



**Kebongo v Barclays Bank of Kenya Presently known as Absa Bank Kenya PLC  
(Cause 1340 of 2018) [2023] KEELRC 108 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEELRC 108 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1340 OF 2018  
L NDOLO, J  
JANUARY 26, 2023**

**BETWEEN**

**STELLA NKATHA KEBONGO ..... CLAIMANT**

**AND**

**BARCLAYS BANK OF KENYA PRESENTLY KNOWN AS ABSA BANK KENYA  
PLC ..... RESPONDENT**

**RULING**

1. By notice dated 31<sup>st</sup> November 2022, the respondent raises a preliminary objection to the claimant's claim as follows:
  - a) That the court be pleased to strike out paragraphs 3 to 82 of the statement of claim dated August 28, 2018 and paragraphs 2 to 79 of the witness statement of Stella Nkatha Kebongo dated 28<sup>th</sup> August 2018 as the said paragraphs are res judicata having been decided in Cause No 460 of 2017 and are therefore contrary to section 7 of the *Civil Procedure Act*;
  - b) That in the alternative and without prejudice to paragraph (a) above, the statement of claim is sub judice as the claimant had filed a similar claim in Cause No 460 of 2017 dated January 16, 2015, which is still pending before the Court;
  - c) That the present statement of claim as taken out, drawn and filed is incompetent, fatally defective, misconceived, bad in law, a nullity, unsustainable, frivolous, vexatious, an abuse of the court process and of no legal consequence.
2. The claimant responds by her replying affidavit sworn on November 7, 2022. She states that the respondent's preliminary objection is frivolous and lacking in merit.
3. The claimant narrates the background to this matter as follows:



- a) That she was engaged by the respondent as regional manager in April 2014. Before then, she had worked for the respondent between 1990 and 2007, rising through the ranks from a clerk to the position of Branch Manager as at 2007. She then moved to Standard Chartered Bank until April 2014 when she re-joined the respondent;
- b) That on November 18, 2016, while the claimant was attending a meeting with her branch team, the then line manager, John Ochoki, Employee Relationship Manager, Vaslas Odhiambo and the HR Representative, Caroline Ndegwa walked into the meeting and announced that the claimant had been suspended immediately, for a period of 30 days. This communication was followed by a formal letter of the same day;
- c) That what followed thereafter was a series of suspensions, notices to show cause and disciplinary hearings. Between November 18, 2016 and February 2017, the claimant was served with five (5) notices to show cause and a capability hearing was scheduled for March 9, 2017;
- d) That the claimant filed ELRC Cause No 460 of 2017: Stella Nkatha Kebongo v Barclays Bank of Kenya Ltd dated March 8, 2017.

In addition to the statement of claim she filed a Notice of Motion of the same date, seeking some interim protection;

- e) In a ruling delivered on May 11, 2017, Mbaru J issued the following orders:
    - i) The respondent is hereby restrained from undertaking any disciplinary action against the claimant on matters within its possession, knowledge and custody as at February 3, 2017;
    - ii) In the interest of justice, the caution and final [warning] letters of February 8, 2017 shall take their course in terms of the claimant's employment, the claimant shall be accorded a conducive work environment to undertake her duties with the respondent;
    - iii) Noting the orders above, for continued industrial peace between parties, no orders to costs.
  - f) That following the ruling, the claimant resumed her duties at the bank where she was assigned a new role as relationship manager.
4. The claimant accuses the respondent of persistently persecuting her through allegations of underperformance, which she denies. She claims to have sought intervention by the respondent's Head Office in South Africa, which was not forthcoming.
  5. According to the claimant, it is at this point that she tendered her resignation out of frustrations. She then filed the present claim where she urges the court to find that she was constructively dismissed.
  6. The claimant depones that the factual similarities between the two claims arise from the fact that the start-off point in the claims is the same. She however maintains that the circumstances under which she filed the earlier suit and the present suit are different. She adds that the causes of action are also different.
  7. The claimant terms the preliminary objection as an attempt by the respondent to delay the matter and/or to gag her from laying out the facts of her case.



8. The parties' counsel made oral submissions before the court. The respondent relied on the decision in *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors* [1969] EA 696 where a preliminary objection was defined as one which:

“...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.”

9. In advancing its argument on res judicata, the respondent cited the case of *E.T v Attorney General & another* [2012] eKLR where it was held that parties cannot evade the doctrine of res judicata by adding other parties or causes of action in a subsequent suit.

10. On the issue of sub judice, the respondent relied on the decision in *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* where it was held:

“The purpose of the sub judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process and diminishing chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter.”

11. I have had occasion to peruse the court record in Cause No 460 of 2017 from which I draw the following observations:

- a) On March 8, 2017, the claimant filed a statement of claim alleging violation of her rights as an employee of the Respondent and seeking restraining orders barring the Respondent from undertaking a disciplinary hearing and/or action against the claimant;
- b) Alongside the statement of claim, the claimant filed a notice of motion under certificate of urgency by which she sought interim orders, restraining the respondent from undertaking a disciplinary hearing and/or action against the claimant;
- c) In a ruling delivered on May 11, 2017 my sister, Mbaru J issued orders as follows:
  - i) The respondent is hereby restrained from undertaking any disciplinary action against the claimant on matters within its possession, knowledge and custody as at February 3, 2017; and
  - ii) In the interests of justice the caution and final letters of February 8, 2017 shall take their course in terms of the claimant's employment; the claimant shall be accorded a conducive work environment to undertake her duties with the respondent.
- d) No further action was taken on this matter, which remains pending in the court system.

12. It would appear that the issues between the claimant and the respondent persisted and on August 21, 2017, the claimant tendered her resignation, which the respondent accepted by its letter dated August 23, 2017. That separation is the subject of the present case being, Cause No 1340 of 2018.

13. From the court record, it is evident that there was no final determination in Cause No 460 of 2017 and the issue of res judicata does not therefore arise.



14. However, it is also evident that the issues giving rise to both cases are the same and what the claimant ought to have done was to amend her claim in Cause No 460 of 2017 to include the emerging developments regarding her employment with the respondent, and not to file a fresh suit altogether.
15. In the interest of justice, I will not accede to the respondent's request to strike out the claimant's pleadings; instead i will allow the claimant the opportunity to regularise her pleadings in light of the findings in this ruling.
16. The costs of the application will be in the cause.
17. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 26<sup>TH</sup> DAY OF JANUARY 2023**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

**Mr. Muchoki for the Claimant**

**Mr. Okweh Achiando for the Respondent**

