



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 2290 OF 2016**

**SILAS MAGERO IMANDA.....CLAIMANT**

**VERSUS**

**TOURVEST HOLDINGS (PTY) LIMITED.....RESPONDENT**

**RULING**

**INTRODUCTION**

1. The claimant was employed by the respondent on 13.5.2005 and worked until 30.11.2012. He brought this suit on 10.11.2012. He brought this suit on 10.11.2016 alleging that the dismissal was illegal and wrongful and prayed for special damages totalling to Kshs.7,596,633, General damages for the wrongful dismissal costs and interest.

2. The respondent filed her defence on 30.6.2017 denying the alleged wrongful dismissal the claim for terminal dues. Simultaneously with the defence the Respondent filed the Notice of Preliminary Object (P.O) dated 27.6.2017. The P.O objects to the suit on ground that it is time barred and it also **Res judicata**.

3. The P.O was disposed of by written submissions by counsel for the two parties. The issues for determination are:-

- (a) Whether the suit is time barred.
- (b) Whether the suit is **res judicata**.

**Analysis and Determination**

4. There is no dispute that the cause of action herein arose on 30.11.2012 when the claimant was dismissed from his employment. I therefore proceed to answer the issues framed above for determination:-

**(a) Time barred suit**

5. Section 90 of the Employment Act provides that:-

***“90. Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (cap 22), no civil action or proceedings based or arising or of this Act or 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 cause of continuing injury or damage within twelve months next after the cessation thereof.”***

6. From 30.11.2012 when the separation occurred to 10.11.2016 when the suit was filed, is almost 4 years. The suit was therefore, in my view, filed out of time and the court lacks jurisdiction to determine it.

**(b) Res judicata**

7. The claimant filed cause No. 163 of 2013 against the respondent before this court, but according to the Respondent it was dismissed for want of prosecution after which he brought the present suit. The Respondent contended that the issues in dispute is the dismissed suit and the present suit were substantially the same and prayed the Court to dismiss the present suit for being **res judicata**. The Claimant never contested the foregoing objection either by way of a reply to defence or even in his submissions to oppose the P.O. I therefore find in favour of the respondent that the suit here is **res judicata**. It is in the public policy and interest that legal proceeding must come to an end at some point.

8. In this case, the Cause No. 163 of 2013 having been dismissed for want of prosecution, the suit, in my view, was determined on the merits. The court applied its mind to the merits of the dispute before it and dismissed it for lack of evidence from the Claimant. Consequently, his way out of that situation was only by way of review or appeal. However, to his detriment he brought a fresh suit. That rendered the new suit *res judicata* under section 7 of the Civil Procedure Act.

**Conclusion and Disposition**

I have found that the suit herein is time barred by dint of section 90 of the Employment Act and also res judicata vis a vis *ELRCC 163 OF 2013*. Consequently, I dismiss the suit with costs.

**Dated, Signed and Delivered in Open Court at Nairobi this 17th day of May 2019**

**ONESMUS N. MAKAU**

**JUDGE**