



REPUBLIC OF KENYA



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**Rabala v Judicial Service Commission & another (Miscellaneous Application
100 of 2019) [2020] KEELRC 957 (KLR) (29 May 2020) (Ruling)**

Donald Odhiambo Rabala v Judicial Service Commission & another [2020] eKLR

Neutral citation: [2020] KEELRC 957 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION 100 OF 2019**

MA ONYANGO, J

MAY 29, 2020

BETWEEN

DONALD ODHIAMBO RABALA CLAIMANT

AND

JUDICIAL SERVICE COMMISSION 1ST RESPONDENT

HON. ATTORNEY GENERAL 2ND RESPONDENT

RULING

1. By his application dated 24th July 2019 filed under certificate of urgency, the applicant seeks the following orders –
 1. This Application be certified as urgent.
 2. This application be heard ex- parte and service be dispensed with in the first instance.
 3. This court be pleased to grant leave to the Applicant to file suit out of time.
 4. The attached Draft Memorandum of Claim be deemed as duly filed.
 5. That the costs of this application be in the cause.
2. In the grounds in support of the application and in his supporting affidavit sworn on 26th July 2019, the applicant, Donald Rabala states that he filed a judicial review application in 2009 under Misc. Application No. 648 of 2009 (R) but the same was not determined by the court as the Employment and Labour Relations Court did not have jurisdiction to determine Judicial Service Commission disputes which were considered quasi-judicial. That the judicial review was dismissed and he preferred an appeal to the Court of Appeal which was dismissed in May 2018 as it was filed out of time. That



he now wishes to pursue the claim as an industrial dispute in this court hence the application to file suit out of time.

3. The 1st respondent filed grounds of opposition on 29th November 2019. The grounds raised therein are that –
 1. The Application offends the doctrine of *Res Judicata* as the subject matter of the intended Statement of Claim, which had erstwhile been lodged vide Judicial Review Misc. Application No. 648 of 2009: *Republic v The Judicial Service Commission & Anor. (ex-parte Donald Rabala)* (the "Judicial Review Application") was heard and determined by the High Court (Odunga J.) on 13th May 2013, with the learned Judge dismissing the Judicial Review Application with costs to the Respondents herein.
 2. The Application offends the express provisions of Section 90 of the [Employment Act](#), 2007 and Section 3 of the [Public Authorities Limitations Act](#) and is irredeemably statute barred.
 3. The jurisdiction of this Court has been wrongly invoked as the subject matter and entire substratum of the intended Statement of Claim was long determined with finality.
 4. The Application is untenable to the extent that it effectively seeks to re-litigate against the decisions reached by
 - (a) the High Court in dismissing the Judicial Review Application and
 - (b) the Court of Appeal in dismissing the application seeking extension of time to file an appeal.
 5. The Application is a belated Appeal in disguise and an attempt at circumventing the provisions of the law in relation to limitation of time, the *res judicata* doctrine, judicial hierarchy and subject-matter estoppel.
 6. The Application is patently an abuse of Court process and should not be countenanced. For the grounds and reasons set out herein above, the Application is fatally defective, bad in law and the same ought to be dismissed in limine.
4. The 2nd respondent filed a notice of preliminary objection dated 26th November 2019 in which it raises the following grounds of objection:-
 1. That the application in respect to the applicant is time barred and offends Section 4(1)(a) of the [Limitations of Actions Act](#) and alternatively Section 90 of the [Employment Act](#).
 2. That the applicant is circumventing the [Employment Act](#) and the [Labour Relations Act](#) by relying on the constitutional provisions having realized the matter is statute barred under the parent Acts which give effect to constitutional rights.
 3. That the Applicant was dismissed on 13th May 2009.
 4. That ten (10) years have lapsed since the cause of action arose.
 5. That the applicant cannot rely on any other law enacted after he had been dismissed from service like; the [Constitution of Kenya](#) 2010, as such law does not apply retrospectively.
 6. That the application is an abuse of the Court process.
 7. That the application is incompetent and ought to be struck out with costs.



5. The court directed that the application be disposed of by way of written submissions. Only the applicant filed written submissions on 27th February 2020.

6. In the submissions the applicant posits that this court has jurisdiction to extend time citing the case of *Beatrice Kabai Adagala v Postal Corporation of Kenya* [2014] eKLR where the court stated -

“... the High Court and the Industrial Court is a court with the status of a High Court can entertain applications for extension of time. Other courts have held that the Industrial Court has no powers to extend time..... I however disagree with that holding as I believe it cannot be the intention of Parliament to fetter the discretion of a Judge. Otherwise, the Judge would be considered a stooge bystander to hold that I can't make any decision over a matter even when circumstances call for action.

This will also go against the principle of "Article 159 of *Constitution* which calls for avoidance to adherence to undue technicalities. Each case must therefore be considered on it's own merits by the court in deciding whether to entertain or not entertain an application for extension of time..."

7. He further relies on the decision in *Fred Mudave Gogo v G4S Security Services (K) Limited* [2014] eKLR where the court stated: -

“.....This time can be extended upon the court being moved by a party who on good grounds finds themselves under this circumstance. That is why the law exists to assist parties who for good reasons are unable to come to court in good time....”

8. He submits that under Section 12(3)(viii) of the *Employment and Labour Relations Act*, this court has unfettered discretion to allow an application to extend time if the applicant has good reasons for extension of time.

9. On the preliminary objection filed by the 2nd respondent, the applicant submits that the preliminary objection does not contain the three ingredients set out in the celebrated case of *Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited* [1969] EA 696 where the court stated that a preliminary objection must raise a pure point of law, demonstrate that the facts pleaded are correct and no fact needs to be ascertained. That this was the holding in *Attorney General and Another v Andrew Maina Githinji and Another* [2015] where the court stated:-

“Applying the ingredients in the above *Mukisa case (supra)* to the rival arguments herein, it is my finding that although the appellants’ plea of lack of jurisdiction on the part of the trial court is no doubt one of the examples of a pure point of law that Law J A gave in the *Mukisa Case (supra)*, it is my finding that the threshold for upholding a Preliminary Objection on a point of law was not met fully by the appellants amended preliminary objection.

My understanding of the principle set by the *Mukisa case (supra)* is that all the three ingredients, I have identified above must be present before a Preliminary Objection can be sustained. Herein only one of the three ingredients was satisfied. Non satisfaction of the other two rendered a fatal blow to the appellants’ amended Preliminary Objection.”

Determination

10. The applicant herein has stated in his application that he first approached the court vide Misc. Application No. 648 of 2009 (JR) which was dismissed by Odunga J. in the judgment delivered on



13th May 2013. His application to appeal out of time therefrom to the Court of Appeal was dismissed by Musinga J. A on 17th April 2015 and by a full bench of the Court of Appeal on 4th May 2018.

11. In the instant application, the applicant states that he has now decided to approach this court via an industrial dispute which he seeks leave to file out of time. The application herein is made under Sections 1A and 31 of the Civil Procedure Act, order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, Article 41, 47 and 48 of the constitution and all other enabling provisions of the law.
12. There are essentially two issues for determination, the first being that the subject matter of this suit has been the subject of previous proceedings which were determined by a court of competent jurisdiction. It is thus *res judicata* in terms of Section of the Civil Procedure Act which provides as follows –

7. Res judicata

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.

Explanation. — (1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. — (2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. — (3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. — (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. — (5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. — (6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

13. In the case of Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR the Court of Appeal explained the doctrine of *res judicata* thus –

“ 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.”
14. In the judicial review, the parties were the same as the instant suit and the subject matter was also the same. The court dealt with the matter to finality. The applicant herein is thus barred by the doctrine of *res judicata* from filing another suit against the same parties on the same facts. The fact that the prayers he sought in the judicial application are not exactly what he seeks in the intended suit does not preclude the suit from the doctrine of *res judicata*.
15. Turning to the main prayer in the application, the applicant seeks leave to file suit out of time. Section 90 of the [Employment Act](#) provides as follows –
90. Limitations
- Notwithstanding the provisions of section 4(1) of the [Limitation of Actions Act](#) (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.
16. Even under the Limitation of Actions Act, the provisions for extension of limitation period relate only to cases of disability, fraud, mistake and ignorance of material facts or where there is acknowledgment and part payment.
17. In the case of *Divecon Ltd v Samani* [1995-1998] 1 EA 48, the Court of Appeal was categorical that:-
- “To us, the meaning of the wording of section 4(1) that:...is clear beyond any doubt. It means that no one shall have the right or power to bring after the end of six years from the date on which a cause of action accrued, an action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action... A perusal of Part III shows that its provisions do not apply to actions based on contract. In light of these clear statutory provisions, it would be unacceptable to imply as the learned Judge of the Superior Court did, that “the wording of section 4(1) of the [Limitation of Actions Act](#). [Emphasis added]
18. There are thus two reasons why the application here must fail. The first is that it is *res judicata* having been the subject of Misc. Application No. 648 of 2009 and secondly, because this court has no jurisdiction to grant the orders sought being extension of limitation period in employment contracts.
19. The application is accordingly dismissed with no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 29TH DAY OF MAY 2020

MAUREEN ONYANGO

JUDGE

ORDER



In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. 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, the 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 1B of the [Civil Procedure Act](#) (Chapter 21 of the Laws of Kenya) which impose on the 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.

MAUREEN ONYANGO

JUDGE

