



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 400 OF 2016

DAVID GATOBU MARETE.....1ST CLAIMANT
STEPHEN KAIGAI KAMAU.....2ND CLAIMANT
GRACE ADOYO MBORI.....3RD CLAIMANT
MARGARET NUNGA NGOTHO.....4TH CLAIMANT
JOHN NGIGI NDUNGU.....5TH CLAIMANT
ANNE MUHIA.....6TH CLAIMANT
ALBANUS H. MUTEMWA.....7TH CLAIMANT
JOHN MUTHIANI KYALO.....8TH CLAIMANT
JAMES M. GITHINJI.....9TH CLAIMANT
AGNES M. BULUMA.....10TH CLAIMANT
MIRIAM MUENI.....11TH CLAIMANT
RICHARD NGETICH.....12TH CLAIMANT
LILIAN WAMONO.....13TH CLAIMANT
PAUL AKHABELE.....14TH CLAIMANT
JANE SERETO KAPAITO.....15TH CLAIMANT
MARY TERRY MBURUGU.....16TH CLAIMANT
FLORENCE NGENGE MANYARA.....17TH CLAIMANT

VERSUS

CONSOLIDATED BANK OF KENYA LIMITED.....RESPONDENT

RULING

1. This application is brought by the Respondent by Notice of Motion dated 26th October 2016 seeking orders to strike out the Claimants' claim on the following grounds:

- a) That the claim is *res judicata* light of Nairobi Industrial Court Cause No 100 of 2003 and Nairobi Civil Appeal No 130 of 2006;
- b) That the claim is statute barred having been filed out of time on 16th March 2016, more than 11 years after accrual of the cause of action on 1st August 2005;
- c) That the affidavit sworn by the 1st Claimant, David Gatobu Marete is incapable of verifying the claims by the 2nd-17th Claimants.

2. In a replying affidavit sworn by the 1st Claimant, David Gatobu Marete on 19th January 2017, it is deponed that in Industrial Court Cause No 100 of 2003 the Claimant was Banking, Insurance & Finance Union (BIFU-K) with Kenya Bankers Association as the Respondent.

3. Marete states that the dispute in the earlier cause arose during review/revision of a Collective Bargaining Agreement while in the present cause the Claimants seek the following reliefs:

- a) Unpaid severance pay;
- b) Underpayment of salary under CBA;
- c) Interest on (a) and (b) above;
- d) Damages for unfair termination; and
- e) Complete and accurate certificates of service reflecting the correct number of years worked.

4. It is further deponed that the matters in issue in Cause No 100 of 2003 and subsequently in Civil Appeal No 130 of 2006 are different from those in the current cause. In particular, the part of the award relating to salary covered a demand by the Union for a 20% increase across the board, while the underpayment claimed by the Claimants herein relates to salary disparities in respect of salary paid to staff of previous financial institutions, taken over in 1991 to form Consolidated Bank, vis a vis salary paid to employees of other Banks that were members of the Kenya Bankers Association.

5. On the issue of the verifying affidavit, Marete states that there is no mandatory requirement for a Statement of Claim to be supported by individual verifying affidavits. The Claimants' position is that the objection on this account is a technical one that is disapproved by Article 159(2) (d) of the Constitution of Kenya, 2010 and Section 20(1) of the Employment and Labour Relations Court Act.

6. Moreover, under the Procedure Rules of the Court, the requirement for verification of pleadings is couched in permissive rather than mandatory terms. Additionally, the witness statements filed by the Claimants make reference to and thus verify the Statement of Claim.

7. Marete goes on to state that the claims in issue herein were first commenced vide a complaint through BIFU (K) in 2005, under the procedure then provided in the Trade Disputes Act (now repealed) and have been alive all through.

8. There are three (3) issues for determination in this application:

- a) Whether the Claimants' claim is *res judicata*;

b) Whether the claim is statute barred;

c) Whether the single verifying affidavit sworn by the 1st Claimant renders the claims by the 2nd-17th Claimants incompetent.

Res Judicata

9. Section 7 of the Civil Procedure Act titled ‘*Res Judicata*’ states as follows:

“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.”

10. The doctrine of ‘*res judicata*’ is grounded on the basic principle that parties to a suit must litigate with finality. In this regard it has been held that it is in the public interest that there should be an end to litigation.

11. In the submissions filed on behalf of the Respondent on 21st March 2017, reference was made to the decision in ***Pop-In (Kenya) Ltd & 3 Others v Habib Bank AG Zurich [1990] KLR*** where the Court of Appeal held that the plea of *res judicata* does not only apply to points specifically pleaded by the parties and upon which the court is actually required to form an opinion and pronounce judgment, but to every point which properly belongs to the subject of the litigation.

12. This remains good law and in ***Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another [2016]*** the Supreme Court rendered itself as follows:

“Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights.

The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process.”

13. The question before the Court is whether by virtue of Cause No 100 of 2003 and Civil Appeal No 130 of 2006, the Claimants’ claim is *res judicata*. The pleadings in the previous cases were not provided to the Court. However, my reading of the Award in Cause No 100 of 2003 reveals that this was an economic dispute between BIFU(K), on behalf of its members and Kenya Bankers Association also on behalf of its members.

14. The current claim is brought by seventeen (17) individuals seeking terminal dues and damages for unfair termination of employment. Even assuming that the Claimants in the present cause were members of BIFU(K) when Cause No 100 of 2003 and Civil Appeal No 130 of 2006 were determined, I find nothing to suggest that the issues raised in this cause were substantially determined in the previous cases. The plea on *res judicata* therefore fails.

Limitation

15. The next plea is that the Claimants’ claim is statute barred. In their Memorandum of Claim dated 5th February 2016 and filed in Court on 16th March 2016, the Claimants state that they reported a dispute, through their Union, on what they termed as unfair labour practices as early as 1996. The Claimants were subsequently declared redundant effective 1st August 2005.

16. From these pleadings, it is evident that the cause of action accrued before enactment of the Employment Act, 2007. The applicable limitation law would therefore be the Limitation of Actions Act. Section 4(1) of the Act provides that actions arising from contract may not be brought after the expiry of six (6) years from the accrual date, and as held by the Court of Appeal in *Divecon Ltd v Samani [1995-1998] 1 EA*, the Court has no jurisdiction to extent time.

17. In their response to the objection on limitation of time, the Claimants state that their claims have been alive since 2005 when their Union reported a trade dispute under the now repealed Trade Disputes Act. In support of their position the Claimants produced a plethora of correspondence among the Respondent, the Claimants' Union and the Ministry of Labour.

18. I have perused this correspondence and find nothing that relates specifically to the Claimants' claim as filed in Court. The argument that the Claimants' disputes have been pending conciliation is therefore rejected. That being the case, I find that the claim is statute barred and the Court has no jurisdiction to entertain it.

Verifying Affidavit

19. Regarding the issue raised on the single verifying affidavit, sworn by the 1st Claimant, the only thing I will say is that if the claim was otherwise properly before the Court, this is a procedural issue that is curable by filing of a letter of authority signed by the other Claimants.

20. However, this is now an academic point as I have already found the claim to be statute barred. The final result is that the Claimants' claim is struck out with no order for costs.

21. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 25TH DAY OF AUGUST 2017

LINNET NDOLO

JUDGE

Appearance:

Mr. Nthiga for the Claimants

Miss Kamau for the Respondent