



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF
KENYA AT NAIROBI

CAUSE NUMBER 473 OF 2018

ANNE WAIRIMU KIMANI.....CLAIMANT

VERSUS

KENYA AGRICULTURAL &

LIVESTOCK RESEARCH ORGANISATION.....RESPONDENT

RULING

1. By a notice of preliminary objection dated 13th April, 2018 the respondent contended that the instant application and the claim are *res judicata*.
2. According to the respondent, the claimant had previously on 1st March, 2017 filed a suit before the Court being Nairobi ELRC cause No 408 of 2017 involving the same parties and same issues as the present claim. In the former suit the claimant challenged the decision of the respondent to transfer her to the respondent's Coffee Research Institute in Ruiru through a letter dated 29th September, 2016. In the present suit, the facts leading to the decision to transfer the claimant and the grounds of the claimant's challenge to the said decision are evident in paragraphs 5,6,7,8,9,10,11,12,13,14,15,16,17,18,19 and 20 of the memorandum of claim.
3. Among the grounds for challenging the transfer are the claimant's medical condition, the working condition, road infrastructure and facilities at Ruiru. According to Counsel, the former suit was conclusively determined vide a ruling delivered on 27th July 2017 by Lady Justice Mbaru.
4. In the ruling the learned Judge decided that the respondent offered transport for staff stationed at Ruiru and where staff bus had broken down, alternative arrangements were made. Further the claimant in her monthly salary was paid commuter allowance of Kshs 8,000/= per month.
5. Regarding the claimant's transfer the learned Judge observed that the duties the claimant was undertaking at Thika were allocated to other employee of the respondent hence effectively the claimant had no role in such a station as her duties were allocated to a new station. Failure by the claimant to move as directed by the respondent thus compromised respondent's business. Mr Mesivo therefore submitted that the issues raised in the present claim challenging the manner and process of transfer were substantively determined in the former suit.
6. In his submissions in response Muga Apondi for the claimant submitted that in the previous suit the claimant sought a declaration that the letter dated 23rd January 2017 requiring the claimant to show cause for offences of absenteeism and insubordination were of no consequence, null and void. The claimant further sought an order that she be paid all her salary being held pending determination of the claim. In deciding the previous suit the learned Judge was of the opinion that the claimant should have first reported to her new work station and then appealed the transfer. The Judge also gave the respondent the go ahead to proceed with the disciplinary process. According to Counsel, the claimant heeded the courts directions and reported to KALRO-CRI – Ruiru on 14th August, 2017.
7. The respondent then commenced the disciplinary process through a show cause letter dated 4th August, 2017 which also served to withhold her salary. The current suit therefore contests the execution of the disciplinary process, its outcome and implementation. The claim also seeks relief from grave health challenges that the claimant was encountering as a result of the transfers.
8. The court has carefully reviewed the ruling of Lady Justice Mbaru and is in agreement that the issue therein concerned the transfer of the claimant from KALRO –Thika to Ruiru. The Judge also dealt with the issue of the disciplinary process which she said she could not interfere with because failure by the claimant to report to Ruiru amounted to insubordination. The claimant heeded the court's advice and reported to Ruiru and appealed against her transfer. By the time this matter was filed the outcome of the appeal was not known. However, the claimant raised additional complaints which included deductions from her salary, harassment and emotional distress. These form

additional subject matter of the claim before the court.

9. The court has noted that Judge Mbaru's decision was a ruling on an application. It did not decide the main suit. The issues in the present suit and cause No. 408 of 2017 in respect of which Lady Justice Mbaru gave a ruling are more or less the same as the ones in the present suit. If there is any difference then they can only be shades however the substance of the dispute and the parties are the same. The court therefore does not understand what necessitated the filing of the present suit while cause No 408 of 2017 was pending. Would it not have been simpler to amend if necessary the claim in Cause No 408 of 2017 to include the additional grievances encountered by the claimant against the respondent.

10. The plea of *res judicata* is sustainable in cases where the issue in controversy in present suit between same parties and was finally decided in a previous suit between them. To that extent the issue of the legality of procedural fairness or motive behind the claimant's transfer as a basis for granting interlocutory order was adequately canvassed before the learned Judge and she declined to issue any interlocutory orders. The claimant heeded the Judge's direction and reported to Ruiru. She however appealed for the reconsideration of the transfer on medical grounds using the respondent's internal appeal process. The outcome of the appeal was not known by the time of filing this suit.

11. There is no interlocutory application seeking injunctive orders against the respondent on the same facts as were before Lady Justice Mbaru hence the issue of *res judicata* cannot arise. Further the question as to the legality of the transfer and deductions or withholding of the claimant's salary were not conclusively decided by Lady Justice Mbaru. The learned Judge thought that by refusing to be transferred the claimant would be guilty of insubordination and directed that she reports to her new station first then she could appeal. The learned Judge therefore declined to injunct the pending disciplinary process. This did not mean the legality or otherwise of the transfer was dealt with.

12. To that extent the court does not agree with the respondent that there is *res judicata*. However, it is a cardinal rule of civil litigation that no court should proceed with any suit between same parties involving same issues as a previous suit pending before the same court. In that regard Cause No 408 of 2017 having been filed first in time involving same parties and same issues, takes precedence over the present suit with the consequence that the present suit stands stayed until Cause No 408 of 2017 is either disposed of or withdrawn.

13. It is so ordered.

Dated at Nairobi this 31st day of May, 2019

Abuodha J. N.

Judge

Delivered this 31st day of May, 2019

Maureen Onyango

Principal Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.