



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**APPEAL NO. E025 OF 2021**

**GILBERT OTIENO OKITE.....APPELLANT**

**VERSUS**

**KENYA SUGAR RESEARCH FOUNDATION (AFFILIATED IN KENYA**

**AGRICULTURAL RESEARCH LIVESTOCK ORGANIZATION.....RESPONDENT**

***(Being an appeal from the Ruling of the Hon. W. K. Onkunya S.R.M***

***delivered on the 25.06.2021 in CMELRC NO. 127 OF 2020)***

**JUDGMENT**

1. The Appellant lodged Cause Number 127 of 2020 at the Kisumu Chief Magistrates Court against the Respondent, seeking three months' salary in lieu of notice, compensation for unlawful termination, 10-year payment till retirement, house allowance, leave allowance, medical allowance, commuter allowance and annual increments amongst others.
2. The Respondent filed a Preliminary Objection against the claim on two grounds, first being that the suit as filled is *Res Judicata* the same issues having been raised as between the same parties in **Civil Case No. 146 of 2010**. Secondly that the claim is time barred, the employer-employee relationship between the parties having ended on 21<sup>st</sup> April, 2010.
3. The Preliminary Objection was urged and a ruling rendered on 25<sup>th</sup> June, 2021, wherein the court upheld the Preliminary Objection, and thus striking out the suit, hence this appeal.
4. The Appellant being dissatisfied with the decision of the Trial Court, lodged this appeal. The appeal is premised on the following grounds:
  - i. That the Learned Trial Magistrate erred in fact and in law to arrive at the decision that the Appellant's suit is *Res Judicata*
  - ii. That the Learned Trial Magistrate's findings that the Appellant's suit is *res judicata* was against the weight of the evidence.
  - iii. That the Learned Trial Magistrate erred in both fact and law in finding that the Respondent's Preliminary Objection is merited whereas the same involved analysis of fact and evidence.
  - iv. That the Learned Trial Magistrate made a grave error in finding that the subject matter of the Appellant's suit is identical with HCCA NO. 146 OF 2010 and CIVIL APPEAL NO. 93 OF 2014 when the same has never been heard substantively on merit.
5. The Appellant prays for reinstatement of his claim and the costs of the Preliminary Objection subject of this appeal.
6. The appeal was canvassed by way of written submissions, and both parties filed their submissions.

**The Appellant's Submissions**

7. The Appellant submitted that for the principle of *res judicata* to be effectively upheld, the requirements of Section 7 of the Civil Procedure Act, and the five essential elements set out by the Court of Appeal in ***Independent Electoral and Boundaries Commission V. Maina Kiai & 5 Others, Nairobi Civil Appeal No. 105 of 2017 (2017eKLR)*** must be met.

8. The Appellant submitted that the previous suits have never been determined on merit, and neither have they been determined by a court of competent jurisdiction. The Appellant further submits that Justice Chemitei never dealt with issues related to employment in the suit before the High Court on the basis of lacking in jurisdiction.

### **The Respondent's Submissions**

9. It is submitted for the Respondent that the Appellant's suit before the lower is *res judicata* by virtue of similar suits having been determined both by the High Court, and the Court of Appeal in **Civil Case No. 146 of 2010 – Gilbert Otieno Okite & William Omolo Okite V Kenya Sugar Research Foundation and Civil Appeal No. 93 of 2017- Gilbert Otieno Okite & William Omolo Okite V. Kenya Sugar Research Foundation**, and hence the appeal herein is without merit.

10. It further submitted for the Respondent, that the prayers in the suit determined at the High Court, and those in the suit subject of this appeal, are issues on employment and payment of terminal dues, hence the suit is *res judicata*. The Respondent sought to rely on Section 7 of the Civil Procedure Act to support this position. The Respondent further cited the case of **Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others (2017) eKLR** to support the position that the suit before the Lower Court is *res judicata*, and should be dismissed.

11. On the issue of the suit being time barred, the Respondent submitted that the Appellant filing suit before the wrong court, did not stop the clock from running. It is the Respondent's further submission that the employment relationship between the parties herein, terminated on 21/4/2010; more than ten years from the date the suit subject of this appeal was filed and thus rendering the suit statute barred by virtue of Section 90 of the employment Act, 2007. The Respondent cited **Civil Appeal No. 10 of 2016 – Albert Magu Musa v Samuel Kangundu Muchira & 3 Others** for the holding that the cause of action arose on the date the Appellant was terminated.

