



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT MERU**

**APPEAL NO. 3 OF 2019**

**REUBEN GICHUNGE & 7 OTHERS.....APPELLANTS**

**VERSUS**

**THE REGISTRAR OF TRADE UNIONS.....1<sup>ST</sup> RESPONDENT**

**KENYA UNION OF COMMERCIAL, FOOD**

**AND ALLIED WORKERS UNION.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The 1<sup>st</sup> Respondent filed a preliminary objection supported by the 2<sup>nd</sup> Respondent to the effect that the Appellants' appeal is *res judicata* and the consequently this court has no jurisdiction to hear and determine the same and that the case was wrongly filed in Meru instead of Nairobi as required by law or practice. The Appellants were opposed and denied that the suit was *res judicata* as the parties before the Court were different from the parties in the previous suit ELRC Appeal No. 14 of 2014 which was heard by Abuodha J.

2. The 2<sup>nd</sup> Respondent's advocate Mr. Nyabena argued that that the Appellants' appeal is *res judicata* as this Court, differently constituted, had made a determination which was appealed to the Court of Appeal and the issue settled. He submitted that the objection was raised on the basis that the judicial pronouncement on the merits as the gist of the appeal before this court was whether the Appellants can form a trade union for supermarket workers. He stated that when the matter went before Abuodha J. he held they cannot as their interests were sufficiently represented by the 2<sup>nd</sup> Respondent. He stated the Court of Appeal came to the same verdict and held that the right to form a trade union is not absolute and the Court of Appeal settled the matter and the Appellants cannot file this here hoping to get a different opinion. He argued that they should have pursued the appeal before the Supreme Court and not come to this Court. He argued the only thing that was different in this case was the name of the proposed union as the objects, intentions and membership remained the same. He submitted that the matter was thus caught up in the *res judicata* rules and that there was no demonstration that the Court of Appeal had not settled the question before me. He submitted that this was a matter that ought to have been filed in Nairobi and not Meru since the Registrar of Trade Unions is based in Nairobi and the first appeal is in Nairobi.

3. The representative of the Appellants Mr. Gichunge argued that in order for the court to determine that this matter was *res judicata* it has to ascertain whether the matter had been determined. He stated that this court was being called upon to determine whether the matter before it is substantively similar to the previous one. He argued that the parties in the earlier suit and the present suit are not the same as if they were the same then it was against the public policy that litigation must come to an end. He submitted that the names in the previous suit and the ones in this suit they are not the same. He stated the Appellants were not parties to the previous suit and neither were the parties in the previous suit in this suit. He argued that the previous case was under Section 12 of the Labour Relations Act while the present suit was under Section 19 of the Labour Relations Act on the matter of registration and as far as they were concerned there were no orders from the Court of Appeal or the Supreme Court that prevents this appeal from being heard by this court. He argued that the 2<sup>nd</sup> Respondent had mistaken the law of *res judicata* and its purpose. He stated that the court should not shut out the Appellants on account of territorial jurisdiction as this court has jurisdiction countrywide as it was a superior court of record for labour matters. He argued that this is not a subordinate court with limited jurisdiction and that this court was devolved to avoid backlog and to reach far flung areas of the country. He argued that as such a resident of Meru County he was bound to file the dispute in Meru. He referred to Appeal No. 5 of 2014 which is the case of Nixon Ngunyu Mbura & 6 Others v Registrar of Trade Unions which was heard and determined in Mombasa. He argued that Article 36 of the Constitution speaks of the right of every person has the freedom of association to join or participate in an association of any kind. He submitted that the matter in this court and the association spoken of is a trade union well covered under Section 4 of the Labour Relations Act. He submitted that the members who met to form this trade union were different from the other members in the appeal that the 2<sup>nd</sup> Respondent had brought to their attention.

4. In a brief rejoinder the 2<sup>nd</sup> Respondent's counsel submitted that the names of promoters could be different but the parties articulated the same issues and that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were parties in the Appeal. He argued that the Appellants are litigating under the title if supermarket works and have sued the same parties and the issues they raise are the same. He submitted that the 2<sup>nd</sup> Respondent does not deny that this court has countrywide jurisdiction but since the lower tribunal is in Nairobi it would be more convenient for the appeal against the decision to be filed in Nairobi not Garissa or Mombasa. He submitted that the right to freedom of association under Article 36 and 41 of the Constitution was decided by Abuodha J. and affirmed by the Court of Appeal and the Appellants were trying to appeal the decision of the Court of Appeal in the wrong forum. He urged the dismissal of the appeal before this court as the Appellants seek to have the second bite of the cherry yet the law in Nairobi and Meru is the same.

5. The phrase *Res Judicata* may be stated to be the general principle that a matter may not be litigated again once it has been determined on the merits. The suit before me is *res judicata* though the parties before the Court are different from the parties in the previous suit ELRC Appeal No. 14 of 2014 which was heard by Abuodha J. and the decision appealed to the Court of Appeal (GBM Kariuki, F. Sichale and S ole

Kantai JJA) which upheld the determination of the superior court. The appellants in the case were the promoters of Kenya Supermarket Workers Union. The current appellants are promoters of Kenya Union of Supermarket Workers Union. The short history of the intended union is that on 18<sup>th</sup> January 2016 it applied for registration and the Registrar declined the registration on 17<sup>th</sup> March 2016 and aggrieved by her decision, the appellants filed Cause No. 52 of 2016 which was dismissed on 25<sup>th</sup> May 2017. Thereafter on 29<sup>th</sup> May 2017 the appellants re-applied for registration but were not issued with a certificate of registration because the Registrar held that all employees working in supermarkets are already represented by the 2<sup>nd</sup> Respondent Kenya Union of Commercial, Food and Allied Workers (KUCFAW). The Appellants argued that not all workers are represented by the 2<sup>nd</sup> Respondent since the word all is encompassing and that in refusing registration the National Labour Board erred as not all the supermarket workers are members in the trade union. This is missing the point. By being told they are represented means there is a trade union already in place for supermarket workers. That decision has also been already made by this court differently constituted and affirmed by the Court of Appeal. The matter is therefore *res judicata* as that decision by the Court of Appeal is binding and conclusive upon all this and other courts of concurrent power whether situated in Nairobi, Nakuru, Mombasa, Kisumu or Eldoret. As such the Appellants were misguided to seek registration of the trade union and even more misguided to appeal the decision. Whereas there was umbrage taken by the 1<sup>st</sup> Respondent to the filing of the Appeal in Meru, the matter of jurisdiction is settled. This Court has the jurisdiction to hear the Appeal, were the Appeal proper, however, it is convenient if the Appeal had been filed to the court nearest where the 1<sup>st</sup> Respondent operates though there is no bar filing it in any Registry of the Employment & Labour Relations Court in Kenya. As the Appeal is *res judicata* the inevitable outcome is that this Appeal is dismissed with costs to the 2<sup>nd</sup> Respondent.

6. This decision was rendered online with the waiver of Order 21 Rule 1 and 3 of the Civil Procedure Rules and in line with the Chief Justice's Practice Directions to Mitigate COVID-19 dated 16<sup>th</sup> March 2020 and the Kenya Gazette Notice 2357 of 20<sup>th</sup> March 2020 issued in Vol. CXXII No. 50. In line with the Practice Directions of the Chief Justice and the Judiciary and the other stakeholders in the administration of justice agreed to scale down operations to mitigate the effects of COVID-19, execution of the judgment is automatically stayed for 14 days.

It is so ordered.

**Dated and delivered at Nyeri this 11<sup>th</sup> day of May 2020**

**Nzioki wa Makau**

**JUDGE**