



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO.550 OF 2019

(Before Hon. Justice Hellen S. Wasilwa on 11th November, 2020)

PETER MUIGAI WAIRIGU.....1ST CLAIMANT

ALLAN OUMA OLOTCH.....2ND CLAIMANT

BRIGIT OCHICHE OBARA.....3RD CLAIMANT

PETER MWANGI KARIUKI.....4TH CLAIMANT

SAMUEL MBURU NJUGUNA.....5TH CLAIMANT

MICHAEL ONYANGO NYOTUMBA.....6TH CLAIMANT

MERCY WANJALA MWASI.....7TH CLAIMANT

FLORENCE WAKEYA.....8TH CLAIMANT

MARY MWENDE MUTUNE.....9TH CLAIMANT

VERSUS

CATHOLIC UNIVERSITY

OF EASTERN AFRICA.....RESPONDENT

RULING

1. The application before Court is the Applicant's Notice of Motion dated 16th June, 2020 seeking the following orders:-

a) THAT this Honourable Court be pleased to declare that the matter herein is subjudice subsequent to Cause 805 of 2017 which is pending before Court of competent jurisdiction with this Honourable court and the same is between the parties herein over the same subject.

b) THAT this Honourable Court be pleased to strike out the Statement of Claim filed in Court on 22nd August, 2019 by the Claimants and all the documents in support of the same.

c) THAT costs of this application and for the entire proceedings be awarded to the Respondent.

2. The application is premised on grounds that:

a) The matter is sub judice, frivolous and in utter defiance of the law. It is meant to sow discord with the discord with the other applications/suits before the Court particularly Cause no. 805 of 2017, which is a matter between the same parties herein over the same subject matter.

b) This Honourable Court should frown upon this subsequent suit by the Respondents as the same is meant to embarrass the Court and result to maladministration of justice as it is very possible that the Court can make competing rulings.

c) The Respondents' advocates as an officer of the Court is being economical with the truth and is misdirecting this Honourable Court by pleading that there is no other suit pending in any other Court between the parties over the same subject matter yet the same exist.

d) In any event the Claim as lodged by the Respondents herein cannot stand as they were fairly terminated by the Applicant and all their pending dues had been advanced to them by the Applicant.

3. The application is supported by the affidavit of Erick Omondi Njiri the Applicant's Human Resource Manager sworn on 16th June, 2020. He deposes that there is another suit by the Respondents being ELRC 805 of 2017 against the Applicant which was filed prior to this matter and immediately after the Applicant terminated them on the basis of redundancy.

4. He deposes that the said suit is pending before a Court of competent jurisdiction between the same parties concerning the same subject matter which amounts to sub judice thus the suit herein should be struck out with costs to the applicant.

5. In response to the application, the Respondents filed a Replying Affidavit sworn by Peter Muigai Wairigu the 1st Claimant/Respondent on 12th August, 2020. He deposes that the suit filed as Cause 805 of 2017 is a different suit between the Union and the Applicant as can be seen from the pleadings. He further deposes that their claim is very specific with a clear cause of action and prayers from the other suit and therefore the application seeking to strike out the instant suit is misconceived and frivolous befitting dismissal.

6. The application proceeded by way of written submissions.

Applicant's submissions

7. The Applicant submitted that the Section 6 of the Civil Procedure Act defines sub judice and that the elements that must be present for the principle to apply include; there must be 2 suits in existence, the matter in issue must be directly and substantially in issue in both suits; parties must be the same and the jurisdiction of the Court must be similar.

8. It submitted that the Court in **Republic v Registrars of Societies- Kenya & 2 Others ex parte Moses Kirima and 2 Others [2017] eKLR** spelt out the elements that qualify a matter to be considered sub judice.

9. It argued that having produced Amended Claim in Cause 805 of 2017, it is clear that there are 2 matters in existence. They further submitted that a quick perusal of the Amended Memorandum of Claim indicates that the matter in issue concerns unlawful and unprocedural termination of the Respondents on account of redundancy.

10. It further argued that the Claimants herein also claim that they were discriminated by the Respondent and that they suffered unlawful redundancy. It submitted that the various compensation and redress that the Respondents are seeking in the two matters as they claim arose as a result of their common alleged claim of being victimised by the Respondent due to the unlawful redundancy.

11. It argued that the Kenya Private Universities Workers Union that filed the Claim 805 of 2019 has the mandate to represent and uphold interests of its members at various places of employment thus it instituted this matter on behalf of the Claimants/Respondents in its capacity as a trade union and the Respondents being its members.

12. It submitted that Paragraph M of Cause 805 of 2017 reveals the individuals are members of the Union and being represented by the said union. It further submitted a perusal of the names shows that the Claimants in Cause 805 of 2017 are all present in Cause 805 of 2017. It submitted that only 2 claimants in Cause 550 of 2019 Samuel Mburu Njuguna and Michael Onyango Nyotumba are not Cause 805 of 2017.

13. It submitted that the outcome of Cause 805 of 2017 will definitely impact Cause 550 of 2019 as the Claimants are the same and they are claiming against a common Respondent. It further submitted that the plight of the 2 Claimants shall be addressed in Cause 805 of 2017 which was filed before this matter.

14. It submitted that both matters were filed in the Employment and Labour Relations Court at Nairobi and are both pending in Court. It submitted that since the issues raised in both matters are substantially the same, it is only just and fair for the Court even for the parties that the subsequent matter be struck out as determination of Cause 805 of 2017 will sufficiently address the issues raised in Cause 550 of 2019.

15. It relied on the case of **Barclays Bank of Kenya Ltd v Elizabeth Agidza & 2 Others [2012] eKLR** where the Court held that to save judicial resources section 6 of the Civil Procedure Act should be invoked, where a substantial part of the matters in issue of controversy in a subsequent suit is covered by the previous suit.

16. It urged the Court to grant the Orders sought, having established that Cause 550 of 2019 is sub judice.

Respondents' submissions

17. The Respondents submitted that the parties in Cause 805 of 2017 are the Kenya Private Universities Union and the Applicant while in this suit it is they as Claimants and the Applicant. They submitted that the cause of action in Cause 805 of 2017 is violation of the Union rights to represent its members employed by the University who are facing redundancy while in the cause of action in the instant suit is unlawful retrenchment and non-payment of the Claimants/Respondents lawful dues.

18. They argued that the 2 suits are different and the current suit has been filed by the Respondents in exercise of their constitutional right of

unlawful expectation and protection of their right to fair labour practices.

19. Finally, they submitted that the element of sub judice has not been established and does not apply to the instant suit. Therefore, the application for striking out the suit is malicious, misinformed and misconceived befitting dismissal with costs.

20. They relied the case of **Kandara Residence Association & Ano v Ananas Holdings Limited & 4 Others, Director of Survey & 3 Others (Interested Parties) [2020] eKLR** that held that a preliminary point of law must be capable of disposing the matter without the Court having to ascertain facts.

21. I have considered the averments of the Parties herein. Indeed, this Court has a duty to consider if the Suit herein is similar to Cause No. 805/2017 in order to arrive at the finding that this Cause is *sub-judice*.

22. Cause No. 805/2017 was filed by the Kenya Private Universities Workers Union. The issue in dispute in Cause No. 805/2017 is refusal by the Respondents to allow the Claimants herein to access both her members and potential members, deductions and remittance of union dues and victimization of her members on account of Trade Union affiliation activities.

23. The Claimants also contend victimization of her members vide unlawful termination of employment contracts of some of her members vide unlawful, unfair, unprocedural and unconstitutional redundancies.

24. The Grievants mentioned in Cause No. 805/2017 include Mary Mwendu Mutune, Brigit Ochiche Obara, Peter Muigai Wairigu, Janet Mongina Otoigo, Mercy Wanjala Mwasi, Antony Njoroge, Loice Kariuko Njoka, Peter Mwangi Kariuki, Lilian Achieng Osaso, Florence Wakeya, Martin Kinyenje, Pius Mayenga, Duncan Waluchio and Allan Olotch.

25. Apparently, all these Grievants in Cause No. 805/2017 are Claimants in Cause No. 550/2019 except Samuel Mburu Njuguna and Michael Nyotumba.

26. The issues in this Claim as in Cause No. 805/2017 relates to redundancies too. In the circumstances, issue of redundancies is a matter which is *sub judice* in both matters.

27. The only point of divergence relates to access to Claimant's members and deduction and remittance of union dues which has not been included in Cause No.550/2019. In the circumstances, the only cure in the matter is either to amend the Claim and exclude the Claimants in Cause No.550/2019 or consolidate the 2 Causes which is dependent on counsels on record and the union.

28. In the circumstances, I agree that Cause No. 550/2019 is *sub-judice* to 805/2017. I will give the Parties 30 days to consider the necessary amendments or consolidation of the two Parties and mention the matter before the Principal Judge for further directions.

29. Costs in the cause.

Dated and delivered in Chambers via zoom this 11th day of November, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Guserwa for Claimants – Present

Madowa for Respondent – Present