Onyinkwa v The Kisii County Assembly Service Board & another (Civil Appeal 10 of 2020) [2025] KECA 547 (KLR) (21 March 2025) (Judgment)

Neutral citation: [2025] KECA 547 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 10 OF 2020

MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA

MARCH 21, 2025

BETWEEN

STELLA ONYINKWA ..... APPELLANT

AND

THE KISII COUNTY ASSEMBLY SERVICE BOARD ..... 1ST RESPONDENT

THE KISII COUNTY GOVERNMENT ..... 2ND RESPONDENT

(An appeal from the ruling of the Employment and Labour Relations Court of Kenya at Kisumu (Mathew N. Nduma, J.) dated 9th July, 2019 in Case No. 193 of 2016)

JUDGMENT

1. By an advertisement published in the Daily Nation newspaper of 30th March 2014, Stella Onyinkwa, the appellant learnt that the County Government of Kisii intended to recruit competent and qualified persons to fill various vacant positions. Satisfied that she met the criterion, she applied for the position of Hansard Editor. On the 8th July, 2016, she was informed that she was amongst the candidates shortlisted for the position and was invited for an interview. Following the interview, successful applicants were hired to fill the respective posts. The appellant was appointed to the position of Hansard Editor with effect from 3rd September 2014.

2. On 8th October 2014, Hon. Samuel Angasa Onukoh an elected member of Kisii County Assembly (MCA) moved the court seeking the following remedies-

    a. Declaration be issued to the effect that the petitioner is entitled to Protection under *the constitution*.

    b. Declaration that the enlisted, recruitment and/or employment of a total of 273 employees to the Kisii County Assembly by the respondents, jointly and/or severally in excess of and/or

beyond the number that was duly advertised for and without regard to the due process of the Law, was unlawful, illegal, and illegitimate.

c. Declaration that the respondents herein were obliged and/or enjoined to advertise all the vacancies and/or portfolios in the Kisii County Assembly and thereby carry out and/or conduct a transparent and/or accountable recruitment, in compliance and/or accordance with Article 10(1), (c) of *the Constitution* 2010.

d. An order of Judicial Review in the nature of Certiorari to issue to remove unto the Honourable Court and quash the enlisting, recruitment and employment of the 273 Employees to the Kisii County Assembly, arising from and/or attendant to the non-existent Board Meeting of the 3rd respondent (sic) held on the 29th day of August 2014 and who were employed without the relevant Advertisement and without due regard to the provisions of the County Government *Act, No. 17 of 2012* and Article 10 of *the Constitution*, 2010.

e. Permanent Injunction, restraining the respondents either by themselves, agents, servants and/or employees, from admitting the subject Employees to the Payroll of the Kisii County Assembly and/or making any payments to and/or in favour of the said employees, either on account of Remuneration, Allowances and/or Salaries, without the necessary budgetary approval of the Kisii County Assembly, whatsoever and/or howsoever.

f. Permanent injunction restraining the Respondents either by themselves, agents, servants and/or employees, from employing, recruiting and/or enlisting employees without complying with the due process of the law and in particular, the provisions of article 10(1) of *the Constitution*, 2010.

g. Costs of the petition be borne by the respondents jointly and/or severally.

h. The Honourable Court be pleased to issue such orders and/or writs as the Court may deem fit and/or expedient.

3. It was the petitioners' case that no advertisement was carried out prior to the recruitment of the 273 employees and that the Kisii County Service Board; and Kisii County Government ("the 1st and 2nd respondents respectively") did not comply with the provisions of Articles 10 and 232 of *the Constitution*; that no employment and/or recruitment exercise could be carried out and/or undertaken by and/or on behalf of the 1st respondent, without a decision having been made to that effect; that such a decision could only arise or ensue from the Board meeting(s) duly convened and held in accordance with the provisions of the County Government *Act, No.17 of 2012*.

4. In response to the petition, it was contended that the 1st respondent in its normal operations sat and passed a resolution to employ persons in various positions within the 2nd respondent. That the vacancies were subsequently advertised in the Daily Nation, Standard, and Star newspapers on 11th August, 2014; thereafter, 1st respondent conducted interviews and recruited the necessary staff who were issued with letters of appointment after which they reported for work.

