



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

AT NAKURU

CAUSE NO.212 OF 2017

PETERKEEN MWIU KIMWELI & 21 OTHERS.....CLAIMANTS

VERSUS

NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES.....RESPONDENT

RULING

The claimants by application and Notice of Motion dated 11th October, 2018 and brought under the provisions of Articles 27910, 41 and 50 of the Constitution, 2010, section 5(3)(b) and 48 (h) of the Employment Act, 2007, Rule 17(1) and (3) of the Employment and Labour Relations Court (Procedure) Rules, 2016 and seeking for orders that;

1...

2. *All employees of the respondent still in service who are interested in joining this case be protected from any punitive action from the respondent as a result of filing and prosecuting this case.*

3..

4..

5. *This court be pleased to issue a temporary order of protection restraining the respondent, its servants or agents or otherwise from any orchestrated, targeted and punitive transfer, premeditated, contrived and speculative disciplinary or administrative actions and/or practices including dismissals, harassment, unfair treatment, discrimination, humiliation and/or unfavourable changes to conditions of employment in relation to the claimants herein, or otherwise penalising the claimants in retaliation to or as a result of the institution of their claim against the respondent pending the hearing and determination of this suit.*

6. *The planned job evaluation to be conducted by the respondent, coming after another earlier job evaluation whose negative effects on the claimants are still a subject matter of a court case, be stayed, stopped till this suit is heard and determined by this court.*

7. *The job evaluation to be conducted by the respondent do not take place the job grades 5 and 6 in any undefined salary scale, steps and or notches.*

8. *Any other and/or further orders of this court do issue as it may deem necessary and expedient in the interests of justice.*

9. *Costs in the cause.*

The application is made on the grounds that some of the claimants are in permanent and pensionable employment terms with the respondent and others former employees who were categorised in job grades 5 and 6 in the job structure. The claimants filed the Claim against the respondent over continued underpayment of salaries and payment of salary arrears from November, 2011 to date. The underpayment salaries and the arrears arose out of the unlawful, wrongful and discriminatory implementation of a job evaluation exercise in November, 2011 as evidenced by the respondent Internal Report summary attached to the Memorandum of Claim.

The respondent in non-compliance with the Job Evaluation Report went ahead and implemented its own structure and grading occasioning severe disparity, disharmony and discrimination in the pay structure. The respondent constituted an internal implementation committee for this purpose under Mrs Milkah Bwondara. Upon completing its work the committee was released on 3rd June, 2014 but the respondent has failed to implement its recommendations.

The failure to implement the recommendation has resulted in the breach of the claimants' legitimate expectation of their salary reviews. The respondent has further issued a public tender notice for selection of a consultancy firm to carry out a job evaluation which is at an advanced stage of being awarded for the conduct of another job evaluation as issued on 27th June, 2018.

The claimants stand to suffer double jeopardy in undergoing yet another job evaluation without the ills and suffering of the previous job evaluation which resulted in continued salary underpayments and salary arrears not being addressed and still incomplete. The current tender documents for a new evaluation is set to penalise the claimants as the same is focused on addressing employee's internal studies and current employee characteristics. The use of an employee character to determine a job evaluation is unscientific and illegal and not legislated and such is a set up tantamount to profiling employees by the use of subjective and discriminative criteria.

The claimants are faced with real and likely danger of disciplinary action and or administrative measures including dismissal from employment and unfair treatment as a result of filing suit against the respondent. In the current call for a consultancy to evaluate respondent employee has not included in the terms the review of historical salary underpayments and salary arrears with regard to the claimants which is a malicious omission by the respondent meant to defeat justice.

The orders sought are to ensure the protection of the claimants from any disciplinary or administrative measures designed by the respondent to intimidate, threaten, and embarrass the claimants from filing this claim.

In the supporting affidavit of Peterkeen Mwiu Kimweli he avers that he one of the claimants and the claim herein relates to salary underpayments and salary arrears resulting from November, 2011 to date. The claimants who are still in employment face imminent danger of disciplinary action for filing the claim.

In response, the respondent filed Grounds of Opposition and avers that the application by the claimants is incompetent as matter is *res Judicata* and issues raised herein also relates to **Nairobi Cause No.1796 – Kenya Commercial Food & Allied Workers Union versus NSSF** and the matter herein thus filed against section 7 of the Civil Procedure Act.

The respondent has relied on the case of **Bernard Mugo Ndegwa versus James Githae & 2 others [2010] eKLR** and the finding that a matter is *res judicata* where the issue is identical in both suits, address the same substantial issue, there is concurrence jurisdiction of the court, subject matter is the same and there is a final determination over the matter.

The respondent other ground sin objection are that where a matter is addressed a second suit should not be allowed by the court in any other from, manner or cause.

The claimants have not complied with the ruling of the court requiring them to amend the pleadings and so there are no known claimants who have purported to give authority to the claimants herein to file suit which is in breach of the rules as held in **John Kariuki & 347 Others versus John Mungai Njoroge & 8 others, Nakuru HCCC No.152 of 2003**.

The parties made their oral arguments and submissions in court.

Arising from the Notice of Motion, the Grounds in Opposition thereto and the submissions by Counsels, the emerging issues for the court determination can be summarised as follows;

Whether the court should issue the interim orders sought by the respondents; Whether the court should find he suit is *res judicata*;

Whether the claimants have complied with the ruling of the court delivered on 15th May, 2018;

On the last issue with regard to compliance with the court ruling of 18th May, 2018 as this matter arise from the grounds of opposition by the respondent, the court notes on 15th October, 2018 the claimants filed Amended Statement of Claim and attached a Verifying Affidavit, Authority to sue, List of Witnesses and a Witness Statement. Where the claimant has not served the respondent with these documents, by Application of Rule 11 of the Employment and Labour Relations Court (Procedure) Rules 2016, time is ticking and there should be compliance.

