



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

CAUSE NO. E002 OF 2021

KENYA UNION OF DOMESTIC, HOTELS, EDUCATION

INSTITUTIONS AND HOSPITAL WORKERS.....CLAIMANT

- VERSUS -

THE UNIVERSITY COUNCIL OF TECHNICAL

UNIVERSITY OF MOMBASA.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 29th October, 2021)

RULING

The claimant trade union filed the memorandum of claim on 18.01.2021 and signed by Hezron Onwongá, the claimant's Industrial Relation Officer. The issue in dispute is refusal by the respondent to pay terminal benefits to 67 grievants as listed in the memorandum of claim. The claimant prayed for orders:

- a) That the Honourable Court is pleased to declare the respondent's refusal to pay service gratuity to the grievants is unlawful and illegal.
- b) That the Honourable Court be pleased to issue an order directing the respondent to pay to the grievants Kshs. 25, 910, 296.80 for service gratuity.
- c) That the Honourable Court be pleased to issue an order directing the respondent to issue certificates of service to the grievants.
- d) That the respondent to meet the costs and interest at Court rate from the date of termination.

The respondent entered appearance on 02.02.2021 and on the same date filed a notice of preliminary objection upon the following grounds:

- 1) The claim is barred by the doctrine of *res judicata* because the claimant had already sued the respondent in **Constitution Petition No. 9 of 2017: Kenya Union of Domestic, Hotels, Education Institutions and Hospital Workers –Versus- Technical University of Mombasa & 2 Others** where the issue of the alleged non-payment of the claimant's members' salaries and allowances (which includes gratuity) was determined in finality by both the Employment and Labour Relations Court and the Court of Appeal.
- 2) The claim contravenes the provisions of Rule 5 (b) (i) and (ii) of the Employment and Labour Relations Court (Procedure) Rules, 2016,
- 3) The respondent has no capacity to be sued.
- 4) The claimant has no *locus standi* under section 73 of the Labour Relations Act, 2007 to represent the 12 grievants listed in the notice of preliminary objection because the 12 are not members of the trade union, the claimant.

The respondent also filed the memorandum of response on 20.04.2021 reproducing the grounds as set out in the notice of preliminary objection. The respondent admitted the following matters as pleaded for the claimant:

- 1) The parties are in valid recognition and collective bargaining agreements.
- 2) The respondent employed the grievants from 2011 to 2018 when their contracts lapsed,

- 3) The claimant filed a petition in the Employment and Labour Relations Court and judgment was delivered on 28.05.2018.
- 4) The respondent was aggrieved with the judgment and filed an appeal in the Court of Appeal where judgment was delivered on 14.03.2019.
- 5) The claimant reported a trade dispute and the Cabinet Secretary appointed a conciliator, the conciliator invited parties for conciliation meeting, both parties attended, the conciliator issued unresolved dispute hence filing of the present suit.

Parties have filed their respective submissions on the preliminary objection.

The 1st issue for determination is whether the suit is chained by the principle of *res judicata*. As submitted for the respondent, **Black's Law Dictionary 10th Edition** defines *res judicata* thus, “An issue that has been definitely settled by judicial decision. An affirmative defense barring the same parties from litigating a second law suit on the same claim, or any other claim arising from the same transaction or series of transactions that could have been – but was not – raised in the first suit. These essential elements are (1) an earlier decision on the issue, (2) a final judgment on the merits, and (3) the involvement of the same parties, or parties in privity with the original parties.”

Further, as submitted for the respondent the doctrine of *res judicata* has been codified in section 7 of the Civil Procedure Act, Cap 21.

There is no dispute that the parties herein were indeed the same parties in **Constitution Petition No. 9 of 2017: Kenya Union of Domestic Hotels, Education Institutions and Hospital Workers –Versus- Technical University of Mombasa & 2 Others** and the subsequent appeal. The main point of dispute is whether the claim for gratuity in issue in the instant case was in issue, or with diligence, it ought to have been an issue in the decided petition between the parties.

It is submitted for the respondent that the claimant herein (being the petitioner in the decided petition) prayed for:

- 1) A declaration that the stoppage, withholding and refusal to pay the petitioner's members their rightful salaries and allowances for 12 years was unconstitutional and in violation of the petitioner's members' rights.
- 2) A mandatory injunction to compel the respondent to employ the petitioner's members and pay them their rightful salaries and allowances including increments and leave allowance accumulated from 1st July 2013 to date.

