



**Ng'eno v Technical University of Kenya (Cause 659 of 2017)  
[2022] KEELRC 14652 (KLR) (13 October 2022) (Ruling)**

Neutral citation: [2022] KEELRC 14652 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 659 OF 2017  
M MBARÚ, J  
OCTOBER 13, 2022**

**BETWEEN**

**RICHARD KIPRONO NG'ENO ..... CLAIMANT**

**AND**

**THE TECHNICAL UNIVERSITY OF KENYA ..... RESPONDENT**

**RULING**

1. The claimant filed the Memorandum of Claim on April 5, 2017 against the respondent and in reply, the respondent filed the response and Preliminary Objections and which objections are the subject of this ruling.
2. The respondent objected to the claim on the grounds that;
  1. This court in a suit filed by the claimant's union in Nyeri ELRC Cause No.343 of 2017 – KUDHEIHA v Technical University of Kenya, heard the case and rendered its judgment via a judgement delivered on 21<sup>st</sup> February, 2019.
  2. In the said suit, the claimant herein was specifically named therein as a grievant.
  3. The substantive issues in the instant claim were also directly and substantively in issue in Nyeri ELRC No.343 of 2017.
  4. Nyeri ELRC No.343 of 2017 was heard on the merits and determined by the court.
3. And for these reasons the suit herein is res judicata and this court lacks jurisdiction to determine the instant suit and should be struck out.
4. The parties attended and agreed to address the objections by way of written submissions.
5. The respondent submitted that while the claimant was in the employment of the respondent he was a member of KUDHEIHA and upon termination of employment, the union filed Nyeri ELRC No.343



of 2017 where the claimant was listed as a grievant and such matter has since been addressed on the merits and the instant suit is *res judicata*. The matters now addressed by the claimant in the instant suit have fully and completely been heard by the court and the court lacks jurisdiction to re-hear the same matter which has substantively been heard and judgement issued on February 21, 2019 as held in Eldoret High Court Civil Suit No.10 of 2019 – Pinna Dilip Chauhan v Bank of Africa Kenya Limited & another.

6. In reply, the claimant submitted that the union in Nyeri ELRC No.343 of 2017 had not obtained his consent to file the case and the union did not communicate to the him that there was a case filed in court and this suit should be allowed to proceed on the merits and the objections made by the respondent should be dismissed with costs.

### Determination

7. The claimant does not contest that he while in the employment of the respondent he was a member of KUDHEIHA as the trade union representing his interests with regard to terms and conditions of employment.
8. The claimant too does not contest the existence of Nyeri ELRC No.343 of 2017 save that the suit was not filed with his consent and the union failed to inform him of the suit and these reasons this suit should be heard on the merits.
9. A suit is *res judicata* where the same court or a court of equal jurisdiction has heard and determined the matter in issue on the merits.
10. The rationale for the doctrine of *res judicata* exists to protect public interest so that a party should not endlessly be dragged into litigation over the same issue or subject matter that has otherwise been conclusively determined by a court of competent jurisdiction as held in the case of *C.K. Bett Traders Limited & 2 others v Kennedy Mwangi & another* [2021] eKLR and which findings are in tandem with section 7 of the *Civil Procedure Act* that;

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.

11. The provision is on the fundamental doctrine that there should be an end of litigation. The Court of Appeal held in *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, [2017] eKLR held that:

for the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

- 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.

in this case, the substantive issue in dispute herein was subject of Nyeri ELRC No.343 of 2017 filed by Kudheihia and the claimant herein listed as the grievant against the same respondent herein and judgement delivered on February 21, 2019 by the court sitting in Nyeri. The same matter cannot be re-heard by this court under the res judicata rule.

12. On the response that the claimant did not give his consent to the union and that there was no communication, once the claimant joined the trade union of his choice, such trade union was bound to represent his interests in court as appropriate. Where the trade union acted contrary to the interests of the claimant, recourse is not against the respondent but against his trade union as held in the case of *Seth Panyako v Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers* [2013] eKLR;

... The respondent assumed the duty of fair representation of its Members at the workplace, in Court and at the Collective Bargaining Platforms. It owed the claimant a duty of care, and is shown in very clear terms to have breached that duty by failing to fairly represent the claimant ... The respondent's [ the trade union] Constitution mandated the respondent to offer the claimant legal and financial support.... The respondent's Constitution allowed the respondent to offer the claimant both legal and financial support.

13. The rationale is that a trade union is liable for damages if it fails to perform the mandate which it accepted to represent its members and where there is alleged no consent or non-communication to a member when suit is filed and there is a negative outcome, recourse is not to file a fresh or new claim against the employer but against the trade union for payment of damages.
14. In this regard, the substantive issue in dispute herein having been addressed with finality in Nyeri ELRC No.343 of 2017 and judgement has since issued, this court lacks and requisite jurisdiction to hear and determine this matter as such would be contrary to the provisions of section 7 of the *Civil Procedure Act* and the doctrine of *res judicata*.
1. Objections by the respondent are hereby found with merit and the suit herein struck out. As the claimant is acting in person, each party shall bear own costs. The claimant shall be supplied with a copy of the ruling as no cost.

**DELIVERED IN COURT AT NAIROBI THIS 13<sup>TH</sup> DAY OF OCTOBER, 2022.**

**M. MBARŪ JUDGE**

In the presence of:

Court Assistant: Okodoi

