



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 289 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

WILSON NJAU HURUKO.....CLAIMANT

-Versus-

THE HON. ATTORNEY GENERAL (Being sued

on behalf of the Government of Kenya,

Ministry of Local Government).....1ST RESPONDENT

COUNTY GOVERNMENT OF KIAMBU

(Being sued as the Lawful Successor of the

MUNICIPAL COUNCIL OF THIKA).....2ND RESPONDENT

RULING

Before me for determination is a notice of preliminary objection filed by the 1st respondent on 23rd October 2017. It is dated 17th October 2017 and raises the following grounds of objection –

1. The claim is grossly incompetent, misinformed, misconceived, vexatious and an abuse of the court process and ought to be struck out *in limine*.
2. That the claim is *res judicata* as per Section 7 and 8 of the Civil Procedure Act and the court lacks jurisdiction to entertain the same having been decided in a ruling delivered in the High Court of Kenya Judicial Review Division Misc. Application No. 1 of 2011.

The preliminary objection was disposed of by way of written submissions.

Background

The Claimant filed this suit against the Respondents on 1st March 2013 claiming damages, costs and interest for alleged wrongful and unfair termination of employment. According to the Claimant's Memorandum of Claim, the cause of action arose from revocation of his Ministerial appointment.

The Claimant avers that on 11th April 2008, he was appointed by the Minister for Local Government as the Government Representative in the 2nd Respondent Council for a tenure of 5 years vide Gazette Notice No. 2951. Thereafter, on 23rd December 2010, the Claimant received a letter dated 14th December 2010 authored by the Minister for Local Government, through which his appointment as Government representative was purportedly revoked. Further, the Minister on 24th December 2010 vide Gazette Notice No. 16747 appointed another person as Government Representative to the 2nd Respondent Council.

Consequently, the Claimant filed this suit alleging that his appointment was for a fixed term tenure of 5 years and the revocation before expiry of 5 years was unlawful and unfair.

Before filing the present suit, the Claimant herein had initiated Judicial Review proceedings vide Notice of Motion application dated 11th February 2011 in Misc. Application No. 1 of 2011 in the High Court of Kenya at Nairobi and a Ruling was delivered by M. Warsame J. (as he then was) on 2nd December 2011. The Ruling is annexed to the Claimant's Memorandum of Claim and marked as "WNH 10" of his documents.

According to the said Ruling, the Claimant sought to quash the Gazette Notice revoking his appointment as well as Gazette Notice appointing another person as Government Representative of the 2nd Respondent Council. The Honourable Judge considered the application and all the arguments for and on behalf of the parties and dismissed the same. It is on the basis of this Ruling delivered by court that the 1st Respondent raised a Preliminary Objection.

The application was disposed of by way of written submissions.

Respondent's Submissions

It is the respondent's submission that the present claim is res judicata as defined in Section 7 of the Civil Procedure Act and in the case of **KARIA & ANOTHER -V- THE ATTORNEY GENERAL AND OTHERS [2015] I EA 83** in which the court defined *res judicata* to mean that there has to be –

1. A previous suit in which the same matter was in issue
2. The parties are the same or parties under whom they or any of them claim litigating under the same title.
3. A competent court heard the matter in issue and determined it finally.

The respondent submits that the Applicant/Claimant and Respondents in JR Misc. Application No. 1 of 2011 and in the present case are the same, that the issues in JR Misc. Application No. 1 of 2011 and in the present case are the same as the suit emanates from the Claimant's purported unlawful termination and/or revocation of the Claimant's employment/appointment. The issues arise from the fact that he had been appointed by the Minister for Local Government (on whose behalf the 1st Respondent has been sued) to represent the Minister in the 2nd Respondent Council. The claimant's employment/appointment was terminated/revoked in December 2010 when he was replaced with someone else.

It is submitted that the same issue was the subject of J. R No. 1 of 2011 in which the court observed as follows while dismissing the application –

“As was rightly pointed out by the advocate of the applicant, the reading of Section 112 and 113 of Cap 265 gives the Minister the powers to appoint a person as a public officer representing the Government in any council. The Act is however, silent on the terms of office of officers appointed by the Minister and also silent on the manner of removal and revocation of the appointments.

I am therefore satisfied that the appointment of the applicant was not underpinned by any Statute. The Minister therefore had the powers to terminate the appointment of the applicant any time and replace him in accordance with the exercise of his powers. In any case, the Minister had no powers to appoint the applicant who was a retired teacher as a public officer. It therefore, means the initial appointment was not in the nature of a public officer but was merely a government representative. It is my determination that there is no public law issue involved in the appointment and termination of the applicant. The Minister had legitimate discretion to appoint meaning that he had the discretion to remove the applicant. The applicant was removed in exercise of a valid power exercised in accordance with Sections 112 and 113 of Cap 265 by the Minister for Local Government. The application is therefore dismissed with no order to costs.”

It is submitted that this court has concurrent jurisdiction with the various divisions of the High Court including the Judicial Review Division and cannot adjudicate over the same issue as doing so would amount to sitting on its own appeal. The respondent relied on the case of **FIZZ HOTELS AND INVESTMENTS LIMITED -V- KENYA NATIONAL HIGHWAY AUTHORITY & ANOTHER** in which the court upheld a preliminary objection on grounds that the subject matter of the suit was res judicata having been filed in the Environment and Land Court after the same issue had been heard and determined in the Judicial Review Division of the High Court.

The respondent further relied on Section 8 of the Civil Procedure Act, which provides that –

8. Bar to further suit

Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of that cause of action.

The respondent also relied on the decision of the Court of Appeal in **JOHN FLORENCE MARITIME SERVICES LIMITED & ANOTHER -V- CABINET SECRETARY FOR TRANSPORT AND INFRASTRUCTURE & 3 OTHERS** in which the court quoted with approval the observation of the court in **KAMUNYE & OTHERS –V- PIONEER GENERAL ASSURANCE SOCIETY LIMITED** as follows –

“Simply put res judicata is essentially a bar to subsequent proceedings involving same issue as had been finally and conclusively decided by a competent court in a prior suit between the same parties or their representatives...The general consensus therefore remains that res judicata being a fundamental principle of law that relates to the jurisdiction of the court, may be raised as a valid

defence to a constitutional claim.”

The respondent submitted that the import or the doctrine of *res judicata* is to ensure conclusiveness in legal proceedings by barring further legal proceedings based on the same issue(s) over the same subject matter between the same parties and their proxies, and to ensure that a party is not vexed twice or forced to fight the same battle twice over the same cause, and further to promote stability of judgments by reducing the possibility of inconsistency in judgments as was observed in the case of **SAMUEL NJAO WAINAINA -V-COMMISSIONER OF LANDS & 6 OTHERS** as follows –

“In this respect, I would do no better than quote the case of **EDWIN**

THUO VS ATTORNEY GENERA! & ANOTHER NAIROBI PETITION NO. 212 OF 2012 (Unreported) where the court stated; *The courts must always be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff is in the second suit is trying to bring before the court in another way and in a form of a new cause of action, which has been resolved by a court of competent jurisdiction. In the case of OMONDI VS NATIONAL BANK OF KENYA LIMITED AND OTHERS (2001) EA 177 the court held that, ‘parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.’*”

The respondent urged the court to uphold the preliminary objection and dismiss the claimant’s suit.

Claimant’s Submissions

For the claimant it is submitted that in his judicial review application only judicial review remedies of *certiorari* was sought and denied. It is submitted that no compensation was sought for unlawful termination of employment. The claimant submits that *res judicata* is thus not applicable in the present case.

Determination

It is not in contention that the claimant herein filed an application for judicial review vide High Court Misc. Application No. 1 of 2011 at the Judicial Review Division of the High Court in Nairobi. It is further not denied that the subject matter of the judicial review application was the same as the subject matter herein being the revocation of his appointment as Government Representative of Municipal Council of Thika.

In the ruling delivered on 2nd December 2011 by Warsame J., he held that the Minister had power to terminate the appointment of the claimant and to replace him.

The orders sought by the claimant herein are as follows –

- a) That the Claimant was an employee of the Ministry of Local Government and/or the Municipal Council of Thika on a fixed term contract for a period of 5 years.
- b) That the Ministry of Local Government through the Minister for Local Government seconded the claimant in the service of the 2nd Respondent which was responsible for paying the Claimant’s allowances
- c) That the fixed employment contract was unlawfully, wrongfully and unfairly terminated without any due process or any regard for the provisions of employment Law and basic tenets of Contract Law.
- d) That the Claimant is therefore entitled to all the dues and/or terminal benefits that necessarily flow from the wrongful and unfair termination of the fixed term contract herein as particularized below –

(i) Salary and/or allowances for the remainder of the fixed term contract (70,000 x 28 months) Kshs.1,960,000.00

(ii) Local Authorities Pension Trust Contributions by employer at the rate of 15% of monthly salary for the remainder of the fixed term contract (15/100 x 70,000.00 x 28 months) Kshs.294,000.00

Kshs.2,254,000.00

ALTERNATIVE PARTICULARS OF LOSS AND DAMAGE

(i) 3 months pay in lieu of Notice Kshs.210,000.00

(ii) 12 months’ pay as compensation for wrongful and

unfair termination of employment Kshs.840,000.00

TOTAL KSHS.1,050,000.00

e) The said sum of Kshs.2,254,000.00 as particularised above in the alternative the sum of Kshs.1,050,000.00 as particularized

- f) The claimant claims damages
- g) Costs of the cause
- h) Interest at Court rates.
- i) Any other or further relief that the Court may deem fit to grant.

The court having held in JR Misc. Application No. 1 of 2011 that the Minister had powers to terminate the appointment of the claimant and to replace him which termination is the basis upon which the claim herein is anchored, this court does not have jurisdiction to re-open the same issue and hear it.

In the judicial review application, the claimant named the following as respondents –

1. Minister for Local Government – 1st respondent;
2. The Hon. Attorney General – 2nd respondent;
3. Municipal Council of Thika – 3rd respondent and
4. Florence Njeri Ngeru – 4th respondent

The Attorney General and the County Government of Kiambu have been sued herein on behalf of the Minister for Local Government and Municipal Council for Thika respectively. It is therefore obvious that the subject matter in issue is the same being removal of the claimant from his position as representative of the Government in Thika Municipal Council. The parties are also the same and the subject matter has been finally determined by a court of competent jurisdiction. The claimant cannot be allowed another bite of the cherry. It does not matter that the prayers he is seeking are different as litigants are not allowed to litigate in instalments so that when one instalment fails they can approach the courts with another. A litigant must choose the vehicle through which they approach the court carefully. That vehicle must be capable of carrying all the claims of the litigant pertaining to or arising from same the subject matter as the law of *res judicata* does not allow him a second visit.

For these reasons I find that the claim herein is *res judicata*. Consequently, the preliminary objection herein succeeds and is upheld with the result that the claim filed herein by the claimant is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 10TH DAY OF AUGUST 2018

MAUREEN ONYANGO

JUDGE