



REPUBLIC OF KENYA



KENYA LAW
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Ogola v Anyango (Appeal E138 of 2024)
[2024] KEELRC 13504 (KLR) (19 December 2024) (Judgment)

Neutral citation: [2024] KEELRC 13504 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E138 OF 2024
M MBARŪ, J
DECEMBER 19, 2024

BETWEEN

MICHAEL ALOYA OGOLA APPELLANT

AND

GERALDINE MATILDA ANYANGO RESPONDENT

*(Being an appeal from the ruling of Hon. Nyariki in Mombasa
CMEELRC No.E592 of 2022 delivered on 4 June 2024)*

JUDGMENT

1. The appellant is seeking that the ruling delivered on 4 June 2024 striking out the suit in Mombasa CMEELRC No.E592 of 2022 be set aside so that he can proceed with his claim.
2. The appeal is on the grounds that the trial magistrate erred in law and fact in holding that his claim was res judicata without evidence to prove the same. The issues addressed could only be proven in evidence, specifically, the fact that he was working for two different employers at the same time. The trial court erred by observing that the appellant failed to provide proof that the respondent used to pay him his dues and disregarded the Mpesa evidence, which indicates that he received a salary of Ksh. 10 000.
3. The appellant's other grounds are that the trial court erred in observing that an agreement slip between the appellant and the respondent cannot be used as prima facie proof of employment when the agreement sets down the employment terms, which is binding. The trial court failed to appreciate that the appellant was employed as a caretaker for an apartment owned by the respondent in Moonlight Estate. Within the estate were several apartments, commonly referred to as Moonlight apartments, which different individuals, including the respondent, owned. The trial court failed to appreciate that the respondent, John Orwa, is unrelated to people who own different apartments within Moonlight Estate. The cause of action arose from two other apartments owned by various owners of the flats within the estate and, hence, different claims.



4. The trial court should have appreciated the facts and circumstances leading to the appellant losing his job from the respondent and that this is not the same case with other respondents. He is seeking for judgment that;
 1. The ruling delivered on 4 June 2024 be set aside;
 2. The appeal be allowed with costs;
 3. The matter be referred to another magistrate other than Hon. Nyariki;
 4. Such other orders as the court may deem fit.
5. Both parties attended and agreed to address the appeal through written submissions.
6. The appellant submitted that he filed suit in Mombasa CMERLC No.E592 of 2022 seeking compensation for unfair termination of employment and payment of terminal dues. The respondent filed an application dated 1 March 2024 to strike out the claim because it was res judicata. The grounds for the application were that the appellant had filed a suit against John Orwa t/a Moonlight Apartments in Mombasa CMELRC E176 of 2022 with similar cause of action and facts with Mombasa CMELRC E592 of 2022 and that the first suit had been determined with finality.
7. The appellant submitted that he was employed by the respondent as a caretaker on 1 January 2012 through a written contract. The appellant was to work at Moonlight Apartments, located within Moonlight Estate, which has six apartments. Each apartment is owned by different persons, including the respondent, who owed several flats. The respondent engaged the appellant to watch over his building, considering that both were within the same estate. The appellant was a caretaker for the two apartments owned by two different persons, John Orwa and Geraldine Matilda Anyango, the respondent.
8. The trial court failed to appreciate employment circumstances and declared the claim and suit res judicata. Under Section 7 of the Civil Procedure Act, a suit is res judicata if the same matter is substantially addressed in a former suit, which is not the case here. For res judicata to be raised, the suit must be directly and substantially in issue in the former suit as held in Communications Commissions of Kenya & 5 others v Royal Services Limited & 5 others [2014] eKLR.
9. The claims in Mombasa CMELRC E176 of 2022 and Mombasa CMELRC E592 of 2022 are foundationally different and against different employers. The claim leading to this appeal relates to a claim for terminal dues of Ksh.2, 817,264.20 and the other claim in Mombasa CMELRC E176 of 2022, he claimed Ksh.3, 794,056.50
10. The employment agreement between the appellant and respondent is different and not signed by John Orwa, the respondent, in Mombasa CMELRC E176 of 2022. The two suits are distinct, and the doctrine of res judicata does not apply; hence, the trial magistrate erred by failing to appreciate each case is different and separate.
11. The respondent submitted that before the appellant filed Mombasa CMELRC E952 of 2022, he had filed Mombasa CMELRC E176 of 2022 against John Orwa, who was trading as Moonlight Apartments. In the definition, the appellant indicated that the Moonlight Apartments was an investment vehicle or a business firm owned by John Orwa and through which he traded. He claimed that he was employed as a caretaker on 1 January 2012 and later dismissed on 31 December 2021 when he was forced to resign due to ill health caused by being overworked.
12. The appellant claimed the following dues;



1. Notice pay Ksh.10,000;
 2. House allowance Ksh.130,000;
 3. Underpayment Ksh.2,177,718;
 4. Accrued leave Ksh.284,644.50;
 5. Unpaid overtime Ksh.911,700;
 6. Unfair termination Ksh.120,000;
 7. Severance pay Ksh.50,000;
 8. Unpaid NHIF Ksh.60,000
 9. Costs of the suit.
13. Judgment was entered for the appellant on 6 April 2023; efforts to set aside the judgment were unsuccessful, and the application was dismissed on 30 August 2023. There is a final determination of the matter.
14. The respondent submitted that from the pleadings in the former suit, the appellant defined John Orwa as the owner of Moonlight Apartment and that he was trading as such. He was employed as a caretaker in the business, and such employment was terminated on 31 December 2021. There is an award under such claim for alleged unfair termination of employment. There was no indication that the Moonlight Apartment comprised 6 apartments, with one owned by the respondent, Geraldine Matilda Anyango, as alleged.
15. The Memorandum of Claim asserts that John Orwa assigned the appellant duties in the business premises located in Nyalı. The witness statement is similar in both suits. The claimed subject of this appeal was filed after judgment in Mombasa CMELRC E176 of 2022, and the facts are identical in that the appellant was employed on 1 January 2012 and terminated on 31 December 2021, which is a replica in the previous suit; hence *res judicata*. The appellant alleges in both suits that he was paid Ksh.10, 000 per month and was employed as a caretaker. The facts and particulars in both suits are similar.
16. The trial court could discern the similarities from the pleadings and held the suit was *res judicata*. It was filed contrary to Section 7 of the Civil Procedure Act, as held in *Abok James Odera v Patrick Machira*. The issues raised in the previous suit are similar and should have all been determined under Mombasa CMELRC E176 of 2022. Filing a new suit is against the principles of *res judicata*, and the appeal should be dismissed with costs as held in *IEBC v Maina Kiai & 5 others [2017] eKLR*.

Determination

17. This is the first appeal from the trial court's ruling in Mombasa CMELRC E592 of 2022. The court is allowed to re-assess, review, and make conclusions.
18. The trial court considered the application dated 1 March 2024, in which the respondent herein challenged the claim in Mombasa CMELRC E592 of 2022 for being *res judicata*. The application was based on the appellant's filing of Mombasa CMELRC E176 of 2022 on similar facts and statements, in which he claimed to have been employed as a caretaker by John Orwa at Moonlight Apartment from 1 January 2012 to 31 December 2021. The reliefs sought are the same, a replica in both suits. There is a judgment delivered on 30 August 2023.



19. The trial court held both suits were similar and contrary to the principles of res judicata and hence struck out the suit, Mombasa CMELRC E592 of 2022.
20. The appellant asserts that he was employed by two employers as a caretaker in the different and separate apartments within Moonlight Estate: one under an agreement with John Orwa and the other by the respondent herein, Geraldine Matilda Anyango.
21. In his Memorandum of Claim filed on 26 October 2022 under paragraph 3, he avers that he was employed by the respondent as a caretaker from 1 January 2012 to 31 December 2021, when his employment was unfairly terminated.
22. Under suit Mombasa CMELRC E176 of 2022, filed on 7 March 2022, under paragraph 2.3 of the Memorandum of Claim, the appellant avers that John Orwa t/a Moonlight Apartments employed him from 1 January 2012 to 31 December 2021, when his employment was unfairly terminated.
23. The claims are essentially the same, except for different employers as respondents.
24. A suit is res judicata if filed contrary to the principles outlined under Section 7 of the Civil Procedure Act. In the case of Bernard Mugo Ndegwa v James Githae & 2 Others[2010] e KLR it was held that the applicant alleging res judicata must show that;
 - a) That the matter in issue is identical in both suits;
 - b) The parties in the suit are substantially the same;
 - c) There is the concurrence of jurisdiction of the court;
 - d) The subject matter is the same; and
 - e) That there is a final determination as far as the previous decision is concerned.
25. The principles of res judicata are important as addressed by the Supreme Court in the case of John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others [2021] KESC 39 (KLR) that;
26. The doctrine of res judicata was based on the principle of finality which was a matter of public policy. The principle of finality was one of the pillars upon which the judicial system was founded and the doctrine of res judicata prevented a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensured that litigation came to an end, and the verdict duly translated into fruit for one party, and liability for another party, conclusively.
27. If the Supreme Court were to find that the doctrine did not apply to constitutional litigation, the doctrine could lose much of its legitimacy and validity.
28. The principles safeguard the principles of finality, multiplicity of suits, and fundamentally, the verdict duly translated into fruit for one party, and liability for another party, conclusively.
29. Whereas a suit is res judicata if the cause of action is substantially addressed with final orders, individual employers can employ an employee. However, dual employment is not permissible. This would lead to duplicity of suits and negate the remedies set out under Section 49 of the Employment Act. Employment cannot run simultaneously. A caretaker for one employer and a caretaker for another should be addressed within a single employment relationship. The employee is one but serving different employers. The time is the same and the remuneration agreed as held in Erick Mutembei Mbaya v Medivet Products Limited [2021] KEELRC 17 (KLR); Ogotu v Undugu Society of Kenya



[2023] KEELRC 2953 (KLR); Jackson Mbaza Imbali v Menengai Oil Refineries Ltd [2018] KEELRC 1050 (KLR).

30. In the case of Nicholas Rono v County Secretary County Government of Bomet, Bomet County Assembly Service Board, County Government of Bomet & Joel Kipkorir Sigei [2020] KEELRC 542 (KLR), the court held that the holding of double employment is inherently incompatible with the responsibilities allocated and public policy, significantly where the two offices correlate. See Felix Kiprono Matagei v Attorney General & 3 others [2016] eKLR.
31. In this case, the time spent serving an employer is similar. Separating the employers and making claims against each would result in abuse of the law and double payment of both statutory dues and wages.
32. The concept of dual employment would negate claims for a wage from both employers, a claim for notice pay, house allowances, underpayment, accrued leave days, overtime and fundamentally, alleged unfair termination of employment. This cannot apply simultaneously. The concept of unfairness can only be mitigated under one figurehead, particularly in this case. One cannot suffer double unfairness from two distinct and separate employers simultaneously.
33. The injury suffered, if at all, can only accrue once. Where notice pay is claimed, it can only accrue once. Where leave pay is due, rest only occurs once and cannot be postponed to be recovered under separate employers.
34. In the case of Nguruman Limited v Jan Bonde Nielsen & Peter Bonde Nielsen [2017] KEHC 6131 (KLR), the court held that;

The two similar suits could be consolidated for hearing and determination. In the present situation, it is not in dispute that this suit and the claim therein arise from HCC 387/2014 between Nguruman Ltd and Jan Bonde Nielsen. The said suit has not been heard and or determined. The linkage is that in HCC 387/2014, the claim is for enforcement of an undertaking as to damages given by the defendant herein in HCC 332/2010 following the successful appeal in CA 77/2012, which discharged and set aside an injunction granted against the plaintiff by Honourable Odunga J. It follows that HCC 387/2010 and HCC 332/2014 are closely linked since an order in one gave rise to the other suit. However, the claims are not the same in as much as the parties are the same.

35. Whereas there can be two employers, employment can only apply in a single continuum or consecutively. Replication of claims would negate the essence of Article 41 of the Constitution, which calls for fair labour practices.
36. The appellant should have consolidated his claims against both respondents. He cannot accrue notice pay, house allowance, underpayments, leave days, overtime, compensation, and service pay for the same job and period. The rationale is that a Certificate of Service under Section 51 of the Employment Act can only be issued for the period served, 1 January 2012 to 31 December 2021. This cannot be duplicated to serve two separate and distinct employers covering the same period.
37. Equally, the appellant cannot justify a claim for compensation for unfair termination of employment over the same period and against two separate employers. Once addressed, the concept of unfair termination can only cover the stated period and not under dual employment periods.
38. For completeness, both suits should be consolidated for the trial court to assess whether there was concurrent or consecutive employment and address similar claims under one heading. This will give the appellant a fair chance to explain his circumstances and how he was able to undertake dual employment and claim notice pay, house allowance, underpayments, unpaid leave days, overtime, compensation



and unpaid NHIF at the same time. A comprehensive analysis of each claim under a consolidated suit would suffice. What is already awarded must be addressed within each heading with a conclusion. What needs to be covered in each suit is to be heard on merit.

39. Such a process should be guided by the trial court judgment already delivered in Mombasa CMELRC E176 of 2022. Upon consolidation, both parties will have a fair chance to analyze similar claims and address the trial court on any pending issues for determination based on the judgment in Mombasa CMELRC E176 of 2022.
40. Accordingly, the appeal addressed both suits in Mombasa E592 of 2022, which shall be consolidated for hearing and determination. Under the judgment in Mombasa E176 of 2022, parties will address similar issues already determined in the judgment delivered on 6 April 2023 and highlight any issue pending determination under Mombasa E592 of 2022 to avoid duplication of remedies addressed with a conclusion.
41. Mention before the trial court for directions.
42. Each party bears its costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 19TH DAY OF DECEMBER 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