It is submitted for the respondent that the service gratuity now prayed for like salaries and allowances claimed in the petition are employment dues and the claim in the instant suit was not separable from the salaries and allowances claimed in the earlier decided petition. The respondent submits that as was held by Wigram V-C in **Henderson –Versus- Henderson (1843) 3 Hare 100, 67 ER 313**, that an issue that ought to have been raised in an earlier decided suit should not be entertained in a subsequent suit thus, “In trying this question I believe I state the rule of the Court correctly when I say that, 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 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 judgment, 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.” The Court of Appeal held as much in **Thomas Owen Ondiek & Another –Versus- National Bank of Kenya Limited & Another [2015]eKLR** that it is trite law that an issue or claim that should have been raised in an earlier case cannot be raised in a subsequent suit between the same parties as per explanation 4 to section 7 of the Civil Procedure Act.

The claimant has urged and submitted that the issue of service gratuity was not litigated in the earlier petition 9 of 2017. The claimant urges that as at the time of filing petition 9 of 2017 the grievants were still in the respondent's employment and they were seeking permanent employment on pensionable terms and to be remunerated per terms of the collective bargaining agreement. Further, service gratuity is an amount that is payable to an employee or employees who have been terminated from service and is not part of remunerative monthly salaries and allowances in issue in petition 9 of 2017 as urged for the respondent. The grievants were terminated after petition 9 of 2017 had been filed.

The petition in ELRC petition 9 of 2017 was filed on 15.09.2017 as per paragraph 1 of the judgment delivered on 11.05.2018 by Onesmus N. Makau J. In the present suit parties are in agreement that the respondent employed the grievants from 2011 to 2018. It is with respect to that separation in 2018 that the claimant is claiming and praying for service gratuity. The Court finds that the cause of action arose in 2018 long after the filing of the previous ELRC petition 9 of 2017 on 15.09.2017. The Court returns that the cause of action is completely unrelated to the transactions leading to the cause of action in petition 9 of 2017. Further the Court finds that it was misconceived when it was submitted for the respondent that service gratuity now claimed was part of salary and allowances as was claimed in petition 9 of 2017. Thus even with due diligence, the claimant could not have raised the issue of service gratuity in the earlier petition 9 of 2017 because the same was clearly a new dispute subject to the agreed dispute resolution process including statutory conciliation under the Labour Relations Act, 2007.

The Court returns that the present suit was not trapped by the principle of *res judicata* as urged for the respondent and that ground of preliminary objection will collapse.

The 2nd issue for determination is whether the claimant lacks *locus standi* because 12 grievants listed in the notice of preliminary objection are not members of the claimant trade union. It is submitted for the respondent that under section 73 (3) of the Labour Relations Act, 2007 a trade dispute may only be referred to the Court by authorized representative of an employer, group of employers, employers' organisation or trade union. The claimant cannot therefore refer the dispute to the Court on behalf of the twelve grievants as listed. They are not members of

the union because their exhibited pay slips show that they were not deducted union dues. The replying affidavit exhibits older pay slips compared to those on the bundle of documents. For the claimant it is submitted that the 12 listed members were duly recruited per section 48 of the Labour Relations Act and they duly signed form S. Further, it was for the respondent to show the union dues had not been deducted being the custodian of the employment records per section 74 of the Employment Act.

The Court considers that it is trite that a preliminary objection is based upon uncontested facts. The parties are in disagreement whether the 12 listed grievants are members of the claimant trade union. Such dispute be resolved only after taking evidence at the hearing. Further, even if the 12 are expunged, the claimant's suit will not thereby be defeated in its entirety. The preliminary objection based on that ground will therefore collapse.

The **3rd issue** is whether the respondent cannot be sued and the suit should therefore collapse. It is submitted that the respondent's Council is defined in section 2 of the Universities' Act as the governing body of the University and does not give such body a legal capacity of a body corporate and cannot be sued. For the claimant it is submitted that the Employment Act, 2007 defines employer as any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company. The claimant further urges that in any event it be granted leave to amend the memorandum of claim as may be appropriate.

The Court has considered the constitutional definition of "**person**" in Article 260 thus "**includes a company, association or other body of persons whether incorporated or unincorporated**"

The Court reckons that the respondent is a body of persons though unincorporated and the court finds that it clearly fits the constitutional definition. It is also clear that the respondent could have acted as an agent of the university as the corporate body and therefore falling to be an employer as submitted for the claimant – but which issue would require evidence to establish and therefore rendering that ground to fail the test for a proper preliminary point.

The Court further considers that the claimant should be granted leave to introduce a proper respondent as may be deemed appropriate with liberty for the respondent to file and serve an amended memorandum of response. In that consideration, the notice of preliminary objection is liable to dismissal with costs in the cause.

In conclusion the notice of preliminary objection is hereby determined with orders:

- 1) The notice of preliminary objection dated and filed on 20.04.2021 is dismissed with costs in the cause.
- 2) The claimant at liberty to file an amended memorandum of claim in 7 days from today and the respondent may file an amended memorandum of response thereafter within 7 days of the service by the claimant.
- 3) The parties to fix the suit for mention for pre-trial directions towards an expeditious hearing and determination.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 29TH OCTOBER, 2021.

BYRAM ONGAYA

JUDGE