



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. E606 OF 2020

GERALD MULI KIILU..... CLAIMANT

VERSUS

ABSA BANK KENYA PLC (FORMERLY BARCLAYS BANK OF KENYA LIMITED)1ST RESPONDENT

CABINET SECRETARY, MINISTRY OF LABOUR & SOCIAL PROTECTION.....2ND RESPONDENT

HON. ATTORNEY GENERAL.....3RD RESPONDENT

RULING

1. The claimant filed this suit on 2nd October, 2020 claiming various reliefs including that the termination be declared wrongful; and he be paid general damages for the wrongful termination of employment on 31st January, 2005.

2. In his pleadings, the claimant states that he filed Industrial Cause No. 124 of 2010 which suit was dismissed by the Court per James Rika, J. in an award made on 29th October, 2010 on the basis that the suit filed on 15th February, 2010 was time barred following preliminary points taken by the respondent.

3. Aggrieved by the decision of the Industrial Court, the claimant filed Civil Appeal No. 10 of 2011 at the Court of Appeal challenging the decision of the Industrial Court.

4. In its ruling dated 22nd April, 2016, the Court of Appeal held *inter alia*: -

“The appellant’s employment having been terminated in 2005 the cause of action was governed by the repealed Employment Act Cap 226 and the repealed Trade Disputes Act Cap 234 Laws of Kenya through the savings provisions in the new laws that replaced them. It was wrong for the appellant to base his claim on the new laws and seek remedies that were not availed in the repealed laws. The learned judge of Industrial Court was right to uphold the preliminary points taken and we find no merit in this appeal which we accordingly dismiss but in the circumstances order that each party pay their own costs.”

5. The claimant undeterred by this finding by the Court of Appeal reported a fresh dispute to the Commissioner of Labour and the dispute was referred to a Conciliator on 12th July, 2017.

6. In a conciliation report dated 4th October, 2017, the Conciliator Dismas Wakhaya found that the termination of the claimant was wrongful and recommended various reliefs to be made by the respondent.

7. The report was served on the respondent on 6th October, 2017 and the respondent responded that it did not agree with the findings of the Conciliator.

8. The 1st respondent filed Preliminary Objection against this suit being ELRC Cause No. 606 of 2020 to wit: -

(i) The alleged dispute between the claimant and the 1st respondent is time barred under the provisions of Section 90 of the Employment Act, 2007, the Trade Dispute Act, Cap. 234 of the Laws of Kenya (*Now repealed*) as read with Section 4 of the Limitation of Actions Act, Cap. 22 of the Laws of Kenya.

(ii) The issues raised in the claim have been fully determined by the Court of Appeal in Civil Appeal No. 10 of 2011; **Gerald Muli Kiilu –vs- Barclays Bank of Kenya**;

and

(iii). The claim is *res-judicata*; the alleged dispute and the parties to this suit are similar to those in Nairobi Employment and Labour Relations Court Judicial Review Miscellaneous Application E606 of 2020 – **Gerald Muli Kiilu –vs- Cabinet Secretary, Ministry of Labour and Social Protection, The Attorney General and Barclays Bank of Kenya**.

9. The 3rd Respondent also filed preliminary objection dated 16th November, 2020 to wit; that there is no cause of action against the 3rd respondent who should be excused from the suit; that the suit is *res-judicata* as seen under paragraph 10 of the Statement of Claim; that the 2nd respondent gave its report over this matter as alleged by the claimant under paragraph 17 of the Statement of Claim; that no orders are sought against the 2nd and 3rd respondents in the Memorandum of Claim and that the dispute and termination of employment of the claimant is an issue between the claimant and the 1st Respondent and does not involve the 2nd and 3rd respondents.

10. The parties filed written submissions and the Court has carefully considered the pleadings; the preliminary objections and the said submissions and has delineated the issues for determination as follows: -

(i) Whether the suit is *res-judicata*.

(ii) Whether the suit is time barred.

(iii) Whether the 2nd and 3rd respondents are non-suited in this matter.

11. It is beyond par adventure that the facts giving rise to this suits as set out in the Statement of Claim is the termination of the employment of the claimant, by the 1st respondent on 31st January, 2005.

12. It is apparently clear that the claimant filed Industrial Cause No. 124 of 2010 against the predecessor of the 1st respondent, Barclays Bank.

13. It is common cause that the suit was struck off by Justice Rika for being time barred.

14. It is also beyond dispute that the claimant appealed the Ruling of the Industrial Court in **Civil Appeal No. 10 of 2011 – Gerald Muli Kiilu –vs- Barclays Bank of Kenya**, and the Court of Appeal dismissed the Appeal in a judgment dated 22nd April, 2016.

15. The Court is satisfied that there is no cause of action disclosed by the claimant against the 2nd and 3rd respondents and the dispute is solely between the claimant and the 1st respondent.

16. The Court is also satisfied that the dispute in this matter was fully determined initially by the Industrial Court and later by the Court of Appeal as aforesaid and the new suit offends the *res-judicata* principle.

17. The decision by the Court of Appeal was final and definitive as per Anzangalala, Sichale, and Kantai JJA in a unanimous judgment that, the appellant’s employment having been terminated in 2005, the cause of action was time barred.

18. The endeavor by the claimant to revive the same dispute by making a fresh report of dispute and adding non-suited respondents to the suit does not take the matter a step further.

19. The suit is *res-judicata* and no new life can be breathed into it.

20. Even if that were not the case, going by the decision of the Court of Appeal in **G4s Security Services (K) Limited –vs- Joseph Kamau and 468 Others [2018] eKLR**, the suit is time barred by dint of Employment Act Cap. 226 Laws of Kenya (*now repealed*) and Section 90 of the Employment Act, 2007 which is the operative Employment law in the country read with Section 4 of the Limitation of Actions Act, Cap. 22 Laws of Kenya.

21. The Court of Appeal stated that: -

“Time does not stop running on the commencement of conciliation or other alternative dispute resolution mechanism provided under the Constitution or any other Law.”

22. The Court of Appeal in **Nicholas Njeru –vs- Attorney General and 8 others [2013] eKLR**, it was held that the doctrine of *res-judicata* is founded on public policy and is aimed at achieving two objectives namely that there must be finality to litigation and that the individual should not be harassed twice with the same account of litigation.

23. Accordingly, this Court finds that the suit before Court is not only *res-judicata* but was definitively adjudged to be time barred. Addition of non-suited 2nd and 3rd respondents does not breathe any life into it.

24. The Preliminary Objections by the 1st, 2nd and 3rd respondents are upheld and the suit dismissed.

25. This is a very unfortunate case, where the claimant was indolent and sat on his rights to his loss and detriment. The claimant has nonetheless failed to heed the judgment of the Court of Appeal and brought this suit afresh and by doing so, clogging the Court with unnecessary litigation. The Court nevertheless finds that each party in the suit bear their own costs of the suit but warns any further unsuitable litigation on the same cause of action would be visited with costs against the claimant.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MAY, 2021

MATHEWS N. NDUMA

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this ruling has been delivered to the parties online with their consent. 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 18 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.

MATHEWS N. NDUMA

JUDGE

Appearances

Mohammed Mungai & Co. Advocates for the 1st Respondent

Begi Law office for the claimant

Leah Odhiambo for 2nd and 3rd respondents.