5. The respondent argued that the petition was sub judice since there was a similar petition filed in Kisumu Industrial Court vide Petition No. 243 of 2014 challenging the entire employment exercise which matter was still pending determination. Further, that the petitioner had filed a motion of impeachment at the County Assembly which was defeated, following which, the present petition was filed, thus the petition constituted double jeopardy and was also res judicata.

6. On its part, the 2nd respondent denied playing any role in the recruitment of staff of the County Assembly nor determining their salaries and remuneration, therefore it was non-suited and an unnecessary party to the proceedings.

7. In her determination, the learned judge (M. Onyango,J) found merit in the petition to the effect that the petitioner had proved that the recruitment of 273 employees by the Respondents was in violation of *the Constitution* and infringed on the rights of the residents of Kisii County on whose behalf the petition was filed by committing funds that would otherwise be used to provide services to the people of Kisii. The learned judge further found that the recruitments also deprived qualified residents of Kisii County a right to compete in the jobs that were unfairly given to the recruited staff; and that the Respondents unlawfully committed public funds of the County of Kisii in violation of *the Constitution* and Section 162(2)(b) of the *Public Finance Management Act*.

   The learned judge granted the declarations sought, a permanent injunction restraining the Respondents from admitting the subject employees to the Payroll of the Kisii County Assembly and/or making any payments in their favour; and issued an order of Judicial Review in the nature of Certiorari quashing the enlisting, recruitment, and employment of the 273 Employees to the Kisii County Assembly.

8. By a memorandum of claim dated 27th June, 2016, the appellant moved the Employment and Labour Relations Court ("the ELRC") seeking a declaration that the acts and/or omissions of the Respondents amounted to constructive dismissal and/or termination, the termination process was unprocedural, unlawful, unfair and further sought a declaration that she was entitled to damages and salary arrears from the date of appointment, among other benefits.

9. In response, the respondents raised a preliminary objection that ELRC Petition No. 271 of 2014 was filed challenging the recruitment exercise in which the appellant and 273 other employees were appointed by the 2nd respondent. In the said petition, M. Onyango, J declared the recruitment unlawful, issued a judicial review to quash the recruitment and employment process, and a permanent injunction restraining the County Assembly from making any payments in favour of the said employees.

10. The preliminary objection was argued in limine. In his considered finding, the learned judge found that the issues raised for determination in the suit were res judicata having been heard and determined in ELRC Petition No. 271 of 2014 and accordingly struck out the suit.

11. Aggrieved with this outcome, the appellant lodged the present appeal, in which it is contended that the learned judge erred; in striking out the suit at the preliminary stage, failing to consider the principles in the application of the doctrine of res judicata, finding that the appellant was among the 273 employees recruited by 2nd respondent, ignoring the appellant's submissions and in denying the appellant an opportunity to be heard on merit.

12. The appellant explained that upon receipt of the appointment letter dated 1st September 2014, which was issued by the respondents, the appellant who was then living and working in Nairobi, made arrangements to relocate to her new job in Kisii; she attended an induction course, was paid an allowance of Kshs.42,000/- and that she had worked for the respondent for four months i.e. September to December 2014; that towards the end of December 2014, the respondents verbally informed the appellant and other employees not to report to work in the month of January 2015, as there were financial issues the respondents were sorting out before she could resume duties.

13. It was the appellant's case that during the period which she worked for the respondents, she was not paid her dues/salaries and/or benefits; and she never took her leave. Ultimately, at the lapse of a year

without any communication from her employer; and several visits to the respondents' offices to find out the state of affairs of her employment, to no avail, the appellant filed the suit the precursor of this appeal against the respondents for breach and/or termination of contract by the respondents.

14. As to whether the issues raised by the appellant in Kisumu ELRC No. 193 of 2016 were determined in Kisumu ELRC No. 271 of 2014, the appellant contended that in ELRC No. 193 of 2016, the claimants sought orders declaring the impugned employment an illegality which orders were granted. However, at the time of the determination, the appellant had worked for four months without being paid. Further, the issues raised by the claimant in ELRC No. 193 of 2016 are not similar to the issues raised in ELRC No. 271 of 2014, the parties were not the same neither were the prayers sought. The appellant relied on Civil Appeal No. 116 of 2019 Murage vs Heritage Insurance [2023] eKLR in which the court observed that;

> " As earlier stated, for the doctrine of res-judicata to apply, the suit must have been adjudicated upon by a court of competent jurisdiction between the same parties and the same subject matter."

15. It is further contended that at the time the declarations in Kisumu ELRC No. 271 of 2014 were made, the appellant had already rendered her services, therefore, the respondent ought to be compelled to compensate her. Relying on Civil Appeal No. 124 of 2019 Mwangi & 32 others vs Baringo County Public Service Board [2023]eKLR, the appellant submitted that her case was struck out prematurely without determining whether the issues raised by the appellant were directly in issue with the issues determined in Kisumu ELRC Petition No. 271 of 2014.

16. In reply, the respondent submitted that Kisumu ELRC No. 193 of 2016 is res judicata as the subject matter was directly and substantially determined between the same parties as in ELRC Petition No. 271 of 2014, the substantive issue for determination in the trial court was the employment of the appellant and the issues raised in the trial court had been directly and substantially been finally determined between the same parties. Relying on the cases of Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others[2017] eKLR, Peter Mbogo Njogu vs Joyce Wambui Njogu & Another[2005]eKLR and Uhuru Highway Development Limited vs Central Bank of Kenya & 2 Others [1996]eKLR, the respondent maintained that the issues raised in the appellant's claim and the previous case both echoed the employment and recruitment process of the appellant among the 273 employees recruited on the basis of a non-existent board meeting which the court of competent jurisdiction rendered its decision on as such the appellant could not claim a right based on illegal employment and a nonexistent relationship between herself and the 1st respondent.

17. Being a first appeal, the Court is enjoined to reconsider the proceedings afresh, evaluate them, and draw its own independent conclusions being cognizant however of the fact that it should not interfere with findings of fact by the trial court unless they were based on no evidence or on a misapprehension of the evidence or the trial judge is shown demonstrably to have acted on wrong principles in reaching his findings. (See Ephantus Mwangi & Another vs. Duncan Mwangi Wambugu [1982- 88] 1 KAR 278).

18. What is before the Court is an interlocutory appeal against a ruling arising from an application. That being the case, the Court's determination will either put to rest the claim or allow it to proceed in the ELRC. The Court must therefore avoid reaching definitive conclusions that may bind the trial court in the event that the appeal is dismissed.

19. In Mbogo & Another vs. Shah [1968] EA 93, this Court stated that an appellate court will not interfere with the exercise of discretion by a trial court unless the discretion was exercised in a manner that was clearly wrong because the judge misdirected himself or acted on matters which it should not have acted

upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is appreciated that the ELRC in allowing the application by the respondent was exercising judicial discretion. Having said as much, the single question for determination is whether the learned Judge erred in striking out the appellant's cause based on the application of the doctrine of res judicata.

20. The doctrine of res judicata is anchored on Section 7 of the *Civil Procedure Act*. The Section provides that:

> " 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."

21. The provision is anchored on the doctrine that there should be an end to litigation. The doctrine exists to protect public interest so that a party should not endlessly be dragged into litigation over the same issue or subject matter that a court of competent jurisdiction has conclusively determined.

22. Res judicata will successfully be raised as a defence if the issue(s) in dispute in the previous litigation or suit were between the same parties as those in the current suit; the issues were directly or substantially in issue in the previous suit as in the current suit and they were conclusively determined by a court of competent jurisdiction. This Court in the case of Independent Electoral and Boundaries Commission vs. Maina Kiai & 5 Others, [2017] eKLR, held that:

> " For the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms:
>
> a. The suit or issue was directly and substantially in issue in the former suit.
>
> b. That former suit was between the same parties or parties under whom they or any of them claim.
>
> c. Those parties were litigating under the same title.
>
> d. The issue was heard and finally determined in the former suit.
>
> e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

The Court went on to state on the role of the doctrine:

> " The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted, and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favorable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice."

