



REPUBLIC OF KENYA



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**Lukorito v Teachers Service Commission (Civil Appeal E169 of 2019)
[2024] KECA 1445 (KLR) (11 October 2024) (Judgment)**

Neutral citation: [2024] KECA 1445 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPEAL E169 OF 2019
FA OCHIENG, SG KAIRU & WK KORIR, JJA
OCTOBER 11, 2024**

BETWEEN

ROSE LUNANI LUKORITO APPELLANT

AND

TEACHERS SERVICE COMMISSION RESPONDENT

(Being an appeal from the Ruling of the Employment and Labour Relations Court of Kenya at Bungoma (Nduma, J.) dated 1st February, 2019 in ELRC Cause No. 55 of 2018)

JUDGMENT

1. In this appeal, the appellant, Rose Lunani Lukorito, has challenged a Ruling delivered on 1st February 2019 by which the Employment and Labour Relations Court (ELRC) at Bungoma (M. N. Nduma, J.) struck out her suit on grounds that the court lacked jurisdiction to entertain her suit. In doing so, the learned Judge stated:

“The six (6) year limitation period is applicable in this suit. The suit was clearly filed after expiry of a period of six (6) years. Accordingly, the court lacks jurisdiction to entertain the suit and strikes out the entire suit with no order as to costs.”
2. The essence of the appellant’s complaints is that the issue of limitation had already been adjudicated upon and determined by the court (H. Wasilwa, J.) in an earlier ruling in the same suit and was res judicata; that the court could not therefore sit on appeal over the same issue that; although the earlier ruling by Wasilwa, J. “was in the court file”, the learned Judge ignored it and there is a miscarriage of justice.
3. A brief background, based on the record of appeal, will provide context. The appellant instituted suit, being Industrial Court Cause No. 2491 of 2013, before the then Industrial Court at Nairobi by a Memorandum of Claim dated 11th December 2012 seeking reliefs for what she contended was unlawful



and unjustifiable termination of her employment as a teacher. The respondent, Teachers Service Commission (TSC), filed a Memorandum of Defence. The suit appears to have been transferred to the Industrial Court, Kisumu and assigned Cause No. 9 of 2014. TSC then filed a Preliminary Objection dated 1st July 2014 contending that the appellant's claim was statute barred by reason of Section 4 of the Limitation of Actions Act and Section 90 of the Employment Act 2007.

4. The record shows that the preliminary objection was heard before Wasilwa, J. and determined in a ruling delivered on 30th September 2014 in which the learned Judge posed:

“Is the matter then time barred? By virtue of S. 26 of Limitation of Actions Act, there are instances where court can extend the period of limitation. This is in the case of fraud and mistake.”

After reproducing Section 26 in the ruling, the Judge went on to state:

“The whole claim therefore seems to be based on a mistake which parties should be given an opportunity to unravel so that the ends of justice are met. I therefore find the preliminary objection has no merit. I dismiss it and order the substantive case to proceed.”

5. The suit was then moved to the ELRC at Bungoma where it was assigned Cause No. 55 of 2018 and the hearing commenced before Nduma, J. on 23rd July 2018. The appellant was sworn in and commenced her testimony. The record then captures this:

“Court: The court has noted the suit was filed after the expiry of six (6) years limitation period. This issue was to be determined before. We proceed with the case on its merit.

Claimant to file and serve submissions on this month within 14 days. The respondent to file within 14 days of service. Highlighting on 26/9/2018.”

6. On 26th September 2019 the court reserved its ruling which was then delivered on 1st February 2019 striking out the appellant's suit as already noted and hence this appeal.

7. During the hearing of the appeal before us on 23rd April 2024, the parties were represented by learned counsel. Ms. Mukanda held brief for Mr. Kraido for the appellant while Mr. Anyour appeared for TSC. Counsel relied on their respective written submissions dated 1st September 2023 and 23rd October 2023 which they orally highlighted. Mr. Anyour sought to challenge the competence of the appeal, but we declined to entertain arguments on competence as objection in that regard ought to have been raised earlier. See Rule 107(b) of the Court of Appeal Rules.

