



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**CASE NO. 170 OF 2017**

*(Before Hon. Justice Mathews N. Nduma)*

GEORGE NGUGI NJORGE.....1<sup>ST</sup> CLAIMANT  
PAUL OKOTH OGANGO.....2<sup>ND</sup> CLAIMANT  
PAUL NGUGI KARANJA.....3<sup>RD</sup> CLAIMANT  
KIPLAGAT BENARD.....4<sup>TH</sup> CLAIMANT

**VERSUS**

ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT  
THE INSPECTOR GENERAL.....2<sup>ND</sup> RESPONDENT  
NATIONAL POLICE SERVICE.....3<sup>RD</sup> RESPONDENT  
NATIONAL POLICE SERVICE COMMISSION.....4<sup>TH</sup> RESPONDENT  
CABINET SECRETARY, INTERIOR AND COORDINATION....5<sup>TH</sup> RESPONDENT

**RULING**

1. The suit was filed on 4<sup>th</sup> May 2017 by the four (4) claimants against the five respondents. The cause of action as set out in the memorandum of claim is:

*“Unfair and unlawful termination of claimants’ employment and subsequent refusal by the respondents to pay the claimants compensation/and or terminal dues and other entitlements for the unfair and unlawful termination of their employment”.*

2. The 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> respondents filed a substantive response to the memorandum of claim on 6<sup>th</sup> November 2017 and on 3<sup>rd</sup> July 2019, Lorna Orege, litigation counsel for the Hon. Attorney General, the 1<sup>st</sup> respondent filed a notice of preliminary objection to wit:

(i) The suit is *Resjudicata* and the same ought to be dismissed with costs.

3. The respondents filed submission on the notice of preliminary objection on 14<sup>th</sup> November 2019 in which they state that the claimants in Nairobi industrial Dispute no. 261 of 2016 raised substantially the same issue as in the present suit filed in Kisumu ELRC Industrial dispute No. 170 of 2017. That the suit was filed by the claimants against the same parties and are litigating under the same title.

4. The claimants filed their submissions on the objection on 7<sup>th</sup> February 2020.

5. The issue to be determined is whether the present suit is *Resjudicata* and should be struck off accordingly.

6. The principle of *Resjudicata* is stipulated under the civil Procedure Act at Section 7 as follows:

“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 can 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 the court”.

7. In **Henderson vs Henderson (1834-60) All E.R 378** was observed:

“The plea of *resjudicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment, but on every point which properly belonged to the subject litigation and which the parties, exercising reasonable diligence, might have brought forward at the time”.

8. In the case of the **Independent Electoral and boundaries Commission vs Maina Kiai and 5 others Nairobi Court of Appeal Civil Appeal No. 105 of 2017 (2017) eKLR**, the court of Appeal held the criteria to be:

- (a) The suit or issue was directly and substantially in issue in the former suit.
- (b) The former suit was between the same parties or parties under whom they or any of them claim.
- (c) The 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.

9. There is no doubt that the plea of *resjudicata* qualifies as a preliminary objection as defined by the Court of Appeal in **Mukisa Biscuit Manufacturing Company Limited vs West End Distributors Limited (1969) EA at page 700** by law J.A provided the facts being relied upon by the objector can be plainly discerned on the face of the previous and present suit, the subject of the objection and therefore not qualified to constitute disputes of fact described in Mukisa Biscuit case supra by Sir Charles Newbold P. as follows:

“A preliminary objection is in the nature of what used to be a demurrer. It raised a pure point of law which is usually on assumption that all the facts pleaded by the other side are correct. It cannot be raised if a fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

10. In the present case, it cannot be gain said that the claimants in the present suit are the same claimants as in Nairobi Industrial Dispute No. 261 of 2016 and the respondents are the same except addition of nominal non consequential respondents in the present suit, the Hon. Attorney General being in terms of *Article 156(3) of the Constitution of Kenya 2010*, the principal legal adviser to the Government and the mandatory representative of the national government in court or in any other legal proceedings to which the national government is a party, other than in criminal proceedings.

11. The other respondents in the present case are the Inspector General; National Police Service; National Police Service Commission and Cabinet Secretary Interior and Coordination sued not in their personal capacity but being representatives of National Government Institutions. To this end, the parties in both suits are the same and are litigating under the same title.

12. Whereas the objector has met the criteria in (a), (b) and (c) set out in the Kiai case above, the objector has in the court’s view and finding failed to meet criteria (d) thereof being:

“The issue was heard and finally determined in the former suit”

13. It is beyond peradventure that the previous suit at Nairobi was not heard and determined by the court on the merits. Therefore, the issue in dispute in the previous suit and in the present suit being whether or not the employment of the claimants was unlawfully and unfairly terminated by the respondents was not determined in the previous suit.

14. It is not in dispute the previous suit was struck out by the court for non-prosecution and was not heard on the merits.

15. Accordingly, the objector has failed to meet this particular pre-requisite for the principle of *resjudicata* to obtain.

16. Provided the present suit has been filed within the limitation period, there is no bar to the same being heard and determined on the merits. It would however be appropriate for a litigant who failed to prosecute a previous suit to seek condonation by the court before filing a new suit to avoid abuse of court process. This is not an issue for determination in this application.

17. The objection by the respondents is dismissed with costs.

**Ruling Dated, Signed and delivered at Kisumu this 15<sup>th</sup> day of October, 2020**

**Mathews N. Nduma**

**Judge**

**ORDER**

In view of the declaration of measures restricting court of operations due the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> 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**

Lorna Orege Litigation Counsel for the Objectors.

Wabomba for the Claimants

Chrispo- Court clerk