



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1677 OF 2015

(Before Hon. Justice Dr. Jacob Gakeri)

JOSEPH KIOKO LANGI.....CLAIMANT

VERSUS

SPUR SECURITY SERVICES LIMITED.....RESPONDENT

RULING

1. By a Notice of raising a Preliminary Objection dated 21<sup>st</sup> September 2021, the Respondent raises a Preliminary Objection to the Claimant's Claim as being Res Judicata. That the Claimant's claim having been fully adjudicated upon and a judgment given by a Court in **Nairobi ELRC Cause No. 1569 of 2020 (Kenya Union of Commercial Food & Allied Workers Union v Spur Security Services Ltd)**, the current claim is *Res Judicata*.

2. The Preliminary Objection was slated for hearing on 29<sup>th</sup> November 2021. On the material day, Mr. Opendo, holding brief for Mr. Namanda was present for Claimant, as was Mr. Chokaa, who was holding brief for Kilonzo for the Respondent. Mr. Opendo informed the Court that he had filed submissions that morning. Dr. Chokaa indicated that since he had not been served, he was not ready to argue the preliminary objection. As a consequence, hearing of the preliminary objection was adjourned to 19<sup>th</sup> January 2022 when none of the parties was represented. Even after waiting for more than 1½ hours, none of the parties was present.

3. On 26<sup>th</sup> January 2022, Miss Omamo, holding brief for Mr. Namanda was present for the Claimant while Mr. Keyonzo appeared for the Respondent. A ruling date was set for 23<sup>rd</sup> March 2022.

**Submissions**

4. The Respondent/Applicant submits that in ELRC Case No. 1569 of 2010 filed by the Kenya Union of Commercial Food and Allied Workers Union [KUEFAWV] on behalf of its members against the Respondent, the union made the following claims:

- (a) Salary arrears for underpayment of wages.
- (b) Issuance of appointment letters and payslips.
- (c) Payment for overtime worked on public holiday.
- (d) Interest on money due and owing to the members by the Respondent

5. It is further submitted that the Claimant in this case **Mr. Joseph Kioko Langi** was one of the Union members represented by KUCFAWU which had made a total claim for **Kshs.744,468** against the Respondent and by a judgment dated 7<sup>th</sup> July 2019 Wasilwa J. awarded all Claimants, including the Claimant Kshs.29,060.15 each.

6. It is the Respondents submission that the Claimant had made a claim similar to **ELRC Cause No. 1569 of 2010** against the 1<sup>st</sup> Respondent. That the cause is clearly *res judicata* by virtue of **Section 7 of the Civil Procedure Act** and should be struck out with costs to the Respondent as it is an abuse of Court process.

7. The Claimant on the other hand identified two issues for determination: -

**Whether:**

(a) The matter before the Court is *res judicata*;

(b) Who to bear costs for this application?

8. As to whether the matter before the Court is *res judicata*, Counsel urges that Section 7 of the Civil Procedure Act is inapplicable in this case to the extent that paragraph 12 of the judgement in **ELRC Cause No. 1569 of 2010** shows that the Claimant herein was not part and parcel of the said judgment.

9. It is the Claimant's submission that the issue of *res judicata* is vexatious and the facts raised in the two cases are different.

10. It is submitted that the Respondent stands to suffer no prejudice at this stage since it has an opportunity to defend the suit at the hearing. The Claimant urges the Court to dismiss the application with costs.

#### **Analysis and determination**

11. The principles that govern the determination of merits or otherwise of a Preliminary Objection are well settled and the articulations of Law JA and Sir Charles Newbold P. in **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696** are commonly cited. According to Law JA,

*"... A Preliminary Objection consists of a point of law which has been preceded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."*

12. Sir Charles Newbold P. on the other hand stated as follows:

*"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."*

13. Applying the requirements of the **Mukisa case (supra)**, the Court is satisfied that the plea of *res judicata* meets the threshold of a preliminary objection.

14. The singular issue for determination is whether the preliminary objection is merited.

15. **Section 7** of the Civil Procedure Act provides 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 in a former suit between the same parties or between parties under whom they wrong of their 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.**

16. In **Joseph Tama Ndua & 10 others v Jacaranda Hotels (MSA) Ltd t/a Jacaranda Indian Ocean Beach Resort [2019] eKLR**.

17. The Court of Appeal explained **Section 7** as follows:

*"Therefore, in order for res judicata to arise, the following elements must be present.*

*(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 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 formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.*

18. These requirements of section 7 were first enunciated in **Uhuru Highway Development Ltd v Central Bank of Kenya & 2 others [1996] eKLR**.

19. The objective of the principle of *res judicata* was explained by the Court of Appeal in **Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR** as follows:

*“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords 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 common-sensual protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a municipality of suits and for a, to obtain at last, outcomes favourable to themselves...”*

20. Finally, in **Henderson v Henderson [1843 – 60] ALL ER 378** the Court states as follows:

*“... where a given matter becomes the subject of litigation in and of adjudication by 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 brought forward as part of the subject in contest but which was not brought forward only because they have from negligence, inadvertence or even accidentally omitted party of their case. The plea of res judicata applies, except in special case, 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 reasonable diligence might have brought forward at the time.”*

21. I will now proceed to apply the above principles to the instant case.

22. While the Respondent submits that the instant suit is *res judicata*, the Claimant submits that paragraph 12 of the judgment in **ELRC Cause No. 1569 of 2010** demonstrate that the Claimant was not part of that judgment. Paragraph 12 of the Judgment in **ELRC Cause No. 1569 of 2010** states as followings:

*“The Claimant’s case was heard on 9<sup>th</sup> July 2018 and 14<sup>th</sup> March 2019 where Raphael Kaka testified on behalf of the Claimants save for Alfred Oduki, Joseph Mumo and Langi Kioko who did not sign the Letter of Authority filed on 31st October 2018 authorizing him to execute the requisite documents or give evidence on their behalf. He adopted their witness statements as evidence.”*

23. It is on the basis of the foregoing paragraph that the Claimant contends that he was not part of the judgment.

24. Puzzlingly, the Claimant filed the instant case while the Union was still pursuing **ELRC Cause No. 1569 of 2010** on behalf of the Claimants as evidenced by the Ministry of Labour and Human Resource Development dated 17<sup>th</sup> September 2008 to the Respondent.

25. A reading of the judgment and in particular paragraph 12, reveals that the Claimant recorded a witness statement but did not sign the letter of authority for Mr. Raphael Kaka to plead or testify on his behalf but the witness adopted his statement in Court and as paragraph 14 shows, the Claimant was employed on 17<sup>th</sup> March 2005.

26. It is instructive to note that two Claimants, **Harrison John Gaita** and **Peter Mbithi** withdrew their claims as they engaged in negotiations with the Respondent. The Claimant did not. Since the Claimant did not sign the letter of authority authorising Mr. Raphael Kaka to testify on his behalf or execute documents, Mr. Alfred Kioko had no authority to testify on his behalf or adopt his statement on record. The Court is in agreement with the Claimant’s submission that the Claimant was not an integral part of **ELRC Cause No. 1569 of 2010** and was therefore not bound by the findings or award of the Court.

27. Paragraph 25 of the judgment states as follows:

*“I therefore find inclusion of prayers from 2011 to 2018 is not proper and departs from the statement of claim filed by the Claimant. The only prayer I find tenable is for underpayment of salary for the grievants from 2010 May to December 2010 which I find to be Kshs.29,060.15 for each grievant.”*

28. The Claimant submits that his issue is different from the issue in the previous suit though the parties are the same, and the Court was one of competent jurisdiction. It is the Claimant’s submission that the judgment in **ELRC Cause No. 1509 of 2010** did not involve his claim.

29. Although the Claimant did not withdraw from **ELRC Cause No. 1569 of 2010** or write to the Union, the Union had no authority to urge his claim. Relatedly, he filed his case before the other case was heard and determined.

30. For the above reasons, the Court is satisfied that it is inopportune to strike out the suit at this stage. The Claimant’s case is based on non-payment of terminal dues which require ventilation in Court and the Respondent will have the opportunity to defend the suit.

**31. The upshot of the foregoing is that the Court finds that the preliminary objection dated 21<sup>st</sup> September 2021 is unmerited and is hereby denied. Consequently, ELRC Cause No. 1677 of 2015 is fixed for hearing on 13<sup>th</sup> July 2022.**

32. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 23<sup>RD</sup> DAY OF MARCH 2022**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**