



**Chumba v Wells Fargo Limited (Cause E171 of 2023)
[2023] KEELRC 1874 (KLR) (24 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1874 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E171 OF 2023
NZIOKI WA MAKAU, J
JULY 24, 2023**

BETWEEN

JOSEPH KIPKEMOI CHUMBA CLAIMANT

AND

WELLS FARGO LIMITED RESPONDENT

RULING

1. The respondent/applicant seeks in the notice of motion expressed to have been brought under Rules 13(5) and 17(1) of the [Employment and Labour Relations Court \(Procedure\) Rules](#), section 7 of the [Civil Procedure Act](#), cap. 21 Laws of Kenya as well as the inherent powers of the Court and all other enabling provisions of the law for orders that:-
 - a. This application be heard in priority to any other proceedings herein and to the main suit.
 - b. The claimant's memorandum of claim be struck out.
 - c. The costs of this application and of the suit be awarded to the respondent.
2. The application was premised on the grounds that the claimant filed suit being Nairobi ELRC No. E004 of 2021 Joseph Chumba versus Wells Fargo Limited asserting a dispute with respect to inter alia alleged unfair labour practices and unfair termination on account of redundancy. The claimant case was based upon his contract of employment with the respondent and sought damages for unfair termination among other reliefs. That through his Statement of Claim dated March 1, 2023, the claimant has instituted suit against the respondent claiming payment of house allowance asserted to be an entitlement arising from his employment relationship with the respondent. The claimant is litigating under the same title as in ELRC No. E004 of 2021 over an issue which was directly and substantially in issue in the said suit. The Application was supported by the affidavit of Mohini



Chauhan. The respondent asserts that the matter raised in this Statement of Claim is res judicata in that the claim for house allowance might and ought to have been made a ground of attack in ELRC No. E004 of 2021, and is therefore deemed to have been a matter directly and substantially in issue in the earlier suit. The respondent argues that these proceedings are an abuse of court process and is an attempt by the claimant to litigate in instalments, which is not permitted in law. Further the claimant has failed to disclose the material fact with respect to the previous litigation to the court.

3. The claimant in his response asserts on the grounds filed in opposition to the motion dated April 17, 2023 titled Grounds of Objection that the defendant's application is unmeritorious, lacking in substance, incompetent, fatally defective and an abuse of the courts process. That the orders sought are incapable of being granted on the basis or grounds set out in the application. That the defendant raises issues of striking on the memorandum of claim. The claimant/respondent thus urged that the said application dismissed with costs.
4. The application was disposed of by way of written submission. In its submissions, the respondent/applicant submits that the claimant is a former employee of the respondent whose employment was terminated on account of redundancy on August 31, 2020. The respondent submits the claimant filed suit against the respondent on January 4, 2021, being ELRC No. E004 of 2021 Joseph Chumba versus Wells Fargo Limited. It was submitted that in that suit, the claimant asserted unfair labour practices, and sought damages for among other reliefs, unfair termination. The respondent submits the case was heard and on January 31, 2023, Rika J. delivered his judgment and dismissed the suit in its entirety. The respondent submits that the claimant thereafter instituted the present suit seeking house allowance, an entitlement he asserts to have arisen from his contract of employment with the respondent. The respondent submits the present suit is for striking out and cites 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.”

5. It is submitted that its not in dispute that the parties in this suit are similar and litigating under the same title as in ELRC No. E004 of 2021. The respondent submits the question for determination is whether the claimant's entitlement to house allowance was directly and substantially in issue in the former suit. The respondent submits that under the explanation to section 7, the law provides that any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. It submits that this principal was restated by the Court of Appeal in *Mburu Kinyua v Gachini Tuti* [1976-80] 1 KLR 790 where the court held that an issue which ought to have been made a ground of attack or defence in a former suit is deemed to have been a matter directly and substantially in issue in such a suit. The respondent cited the decision of the Court of Appeal in [UAP Provincial Insurance Company Ltd v Michael John Beckett](#) [2013] eKLR which cited with approval the decision of [Henderson v Henderson](#), where Wigram VC stated:

“...where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because



they have, from negligence, inadvertence, or even accident. omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time."

6. The respondent submits that section 12(a) of the *Employment and Labour Relations Court Act* provides that the court has jurisdiction to hear and determine disputes relating to or arising out of employment between an employer and employee and that ELRC No. E004 of 2021 dealt with a dispute arising out of the employment relationship between the claimant and the respondent. The respondent submits the entitlement and payment of house allowance arises from the parties' employment relationship and that this is an issue which ought to have been a ground of attack and belonged to the subject of litigation in ELRC No. E004 of 2021 and was therefore substantially in issue in the suit. The respondent submits that the documents produced by the claimant in support of his claim are his employment contract, his payslip and that these are documents that have been in the claimant's possession all along. A party exercising reasonable diligence would have brought forward the claim in the former suit and that the assertion that the failure to include the claim for house allowance in the former suit was an omission by his advocate which was not deliberate and does not preclude him from claiming the house allowance does not hold water. The respondent submits that an omission to bring forward part of the suit which ought to have been brought in the former suit in of itself is not an exception to the bar of res judicata as there are no special circumstances in this case to exempt the claimant from the application of res judicata. The respondent submits that a case belongs to a litigant who must pursue his matter. It cites the decision in *Bi-Mach Engineers Limited v James Kaboro Mwangi* [2011] eKLR, where the Court of Appeal in dismissing an application to file an appeal out of time held that:-

"It is not enough simply to accuse the advocate of failure to inform as if there is no duty on the client to pursue his matter. If the advocate was simply guilty of inaction, that is not an excusable mistake which the court may consider with some sympathy. The client has a remedy against such an advocate. I would in the circumstances be disinclined to exercise my discretion in favour of the applicant."

7. The respondent submits that the same principles apply equally to this case and that it is the litigant who knows the remedies he is seeking in a suit, and it is his responsibility to ensure that these remedies are included in his suit papers. The respondent cites Spencer Bower, Turner and Handley, *The Doctrine of Res Judicata* (Butterworths 1996) at page 252, para 445 where the author when considering the extended doctrine of res judicata states:

"it was followed in *MacDougall v Knight*, where the plaintiff who had failed in a libel action based upon parts of a pamphlet brought a second action based on other parts. The court held that the action was barred by res judicata, but in any event was an abuse of process."

8. The respondent submits that at paragraph 39 of the judgment by Rika J. in ELRC No. E004 of 2021, the court noted that the claimant had conceded that he did not have further claims from the respondent. To that extent, there is no basis whatsoever for the claimant to assert any claims against the respondent. This suit is therefore an abuse of court process.
9. The claimant on his part submitted that the issues for determination are whether (i) the claimant could institute a suit and (ii) whether the claimant's suit is *res judicata*. The claimant submits that he filed a suit in the Employment and Labour Relation Court at Nairobi claiming compensation for violation



of constitutional rights and 12 months salary as damages and that through a judgement delivered by Justice Rika, the claim was dismissed with no orders on cost. The claimant submits that the issue of house allowance was never raised in the previous suit and therefore was not directly and substantially in issue. The claimant cites the the case of *Brar v Wareng Quarry & another* [1978] eKLR, where the Court of Appeal while dealing with the same issue stated as follows:-

“It is my view that as rule 53 stands, the court must at least say whether or not the property in question was or was not liable to attachment If the court finds the property was not liable to attachment it would then be open to the aggrieved party to seek appropriate remedy which may be an action to recover damages against those concerned.”

10. The claimant submits that objection proceedings before Rika J. had been taken pursuant to section 43 of the *Employment Act* and article 41 and 31 of the *Constitution* of Kenya. That the court made a finding that the claimant did not have good ground to file a claim in court challenging the redundancy process, after he had received redundancy package from the respondent and conceded that he did not have further claim from the respondent. The claimant submits that there may well be infirmities in the redundancy process, and without his discharge of the respondent, the court would have taken time to analyse them and make a finding on whether the infirmities rendered redundancy and eventual termination of employment an unfair exercise, warranting compensation but the parties agreed that once the claimant was paid redundancy package there would be no further claims and the court is not mandated to go beyond what was agreed by the parties. The claimant submits that he has a right to sue in a new case of action against the respondent.

11. As to whether the suit before the court is res judicata, the claimant submits that section 7 of the *Civil Procedure Act* defines res judicata 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, 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.”

12. The claimant submits that the provision is on the fundamental doctrine that there should be an end to litigation and that the doctrine of res judicata may be pleaded by way of estoppel so that where a judgement has been given future and further proceedings are estopped. The claimant submits the rationale for the doctrine of res judicata exists so that a party should not endlessly be dragged into litigation over the same issue or subject matter that has otherwise been conclusively determined by a court of competent jurisdiction. In that respect, the claimant refers to the decision in the case of *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others* [2017] eKLR where the Court of Appeal held that

“...for the bar of *res judicata* to be effectively raised and upheld on account of a former suit the following elements must be satisfied as they are rendered not in disjunctive but conjunctive terms:

- a. The suit or issue was directly and substantially in issue in the former suit.
- b. That former suit was between the same parties or parties under whom they or any of the claim.



- c. Those parties were litigating under the same title
 - d. The issue was heard and determined in the former suit.
 - e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."
13. The claimant submits that the court went on to state on the role of the doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and afford parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping by a multiplicity of suits and fora, to obtain at last outcomes favourable to themselves without it there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The claimant submits that the foundations of *res judicata* thus rest in the public interest for swift sure and certain justice. The claimant submits that the parties in previous case are the same as those in the present suit, however, the issues in the previous suit are not the same as the issue in the present suit and that the issue before the court is whether the claimant is entitled to house allowance in the circumstance therefore he submits the application does not fit the criteria for holding the suit *res judicata*. The claimant thus prays that the application be dismissed with cost.
14. The court has considered the motion before it, the submissions of parties, the law and cited authorities in coming to this decision. The issue for determination is whether the claimant's claim is *res judicata*. It is provided under the law that a party cannot litigate over matters that were directly and substantially in issue in the earlier suit initiated by parties litigating in the new suit under the same head. In this case, the claimant seeks house allowance which the respondent asserts was a matter directly and substantially in issue in the previous suit between them. The claimant on his part asserts the matter of house allowance was not in issue in the previous suit.
15. In a decision cited by the claimant, the Court of Appeal in a 5 Judge bench comprising of Makhandia JA, Ouko JA (as he then was), Kiage, M'Inoti & Murgor, JJA [in the matter of Independent Electoral and Boundaries Commission v Maina Kiai & 5 others](#) [2017] eKLR held as follows:
- "The doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and afford parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping by a multiplicity of suits and fora, to obtain at last outcomes favourable to themselves without it there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice.
- There is no dearth of learning or authority surrounding this issue, and this court has expressed itself on it endless times. In one recent decision, [William Koross v. Hezekiah Kiptoo Komen & 4 others](#) [2015] eKLR, it was stated;
- "The philosophy behind the principle of *res judicata* is that there has to be finality; litigation must come to an end. It is a rule to counter the all-too human propensity to keep trying until something gives. It is meant to provide rest and



closure, for endless litigation and agitation does little more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go."

Speaking for the bench on the principles that underlie *res judicata*, Y.V. Chandrachud J in the Indian Supreme Court case of [Lal Chand v Radha Kishan](#), AIR 1977 SC 789 stated, and we agree;

"The principle of *res judicata* is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue."

The practical effect of the *res judicata* doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties – because it is the court itself that is debarred by a jurisdictional injunction, from entertaining such suit."

16. I am in entire agreement with the reasoning and finding of the court of Appeal that the practical effect of the *res judicata* doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties – because it is the court itself that is debarred by a jurisdictional injunction, from entertaining such suit. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping by a multiplicity of suits and fora, to obtain at last outcomes favourable to themselves. Without it there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice. I therefore cannot entertain the claimant's suit herein as it is barred by the doctrine of *res judicata*. His prayers for house allowance were an issue in the previous case and failure to articulate them there was fatal on his part. As such the present suit is dismissed with costs for being *res judicata*.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JULY 2023

NZIOKI WA MAKAU

JUDGE

