



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 29 OF 2014

(An appeal from the Ruling of the Senior Principal Magistrate, Embu in Civil Suit No. 66 of 2013 dated 22/9/2014)

BERNARD NJERU KINYUA.....APPELLANT

VERSUS

KENYA TEA DEVELOPMENT AGENCY..... RESPONDENT

J U D G M E N T

This an appeal against the Ruling of Embu Principal Magistrate in Civil Suit No.66 of 2013 delivered on 22/9/2014. In his memorandum of appeal, the appellant purports to fault the Judge on the basis that the subject matter in the previous suit Embu HCCC No. 33 of 2000 which was a different suit from CMCC No. 66 of 2013. It is important to note that any appeal against a high court judgment ought to be filed in the court of appeal.

In his memorandum of appeal, the appellant relies on several grounds which can be summarized as follows:-

- 1. That the magistrate ignored the judgment in CMCC No. 42 of 2002.*
- 2. That the magistrate entertained a preliminary objection in CMCC No. 66 of 2013 and dismissed his suit which sought for reinstatement of employment.*
- 3. That the magistrate did not take into consideration that the appellant was employed by the respondent in 1978 and later confirmed as a permanent employee after three months' probation.*
- 4. That the magistrate failed to consider that the appellant had won a defamation case CMCC No.42 of 2002 against the defendant's employee one Charles Ndwiga.*
- 5. That the magistrate ignored the fact that the appellant's case in CMCC No.66 of 2013 had proceeded for formal proof after the respondent failed to enter appearance.*
- 6. That the magistrate did not take into consideration the provisions of the employment act in dismissing the appellant.*

The appellant appeared in person while the respondent was represented by Riunga Raiji & Co. Advocates. The parties agreed to dispose of the appeal by way of written submissions. It is only the

respondent who filed its submissions.

The respondent submitted that the matter was an appeal against the judgment in CMCC No. 66 of 2013 where the respondent's preliminary objection that the appellant's suit was *res judicata* was upheld. The other suits whose particulars were given by the respondent in the memorandum of appeal are irrelevant to the subject matter herein.

The respondent was the defendant in HCCC 33 of 2000 where he was sued by the appellant for unlawful termination of employment. The suit was dismissed on the 25/10/2008. The claim in CMCC No. 66 of 2013 was for damages for unlawful termination. The respondent raised a preliminary objection that the suit was *res judicata* since the same issues had been determined by a court of competent jurisdiction in HCCC No. 33 of 2000.

The respondent contended that the award of costs of KShs.55,014/= in CMCC No. 66 of 2013 was successfully challenged Nyeri Civil Appeal No. 264 of 2004. The respondent lawfully recovered the amount from the appellant's account and the certificate of costs is annexed to the submissions.

The respondent states that he was not a party in CMCC No. 42 of 2002 where judgment was entered in favour of the appellant against one Charles Nwiga on 29/1/2008. The judgment in HCCC No. 33 of 2000 was delivered on 28/10/2008 nearly 10 months later where the appellant claims to have been absolved from blame. The appellant did not present the said judgment before the court.

The duty of the first appellate court was explained in the case of ***KENYA PORTS AUTHORITY VS KUSTON (KENYA) LIMITED [2009] 2 EA 212***

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”

I begin on the premise that the appeal herein is against the ruling of the Senior Principal Magistrate in CMCC No. 66 of 2013 delivered on 22/9/2014. In that ruling the court upheld the preliminary objection of the respondent which was based on the following grounds:-

1. *That the suit was res judicata considering that the issues had been determined in HCCC No. 33 of 2000.*
2. *That the sum of 55,014/= claimed by the plaintiff was regularly recovered by the respondent in Nyeri Civil Appeal No. 264 of 2009.*
3. *That the claim of the appellant was time barred under the law.*
4. *That the court had no jurisdiction to determine the suit which was based on provisions of Employment Act.*

In the amended plaint in HCCC No. 33 of 2000, the appellant averred that he was an employee of the respondent (KTDA) as a leaf clerk in May 1978. He served in the same capacity at Rukuriri Tea Factory until 27/7/1998 when his contract was terminated. He alleged that his employment was unlawfully terminated by the respondent in that he was not given a chance to defend himself. At the time of dismissal, the appellant stated that he was aged 46 years and he was earning KShs.9,215/= and would have worked up to the age of 55 years. He claimed salary and benefits for 9 years against the respondent. The prayers in the plaint included general damages for wrongful dismissal, 9 years' salary plus costs and interest. The court found that the termination was lawful and dismissed the suit.

The plaint in CMCC No. 66 of 2013 raises the same issues as that of HCCC No.33 of 2000. The

appellant states that he worked for the respondent as a leaf clerk and served in the same capacity at Rukuriri Tea Factory until he was dismissed on 27/7/1999. He claims damages against the respondent for unlawful termination of employment.

The applicable law in res judicata issues is Section 7 of the Civil Procedure Act which provides:-

“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.

Explanation. (1)—The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation.(2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation.(4)—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. (5)—Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. (6)—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

The magistrate in upholding the preliminary objection, on the ground that the suit was res judicata, observed that the issues in the two suits were similar and had been decided by a competent court. I have outlined the claim in HCCC No. 33 of 2000 and CMCC No. 66 of 2013 and find that the issues in the second suit are directly and substantially in the former suit and were decided by a court of competent jurisdiction. At the time that CMCC No.66 of 2013 was filed, the Labour and Employment courts had already been established. The chief magistrate’s court was therefore not possessed of jurisdiction to hear employment matters. The magistrate rightly upheld the ground that he had no jurisdiction to determine the matter.

It was held in the case of **NICHOLAS NJERU VS ATTORNEY GENERAL & 8 OTHERS [2013]** where the case of **JAMES KATABAZI & 21 OTHERS VS AG OF UGANDA EACJ** was cited with approval that:-

- *the matter must be 'directly and substantially' in issue in the two suits.*
- *The parties must be the same or parties under whom any of them claim, litigating under the same title; and*
- *the matter must have finally decided in the previous suit (see Uhuru Highway Development Ltd. Vs Central Bank & 2 others – Civil Appeal No. 36 of 1996).*

In regard to the contention that the claim was statutorily barred, the provisions of Section 90 of the Employment Act are applicable. The Section provides that proceedings based on a contract of service shall be commenced within a period of three years while those for neglect or default shall be filed within the next 12 months after cessation.

Under Section 4 of the Limitation of Actions Act founded on contract, shall be filed within 6 years from the time the action arose. The cause of action in CMCC No. 66 of 2013 arose in 1998 before the commencement of the Employment Act, 2007. The law applicable was Section 4 of the Limitation of Actions Act. The claim of the appellant was therefore statutorily barred.

The respondent annexed the certificate of costs in Nyeri Civil Appeal No. 264 of 2009 to its submissions. It was explained that the respondent was awarded costs of KShs.55,014/= by the Court of Appeal. The amount was therefore rightly deducted from the account of the appellant.

The appellant faulted the magistrate for setting aside the ex parte judgment in CMCC No. 66 of 2013. I have perused the records and note that the respondent applied for setting aside the judgment in his application dated 13/3/2014 on grounds that the appellant had filed a similar case in the high court HCCC No. 33 of 2000 which had been dismissed. The magistrate considered the issues raised in the application and granted the respondent leave to defend the suit. The appellant did not appeal against the magistrate's ruling delivered on 12/5/2014. The case then proceeded before the court in course of which the preliminary objection was raised and subsequently upheld. The ruling of 12/5/2014 is not a subject of this appeal.

The appellant has also raised issues to the effect that the magistrate ignored the law in the decision made in CMCC No. 42 of 2002. As I have stated earlier, this case had no relevance to CMCC No. 66 of 2013 where the respondent was not a party. The magistrate had no business in considering the decision of CMCC No. 42 of 2002 which had ended in the appellant's favour. The magistrate considered the provisions of the law which were relevant to the matter before him.

I find no merit in this appeal and it is dismissed with costs to the respondent.

It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 6TH DAY OF OCTOBER, 2015.

F. MUCHEMI

JUDGE

In the presence of:-

Appellant present

Mr. Kiura for Respondent