



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

MISC. APPLICATION NO. 48 OF 2019

HENRY OMUKOTO.....APPLICANT

VERSUS

TEACHERS SERVICE COMMISSION.....RESPONDENT

RULING

1. The Applicant herein filed an application dated 3rd November, 2021, seeking review of the orders issued in a ruling delivered on 10th March, 2020, and leave to file suit against the Respondent out of time.
2. The application is based on the grounds that there are new facts which were not within the Applicant's knowledge at the time of filing the application of 7th October, 2019.
3. The Respondent filed a Notice of Preliminary Objection against the Applicant's application, and which objection, is the subject of this ruling.
4. The objection is premised on the ground that the intended suit is *res judicata* the issues therein, having been substantially determined in the judgment delivered in **Kakamega CMCC 204 of 2000 Henry Omukoto v Secretary, Teachers Service Commission**.
5. The Respondent further contend that the intended Claim is time barred, and grossly offends the mandatory provisions of Section 90 of the Employment Act, 2007.
6. The Applicant opposed the Preliminary Objection and argued that the case at Kakamega (**Kakamega CMCC 204 of 2000 Henry Omukoto v Secretary, Teachers Service Commission**.) was not finalized as to render the intended claim *res judicata*. The Applicant further states that he has been unwell and hence his inability to lodge his case in time, and which situation was compounded by the ravages of the Covid-19 pandemic.

Determination

7. I have appraised the Notice of Preliminary Objection vis-à-vis the Applicant's application, together with the parties' written and oral submissions. The issues for determination is whether the application dated 3rd November, 2021 is *res judicata* and secondly, whether the application is time barred.
8. The Applicant's application dated 7th October, 2019, sought enlargement of time to enable the Applicant herein file suit against the Respondent. The application was dismissed on the ground that the court does not have power to enlarge time. The same prayer has now been brought, together with the prayer for review of the orders given in that ruling.
9. The issue for determination is whether or not the application of 3rd November, 2021 is *res judicata*. 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.”

10. The Applicant vide his application of 7th October, 2019, sought extension of time to file a claim out of time. The issue of whether the intended suit was time barred was also addressed by the court in the ruling of 10th March, 2020.

11. There is no doubt that the issues in the application of 7th October, 2019 are the same issues in the application of 3rd November, 2021, and so are the parties to the two application. Further, the application of 7th October, 2019 was heard and finally determined by a court of competent jurisdiction vide the ruling rendered on 10th March, 2020.

12. I find and hold that the Applicant’s application is *res judicata* and that it offends the provisions of Section 7 of the Civil Procedure Act.

13. The upshot is that the Applicant’s application dated 3rd November, 2021, is hereby struck out with no orders as to costs.

14. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 17TH DAY OF MARCH, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Omukoto Applicant present in person

Mr. Ochieng h/b for Ms. Manyasa for the Respondent

Christine Omollo – C/A