As correctly submitted by the respondent in the Grounds of Opposition, where the court has addressed a matter, no new suit should be filed by the same parties over the same cause of action and arising from similar facts already addressed or a decision exists therefrom as held in **Moses Ogutu Oyugi & 6 others v Kenya Shoe and Leather Workers Union & another [2018] eKLR**.

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.

...

Can the claim herein be said to relate to a Matter directly or substantially by the same parties or similar dispute, and has the court made a determination therefrom?

The respondent's case is that there exists **Cause No.1796 of 2011** which is between **Kenya Commercial Food & Allied Workers Union versus NSSF**. The obvious is that the claimant is different from the claimants herein. The issue in dispute is only noted as being matters arising from similar facts in the year 2009 but the details and nature of orders sought by the claimant, **Kenya Commercial Food & Allied Workers Union** as against the current respondent NSSF is not set out. The respondent also failed to articulate as to the current status of this matter since the year 2011. A search by the court on any ruling or judgement therefrom did not yield anything. I take it where such matter was filed, the parties are different and the claim herein arising from what is pleaded in the Amended Memorandum of Claim should be addressed on the merits.

The respondent by opting to file Grounds of Opposition instead of a Replying Affidavit largely denied of this court material particulars with regard to matters now addressed in the grounds of opposition. To evaluate the veracity of the issue of *res Judicata* based on what is set out without material particular does not aid the court well.

On the orders sought by the claimants, the stoppage of the job evaluation so as to ensure the protection of employment and on the grounds that a previous exercise has been carried out and its recommendations not implemented and there is fear that a new exercise shall be carried out to the detriment of the claimants whose salary underpayments and salary arrears have not yet been addressed is a matter which the court should address with caution and seek for the evidence in support as to why such protection should issue. The application is premised on the grounds that the claimants have been orally threatened by the Human Resource Department officers that they shall face severe disciplinary and administrative measures in retaliation if they do not withdraw the suit against the respondent. However, the respondent as a public body and the employer of the claimants has issued employment contracts to the claimants who are on permanent and pensionable terms and for the claimants whose are former employees of the respondent and are owed salary arrears, such dues where lawful and legitimate should be addressed and the court to issue appropriate orders.

The claimants still in the employment of the respondent are secured in their employment. the respondent as the employer has the prerogative to manage its human capital and resource as necessary and to ensure retention of high calibre of employee to serve in its mandate and further to ensure that any performance and capacity gaps are correctly addressed. Such prerogative should apply within the confines of the law. where the job evaluation is undertaken targeting specific employees for having filed suit, There is a legal remedy under section 46 of the Employment Act, 2007.

Ideally, a job evaluation exercise by an employer should be consultative. The employer should ensure all key role players and departments which are required to implement the job evaluation recommendations are embraced. Fundamentally the purpose of such job evaluation should be shared with the employee. Where there is a collective, which is not the case here this would be achieved with ease. But in the claimants' current character of being in various locations, the respondent as the employer has to devise a consultative process to create harmony and reduce anxiety. This will receive the support of the employees who include the claimants and the intended purpose will be realised.

In job evaluations, considerations of fairness and equity come alive.

Account must be to the regulatory and statutory framework within which the public service operates, putting into account any unique requirements of the respondent entity and including how the job evaluation exercise has come into being as well as the context within which its regulations are framed. With clarity of the purpose, context and process, the respondent should not be constrained by an order of the court.

In the Supporting Affidavit of Peterkeen Mwiu Kimweli at paragraph 13 and 14 he avers that;

The Terms of Reference of the intended Job Evaluation do not address the historical injustices resulting from the Job Evaluation contrary to Respondents' own pledge.

The very action of commencing a new Job Evaluation while the effects of the earlier Job evaluation are a subject of a court case is mischief intended to defeat justice.

Effectively, by the claimants' own admission, there is in court a matter already addressing *historical injustices* as it were. Following this line and conscious of the findings above and matters raised by the respondent that the suit herein is *res judicata* but without details, on the claims made and amended thereafter, the court should delve into the same and make a final determination.

Where there is indeed another suit pending with the court and which addresses similar matters as herein and part include what is termed *historical injustices* against the claimants, it shall serve the interests of justice for such matter to be addressed jointed with this one to ensure consistent findings by the court and to ensure any injustice is corrected within the confines of the law.

The averments by the claimants should therefore not go to waste. Where there are (is) suits pending should be disclosed for the court to direct as appropriate.

With regard to application dated 11th October, 2018 the orders sought shall not issue as framed. The respondent is directed to address the new call for job evaluation within its mandate and in adherence to the law on employment and labour relation, the respondent's governing statute the NSSF Act, the operational framework in place subject to ensuring compliance with the terms and conditions of employment for each claimant and without placing them at a disadvantage for filing the claims herein. The court brings to the attention of the respondent the provisions of section 46(h) of the Employment Act, 2007.

Upon service upon the respondent with the Amended Memorandum of Claim, file reply and the court shall issue hearing directions or priority basis.

Dated and delivered at Nakuru this 18th day of December, 2018.

M. MBARU

JUDGE

In the presence of: