



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
Civil Suit 83 of 2003

KENYA NATIONAL UNION OF TEACHERS (NAKURU

BRANCH).....PLAINTIFF

VERSUS

JOHN MARIGA KIHICO.....1ST DEFENDANT

DAVID KIMANI KAMAU.....2ND DEFENDANT

FREDRICK MWANIKI TUGUIYI.....3RD DEFENDANT

R U L I N G

The Defendants filed an application dated 3/6/2004 praying that the plaintiff's suit be dismissed with costs as it was res judicata on the basis that there was another suit, Nakuru Chief Magistrate's Civil Suit No. 2063 of 2000 which had been heard and determined involving the same subject matter and between the same parties under whom they claim under the same title.

The applicants swore an affidavit in support of their application and the same was sworn by John Mariga Kihiko for and on behalf of himself and his co-defendants.

He deposed that the defendants and several other people sued the Plaintiffs in the aforesaid CMCC No. 2063 of 2000 after they had been removed from office as officials of the Kenya National Union of Teachers on unfounded allegations of misappropriation of funds, which allegation is the basis of the present suit. The suit was heard and determined and the court found that the removal of the plaintiffs from office and their denial from participating in elections was illegal and wrongful and they were reinstated into office. In the aforesaid case, the Plaintiff in the present suit did not file any counterclaim against the defendants in this suit. The plaintiff was accused of failing to disclose to the court the fact of the aforesaid earlier suit.

The defendants also accused the Plaintiff of delay in fixing this suit for hearing. Mr. Mwangi for the defendants cited two Court of Appeal decisions to buttress his submission that the present suit was res judicata. The cited cases were:-

1. *MWANTHI VS IMANENE [1982] K.L.R. 323 and*
2. *MBURU KINYUA VS GACHINI TUTI [1978] K.L.R. 69.*

The Plaintiff opposed the said application and filed a replying affidavit sworn by Kuria Njau, the local branch chairman. Mr. Mugambi for the Plaintiff submitted that the suit in the lower court was one where

the applicants were seeking to be reinstated to office where as the present suit in this court was for recovery of money that was allegedly embezzled. The lower court did not have jurisdiction to try the present suit as the claim was for over Kshs.11 million, he submitted.

In paragraph 10 of the plaint, the plaintiffs had disclosed the existence of Nakuru CMCC No. 793 of 2001 between the Plaintiff and the first Defendant, Mr. Mugambi submitted. I have considered the submissions by the counsel and the affidavits filed by the parties in this matter. The only issue for determination is whether the Plaintiff's suit is res judicata for the reasons aforesaid. A locus classicus on the issue of res judicata was stated in YAT TUNG INVESTMENT CO. LTD VS DAO HENG BANK LTD [1975] AC 581 at Pg. 590 as follows:-

“Where a given matter becomes the subject of litigation in, an 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. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time”.

In my view the Plaintiff's claim could not have been brought up in the Chief Magistrate's court as it was not a court of competent jurisdiction given the magnitude of the claim. Also the cause of action had not fully crystallized by the year 2000 when the defendants and other persons brought CMCC No. 2063 of 2000 against the Plaintiff. The audit which revealed the misappropriation of the sum claimed in this suit was for the period 1998 to 2001 and Mr. Mugambi submitted that the audit could not have been done when the defendants were in office.

For these reasons, I hold that the present suit is not res judicata and dismiss with costs the Defendant's application dated 3rd June, 2004.

DATED, SIGNED & DELIVERED at Nakuru this 22nd, day of October, 2004.

DANIEL MUSINGA

AG. JUDGE

22/10/2004