



Kenya County Government Workers Union v Wairimu & 19 others (Cause 112 of 2018) [2018] KEELRC 2581 (KLR) (14 June 2018) (Ruling)

Kenya County Government Workers Union v Faith Wairimu & 19 others [2018] eKLR

Neutral citation: [2018] KEELRC 2581 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

CAUSE 112 OF 2018

M MBARŪ, J

JUNE 14, 2018

BETWEEN

KENYA COUNTY GOVERNMENT WORKERS UNION CLAIMANT

AND

FAITH WAIRIMU 1ST RESPONDENT
LINCY MUKWAYA 2ND RESPONDENT
MARY KAMAU 3RD RESPONDENT
JOEL O OTIENDE 4TH RESPONDENT
CORNEL MABATSI 5TH RESPONDENT
JOHN K MALIMO 6TH RESPONDENT
SAMUEL J KIBOI 7TH RESPONDENT
JAMES GITONGA CHARLES 8TH RESPONDENT
GEORGE KORO 9TH RESPONDENT
PHANUE; JAOKO 10TH RESPONDENT
EUNICE CHEPOGON 11TH RESPONDENT
MARGARET LIMARENG 12TH RESPONDENT
EVANS WAFULA MAKOKHA 13TH RESPONDENT
FRANCIS N MAINA 14TH RESPONDENT
JOHN M NDUNDA 15TH RESPONDENT
JULIUS MREFU (JULIUS MUSANKA KIREU) 16TH RESPONDENT



FRANCIS MAKOKHA	17 TH RESPONDENT
BENSON MWANGI	18 TH RESPONDENT
ZAPHANIAH NYAMBANE	19 TH RESPONDENT
CHRISTOPHER MUTINDA	20 TH RESPONDENT

RULING

1. The ruling herein relates to the respondents application and Notice of Motion dated 9th May, 2018 and made under the provisions of sections 3A and B of the *Civil Procedure Act*, Article 159 of the *constitution*, Rule 17 (3), (7), (8) and 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and seeking for orders that;

That the Orders granted by this Court on the 30th April, 2018 restraining the respondents/ applicants from conducting a Special Delegates’ Conference in Nakuru on the 11th May 2018 be and are HEREBY vacated and/or set aside.

That in the alternative pending the hearing and determination of the respondents’/ applicants’ application herein the orders of injunction granted to the Applicants/ Respondents herein on the 30th April 2018 BE and are hereby stayed until further orders of this court.

Those costs of this motion be provided for.

2. The application is supported by the annexed affidavit of Faith Wairimu the 1st respondent, the 1st respondent and on the grounds that the claimant did not disclose to the court that they filed Cause No.606 of 2018 Nairobi and applied for similar orders as the instant and which were refused and the same is pending and where the claimant was ordered by the court to serve the respondents with the motion for hearing on 3rd May, 2018 but elected to abandon it and file the instant suit in Nakuru.
3. Other grounds in support of the application are that the actions of the claimant are geared to frustrate a legitimate meeting by the respondents without show of any colour of right and the deponent in support of the claimant’s application is guilty of material nondisclosure of fact and in perjury. The claimant has come to court with unclean hands and in the interests of justice the impugned orders should be vacated.
4. In the affidavit, Ms Wairimu avers that she issued notice convening the Special Delegates Conference in Nakuru after the General Secretary refused to convene the same despite several requests. Such notice was issued in accordance with the claimant’s constitution.
5. Ms wairimu also avers that when the claimant received the Notice for the Special National Delegates Conference they moved the court at Nairobi and filed Cause No. 606 of 2018 on 27th April, 2018 and wherein they sought for conservatory orders restraining the respondents form convening the Special Delegates Conference on 11th May, 2018 and the court directed the claimant to serve the respondents and attend inter-parties hearing on 3rd May, 2018. Instead of serving the respondents the claimant abandoned the suit and moved in the instant motion.
6. In the affidavit of Roba Duba he committed perjury herein when he swore there is no other suit pending between the parties yet he knew there was Cause No.606 of 2018 Nairobi. The motion by the claimant is actuated by high handedness, malice and with intent to deny the respondents rights



under the constitution. the claimant is lethargic to the new dispensation under the constitution of Kenya which has given office holders an opportunity to account for their performance and the multiplicity of suits is done in bad faith. This shows Roba Duba has failed to discharge his mandate as Secretary General of the union. A Special Delegates Conference is not held after 5 years but can be held to discuss performance of the National Executive Committee. The claimant and officers who moved the court are dishonest persons taking the court in circus for undisclosed interests and with the objective of clogging rights of the respondents and restraining them from concerning to address issues affecting their welfare as members of the union and unless the orders sought are issued there will be injustice.

