



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KERICHO**

**ELRC CAUSE NO. 13 OF 2020**

**JOHN KIPYEGO BIYI.....CLAIMANT**

**-VERSUS-**

**KENYA NATIONAL UNION OF NURSES.....RESPONDENT**

**RULING**

1. The Claimant filed this claim against the Respondent, a trade Union. He states that he is a registered nurse and an active member of the Respondent having joined the union several years back and was even elected as the chairperson of the union in 2014 which office he runs to date.
2. He complained that the Respondent failed to protect his interest as a member of the Union and instead acted in utmost bad faith an act that caused him to lose his job with Uasin Gishu County Government.
3. He alleges that the Respondent had instituted a suit being Nakuru ELRC Cause number 369 of 2015 against county Government of Uasin Gishu, when the County government had unfairly dismissed him from employment. That the matter proceeded as he was the grievant however on 1<sup>st</sup> February, 2017 the Respondent withdrew the suit without consultation an act which prejudiced his case forcing him to request the court by an application to act in person and litigate the suit in person which application was allowed and he proceeded with the case which went in his favour and he was reinstated back to employment. However that the Respondent maliciously wrote a letter dated 3<sup>rd</sup> July, 2019 informing the County government of Uasin Gishu that the claimant had been fraudulently reintroduced into its payroll.
4. further that the Respondent failed to remit his allowances as the chairperson of the Respondent despite having been ordered by the Court in Nairobi Elrc Cause number 12 of 2017 when the other officials are still drawing their salaries from the union every month.
5. He therefore prayed for several reliefs for this Court to declare the actions of the Respondent unlawful and for the Respondent to pay him General damages.
6. The Respondent in response to the claim filed a Notice of preliminary Objection on the 16<sup>th</sup> November, 2020 alleging that the claim herein is res judicata.
7. The basis upon which the Respondent alleges the Claim to be *res judicata* is that the issues raised in this claim had already been conclusively determined in Nakuru ELRC No. 369 of 2015 between Kenya National union of Nurses –v- County Government of Uasin Gishu and others where the Respondent herein sued Uasin Gishu County Government for unfair and unlawful dismissal of the grievant( John Kipyego Biyy) and a judgment delivered on 28<sup>th</sup> April, 2017 which case was dismissed after the Court had found the Respondent had reasonable reasons for dismissing the claimant.
8. He stated that the Respondent by a letter of 3<sup>rd</sup> July, 2018 inquired on the circumstances under which the Claimant herein was reintroduced into the payroll of Uasin Gishu County Government and the claimant did not take the matter well. It is stated further that the Claimant had an opportunity of filing an appeal against the judgment of 28<sup>th</sup> April, 2017 instead of filing this fresh suit.
9. It is contended that the matter is also res judicata for the reason that the issue the claimant seeks to litigate is with regard to his removal from the position of Branch official and National chairperson which issue were equally litigated Nairobi cause number 12 of 2017 John K. Biyy –v- Kenya National Union of Nurses and others.
10. The Respondent stated that this Court lacks jurisdiction to hear this matter as the same is in breach of section 6 and 7 of the Civil Procedure Act as the issues are substantially in issue in the previous suit which have already been determined.

11. The Claimant in response to the preliminary objection filed his grounds of opposition on the 13<sup>th</sup> April, 2021 stating that the preliminary objection is full of half-truths and concealment of material facts, issues that are not fit to be disposed of in a preliminary objection as per *mukisa biscuits case*.

12. He stated that the preliminary objection is not based on pure points of law but disputed facts that will require this court to call evidence to ascertain the issue raised therein.

13. He prayed for the dismissal of the preliminary objection and the matter be allowed to be heard inter partes.

14. The parties were directed to file submissions to dispose of preliminary objection which the Claimant filed on 26<sup>th</sup> July, 2021 however the Respondent had not filed any submission when this matter came up for ruling.

#### **Claimant's submissions.**

15. The Claimant submitted that the Respondent's preliminary objection is not merit as it does not raise pure points of law as envisaged under *Mukisa Biscuits case*.

16. It is submitted that the respondent's allegations that the suit is res judicata is ill founded and frivolous. He argued that the main issue for determination in Nakuru ELRC cause number 369 of 2015 is the unfair and unlawful termination of the Claimant by Uasin Gishu county government while the issue for determination in Nairobi ELRC Cause number 12 of 2017 was for the Respondent herein to remit union allowances owed to the claimant while the present suit revolves around the breach of claimants rights by the Union, who arbitrarily withdrew the Claimant's case without consultation, ceased to remit the claimants union allowance of Kshs. 100,000/- together with airtime of Kshs. 5,000/- when the Claimant is the Respondent rightful chairperson.

17. He submitted further that the Respondent had failed to file a response to the claim and instead filed this preliminary objection making it difficult for the court to discern facts herein. In this he cited **Nakuru ELRC cause number 253 of 2014 Alex Oluchili Miloko –v- Nakumatt Holdings Limited (Unreported)**.

18. He therefore prayed for the Preliminary objection to be dismissed and he be allowed to prosecute his claim to its logical conclusion.

19. I have examined the averments of the parties herein. The respondent herein have raised a preliminary objection to the effect that this claim is res judicata and therefore this court lacks jurisdiction to handle the same.

20. The claimant has submitted that this claim is not res judicata as the issues determined in the previous suits were different.

21. Pleadings in cause 309/2015 were submitted in court and the issue therein was suspension of the claimant herein from 2<sup>nd</sup> respondent in which case the court found for the claimant and awarded him damages equivalent to 995,280/=.

22. In cause No.12/2017, the claimant herein sought garnishee orders to attach the 3 respondents account (Nurses Union) for payment of 1,855,000/=.

23. The court declined to grant orders sought for the reason that Order 40 Rule 6 provides that where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of 12 months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.

24. The court found that the order of injunction had lapsed within 12 months as cause No. 12/2017/NRB ELRC had also not been determined as at 6/3/2019 when the above orders were granted. The matter related to remittance of union allowances to the claimant.

25. The current claim however relates to breach of the claimant's rights by the union.

26. I find basically that the three claims are different in terms of the remedies sought. I therefore find the preliminary objection has no merit.

27. I therefore dismiss the preliminary objection and direct the claim to proceed on merit.

28. Costs in the cause.

Ruling delivered virtually this 30<sup>TH</sup> day of SEPTEMBER, 2021.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:-**

Kirwa for claimant – present

Busuga for respondent – absent

Court Assistant - Fred