



REPUBLIC OF KENYA



KENYA LAW
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Onsoti & 106 Others v Danree Multihandling Services Ltd & another (Cause 544 of 2017) [2022] KEELRC 3951 (KLR) (16 September 2022) (Ruling)

Neutral citation: [2022] KEELRC 3951 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE 544 OF 2017
DKN MARETE, J
SEPTEMBER 16, 2022

BETWEEN

JAMES OMOKE ONSOTI & 106 OTHERS APPLICANT

AND

DANREE MULTIHANDLING SERVICES LTD 1ST RESPONDENT

A-ONE PLASTICS LIMITED 2ND RESPONDENT

RULING

1. This is an application by way of a preliminary objection dated November 26, 2021 and comes out as follows;
 1. The claimant's application dated October 18, 2021 is bad in law, incompetent and an abuse of the court process as it offends the mandatory provisions of section 7 of the [Civil Procedure Act](#) Chapter 21 of the Laws of Kenya for the reason that;
 - a. The issues raised in the present application are directly and substantially in issue in the application dated February 19, 2019 between the same parties/ in the name of James Omoke Onsoti and Bonventure Arema Ahingana under whose name the claimants filed their suit and the person the claimants authorized to institute the matter, plead, execute all papers and take any steps in relation to this matter respectively.
 - b. The parties were litigating under the same title and the matter was heard and finally determined by a competent court.
 2. The claimant's application dated October 18, 2021 is bad in law, incompetent and an abuse of the court process as it offends the provisions of rule 33(6) of the [Employment and Labour Relations Court \(Procedure\) Rules, 2016](#) for the reason that it seeks to review the orders of this honourable court made pursuant to a previous application for review dated February 19, 2019.



3. The claimant herein further lacks locus standi to originate, maintain and mount the instant complaint insofar as the claimant is not an aggrieved party under and/or pursuant to the provision of section 87 of the [Employment Act](#) 2007.
2. The respondent in her written submissions dated February 22, 2022 argues that this application is res judicata. She submits as follows;

...We note that the claimants present application is seeking reinstatement of the suit which is a prayer similar to that which was before this Honourable court *vide* the application dated February 19, 2019. We also note that this honourable court did hear and determine that prayer and dismissed the same *vide* the ruling dated May 24, 2019.

The respondent further submits as follows;

...we draw this court's attention to section 7 of the [Civil Procedure Act](#) which thus provides;

7. Res judicata

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 decided by such court.”

3. She further seeks to rely on the authority of [Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others](#) (2017) eKLR, the Supreme court while considering section 7 of the [Civil Procedure Act](#) held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is,
 - (a) The suit or issue was directly and substantially 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 formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”
4. It is her submission that the present application satisfies all the facets of res judicata expressed in the authorities above and should therefore fail.

Again, the respondent submits that this application offends the provision of paragraph 33(6) of the [Employment and Labour Relations Court \(Procedure\) Rules, 2016](#) which provides as follows;

(6) An order made for a review of a decree or order shall not be subject to further review.

5. This is coupled with Order 45 rule 6 of the [Civil Procedure Rules, 2010](#) provides as follows;

“6. No application to review an order made on an application for a review of a decree or order passed or made on a review shall be entertained.”



6. The applicants submit that their matter was dismissed for non-appearance and therefore not *res judicata*. They come out thus;

An application for review under Section 80 of the [Civil Procedure Act](#) Cap 21 of the Laws of Kenya and Order 45 of the [Civil Procedure Rules](#) is different from an application for reinstatement of a suit dismissed under Order 12 rules 7 of the [Civil Procedure Rules, 2010](#).

7. They further seek to buttress their case by relying on the authority of [CK Bett Traders Limited & 2 others v Kennedy Mwangi & another](#), High Court Kajiado Civil Appeal No 7 of 2020 where the court observed thus;

31. The second issue question is whether the suit before the trial court was *res judicata*. Section 7 of the [Civil Procedure Act](#) on *res judicata* reads 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 decided by such court.

32. The provision is on the fundamental doctrine that there should be an end of litigation. The doctrine of *res judicata* may be pleaded by way of estoppel so that where a judgment has been given future and further proceedings are estoppel. The rationale for the doctrine of *res judicata* exists to protect public interest so that a party should not endlessly be dragged into litigation over the same issue or subject matter that has otherwise been conclusively determined by a court of competent jurisdiction.

33. *Res judicata* is normally pleaded as a defence to a suit or cause of action that the legal rights and obligations of the parties have been decided by an earlier judgment, which may have determined the questions of law as well as of fact defence if the issue (s) in dispute in the previous litigation or suit were between the same parties as those in the current suit; the issues were directly or substantially in issue in the previous suit as in the current suit and they were conclusively determined by a court of competent jurisdiction.

8. The respondent/applicant further seeks to rely on the authority of the [Independent Electoral and Boundaries Commission v Maina Kiai & 5 others](#) (2017) eKLR, the court held thus;

(F) or the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

- 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.⁴
- 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.



9. This application tilts in favour of the claimant/respondent. It is their case that the matter in issue was dismissed without any hearing and therefore no determination as such has been had. The hearing of the cause was done in their absence and this absence was overall inadvertent. The application for restoration of the suit dated October 18, 2021 which was dismissed is altogether different from that of February 19, 2021. A case of *res judicata* therefore does not arise.
10. This is the plausible and real situation in the circumstances. No substantial hearing of the claim was ever had, or at all. It was not decided on its merit. There was no hearing or involvement of the parties before determination. It is an interlocutory judgment of court. The Preliminary objection therefore fails for want of merit.

No substantive justice is attainable through blocking the claimant on technicalities.

I am therefore inclined to dismiss the preliminary objection with costs to the claimant/respondent.

DATED AND DELIVERED AT NYERI THIS 16TH DAY OF SEPTEMBER 2022.

D.K.NJAGI MARETE

JUDGE

Appearances

Mr. Nyongesa instructed by Sospeter & Co. Advocates for the Claimant/Respondent.

Miss Kamande instructed by Mahinda & Maina & Co. Advocates for the 2nd Respondent.

No appearance for the 1st Respondent.

