



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 521 OF 2019**

(Before Hon. Lady Justice Maureen Onyango)

**KEPHER OGUWI LANGI..... CLAIMANT**

**VERSUS**

**KENYA UNION OF POST PRIMARY EDUCATION TEACHERS (KUPPET)....1<sup>ST</sup> RESPONDENT**

**THE PS, MINISTRY OF EDUCATION DEPARTMENT OF VOCATIONAL & TECHNICAL  
TRAINING..... 2<sup>ND</sup> RESPONDENT**

**TEACHERS SERVICE COMMISSION.....3<sup>RD</sup> RESPONDENT**

**HON. ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**RULING**

The Claimant filed this suit, seeking to set aside the consent order recorded in **Nairobi ELRC Petition 97 of 2018; Rose Chege & 4 Others v TSC & 3 Others** which was consolidated with **Nairobi ELRC Cause 85 of 2018; KUPPET v TSC & 3 Others**. The 1<sup>st</sup> Respondent thus raised the Preliminary Objection dated 15<sup>th</sup> May 2020 against the Claimant’s Application dated 5<sup>th</sup> May 2020, on the following grounds –

- a. That there is another matter pending before this Court between the same parties herein, being ELRC consolidated Petitions 97 of 2018 and Petition 85 of 2018.
- b. That the issues raised in support of the said Application and in the Claimant’s Application and Statement of Claim both dated 9<sup>th</sup> August 2019 (hereinafter ‘the main suit’) are *res judicata*, the same having been directly and substantially in issue between the same parties in the consolidated petitions.
- c. That consent orders were thereafter recorded to aid in execution of the judgment on 15<sup>th</sup> July 2020, which consent orders, are effectively under structural interdict by way of supervision by this Court, and as such the matters raised by the Claimant in the Application and in the main suit are *sub judice*.
- d. The Claimant already filed the Application dated 14<sup>th</sup> March 2019 in the consolidated petitions hence the instant application and the main suit offend the legal doctrine of duplicity of lawsuits espoused in section 6 of the Civil Procedure Act.
- e. That this Court has therefore no jurisdiction to entertain both this Application and the main suit.
- f. That the said Application and main suit are thus misconceived, incompetent, bad in law and an abuse of the Court process.
- g. That it is just meet and in the interest of the rule of law, fairness and justice that the Application dated 5<sup>th</sup> May 2020 and the main suit be dismissed forthwith with costs to the 1<sup>st</sup> Respondent.

The Claimant opposed the preliminary objection vide his Replying Affidavit sworn on 28<sup>th</sup> May 2020. He contended that he was not a party to the consent order entered in ELRC 97 of 2018 and ELRC 85 of 2018 which was signed by other parties. As such, his application is not *res*

*judicata*.

In response to ground 3 of the preliminary objection, it was the Claimant's contention that the 1<sup>st</sup> Respondent failed to cite the relevant provisions of law that were used to develop and secure consent 3 and 4. As such, the consent was grounded on presumptions and individual opinions of the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents hence a violation of the Applicant's rights. Therefore, the issue of agency fee as raised in the preliminary objection does not arise as it was done in bad faith and brought to Court with unclean hands hence should be dismissed with costs.

The Claimant contended that despite the existence of the consent order, the 1<sup>st</sup> Respondent still issued directions for deductions and payment of agency fees to KUPPET. He contended that he was a stranger to the consolidated matter as his application to be enjoined to the proceedings was rejected.

The Claimant averred that the 1<sup>st</sup> Respondent was guilty of material non-disclosure for its failure to inform this Court that it had signed a CBA with the 3<sup>rd</sup> Respondent on 26<sup>th</sup> October 2016 which clearly indicated the terms of exit between the 3<sup>rd</sup> Respondent and its employees.

It was the Claimant's contention that there was no CBA between the 1<sup>st</sup> and 2<sup>nd</sup> Respondents signed on behalf of the Applicant herein and that the 1<sup>st</sup> Respondent was yet to sign a recognition agreement which was prerequisite to negotiating and signing a CBA.

The Preliminary Objection was disposed of by way of written submissions with all the parties filing their respective submissions.

### **Submissions in Support of the Preliminary Objection**

The 1<sup>st</sup> Respondent submitted that the preliminary objection was valid and met the threshold set out in the case of **Mukisa Biscuits Company v West End Distributors Limited [1969] EA 696** as it is raised on pure points of law.

On whether the issues raised in the suit are *res judicata*, the 1<sup>st</sup> Respondent submitted that the Claimant in this suit was a party in the previous suit on account of the following: he was a member of KUPPET at the time the petition was filed and he was an independent Applicant by being an Interested Party. As such, the 1<sup>st</sup> Respondent urged this Court to disallow the Claimant from re-introducing the same subject matter, clothed as a new cause of action which was the holding in the case of **Edwin Thuo v Attorney General & Another; Petition 212 of 2013**.

The 1<sup>st</sup> Respondent also relied on the cases of **Nagabhushana v State of Karnataka & Others [2011] INSC 88**, **John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR** where it was observed that the doctrine of *res judicata* was a fundamental principle which sustains the rule of law in ensuring that litigation comes to an end.

It was the 1<sup>st</sup> Respondent's submissions that the suit offended the provisions of section 6 of the Civil Procedure Act since the impugned consent order recorded to aid in execution of the judgment, was effectively under structural interdict by this Court. The case of **Mwangi Stephen Muriithi v Daniel T. Arap Moi & Another [2017] eKLR** was relied upon to support this position. The 1<sup>st</sup> Respondent urged this Court to strike out the suit to prevent an abuse of the Court process.

The 3<sup>rd</sup> Respondent joined issues with the 1<sup>st</sup> Respondent and submitted that this suit is *sub judice* since the Claimant's application dated 14<sup>th</sup> March 2019 is pending for determination before another Court of competent jurisdiction, contrary to the provisions of section 6 of the Civil Procedure Act. It was the 3<sup>rd</sup> Respondent's position that the issues pending before this court are also directly and substantially in issue in the consolidated suit and relied on the case of **Kampala High Court Civil Suit 450 of 1993; Nyanza Garage v Attorney General** to buttress this position.

The 3<sup>rd</sup> Respondent's view was that by filing multiple suits, the Claimant is guilty of abusing the court process contrary to the overriding principle set out in section 3 of the Employment and Labour Relations Court Act. The 3<sup>rd</sup> Respondent relied on the case of **Satya Bhamu Gandhi v Director of Public Prosecutions & 3 Others [2018] eKLR** where the Court termed filing multiple suits on the same subject matter as abusing the court process.

Lastly, the 3<sup>rd</sup> Respondent submitted that the Claimant had erroneously enjoined it hence had no cause of action against it since he was not its employee, having been transferred to the 2<sup>nd</sup> Respondent. The 3<sup>rd</sup> Respondent urged this Court to strike out this suit in accordance with section 2 of the Civil Procedure Act.

The 2<sup>nd</sup> and 4<sup>th</sup> Respondents joined issues with the 1<sup>st</sup> Respondent. They submitted that the Claimant's application is *res judicata* within the meaning of section 7 of the Civil Procedure Act and the threshold set in the case of **Hosea Sitienei v University of Eldoret & 2 Others [2018] eKLR**.

In particular, they submitted that the issues raised in the Claimant's instant application were directly and substantially in issue in the Claimant's Application and Statement of Claim dated 9<sup>th</sup> August 2019, as they both seek to stay and nullify the consent orders. Further, the parties in the instant application are the same parties as the Application and Statement of Claim dated 9<sup>th</sup> August 2019.

Finally, the 2<sup>nd</sup> and 4<sup>th</sup> Respondent submitted that the application was *sub judice* as there was a pending application regarding the same subject matter. They too urged this Court to dismiss the Claimant's application.

## Submissions opposing the Preliminary Objection

The Claimant filed three written submissions to oppose the preliminary objection and to respond to the Respondents' submissions. He submitted that the preliminary objection was the 1<sup>st</sup> Respondent's attempt to ensure that no suit involving the parties herein proceeds. He contended that the grounds raised in the preliminary objection are not premised on any formal application, law or supported by any affidavit.

The Claimant submitted that he was not a party to the consolidated matters and that this was the only suit in which he was appearing as a party. It was his contention that there was no suit pending concerning illegal deduction of union dues hence this suit was not *sub judice*. He also submitted that the 1<sup>st</sup> Respondent had quoted the law on *sub judice* and *res judicata* out of context as the cause of action in this suit differed from that in the consolidated matters. The Claimant relied on the case of **Nathaniel Ngure Kihiu v Housing Finance [2008] KLR**, to buttress this position.

It was the Claimant's submissions that the facts indicate that stay orders were in place when the consent order was signed hence the same was unconstitutional and grounded on fraud and collusion by the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondent. He submitted that he had made an application to be joined to the proceedings, which application was opposed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

The Claimant contended that this Court had the jurisdiction to preside over this matter and issue relevant orders. He urged this Court to apply the principle of *res judicata* sparingly and relied on the case of **Wycliffe Gisebe Nyakina v Attorney General & Another [2014] eKLR**.

The Claimant submitted that the 1<sup>st</sup> Respondent was guilty of misleading this Court that it was representing the trainer yet when they transitioned to the Public Service Commission, they were issued with new payroll numbers hence could not continue being the 1<sup>st</sup> Respondent's members.

It was his submissions that the 1<sup>st</sup> Respondent quoted irrelevant authorities which were not backed by the Constitution or the law, as far as this suit was concerned. He therefore submitted that the PO was out of order, an abuse of court process and should be dismissed with costs.

In response to the 3<sup>rd</sup> Respondent's submissions, the Claimant submitted that having issued its notice of withdrawal, the 3<sup>rd</sup> Respondent was not supposed to participate in these proceedings without the permission of the Court. Nevertheless, he submitted that the 3<sup>rd</sup> Respondent was aware of the terms of exiting the CBA hence it concealed the information before this Court and perpetrated an illegality by signing the consent.

The Claimant reiterated his position as enumerated in his written submissions and maintained that the orders sought in the application were not the same as those sought in **Petition 97 of 2018**.

In response to the 2<sup>nd</sup> and 4<sup>th</sup> Respondent's submissions, he submitted that this suit was filed to stop the illegal deduction of union dues and agency fees by the 2<sup>nd</sup> Respondent who remitted the same without any legal authority or recognition agreement with the 1<sup>st</sup> Respondent. The Claimant stressed on the fact that the parties seeking redress in this suit were employees of the Public Service Commission and not the 3<sup>rd</sup> Respondent.

As in his submissions in opposition to the preliminary objection, the Claimant reiterated that the authorities relied on by the 2<sup>nd</sup> and 4<sup>th</sup> Respondents were irrelevant in as far as this cause was concerned. The Claimant contended that that there was no evidence to prove that the cause of action herein, was similar to that in the consolidated matters and relied on the case of **ASL Credit Limited v Abdi Basid Sheikh Ali & Another [2018] eKLR** to fortify this position.

## Analysis and Determination

I have carefully examined and considered the preliminary objection, the Claimant's Replying Affidavit together with the submissions filed and find that the issues for termination before this Court are –

1. Whether the preliminary objection meets the threshold set in the case of **Mukhisa Biscuit Manufacturing Company Limited v West End Distributors Limited [1969] EA 696**
2. Whether the issues raised in the application and claim are *res judicata* and *sub judice*.
3. Whether the suit and application should be struck out.

## Whether the Preliminary Objection meets the set threshold

Order 2 Rule 9 of the Civil Procedure Rules allows a party to raise any point of law in their pleadings. A preliminary objection should be raised on a pure point of law which has been pleaded or which arises by clear implication out of the pleading and if argued as a preliminary point, may dispose of the suit.

The threshold to be met by a preliminary objection was set out in the case of **Mukhisa Biscuit Manufacturing Company Limited v West End Distributors Limited [Supra]** where it was observed as follows–

“A Preliminary Objection is in the nature of what used to be demurrer. It raises a pure point of law which is argued on the

assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”

It is not in contention that the consent order the Claimant seeks to challenge was entered into, in relation to Petition 97 of 2018 as consolidated with Petition No. 85 of 2018. In his claim, the Claimant seeks the following orders–

- a. A declaration that the consent order entered between the Respondents and recorded as an order of the Court on 15<sup>th</sup> July 2019 is unlawful, null and void.
- b. A declaration that no employer can effect any deductions of union dues unless FORM S duly signed by employee(s) has been received from the said trade union and validation as to *its validity is ascertained*.
- c. An order to set aside the consent order dated 15<sup>th</sup> July 2019.
- d. Any other relief which the court may deem fit to grant.
- e. Cost of the claim be provided for.

The Claimant sought the following orders in the impugned application–

- a. This application be certified urgent for hearing ex parte in the first instance.
- b. That pending the hearing and determination of this application, this Court be pleased to grant conservatory orders restraining the 2<sup>nd</sup> Respondent from deducting, taking and or transferring any monies whether union dues or Agency fees to the 1<sup>st</sup> Respondent from the Trainers/Lecturers who have resigned from the 1<sup>st</sup> Respondents.
- c. That pending the hearing and determination of this Petition, this Court be pleased to grant conservatory orders restraining the 2<sup>nd</sup> Respondent from deducting, taking and or transferring any monies whether union dues or Agency fees to the 1<sup>st</sup> Respondent from the Trainers/Lecturers who have resigned from the 1<sup>st</sup> Respondents.
- d. That pending the hearing and determination of this petition this Court be pleased to grant an order directed to the 2<sup>nd</sup> Respondent to refund all the monies so far illegally deducted whether Union dues or Agency fees.
- e. That pending the hearing and determination of this petition this Court be pleased to grant an order directed to the 2<sup>nd</sup> Respondent stopping, prohibiting, entering, signing, executing or in any contracting a Recognition Agreement with the 1<sup>st</sup> Respondent.
- f. That this Court be pleased to make such orders as it deems necessary to safeguard the ends of justice.
- g. That costs of and incidentals to this application be provided for.

For the Court to establish whether issues raised in this suit are substantially similar to those raised in the consolidated matter, it will be required to look into the evidence by re-evaluating the pleadings in both suits, which were never presented before this Court.

For a preliminary objection to pass the set standards, the facts it relies upon must not be contested. In this case, the issue of whether the matter before this Court was *res judicata* or *sub judice*, is hotly contested with the Respondents insisting that the matter is *res judicata* while the Claimant made contestations to the contrary by virtue of the fact that the issues before this Court related to deductions of union dues and agency fees which he and his colleagues, whose interests he represents in the matter, find fraudulent and coercive.

The issues raised by the Claimant cannot be canvassed by way of preliminary objection as evidence must be interrogated to establish whether the assertions, he has made are indeed true. In particular, the Claimant has challenged the validity of the consent which affected him together with other employees yet in his view, they ceased to be the 1<sup>st</sup> Respondent’s members when they were transferred to the 2<sup>nd</sup> Respondent. The claimants further argue that for them to be liable to pay agency fees, there has to be a recognition agreement that would pave way for CBA negotiation, which is non-existent in their case

Lastly, the Claimant’s assertion that his application to be joined to the proceeding in the consolidated matter was not allowed is not contested by the Respondents. Having not been allowed to be enjoined, the only forum left for the Claimant to seek redress is to file a fresh suit, which he is entitled to by dint of article 48 of the Constitution. To uphold the preliminary objection would be to deny the Claimant and other grievants access to justice, having been locked out from the consolidated matter.

All these are issues that require this Court to evaluate the evidence which therefore demonstrates that a preliminary objection application is not the appropriate vehicle to move this Court. As such, after carefully considering the preliminary objection and the arguments made by the parties, I find that the 1<sup>st</sup> Respondent’s preliminary objection does not meet the set threshold.

**Whether the suit is sub judice and/or res judicata**

**Sub judice** as defined in Section 6 of the Civil Procedure Act 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.**

The issues in the instant claim arose after the consent judgment had been entered into and are not similar to those raised in the consolidated suit. What the claimant contests is the validity of the consent order, and the effect thereof which is to force him and the claimants he represents to pay union dues and agency fees to the 1<sup>st</sup> Respondent to be effected by the 2<sup>nd</sup> Respondent.

The pleadings in Petition No. 97 of 2018 and 85 of 2018 have not been availed to this court. From the judgment attached to the claim herein, I do not see any similarity in issues raised there and those raised in this matter, the issues herein having arisen as a consequence of the consent order after the judgment.

More importantly, the claimant herein or any of the claimants he represents, were never parties in the two petitions. The interests they seek in the suit herein are also not similar to those in the two petitions.

I therefore find that the suit herein is neither *sub judice* or *res judicata*.

**The upshot is that the preliminary objection is without merit and is accordingly dismissed.**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 1<sup>ST</sup> DAY OF DECEMBER 2020**

**MAUREEN ONYANGO**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**