seeking orders that the further statement in support of calculations for final dues dated January 10, 2020 be struck out and expunged from the record and that Mr L W Kariuki of FKE be given a further 30 days to complete his report.



38. That application was argued and in its ruling delivered on May 28, 2021, the court dismissed the application with costs and directed the parties to file submissions on terminal benefits due to the grievants based on agreements of the parties during conciliation, then take a date for judgment. The court fixed the matter for mention on July 26, 2021.
39. When parties appeared before the court on July 26, 2021, counsel for the respondent informed the court that his client demanded a full hearing. The court declined the prayer and directed the respondent to file its written submissions as directed on May 28, 2021. Counsel for the respondent then applied for 30 days to comply which application was granted by the court and the respondent given 21 days to file its submissions against protests by the claimant.
40. When parties appeared in court on September 29, 2021 to confirm filing of submissions by the respondent, counsel for the respondent informed the court that it had filed an application under certificate of urgency which they had served upon the claimant.
41. The said application is the one before the court for determination.
42. Having considered the application and the submissions both in support and in opposition thereto, it is clear that the prayers sought in the application are the very prayers sought in the application dated July 17, 2020 that was dismissed by this court in the ruling delivered on May 28, 2021. It is also similar prayers that the court declined on July 26, 2021.
43. A litigant will not be allowed to litigate the same issues all over again once a determination has been made on the same. This is the essence of the doctrine of *res judicata* and the doctrine of issue estoppel. The purpose of the doctrines is to prevent the repetition of issues and to prevent the harassment of the party against whom the litigation is repeated.
44. The doctrine of *res judicata* is provided for in section 7 of the [Civil Procedure Act](#) and its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgement between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit.
45. In *Gurbachan Singh Kalsi v Yowani Ekori* Civil Appeal No 62 of 1958 [1958] EA 450 the former East African Court of Appeal stated as follows:-

“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 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 special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgement, 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...No more actions than one can be brought for the same cause of action and the principle is that where there is but one cause of action, damages must be assessed once and for all... A cause of action is every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.”



46. The civil justice system depends on the willingness of both litigants and lawyers to try in good faith to comply with the rules established for the fair and efficient administration of justice. When those rules are manipulated or violated for purposes of delay, harassment, or unfair advantage, the system breaks down and, in contravention of the fundamental goal of the Civil Procedure Rules, the determination of civil actions become unjust, delayed, and expensive.
47. Besides the foregoing, it is the court that sent the parties to try and settle this matter outside court when they went to Mr L W Kariuki of FKE. These efforts having failed, the court has directed parties to proceed by way of written submissions, building on agreements reached during conciliation. The repeated insistence of the respondent to go back to FKE while in the same breath asking for *viva voce* hearing is obviously in bad faith.
48. I therefore find that the application herein is an abuse of court process as the prayers sought in the application have been sought and declined before this court before. The same is dismissed with costs and the respondent directed to file its submissions within fourteen (14) days to enable this court make a final determination in this matter.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13<sup>TH</sup> DAY OF MAY 2022**

**MAUREEN ONYANGO**

**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.

**MAUREEN ONYANGO**

**JUDGE**

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