23. Similarly, the Supreme Court of Kenya in the case of John Florence Maritime Services Limited & Another vs. Cabinet Secretary Transport & Infrastructure & 3 Others (Petition 17 of 2015) [2021] KESC 39 (KLR), encapsulated the elements that should be demonstrated for the doctrine of res judicata to be invoked in a civil matter, namely, that there was a former judgment or order which was final; that the judgment or order was on merit; that the judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and that there had to be identical parties, subject matter and cause of action in both actions.

24. And in Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others [2014] eKLR, the Supreme Court expressed itself as follows:

> " The concept of res judicata operates to prevent causes of action or issues from being re-litigated once they have been determined on the merits. It encompasses limits upon both issues and claims and the issues that may be raised in subsequent proceedings....[319]There are conditions to the application of the doctrine of res judicata:(i) a competent Court must have decided the issue in the first suit;(ii)the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar; and(iii)the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title Karia and Another -vs- The Attorney General and Others, [2005] 1 EA 83, 89."

25. In the instant appeal, the subject matter of the appellant's suit was a breach of employment contract. The ELRC judge determined with finality the question of the appellant's employment and found the engagement to have been irregular and unlawful. The instant suit by and large seeks the trial court to again interrogate the same issues. Parties cannot be allowed to litigate in installments or keep refashioning their cases with each passing day under the guise of a new cause of action and different prayers.

26. In E. T vs. Attorney General & Another [2012] eKLR it was stated:

> " The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi vs. National Bank of Kenya Limited & Others (2001) EA 177, the court held that 'parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.' In that case the court quoted Kuloba J., in the case of Njangu vs. Wambugu & Another Nairobi HC No. 2340 of 1991 (unreported) where he stated, 'If parties were allowed to go on litigating forever over 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 court, then I do not see the use of the doctrine of res judicata....."

27. This is what the appellant has purported to do. The fact that she now brings a different suit claiming compensation for breach of the employment contract that was declared irregular and unlawful by a court of competent jurisdiction does not bar the invocation of the doctrine of res judicata. It is also not lost to us, that when asked by the court as to whether the Judge ruled that the entire recruitment process was a nullity, which process also included the appellant, counsel for the appellant responded in the affirmative; and also admitted further that there was no appeal preferred against the decision.

However, counsel maintained that even though the process of appointment was flawed, the appellant had already worked for about four 4- months, and should be compensated for the period she worked.

28. On their part, the respondents maintained that Kisumu ELRC No. 271 of 2014 nullified the entire recruitment process as such no liability could accrue from an illegal contract. The respondents contended that even if the matter goes back to the trial court, the court had already determined the issue of employment and found with finality that the recruitment of the 273 people was illegal.

29. From the record, it is evident that at the time of the institution of the cause, the ELRC judge had already heard and determined the issues touching on the appellant's recruitment and employment which she found irregular. Lord Denning in Mcfoy vs. United Africa Co. Ltd (1961) 3 All E R 1169 stated that:

> The defendant here sought to say therefore that the delivery of the statement of claim in the long vacation was a nullity and not a mere irregularity. This is the same as saying that it was void and not merely voidable. The distinction between the two has been repeatedly drawn. If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. Every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.

30. The appellant's recruitment and subsequent employment having been rendered a nullity, meant that no legal relationship of employer-employee existed between the appellant and the respondents from the onset as such she could not lay any claim under the *Employment Act*.

31. In his ruling, the learned Judge of the ELRC stated as follows;

> " It is beyond doubt that the claimant herein, though not mentioned by name was one of the 273 employees newly recruited by the Kisii County Assembly who were the subject matter of the ELRC Petition No. 271 of 2014 at Kisumu. It is beyond peradventure that Hon. Maureen Onyango, declared the recruitment and appointment of the 273 employees who included the claimant herein unlawful and illegitimate and injuncted (sic) any payment to anyone of the 273 employees in respect of the impugned appointments. It is my considered finding that the issues raised for determination in this suit are res judicata having been heard and determined in ELRC Petition No. 271 of 2014 at Kisumu.

32. The learned judge was clear in his mind that the ELRC had no jurisdiction to entertain the dispute relating to the appellant's breach of contract as the same had already been determined by a court of competent jurisdiction. We detect no error in law or fact, nor in application of legal principles as to find fault with the decision of the learned judge. The upshot is that this appeal lacks merit and is dismissed with costs to the respondents.

DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF MARCH, 2025.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR