



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, OUKO & KIAGE, J.J.A.)

CIVIL APPEAL NO. 336 OF 2012

BETWEEN

MOSES OGUTU OYUGI 1ST APPELLANT

HUDSON LUMIRE 2ND APPELLANT

FRANKLIN NKONGE 3RD APPELLANT

JOSEPH OPONDO 4TH APPELLANT

OBOTE SHIUNDU 5TH APPELLANT

ENOCK AKELLO 6TH APPELLANT

SAMMY EREGWA 7TH APPELLANT

VERSUS

KENYA SHOE AND LEATHER WORKERS UNION....1ST RESPONDENT

REGISTRAR OF TRADE UNIONS2ND RESPONDENT

(An appeal from the Ruling & Order of the Industrial Court at Nairobi (Monica Mbaru, J.) dated 12th October, 2012

in

Industrial Cause No. 801 of 2012)

JUDGMENT OF THE COURT

INTRODUCTION

1. This judgment arises from a ruling delivered by Mbaru, J. on 12th October, 2012 in respect of a preliminary objection filed by the respondents in **Industrial Cause No. 801 of 2012**. In that preliminary objection the respondents contended that the appellants' claim in the aforesaid suit was the same subject matter as in **Industrial Cause No. 183 of 2012** involving the same parties that had been heard and determined by Mukunya, J. on 26th April, 2012.

2. The trial court allowed the preliminary objection and proceeded to dismiss the appellants' application dated 9th May, 2012 as well as the entire suit.

APPEAL

3. Being aggrieved by the said decision, the appellants preferred an appeal to this Court. Their basic argument was that the learned trial judge erred in law by holding that the issues in the two suits were the same; that the parties in dispute were the same; and that the earlier suit had been conclusively determined. They urged this Court to allow the appeal, set aside the learned judge's decision and reinstate their application dated 9th May, 2012 as well as the suit.

4. Before the appeal was set down for hearing, it was listed down for case management conference on 26th July, 2017. On that day **Miss Ochieng** held brief for **Mr. Rakoro** for the appellant, while **Mr. Museve** held brief for **Ms. Guserwa** for the 1st respondent. There was no appearance for the 2nd respondent. Directions were given to the effect that the appeal would be canvassed by way of written submissions that were to be filed and served within 30 days from 26th July, 2017.

5. Subsequently, the appeal was set down for hearing on 13th February, 2018 and hearing notices served upon all the parties and/or their respective advocates. On the scheduled hearing date, the appeal was called out for hearing at about 9.30 a.m. **Mr. Shairi**, who held brief for Mr. Rakoro for the appellant, prayed for adjournment, saying that parties were negotiating a settlement. Neither the respondents nor their representatives were in court. The court declined to adjourn the appeal and directed that it be heard at 10.00 a.m.

6. When the appeal was called out for hearing at 10.55 a.m, only Mr. Rakoro was in court. He confirmed that the 1st and 2nd respondents had been served with hearing notices on 15th and 21st November 2017 respectively. Counsel informed the Court that parties were desirous of pursuing a settlement. He chose not to make any submissions.

ANALYSIS OF THE RECORD OF APPEAL AND DETERMINATION

7. In **Industrial Cause No. 183 of 2012**, Kenya Shoe and Leather Workers Union, was the claimant and now the 1st respondent; while the 1st to 10th respondents were Evans Nyaundi Senden, David Maweu Muteti, Joseph Kiplangat Mutai, Naftali Nyongesa, Jane Wangui, Edward Nyamari,

Thaddeus Wambua, Paul Kinyanjui, Julius Maina and Isaiah Odhiambo. The Registrar of Trade Unions was the 11th respondent. The main issue in that suit was whether the 1st to 10th respondents were the duly elected national office holders of the aforesaid Union, the 1st respondent. The claimant alleged that they were not, but the 11th respondent (the Registrar of Trade Unions) wrongly registered them as the duly elected officials.

8. The 1st to 10th respondents opposed the claim. They contended that they were in office lawfully. They also argued that the Union had not authorized Moses Ogutu Oyugi to institute the proceedings in its name. The 11th respondent also opposed the claim, saying that due process was followed before the 1st to 10th respondents were registered as officials of the Union.

9. After a full hearing, the trial judge, Mukunya, J. in dismissing the claim, concluded his judgment as follows:

“Upon careful consideration of all circumstances of this dispute including the written memoranda, the available evidence and oral submissions it is the holding and finding that Moses Oyugi Ogutu and his group have not been able to establish that they have the right in law to institute and prosecute the dispute on behalf of the Claimant Union. They have also not proved that the group led by Julius Maina fraudulently procured registration as office bearers of the Union. The latter group is registered and recognized by the Registrar of Trade Union and the provisions of Labour Relations Act 2007 as the valid and official leadership of the Union. The Court agrees with the prayers made on behalf of the Respondents that the Memorandum of Claim and the issues raised in the application by Notice of Motion filed on 8th February 2012 are without merit and are hereby dismissed.”

10. Barely 15 days after delivery of the said judgment the appellants filed **Cause No. 801 of 2012** seeking, *inter alia*, a declaratory order that the very same persons named as 1st to 10th respondents in **Cause No. 183 of 2012** are not the true and legitimately elected office holders of the Kenya Shoe & Leather Union. The appellants also filed an application, seeking among other prayers, a temporary injunction to restrain the aforesaid ten persons from holding themselves out as the Union's national officials.

11. The 1st respondent herein opposed the suit as well as the application and rightly filed the preliminary objection which we alluded to earlier.

12. In our view, the learned judge cannot be faulted for holding that the claim was *res judicata*, in view of the earlier determination of the same issue by Mukunya, J. in Cause No. 183 of 2012. **Section 7** of the **Civil Procedure Act** states as follows:

“No court shall try any suit or issue in which the matter 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 which such issue has been subsequently raised, and has been heard and finally decided by such court.”

13. The latter suit was therefore *res judicata* and so we agree. We find this appeal lacking any merit. Consequently, it is hereby dismissed. As the respondents neither filed any document nor attended court for the hearing of the appeal, we order that each party bears their own costs.

Dated and delivered at Nairobi this 20th day of April, 2018.

D.K. MUSINGA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR