



Avalia & 14 others v Majani Mingi Group pf Companies & another (Cause E015 of 2020) [2023] KEELRC 470 (KLR) (26 January 2023) (Ruling)

Neutral citation: [2023] KEELRC 470 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE E015 OF 2020
DN NDERITU, J
JANUARY 26, 2023**

BETWEEN

**BENSON ATONYA AVALIA 1ST CLAIMANT
GEORGE OCHIENG 2ND CLAIMANT
CHARLES M. KIGET 3RD CLAIMANT
ISMAEL OMONDI JOHANA 4TH CLAIMANT
IBRAHIM ODONGO SIRISIA 5TH CLAIMANT
JOSEPH ATULO ABWABO 6TH CLAIMANT
JAMES OGUTU ADUNDO 7TH CLAIMANT
CAROLINE CHEPKWONY 8TH CLAIMANT
PATRICIA ATIENO 9TH CLAIMANT
WILSON CHEBII TANUI 10TH CLAIMANT
TERESIA ODERA 11TH CLAIMANT
MARGAET ATIENO 12TH CLAIMANT
PETER OTIENO 13TH CLAIMANT
EUNICE ATIENO AREJA 14TH CLAIMANT
MARIA AWINO 15TH CLAIMANT**

AND

**MAJANI MINGI GROUP OF COMPANIES 1ST RESPONDENT
KENYA PLANTATION & AGRICULTURAL WORKERS UNION 2ND
RESPONDENT**



RULING

I. Introduction

1. Vide a memorandum of claim dated 30th October, 2020 drawn by Arusei & Co. Advocates the Claimants commenced this cause seeking the following –
 - a. A declaration that the Claimants herein were employees of the 1st Respondent and were entitled to be heard in Nakuru ELRC Cause No.76 of 2023 and that did not happen.
 - b. That the Consent judgment entered on the 2nd day of November, 2015 be is hereby varied, set aside and/or reviewed to accommodate the Claimants herein who had been excluded and the Claimants herein afforded a hearing or their respective claims.
 - c. That upon hearing, the Honourable Court be pleased to enter judgment in favour of each Claimant in respect of their salary arrears and other payments such as allowances and benefits entitled to them individually.
 - d. Costs be awarded to the Claimants.
 - e. Any such other or further relief as this Honourable Court may deem fit to grant
2. The 1st Respondent filed a response to the claim dated 3rd March, 2021 drawn by Sheth & Wathigo Advocates wherein the 1st Respondent intimated that it shall raise a preliminary objection to the suit as the same is “incompetent and statute barred by virtue of Limitation of Action(s) Act or by virtue of section 90 of the Employment Act”. The 1st Respondent pleaded that this court has no jurisdiction to entertain the cause and hence prayed that the same be dismissed with costs.
3. The 2nd Respondent filed a response to the claim through KTK Advocates dated 1st December, 2021 wherein it intimated that it shall raise a preliminary objection to the cause on the same basis as those that were raised by the 1st Respondent as alluded to above.
4. The 2nd Respondent added another ground of objection to the claim and pleaded that the cause is *res judicata* as the issues raised had been heard and determined conclusively in Nakuru ELRC No. 76 of 2013 (hereinafter the former cause).
5. The Claimants filed replies to the respective responses filed by the Respondents and admitted that indeed the Claimants were party, as represented by the 2nd Respondent herein, in the former cause but that they were dissatisfied with the consent that was recorded in that cause which consent was subsequently adopted as the judgment of the court. The Claimants allege that the said consent did not consider their grievances and no compensation was made to them.
6. In the reply the Claimants allege that this cause is not a new cause of action but a cause to review, vary, and or set aside the consent judgment entered in the former cause. Consequently, the Claimants argue that this instant cause is neither time or statutorily barred nor *res judicata* and pray that judgment be entered as prayed in the claim.
7. Vide a notice of Preliminary objection (hereinafter the PO) dated 22nd February, 2022 the 1st Respondent raised the following two preliminary points for determination by this court before the main cause is heard –



1. That the Claim herein be dismissed as the same is *res judicata* pursuant to section 7 of the [Civil Procedure Act](#) having been decided by a court of competent jurisdiction in Nakuru Industrial Cause No. 76 of 2013.
2. That the Claim herein is statute barred as it offends the provisions of section 90 of the [Employment Act](#) which makes the entire Claim fatally defective and ripe for dismissal ab initio.
8. When this matter came up in court on 23rd March, 2022 for directions the court directed that the PO be heard first and that the same be canvassed by way of written submissions by counsel for the parties. Counsel for the 1st Respondent filed written submissions on 20th May, 2022 while counsel for the Claimants filed on 23rd May, 2022. On 20th July, 2022 counsel for the 2nd Respondent informed the court that they were not filing any submissions. With the leave of court, the Claimants' counsel filed supplementary submissions on 26th July, 2022.
9. This ruling is hence in regard to the PO issued by the 1st Respondent raising the two issues alluded to above.

II. Submissions by 1st Respondent's Counsel

10. Counsel for the 1st Respondent identifies the two issues for determination by this court in the PO to be whether this cause is *res judicata* and whether this cause is statutorily time barred. This court agrees that those are the two main issues, and then there is the issue of costs of the PO and the main cause, just in case the court finds either of the two issues in the affirmative and hence strikes out the cause.
11. Counsel has cited *Mukbisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 and *Oraro v Mbaja* (2005) eKLR among other decisions in delineating what constitutes a proper PO. Counsel has also cited *JN & 5 others v Board of Management of St. George School Nairobi & Another* (2017) eKLR in distinguishing a point of law from a point of fact in supporting the preposition that what is raised in the PO is purely a point(s) of law and not facts.
12. As far as this court understands the applicable law and principles, a PO is a point or points of law that if successfully argued may dispose of a cause or an issue in controversy between parties. Such a PO may relate to any legal issues and the same may concern the main cause or even an interlocutory application or proceedings. The PO may be raised on legal grounds such as jurisdiction of the court, legal capacity of a party, *res judicata*, bar or estoppel by law, incurably defective pleadings, or any other such grounds based on the Constitution, statute law, or precedents.
13. A most distinguishing feature of a PO from any other objection is that it should be based on law not on contested facts which may require a court to interrogate the pleadings and or call for evidence. The issue(s) should be so readily visible, *prima facie*, that the trial court should not require a legal microscope or binocular to see, identify, and isolate the legal issues in contest in the PO. The PO becomes even clearer where the facts that would obscure the law are admitted and or agreed by and between the parties.
14. This court agrees with counsel that, *prima facie*, the issues raised in the PO are properly before this court as they are purely based on law as shall be discerned shortly.
15. On *res judicata*, counsel has cited section 7 of the [Civil Procedure Act](#) which provides as follows –

“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. The essence of the doctrine of res judicata is to avoid duplicity of causes and forum-shopping. Litigation should come to an end in one way or the other. The denial of a party to file and prosecute multiplicity of causes over the same subject matter also allows jurisprudential stabilization by avoiding and or limiting the possibility of courts arriving at different findings and conclusions on the same subject matter based on the same facts and evidence. It also saves time and costs to parties and court.
17. As it should be the case, the 1st Respondent has raised the PO at the earliest opportunity available, just upon closing of the pleadings – See *Independent Electoral Boundaries Commission v Maina Kiai & 5 Others* (2017) eKLR.
18. Counsel has submitted that it is not contested that the Claimants herein were part of a larger group who were represented by the 2nd Respondent as the Claimant in the former cause wherein the 1st Respondent was the Respondent. Counsel submits that what the Claimants herein are complaining about is that the consent judgment in the former cause did not take care of their interests. Counsel submits that what the Claimants were supposed to do in the circumstances was to either apply for review of the said judgment or appeal against the same but not filing a new cause as they have done through the instant cause.
19. Counsel has cited *Kasamba Enterprises Limited v Equity Bank (Kenya) Limited* (2022) eKLR and the *Board of St. George School (supra)* in laying emphasis that adding new parties or prayers in a cause whose subject matter has been concluded does not offer an escape route for a cause that is *res judicata*.
20. Counsel passionately argues that if the Claimants are unhappy with the consent judgment recorded in the other cause they ought to have applied for review in the same cause or appeal against the said judgment. Counsel submits that filing a new cause is not an option available to the Claimants herein. Counsel argues that since the former cause was concluded as alluded to above this instant cause is clearly *res judicata* and hence prays that the same be struck out with costs in limine.
21. On the second issue of this cause being statutorily barred, counsel has cited section 90 of the *Employment Act* and section 4(1) of the *Limitation of Actions Act* as the law that prohibits and bars the Claimants from filing this instant cause. Counsel argues, without prejudice to the arguments advanced in regard to the cause being res judicata, that if the Claimants had any good cause of action they ought to have filed the same within three years of the cause of action arising.
22. Counsel submits that the cause herein by the Claimants is a classic example of abuse of court process and cites *Muchanga Investments Ltd v Safaris Un-Limited (Africa) Ltd & 2 Others* (2009) KLR 229 to buttress that argument. On this ground Counsel again prays that this cause be struck out with costs.

III. Submissions by Claimants’ Counsel

23. The Claimants’ Counsel has cited *Mukhisa Biscuits case (supra)* in delineating the elements of a proper PO. Counsel submits that Counsel for the 1st Respondent has misconstrued the nature of the cause filed by the Claimants. Counsel submits that as per their prayers in this cause the Claimants are seeking to challenge the consent judgment recorded in the former cause as far as the said consent judgment affects the Claimants in the instant cause.
24. Counsel argues that the 2nd Respondent in the instant cause was the Claimant in the former cause and the 1st Respondent was the Respondent. However, Counsel admits that the Claimants herein were part of a bigger group that was represented by the 2nd Respondent as the Claimant in the former cause.



25. Counsel argues that the Claimants herein, though represented by the 2nd Respondent, the union, in the earlier cause, they could not file for review or setting aside of the judgment and as such the Claimants herein have opted to file a fresh cause. Counsel has cited *Flora N. Wasike v Destimo Wamboko* (1988) eKLR and *Jeremiah Kamau Gitau & 2 Others v Wandai & 5 Others* (1989) eKLR in support of the argument that the Claimants have a legal right in filing the instant cause.
26. Counsel further argues that the circumstances under which the consent judgment in the former cause was entered into and adopted by the court are not clear and are challenged in the instant cause and that those circumstances can only be ascertained by way of adduction of evidence, rendering the PO premature.
27. On the second issue of statutory bar to the cause, counsel submits that what is challenged is the consent judgment which was recorded in 2015 and hence the claim, according to counsel, is not time barred under the *Limitation of Actions Act*.
28. In the supplementary submissions counsel reiterates and confirms that the Claimants are “not seeking fresh orders but rather a review/variation of the consent judgment in Nakuru Industrial Cause No. 76 of 2013 only to the extent that it affects the Claimants herein and for good reasons.” Counsel reiterates that although the Claimants were parties in the above cause no award was made to them in the consent judgment. Counsel submits that no payments of terminal benefits or compensation have been made to the Claimants and hence they were left without a remedy in the above cause making the instant cause proper for the Claimants to get compensation by way of review of the consent judgment in the cited former cause.
29. Counsel concludes that in view of the remedies sought in the memorandum of claim this cause is neither res judicata nor statutorily time barred and prays that the PO be dismissed with costs.

IV. Determination

30. This court agrees with counsel for both parties that there are only two issues for determination as raised in the PO by the 1st Respondent. The first issue is whether this cause is Res judicata and the second is whether the cause is statutorily barred by virtue of Section 4 of the *Limitation of Actions Act* and Section 90 of the *Employment Act*.
31. On the first issue, there is no dispute that the Claimants were part of a group that filed Nakuru ELRC No. 76 of 2013 wherein the 2nd Respondent was the Claimant for and on behalf of a group of Claimants, including the Claimants in the instant cause, and the 1st Respondent was the Respondent. That cause was for compensation and terminal dues payable to the Claimants.
32. The above cause was heard and concluded by way of a consent entered into between the parties through their duly instructed lawyers. Through the instant cause the Claimants now allege and plead that their claims and interests were not taken care of in the said former cause and that is why they are pleading to have the consent judgment therein varied, set aside, and or reviewed to accommodate their claims.
33. This court has gone through the pleadings and submissions by the Claimants and curiously there is no explanation as to why the Claimants have not filed an application to vary, review, and or set aside the judgment within the former cause. There is no doubt that the compensation that the Claimants were allegedly denied in the said former cause is the subject matter that the Claimants are now seeking to get through this cause. The former cause was concluded by a competent court that issued final orders that have neither been reviewed nor set aside on appeal.



34. It is the opinion of this court that upon the conclusion of the former cause the Claimants herein had at least two legal options at their disposal if they were dissatisfied. The first option was to appeal, which they ought to have done within 30 days. The second option was to apply for review under Section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules* without unreasonable delay.
35. As far as the court can gather, and this is admitted by both parties, the Claimants neither appealed the said decision nor did they apply for review.
36. The Claimants are clearly named among the group of Claimants on whose behalf the 2nd Respondent filed the former cause. Section 80 and order 45 cited above provide that “any person considering himself aggrieved” by an order or a decree made by a court may file for review.
37. The consent in the former cause was filed on 2nd March, 2015 and a decree was issued on 2nd November, 2015. As stated above the Claimants did not appeal against the judgment and did not apply for review. The Claimants then filed this instant cause in 2020, after a period of about five years.
38. It is the considered view of this court that the only reason why the Claimants opted to file this cause is to circumvent the statutory time limitation having failed to appeal or apply for review within the time allowed in law. In my view, this is a classic example of abuse of court process.
39. For all intents and purposes, the former cause was heard and determined with finality on merits, albeit by way of a consent. After the consent judgment was entered and a decree subsequently issued, the Claimants had only the two options explained above, to either appeal or apply for review. They took neither of the two and remained indolent until 2020 when they decided to file the instant cause in total abuse of court process. In trying to justify this abuse of process, Counsel for the Claimant has cited some obsolete and irrelevant practice rules that have no place in our contemporary jurisprudence which has clear rules of practice and procedure.
40. This court agrees with Counsel for the 1st Respondent that this instant cause is Res judicata and an abuse of the court process as the same raises the same issues that were raised and resolved in the former cause. Clearly, the issues in that cause, just like in this one, is about compensation and terminal dues to the Claimants herein and others and the court entered a judgment that has not been challenged. The two ways for challenging the said judgment are either appeal or review and the Claimants have failed, refused, and or neglected to take either of the options legally available to them but instead decided to file a new cause in total abuse and disregard of court process and procedure.
41. For the foregoing reasons this court finds that prayer (a) as pleaded in this cause is incapable of being granted as the same ought to have been dealt with in the former cause. The Claimants were heard as evidenced through the consent judgment that was entered in that cause. Any issues concerning the said judgment ought to be raised in that cause as any other approach is in abuse of court process. Prayer (b) is seeking review and or setting aside of the consent judgment. Again, an application for such a prayer ought to be filed in that former cause.
42. In prayer (c) the Claimants are discreetly asking this court to order the Respondents to pay to them salary arrears and other benefits and terminal dues. Clearly, those are issues that ought to have been addressed and settled in the former cause. This court cannot deliberate on those issues of compensation and terminal benefits as such an adventure would clearly be ultra vires and time barred under section 90 of the *Employment Act* which sets the time within which to file a claim at three years of the cause of action arising. This request by the Claimants is clearly statutorily time barred.
43. This court has noted, from the materials provided by the parties herein, that each of the Claimants were placed in some category or cluster in the former cause and orders were made in regard to each of



such category or cluster. What the Claimants ought to have done was to pursue their compensation or denial thereof, as the case may be, under that cause and if so desired challenge the consent judgment by way of an appeal or review.

44. For all the foregoing reasons this court arrives at the inevitable conclusion that the cause by the Claimants herein is bad in law and misconceived as the same is Res judicata, statutorily time barred, and an abuse of the court process and procedure.

V. Costs

45. Ordinarily, costs follow event. However, this matter has been determined at an early stage through a PO hence greatly ameliorating the likelihood of the parties incurring further costs. In the circumstances, and in the interest of justice, this court orders each party to meet own costs.

VI. Orders

46. Flowing from the foregoing, in regard to the preliminary objection by the 1st Respondent as contained in the notice dated 22nd February, 2022 this court hereby issues orders that this cause is res judicata, statutorily barred, and an abuse of the court process and procedure and the same is hereby struck out accordingly and each party shall meet own costs.

DATED, DELIVERED VIRTUALLY, AND SIGNED AT NAKURU THIS 26TH DAY OF JANUARY, 2023.

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DAVID NDERITU

JUDGE

