



REPUBLIC OF KENYA



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**Esevwe v University of Nairobi (Employment and Labour Relations Cause E458 of 2022) [2022] KEELRC 12973 (KLR) (27 October 2022) (Ruling)**

Neutral citation: [2022] KEELRC 12973 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E458 OF 2022**

**JK GAKERI, J  
OCTOBER 27, 2022**

**BETWEEN**

**FRANK ESEVWE ..... CLAIMANT**

**AND**

**UNIVERSITY OF NAIROBI ..... RESPONDENT**

**RULING**

1. Before the court for determination is a Notice of Motion Application by the Applicant dated June 28, 2022 seeking Orders That;
  - i. Spent.
  - ii. Pending the hearing and determination of this application and the suit, an order of temporary injunction be issued and is hereby issued, suspending the implementation of the respondent's notice/letter dated June 21, 2022 (wrongly stated as June 21, 2021).
  - iii. Pending the hearing and determination of this application and suit, an order to be issued and is hereby issued barring the Respondent, its agents, servants, managers and employees from reducing applicant's house allowance currently payable to the Applicant.
  - iv. Any other order the court may deem fit to grant for the ends of justice.
2. The Application was filed under certificate of urgency and is expressed under section 3, and 12 of the *Employment and Labour Relations Court Act*, 2011 (wrongly stated as 2014), section 5, and 31 of the *Employment Act*, 2007, Articles 10, 27, 41, 43 and 47 of the *Constitution* of Kenya, 2010 and all other enabling provisions of law.
3. The Application is based on the grounds expressed on its face that the applicant is a unionisable employee of the respondent working in the Transport Department.



4. The claimant avers that his current Basic pay is Kshs 31,144/= and a house allowance of Kshs 17,013/=. That the latter was last adjusted in 2015 pursuant to a CBA signed on March 19, 2014.
5. That the current house allowance is a product of a CBA negotiated by union and the respondent.
6. The Applicant avers that by letter dated June 21, 2022, the respondent has intimated that it intends to reduce his house allowance from Kshs 17,013 to Kshs 4,671.60 contrary to the provisions of the *Employment Act, 2007*.
7. The Applicant further avers that prior to the instant suit, he and 57 others lodged Cause No 511 of 2016 seeking harmonization of House allowance but the claim was disallowed. That the judgement dated May 19, 2022 did not grant any orders in favour of the respondent and the intended reduction of the applicant's house allowance is in breach of terms of the employment contract, a violation of Articles 27(1) & (2), 41, 43 and 47 of the *Constitution* of Kenya, 2010 and is discriminative since it affects only those involved in Cause No 511 of 2016 and is a unilateral variation of the terms of employment.
8. That the applicant and the 57 others are likely to be deprived their protected right to earnings contrary to the law.
9. That the applicant has moved to court without undue delay.
10. It is also averred that if the orders sought are not granted, the applicant stands to suffer untold misery and suffering and the respondents shall suffer no prejudice.
11. It is the Applicant's averment that he was presented a prima facie case with high chances of succeeding and the balance of convenience is in favour of the Applicant.
12. That it is in the interest of justice that the application be allowed.

### **Respondent's case**

13. In its Replying Affidavit sworn by Harrison Shimanyi Akala, the affiant states that he is the Deputy Registrar Industrial Relations.
14. The affiant states that the subject matter of the dispute is res judicata and an abuse of the court process.
15. The respondent states that the matter of law and fact in Nairobi ELRC Cause No 358 of 2022 and Nairobi ELRC Cause No 511 of 2016 are similar to those in the instant case and are
  - i. Directly and substantially in issue
  - ii. The claimant is the same and
  - iii. Litigating under the same title
  - iv. Courts have competent jurisdiction
  - v. The matters were heard and determined.
16. The affiant states that the claimant is abusing the court process by filing multiple actions on the same subject matter, raising issues already determined in previous suits, inconveniencing the respondent, forum-shopping and commencing a fresh suit in respect of a matter he is appealing against.
17. It is the respondent's case that Applicant's claim for Kshs 17,013 is a benefit not approved by the Salaries and Remuneration Commission and payment of the sum to the Applicant was in error and is thus recoverable and was not a review of terms and conditions of employment.



18. Finally, the affiant states that the claimant's house allowance benefit is pegged at 15% of his basic salary.

### **Applicant's further affidavit**

19. The Applicant filed a further affidavit sworn on September 19, 2022 in opposition to the Memorandum of Response and the respondent's Replying Affidavit.
20. The affiant states that the respondent has tendered no prove that the Application herein is res judicata and his claim stems from the judgement in *Frank Esevwe & 57 others V University of Nairobi*.
21. That the alleged error on the house allowance has subsisted for 7 years and the respondent's letter of June 21, 2022 makes no reference to the error but is implementing court orders.
22. The claimant depones that there is no evidence or pleading that the 15% house allowance is approved by the Salaries and Remuneration Commission (SRC) or negotiated in any Collective Bargaining Agreement.
23. That the respondent has not denied that the instant application is challenging the respondent's letter dated June 21, 2022 which was not the subject of litigation in Frank Esevwe & 57 others V University of Nairobi (Supra).

### **Claimant's submissions**

24. The claimant's submissions address issues of res judicata, jurisdiction of the court, whether the decree issued in ELRC Cause No 511 of 2016 ordered the respondent to reduce the claimant's house allowance, discrimination, victimization, revenge, punishment and intimidation.
25. On res judicata, the claimant urges that there is no other suit litigated between the parties hereto on the notice dated June 21, 2022. That it is a new and fresh suit. Reliance is made on section 7 of the *Civil Procedure Act* and the decision in *Henderson V Henderson (1843-60) ALL ER 378* to espouse the concept of res judicata.
26. On jurisdiction, reliance is made on the provisions of section 12 of the *Employment and Labour Relations Court Act, 2011* to urge that court has jurisdiction to hear and determine the suit herein.
27. As regards the decree in ELRC Cause No 511 of 2016, it is urged that the court did not order reduction of the claimant's house allowance from Kshs 17,013 to 15% of the basic salary and the argument that the house allowance of Kshs 17,013 was not approved by the Salaries and Remuneration Commission (SRC) was fallacious.
28. On discrimination, victimization, revenge, punishment and intimidation, the claimant submits that the respondent was targeting drivers who filed ELRC Cause No 511 of 2016.

### **Respondent's submissions**

29. The gravamen of the respondent's submissions is that the prayers sought are res judicata, the same having been litigated and determined in ELRC Cause No 511 of 2016. That the court is being called upon to repeat itself.
30. It is the respondent's submission that the issue of the claimant's house allowance was litigated in ELRC Petition No 112 of 2018 and judgement rendered on May 19, 2022. Contrary to this submission by counsel for the respondent, the judgement rendered on May 19, 2022 is in Cause No 511 of 2016.



31. Reliance is made on the decision in *Okiya Omtata Okiiti & another V Attorney General & 2 others (2015) eKLR* to urge that the prayers sought are res judicata.
32. The respondent rehashes the contents of its Replying Affidavit on the elements of res judicata as set out in section 7 of the *Civil Procedure Act*.
33. Further reliance is made on the decisions in Henderson V Henderson (Supra) and the Court of Appeal decision in *John Florence Maritime Services Ltd & another V Cabinet Secretary for Transport and Infrastructure & 3 others (2015) eKLR* to reinforce the submission.
34. The respondent further submits that the application herein is an abuse of the court process based on the grounds enumerated in the Replying Affidavit.
35. On the amount of house allowance payable to the claimant, the respondent relies on the judgment of the court in ELRC Cause No 511 of 2016.
36. It is the respondent's contention that the application herein is fatally defective, frivolous, misconceived, bad in law and an egregious abuse of the court process as no breach of constitutional rights have been demonstrated.
37. Finally, the respondent submits that there is no basis on which the application can be sustained and the same should be dismissed with costs.

#### **Determination**

38. The only issue for determination is whether the Claimant/Applicant's Notice of Motion Application dated June 28, 2022 is merited.
39. Although the issue of res judicata is elemental as submitted by the parties and could ultimately determine the suit before the court, it is common ground that the instant application is based on circumstances that occurred after the judgement in ELRC Cause No 511 of 2016, was delivered and though similar to a previous attempt, the current notice is based on the judgement in ELRC No 511 of 2016. The court is persuaded that whereas the instant application may not turn on the principle of res judicata, the main suit will. In this case, the Claimant/Applicant is seeking an order of temporal injunction to suspend implementation of the respondent's letter/notice dated June 21, 2022.
40. That the respondent be restrained from reducing the applicant's house allowance payable to him as at the date of this application of Kshs 17,013.00.
41. It is not in dispute that the Claimant/Applicant is an employee of the respondent serving as a driver.
42. It is also not in dispute the Claimant/Applicant was the architect of ELRC No 511 of 2016 Frank Esevwe and 57 others V University of Nairobi whose judgement was delivered on May 19, 2022.
43. In order to contextualize the current dispute, it is essential to rehash the facts and decision in Frank Esevwe V University of Nairobi, (2016).
44. In that case, the Claimants alleged that a Collective Bargaining Agreement (CBA) representing all employees of Public Universities for the period 2010/2013 was signed on 19<sup>th</sup> March, 2014 and by court order, the claimants house allowance and other drivers was backdated to 2012/2015. That subsequently, the court ordered the respondent to implement the Minimum Wage Regulation Orders, 2012 and 2015 as published by the Minister.



45. The gravamen of the suit was that the respondent had issued a notice to the effect that the house allowance of the claimant would be reduced with effect from March 1, 2016 analogous to the present suit and Application. Under the notice, the house allowance would reduce from Kshs 17,013.00 to Kshs 10,371.00 and in the instant suit from Kshs 17,013.00 to 15% of the basic salary.
46. In addition, the claimants alleged that they were discriminated.
47. Intriguingly, apart from some minor modifications, the reliefs sought in 2016 are substantially similar to the reliefs sought in the instant application and suit.
48. The issue of the alleged discrimination fell by the way side for want of particulars.
49. The court expressed itself as follows;
- ' The claimant's claims of unfair discrimination are not well articulated in the statement of claim. However, it does not necessarily mean that the respondent unfairly discriminated against them by placing a higher house allowance for unionised employees as against unionisable employees who have not joined the union. This is an issue that can properly be determined in due course when all the facts are placed before court and not in this instance without particulars.'
50. As regards the increase of house allowance for the claimants, the learned judge was categorical that the respondent could not unilaterally do so without the advice of the Salaries and Remuneration Commission. Such advice is imperative.
51. On the issue of the alleged reduction of house allowance, the court found that the respondent had acknowledged that an accounting error occurred in October 2015 and efforts were being made to rectify the same as payments made on error are recoverable in accordance with the provisions of section 19(1)(e) of the *Employment Act, 2007*.
52. The court stated as follows;
- ' It is therefore important that once the error is noted by either party, it is addressed to avoid the same accumulating and placing the employee at a disadvantage when recovering the same following an honest mistake or error of the employer. And on the other hand, the employer should bring the error to the notice of the employee at the earliest to avoid the employee falling into a comfort zone with the wind fall.'
53. Finally, as regards the critical issue of house allowance, the court reasoned that the minimum wage payable under the Regulation of Wages (General)(Amendment) Orders is subject to a house allowance as a benefit as ordained by section 31 of the *Employment Act* and payable in kind or monetary allowance at the rate of 15%.
54. On this issue, the learned judge held as follows;
- ' In this regard, the claimants claim outside the letters of appointment as drivers, the applicable Regulation of Wage orders for house allowance that is above 15% of their basic wage is not lawful and in this regard is not justified.
- Ultimately, there is no evidence that the Salaries and Remuneration Commission approved any salary increase or a review to the house allowance as alleged by the claimants. The same body has the mandate to review, harmonise and determine the cycle of salaries in the Public Service and recommend a review.



Since the orders of February 16, 2017 have applied herein to allow for hearing of the suit on the merits, any payments done in this regard shall suffice and revert to a house allowance of 15% of the due basic wage unless revised under a CBA which the claimants are beneficiaries as members or under agency.'

55. The orders dated February 16, 2016 were issued pursuant to a Notice of Motion Application dated March 30, 2016 which sought inter alia an order of injunction to restrain the respondent, its agents and/or servants from interfering with the house allowance of the claimants and or reduce it from Kshs 17,013 to Kshs 10,371.

56. It also sought an order of injunction to stay implementation of reduction of house allowance.

57. Needless to emphasize, these orders are similar to those sought in the instant case in all respects.

58. Finally, the court held that;

' The claimants are not unionised so as to claim under the CBA or return to work formula agreement entered into between KUDHEIHA and the respondent. The filing of the instant claim outside of any unionisation is evidence of such fact.

The benefit(s) already enjoyed shall suffice.'

59. The foregoing is a clear demonstration that the issue at the heart of the instant suit appear similar to the issue that the court dealt with in ELRC Cause No 511 of 2016 and although the court granted orders pending the hearing and determination of the suit, after the suit was heard on the merits, the court was satisfied that the orders sought were not merited.

60. It is noteworthy that the applicant herein filed a Notice of Appeal dated May 30, 2022 on May 31, 2022 and by letters dated June 2, 2022 requested for the decree from the judgement delivered on May 19, 2022 as well as typed and certified proceedings and undertook to pay the necessary charges. The proceedings have since been typed. It would appear as if the applicant has filed the instant suit while pursuing an appeal simultaneously which could suggest abuse of the court process.

61. Be that as it may, the instant application turns on whether the Applicant has met the threshold for the grant of the order of injunction as enunciated in *Annielo Giella V Cassman Brown & Co Ltd (1973) EA 358* as restated in [Nguruman Ltd V Jan Bonde Nielsen & 2 others \(2014\) eKLR](#) as follows;

' In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- a. Establish his case at a prima facie level,
- b. Demonstrate irreparable injury if a temporary injunction is not granted, and
- c. Ally any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent.

It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount subsequently.'



62. In *Mrao Ltd v First American Bank of Kenya Ltd & 2 others (2003) KLR 125*, the court explained the requirements of a prima facie case as follows;

' A prima facie case is more than an arguable case. It is not sufficient to raise issues but evidence must show an infringement of a right and the probability of success of the applicants case upon trial. That is clearly a standard which is higher than an arguable case.'

63. On irreparable injury, the court stated as follows;

' An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate.' (See *Nguruman Ltd V Jan Bonde Nielsen & 2 others (Supra)*).

64. The court is bound and guided by these sentiments.

65. From the evidence on record and on the face of it, the applicant appear to have established a prima facie case, the alleged reduction of house allowance as evidenced by copies of letters from the respondent and failure of the respondent to consult the applicant as required by the provisions of section 10(5) of the *Employment Act, 2007*.

66. However, in light of the decision in ELRC Cause No 511 of 2016, the probability of success is doubtful.

67. As regards irreparable harm or injury, though paragraph 22 of the Supporting Affidavit dated June 28, 2022 states that the applicant stands 'to suffer irreparable loss and damage', particulars of the alleged loss or damage or unsubstantiated.

68. In the premises, the second requirement for an order of injunction to issue is not satisfied and the balance of convenience cannot therefore be in favour of the applicant.

69. For the foregoing reasons, it is the finding of the court that applicant has failed to demonstrate that the orders sought should issue.

70. In the upshot, the Notice of Motion Application dated June 28, 2022 is unmerited and is accordingly dismissed with no orders as to costs.

71. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 27<sup>TH</sup> DAY OF OCTOBER, 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**

