Dock Workers Union Kenya v Kenya Ports Authority (Civil Appeal 112 of 2019) [2021] KECA 87 (KLR) (8 October 2021) (Judgment)

Neutral citation: [2021] KECA 87 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL 112 OF 2019

MA WARSAME, MSA MAKHANDIA & J MOHAMMED, JJA

OCTOBER 8, 2021

BETWEEN

DOCK WORKERS UNION KENYA .... APPELLANT

AND

KENYA PORTS AUTHORITY .... RESPONDENT

(An appeal from the Ruling and order of the Employment & Labour Relations Court at Mombasa (Rika. J.) dated 20th June 2019 in ELRC Cause No. 815 of 2016)

JUDGMENT

1 The appellant is a trade union registered under the Trade Unions Act. It sued the respondent, a state corporation on behalf of its members vide a statement of claim dated 14th October 2016 in the Employment and Labour Relations Court "ELRC" at Mombasa. The appellant claimed that the respondent had dismissed its members from employment on diverse dates between 2nd July 2015, and 30th September 2015 and withheld their bonus for the financial period 2014 and 2015. According to the appellant the withholding of its members' bonus was contrary to Section 18 of the *Employment Act* 2007. It was also the appellant's contention that it informed the respondent to make a separate arrangement to pay the dismissed employees their bonuses but the same was not honoured, yet these members had contributed to the positive performance of the respondent that led to the award of the bonuses. The respondent had therefore violated Article 41 of the Constitution which required fair labour practice. It was its prayer that an order of specific performance be issued to compel the respondent to pay the bonuses. It also prayed for costs of the claim.

2 As a response to the claim an answer dated 8th November 2016 was filed. The respondent averred that the appellant did not have any locus standi to file the claim; the appellant's members who had been dismissed were not entitled to any bonus since it was a discretionary sum paid as a gesture of goodwill and in any event the claim was res judicata.

3 The respondent subsequently filed a preliminary objection to the claim dated 25th January 2019 on three grounds; the appellant lacked locus standi to lodge the memorandum of claim; there was no cause of action against it and that the claim was in any event res judicata. The preliminary objection was canvassed in court on the 21st March 2019. Mr. Ondego learned counsel for the respondent submitted that there was a similar claim No. 448 of 2015 "hereinafter the earlier suit" filed by the appellant's members and the court had directed that they be paid their dues and they had appealed against the decision. In the present claim the appellant had sued on behalf of its members but the issues were similar to those raised in claim number 448 of 2015. Thus the claim was res judicata.

4 Mr. Ochieng' learned counsel for the appellant on the hand argued that the issue in the present claim was payment of the bonus which had accrued after judgment in claim No. 448 of 2015 and was therefore not res judicata. The trial court in its ruling dated 20th June 2019 held that bonus was paid at the discretion of the court, and if an employee had been dismissed on disciplinary grounds they were not entitled to any bonus which was declared on 23rd August 2016. Further, the claim was in any event res judicata since the issues raised in the earlier suit were the same, same issues raised in the current suit.

5 Aggrieved by this ruling the appellant filed its memorandum of appeal dated 16th August 2019 on the grounds that; the court erred to find the cause of action had not accrued when ELRC Cause No. 448 of 2015 was heard and determined; that the parties in the earlier suit were different from the instant claim; the court erred to determine a question on whether the aggrieved members were entitled to payment of bonuses, which was never pleaded in the preliminary objection and lastly the court erred by relying on the wrong analysis and interpretation of facts.

6 In support of the appeal, it was submitted by Mr. Ochieng', that the court erred in finding that the claim was res judicata. We were referred to Section 7 of the *Civil Procedure Act* which defines res judicata and its application. The claim in the earlier suit did not form part of the record of the preliminary objection. The bonus in question had been declared on 23rd August 2016 whereas judgment in the earlier suit was delivered on 29th February 2016, the appellant was not a party to those proceedings and that this issue had not been raised therein. In addition we were urged to find that the court erred when it failed to determine issues on law only. That the court had gone ahead to determine whether the dismissed employees could benefit from the bonus, an issue that was to be determined at a full trial.

7 In opposing the appeal, Mr.Khagram, learned counsel for the respondent submitted that the claimants who were members of the appellant were parties to the earlier suit and therefore they were precluded from pursuing the same claims in another suit. That the appellants' members had even filed an appeal against the decision in this court and lost. It is then that they decided to use the union, being the appellant herein, to file the claim leading to this appeal. In addition the appellant had 3 previous suits with the same cause of action and this court had held that the appellant could not litigate in piece meal. Lastly, he invited us to dismiss the appeal with costs.

8 Having perused the record of appeal, the ruling, grounds of appeal, submissions of counsel and the law, only one issue stands out for determination which is whether the trial court was right in holding that the suit was res judicata.

9 This being a first appeal we are called upon to reconsider, evaluate and draw our own conclusions as this court held in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR as follows;

> " An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must 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 allowances in this respect"

10 In determining this appeal therefore we shall be guided by the above parameters.

The appellant filed a statement of claim urging the court to order the respondent to pay bonuses to its members, a claim denied by the respondent on account of being res judicata. Consequently a preliminary objection on that basis was successfully raised.

11 In *Mukisa Biscuit Manufacturing Ltd v. West End Distributors Ltd* [1969] E.A 696 Sir Charles New-Bold stated as follows with regard to preliminary objection:

> " 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 of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration. 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 the 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."

12 The effect of upholding a preliminary objection is to summarily dispose off an entire suit without going through the motions of plenary hearing. Therefore the same has to be exercised with caution. The respondent's preliminary objection was in the main that the claim was res judicata. This is purely a matter of law contrary to the submissions of the appellant. That other issue of locus standi was peripheral and need not concern us here. In any event the trial court did not make a determination on the same.

13 The appellant submitted that the cause of action in the present claim was payment of bonus which issue was not raised in the previous suit. The previous suit had been filed by various union members in their personal capacities who had been summarily dismissed from employment which the trial court held was unlawful. As a consequence the respondent was ordered to pay all the claimants their terminal benefits. This judgment was delivered on 29th February 2016, whereas the present claim was filed on 14th October 2016. By this time the appellant members had been dismissed from employment on diverse dates of 2nd July 2015, 29th September 2015 and 30th September 2015. The bonus was declared in August 2016 as asserted by the respondent. The appellant's members had been awarded terminal benefits in the previous suit.

14 Did the issue on payment of bonus form part of the preliminary objection? It is quite clear from the record that it was contrary to the submissions by the appellant. Issue number two of the preliminary objection raised the question of cause of action. The appellant's claim on payment of bonus was raised and objected to by the respondent. This are set of facts that gave rise to the claim filed by the appellant and it cannot therefore turn around and allege that it was not pleaded in the preliminary objection.

15 It is the appellant's contention that the respondent had failed to pay some of its members the bonus for the period of 1st July 2014 and 30th June 2015 when the claimants were still in service. In the previous suit 30 claimants had filed the claim which included a claim for bonuses. In the end the trial court awarded them terminal dues. The matter moved to this court by way of appeal by the respondent which appeal was allowed, the effect of which was to set aside the judgment of the trial court. The claimants in the previous suit then devised an ingenious way of relitigating the dispute again by bringing on board the appellant to sue on their behalf again. It is not lost on us that at some point during the proceedings,

Mr. Ochieng' had asked the trial court to stay the proceedings as some of the claimants had appealed against the decision in the earlier suit and depending on the outcome of the appeal they may opt not to pursue the present claim as the issue of bonuses was central in the appeal. With this background in mind can it be said that the trial court was not right to uphold the preliminary objection on res judicata? Section 7 of the *Civil Procedure Act* provides for the principle of res judicata. It is in terms 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. (Emphasis provided)

16 The doctrine of res judicata has been expounded by this court in *Independent Electoral Boundaries Commission v. Maina Kiai & 5 Others* [2018] eKLR, as follows:

> "Thus, 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 further and stated:

> " 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, to obtain at last, outcomes favourable 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."

17 The purpose of this doctrine is to lock out a party who has already been heard before a competent court coming back with the same issues against the same party to be determined. Did the respondent satisfy the conditions set above for the claim to be held to be res judicata? We think it did! We have already demonstrated that the appellant was seeking for bonus payment in the present claim, which the court in the earlier suit had determined. Indeed in the cause of the proceedings, counsel for the appellant did apply for stay of proceedings pending the hearing and determination of the appeal. This was on the basis that the issues in the appeal were the same as in the current suit and depending on the outcome

of the appeal they may opt not to pursue the claim. To our mind this is a clear demonstration and or admission that the issue of bonuses was alive in the previous suit that led to the appeal and the current suit. With this court having determined the issue finally, it cannot be revisited by way of another suit under the guise that the appellant was not a party to the previous suit. The argument that the claim arose after judgment is neither here nor there as parties are not permitted to litigate in piecemeal. The bottom line is that the issue of payment of bonuses was an issue in the previous suit and was also an issue in the current suit, the suit was among the same parties or those claiming under the same title and the same was determined by a court of competent jurisdiction. Yet the same issue was being revisited in the current suit. This is a classic case where the doctrine of res judicata fits in well. We hold so.

18 In the light of all the foregoing we are satisfied that the trial court was right in upholding the preliminary objection that the claim was *res judicata*. Accordingly, we uphold the trial court's ruling and order with the consequence that the appeal be and is hereby dismissed with no order as to costs.

Dated and delivered at Nairobi this 8th day of October, 2021.

M. WARSAME

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR