



**Dacho v Ellams Products Limited (Cause 1482 of 2017)  
[2022] KEELRC 12803 (KLR) (6 October 2022) (Ruling)**

Neutral citation: [2022] KEELRC 12803 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1482 OF 2017  
K OCHARO, J  
OCTOBER 6, 2022**

**BETWEEN**

**BENSON OTIENO DACHO ..... CLAIMANT**

**AND**

**ELLAMS PRODUCTS LIMITED ..... RESPONDENT**

**RULING**

1. Through its Notice of Motion Application dated 11<sup>th</sup> March 2022, the Respondent/Applicant sought that;
  - a. The memorandum of claim dated 28<sup>th</sup> July, 2017 and filed on the 13<sup>th</sup> July, 2017 be struck out as against the Respondent on the basis that the issues for determination in this cause are res-judicata as they were heard and determined by this Honourable Court in Nairobi ELRC Cause No. 1435 of 2015 between Benson Otieno Dacho v. Ellams Products Limited.
  - b. The costs occasioned by this Application be provided for.
2. The Application is grounded on the grounds obtaining on the face of the Application and the supporting affidavit sworn by Guyvira Nduma, the Human Resource Officer of the Respondent company.
3. When this matter came up for mention on the 28<sup>th</sup> April, 2022 the Court gave directions inter alia that the Claimant/Respondent does file and serve his response to the application within 10 [ten] days of the mention date. The Application then was to be canvassed by way of written submissions.
4. The Claimant/Applicant has neither filed the response nor submissions to the application.



## **The Application**

5. The Respondent contended that the Claimant/Respondent instituted the claim herein against it alleging unfair termination, under payment of wages; underpayment of house allowance; refusal to pay for rest days and discrimination in payment of lumpsum, leave travelling allowance, bonus and fare allowance.
6. That upon being served with summons to enter appearance, the Respondent herein did enter appearance, and filed a memorandum of reply, a list of witnesses, witness statement, bundles of documents all dated 6<sup>th</sup> February, 2019, and later on a supplementary list bundle of documents dated 13<sup>th</sup> September, 2019.
7. That it later on dawned on the Respondent's Counsel on record, that the Claimant had previously filed another suit [ELRC Cause No. 1435 of 2015 – Benson Otieno Dacho vs. Ellams Products Limited] before this Court, wherein he sought against the Respondent/Applicant for:
  - a. Kshs. 375,350
  - b. Three months' salary in lieu of notice of termination, Kshs. 46,350.
  - c. Leave due and accruing, one-month salary Kshs. 15,450.
  - d. Leave travel allowance Kshs. 5,000.
  - e. Overtime Kshs. 10,000.
  - f. Seven years severance pay at one month salary per year Kshs. 15,450.447 = Kshs. 108,500.
  - g. General damages for unlawful termination [12 months at Kshs. 15,450 = Kshs. 185,400].
  - h. Certificate of service.
  - i. Costs of the claim plus interest.
  - j. Any other relief the Honourable Court may deem fit.
8. It was asserted that the issues in the matter herein were directly and substantially in issue in the above stated former suit. The parties were the same litigating under the same title.
9. The above stated matter was heard and determined by way of a judgment that was delivered on 29<sup>th</sup> November 2019, by Justice Byram Ongaya in favour of the Claimant.
10. The Respondent/Applicant argued that the filing of two separate suits can only be seen as an act amounting to an abuse of the Court process.

## **Submissions**

11. Pursuant to the direction of this Court, the Respondent/Applicant filed written submissions dated 21<sup>st</sup> September 2022. The Applicant distils two issues for determination, thus;
  - a. Whether the suit is res-judicata and an abuse of the Court process.
  - b. Whether the Claimant's suit should be struck out.



12. On the 1<sup>st</sup> proposed issue, the Applicant submits that what amounts to res-judicata was elaborated in the case of *Kirwa Jonah t/a Mwakio Kirwa & Co. Advocates vs. County Public Services Board Bomet & another* [2021] eKLR, thus;

“Res-judicata is only applicable where the same dispute between same parties has been conclusively determined by a Court of competent jurisdiction.”

13. It was submitted that the filing of two separate suits equates an abuse of the Court process. To buttress this submission, reliance was placed on the case of *Satya Bhama Gandhi v. Director of Public Prosecutions & 3 others* [2018] eKLR where Justice Mativo J. stated;

The situation that gives rise to an abuse of the Court process are inexhaustive, it involves situations where the process of the Court has not been resorted to fairly, properly, or honestly to the detriment of the other party. However, abuse of Court process in addition to the above arises in the following situations:

“(a) Instituting multiplicity of action on the same subject matter, against the same opponent, on the same issue or multiplicity of action on the same matter, between the same parties even where there exists a right to begin the action...”

14. It was further submitted that the matter herein is a fit candidate to meet the fate of dismissal on account that it is res-judicata the former matter.

#### **Determination**

15. This Court takes note of the fact that the Application herein has not been opposed in the manner provided by law or at all. The Respondent/Applicant did not file a replying affidavit or grounds of opposition to the application.
16. Emerging from the Judgment in ELRC 1435 of 2015, that the Applicant/Respondent has placed before this Court, it cannot be in dispute that the matter was between the Claimant/Respondent and the Respondent/Applicant herein, litigating under same title as they are in the current suit. The subject matter of both the matters is that contract of service between the parties commenced in June 2007 and determined in March 2015.
17. The issues raised in the current suit were directly and substantially in issue in the former matter. I find no difference between the reliefs that were sought in the former matter and those that have been in the current one.
18. By reason of the foregoing premises, I am convinced that the matter herein is res-judicata Nairobi ELRC Cause No. 1435 of 2015. Consequently, the same is hereby dismissed with costs.

**READ, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 6<sup>TH</sup> DAY OF OCTOBER 2022.**

**OCHARO KEBIRA**

**JUDGE**

In Presence of:

Mr. Karagu/Applicant

No appearance for Respondent.



## **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 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.

A signed copy will be availed to each party upon payment of Court fees.

**OCHARO KEBIRA**

**JUDGE**

