



Muliro v Kibabii University of Science and Technology (Employment and Labour Relations Cause E003 of 2023) [2023] KEELRC 1744 (KLR) (13 July 2023) (Ruling)

Neutral citation: [2023] KEELRC 1744 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS CAUSE E003 OF 2023**

**JW KELI, J
JULY 13, 2023**

BETWEEN

WALUBENGO SINGORO MULIRO CLAIMANT

AND

KIBABII UNIVERSITY OF SCIENCE AND TECHNOLOGY RESPONDENT

RULING

1. The Respondent in objection to the Claimant's Statement of Claim dated February 7, 2023 filed a Preliminary Objection dated April 3, 2023 through its representatives, the Federation of Kenya Employers, seeking to strike out the Claimant's Claim on the allegations that:-
 - a. The Statement of Claim filed against the Respondent is incurably defective and incompetent as it has been filed in violation of the express and mandatory provisions of Section 90 of the [Employment Act, 2007](#);
 - b. The claim is similarly *res judicata* on the ground that the Claimant's allegations of unfair termination of employment was a matter that was directly and substantially in issue in Bungoma ELRC Cause No 61 of 2018 Walubengo Singoro Muliro vs Kibabii University, where the same was dismissed.
 - c. The suit is fatally defective, incompetent and an abuse of the court process deserving to be struck out with costs to the Respondent.
2. The Preliminary Objection was premised on the following grounds: -
 - i. The cause of action arose when the Claimant was dismissed from employment vide a summary dismissal letter dated October 8, 2018, while he filed the instant suit on March 16, 2023, contrary to having filed it on or before October 7, 2021.



- ii. At the time of filing this instant suit it was well over three years since the cause of action arose and pursuant to Section 90 of the [Employment Act](#), which is couched in mandatory terms, the claim is incurably defective.
 - iii. Section 90 (above) does not donate to this Honourable Court jurisdiction to entertain a suit filed out of time nor give it power to extend time within which to file a suit and affords the Respondent a defence of laches against indolent Claimants.
 - iv. The substantive issues raised in the instant case were directly and substantially in issue in Bungoma ELRC Cause No61 of 2018, [Walubengo Singoro Muliro vs Kibabii University](#) and had been determined to finality where a Judgement was delivered on December 1, 2022 and is therefore subject to the doctrine of *res judicata*, that guarantees the end to litigation.
 - v. The Claimant having filed this suit which has already been heard viva voce, has nothing new to agitate in court, save to gain an undue advantage over the Respondent, knowing in advance what the Respondent's evidence which was rendered in the earlier suit.
3. The court on April 25, 2023 directed that the Notice of Preliminary Objection dated April 3, 2023 be canvassed by way of written submissions. The Respondent was to file its submissions within seven(7) days and the Claimant upon service; to respond to the Preliminary objection and file its submissions simultaneously.
 4. The Respondent's written submissions were drawn and filed by the Federation of Kenya Employers on the May 4, 2023.
 5. When the matter came up for mention on May 22, 2023, the Respondent confirmed having failed to serve the Claimant its submissions, but agreed to serve on the same day. The Court directed the Claimant to file its submissions before the next mention date set for June 20, 2023. The Claimant's written submissions on the Preliminary objection were drawn and filed by Aileen Alluso Ingati - Advocate on June 20, 2023.
 6. The Claimant opposed the Preliminary objection and urged as follows:-
 - i. That contrary to the Respondent's assertion that the Preliminary objection was unopposed and it should be allowed, the Claimant argued that the court on May 22, 2023 had directed that the Claimant need not file a response to the Preliminary Objection but submissions alone could suffice.
 - ii. That the Respondent's contention that the suit was *res judicata* was misleading, as the previous suit Bungoma ELRC Cause No61 of 2018, [Walubengo Singoro Muliro vs Kibabii University](#) was not determined on merit and was rather struck out on a technicality that had been occasioned by the Claimant's previous counsel.
 - iii. That the suit Bungoma ELRC Cause No61 of 2018, [Walubengo Singoro Muliro vs Kibabii University](#) was fixed for hearing on March 24, 2020 and the Respondent herein after the conclusion of the hearing, raised an objection in its written submissions, that mislead the court into failing to deliver a judgement on merit, but rather dismissed it on technicalities that had already agreed upon through consent between the parties.
 - iv. That in accordance with Article 159(2) (d) of the [Constitution](#), justice should be administered without undue regard to procedural technicalities and hence substantive justice takes priority over procedural technicalities.



- v. That pursuant to Article 50(1) of the Constitution, the Claimant was denied the right to fair hearing.
- vi. That under Article 25 of the Constitution, the application of the doctrine of *res judicata* will limit the Claimant's right to fair trial.
- vii. That *res judicata* does not apply in this instant case as the Claimant's fundamental rights were violated during the earlier proceedings by virtue of not having being heard and determined.
- viii. That the Respondent's assertion that the instant suit was filed out of the statutory timeline contrary to Section 90 of the Employment Act, is false, as the Claimant filed its claim without undue delay, noting that the previous proceedings were dismissed on a mere technicality and the instant claim filed without delay after determination of the previous proceedings.
- ix. That the Claimant filed this claim at this time which was beyond its control as the previous proceedings was being heard and determined and the Claimant could not file a claim beforehand within the prescribed timeline.
- x. That the delay in filing was not deliberate and should not shut the door of justice on that threshold on the Claimant.
- xi. That the Respondent will not suffer any prejudice, if the extension of time is granted for the matter to be re-heard.
- xiii. The Claimant opines that this Court has the unfettered jurisdiction to entertain the suit and make such orders as are expedient.

Determination

7. After carefully considering the application and the entirety of the materials submitted before me, it appears to me the respondent objects to the preliminary objection and that the salient issues to be determined in this ruling are:
 - a. Whether the suit is time barred under Section 90 of the Employment Act, 2007?
 - b. Whether the instant suit is *res judicata*?

Issue a). Whether the suit is time barred under Section 90 of the Employment Act, 2007.

8. It was submitted for the Respondent that the Court does not have jurisdiction to entertain a suit filed out of time nor the court have jurisdiction to extend time to file suit out of time pursuant to Section 90 of the Employment Act.
9. The Respondent relied on the authorities in Nairobi CA No 158 of 2015- G4S Securiry Services (K) Ltd ; Kennedy Muriuki Ndwiga Vs Kenya Credit traders Limited (2020) eKLR and Gerald Muli Kiilu V Barcalys Bank of Kenya Ltd(2016) eKLR to stress its argument that the statutory limitation of time for employment matters bars the court from proceeding with a suit and the bar is not a mere technicality.
10. Rightly so, Section 90 of the Employment Act is framed in mandatory terms that a claim based on a contract of employment must be filed within 3 years. This Court is denied jurisdiction to extend time



to file suits not lodged with the court within 3 years from the date the cause of action arose. Section 90 of the Act provides that:

“90. Notwithstanding the provisions of section 4(1) of the *Limitation of Actions Act*, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.”

