



**Kamau v Barclays Bank Of Kenya (Cause 535 of 2017)
[2022] KEELRC 3888 (KLR) (16 September 2022) (Ruling)**

Neutral citation: [2022] KEELRC 3888 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 535 OF 2017
SC RUTTO, J
SEPTEMBER 16, 2022**

BETWEEN

JAMES MWANGI KAMAU APPLICANT

AND

BARCLAYS BANK OF KENYA RESPONDENT

RULING

1. What comes up for determination is the respondent's preliminary objection dated April 28, 2022.
2. The genesis of the said preliminary objection is the application dated April 8, 2022, through which the claimant's legal representatives seek orders to reinstate and/or revive the suit, which abated following the claimant's death. The application further seeks orders to enlarge time and substitute the name of the claimant with that of his legal representatives.
3. The respondent's preliminary objection is premised on grounds that the court lacks jurisdiction to hear and determine the matter as the application is *res judicata* as the issues and the prayers sought have been heard and determined on the merits having been directly and substantially in issue in the claimant's application dated September 23, 2021.
4. The court directed that the preliminary objection be determined in the first instance through written submissions.
5. The respondent submitted that the application dated April 8, 2022, is *res judicata* as the fundamental issues raised in the application - substitution and reinstatement- were already determined by this honourable court in the ruling delivered on March 31, 2021. That therefore, the application offends section 7 of the *Civil Procedure Act*. The respondent supported its position with the determination in the case of *John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others* (2015) eKLR.



6. On its part, the applicant submitted that the issue in dispute is better off being judicially resolved than summarily. The applicant placed reliance on the cases of Independent *Electoral Boundaries Commission vs Jane Cheperenger & 2 Others* (2015) eKLR and *Independent Electoral Boundaries Commission vs Maina Kiai & 5 others* (2017) eKLR.
7. The gist of the respondent's preliminary objection is that the application dated April 8, 2022 is *res judicata*.
8. The basis for the respondent's objection is an earlier application dated September 23, 2021, through which the applicant sought orders to substitute the name of the claimant with that of his legal representatives. The court vide its ruling delivered on March 31, 2022, dismissed the said application on the basis that the suit had abated hence there was nothing to substitute.
9. The applicant through the second application dated April 8, 2022, seeks to; reinstate the suit, enlarge time within which to substitute the deceased and to substitute the name of the claimant with that of Grace Wairimu Kamau, Maureen Wangu Mwangi and Dennis Githuhu being his legal representatives.
10. Section 7 of the *Civil Procedure Act* addresses the doctrine of *res judicata*, 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.”
11. In this respect, the Court of Appeal held in case of the *Independent Electoral and Boundaries Commission vs Maina Kiai & 5 others*, [2017] eKLR), that: -

[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.
 - 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.
12. Flowing from the above, it is evident that in order to determine the question of *res judicata*, the following elements must be established: -
 - i. Same issues;
 - ii. Same parties;
 - iii. Same title;
 - iv. Matter must have been heard and determined; and
 - v. Matter must have been determined by a court of competent jurisdiction.



13. As stated herein, the second application by the applicant seeks to revive the suit by enlarging time and substituting the name of the claimant.
14. The court in the first application dismissed the suit for having abated hence the prayer for substitution was denied.
15. Therefore, the court dealt with the issue of substitution extensively in the first application. What the applicant is inviting the court to do, is to review its decision in the first application by allowing the second application which seeks for substitution.
16. Further, it is notable that in the event the court is to entertain the second application, it will have a *res judicata* effect as the ultimate determination will be substitution of the claimant's name with that of his legal representatives. As stated herein, the issue of substitution was before the court in the first application and was heard and determined.
17. Indeed, the applicant put the cart before the horse by initially filing the application for substitution after abatement of the suit. Once the same was dismissed, the door was closed and the court cannot now be called to hear and determine an issue that will have the effect of reopening a previous issue that was before it in the first application.
18. In the circumstances, I find that the application dated April 8, 2022, is *res judicata*.
19. In the *Independent Electoral and Boundaries Commission vs Maina Kiai & 5 others* (supra), the court in stating the rationale of the doctrine of *res judicata* reckoned thus:

“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 commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice.”
20. This principle also holds true when it comes to applications. There must be a finality in applications of a similar nature.
21. The upshot of the foregoing is that the respondent preliminary objection dated April 28, 2022 is upheld and the application dated April 8, 2022, is dismissed for being *res judicata*.
22. There will be no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF SEPTEMBER, 2022.

STELLA RUTTO

JUDGE

Appearance:

Mr. Kogi for the Claimant/applicant

Mr. Biko Angwenyi for the respondent

Court Assistant Abdimalik Hussein



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 March 2020 and subsequent directions of 21st 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 had 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.

STELLA RUTTO

JUDGE

