Chepwogen v New Cooperative Creameries Limited (Cause 4 of 2020) [2022] KEELRC 13574 (KLR) (20 December 2022) (Ruling)

Neutral citation: [2022] KEELRC 13574 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO

CAUSE 4 OF 2020

HS WASILWA, J

DECEMBER 20, 2022

BETWEEN

JERUSHA CHEPWOGEN ..... CLAIMANT

AND

NEW COOPERATIVE CREAMERIES LIMITED ..... RESPONDENT

RULING

1. The Respondent/Applicant filed a notice of motion dated 26th September, 2022 under certificate of urgency pursuant to Sections 3A & 3B of the *Civil Procedure Act*, Order 42 Rule 6(1)&(2), Order 51 Rule 1 of the *Civil Procedure Rules*, 2010, the inherent powers of the Court and all other provisions of the law, seeking the following Orders that;

    1. Spent.

    2. There be an order of stay of execution of the judgement delivered by Honourable Justice Onesmus Makau on 28th April, 2022 pending hearing and determination of this application inter partes.

    3. There be an order of stay of execution of the judgement delivered by Honourable Justice Onesmus Makau on 28th April, 2022 pending the hearing and determination of the application.

    4. There be an order of stay of execution of the judgement delivered by Honourable Justice Onesmus Makau on 28th April, 2022 pending the hearing and determination of the Appeal.

    5. Costs of this application be provided for.

2. The application is premised on the grounds set out in the face of the application and the supporting affidavit of linda Yegon, the Respondent's legal officer, deposed upon on the 26th September, 2020. It

is averred that this Court (Justice Onesmus Makau) delivered judgement in this case in favour of the Claimant on the 28th April, 2022 for payment of Kshs. 933, 160.

3. That the Respondent is dissatisfied with the award given by the Court and filed a notice of appeal dated 6th May, 2022 and was in the process of filling the memorandum of appeal and the record of appeal when the Claimant filed a Bill of costs dated 6th May, 2022 which is scheduled for ruling on 30th August, 2022.

4. It is averred that the sum to be paid out is a colossal sum which if paid to the Claimant might not be recovered when the appeal succeeds. Furthermore, that the Respondent relies on being financed by Kenya farmers and if the said sum of money is paid out, the Respondent's operations will come to a halt.

5. It indicated its willingness to provide security for due performance of the decree and added that the application has been filed timeously.

6. It is stated further that the Claimant/ Respondent has taken tremendous steps towards satisfaction of the decree.

7. The Application is opposed by the Claimant / Respondent who filed a Preliminary Objection dated 4th October, 2022, based on the following grounds; -

    i. That the application is Res-judicata. The applicant filed a similar application dated 17th June, 2022 in the Employment cause number 4 of 2020 which was consolidated with cause number 5, 6 and 8 seeking similar Orders, which application was heard and determined by the Court in the ruling issued on 22nd September, 2022 dismissing the application with costs.

    ii. That the application is an abuse of Court process and should be dismissed with costs.

8. Together with the Preliminary Objection, the Claimant, Jerusha Chepwogen Rotich, filed a replying affidavit deposed upon on the 4th October, 2022, alleging that the application herein is fatally defective, bad in law and abuse of Court process because it contains half truths and concealment of facts.

9. It is averred that the application herein is similar to another application which was filed by the applicant in Kericho ELRC cause number 4 of 2020 which had been consolidated with this cause and another cause number 5 and 8 of 2020, dated 17th June, 2022 and thus the application herein is res judicata and offends the provisions of section 7 of the *Civil Procedure Act*.

10. She states that entertaining this application having heard and determined a similar application would amount to abuse of Court process and a waste of precious judicial time contrary to the overriding objectives of this Court. The Claimant urged this Court to disallow the application.

11. Directions were taken for the preliminary objection to be disposed of first by written submissions. The applicant filed on 26th October, 2022 and the Respondent filed on 21st October, 2022.

12. The Ruling herein is therefore with regard to the Preliminary objection dated 4th October, 2022.

Claimant's submissions.

13. The Claimant submitted on two issue; whether the application is Res-judicata and whether the application amount to abuse of Court process.

14. On the first issue, it was submitted that the application herein offends the provisions of section 5 as read with section 7 of the *Civil Procedure Act*, because a similar application dated 17th June, 2022 had been filed by the Applicant and dismissed by the Court vide the Ruling of 22nd September, 2022.

15. The Claimant cited he case of *Independent Electoral and Boundaries commission v Maina Kiai and 5 others* [2017] eKLR, where the Court of appeal set out the test to determine what amounts to Res Judicata as follows;

> " Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all 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."

16. The Claimant submitted further on the essence of the doctrine of Res judicata as was elaborated in the case of *Christopher Orira Kenyaririr t/a/ Kenyariri and associates Advocates v Salama Beach Hotel Limited and 5 others* Civil Suit No. 20 of 2015 where the Court held that;

> " ...my understanding of res judicata principle is that it is meant to lock out from the Court system a party who had had his day in Court of competent jurisdiction from re-litigating the same issues against the same opponent. Surely it would be a waste of Courts valuable time if there was no tool for arresting such mischief."

17. On that basis, the Claimant submitted that the application before Court is a mirror reflection of the one dated 17th June, 2022 which was determined by this Court on 22nd September, 2022 dismissing it on the basis that the application had been filed on the wrong Court and advice given for the application to be filed before the Court of Appeal.