### **Analysis and Determination**

12. The appeal is premised on four grounds, but which grounds are repetitive, and which summarized, is that the Learned Trial Magistrate erred in fact and in law to arrive at the decision that the Appellant's suit is *Res Judicata*.

13. The Court of Appeal in **Musera vs. Mwechelesi & Another ([2007]) KLR 159**: stated as follows in regards to appeals:

*“We must at this stage remind ourselves that though this is a first appeal to us and while we are perfectly entitled to make our own findings on the evidence, the trial Judge has in fact made clear and unequivocal findings and as an appellate court we must indeed be very slow to interfere with the trial Judge's findings unless we are satisfied that either there was absolutely no evidence to support the findings or that the trial Judge must have misunderstood the weight and bearing of the evidence before him and thus arrived at an unsupportable conclusion.”*

14. Following the holding in the case cited herein, my role in this appeal, which is a first appeal, is to re-assess and re-evaluate the entire evidence tendered before the trial court and arrive at my own conclusions.

15. The Appellant is aggrieved by the decision of the Trial court declaring his suit *res judicata*. The Respondent has also contended that the suit subject of this appeal is time barred by dint of Section 90 of the Employment Act, 2007. The issues that present themselves for determination are whether the suit before the trial court is *Res judicata* and whether the claim is time barred.

### **Whether the Claim subject of the appeal is Res Judicata as determined by the Trial Court**

16. It is not disputed that the Appellant herein lodged **Civil Case No. 146 of 2010 – Gilbert Otieno Okite & William Omolo Okite V Kenya Sugar Research Foundation**, before the High Court at Kisumu, and later **Civil Appeal No. 93 of 2017- Gilbert Otieno Okite & William Omolo Okite V. Kenya Sugar Research Foundation**.

17. The doctrine of *res judicata* as correctly submitted by both parties to this suit, is anchored on Section 7 of the Civil Procedure Act. The principle has further been clearly set out by a plethora of court decisions including the case of **Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others (2017) eKLR** cited by both parties herein in support of their different positions.

18. The Court of Appeal in **Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others (2017) eKLR** set out the elements that must be satisfied for the bar of *res judicata* to be effectively raised and upheld in the following words:

*“a. the suit or issue was directly and subsequently in issue in the former suit.*

*b. the former suit was between the same parties or parties under whom they or any of them claim.*

*c. those parties were litigating under the same title*

*d. the issue was heard and finally determined in the former suit.*

*e. the court that formally heard and determined the issue was competent to try the subsequent suit in which the issue is raised.”*

19. The Appellant contends that for reason that the issues involving employer-employee relationship were not determined by the High Court

under **Civil Case No. 146 of 2010 – Gilbert Otieno Okite & William Omolo Okite V Kenya Sugar Research Foundation** for want of jurisdiction, the Trial Court’s finding that the claim is *res judicata* cannot stand. The Respondent’s stand point, is that the issues subject of the claim are similar to the issues subject of the suit before the High and the Court of Appeal and which according to her, were fully determined.

20. The elements set out by the Court of Appeal as being the final determinants of whether or not a suit is *res judicata*, are true in so far as the issues in **Civil Case No. 146 of 2010** were directly and subsequently in issue in **Cause No. 127 of 2020**, the suits were between the same parties and the parties were litigating under the same title.

21. I however disagree with the Trial Court on the last two elements of whether the issues were heard and finally determined in the former suit, and whether the court that formally heard and determined the issue was competent to try the subsequent suit in which the issue is raised. **Justice Kiage** in **Civil Appeal No. 93 of 2017**, had this to say on **Justice Chemitei’s** finding in **Civil Case No. 146 of 2010**:

**“The Learned Judge held that the issues of termination of employment whether unfair and the issues of outstanding dues could only be ventilated at the Labour Relations Court. He therefore did not determine any question concerning the employer-employee relationship that existed between the 1<sup>st</sup> Appellant and the Respondent.”**

22. Clearly therefore, the issues subject of the former suits, and which, though similar to those giving rise to **Cause No. 127 of 2020** that brings about this appeal, were never conclusively determined as to render the latter suit *res judicata*.

23. I find and hold that **Cause No. 127 of 2020-Gilbert Otieno Okite & William Omolo Okite V Kenya Sugar Research Foundation**, is not *res judicata* for reasons espoused above, and the finding of the Trial Court in this respect is set aside.

#### **Whether the Claim before the Trial Court is time barred**

24. The Appellant in his submissions, did not address the issue of whether or not the suit before the Lower Court is Statute barred, other than stating that he sought extension of time to file the suit, and which leave was granted.

25. The Respondent asserts that for reason that the Appellant was retired from the service of the Respondent on 21/4/2010, the suit is time barred by virtue of Section 90 of the Employment Act, 2007.

26. The Appellant in his Amended Memorandum of Claim, stated that he was retired from the service of the Respondent in the public interest on 21/4/2010. The Claim is dated 28<sup>th</sup> September, 2020 and filed on 29<sup>th</sup> September, 2020.

27. To determine whether or not **Cause No. 127 of 2020** is statute barred, the court has to determine the date when the cause of action accrued. The Court of Appeal in **Attorney General v Andrew Maina Githinji & Another (2016) eKLR**, held that once the employee received the termination letter, the termination took effect and the cause of action accrued and that was the date time began to run.

28. The **Black’s Law Dictionary (10th Edition)** defines the word “*accrue*” to means “*to come into existence as an enforceable claim or right.*” This court would then ask, when the Appellant’s claim became one capable of enforcement. The Appellant asserts under his claim, that his retirement from the service of the Respondent, amounted to termination, and which termination was unlawful, illegal and unprocedural, as the grounds for the retirement were not justified as he had been acquitted of criminal charges.

29. To my mind therefore, the cause of action in the claim accrued on the date of the letter of retirement in the public interest, and which has been stated to be 21/4/2010. In **Hilarion Mwabolo v Kenya Commercial Bank (2013) eKLR**, the court stated that: -

**“... termination kicks in from the date stated in the termination letter...”**

30. Having determined the date of accrual of the cause of action, the next question become, whether the claim is time barred. Section 90 of the Employment Act, 2007 states: -

**“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.”**

31. The suit subject of this appeal was filed in the year 2020; 10 years after the accrual of the cause of action. By dint of the foregoing provisions of Section 90, the claim is statute barred, having been filed after the three years prescribed by Statute.

32. The Appellant contended that he sought extension of time to file the suit before the lower court, and which leave was granted. The next question become whether the time lapse is cured by the leave to enlarge time.

33. In my opinion, the wording of Section 90 of the Employment Act, is couched in mandatory terms. The time provided therein is not elastic, and hence incapable of enlargement. The Court of Appeal while dealing with the issue of limitation in the case of **Beatrice Kahai Adagala v Postal Corporation of Kenya [2015] eKLR** stated that their hands were tied as Section 90 of the Employment Act 2007, is in mandatory terms that a claim based on a contract of employment must be filed within 3 years. In a further case of **David Ngugi Waweru v Attorney General & Another [2017] eKLR**, the Court of Appeal held that there is no room to extend time in cases of limitation under Section 90 of the Employment Act.

34. Consequently, I find and hold that the Appellant's claim in **Cause No. 127 of 2020**, is Statute barred.

35. The Trial Court did not address its self to the issue of the claim being time barred in spite the same being raised under the Preliminary Objection subject of the ruling giving rise to this appeal. Nonetheless, I proceed to find the claim statute barred, and further uphold the striking out of the Appellant's claim dated 28<sup>th</sup> September, 2020.

36. The upshot is that although the Appellant's claim is found not to be *res judicata*, the same is time barred by dint of Section 90 of the Employment Act, and the holding of the trial court is upheld and the appeal herein dismissed with costs to the Respondent.

37. Judgment accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 24<sup>TH</sup> DAY OF FEBRUARY, 2022.**

**CHRISTINE N. BAARI**

**JUDGE**

**Appearance:**

Mr. Gilbert Otieno Okite the Appellant present in person

N/A for the Respondent

MS. Christine Omollo - Court Assistant.