**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**PETITION NO. 84 OF 2020**

**JOSEPH KAGUTHI & 11 OTHERS.....PETITIONERS**

**VERSUS**

**THE PERMANENT SECRETARY MINISTRY OF INTERIOR & COORDINATION**

**OF GOVERNMENT & ANOTHER.....RESPONDENTS**

**RULING**

1. The Petition is opposed by the Respondents who filed grounds of opposition and a preliminary objection. In the Grounds of Opposition dated 21st December 2020 the Respondents assert: That the Petition herein is *res judicata* and that the facts and issues raised in the Petition are similar to the facts and issues in ***ELRC Cause 85 of 2020 - Joseph Kaguthi & 11 others vs. the Principal Secretary Ministry of Interior and Coordination of National Government & Another***. That the parties in the Petition are also similar to the ones in ELRC Cause 85 of 2020 and were litigating under the same title as in the present Petition. That parties canvassed the issues in the Cause and the same was dismissed vide a Ruling of the Hon. Justice Radido on 22nd May 2020 and that the suit herein is thus a waste of court's time and an abuse of the due process of law as the Petitioner is trying to re-litigate. Further, that this Court does not have the requisite jurisdiction to hear and determine the matter before it because under Section 3(1) of the Public Authorities Limitation Act, a claim for Tort cannot be brought against the Government after the end of 12 months from the date the cause of action accrued. The Respondents assert that the same principles were echoed by Justice Majanja in **E.T. *v* Attorney General & Another [2012] eKLR** and thus pray that the Petition be dismissed with costs.

2. Oral arguments were advanced for each side with appearances being Miss Akuno for the Respondents and Ms. Guserwa for the Petitioners. Miss Akuno for the Respondents reiterated the grounds of the preliminary objection and submitted that the issues raised herein are directly and substantially similar to those in Cause 85 of 2020. She argued that the said issues were heard and determined by a competent court and that litigation must come to an end. She submits that if the Petitioners were dissatisfied by the outcome in Cause 85 of 2020 they should appeal or seek review of the decision of Radido J. Counsel submitted that the Petition is filed in blatant abuse of court process and urged the Court to uphold the objection. She relied on the List of Authorities the Respondents' annexed in support of their grounds of opposition.

3. Mrs. Guserwa for the Petitioners submitted that the Petitioners oppose the preliminary objection raised by the Respondents. She argued that the suits are materially different and that the difference is Cause 85 of 2020 was an application for leave to institute a suit out of time and was not a suit in its own right. That the same is to say the Claimants' cause of action has not been litigated against or upon its merits and has not been determined on merits. She submitted that Radido J. declined to allow institution of suit by way of cause of action and that the Claimants reconsidered their position and the fact they had a right to fair remuneration, right to fair labour practices hence their Petition before Court. She argued that these grievances have not been determined on merit. She denied that the Petitioners had abused court process and stated that they merely exercised their right under the Constitution and that there is no bar. She stated that the principle of *res judicata* does not apply and prayed for the Court to distinguish the different and distinct differences in the two – refusal to admit case and the Petition. She urged the Court to find favour in argument of the Petitioners to allow them to air their views. She submitted that it is unfair to deny them these rights.

4. In response, Miss Akuno for the Respondents prayed that the Court looks at the claim and prayers in the former suit and argued that the Court would agree that this Petition is *res judicata*.

5. The Respondents filed their List of Authorities in opposition to the Petition herein and wherein they cite 6 authorities. It was submitted that in the case of **Independent Electoral & Boundaries Commission *v* Maina Kiai & 5 Others [2017] eKLR**, the court held: "*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…Without it there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata *thus rest in the public interest for swift, sure and certain justice.*" The Respondents also cite the case of **Peter Mbogo Njogu *v* Joyce Wambui Njogu & Another [2005] eKLR**, where the court held: "*…Once a decision has been given by a court of competent*

*jurisdiction between two persons or their privies over the same subject-matter, neither of the parties would be allowed to relitigate the issue again or to deny that the decision had in fact been given, subject of course to certain conditions."(**Kuloba, J. in Mwangi Njangu vs Meshack Mbogo Wambugu and Another, HCCC 2340 of 1991- Unreported**)* The case of **Uhuru Highway Development Limited *v* Central Bank of Kenya & 2 Others [1996] eKLR**, where the court followed the dictum of *Wilgram V-C, in Henderson v Henderson (1843) 67 E R 313, 319,* which the Privy Council described as the locus classics of this aspect of *res judicata*, in *Yat Tung Investment Co. Ltd. vs Dao Heng Bank Ltd. (1975) AC 581, 590* as follows:

> Where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time"

With due respect, Madan J. A. does not say that a party can continue coming to court ad infinitum until such time as the courts conscience is clear. What he says is that the principle of res-judicata applies to a matter properly adjudicated upon by court but he was of the opinion that there was no full or proper adjudication as some of the facts disclosed in the second application were not before the superior court judge when he heard the first application, that is to say, the appellant's defence in that case was not disclosed in the first application and the superior court judge (Channan Singh, J.) did not consider it and that, therefore, he never pronounced a judgement upon or relating to it. This is where we differ from Madan J. A. and agree with Wambuzi and Law JJ.A. The facts regarding the merits of defence were known to the appellant at the material time and it was his duty to have brought out these facts at the time of the first application. With respect, a party cannot be allowed to have a second bite at the cherry.

Law J. A. put the matter in its proper perspective when he said:

> "To sum up my view of this aspect of the case, an applicant whose application to set aside an ex parte judgement has been rejected has a right of appeal. Alternatively, he may apply for a review of the decision, under section 80 of the Civil Procedure Act. He can only successfully file a second application if it is based on facts not known to him at the time he made the first application. If the facts were known to him, his second application will be dismissed as res judicata, as happened here. The position otherwise would be intolerable. A decree-holder could be deprived of the benefit of his judgement by a succession of applications to set aside the judgement and judges would in effect be asked to sit an appeal over judges. As regards Madan J.A's expressed feeling that justice can only be done by giving the appellant the right to defend, I would respectfully point out that there are always two aspects to the concept of justice. A successful litigant is convinced that justice has been done, the loser is unlikely to share that view."

6. The Respondent submitted that in the case of **E.T. *v* Attorney General & Another [2012] eKLR,** the court cited the case of *Richard Kariuki v Leonard Kariuki & another, Nairobi Misc. Civil App. No, 7 of 2006 (Unreported)* where the High Court concluded that fundamental principles of law and public policy like *res judicata* are valid and applicable in constitutional matters. The Court went on to hold that:

> "For the operation of the doctrine of res judicata first, the issue in the first suit must have been decided by a competent court. Second, the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar. Third, the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title (see the case of Karia and Another v The Attorney General and Others [2005] 1 EA 83, 89)."

7. The Respondents also rely on the holding in **William Koross (Legal personal Representative of Elijah C.A. Koross) *v* Hezekiah Kiptoo Komen & 4 Others [2015] eKLR** as well as the case of **George W M Omondi & Another *v* National Bank of Kenya Ltd & 2 Others [2001] eKLR** where the court held that:

> "..I wholly agree with the opinion of Kuloba J in Mwangi Njangu v Meshack Mbogo Wambugu (supra) where he said:-
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> "If a litigant were allowed to go on forever re-litigating the same issue with the same opponent before Courts of competent jurisdiction, merely because he gives his case some cosmetic face-lift on every occasion he comes to a Court, then I do not see what use the doctrine of res judicata plays".

8. The issue that crystalizes for determination is whether the Petition is *res judicata*. The Respondents had raised in its Grounds of Opposition that this Court lacks the jurisdiction to hear the matter before it by virtue of Section 3(1) of the Public Authorities Limitation Act but they did not submit on the same in Court. However, they submitted extensively on the issue of *res judicata.* The general principle of *res judicata* is captured in Section 7 of the Civil Procedure Act which provides as follows:-

> 7. 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.

9. The key elements that would give rise to *res judicata* were identified in the case of **Uhuru Highway Development Ltd *v* Central Bank of Kenya [1999] eKLR** to include;

"(a) the former judgment or order must be final;

(b) the judgment or order must be on merits;

(c) it must have been rendered by a court having jurisdiction over the subject matter and the parties; and

(d) there must be between the first and the second action identity of parties, of subject matter and cause of action."

10. In the case of **George W M Omondi & Another *v* National Bank of Kenya Ltd & 2 Others [2001] eKLR**, Ringera J. (as he then was) in finding that the suit is not *res judicata*, held as follows:

> "I have concluded that the present suit is not res judicata for the following reasons. First, as regards HCCC No 350 of 1998, I accept Mr K'Opere's submission that the same having been withdrawn rather than determined on its merits, there would be no basis of pegging the plea in bar thereon for it is a fundamental condition precedent to this plea in bar that the previous suit should have been heard and finally determined by a Court of competent jurisdiction…"

11. Has this cause been determined on merits? I must agree with the Petitioners' submission that his cause of action has not been determined on merits and that the Court merely dismissed the application filed to institute Cause 85 of 2020 out of time but never determined the said suit on its merits. The Court is persuaded by the holding in the **George W M Omondi case (*supra*)** that there would be no basis of pegging the plea of *res judicata* in bar because the previous suit was not heard and finally determined on its merits as a fundamental condition precedent to this plea. The position I take is affirmed by the Court of Appeal in the case of **Kundan Singh Construction Limited & Another *v* Tanzania National Roads Agency [2019] eKLR** where the Judges of Appeal held that since their analysis of the record did not show that the dispute was ventilated in a court of competent jurisdiction, or at all, the suit is not *res judicata*. The appellate court went on to hold that the interests of justice dictate that the parties in the case should proceed to have their day in court to have it fully heard and determined on its merits once and for all. The Petitioners' have a right to institute a Petition to protect their rights under the Constitution. Even though the Petitioners were barred from instituting their cause of action under Cause 85 of 2020, their remedies were not barred ( ***see para 34 of Ruling by Radido J. in ELRC Cause 85 of 2020 - Joseph Kaguthi & 11 others vs. the Principal Secretary Ministry of Interior and Coordination of National Government & Another***). In the final analysis the preliminary objection is not merited and is dismissed albeit without any order as to costs. After this Ruling directions will be issued for the disposal of this Petition.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF MARCH 2021**

**NZIOKI WA MAKAU**

**JUDGE**