



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

RESPONDENT CAUSE NO. 4 OF 2020

JOSEPH MURIITHI NJERU.....CLAIMANT

VERSUS

COUNTY GOVERNMENT OF KIRINYAGA.....RESPONDENT

RULING

1. The Respondent/Applicant filed notice of motion dated 4th August 2020 alongside a preliminary objection dated 24th June 2020. The Notice of motion sought for orders *inter alia*:-

- a. That this Honorable Court be pleased to set aside/vacate and or stay its orders issued on 27th July 2020 in this case pending the *inter partes* hearing and determination of the application and the Respondent's Preliminary Objection dated 24th June 2020.
- b. That the costs of this application be provided for.

2. The notice of motion is premised on the grounds on the face of the motion as well as the supporting affidavit sworn by Carolyn Kinyua, the County Attorney and Legal Advisor in the County Government of Kirinyaga. The preliminary objection dated 24th June 2020 was to the effect that the suit is fatally defective and a non-starter as it violates the provisions of Sections 6 and 7 of the Civil Procedure Act. The preliminary objection is premised on the assertion that the issue in this suit is the same issue and between the same parties which issue was substantially in issue in former suits to wit **NYERI ELRC NO. 192 OF 2018** and **NYERI ELRC NO. 24 OF 2019**, which were between the same parties litigating under the same title in the same court competent to try this suit.

3. The Claimant filed a replying affidavit and deposed that the application is fatally and incurably incompetent as it is premised on the Civil Procedure Rules and the Civil Procedure Act when this Court has its own enabling statutes and rules of procedure. The Claimant deposed that the only basis for review of rulings, judgments, orders or decrees of this court is Rule 33 of the Employment and Labour Relations Court (Procedure) Rules which sets out the basis for review as:-

- a. if there is discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made,
- b. on account of some mistake or error apparent on the face of the Record,
- c. if the Judgement or ruling requires clarification and/ or
- d. for any other sufficient reason.

4. The Claimant deposed that the Respondent failed to satisfy any of the above requirements and instead misrepresented a number of facts in the certificate of urgency, the notice of motion and the supporting affidavit in their endeavor to get a review and setting aside/vacation of the orders of this court of 27th July 2020. The Claimant deposed that the Respondent variously referred the orders issued on 27th July 2020 as being *ex parte* orders which is untrue since the true position is that the Court delivered a Ruling where it considered both the Claimant's application as well as the Respondent's Notice of Preliminary objection and dismissed the same for lacking merit. The Claimant asserts he drew the Court's attention to the facts and circumstances surrounding the filing and dismissal of ELRC NO. 192 OF 2018 and ELRC NO. 24 OF 2019. The Claimant averred that John Kangangi Muriithi is substantively the Kerugoya Ward Administrator and only assumed the office of Sub-County Administrator for Kirinyaga Central in acting capacity. He asserts that nothing, therefore stops him from resuming his substantive duties as Sub-County Administrator for Kirinyaga Central and the said John Kangangi Muriithi carrying on with his substantive duties as ward administrator for Kerugoya Ward. The Claimant deposed that the appointment letter for John Kangangi Muriithi dated 27th June 2019 could not have remained in force for more than 6 months in accordance with the Public Service Commission Human Resource

Policies and Procedures Manual. The Claimant averred that the Respondent expressly stated their intention to disregard the orders of this court hence they are undeserving of both the audience and any exercise of discretion by this court. Further, the Claimant averred that the application dated 4th August 2020 is without merit and that the same ought to be dismissed with costs.

5. Both the application and the preliminary objection were canvassed by way of written submissions. The Respondent's submissions were to the effect that the matter in issue herein is directly and substantially in issue in Nyeri ELRC No. 192 of 2018 which is between the same parties litigating under same title hence rendering these proceedings contrary to Section 6 of the Civil Procedure Act Cap. 21 of the Laws of Kenya. The Respondent submitted that the proceedings also offend Section 7 of the Civil Procedure Act because the suit herein is the same as the one in Nyeri ELRC No. 192 of 2018 between the same parties litigating under the same title in a Court with status and jurisdiction as the instant Court. The Respondent submitted that it also sought for an order to vacate the court orders of 27th July 2020 to enable the hearing and determination of the preliminary objection. The Respondent stated that the following were the issues for determination:-

- i. whether the matter in issue herein is directly and substantially in issue in previously instituted suits Nyeri ELRC No. 192 and Nyeri ELRC No. 24 of 2019 which are between the same parties litigating under the same title
- ii. whether this Honourable Court should strike out the suit *ab initio*.
- iii. Whether this Honourable Court should set aside/vacate its orders issued on 27th July 2020

6. In dealing with the first issue, the Respondent submitted that the Claimant instituted Nyeri ELRC No. 192 of 2018 alleging that the re-deployment from Kirinyaga Central as Sub-County Administrator responsible for co-ordination, management and supervision of the general administration functions of the sub-county to the County Ministry of Agriculture, Livestock, Veterinary and Fisheries was unconstitutional. The Respondent submitted that the said suit was dismissed for the Claimant's non-attendance. The Respondent submitted that the Claimant filed an application to reinstate suit but the said application is yet to be served on the Respondent. Nevertheless, the Claimant filed ELRC No. 24 of 2019 against the Respondent claiming that the re-deployment from Kirinyaga Central as Sub-County Administrator to the office of the County Secretary was unconstitutional. The Respondent subsequently filed a preliminary objection on the grounds that the matter in issue in Nyeri ELRC No. 24 of 2019 was directly and substantially in issue in Nyeri ELRC No. 192 of 2018 which was pending before this Court and the preliminary objection was upheld and Nyeri ELRC No. 24 of 2019 was dismissed. The Respondent submitted that the Claimant was unperturbed and further filed Nyeri ELRC No. 4 of 2020, the instant suit, still against the Respondent alleging that the re-deployment from Kirinyaga Central as Sub-County Administrator to the County Ministry of Agriculture, Livestock, Veterinary and Fisheries and the re-deployment from Kirinyaga Central as Sub County Administrator to the office of the County Secretary is unconstitutional. The Respondent submitted that this is contrary to the rule of *sub judice* under Section 6 of the Civil Procedure Act which provides as follows:-

