



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 294 OF 2018

JOHN SIGURA OTIDO..... CLAIMANT

- VERSUS -

ENERGY REGULATORY COMMISSION.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 22nd June, 2018)

RULING

The claimant filed the memorandum of claim dated 13.03.2018 through Madala & Company Advocates. The claimant filed on 13.03.2013 the notice of motion for lifting of the interdiction imposed on 06.09.2017 and for resumption of duty pending the hearing and determination of the suit and the application. The claimant also filed a notice of motion on 23.04.2018. The claimant further filed the amended memorandum of claim on 23.04.2018 and the respondent filed on 02.05.2018 the response to amended memorandum of claim.

The respondent filed a preliminary objection on 16.03.2018 through Ogetto, Otachi & Company Advocates. The respondent stated that pursuant to the application dated 13.03.2018 the respondent raised the following objection and shall apply for the application and claim to be struck out with costs on the grounds that:

- 1) The issues raised in the application have recently been adjudicated upon and determined by the Hon. Justice Radido in his ruling delivered on 23.02.2018, the application being **res judicata**, thus.
- 2) All prayers and reliefs sought hereunder were determined in the claimant's application under certificate of urgency in E.L.R.C Cause No.1851 of 2017, where the Learned Judge dismissed its applications, with costs, by reason that they lacked merit and substantive suit is pending hearing.
- 3) Therefore there is still in existence a similar suit between the same parties over the same dispute and the claimant offends provisions and the spirit of the law by purporting to institute this current suit.
- 4) The claimant further offends the provisions of the Civil Procedure Rules, 2010, by purporting to institute a subsequent suit having not complied or obeyed the court's order, in the initial suit, as to costs upon dismissal of his applications.
- 5) The claimant has committed perjury by misleading the Court as to existence of a similar suit, where in his verifying affidavit he avers that there **"is no other claim pending and there has been no previous proceedings in any court between the claimant and the respondent over the same matter."**

6) The institution of this suit and application offends the provisions of Articles 27, 159(2) (a) & 259 (1) (b) of the Constitution, 2010.

Parties filed submissions on the preliminary objection as directed by the Court. For the claimant it was submitted as follows:

- 1) In reply to grounds 1, 2, and 3 of the preliminary objection the claimant states that E.L.R.C Cause No.1851 of 2017 was withdrawn before it was heard and concluded. The withdrawal was pursuant to the notice of withdrawal of claim signed by the claimant dated 05.03.2018 and filed in Court on 07.03.2018 and recorded in Court on 08.03.2018 as per the order issued on 09.05.2018.
- 2) Further the issues that were litigated in E.L.R.C Cause No. 1851 of 2017 are completely different from those being raised in the present case as the previous case challenged the unprocedural issuance of an interdiction letter the same having been withdrawn, the present suit is challenging unfair termination of employment.
- 3) In reply to grounds 4 and 5 the issue of costs and perjury are not pure points of law to be entertained by the Court as preliminary objection.
- 4) In response to ground 6 the claim does not offend constitutional provisions under Articles 27, 259 (2) (d) as alleged by the respondent as the Constitution of Kenya mandates the Court to grant a party a fair hearing as per Article 50 and with no regard to any procedural technicalities in determining matters litigated before it.

The **1st issue** for determination is whether the present suit is an abuse of court process by reason of the doctrine of **res judicata**.

Res-Judicata is an affirmative defense barring the same parties from litigating a second law suit on the same claim or any other claim arising from the same transaction or series of transactions and that could have been, but was not raised in the first suit (See Black's Law Dictionary, 9th Edition). The three essential elements are:

- (a) an earlier decision on the issue;
- (b) a final judgment on the merits; and
- (c) the involvement of the same parties, or parties in privities with the original parties.

The doctrine of **res judicata** aims at ensuring that litigation comes to an end. An issue that has been conclusively decided upon by a competent judicial authority must not find itself before the same or other competent judicial authority for reconsideration.

The present suit was filed on 13.03.2018 and the previous suit was withdrawn by the order issued on 09.05.2018. The Court returns that as at the time of filing the present suit, the previous suit had not effectively been withdrawn so that there was a pending suit in that regard. Further, the Court returns that the previous suit had not been heard and determined on its merits and so there exists no final determination on the matters in issue. The Court has considered the ruling by Radido J delivered on 23.02.2018 and returns that the issue of staying or lifting of the claimant's interdiction pending the final determination of the dispute and as conveyed by the letter of interdiction dated 06.09.2017 was determined in that ruling. In any event the issue of interdiction has been overtaken by events following the summary dismissal of the claimant by the letter dated 11.04.2018. Thus, the Court returns that in view of the ruling and the claimant's summary dismissal, the application herein by the notice of motion dated 13.03.2018 is either an abuse of court process or overtaken by events in so far as it seeks lifting of the interdiction. As submitted for the respondent, the application filed for the applicant and dated 13.03.2018 is liable to dismissal with costs as it is an abuse of Court process. However, the present suit raises new issues such as the summary dismissal and the Court returns that for that reason, **res judicata** will not

apply. The respondent has raised objections to the manner in which the claimant withdrew the previous suit including that the claimant signed the notice of withdrawal in person whereas he had an advocate on record in that other suit. The Court returns that the validity of that withdrawal of the previous suit may be questioned by the relevant proceedings such as an application for review. The present ruling will therefore not delve into the validity of the withdrawal of the previous suit. Related issue of costs consequential to such withdrawal would similarly need to be decided in that previous suit in an appropriate process.

The **2nd issue** for determination is whether the claimant is guilty of material non-disclosure. At filing of the suit and application it is clear that the claimant failed to disclose that there existed a previous suit between the parties and that Radido J had delivered a ruling on the issue of the then prevailing interdiction. The Court finds that the respondent has established that the claimant was guilty of material non-disclosure in that respect. It is also true as submitted for the respondent that the claimant failed to fully disclose the material steps involved in the withdrawal of the previous suit other than the annexing of the withdrawal order on the submissions herein. The Court has considered the material non-disclosure and returns that the claimant is not deserving of the interim orders herein that the vacancy flowing from the claimant's summary dismissal be preserved pending further orders by the Court as given on 30.30.05.2018 and issued on 05.06.2018.

The Court has considered the circumstances of the case. The Court has considered the claimant's non-disclosure of material facts. The Court has also considered the changed and new character of the present suit as founded upon the amended pleadings. To balance justice in the matter the Court makes orders as follows:

- (a) The application filed for the applicant and dated 13.03.2018 is hereby dismissed with costs as it is an abuse of Court process.
- (b) The interim order given herein on 30.05.2018 and issued on 05.06.2018 preserving the vacancy flowing from the summary dismissal of the claimant until further orders by the Court is hereby set aside.
- (c) Parties are invited to take directions on further steps in the suit.

Signed, dated and delivered in court at **Nairobi** this **Friday 22nd June, 2018**.

BYRAM ONGAYA

JUDGE