



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO

ELRC CAUSE NO. 52 OF 2019

GEOFFREY WAFULA OKUMU.....CLAIMANT

VERSUS

UNILIVER TEA KENYA LIMITED.....RESPONDENT

RULING

1. This ruling relates to the Respondent's preliminary objection dated 18.11.2019, which seeks to have the suit struck out with costs on grounds that:

- (a) The suit is *res judicata* Nairobi ELRC 1578 of 2017 and Nakuru ELRC Misc. Application no.1 of 2019.
- (b) The consent letter marking the matter settled is binding on the parties.
- (c) The claim is a duplication, bad in law and an abuse of court process.

2. The Preliminary Objection was served upon the claimant and later he was served with a hearing notice but he never attended court to oppose the objection. Never the less I have the duty to consider the objection on merits.

Issues for determination

3. I have carefully considered the pleadings, Notice of Motion dated 25.9.2019, Replying Affidavit sworn on 4.11.2019 and the notice of preliminary objection and the rival submissions. The issues for determination are:

- (a) ***Whether the objection meets the legal threshold.***
- (b) ***Whether the suit is res judicata.***
- (c) ***Whether the suit is an abuse of the process of the court.***

Whether the objection meets the required legal threshold.

4. The petitioner contends that the objection herein does not raise pure points of law but the 1st respondent is of a different view. I have considered the grounds raised in the objection and in **Mukisa Biscuits –vs Westend Distributor Ltd [1969] EA 696**, thus,

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all 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...”

5. The objection herein stands on two legs, namely, the suit is *res judicata* and also an abuse of the process of the court. The said points are pure points of law and if established, they can bring the suit to an end. Consequently, I find and hold that the objection has met the required legal threshold of a preliminary objection.

Whether the suit is res judicata

6. The respondent is referring to memorandum of agreement and a consent order between it and the claimant's trade union to establish the

said grounds objection. The said documents are annexed to the Replying Affidavit which is on record and the court has perused the same.

7. I have also noted from the court record that the claimant was served with the Affidavit and even admitted in the open court on 16.10.2019 that such agreement was negotiated by his union and it reduced his earlier dismissal to normal termination with benefits. His complain in this suit is that he should not be evicted from the respondent's staff house until he said paid his benefits as agreed in the said settlement.

8. The foregoing is evidence that the dispute herein has already been determined by court of competent jurisdiction and what the claimant is pursuing now is execution of the said determination through a fresh suit.

9. The foregoing is unacceptable under our rules of procedure because the issues raised in the instant suit were directly in issue in the said suits that were settle by consent between the claimant's union and the respondent. Consequently, I agree with the respondent that the suit herein is *res judicata*.

Whether the suit is an abuse of the court process

10. I will not belabor this point because in my view, it is obvious that, a party who brings a suit knowing very well that the issues therein have fully been determined by a court of competent jurisdiction is abusing the process of the court.

11. In view of the findings and observations made herein above, I allow the respondent's preliminary objection to the extent that the claimant's suit is struck out with costs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 30TH DAY OF MARCH 2022.

ONESMUS N MAKAU

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 April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE