



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO.231 OF 2016

FRANCIS NDIRANGU.....CLAIMANT

VERSUS

NAKUMATT HOLDINGS LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Thursday 25th May, 2017)

RULING

The application is filed for the respondent on 23.11.2016 through Nyaberi & Company Advocates. The application is under section 3 of the Civil Procedure Act and Order 2 Rule 15(b) and (d) of the Civil Procedure Rules. It is supported with the affidavit of J.P.L Nyaberi Advocate for the applicant.

The prayer is for the order that the whole suit herein be struck out as it is scandalous, frivolous or vexatious and otherwise an abuse of the process of the court. It is urged that the suit is *res judicata* because the issues raised were determined or ought to have been determined in the previous ELRC cause 218 of 2014 at Nairobi between the same parties. It is not disputed that the previous suit was between the parties and the present claimant being a claimant in that previous suit prayed for judgment against the present respondent for a declaration that the termination was unlawful; reinstatement; 3 months' pay in lieu of termination notice; severance pay; leave; damages for unfair termination; certificate of service; and such further or other relief that the honourable court may deem fit to grant. In the judgment delivered on 26.02.2016, the court (Abuodha J.) awarded the claimant 7 months' basic salary being compensation for unfair termination, one month's basic salary in lieu of the notice of termination, and the respondent do issue the claimant with a certificate of service. There is no dispute that the decree flowing from the judgment has since been fully satisfied.

After the judgment the claimant has filed the present suit. The suit is on account of the same termination of 31.05.2013 which was in issue in the previous suit. The claimant is alleging defamation, psychological and health problems, and financial loss all said to flow from the said unfair termination of 31.05.2013. He again claims that the respondent must compensate him for the unjustified termination.

In the replying affidavit filed on 15.05.2017, the claimant has opposed the application and the preliminary objection as per the application filed for the respondent on 23.11.2016. The claimant states that the respondent terminated his employment on 31.05.2013 and which has caused the claimant untold mental anguish. Thus, the application should be dismissed with costs as the court should look at substantive justice and fairness. In his submissions, the claimant stated that indeed the matters raised in the present suit should have been determined in the previous suit but the claimant did not understand why his advocate in the previous suit failed to raise and submit on the issues.

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.

It is clear that the issues and claims in the present suit were in the previous suit and the related issues ought to have been determined in that previous suit. In particular, the issue of the unfair termination of the claimant's contract of service by the respondent was determined in the previous suit and the claimant was duly compensated per the judgment in that previous suit. It is clear that in the present suit, on the basis of the unfair termination, the claimant is seeking compensation on the headings of defamation, financial loss and psychological injury or suffering. The court returns that all such claims are flowing from the same transaction namely the unfair termination of the claimant's employment on 31.05.2013. The court returns that the suit is indeed *res judicata* and therefore an abuse of due process. The court further considers that the cause of action being 31.05.2013, the claims based on tort may be time barred under section 4 of the Limitation of Actions Act and that serves as an impetus to dismissing the present suit.

In conclusion, the application by the notice of motion dated 22.11.2016 and filed on 23.11.2016 is hereby allowed with orders:

- a) The claimant's suit herein is hereby struck out.
- b) The claimant to pay partial costs of the suit and the application fixed at **Kshs.20, 000.00**.

Signed, dated and delivered in court at **Nyeri** this **Thursday, 25th May, 2017**.

BYRAM ONGAYA

JUDGE