



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI**

**CAUSE NO. 271 OF 2016**

**(Formerly Cause No. 2077 of 2016 at Nairobi)**

**BARAGWI FARMERS COOPERATIVE SOCIETY LIMITED.....CLAIMANT**

**-VERSUS-**

**BANKING, INSURANCE & FINANCE UNION (KENYA).....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 5<sup>th</sup> May, 2017)

**RULING**

The claimant filed the memorandum of claim on 07.10.2016 through Lorraine Oyombe Advocate. The claimant prayed for judgment against the respondent for:

- a) A declaration that the claimant has fully implemented the parties' collective bargaining agreement.
- b) A declaration that the strike notice dated 3<sup>rd</sup> October 2016 is illegal, unwarranted and amounts to bad industrial relations.
- c) An order directing the respondent to engage in negotiations over any issue arising in good faith.
- d) An order directing the respondent to sign the collective bargaining agreement.
- e) Any other order and relief the court may deem fit to make or grant.

The respondent opposed the suit by filing a preliminary objection on 21.02.2017. The preliminary objection was based on the grounds that the claimant's statement of claim is *res judicata* and it amounts to an abuse of the court process because the issue of refusal to sign negotiated collective bargaining agreement were substantially in issue and conclusively determined by the court in cause no. 111 of 2013 by the judgment and orders of the court dated 20.03.2015, 22.03.2016 and 26.05.2016. The respondent urged that the court's jurisdiction had thereby become spent or the court lacked jurisdiction as the jurisdiction had been exhausted. Thus, the claimant's suit be struck out for being *res judicata*.

The **issue** for determination is whether the present suit is *res judicata* in view of the previously decided suit between the parties being cause 111 of 2013.

**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, 9<sup>th</sup> 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 privity 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.

**First**, it is not in dispute that the previous suit was between the same parties.

**Second**, the court has to determine if the issues in dispute in the present case were in dispute in the previously determined suit, or, if not, with due diligence, the issues ought to have been raised in that previous suit.

The court has revisited the judgment in the previous suit between the parties being cause 111 of 2013 at Nyeri. The issues in dispute included the effective date of the collective agreement between the parties and levels of payment due to the workers in terms of overtime, annual leave allowance, housing allowance, provident fund, terminal benefits, salaries and wages, commuter allowance and the effective date of the pay increment. The court pronounced judgment on 20.03.2015 with orders:

- a) That 01.01.2015 shall be the effective date for the agreed payments, the respondent to pay the arrears by 01.05.2015 in default interest to be payable at court rates from 01.01.2015 till full payment.
- b) That the entry points shall be the minimum wages for all those deployed in factories, and minimum wages for municipalities for those deployed in the respondent's head office as per the applicable general wage order, with 01.01.2015 as due date for implementing 1<sup>st</sup> year agreed increments.
- c) The parties shall, by 01.05.2015, conclude and register in the court a collective agreement reflecting the agreed terms as recorded and determined by the court in the judgment.
- d) The parties to bear own costs of the suit.

The claimant's submission is that the present suit is not *res judicata* because the main issue in dispute is whether the strike in issue is illegal and as per prayers sought. The court returns that the issue of the ensuing strike was not in issue in the previous suit and could not be canvassed in the previous suit, even with due diligence, as it constitutes a new cause of action between the parties. The court further finds that as submitted for the respondent, the implementation of the collective agreement that was to be signed and registered as per orders in the judgment in the previous suit or lack of such implementation of the collective agreement is an issue that could not be canvassed in the previous suit as it is a new cause of action that did not exist at the time of the previous suit. The respondent submitted that it had implemented the collective agreement as per terms of service set out in the judgment in the previous suit but without the agreement being signed and registered in court.

In view of the findings of the court, the court returns that the present suit is based on fresh cause of action that could not be urged in the previous suit. Accordingly, the preliminary objection collapses and will not be allowed.

In conclusion, the preliminary objection filed for the respondent on 21.02.2017 is hereby dismissed with orders that the costs will be in the cause and the parties are invited to propose the further steps in the suit.

**Signed, dated and delivered** in court at **Nyeri** this **Friday, 5<sup>th</sup> May, 2017**.

**BYRAM ONGAYA**

**JUDGE**