8. We have duly considered the appeal and the submissions. In our view, the overarching issue in this appeal is whether the learned Judge erred in striking out the suit based on limitation, the issue having been adjudicated upon in an earlier ruling in the same suit. It is necessary to reproduce what Nduma, J. stated in the opening paragraph of his impugned ruling:

“A preliminary objection was raised before Hon. Wasilwa J on grounds that the suit was time served (sic) on 19th September 2014 and in a ruling reserved for 25th September 2014. A careful perusal of the record does not show that Hon. Wasilwa J made a ruling on this point at all. There is no written ruling in the file and these parties have been of no assistance on this point. Despite the claimant raising the issue of res judicata on this point, the advocate has not provided the alleged ruling by Wasilwa J nor has the claimant stated the date when



the alleged ruling was delivered by Wasilwa J. This being the case the court is left with no option but to determine the Preliminary Objection afresh.”

9. As already noted above, the appellant had already commenced her testimony, when the trial court, on its own motion, raised the issue of limitation. The trial court then gave directions on filing of submissions. The advocates for the claimant in their written submissions dated 21st September 2018 filed before the trial court on 24th September 2018 submitted that the “preliminary objection was heard by Honourable Justice Hellen S. Wasilwa on 30th September 2014 and after considering the grounds in support of the objection and claimant’s opposition...the court by its ruling given on merits...dismissed the preliminary objection...”.
10. In the same submissions counsel submitted at length on the doctrine of res judicata. The Advocates for the respondent on the other hand in their written submissions before the trial court dated 7th August 2018 submitted on the preliminary objection “(pursuant to the order of the court issued on 24th September 2018)” without any mention that the matter had been dealt with by Wasilwa, J. Based on those submissions Nduma, J. rendered the impugned ruling in which he indicated that the ruling of Wasilwa, J. was not on record and had not been supplied.
11. It bears repeating that the learned Judge raised the issue of limitation, suo motto, after the trial had commenced and then invited submissions. In our view, ELRC being a court of record, counsel for the appellant was entitled to assume that the previous ruling of Wasilwa, J. would be on record. The trial court’s attention was drawn to the existence of that ruling. There is no indication that the learned Judge (Nduma, J.) requested counsel to supply the ruling of Wasilwa, J. but they failed to do so. It is possible that with the movement of the court file from Kisumu to Bungoma, the ruling may have been misplaced. But we speculate.
12. As it turns out, there was in fact in existence, as counsel for the appellant had submitted before the trial court, a ruling that determined the preliminary objection on limitation. The Judge proceeded on a mistake of fact, and went ahead to determine afresh, an issue that had already been determined. In *John Florence Maritime Services Limited & another vs. Cabinet Secretary Transport & Infrastructure & 3 others* (Petition 17 of 2015) [2021] KESC 39 (KLR) the Supreme Court of Kenya stated as follows:

“For res judicata to be invoked in a civil matter the following elements must be demonstrated:

 - a. There is a former Judgment or order which was final;
 - b. The Judgment or order was on merit;
 - c. The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
 - d. There must be between the first and the second action identical parties, subject matter and cause of action.

(See *Uhuru Highway Developers Limited v Central Bank of Kenya & others* [1999] eKLR and See the decision of the Court of Appeal in *Nicholas Njeru v Attorney General & 8 others* Civil Appeal 110 of 2011 (2013) eKLR)”
13. We have no doubt that all those elements of res judicata as spelt out by the Supreme Court were met in this case and the matter of limitation was not open to be re-litigated.



14. In the result, the appeal succeeds and is hereby allowed. The Ruling and orders of the ELRC delivered on 1st February 2019 is set aside. The appellant's suit is hereby reinstated and is to be heard afresh on merits before the ELRC before a judge other than M. N. Nduma, J.

15. Costs of the appeal to the appellant.

DATED AND DELIVERED AT NAKURU THIS 11TH DAY OF OCTOBER, 2024.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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F. OCHIENG

JUDGE OF APPEAL

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W. KORIR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