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

7. The Respondent submitted that Nyeri ELRC No. 192 of 2018 has two pending applications and hence it is against the above provision of law to institute the instant suit, Nyeri ELRC No. 4 of 2020. The Respondent relied on the case of **Freidman v State 53 Misc. 2d 955, 278 N.Y.S.2d 999 (Ct. Cl. 1967)** where it was held that in an instance where a court does not have jurisdiction the matter can only be appealed and not abandoned to institute a fresh claim. This would form a ground for both estoppel and *res judicata*. The Respondent cited Order 12 Rule 6(2) which dictates that where a suit has been dismissed for non-attendance when only defendant attends no fresh suit may be brought in respect of the same cause of action. The Respondent submitted that the Claimant had an option of applying to set aside the order of dismissal under Order 12 Rule 7. The Respondent relied on the case of **Birds Paradise Tours & Travel Ltd v Hotel Secretaries [1990] KLR 58** where the Court held:-

“Though the earlier suit does not operate as *res judicata*, its dismissal either directly under Order IXB rule 4 or by virtue of order XVI rule 3, and it involving the same cause of action as the present application and the plaint upon which it rests, and the applicant not having applied to set aside or vary the order of dismissal, the applicant was prohibited from bringing the present application.”

The Respondent also relied on the case of **Salem Ahmed Hasson Zaidi v Faud Hussein Humeid [1960] EA 92** where at the hearing of the case the plaintiff did not appear but the defendant was present. When the suit was dismissed for non-attendance a fresh suit filed in its stead was held to be *res judicata*. The Respondent urged the court to set aside/vacate its orders dated 27th July 2020 given *ex-parte* in favour of the Claimant because the said orders were given based on misrepresentation of facts. This because when Nyeri ELRC No. 192 of 2018 was dismissed on 11th June 2019, the Respondent deployed the Claimant from the office of the Sub-County Administrator to the Office of the Sub-County Secretary. The former position and duties were given to another officer, John Kangangi Muriithi, on 27th June 2019. The Respondent submitted that the orders are unenforceable since the Claimant cannot resume his duties as a Sub-County Administrator.

8. The Claimant's submissions were to the effect that the matter espouses the following issues:-

- a. Whether the Respondent's preliminary objection dated 24th June 2020 is *res judicata*.
- b. Whether the Respondent is *prima facie* in contempt of the orders of this Court dated 13th June 2020 and what the consequences of the same are.
- c. Whether the Respondent's application for setting aside of the interlocutory orders is merited.

On the issue of *res judicata*, the Claimant submitted that this Court held in its Ruling dated 13th July 2020 that the suit raises matters that are not substantively in issue in any suit pending determination by the Court and that there is therefore no bar to the instant suit. On contempt, the Claimant submitted that the Respondent defied the orders dated 13th July 2020 and denied the Claimant a chance to resume work in his office as directed by the Court. The Claimant submitted that the Respondent is not deserving of any favours of the Court for failure to obey court orders. On setting aside the interlocutory orders, the Claimant submitted that this is improper since the Claimant can occupy the office and discharge the duties as directed by this Court. The Claimant submitted that the said other officer, John Kangangi Muriithi, is a Kerugoya Ward Administrator and is only discharging the duties of the Claimant on acting capacity and according to the Public Service Commission Human Resource Policies, one cannot serve on acting capacity for over 6 months. The Claimant submitted that said officer's term has lapsed since he was appointed on such capacity on 27th June, 2019.

9. The issues that arise for determination are:-

- a. Whether the instant suit is *sub judice* and/or *res judicata*.
- b. Whether the Respondent has raised sufficient grounds for this Court to consider setting aside the orders issued on 13th July 2020

The law provides as follows in Section 6 of the Civil Procedure Act:

6. No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

In the case cited by the Respondent being the case of **Birds Paradise Tours & Travel Ltd v Hotel Secretaries** (*supra*) the Court held:-

“Though the earlier suit does not operate as *res judicata*, its dismissal either directly under Order IXB rule 4 or by virtue of order XVI rule 3, and it involving the same cause of action as the present application and the plaint upon which it rests, and the applicant not having applied to set aside or vary the order of dismissal, the applicant was prohibited from bringing the present application.”

The case is substantially *res judicata* as the Claimant is prohibited from bringing the present suit as he ought to have either appealed the decision made or sought a review of the determination of the Court instead of filing a fresh suit. As held in the case above there is a prohibition to litigate again. The principle of *res judicata* applies even where a suit is dismissed. Notably, however, the Respondent has not shown sufficient reasons for the Court to set aside interim orders granted vide the Ruling of 13th July 2020. Court orders are not mere suggestions. There is therefore no excuse for the manifest failure, which failure is admitted by the Respondent in its pleadings to abide by the said Court orders. The final result is that the objection is upheld and the suit is struck out albeit with no order as to costs. Respondent however, must obey the Court orders issued in the matter.

It is so ordered.

Dated and delivered at Nyeri this 15th day of October 2020

Nzioki wa Makau

JUDGE