REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO.E002 OF 2020

(Before D.K.N.Marete)

DAVID MWANGI, JANEROSE MUGURTE MUTAHI, JOHN MBUTHIA WAGOKI & 347 OTHERS...CLAIMANTS

VERSUS

COUNCIL OF GOVERNORS.....1ST RESPONDENT

PRINCIPAL SECRETARY, MINISTRY OF HEALTH.....2ND RESPONDENT

MURANGA COUNTY SECRETARY.....3RD RESPONDENT

PUBLIC SERVICE BOARD, MURANGA COUNTY GOVERNMENT.....4TH RESPONDENT

MURANGA CONTY CHIEF OFFICER FINANCE.....5TH RESPONDENT

MURANGA COUNTY CHIEF OFFICER HEALTH & SANITATION.....6TH RESPONDENT

AND

KENYA NATIONAL UNION OF NURSES.....1ST INTERESTED PARTY

COUNTY ASSEMBLY OF MURANGA.....2ND INTERESTED PARTY

RULING

This application is originated by way of a preliminary objection and an application both dated 23rd November, 2020. The preliminary objection comes out thus;

1. This court has already heard and determined the claim herein on its merits in Nyeri Employment Cause No.111 of 2018.

2. The suit herein is therefore res-judicata and an abuse of the court process.

3. Consequently, this court does not have jurisdiction to entertain the suit.

The Application is in similar term and comes out as follows;

1. The Claimants claim and the entire suit is res-judicata.

2. The Claimants claim and the entire suit is frivolous and vexatious.

3. The Claimants claim and the entire suit is an abuse of the court process.

4. The Claimants claim and the entire suit is hereby struck out and/or dismissed with costs.

The application is grounded on the supporting Affidavit of Dominic Mathenge and other grounds to be adduced at the hearing hereof.

The matter came to court variously until the 19th January, 2021 when the parties agreed on determination by way of written submissions.

The Claimants in their written submission dated 5th March, 2021 oppose the preliminary objection and application. The preliminary objection however gets the support of the 1st, 3rd and 6th Respondents.

The 1st Respondent in a Replying Affidavit sworn on 11th January, 2021 answers the application whereas the 1st Respondent answers the preliminary objection in reply dated 13th November, 2020.

The 1st Interested Party opts out of participating in the action at this stage whereas the 2nd Respondent and the 2nd Interested Party remain silent and non-participatory.

The 3rd to 6th Respondents in their written submissions dated 29th January, 2021 submit that the preliminary objection and application both dated on 23rd November, 2021 are premised on the fact that the claim is *res judicata* in the light of previous suits on the same subject matter and between the same parties in this court.

They wish to rely on the authority of section 7 of the Civil Procedure Code which provides as follows;

“No court shall try any suit or issue in which the matter directly and substantially in issue has been 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 in which such issue has been subsequently raised. And has been heard and finally decided by such court”.

It is their case that this is a matter on payment of salaries for the months of June, July, August, September and October, 2017 which were claimed by the 1st Interested Party in ELRC Cause No.111 of 2018.

Their further case is as follows;

15. The Claimant has not filed a reply to the 3rd-6th Respondents’ objection and application dated 23rd November 2020 and hence the factual basis of the objection and application is not disputed.

16. In its replying affidavit, the 1st Interested party stated that inter alia that “the claimants in this suit were not parties under the alleged former suits hence the suit is not res-judicata.”

17. The 3rd-6th Respondents submit that the claimants herein are non-suited and their claim is res-judicata for the following reasons;

i. The issue in this suit regarding the non-payment of salaries when the claimants participated in an illegal strike was substantially

and directly in issue in Nyeri ELRC cause No.111 of 2018 ("former suit") and before the same court.

ii. In the said Nyeri ELRC Cause No.111 of 2018, the 1st Interested Party herein acting on behalf of the claimants who are its members sought orders compelling payment of the withheld salaries which is the exact same prayer in the claim now before the court. This is clearly evident from the facts set out in paragraphs 5 to 7 above and in the affidavit of Dominic Mathenge sworn in support of the application.

iii. At paragraph 9 of the memorandum of claim in Nyeri ELRC Cause No.111 of 2018, the 1st Interested Party as claimant therein pleads that it 'has a recognition agreement with the Respondents which gives the Claimant the locus standi to act on behalf of the nurses who are in the service of the County Public Service Board'.

iv. The issue now before the court was finally and conclusively determined on merit by this court of competent jurisdiction on 15th May, 2019.

v. As a matter of fact, the 1st Interested Party preferred an appeal to the Court of Appeal against the judgment of this court. See notice of appeal annexure "DM 3" to the affidavit in support of the application.

vi. Therefore, the claimants herein now seek through craft and innovation to introduce a cause of action already resolved by a court of competent jurisdiction in a matter they have previously litigated through the 1st Interested Party as their proxy.

18. The attempts by the claimants to file this suit in their individual names does not change the fact that the matter has previously been litigated in a suit where they were ably represented by the 1st interested Party through whom they were claiming.

19. The Claimants' apparent mischief must be what informed the drafter of section 7 of the Civil Procedure Act to state 'No court shall try any suit or issue in which the matter directly and substantially in issue has been 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…'

The 3rd to 6th Respondents further seek to support their case by relying on the authority of **George Omondi & Anor v National Bank of Kenya & 2 others Civil Suit No.958 of 2001**, where the court observed as follows;

"Parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit. They are bound to bring all their case at once. They are forbidden from litigating in installments. I wholly agree with the opinion of Kuloba J in Mwangi Njangu v Meshack Mbogo Wambugu (supra) where he said:-

"If a litigant were allowed to go on forever re-litigating the same issue with the same opponent before courts of competent jurisdiction, merely because he gives his case some cosmetic face-lift on every occasion he comes to a court, then I do not see what use the doctrine of res judicata plays".

27. Therefore, the instant suit offends the two public policy objectives for which the doctrine of res judicata was fashioned, namely; that it is desirable that there be an end to litigation and that a person should not be vexed twice in respect of the same manner.

28. It is trite that when a matter is res-judicata, this court is statutorily debarred from entertaining the same and must down its tools for want of jurisdiction. The only remedy available is for the court to dismiss the matter forthwith. In John Florence Maritime Services case (supra) it was held as follows;

"The doctrine is not a technicality. It goes to the root of the jurisdiction of the court to entertain a dispute. If it is successfully ventilated, the doctrine will deny the court entertaining the dispute jurisdiction to take any further steps in the matter with the consequence that the suit will be struck out for being res judicata.

It is their further submission that the application should also fail for being frivolous, vexatious and an abuse of the process of court. This is based on the following grounds;

- After the dismissal of Nyeri ELRC No.111 of 2018, the Claimants through the 1st interested Party went ahead and shopped a forum in Nairobi where they filed Nairobi ELRC Petition No.98 of 2019 against the 1st Respondent to litigate the same issues that were dismissed in the claim and are now before this court.
- Nairobi ELRC 98 OF 2019 was dismissed for being *res-judicata* in the light of Nyeri ELRC No.111 of 2018.
- After the dismissal of Petition No.98 of 2019, the claimants through the 1st Interested Party filed consolidated Petition No.5 of 2019 on the same subject as had been heard and is now before court. This was later withdrawn.
- These facts are a demonstration of the cunning, vexatious and litigious nature of the Claimants and 1st Interested Party.
- The 3rd to 6th Respondents have been dragged to court four times over the same subject matter and at great expense.
- This is a violation of their rights not to be vexed twice on the same matter.

The 1st Respondent in her written submissions dated 10th February, 2021 denies the presence of an employment relationship with the claimants.

On this, she seeks to rely on the authority of **Kenya Union of Domestic, Hotels, Educational Institutions and Hospital Work v Pwani University & another; Cause 110 of 2014** at paragraph 10 where the court observed as follows;

"It is trite law that joinder of a party is only necessary when it is for effective adjudication and determination of the dispute before the court. It is also rite that joinder of a defendant is necessary only if there is a relief sought against him or if a decree ensuing from the proceedings before the court may not be executed without enjoining the defendant. The foregoing is not the case herein. The 2nd respondent has never employed the grievants and she is not privy to the Recognition agreement and the CBA between the 1st respondent and the claimant. Consequently the 2nd Respondent is struck out of this suit but with no order as to costs."

They pray that they be struck out of these proceedings for not being a competent party to the suit.

The 1st Respondent further associates with the case and the submissions of the 3rd to 6th Respondents on the doctrine of res *judicata* as it applies to this suit. This is as follows;

14. The Claimants in their Statement of Claim under paragraph 8 states that "all the Claimants in the present suit are subscribing members of the 1st Interested Party." By their very nature trade unions represent the interests of their members, as such the 1st Interested Party cannot run away from the fact that they represent the interests of the Claimants in both cases herein above.

15. The 1st Respondent submits that the attempt by the Claimants to re-litigate the same issue under their own names does not change the fact that the same was already heard and determined by the same court when it was brought before it by the 1st Interested Party in Nyeri ELRC Cause 111 of 2018.

She further seeks to rely on the authority of **John Florence Maritime Services Limited & Anor v Cabinet Secretary for Transport & Infrastructure & 3 Others; Civil Appeal No.42 of 2014**, where the court at Malindi observed thus;

"The doctrine is not a technicality. It goes to the root of the jurisdiction of the court to entertain a dispute. If it is successfully ventilated, the doctrine will deny the court entertaining the dispute jurisdiction to take any further steps in the matter with the consequence that the suit will be struck out for being res judicata.

In the penultimate, the 1st Respondent submits thus;

20. We hereby submit that this Honourable court ought to strike out the present suit for being res judicata.

21. The 1st Respondent therefore submits that this Honourable court lacks the jurisdiction to hear the allegations as leveled against it as it is not an employer of the Claimants.

22. As such, it is our submission that there is no cause of action, reasonable or otherwise to warrant granting of their prayers as

enforced against the 1st Respondent. The 1st Respondent urges this court to dismiss the suit in its entirety with costs to the respondents.

23. We humbly submit.

It is her case and submission that, firstly, she ought not to be enjoined as a party to this suit for not being the claimants' employer. Again, the entire matter is the subject of dismissal with costs to the respondents for being *res judicata.* This ousts the jurisdiction of this court.

The Claimants in their written submissions agree and concede that this suit is premised on non-payment of salaries and other allowances in their favour for the months of June, July, August, September and October, 2017.

Further, the respondents have not denied signing of the agreement of 2nd November, 2017 and are therefore jointly and severally bound by the principle of privity of contract on this. They are sued in this capacity.

It is the Claimants' case that for a determination as to which party is bound to pay the salaries claimed, a verification of the facts and data is necessary.

Further, the respondents have not denied all the exhibits on record more specifically the letter dated 5th January, 2018 by the 1st Respondent directing the rest of the respondents to comply and pay the claimants their salaries for June, July, August, September and October, 2017.

These salaries have since been paid out in the other 46 counties save for the County Government of Murang'a. The County Government of Elgeyo Marakwet paid this in 2020 pursuant to the judgment of court in **ELRC No.233 of 2018, Peter Mutai & 282 others vs County Government of Elgeyo Marakwet**.

It is their further submission that the parties in this suit participated and signed the agreement dated 2nd November, 2017. The remaining issue therefore is who is bound to satisfy the terms therein as this has never been litigated upon and judgment thereof entered in finality.

The Claimants' in their further submissions fault the preliminary objection for lacking in its essential basis. On this they seek to rely on the celebrated authority of **Mukhisa Biscuits Manufacturing Company Ltd Vs West End Distributors Limited (1969) EA 696**, which provides thus;

"…a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose off the suit…

Further,

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

The Claimants' further submits that the law and practice on preliminary objections is now settled in Kenyan case law and recite this as follows;

In Nancy Mwangi T/A Worthlin Marketers v Airtel Networks (K) Ltd (formerly Celtel Kenya Ltd) & 2 others (2014)eKLR, Kamunye & others v Pioneer General Assurance Society Ltd (1971) E.A 263 and John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 others (2015)eKLR and most recently by Justice Nzioki wa Makau in Industrial Cause No.1981 of 2011 as considered workers Union vs Moi University and Rivatex E.A Ltd where the court reiterated the principles for preliminary objection as:

a. A preliminary objection raises a point of law.

b. A preliminary objection is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained.

c. It cannot be raised if what is sought is the exercise of judicial discretion.

d. Are the parties in the present suit the same as those who litigated the original claim

e. The matter in issue must have been heard and finally decided in the former suit".

The claimants' in conclusion submit that in view of the above submissions, the instant suit is not *res judicata*. The ingredients of *res judicata* are not satisfied in the circumstances of this case. This is because;

a. The substantial issue determined in Nyeri Employment Cause No.111 of 2018 by the Hon.Nzioki wa Makau is one and the issue is whether the council of governors decisions is binding on the county governments. The issue as to payment of salaries as pleaded and prayed in this suit was not delved upon by the honourable judge.

b. Firstly, the alleged preliminary objection on the face of it does not point out the points on law under which it stands. The preliminary objection does not state its basis on a point of law.

c. The parties in Nyeri Employment Cause No.111 of on the face of it are substantially different from the instant suit. The parties were Kenya National union of Nurses vs Murang'a county public service Board and the Governor of Muranga. The claimants, the 1st, 2nd, 3rd, 5th and 6th respondents were not parties in the said suit.

d. The claimants, 2nd, 3rd, 4th and 5th respondents together with the 2nd interested party have never been parties to any of the suits cited herein save for this suit.

e. In all the cases cited by the respondents, the issue of discrimination, payment of salaries for the months of June, July, August, September and October, 2017 has NEVER been finalized or at all. There are NO judgments on record and on merit for the same to be res judicata this suit.

f. That the claimants are 350 individuals of sound mind seeking redress from the honourable court over non-payment of their salaries for the months of June, July, August, September, and October , 2017 their own capacities. This is matter that will require examination of facts and evidence and as such ought not be determined summarily by way of an application.

g. The issues in this suit and the orders being sort are substantially different from al the orders being sort in the other suits for instance. The prayers herein and the issued thereof have never been substantially determined in any court:- in this suit the orders being sort in summation are:-

a. Declaration that the claimants herein are entitled to be paid their salary arrears for the months of June, July, August, September and October, 2017.

b. An order directing the respondents to comply with the terms of the agreement dated 2nd November, 2017 reached pursuant to the consultative forum between the County Governments of Kenya, the National Government and Kenya National Union of Nurses.

c. A declaration that the claimants herein were discriminated upon and as such entitled to damages. Damages for discrimination to be awarded by the honourable court.

d. Interest. The Claimants claims interest on the sums due in their salary arrears for the months of June, July, August, September and October, 2017 at commercial or court rates prevailing from 2nd November, 2017 until payment in full.

e. Judgment in the sum of Kshs.208,512,500/0 being salary arrears for the months of June, July, August, September and October, 2017 as tabulated here below for every individual claimant:-

f. Any other relief that the honourable court deems fit to grant.

The Claimants' further case and submission is that salaries and allowances were approved by County Assembly of Murang'a for the year 2017/2018. This is not denied by the Respondents or the 2nd Interested Party. It is an issue that ought to be ventilated by way of the evidence annexed to the claim and not through an application.

Further, the claimants' submits thus;

- The 1st Respondent signed the agreement dated 2nd November, 2017 and by dint of the principle of privity of contract, it is bound by the same and should not be allowed to run away from it.
- The Intergovernmental Relations Act, No.2 of 2012 establishes the Council of Governors whose functions under Section 20 of the said Act is to provide a forum for among others, consultation amongst County Governors and considering matters of common interests to county governments.
- That the Council of Governors interacted in the matter of the Nurses National strike of 5th June, 2017 and thereby a return to work formula dated 2nd November, 2017 was had and binds all county governments.
- Some nurses in Murang'a County Government were paid their salary arrears whereas others were not, this amounting to unjustifiable discrimination contravention of Articles 10, 41, 27 and 47 of the Constitution of Kenya, 2010.
- A similar agreement dated 12th November, 2016 binding the county public service boards was honoured by the Murang'a Public Service Board while on similar terms to this one.
- The Murang'a County Public Service Board and respondents are not isolated from the agreement in issue as signed by the Council of Governors.
- Section 6(4) of the County Governments Act, provides *inter alia* that all agreements entered into under the section shall be valid and binding at the County Government, its assigns and successors and so is the case here.
- If the Respondents are not bound to pay the salaries now claimed, it would mean that the issues culminating to the strike as still pending and the claimants' would seek refuge in another strike notice to resolve the same.
- The County Government and County Public Service Board have never formally disowned or opposed non-payment of salaries for the period in issue and this appears an afterthought.
- Workers have a guaranteed right to strike per Article 41 (2) (d) of the Constitution and should not be victimized for exercising their right to strike. To this end, we rely in the case of **Combe vs Combe 195 1 All England Law Reports 766** at 770 by Denning LJ where it states as follows;

