



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

CAUSE NO. 66 OF 2019

LABAN OWINO OCHIENG.....CLAIMANT

- VERSUS -

AWANAD ENTERPRISES LIMITED.....1ST RESPONDENT

PILI MANAGEMENT CONSULTANTS LIMITED.....2ND RESPONDENT

THE HABO GROUP OF COMPANIES LIMITED.....3RD RESPONDENT

HEZRON AWITI BOLLO.....4TH RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 18th June, 2021)

RULING

On 06.05.2021 it was ordered that by consent of the parties, Habo Group of Companies is struck off as a party to the suit as it no longer exists and the claimant to file and serve amended statement of claim within 14 days. The claimant did not file an amended statement of claim but instead parties agreed to file submissions on the three applications filed for the remaining respondents.

The 1st, 2nd and 4th respondents have filed on 12.08.2020 their respective applications through their Advocates, Amuga & Company Advocates. The applications are under section 90 of the Employment Act, 2007 and Rule 17 of the Employment and Labour Relations Court (Procedure) Rules, 2016. Each prays for orders:

- 1) That the claim against the respondents be struck out with costs.
- 2) That costs of the application be borne by the claimant.

The applications are based on the annexed supporting affidavits and upon the following grounds:

- 1) The claimant has previously sued the 1st, 2nd, and 4th respondents in Nairobi HCC No. 429 of 2017, Laban Owino Ochieng – Versus- Awanad Enterprises Limited; and, or, Mombasa ELRC Cause No. 22 of 2019, Laban Owino Ochieng –Versus- Awanad Enterprises Limited, Pili Management Consultants Limited and Hezron Awiti Bollo. The said Cause 429 of 2017 was struck out with costs on the grounds that the High Court lacked jurisdiction to determine the employment dispute between the parties and as per the ruling by Olga Sewe J delivered on 05.02.2018. The said Cause 22 of 2019 was dismissed for want of jurisdiction and for being improperly before the Court as per the Ruling by Rika J delivered on 27.09.2019. Rika J found the suit to be time barred because the suit had been filed sometimes in early 2019 in the Chief Magistrate’s Court and improperly moved to this Court and the cause of action having accrued when the claimant resigned on 30.04.2012.
- 2) The claimant ceased to be an employee of the 1st respondent on 30.04.2012 when he terminated his contract of employment upon resignation and he filed the suit on 01.10.2019 long after lapsing of three years of limitation of the cause of action as per section 90 of the Employment Act, 2007.
- 3) The claim herein is **res judicata** and is time barred.
- 4) The Court lacks jurisdiction to entertain the entire claim.

The claimant has filed on 03.09.2020 his replying affidavit through F.K Omenya & Company Advocates. He states as follows:

- 1) The applications are defective and misconceived. The applications are meant to delay the wheels of justice.
- 2) The issue of termination is triable and requires evidence to be resolved. It is not a proper preliminary objection and must go to full hearing. It is a contestable issue if the claimant remained in employment for 6 years and a full hearing is needed to resolve the issue.
- 3) The applicants' invoking of *res judicata* is abusive because there have been no previous similar issues raised herein between the same parties that have been decided by a court of competent jurisdiction.
- 4) The Court should invoke its constitutional and statutory jurisdiction to hear and determine the suit on merits.

The Court has considered the parties' respective materials and the submissions on record and makes findings as follows:

1) The two previous cases cited for the applicants indeed were considered and dismissed on account as urged in the grounds supporting the application. The cases were clearly between the parties herein and were about the same commissions claimed herein and based on the claimant's resignation letter dated 30.04.2012. The Court finds that the suits were between the same parties and the same issues or transactions. The claimant rightly submits that the previous suits were decided upon preliminary points that the High Court lacked jurisdiction in HCC No. 429 of 2017, and, ELRC No. 22 of 2019 was dismissed upon the preliminary points that the suit was improperly before the Court and was also time barred. The claimant submits that indeed the parties in the previous suits were equally the parties in the present suit. It is further submitted for the claimant that previous suits having been dismissed upon preliminary grounds, the claimant was entitled to file the present suit. The Court finds that as submitted for the applicants, the present suit is indeed *res judicata* because, even if the previous suits were dismissed on preliminary grounds, the Court finds that indeed, with due diligence and particularly in ELRC Cause No. 22 of 2019, the claimant ought to have raised all the grounds including such matters that may not have rendered the suit time barred including the issue now urged and namely, that after his resignation letter of 30.04.2012, by letter dated 03.05.2012 the employer flatly and partially rejected the claimant's resignation by withdrawing particulars of the clause "**basic salary and other benefits**" but the issue of 3% commission remained intact. The claimant submits that on account of the 3% commission he successfully completed projects the 2nd respondent undertook to the tune of Kshs. 793, 000, 000.00 commencing 2011 and completed in 2017 so that the cause of action in that regard arose in 2017. Thus, at paragraph 14 of the memorandum of claim, the claimant has pleaded thus, "**14. The Claimant further avers that in further frustration he had no choice but to tender his resignation letter dated 30th April 2012 in line with Clause 7 of the contract on termination over a retainer but maintained project management consultancy work until 2017 as per clause 7a when the same was completed and handed over.**" The Court finds that all the three applicants were parties in ELRC Cause No.22 of 2019 and the matters being raised for the claimant ought to have been raised in that case which appears to have been filed sometimes in 2019 long after 2017, the year the claimant says the projects in issue were successfully completed. The Court considers that the claimant appears to raise a new argument to defeat the Court's earlier finding that the suit was time barred but the Court has returned that such were arguments that ought to have been made before the Court in the earlier decided case.

2) The Court further finds that as submitted for the applicants, ELRC Cause No. 22 of 2019 was about the same parties, about the same claimant's resignation, as the same transactions and claims in issue about the 3% commission were in dispute. To that extent the Court finds that the present suit is trapped by the doctrine of *res judicata* and must fail as an abuse of Court process. The matters raised in the present suit clearly ought to have been placed before the Court in ELRC Cause No. 22 of 2019 but the claimant failed to do so and the suit having been dismissed for want of jurisdiction, it is not open for the claimant to reopen the dispute in the current suit by re-pleading, re-engineering and reconstructing his case to defeat the finding that it was time barred and in view of the ruling by Rika J. The Court finds that indeed, it was for achieving finality in litigation that *res judicata* was invented as a valid bar to re-litigating disputes. The applications will succeed on account that the suit is *res judicata*.

3) It is clear that the claimant is urging that the present suit is not time barred because his resignation was only partially acceptable and he continued to manage the projects until 2017 upon the understanding that he would be paid 3% commission. The Court has already found that such was an issue that ought to have been raised in ELRC Cause 22 of 2019 and the finding by Rika J in that Cause that the claim was time barred is binding upon the Court as the Court is indeed *functus officio* and cannot reopen the suit.

4) The applications are therefore allowed on account of the suit being *res judicata* and the suit is liable to being struck out with costs.

In conclusion, the applications are hereby allowed and the claimant's memorandum of claim struck out with costs.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 18TH JUNE, 2021.

BYRAM ONGAYA

JUDGE