



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 2099 OF 2017

(Before Hon. Justice Hellen S. Wasilwa on 4th July, 2019)

RICHARD OTIENO ONYANGO.....CLAIMANT

VERSUS

STANDARD CHARTERED BANK (K) LIMITED.....RESPONDENT

RULING

1. The Respondent/Applicant, Standard Chartered (K) Limited filed a Notice of Motion Application dated 24/01/2019 brought under *Section 3, 12 (viii) of the Employment & Labour Relations Act, Section 3A of the Civil Procedure Act, Order 2 Rule 15 and Order 51 Rule 1 of the Civil Procedure Rules and the inherent jurisdiction of the Court* against the Claimant, Richard Otieno Onyango.

2. He seeks to have the Memorandum of Claim dated 16/10/2017 and the entire suit in ***Nairobi ELRC No. 2099 of 2017*** struck out and for costs of this Application and the suit to be awarded to the Respondent/Applicant herein. The Application is based on the grounds that:-

1. "The issues in dispute were the subject of Nairobi ELRC No. 999 of 2017 – Silas Wangila Wanyama & 81 others vs. Standard Chartered Bank in which the Claimant herein was also a party and which was settled by a consent between the parties.

2. This suit is therefore res judicata and is an abuse of the Court process.

3. It is in the interest of justice that this Application be allowed and the suit be struck out.

4. The Application is supported by the Affidavit sworn by the Respondent's Head of Employee Relations in charge of East Africa, Harrison Okeche. He avers that the Claimant was amongst the Claimants who filed a suit on 07/06/2017 against the Respondent for being unfairly and unlawfully declared redundant in *Nairobi ELRC No. 999 of 2017*.

5. That the said Claimants obtained an interim Court order as per ***Exhibit HO 2***, barring the Respondent from declaring them redundant and that the parties in the said Cause arrived at a settlement as per ***Exhibit HO 3***. That after the consent was filed in the Court, the Respondent paid the Claimant his agreed terminal dues as evidenced by the payslip annexed and marked ***HO 5*** but that the Claimant then went ahead to file the suit herein seeking the same orders.

6. He continues to aver that this Honourable Court would be subjecting the Respondent/Applicant to double jeopardy if it is to entertain this suit and that the Claimant would unjustly benefit from double compensation. That the Claimant is to date therefore guilty of non-disclosure of the fact that the pertinent issues have already been deliberated upon in another suit.

Claimant/Respondent's Case

7. The Claimant/Respondent filed a Replying Affidavit dated 25/03/2019 averring that the Application herein is grossly misconceived and presented to deny him his day before this Honourable Court against the illegal acts perpetrated by the Respondent during his employment.

8. That the said *ELRC No. 999 of 2017* is alien to him as he does not recall authorizing the said Silas Wangila Wanyama to represent him in any suit and he further denies the Applicant's averments on the same. That this Court should interrogate the purported 'authority to plead' at *pages 36-38* of the application herein and that evidently, the said Silas did not have any express authority to act for the 81 Claimants he purported to act for.

9. He invites this Court to issue Summons against the said Silas to come before this Court for cross-examination as to how and when he allegedly obtained his authority in the said cause.

10. That he was never part of the negotiations and terms of settlement leading to the Settlement Agreement dated 05/07/2017 and that he puts the Respondent and the said Silas to strict proof as to whether he was ever consulted. That on several occasions, the Respondent's representative contacted him for purposes of settling his terminal dues even after the purported settlement in the aforementioned Cause involving Harrison Okeche evidenced in the annexure marked **ROO-2** and as herein below:-

i) On or about 10/08/2017, the said Harrison emailed him (as shown at ROO-1) stating that the Respondent had decided to vary the terms of the purported settlement agreement because of his rejection of the same;

ii) On or about 15/08/2017, the said Harrison arranged for a meeting with him at the Respondent bank Chiromo Branch so as to negotiate terms of his settlement proving that he had never been part of the aforementioned cause; and

iii) On or about 05/09/2017, the said Harrison once again arranged for another meeting with him and another bank official called Francis Omeno to continue with the negotiations regarding his settlement.

11. That the said negotiations did not bear fruit prompting him to seek justice before this Court and that he further contests his purported signature appearing in the settlement agreement in the aforementioned cause. That his signature was either doctored or copy-pasted or forged and that this instant suit is not res judicata as put by the Applicant and that the triable issues he raises herein are of merit and ought to be determined by this Court. That if the Respondent was certain, it would have initiated a Preliminary Objection prior to submitting to this Court by filing its defence and documents thereto.

Respondent/ Applicant's Submissions

12. The Applicant submits that the legal basis for this Application is **Section 7 of the Civil Procedure Act** on matters that have been raised and heard by another Court. That the Claimant admitted in his Witness Statement dated 18/10/2017 at paragraph 6 that he was aware of the injunction and negotiations in *ELRC No. 999 of 2017* that led to the settlement and that he is estopped from denying the same.

13. That based solely on that admission, this application should be allowed and that the negotiations described by the Claimant involved a package above legal requirements that the Respondent could offer. That as shown in *Exhibit HO 5* at page 3 of the email thread, the Claimant admitted to having received payment in 2017 and that it paid him before he had cleared with it.

14. It is submitted by the Applicant that if the Claimant/Respondent has any evidence of fraud, the proper forum to raise such issues would be in *ELRC No. 999 of 2017* as it may be grounds to set aside the consent and that as it stands, the consent is a valid order of the Court. The Applicant relies on the case of **David Nyumu Muchiru –v- Standard Chartered Bank (K) Ltd [2016] eKLR** where the Court stated that a consent compromising a suit is a final determination of a matter and thus fits in the confines of the provisions of Section 7 of the Civil Procedure Act. The Respondent/Applicant also relies on the case of **Christopher Kinyuuti Maundu v Shell & BP (Malindi) Kenya Limited [2018] eKLR** and prays that this Application be allowed as prayed.

Claimant/Respondent's Submissions

15. The Claimant submits that it has been widely upheld that no Court of law should strike out a suit without according the litigant their day in Court such as in the case of **Yaya Towers Limited –v- Trade Bank Limited (In Liquidation) Civil Appeal No. 35 of 2000**. The Court of Appeal in **Mwangi –v- Mwangi [1999] 2 EA 234** observed that a litigant must be heard on merits as far as possible. The Claimant/Respondent contends that this Honourable Court should interrogate his Claim before making any determination thereto.

16. He submits that Section 7 of the Civil Procedure Act on res judicata is not applicable in this suit and that this Court should appreciate the decision in **William Charles Fryda –v- Lance P Nadeau & another [2015] eKLR** that the power to strike out a pleading is a discretion, which should be exercised with the greatest care and caution. The Claimant/Respondent finally submits that the Applicant ought to be condemned with costs should this Court reject the application.

17. I have considered the averments of both Parties. I have looked at Pleadings in case No. 999/2017 Silas Wangila Wanyama and 81 others vs Standard Chartered Bank of Kenya Limited filed in 2017 June. Attached to the claim was an "Authority to plead and sue a Verifying Affidavit". Amongst those who signed this authority is the Claimant Richard Onyango Otieno ID no. 21970746.

18. A consent was entered in this case after a settlement agreement dated 5.7.2017 was presented in Court. The claim was thereafter marked as settled after the consent of the parties dated 6.7.2017 and filed in Court on 12/7/2017.

19. Following this Consent, the Respondents aver that the Claimant was fully paid 11,249.15 after deduction of 1,708,687.10.

20. The Claimant denied the Respondents averments and indicated that he was not party to Cause No. 999/2017. The Pleadings presented before in Cause No. 999/2017 indicate that the Claimant was Silas Wangila Wanyama and 81 others. The list of the 81 others has not been presented before Court as part of the Claimant's Memorandum of Claim in Cause 999/2017.

21. There is also at page 36 and 37 of the annexures to this application a list of Parties who authorised swearing of a verifying affidavit. It is however not indicated in which Claim this authority was given and whether the same was filed in Court. This Court cannot rely on the said incomplete document to find that the Claimant was indeed part of this Claim No.999/17 and benefited from the judgement therein.

22. There is also no evidence presented in Court that the Claimant was indeed paid off following the judgement in this Claim No.999/17.

23. As the application stand, the Applicant has not set out its case as expected to make this Court conclude that indeed this cause is res judicata. It would be a miscarriage of justice for this Court to proceed and strike out this Claim at this stage without clear evidence that this cause has been already determined. I therefore dismiss this application accordingly and direct the claim to proceed.

24. Costs in the cause.

Dated and delivered in open Court this 4th day of July, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Were for Respondent – Present

Farah for Claimants – Present