"the principle as I understand it is that where one party has by his words or conduct made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, the once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but must accept legal relations subject to the qualification which he himself has so introduced even though it is not supported in point of law by any consideration, but only by his word."

To further buttress our above submissions, we wish to rely on the authority of **Alex Miloko vs Nakumatt Holdings Limited cause No.253 of 2014** wherein in dealing with similar preliminary objection the Court of Appeal at Nakuru held thus;

"The fact that the Respondent has failed to file a Response to state its version only makes it more difficult to accept that the preliminary objection is a true preliminary objection arising out of the Claimant's pleadings…

The court therefore declines to uphold the preliminary objection and dismisses it with costs to the claimant.

The Claimants' closes by submitting that the preliminary objection and the application the subject of this submissions is a delay tactic intended to occasion unnecessary backlog both to the claimants and the court contrary to the principle objective of court as

stipulated at Section 3 of the Employment and Labour Relations Act together with the judicial authority vested to the court under Article 159 of the Constitution of the Republic of Kenya, 2010.

The application and preliminary objection (applications) therefore fail and should be dismissed with costs.

Agreeably, the claimants' case and submissions overwhelms those of the participating respondents. There are clearly issues pending hearing and determination between the parties in this cause. These relates to the subject matter of the salaries for the months of June, July, August, September and October, 2017 which were thrashed out and agreed upon in the agreement of 2nd November, 2017 between the claimants' and the 1st Respondent who was acting on behalf of the County Governments of Kenya. This is still binding and binds the respondents herein.

I also agree with the claimants' case that the issue in dispute has not been heard and determined to any finality. That is why *res judicata* as a defence would not be applicable in the circumstances.

I have had occasion to scrutinize the pleadings and authorities in all the matters cited in support of a case for *res judicata*. The question is;

- Who are the parties"
- What is the subject matter"
- Are the claimants' in this cause replicated in the previous suits"

The answer is that the parties and subject matter in this cause differ from those of the previous suits. This is spelt out and clearly brought out in the claimants case. The subject matter of this suit is essentially the payment of the claimants' salaries for the months of June, July, August, September and October, 2017. This has not been previously litigated to finality. The peculiarities of this suit point to a subject matter that is not analogous with the previous suits. It is distinct in its essence.

There is no replication of the current claimants' in the other suits. The claimants case and submission ably dwell on this. This further disqualifies a defence of *res judicata*.

Overall, the preliminary objection does not boarder on a pure point of law. It would require an analysis, thrashing and establishment of data and evidence to establish who the parties to the other suits were and also the subject matter, the bone of contention in this and the previous matters. A preliminary objection therefore becomes unsustainable in the circumstances.

I am therefore inclined to dismiss the applications with orders with costs to the Claimants.

DATED AND DELIVERED AT NYERI THIS 26TH DAY OF JULY, 2021

D.K.NJAGI MARETE

JUDGE

Appearances

1. Mr.Kirwa instructed by Mwakio Kirwa & Company Advocates for the Claimants.

2. Mr.Lawi instructed by Eugene N.Lawi Advocates for the 1st Respondent

3. Mr.Orenge holding brief for Mr.Kamau instructed by Mbugua Ng'ang'a & Company Advocates for the 3rd to 6th Respondents.

4. Mr.Kinoti for the 1st Interested Party/Union

5. No appearance for the 2nd Interested Party

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