



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, MUSINGA & GATEMBU, JJA.)

CIVIL APPEAL NO. 1 OF 2015

BETWEEN

HUDSON KELLY A. AGALO APPELLANT

AND

TELKOM KENYA LIMITED RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Kisumu (Wasilwa, J.) dated 30th September, 2013

in

The original

INDUSTRIAL COURT CAUSE NO. 6 OF 2013)

JUDGMENT OF THE COURT

- Hudson Kelly A. Agalo**, the appellant, was the plaintiff/claimant in **Industrial Court Case No. 6 of 2013** against Telkom Kenya Limited, the respondent herein. The appellant's claim was that he was employed by the Kenya Posts and Telecommunications in 1980 but his services were unlawfully terminated on 4th June, 1997. As at the date of his dismissal his employer's name had been changed to **Telkom Kenya Limited**, the respondent.
- The appellant prayed for payment of pension in the sum of **Kshs.1,134,000/=**.
- Prior to instituting Industrial Cause No. 6 of 2013, the appellant had filed another case against the respondent in the Chief magistrate's Court at Kisumu, **CMCC No.490 of 2003**. In that case the appellant had also contended that his termination was unlawful and sought, *inter alia*, compensation for wrongful dismissal being three months' salary in lieu of notice, calculated pension for fifteen years amounting to **Kshs.2,041,490/=**, among other reliefs.
- The trial magistrate found that the appellant had not pleaded the claim for pension, although he had

prayed for the same. The learned magistrate stated:

“The plaintiff produced some calculations for his pension (P Exh14). It is not clear on what basis this calculation was done. Even if it was not contested the plaintiff still had a duty to show how those figures were arrived at.”

5. The court dismissed the claim for pension but awarded the appellant one months’ salary in lieu of notice, leave allowance, half salary for six months and gratuity earned for 15 years amounting to **Kshs.857,700/=** plus costs and interest.

6. The respondent appealed against that decision vide **HCCA No. 140 of 2008**. The appeal was however struck out, meaning that the lower court’s decision prevailed.

7. Shortly after dismissal of the aforesaid appeal the appellant instituted **Industrial Cause No. 6 of 2013**. As stated earlier, his main claim in that cause was for payment of pension, which he claimed was not sought before the lower court. He blamed his former advocates for failing to plead that claim.

8. The trial judge (Wasilwa, J.) found that the suit was *res judicata* in view of the determination made in CMCC NO. 490 of 2003. The suit had also been filed outside the three years period as stipulated under **section 90** of the **Employment Act, 2007**. That is the decision that gave rise to this appeal.

9. In the memorandum of appeal filed through Moses J. O. Orengo Advocate, the appellant argued that the learned judge erred in law in holding that his claim was *res judicata* and in finding that the same had been filed after expiry of the limitation period in terms of **section 90** of the **Employment Act, 2007**.

10. The appellant’s learned counsel submitted that in **CMCC No. 490 of 2003**, the appellant had not pleaded for payment of pension. Counsel conceded that such claim could have been included but there was an oversight on the part of the appellant’s former advocates, **M/S. Ashioya & Company**.

11. Counsel further submitted that a claim for pension is not subject to limitation of time like other terminal benefits. He added that the claim for pension was different from the gratuity that had been awarded by the learned magistrate. In that regard, he cited **section 2 (1) of the Pension (Increase Act), Cap 190** which states that:

“ ‘Pension’ means any pension or other benefits payable by way of periodical payments, but does not include any gratuity or any sum payable otherwise than by way of periodical payments ...”

12. Responding to those submissions, **Mrs. Mbabu**, learned counsel for the respondent, submitted that the appellant’s claim before the Industrial Court was *res judicata* in view of the judgment in CMCC No. 490 of 2003. She referred the Court to the appellant’s amended plaint where he had stated that following the wrongful dismissal from his employment he was entitled to *“payment of full benefits, salary under the contract of employment, general damages for wrongful dismissal and defamation”*. In her view, *“full benefits”* included pension.

13. Mrs. Mbabu further submitted that if at all the appellant had a genuine claim for pension, the same should have been made against the **Telposta Pension Scheme** and not Telkom Kenya Limited, the respondent. The appellant was aware of that position and had since 20th of January, 2010 exchanged correspondence with Telposta Pension Scheme regarding his claim for benefits. Counsel referred the Court to several letters to that effect that are contained in the record of appeal.

14. As to whether the appellant’s claim was instituted after the statutory limitation period, Mrs. Mbabu submitted that the claim was based on a contract of employment whose time limit is six years. The appellant instituted the claim before the Industrial Court after 15 years from the date of termination of his service. The claim was therefore time barred.

15. We have considered the submissions made by counsel and perused the record of appeal. The gravamen of this appeal is whether the appellant's claim before the Industrial Court was *res judicata* or not. The doctrine of *res judicata* is stated and explained under **section 7** of the **Civil Procedure Act** which states as follows:

“7. 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.”

16. In **Greenfield Investments Limited V Baber Alibhai Mawji [2000] eKLR**, this Court held that parties are required to bring to court their whole case and will not (*except under special circumstances*) permit the same parties to open the same subject matter which might have been brought forward as part of the subject in contest but was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case.

17. The Court went on to state that *res judicata* is not confined to the issues which the court is actually asked to decide but also covers issues or facts which are so clearly part of the subject matter of litigation and ought to have been raised, that it would be an abuse of the process of the court to allow new proceedings to be started in respect of them.

18. Looking at the appellant's amended plaint in **CMCC No. 490 of 2003**, it is clear that he was pursuing all his lawful benefits against the respondent following termination of his employment. As pointed out by the trial court, the appellant, although he had not specifically included in his pleadings a claim for pension, he had the same in mind when he sought “*full benefits*” because he tabled calculations for pension. In the matter that gave rise to this appeal, the appellant conceded in cross examination that “*full benefits*” included pension. He is estopped from denying that which he had expressly admitted in the earlier suit. His complaint against his former advocates for failing to specifically plead that claim cannot afford him any defence against the application of the doctrine of *res judicata*.

19. The magistrate's court considered the appellant's claim for pension but did not award the claim for pension because the appellant did not specify the basis upon which the calculations had been made. It was also not clear whether the appellant was entitled to payment of any pension by the respondent.

20. In the circumstances we agree with the learned judge that the appellant's claim was clearly *res judicata*. Having come to that conclusion, it is superfluous for us to consider whether the claim was made outside the statutory period and whether the claim ought to have been filed against Telposta Pension Scheme and not as against the respondent.

21. This appeal is without merit and is consequently dismissed with costs to the respondent.

DATED and delivered at Kisumu this 4th day of March, 2016.

D. K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR