



**Kenya Union of Pre-Primary Education Teachers v Chief Officer,  
Finance Embu County Government & another (Cause E008 of 2022)  
[2022] KEELRC 13203 (KLR) (17 November 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13203 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU  
CAUSE E008 OF 2022  
ON MAKAU, J  
NOVEMBER 17, 2022**

**BETWEEN**

**KENYA UNION OF PRE-PRIMARY EDUCATION TEACHERS ..... CLAIMANT**

**AND**

**CHIEF OFFICER, FINANCE EMBU COUNTY GOVERNMENT .... 1<sup>ST</sup>  
RESPONDENT**

**COUNTY SECRETARY EMBU COUNTY GOVERNMENT .. 2<sup>ND</sup> RESPONDENT**

**RULING**

1. By the Notice of Preliminary Objection dated June 28, 2022, the respondents urged the court to strike out the suit herein on the following grounds;-
  - i. This honourable court lacks jurisdiction to hear and determine the petition since the persons sued are not employers of the claimant's members.
  - ii. The Petition and the Claim is incompetent and fatally defective since the respondents have no legal standing to be sued in their capacities as servants of the County Government.
  - iii. The Claim offends the *Employment Act* since none of the respondents are employers of the members of the claimant within the meaning of the law.
  - iv. The Claim offends section 6, 44 and 45 of the *County Governments Act* since none of the respondents have corporate status or any status capable of being sued.
  - v. The Petition and Application herein are ill conceived, bad in law, incompetent, premature and fundamentally defective and ought to be dismissed and struck out with costs to the 1<sup>st</sup> and 2<sup>nd</sup> respondents.



## Factual Background

2. The claimant is a trade union registered to represent pre-primary education teachers while the respondents are officers of the Embu County Government.
3. On June 17, 2022, the claimant brought this suit on behalf of its members (hereinafter called the grievants) seeking the following reliefs:-
  - i. That this honourable court do declare that the willful failure to remit statutory deductions is arbitrary, unlawful and a violation of the grievants' rights to fair labour practices.
  - ii. That this honourable court do direct the Director of Public Prosecutions to prefer criminal charges upon the respondents in person in line with section 19(5) of the *Employment Act*.
  - iii. That this honourable court be pleased to order the respondents to forthwith, remit to the respective institutions, all the withheld statutory deductions subject to any applicable accrued interest or penalty.
  - iv. That this honourable court do order the Respondents to forthwith, refund to the grievants the total amount deducted from grievants' salaries and also pay the intended beneficiaries on behalf of the grievants with the employer's own funds.
  - v. That the respondents do provide for costs of the suit.
4. Simultaneously with the Claim the claimant filed Notice of Motion dated June 17, 2022 seeking the following orders:-
  - i. That this honourable court be pleased to order the respondents to produce in court all the payment schedules and remittance advice notes pertaining to the 389 grievants (ECDE teachers) check-off loans, NSSF, Lap Fund and insurance schemes subscribed to through check-off with effect from January 2022 to date.
  - ii. That costs be in the cause.
4. The main issue for determination is whether the suit is fatally defective and incompetent for lack of competent respondents.
5. The respondents contend that they lack legal capacity of being sued; that they are not the employer of the claimants and therefore the suit is bad in law, is incompetent and fundamentally defective. They further contend that they are just employees of Embu County Government which is a body corporate capable of being pursued in its own name for any legal claim by the claimants.
6. They further submit that section 133 of the *County Government Act* shields employees of County Government from personal liability. It is their view that the suit against them is untenable and premature since joinder of officers is normally done during execution stage and not at the commencement of the suit. For emphasis, reliance was placed on the case of *John Rimui Waweru & 3 others v Githunguri Constituency Ranching Co. Ltd & 5 others* [2015] eKLR where the court struck out suit against a Governor because he was shielded from personal liability by section 133 of the Act.
7. In addition the respondents submit that the court lacks jurisdiction over the suit herein because section 12 of the *ELRC Act* does not extend jurisdiction to suits between a Trade Union and officers of an employer, like in this case.
8. The claimant has opposed the Preliminary Objection and urged the court to dismiss it with costs. It submits that under Order 1 Rule 9 of the *Civil Procedure Rules*, no suit should be defeated for reason



of misjoinder or non-joinder of parties, but the court may deal with the matter in controversy in so far as regards the rights and interest of parties actually before it.

9. The foregoing notwithstanding, the claimant submits that the respondents are sued in their official capacity and not in their personal capacity. It contends that section 21(3) of the [County Governments Act](#) places statutory duty on the respondents to make payments on behalf of the Government Department.
10. The claimant further relies on section 19(1) of the Act to urge that a government officer performing any act on behalf of government is capable of being sued and such suit is deemed to be against the government. However, it clarified that by dint of section 19(4) of the Act, the officer being sued is insulated from personal liability with respect to the decretal sum or costs of the suit.
11. The claimant relied on [Republic v The County Secretary Nairobi City County & another](#) [2020] eKLR and submitted further that under section 103 of the [Public Finance Management Act](#) the County Secretary and the Chief Officer – Finance are jointly responsible for the satisfaction of court orders and decrees on payment of money owed by the County.
12. The claimant further submitted that joinder of County Secretary is not fatal as the orders are made against the office and not the individual person.
13. Again the claimant submits that under section 45(2) of the [County Governments Act](#), a County Chief Officer is the authorized officer in respect of the delegated power.
14. Finally the Claimant submitted that the Preliminary Objection herein does not raise a pure point of law and therefore it is frivolous and a waste of judicial time.

### **Analysis and Determination**

4. There is no dispute that the respondents are not the employers of the grievants, and they are also not body corporates with capacity of being sued. It is also a fact that the grievants are employees of the Embu County Government through appointment by the Embu County Public Service Board. The two have capacity to sue and be sued in their own names. So why sue their officers instead?
5. The claimant has not shown any reason for not suing the employers or why it opted to sue fellow employees or offices in the employer's establishment which lack legal capacity of being sued.
6. In addition the claimant has not sought to remedy the said problem by seeking joinder of the employer. Instead it has cited legal provisions and judicial precedents to justify the omission.
7. These being adversarial proceedings, the court does not come to the aid of any party and especially the party who deliberately opts to ignore cardinal principles of law like in this case. The court is being asked to proceed against nobody yet the [County Governments Act](#) provides expressly the legal persons against whom suits can be filed in court.
8. As regards the reliefs sought, the claimant asks this court to “direct” the Director of Public Prosecutions to prefer criminal charges against the respondents. However that relief is untenable because the office of the DPP is not open to directions from anyone including this court. If the Claimant has a valid complaint it is free to lodge a complaint of criminal nature to the right agencies. In any event the DPP is also not a party to this suit.
9. The claimant cites section 103 of the [Public Finance Management Act](#) to urge the court that the respondents are the people with obligation to settle decrees by courts. It also relied on several judicial



precedents to support that view. Such argument and the precedents cited are not relevant to this suit because it is not seeking to enforce a decree of the court.

10. I agree with the respondents that suing them without joinder of the employer is premature. A court of law can only declare and determine rights and interests of the parties if the proper parties are sued. In this case the proper parties have not been sued and the claimant has failed to seek their joinder. Consequently, I allow the Preliminary Objection and proceed to strike out the claimant's suit for being incompetent. As agreed by the parties on October 28, 2022 this ruling applies to Cause No. E007 of 2022. Since there is no competent respondent sued I award no costs.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 17TH DAY OF NOVEMBER, 2022.**

**ONESMUS N. MAKAU**

**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 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28(3) of the [ELRC Procedure Rules](#) which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**ONESMUS N. MAKAU**

**JUDGE**

