



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO.E6470 OF 2020

ENOCK ANGOYA OMBEVA.....CLAIMANT

VERSUS

KENYA MEDICAL TRAINING COLLEGE..... RESPONDENT

RULING

The ruling herein relates to Notice of Preliminary Objections filed by the respondent and dated 11th December, 2020 on the grounds that;

1. *The court has no jurisdiction to hear and determine the instant application as the same is res judicata.*
2. *The instant application is otherwise an abuse of the court process and should be dismissed with costs to the respondent.*

Both parties attended and agreed to address the objections filed by way of written submissions.

The respondent as the applicant submitted that the claimant was employed by the respondent vide letter dated 17th August, 1988 but was dismissed on 2nd October, 2014 for gross misconduct. He filed suit claiming unfair termination of employment on 11th October, 2018 contrary to the provisions of section 90 of the Employment Act and which claim was dismissed by the court on 15th October, 2020 for being time barred.

The instant suit is *res judicata*, the court is without jurisdiction to hear the same, and the claimant is in abuse of court process.

The respondent also submitted that the same suit was heard and determined vide ruling delivered on 15th October, 2020 when the court dismissed the same for being

time barred. The suit is *res judicata* as defined under section 7 of the Civil Procedure

Act and in the case of **The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, Nairobi Civil Appeal No.105 of 2017** that where a matter has been addressed to conclusion the aim is to bring finality to litigation and afford 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.

The court lack jurisdiction to hear the suit as upon delivery of ruling on a similar matter on 15th October, 2020 it became *functus officio* as held in the case of **Raila Odinga & 2 others v The Independent Electoral and Boundaries Commission [2013] eKLR; Telkom Kenya Limited v John Ochanda (Suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited) [2014] eKLR** that the law does not allow the reopening of a matter before a court that has rendered a final decision thereon.

The claimant is in abuse of court process as he is seeking to re-litigate before the same court on a matter already addressed with finality as held in **Jane Ngatu v Jane Mpinda & 3 Others [2019] eKLR; Shahzid Ahmed Yusuf v County Government of Kilifi [2017] eKLR.**

The claimant on his part submitted that upon employment by the respondent he was unlawfully dismissed on 2nd October, 2014 and his union took over the matter and made a report to the Minister but the respondent frustrated the same with promises that he would be reinstated ending in 3 years lapse and where he instructed his advocates to file ELRC Cause No.1432 of 2018 but the same was dismissed on a

technicality on the grounds that he had not obtained leave to file suit out of time. Upon the dismissal on 15th October, 2020 the claimant filed the instant application seeking for extension of time to file suit.

The suit is not *res judicata* as alleged and the legal principles under section 7 of the Civil Procedure Act only apply in matters where a competent court has heard the entire evidence adduced by all parties as held in **Nancy Mwangi t/a Worthlin Marketers v Airtel Networks (K) Limited (formerly Celtel Kenya Ltd) & 2 others [2014] eKLR**.

The previous suit was not heard on the merits but on technicalities and the principles of *res judicata* only apply where there is a final judgement. This court has not heard the merits of the case so as to render judgement on the substantive issue(s) between the parties with regard to employment and labour relations. The court is conferred with jurisdiction to hear and determine the matter herein.

The suit is not in abuse of the court process and does not have the ingredients set out in the case of **Nancy Musili v Joyce Mbete Katisi [2018] eKLR** which bar the filing of multiple suits on the same subject matter against the same parties or the commencement of similar processes to address the same matter. The objection made should be dismissed with costs.

Determination

On 11th November, 2020 the claimant filed the instant suit [**Cause No.E6470 of 2020**] and Notice of Motion seeking;

THAT leave be granted to the Applicant to file suit against the Respondent out of time.

This motion is made on the grounds that the claimant's employment was unfairly terminated on 21st July, 2014 by the respondent and whereupon he filed ELRC Cause No.1432 of 2018 which suit was struck out under the Limitation of Actions Act on the grounds that he had not obtained leave to file suit out of time.

I have obtained the subject file and ELRC Cause No.1432 of 2018 and the ruling delivered on 15th October, 2020. **Enock Angoya Ombeva v Kenya Medical Training College [2020] eKLR** the issue(s) before court were that;

The application before this Court is the Respondent's Preliminary Objection dated 13/1/2019 based on the following grounds:-

a. THAT the Honourable Court has no jurisdiction to hear and determine the instant suit which is time barred and filed out of time contrary to the mandatory provisions of section 90 of the Employment Act No. 11 of 2007.

b. THAT the instant suit is otherwise an abuse of the Court process and should therefore be dismissed with costs to the Respondent.

The court held;

It is therefore my finding that the Preliminary Objection has merit that indeed the Claim as filed is time barred. I allow the Preliminary Objection and dismiss this Claim.

The suit was dismissed for being time barred. It was not struck out so as to allow the claimant time to file a fresh suit. The suit was decisively dealt.

Where the claimant is seeking extension of time to file suit out of time, a fresh *Cause* is ill-advised. Even where such leave is required, as is the case herein, such matter should be urged through a miscellaneous application and upon the court hearing and allowing the same, which is not the case here, then move with the leave obtained and file suit.

To proceed and file the instant *Cause* is premature.

Is the suit *res judicata*?

It has not been denied that the claimant filed ELRC Cause No.1432 of 2018. This suit as addressed above was dismissed for being time barred. The basis was with regard to the application of Section 90 of the Employment Act, 2007 which bar all suits with regard to employment and labour Relations Claims filed upon the lapse of 3 years from the date the cause of action arose. Such is therefore a statutory requirement entrenched in various cases and the principles set out in the case of **Charles Onchari Ogoti v Safaricom Limited & another [2020] eKLR** and in **Kamau James Gitutho & 3 others v Multiple ICD (K) Limited & another [2019] eKLR** that;

This is a doctrine which enables the courts to say litigation must end at a certain point regardless of what the parties think of the decision which has been handed down.

The foundation is to be found in **Mukisa Biscuit Manufacturer Ltd v Westend Distributers Ltd (1969) E A** that;

...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is

sought is the exercise of judicial discretion

Where objections are raised on a purely point of law and the same is addressed with finality, the claimant cannot be found to assert that the matter is still unresolved. In his case, upon the court addressing the application of section 90 of the Employment Act, 2007 and proceeded to dismiss the suit for being time barred such addressed the same with finality and cannot be revived in any other form.

Where dissatisfied with the ruling and order of the court, recourse was not to file the instant suit. The court stands *functus officio*. It has rendered itself and cannot revisit the same matter between the same parties with regard to the same cause of action as such is to re-ligate on a matter the court has already address and thus stand *res judicata*.

Effectively, the court is denied jurisdiction in all fronts. For the claimant to urge the court as he has done in this case is sheer abuse of court process. He is well aware his suit in ELRC No.1432 of 2018 was dismissed for being time barred. To initiate this *Cause* even before obtaining leave is to engage in hide and seek with the court. Such abuse of process should not be encouraged.

Even in a case where the court was to hear the claimant's motion, the court is denied jurisdiction to extend or enlarge time to file suit out of time. See **Lee Njiru v John Lokorio & another Misc. No.22 of 2019 (Nakuru)**.

In the case of **Denis Kisang Ripko v Kenya Commercial Bank Limited [2016] eKLR** the court held that;

This court cannot extend the limitation period in a claim based on contract as the court is not seized of jurisdiction to do so.

And in the case of **Beatrice Kahai Adagala v Postal Corporation of Kenya [2015] eKLR** the court held that;

Much as we sympathize with the appellant if that is true, we cannot help her as the law ties our hands. Section 90 of the Employment Act 2007 which we have quoted verbatim herein above, is in mandatory terms. A claim based on a contract of employment must be filed within 3 years. ... the limitation period is never extended in matters based on contract. ...

Similarly in this case the instant *Cause* herein is *res judicata* and the court denied jurisdiction to hear and determine the same and hence must stop.

Accordingly, the Cause is hereby dismissed. the claimant shall meet the respondent's costs assessed at ksh.50, 000.

DELIVERED IN OPEN COURT AT NAIROBI THIS 20TH DAY OF APRIL, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

..... and