7. The 16th respondent filed a Replying Affidavit and avers that he is Julius Musanka Kireu the claimant's Youth Leader, Narok Branch. He was served with a court order and application dated 20th April, 2018 filed by the claimant union.
8. In reply, the claimant filed the Replying Affidavit sworn by Roba Duba the GS of the claimant union and is conversant with the matters herein as the 1st respondent is the claimant's Women Representative Laikipia County Branch.
9. Mr Duba avers that By letter dated 5th February, 2018 the 1st respondent wrote setting out that following a consultative meeting held at Nakuru on 26th January, 2018 between her and 22 other county branch officials there was an agreement to hold a Special National Delegates Conference. The 1st respondent gave a 21 days' notice demanding the convening of the Special National Delegates Conference in accordance with article 1(2) and 2(4) of the Kenya constitution and articles 5.1.5 (a), (b), (c), (d) and 9f) of the claimant constitution.
10. Mr Duba also avers in reply that he is aware that article 5.1.1(b) of the claimant constitution that for a Special National Delegates Conference to be convened, the date and place has to be determined by the national executive committee on which he is the one to communicate too all branch secretaries in a notice of 28 days. Matters for discussion at such meeting must be sent by the GS in 14 days before the Special National Delegates Conference and in this case the respondents were in clear contravention of the claimant constitution. the constitution also sets out the manner and quorum of an Special National Delegates Conference which the respondents had failed to address themselves to. Some of the delegates now respondents have not signed to the requisition for the meeting as required under the constitution.
11. Mr Duba also avers that the notice for the Special National Delegates Conference was illegal and by contravening the claimant constitution and noting the same he instructed advocates to move the court on 18th April, 2018 where Cause No.606 of 2018 was filed at Nairobi under Certificate of Urgency. The application was heard ex parte and directions issued for hearing inter parties for 3rd May, 2018. With the imminent threat of the Special National Delegates Conference meeting taking place in Nakuru on 11th May, 2018, he instructed advocates on 27th April, 2018 to proceed and withdraw the matter filed at Nairobi and file the same in Nakuru where the intended Special National Delegates Conference was to be held due to its geographical proximity to where most respondents hail.
13. The notice of withdrawal was filed on 30th April, 2018 at Nairobi Cause No606 of 2018.
14. The claimant then proceeded to file a new suit at Nakuru on equal date Cause No.112 of 2018 under Certificate of Urgency and conservatory orders were issued stopping the respondents form convening the Special National Delegates Conference and hearing scheduled for the 14th May, 2018.
15. On the due date the claimant learnt of the application filed by the respondents on 9th May, 2018 challenging orders issue don 30th April, 2018 on the grounds that there was a pending suit in Cause No.606 of 2018 which was not the case as such suit had since been withdrawn. The respondents were thus misleading the court with their averments to this effect. The claimant has the right to withdraw



suit at any stage and as the respondents were not served with summons or any orders they did not incur any costs under Cause No.606 of 2018 and should apply the existence of such suit to seek the court herein to vacate orders issue don 30th April, 2018.

16. The orders issued on 30th April, 2018 were not with concealment of material facts as there was no other suit pending as at the time as Cause No.606 of 2018, Nairobi had been withdrawn. The court herein was move don good basis and orders issued justified. And the application by the respondents should be dismissed with costs.
17. The respondents filed Further Affidavit sworn by the 5th respondent, Cornel Mabatsi and who avers that as a member of the claimant he is support of application seeking to set aside, review and or vacate orders herein issue don 30th April, 2018. Under Article 2(5) and 41 of the constitution, 2010 and ILO conventions workers have the right to organise and bargain collectively. Under the claimant constitution article 5 provides for the convening of the Special National Delegates Conference and by barring the respondent from convening such meeting such is an infringement of their constitutional rights. The claimant has moved the court and abused the process well aware that there existed Cause No.606 of 2018 at Nairobi and thus the matters herein as sub judice.
18. The parties herein made oral submissions in court. the claimant filed a list of Authorities.
19. The 16th respondent opted to have his advocates address matters of law and no Affidavit was filed.
On application dated 9th May, 2018 the submissions of the parties and the list of cases filed by the claimant several issues arise for determination;
Whether the orders issued on 30th April, 2018 should be reviewed, set aside and or vacated;
Whether the suit herein is sub judice or res judicata; Whether the orders sought by the respondents should issue; Question of filing counter-application; Is there abuse of the court process: and The position of the 16th respondent.
20. On the last issue, it is clear the claimant filed suit against the respondents and including the 16th respondent who has since denounced the same and stated that upon being served he noted the proceedings were against a person holding his position as Youth Leader, Narok Branch of the claimant but he is Julius Musanka Kireu and not JULIUS MREFU as set out in the Memorandum of Claim. Julius Musanka Kireu has since instructed his advocates to attend herein and made submissions in support of the claimant's case.
21. The duty is upon the claimant to amend the pleadings having moved the court on 30th April, 2016 under the wrong perception that JULIUS MREFU is one and the same with Julius Musanka Kireu, which has since been clarified.
22. The option also exists for Julius Musanka Kireu to attend as an interested party as from submissions made it is clear that he has a position in these proceedings. At this point and noting the misjoinder and the potential orders being sought, there is misjoinder of a person other than the stated 16th respondent who is hereby removed from these proceedings.

On the question of a suit being res judicata or sub judice, on the one hand a suit is a suit is res judicata where Section 7 of the Civil Procedure Act states as follows:

No court shall try any suit or issue in which the matter directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit



or the suit which such issue has been subsequently raised, and has been heard and finally decided by such court.

23. In *Moses Ogutu Oyugi & 6 others v Kenya Shoe and Leather Workers Union & another* [2018] eKLR, the Court of Appeal emphasised that where parties have filed suit they cannot file a similar suit with direct and substantively same issues as the former suit in a court competent to try such subsequent suit. In *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others* [2015] eKLR the court held that;

... the ingredients of res judicata are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title and lastly that the court or tribunal before which the former suit was litigated was competent and determined the suit finally (see *Karia & Another v the Attorney General and Others* [2005] 1 EA 83. ...We can however do no better than reproduce the re-indentation of the doctrine many centuries ago as captured in the case of *Henderson v Henderson* [1843] 67 ER 313:- “.....where a given matter becomes the subject of litigation in and 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....

24. That settled, on the question as to whether the matter is sub judice, The sub judice rule is a common law principle that generally prohibited public discussion on matters pending before the court. At common law, the principle was particularly appropriate in cases of trial by jury where there was genuine fear that lay jury members would be swayed by public opinion. Such rule must however be seen in view of the [constitution](#), 2010 and the protections granted with regard to the right to expression as held in in *Okiya Omtatah Okoiti versus Attorney General & 2 Others* [2013] eKLR that any limitation on the freedom of expression guaranteed under Article 33 must be justified.

25. In this case therefore, the claimant moved the court on 30th April, 2018 seeking for urgent orders in the nature that;

1. ...
2. That pending hearing and determination of this application this Court be pleased to issue a conservatory order by way of injunction restraining the respondents, their officer, staff, servants, and/or any other person's in rem acting at their behest from convening a Special National Delegates Conference.
3. That pending hearing and determination of this Claim this Court be pleased to issue a conservatory order by way of injunction restraining the respondents, their officer, staff, servants, and/or any other persons in rem acting at their behest from convening a Special National Delegates Conference.
4. That costs of this application be provided for.

26. The application by the claimant was supported by the affidavit of Roba Duba the GS on the grounds that the respondent had issued notice for a Special National Delegates Conference contrary to the



claimant union constitution and thus should be restrained from convening such Special National Delegates Conference.

