



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1262 OF 2013

FRED OBARE CLAIMANT

VERSUS

THE DEPUTY VICE CHANCELLOR (ADMINISTRATION)

KENYATTA UNIVERSITY 1ST RESPONDENT

KENYATTA UNIVERITY 2ND RESPONDENT

RULING

1. The Respondents, The Deputy Vice Chancellor (Administration) Kenyatta University and the Kenyatta University by application dated 4th May, 2015 brought under the provisions of Rules 14 (6) and (7), 16(1) and (2) of the Industrial Court (Procedure) Rules [before amendment to Employment and Labour Relations Court (Procedure) Rules, 2016] and seeking for orders that;

The Respondents be and are hereby granted leave to amend the Memorandum of Response filed on September, 2013 in terms of the draft amended Memorandum of Response and Counterclaim attached to the Affidavit of Prof. P.K. Wainaina in support of this application.

2. The application is supported by the annexed affidavit of Prof. P.K. Wainaina and on the grounds that the Respondents intend to amend the defence in order to raise a counter-claim against the Claimant for failure to pay salary in lieu of notice upon his immediate termination of his employment and the also claim for monies against the Claimant for breach of trust, car loan reimbursement and excess medical claim incurred by the claimant's spouse. The amendment will obviate the need to file a new suit for all issues to be addressed herein and all issues between the parties will be well articulated in this suit. The amendments sought are necessary and will not prejudice the claimant.

3. In his affidavit, Prof. P.K. Wainaina avers that he is the 2nd respondnet's Vice Chancellor (Administration). A draft defence and counter claim are attached to the affidavit in support of the application.

4. In reply the Claimant filed his Replying Affidavit and avers that the amendments sought by the Respondents are dishonest, defective and an abuse of court process and should be dismissed. The amendments as proposed are *res judicata* having been addressed in *Nairobi Cause No.240 of 2009, Fred Obare versus Kenyatta University* and the amendments and counterclaim form a new suit which offends the Limitation of Actions Act and the same filed with inordinate delay and should be dismissed.

5. The Claimant also avers that the court in **Cause No.240 of 2009** was on similar issues as the

Respondent has put in the counterclaim and the court held that the Claimant had been unlawfully suspended and ordered reinstatement. The Respondents filed an appeal to the Court of Appeal and the matter is pending hearing. The claim on medical cover is an afterthought the same having been approved by the respondent's finance officer on 10th September, 2007.

6. That the claim herein is against the Respondent due to demotion upon the court order for reinstatement, claim for mistreatment and breach of government code of regulations, employment law and constitution. The application should be dismissed with costs.

7. Both parties filed written submissions.

8. The Respondents submit that the proposed amendments are not *res judicata* and were not addressed in Cause No.240 of 2009 – Fred Obare versus Kenyatta University. The amendment and counterclaim seek to address the questions as to whether the Claimant owes the Respondent 3 months' salary in lieu of notice as a result of terminating his employment contract without notice; whether the Respondent should get a reimbursement for false mileage claims the Claimant made before termination of his contract; whether the Claimant should refund excess medical expenses incurred by his spouse and which the Respondent paid for; and whether the Claimant should compensate the Respondents for catering for his outstanding car loan with his bankers. These issues were never determined in any previous suit. These are not matters already addressed by any court. The suit in Cause No. 240 of 2009 related to stoppage of salary and medical cover and reinstatement of the claimant.

9. The court found the process leading to the termination of the Claimant was unfair and never went into the interrogation of the reasons leading to the termination. The matters raised by the Respondent in the counterclaim have never been addressed.

10. The Respondent also submits that the proposed amendments do not offend the Limitation of Actions Act and the claim for notice pay arose with the resignation of the Claimant on 8th January, 2013 and claim is filed within time. In Cause No.240 of 2009 the court directed an investigation into the false mileage claims and when the disciplinary hearing concluded on 18th January, 2013 all allegations made against the Claimant were found as just. The Claimant was given a fair chance to defend himself. Cause of action thus arose after 18th January, 2013 when the Claimant failed to appear before the disciplinary hearing. The Limitation of Actions Act at section 26 a claim can be filed in 6 years. In **Kuria Tharao and another versus Joseph Kinyanjui Mwai and 3 others [2014] eKLR** the court allowed a claim after two years following discovery of the status of the title.

11. There is no delay in filing the application for amendment of defence and counterclaim as claim was served on 12th August, 2013 and application filed in 2 years i.e. on 15th May, 2015. The leave sought is to enable the court allow the filing of the amendments and defence counterclaim.

12. The Claimant submits that the intended amendments proposed by the Respondent have been overtaken by time under the Limitation of Actions Act as the cause of action arose in 2008 as stated by the Respondents at paragraph 35 of the counterclaim. The court in **Kenya Union of Commercial, Food and Allied Workers versus Water Resource Management Authority and another [2015] eKLR**, held that the law on limitation is not a mere technicality and such law exists to assist parties who for good reason are unable to come to court in good time. The Respondents herein have not shown any such good cause to warrant the grant of leave to amend defence and file counterclaim.

13. That the intended amendments are *res judicata* having been dealt with in Cause No.240 of 2009 – Fred Obare versus Kenyatta University. The Respondents had raised similar claims of excess medical claims incurred by the claimant's spouse. The Respondent has since filed appeal and is pending before the Court of Appeal.

14. In **Nancy Mwangi t/a Worthlin Marketers versus Airtel Networks (K) Ltd (formerly Celtel Kenya Ltd) and 2 others [2014] eKLR** held that the court must be vigilant to guard against a party

brining in a second suit in form of a matter already resolved by the court so as to avoid the doctrine of *res judicata*.

15. That this application should be dismissed with costs.

Determination

Whether the suit is limited in time;

Whether the suit is *res judicata*; and

Whether the amendments and counterclaim should be allowed

16. The general principle in addressing amendments of pleadings is to allow the same if made before judgement is rendered. However, such must be looked at in view of each individual case and the nature of amendment sought. In this regard, the claim was filed on 12th August, 2013 and defence filed on 19th September, 2013. This is the defence the Respondents are seeking to amend and file a counterclaim.

17 The amendments made to the defence relate to a counterclaim.

18. Upon exchange of pleadings, the matter came up for hearing on two occasions but for good cause did not proceed. As such, the hearing has not commenced.

19. However, the Claimant has challenged the application by the Respondents on the grounds that by application of the Limitation of Actions Act, the suit is time barred. The counterclaim is premised on the claim that by a reinstatement order on 20th December, 2012 in Cause No.240 of 2009 (Nairobi) – Fred Obare versus Kenyatta University, the Claimant was an employee of the Respondent and on 7th January, 2013 he resigned from his employment without notice or payment in lieu of notice thereof. At the time the Claimant had made false mileage claims and received funds that should be paid back to the respondent. That the Claimant enjoyed medical cover with his family and while the Claimant incurred additional costs in terms of treatment for his spouse while aware that he had surpassed his cover limits and ought to refund the same to the respondents. The Claimant had a bank facility facilitated by the Respondent at National Bank of Kenya to finance purchase of a motor vehicle and by securing such a facility the Claimant failed to pay the balances due forcing the Respondents to pay the sum of Kshs.231,984.95 and these monies should be paid back by the claimant. The counterclaim is for 3 months' notice pay in lieu of notice; mileage variance; outstanding car loan; excess medical expenses, interests and costs.

19. The Court of Appeal in **Kenya Hotel Properties Limited versus Willisden Investments Limited & 6 others [2013] eKLR held that;**

Res judicata, is a doctrine of law founded on public policy and aimed at ensuring two objectives, namely, there must be a finality to litigation and that parties who have gone through litigation should not be subjected to the same tests. See the provisions of section 7 of the Civil Procedure Act which provides:

“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 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 such court. (See also Mulla the Code of Civil Procedure 16th Ed. Vol. pg 161.”

20. The principle being that, where the court has directly and substantively heard an issue in a former suit between the same parties and on the same title before a competent court, such a matter should not be litigated before the same court again. To litigate over similar matter before the same court between the

same parties would negate the purpose of settling disputes with finality.

21. The Claimant has submitted that he filed Cause No.240 of 2009 against the respondent, Kenyatta University and by judgement of the court he was reinstated. That the same matters now addressed by the Respondents in counterclaim were part of the proceedings in his suit and defence and has such been addressed between the parties herein and cannot be litigated upon.

22. The Claimant has attached pleadings in Cause No.240 of 2009 – Fed Obare versus Kenyatta University and Another. The claims therein are;

a) Declaration for the suspension and the subsequent stoppage of his salary and medical cover while on suspension was unlawful and wrongful.

b) Reinstatement of the claimants' half monthly salary and the arrears plus reinstatement of medical cover.

c) Damages for wrongful suspension, pain and injury.

23. The court in the above claim considered the issues in dispute and noted that the Claimant had been maliciously and summarily been suspended on falsified unsubstantiated grounds; his medical and salary had been wrongly stopped and were thus reinstated with the reinstatement of the claimant. The claim before court was thus clear.

24. With the reinstatement, the Claimant was taken back to where he was and ought to have been before the wrongful suspension, the stoppage of medical cover and the payment of half salary. He was back to work with payment of all his dues. The reinstatement remedied the wrongful acts of the respondent. Employment proceeded on the basis that the court made an order of reinstatement back to employment.

25. Of importance, the court at page 8 of its judgement held;

Consequently declare the indefinite suspension of the Claimant without pay and medical cover unfair, wrongful and unlawful. In addition I hereby lift the said suspension and direct the Claimant to report to his work station within 7 days of this judgement for deployment.

For avoidance of doubt, the Respondent will be at liberty to constitute a board to do disciplinary hearing after reinstatement and deploying the claimant.

26. In my humble view, the court having found that the suspension of the Claimant was wrongful and the same remedies, the reasons leading to the suspension remained unresolved and the Respondents were at liberty, upon reinstatement of the Claimant to address the same. The Claimant has not appealed against such orders.

27. It is not in dispute that the Claimant has since resigned from his position with the Respondent with effect from 8th January, 2013. The notice was issued was dated 7th January, 2013. There was no notice issued in terms of the contract of employment or payment in lieu thereof. Without going into the merits of the counterclaim, where such notice or payment in lieu thereof is due, such is a matter that has not been litigated before between the parties and before this court for this to be *res judicata*.

28. With the reinstatement of the claimant, where there were investigations, disciplinary hearings on matters relating to his employment and such matters relate to false mileage claims or his incurring excess medical cover for his spouse or his non-payment of car loan, such I find to be matters that arose with his employment and where not resolved, the Respondent has good cause to file new claim on the same. As the proposed amendments relate to a counterclaim and which counterclaim is to be understood as a new suit and cause of action, the matters set out being new and not addressed previously by the court, the respondent's application finds merit.

29. The question of limitation of time and res judicata are herein to a great extent intertwined. The Claimant resigned from his employment with the Respondent with effect from 8th January, 2013. The counterclaim against him is for notice pay that arose as a result of resignation; claim for false mileage claims not settled before resignation; outstanding car loan not paid before resignation; and the excess medical expenses not resolved before the termination of employment as at 8th January, 2013.

30. The counterclaim between the parties herein is with regard to the employment relations that ended on 8th January 2013. Any claims relating to the parties on this basis must adhere to the mandatory provisions of section 90 of the Employment Act which requires all claims arising from an employer/employee relationship be filed with the court within 3 years from the date the cause of action arose.

31. The application herein was filed on 11th May 2015 under Rule 14 of the Court rules before amendment. Such I find to be a time of 2 years since the cause of action arose. Such period is less the 3 years contemplated under section 90 as time within which claim should be filed. As such, the Respondent is well within time to raise the application and counterclaim set out in the application.

Accordingly, application by the Respondent dated 4th May, 2015 is not *res judicata* and is filed within time; the same is found to have merit and is hereby allowed. The Respondent shall file the amended memorandum of response within 14 days; serve the Claimant who shall reply within 14 days; and costs herein shall be in the cause.

Dated, delivered in open court at Nairobi this 16th day of March, 2017.

M. MBARU

JUDGE

In the presence of:

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