



**Kijusa v Race Guards Limited (Cause 641 of 2016)
[2023] KEELRC 1770 (KLR) (25 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1770 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 641 OF 2016**

**JK GAKERI, J
JULY 25, 2023**

BETWEEN

PATRICK KIJUSA CLAIMANT

AND

RACE GUARDS LIMITED RESPONDENT

RULING

1. This is the Respondent’s Preliminary Objection dated October 19, 2022 objecting to the Claimant’s suit on the grounds that;
 1. The claim is fatally and incurably defective in law as it offends the provisions of Section 7 of the Civil Procedure Act, Section 47 and 49 of the Employment Act as the claim was heard, determined and an Award made by the Kiambu Labour Office and as such is res judicata.
 2. The claim herein is fatally and incurably defective as it offends the provisions of Section 12(5) (b) of the Employment and Labour Relations Court Act as it does not constitute an Appeal provided under Section 12(5)(b) of the Employment and Labour Relations Court Act.
 3. The claim herein essentially constitutes an initial claim and/or suit in further offense to Rule 8 of the Employment and Labour Relations Court (Procedure) Rules, 2016.
 4. The claim should thus be struck out with costs.
2. A copy of a similar Preliminary Objection dated June 22, 2021 is also on record. It is unclear to the court if the same was prosecuted and concluded.

Respondent’s submissions

3. Counsel for the Respondent submitted that correspondence on record revealed that the issue herein were heard, adjudicated and an Award made by the Kiambu County Labour Officer.



4. As to whether the instant suit was an appeal, counsel relied on the provisions of Section 12(5)(b) of the *Employment and Labour Relations Court Act*, 2011.
5. Counsel further relied on Rule 8 of the *Employment and Labour Relations Court (Procedure) Rules*, 2016 on appeals.
6. Counsel submitted that since the Claimant was aggrieved by the decision made by the Kiambu County Labour Officer, he ought to have filed an appeal and a fresh claim was unsustainable.

Claimant's submissions

7. Counsel submitted that Preliminary Objection required clarity as its effect was to determine the point of objection. That in its response, the Respondent averred that the Claimant declined to participate in the arbitration despite having commenced the same.
8. Counsel submitted that by letter dated October 8, 2015, the Kiambu County Labour Officer requested the Respondent to deposit Kshs 103,386.50 on or before October 23, 2015 and the Respondent did not comply.
9. That no decision was made by the parties as no agreement was arrived at for the matter to be concluded and no payment was made.
10. That the Respondent had not provided a certificate of payment and the matter was not *res judicata*. At any rate the court had unlimited jurisdiction.
11. Counsel submitted that the Preliminary Objection before the court was frivolous and vexatious as it did not meet the threshold provided by Order 2 Rule 5 of the *Civil Procedure Rules*, 2010 and no reasonable cause of action had been disclosed.
12. Counsel attached the decision of Wasilwa J. in *Francis Momba V Joel Yducha* (2020) eKLR to reinforce the foregoing submission.
13. Counsel prayed for costs.

Determination

14. The salient issues for determination is whether there is a competent Preliminary Objection before the court and whether the claim herein should be struck out.
15. As to whether the objection before the court meets the threshold of a Preliminary Objection, the home port is the locus classicus enunciation of the threshold by the Court of Appeal in *Mukisa Biscuits Manufacturing Co. Ltd V West End Distributors Ltd* (1969) EA 696 as follows;

Law JA;

“So far as I am aware, a Preliminary Objection consists of a pure point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer dispute arbitration. . .”



16. Sir Charles Newbold P added;

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion . . .”
17. Similarly, in *John Musakali V Speaker County Assembly of Bungoma & 4 others* (2015) eKLR, the court stated as follows;

“The position in law is that a Preliminary Objection should arise from the pleadings and on the basis that the facts are agreed by both sides. Once raised, the Preliminary Objection should have the potential to disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained that would not be a suitable Preliminary Objection on a point of law.”
18. Ojwang J. (as he then was) expressed similar sentiments in *Oraro V Mbaja* (2005) KLR 141 that;

“ . . . Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence. . .”
19. From the foregoing, it is clear beyond peradventure that a Preliminary Objection must raise a point of law and the circumstances of the case must be such that the facts pleaded are not disputed.
20. I will now proceed to determine whether the Respondent’s objection meets the threshold set forth above.
21. The Respondent is challenging the Claimant’s suit on the premise that it was heard and determined by the Kiambu County Labour Officer on an unspecified date and other than two letters from the Ministry of Labour, Social Security and Services, Department of Labour, Kiambu County to the Managing Director of the Respondent dated August 14, 2015 and October 8, 2015 respectively, the Respondent has not attached any evidence of a conciliation document executed by both parties as evidence of the alleged determination of the issues raised by the Claimant.
22. Although the letter dated October 8, 2015 makes reference to a joint conciliation meeting held on August 28, 2015, it makes no suggestion that the parties had agreed to the contents of letter dispatched to the Respondent more than one (1) month after the alleged meeting.
23. The hearing, determination and Award referred to by the Respondent’s counsel in its objection herein is not apparent from the documentation on record.
24. If indeed there was an agreement by all the parties, such agreement cannot be ignored and the party challenging the agreement would bear the burden of establishing otherwise.
25. The Respondent has not availed a settlement agreement binding on both parties.
26. (See *Fatuma Hassan V Sports Management Board* (2019) eKLR and *Daniel Njuguna Muchiri V Sugar Bakery Ltd* (2019) eKLR.)
27. More significantly, certain facts are disputed, such as length of employment and payment of dues.



28. Relatedly, the contention that the Claimant’s suit ought to have been an appeal against the decision of the Labour Officer is puzzling as is the contention that the matter is *res judicata*.
29. Whereas parties are encouraged to explore other ways of resolving disputes as ordained by Article 159 of the [Constitution](#) of Kenya, 2010, the decisions made in such forums are not court decisions unless adopted by the court as such at the instance of the parties.
30. This is simply because those other dispute resolution mechanisms are consensual and the outcome may be challenged in court by either party and the court is obligated to give a determination.
31. As regards *res judicata*, Section 7 of the [Civil Procedure Act](#) is clear that;

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue is 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.
32. Section 2 of the [Civil Procedure Act](#) defines a suit to mean “all civil proceedings commenced in any manner prescribed.”
33. Clearly, the doctrine of *res judicata* is only applicable where judicial proceedings have taken place not a complaint made to the Labour Officer. Equally, proceedings before the Labour Officer who acts as a conciliator are not a suit and the outcome is an agreement as opposed to a court decision capable of being appealed against in a higher court.
34. The last requirement of *res judicata* makes it crystal clear that the court that heard the earlier suit was competent to hear and determine the subsequent suit or the suit in which the issue is raised.
35. (See [Independent Electoral and Boundaries Commission V Maria Kiai & 5 others](#) (2017) eKLR on the requirements or elements of *res judicata* and its essence in litigation, [C.K. Bett Traders Ltd & others V Kennedy Mwangi Bealine Kenya Auctioneer](#) (2021) eKLR and the Court of Appeal decisions in [John Florence Maritime Services Ltd & another V Cabinet Secretary for Transport and Infrastructure & 3 others](#) (2015) eKLR, [Accredo AG & 3 others V Steffano Uccelli & another](#) (2019) eKLR and the Supreme Court decision in [Kenya Commercial Bank Ltd V Muiri Coffee Estates Ltd & another](#) (2016) eKLR for a lucid elucidation of the doctrine of *res judicata*.)
36. From the foregoing, it is unmistakable that the Respondent’s objection herein does not meet the threshold of a Preliminary Objection as enunciated in *Mukisa Biscuits Manufacturing Co Ltd V West End Distributors Ltd* (*Supra*) and is for dismissal and it is accordingly dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 25TH DAY OF JULY 2023

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments



and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