11. The court holds that pursuant to section 90 of the *Employment Act* the limitation period, the court lacks jurisdiction to extend time in matters based on an employment contract. The period can only be extended in claims founded on tort and only when the applicant satisfies the requirements of Sections 27 and 28 of the *Limitation of Actions Act* which provisions do not apply in employment and labour relations claims.
12. For avoidance of doubt the Court has perused the prayers in the Claimant’s Statement of Claim being (a) to (i) and, it is clear that the prayers are with respect to an employment contract and further challenge the merit of its decision which then become an issue of appeal.
13. Termination of an employment contract kicks in from the date stated in the letter of termination, and in the instant suit, the Claimant’s letter of dismissal from employment was dated October 8, 2018. This was the time the cause of action herein arose and this day marked the beginning of the count down to the three years’ statute limitation period. The instant suit was filed on the March 16, 2023. This was outside the three years period.
14. The Claimant ought to have filed suit with regard to the summary dismissal within three years therefrom. Conspicuously, the Claimant had filed another suit Bungoma ELRC Cause No61 of 2018, *Walubengo Singoro Muliro Vs Kibabii University* on October 29, 2018, which had been filed within the allowed statutory timelines, the issue regarding this suit will be determined as a different issue.
15. The Claimant asserted in his submissions that he had come to court without delay and the delay in coming to court had been occasioned by the pendency of the previous suit Bungoma ELRC Cause No61 of 2018, *Walubengo Singoro Muliro Vs Kibabii University* which had not been determined and that he could only file the instant suit after the earlier suit was struck out on a technicality.
16. The Claimant relied on the authorities in *Hamilton Harrison & Mathews v Keroche Breweries Limited* [2021] eKLR; *Fabim Yasin Twaha v Timamy Issa Abdalla & 32 others* [2015] eKLR and *Nathaniel Ngure v Housing Finance* [2018] eKLR which related to the principles the court considers when granting orders relating to extension of time.
17. The Claimant did not place before this court an application for extension of time which could have steered this court’s finding on whether the matter merited an extension of time. An application for extension of time must be made before a matter is filed. Submissions do not amount to an application. Guided by the Supreme Court’s decision in *Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 others*, Supreme Court Application No 16 of 2014[2014] eKLR which laid out the principles governing the grant of extension of time :-

“Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;



1. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
 2. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
 3. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
 4. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 5. Whether the application has been brought without undue delay; and
 6. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
18. As no application for extension of time was made before it, the court cannot therefore determine such an application alluded to by a party in its submissions. The court further holds it lacks jurisdiction to extend time of filing claims under section 90 of the Employment Act which provides:-
- ‘Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained of or in the case of continuing injury or damage within twelve months next after the cessation thereof.’(Emphasis of the mandatory nature of the provision)
19. What this court is called to consider is whether the instant suit was filed within the stipulated statutory timelines available for such a suit.
 20. The Claimant having been dismissed on October 8, 2018, the fact that this suit was filed 4 years 5 months and 8 days later, denotes that the suit was filed one year 5 months and 8 days late and outside the limitation period of three years.
 21. Pursuant to Section 90 of Employment Act, such cannot be cured in any other way save for the court to stop as there is no jurisdiction.

Issue b. Whether the instant suit is *res judicata*?

22. Having decided that this court lacks jurisdiction to hear the instant suit having being filed out of time; I will nevertheless consider the issue of *res judicata* raised in this application.
 1. The respondent has submitted that the instant suit is *res judicata* having being heard and determined in Bungoma ELRC Cause No61 of 2018, Walubengo Singoro Muliro v Kibabii University where a judgement was delivered in December 1, 2022.
23. The Claimant in a concession submitted that indeed a suit had been filed but the same was dismissed on technical grounds and not on merit and that precipitated the filing of the current suit.



24. The law pertaining to the doctrine of *res judicata* is captured under the provision of Section 7 of the [Civil Procedure Act](#) 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 by such court.”

25. The circumstances under which *res judicata* applies were discussed by Osiemo, J. in the case of [Francis Wabururu Njau v Bernard Kagia Njuguna](#)[2009] eKLR as follows:

“To constitute *res judicata* the following conditions must concur.

(1) The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue either actually or constructively in the former suit.

(2) The former suit must have been between the same parties or between parties under whom they or any of them claim.

(3) The parties aforesaid have litigated under the same title in the former suit.

(4) The court which decided the former suit must have been a court competent to try the subsequent suit in which such issue is subsequently raised.

(5) The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided in the first suit.

In order that a decision in a former suit may operate as *res judicata* in a subsequent suit, it is necessary that the court which tried the former suit must have been a court competent to try the subsequent suit.”

26. It is not in dispute that the parties in Bungoma ELRC Cause No 61 of 2018, Walubengo Singoro Muliro v Kibabii University are the same parties in the current suit.

27. It is not in dispute that the issue in ELRC Cause No61 of 2018, of unfair termination, is the same issue in the current suit and brought by the same parties.

28. The court in ELRC Cause No61 of 2018 heard the matter and considered the parties cases and delivered a judgement on December 1, 2022 as follows:-

“The court holds that it cannot determine merits of a case founded on illegalities on face of its record. The claim dated October 25, 2018 is dismissed with costs to the respondent for being fatally defective.”

29. The Claimant was heard on merit and the court upon considering the parties’ documents pronounced itself that the claimant’s case was founded on an illegality.

30. The court is guided by the decision in [Cosmas Mrombo Moka v Co-operative Bank of Kenya Limited & another](#) [2018] eKLR where Justice P.J.O. Otieno stated as follows: -



- “24. The purpose and only object of the *res judicata* rule is to bring litigation to finality so that nobody is vexed or just harassed with unwarranted litigation and attendant costs over same matter twice or more times over[1].
- “25. That is the only way respect for court process can be built and maintained. Concomitantly, the only purpose of the court is to determine disputes brought before it by parties in a robust and in a fair and proportionate manner. Fair determination connote that the thrust of the dispute has been placed before the court and a determination on the merits rendered. Here determination on the merits need not mean having oral evidence only. It includes consideration of merits even in applications like striking out and summary judgment where the merit of the case or defense is considered, tested and a determination rendered. Where however, the final determination is grounded on lapses like failure to attend court or take steps in prosecuting the case, the court would not have gone into the merits. I am always reminded that ‘the court is often said to exist from the purpose of deciding the rights of the parties not for purpose of imposing discipline[2].....’”(Emphasis added).
31. A reading of the above decision denotes that, the consideration by a court an application to strike out a suit is considered fair determination on merit. The Respondent in the earlier suit through their statement of defence and submissions stated that the Claimant’s verifying affidavit sworn on October 25, 2018 and witness statement of even date adopted in court were not executed by the claimant and offend the provisions of *Oaths and Statutory Declarations Act* hence claim was void ab initio and prayed That the document titled authority to swear affidavit and pleadings executed by claimant be struck off.
32. This court vested with competent jurisdiction rendered its judgement holding that the verifying affidavit and the witness statement all dated October 25, 2018 were fatally defective having been signed by unauthorized third party in the name of the claimant and the court struck out the said verifying affidavit and witness statement all dated October 25, 2018 for being illegalities.
33. The Court in the earlier suit held that it could not delve into the suit’s merit when the same could amount to deciding a suit on an illegality. The claim of forgery as was pointed out in the said judgement was not a mere technical issue.
34. The Claimant was at liberty after the judgement in ELRC Cause No61 of 2018, to file an appeal to the said judgement, on the grounds alleged in this instant application that the court failed to consider the merits of the case; rendered judgement dismissing his claim on procedural technicalities and denied the Claimant a fair hearing, however, the Claimant went ahead and filed the instant suit.
35. In any event, even if the current suit had not been rendered *res judicata*, the instant suit would fail based on the first issue of limitation of time, having being filed beyond the statutory timelines allowed for employment matters.
36. In view of my analysis of the facts and the law herein above, it is my finding that the Respondent’s Preliminary Objection is merited. The upshot is that the Preliminary Objection dated April 3, 2023 succeeds and I hereby order the Claimant’s statement of claim herein be struck out.
37. To temper justice with mercy the suit having not proceeded on merit, the court makes no order as to costs.
38. Right of appeal in 30 days.
39. It is so Ordered.



DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 13TH DAY OF JULY 2023.

JEMIMAH KELI

JUDGE

IN THE PRESENCE OF

Court Assistant: Lucy Macheso

Claimant :- Thuku

Respondent: DickenOuma