18. On the second issue, it as submitted that the applicant filed this application to frustrate due process and subvert justice in effect abusing the Court process. To support this argument, she cited the case of *Muchanga Investment Limited v Safaris Unlimited(Africa) Limited and 2 others* [2009] KLR 229 where it was held that;-

> " Again the Court of Appeal in Abuja, Nigeria in the case of *Attahiro v Bagudo*1998 3 NWLL pt 545 page 656, stated that the term abuse of Court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice."

19. A similar decision was arrived at in *Satya Bhama Gandhi v Director of Public Prosecution and 3 others* [2018] eKLR where Mativo J held that;-

> " The situation that may give rise to an abuse of Court process are indeed in exhaustive, it involves situations where the process of Court has not been or resorted to fairly, properly, 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 a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.

(b) Instituting different actions between the same parties simultaneously in different Court even though on different grounds.

(c) Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and Respondent notice.

(d) Where an application for adjournment is sought by a party to an action to bring another application to Court for leave to raise issue of fact already decided by Court below.

(e) Where there no iota of law supporting a Court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.

(f) Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.

(g) Where an appellant files an application at the trial Court in respect of a matter which is already subject of an earlier application by the Respondent at the Court of Appeal.

(h) Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent.

20. Based on the findings in the cases above, the Claimant submitted that the application of 17th June, 2022 and the current application are similar in both grounds and prayers sought and having determined the earlier application, the subsequent application is an abuse of Court process as it is meant to delay the case herein and consume judicial time. He urged the Court to allow the Preliminary objection and dismiss the Application filed.

Respondent's Submissions.

21. The Respondent on the other hand argued that the application is not res judicata because the initial application was dismissed for being premised on the wrong provisions of the law and lacked substantive prayer that was capable of being granted. He argued that the said application was dismissed for lacking substance and not on merit as such the application is not res judicata. Furthermore, that the application did not have the prayer for stay of execution pending appeal which is the main prayer in the current application.

22. The Respondent defined the res judicata as stated in Black law Dictionary, 2nd Edition as 'once a lawsuit is decided, the same issue or an issue arising from the first issue cannot be contested again'. With regard to the principle applicable in res judicata, the Respondent cited the case of Turkana

Limited (Previously known as *Turkana Drilling Consortium Limited & 3 others v Permanent Secretary Ministry of Energy and 17 others* [2016] eKLR where the Court held that;-

> " The Supreme Court of England in *Virgin Atlantic Airways Limited v Zodiac Seats UK Limited* [2014] 1AC 160; [2013] 4 All E R 715 referred to res judicata as "a portmanteau term...used to describe a number of different legal principles with different juridical origin". The Court in that case identified at least five different legal principles underlying the doctrine of res judicata. It is necessary to quote from that judgment at some length:
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> "The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is "cause of action estoppel". It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings. Secondly, there is the principle, which is not easily described as a species of estoppel, that where the Claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages: see *Conquer v Boot* [1928] 2 KB 336. Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given upon it, and the Claimant's sole right as being a right upon the judgment. Although this produces the same effect as the second principle, it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as "of a higher nature" and therefore as superseding the underlying cause of action...
>
> ...Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties...
>
> ...Finally there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger."

23. Accordingly, that the application herein has not met the criteria highlighted in the above case to warrant it being res judicata. In any case that the application of 17th June, 2022 was not determined on merit but dismissed for being based on the wrong provisions of the law.

24. It was submitted further that the guideline on the issue of Res Judicata was made by Justice Joel Ngugi in *MW vs AMW* [2016] eKLR where the Court held 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 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.17. The section, of course, codifies the doctrine of res judicata in Kenya. Our case law has now distilled the essential ingredients of the doctrine – see, for example, *Nancy Mwangi t/a Worthlin Marketers v Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd) & 2 others* [2014] eKLR; *Kamunye & others v Pioneer General Assurance Society Ltd* [1971] E.A. 263 and *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others* [2015] eKLR. There are, restated, four ingredients:
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> a. Was there previous litigation in which identical claims were raised or in which identical claims could have been raised?

b. Are the parties in the present suit the same as those who litigated the original claim?

c. Did the Court which determined the original claim have jurisdiction to determine the claim?

d. Did the original action receive a final judgment on the merits?"

25. From the foregoing, the Respondent submitted that the application previously filed was dismissed for being fatally defective and not on merit as such is not res judicata.

26. The applicants have sought orders of stay of execution in this matter. The Respondents have submitted that this application is res-judicata having been considered by this Court previously and disallowed.

27. Indeed the applicants filed an application for stay dated 17/6/2022 which application was considered by J. Onesmus Makau and vide a ruling of 22/9/22 and disallowed. The application was disallowed on the grounds that it was improperly before Court and the Court didn't consider its merit though and on 26/9/2022 the applicants filed another application seeking similar orders.

28. They have premised their application on the fact that they have filed an Appeal.

29. It is indeed true that a Notice of Appeal was filed on 6/5/2022 which was not an issue raised in the dismissed application.

30. The contention that this application is res-judicata is therefore not true.

31. In consideration of the application now before me, it is true that it was filed timeously and the applicants have since filed an Appeal before the Court of Appeal and in order to avoid a miscarriage of justice, I allow the application for stay on condition that the applicant Respondent deposits ½ the decretal sum in a joint interest earning account held in joint names of counsels on record within 90 days.

32. In default execution may proceed.

33. Costs to abide the determination of the Appeal.

RULING DELIVERED VIRTUALLY THIS 20TH DAY OF DECEMBER, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Kirwa for Claimant present

Mutanda for Respondent – present

Court Assistant – Fred