Attached to the application by the claimant was the Memorandum of Claim of which at paragraph (j) the claimant asserts that;

There is no any other suit before the court or any other court prior to this claim between the parties herein on the same subject matter.

27. The claim is supported by the Verifying Affidavit of Roba Duba the GS of the claimant and confirming that matters set out in the Claim as true to the best of his knowledge.
28. The court thus moved issued interim orders and in essence the meeting and Special National Delegates Conference scheduled on 11th May, 2018 was stopped pending hearing of both parties on 14th May, 2018.
29. Aggrieved, the respondents moved the court seeking to have the orders issued on 30th April, 2018 be set aside and or vacated as the claimant had failed to disclose the existence of Cause No.606 of 2018 at Nairobi and moved this court with concealment of material facts. I find averments by Roba Duba in his Replying Affidavit to the respondents at paragraph 13 and 14 relevant to highlight where he avers that;
 13. That on 27th April, 2018, the erstwhile advocates on record for the claimant diligently filed the said application and the same was heard ex parte and directions issued that the claimant serves the respondent for hearing on 3rd May, 2018.
 14. That on the imminent threat of the Special National Delegates Conference meeting taking place in Nakuru on 11th May, 2018 I instructed the advocates on record for the claimant on 27th April in the evening to withdraw the matter filed in Nairobi and file the same in Nakuru Law Courts where the intended Special National Delegates Conference was to be held due to its geographical proximity to where most of the respondents hail.
 15. That I know for a fact that having instructed the advocates on record for the claimant on Friday 27th April, 2018 in the evening, the advocate for the claimant couldn't [could not] swiftly move the court in time to file the said withdrawal hence prompting the filing of the said Notice of Withdrawal on Monday, 30th of April, 2018.
30. In this regard, Mr Duba as the GS acknowledges that as at 30th April, 2018 when this court was moved and interim orders granted, there was Cause No.606 of 2018, Nairobi and the essence of filing this cause at Nakuru was to address the imminent threat of the Special National Delegates Conference meeting taking place in Nakuru on 11th May, 2018 and where the court under Cause No.606 of 2018 and presiding at Nairobi had addressed and directed service upon the respondents for inter parties hearing on 3rd May, 2018.
31. By 30th May, 2018 there were active proceedings and orders and a date set by the court at Nairobi for inter-parties hearing on 3rd May, 2018. Such was the forum within which the claimant ought to have attended and address their issues but noting the Special National Delegates Conference intended by the respondents would have been held, moved the court herein, Nakuru and were able to urge similar orders as in Cause No.606 of 2018 at Nairobi. Such conduct cannot be defined in any other manner but abuse of court process. Where the claimant meant to file suit closer to the respondents, such was filed at Nairobi and upon the directions by the court to attend on 3rd May, 2018, well presented, the court had the power to order for a transfer of the matter to Nakuru or remain at Nairobi the locus of the claimant.



32. The Notice to Withdraw suit filed by the claimant on 30th April, 2018 is self-serving to avoid responsibility in this case and a continued perpetuation of abuse of the court process. Such Notice to withdraw suit once filed has not been urged. The court under Cause No.606 of 2018 has not been moved to adopt the Notice of Withdrawal as the final order of the court and effectively close such matter. Indeed I have done due diligence in this regard and Cause No.606 of 2018 was registered for court on 3rd May, 2018. Such matter remains alive.
33. Where the claimant was well aware that the court had been moved under Cause No.606 of 2018, Nairobi seeking to stop the Special National Delegates Conference scheduled by the respondents on 11th May, 2018 and failed to obtain the orders sought, recourse was to return to the same court under the same Cause No.606 of 2018 and urge a review of the orders and directions issued and not initiate a new suit as herein.
34. The claimant in their submissions well relied on the High Court in the case of Graham Rioba Sagwe & 2 others versus Fina Bank Limited & 5 others [2017] eKLR and I wish to rely on the same herein where it was held that;

The concept of abuse of court/judicial process is imprecise. It involves circumstances and situation of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents.[Public Drug Co V Breyerke cream Co, 347, Pa 346, 32A 2d 413, 41] The situation that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-

- (a) Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.
- (b) Instituting different actions between the same parties simultaneously in different court even though on different grounds.
- (c) Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and respondent notice.
- (d) Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.
- (e) Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.[Jadesimi V Okotie Eboh (1986) 1NWLR (Pt 16) 264]
- (f) Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.



- (g) Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.
- (h) Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent.

35. The above principles in addressing what abuse of the court process is defines the claimant's conduct herein. Well aware of proceedings in Cause No.606 of 2018, Nairobi and aware that such suit related to the parties herein and over the same cause of action filed the suit herein. Such conduct cannot be explained in any other way save to add it is forum shopping in the enforcement of a conceived right that the claimant would get orders urged and not allowed at Nairobi and would get them at Nakuru before a court of equal jurisdiction. The claimant aware that the reliefs sought therein are similar to what had been previously urged and declined. Cumulatively these amounts to abuse of the court process. Such conduct should be frowned upon by the court and dealt with firmness.
36. With the cause under Nairobi Cause No.606 of 2018 being alive, to sustain this suit as herein would be to visit injustice on the respondents. The basis of the interim orders issued on 30th April, 2018 being tainted as set out above, to keep the same on record and the suit herein would be to visit greater injustice on the respondents.
37. Application by the respondents seeking to have the orders of 30th April, 2018 I find to have been filed with responsibility and based on legitimate grounds that as at 30th April, 2018 there existed Cause No. 606 of 2018 between the parties herein over similar cause of action, grounds and such had not been closed. To move the court as herein, and obtain orders declined under Cause No.606 of 2018 Nairobi was in abuse of the court process. The authorities cited by the claimant by the Supreme Court in the case of John Ochanda versus Telkom Kenya Ltd, SC Appl. No 25 of 2014; Kenya Plantation & Agricultural Workers Union versus P.J. Flowers Ltd [2015] eKLR and Enock Osoro Kinara versus Postal Corporation of Kenya, Cause No.2202 of 2016 are easily distinguishable from the matters herein. To apply the findings in the cited suits without taking into account the facts of the matters herein would be to omit an essential element of the same.
38. With the finding above, to address matters between the parties as to the legality of notices issued by the respondents to the claimant to convene an Special National Delegates Conference on 11th May, 2018 would be academic. Save to add that there is obvious disquiet within the membership of the claimant and where not addressed will result in unrest and further agitation. The GS well aware of matters between the parties ought to address and not hide behind the *constitution* and the stringent terms well aware the respondents are unable to meet. I refer the GS to the preamble of the *Labour Relations Act*, 2007 and which provides that;

An Act of Parliament to consolidate the law relating to trade unions and trade disputes, to provide for the registration, regulation, management and democratisation of trade unions and employers organisations or federations, to promote sound labour relations through the protection and promotion of freedom of association, the encouragement of effective collective bargaining and promotion of orderly and expeditious dispute settlement, conducive to social justice and economic development and for connected purposes



39. Unionisation should be with a view to guarantee various rights and fundamentally to ensure democratisation of trade unions. The concept of democratisation cannot be achieved where the person of GS is keen to circumvent justice and take the respondents in circus by filing multiple suits to keep them engaged and not achieve the purpose(s) for which they joined the claimant union. Democratisation well applied will ensure the GS office is held with responsibility and honour to the awe of all members. Where abused, this is reflected in suit such as this.

40. This Cause should not have been filed in the first instance. The abuse of court process apparent, the application by the respondents and dated 9th May, 2018 is found with merit and is hereby allowed. There being no account as to the loss incurred by the respondents following the stoppage of Special National Delegates Conference scheduled for 11th May, 2018 suit costs shall be assessed accordingly.

There exists Cause No.606 of 2018, Nairobi where parties ought to urge matters as herein. The suit herein is hereby dismissed with costs to the respondents save for party stated under 16th respondent.

DELIVERED IN OPEN COURT AT NAKURU THIS 14TH DAY OF JUNE, 2018.

M. MBARU JUDGE

In the presence of:

Court Assistant:

