



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT AT NAIROBI
CAUSE NO 1037 OF 2015

EUNICE CHEBUKWA WANJALA.....CLAIMANT

Versus

KENYA COMMERCIAL BANK LTD.....RESPONDENT

Mr. Moleje for Respondent/Objector

Mr. Mathenge for Claimant/Respondent

RULING

1. This suit was filed as HCC Misc. Application No. 509 of 2014 at the High Court and the same was transferred to the Employment and Labour Relations Court and registered as ELRC Cause No. 1037 of 2015.
2. The matter was mentioned before Abuodha J. on 30th June, 2015 when counsel for the Respondent drew the attention of the Judge that there was a similar matter concluded before me being Cause No. 1159 of 2013 in which the Applicant sought leave to file a suit out of time and the same was dismissed. The matter was referred to me for mention on 23rd July, 2015.
3. On 23rd July, 2015, the Claimant was represented by Mr. Mathenge who was holding brief for Mr. Dola Ididis and M/s Oyombe represented the Respondent.
4. M/s Oyombe drew the attention of the court to the existence of Cause No. 1150 of 2013 in which I had delivered a Ruling on 4th April, 2014 on the issue of extension of time. The court directed the Deputy Registrar to produce Cause No. 1150 of 2013 and place it in this file and set the hearing of the preliminary objection for 24th September, 2015.
5. On 24th September, 2015, the Claimant appeared in person and informed the court that she had recently appointed M/s Wokabi & Mathenge Advocates to represent her in the matter and sought a new date for the hearing of the Preliminary Objection. M/s Kamau held brief for Mr. Moleje for

- the Respondent.
6. The hearing of the Preliminary Objection was set for 29th October, 2015.
 7. On 29th October, 2015, the Claimant appeared in person and Mr. Moleje appeared for the Respondent.
 8. The Claimant requested the court to place the matter aside and wait for her Advocate Mr. Mathenge. Mr Mathenge appeared at 10.30 a.m. when the Preliminary Objection was canvassed in court.
 9. The Notice of Preliminary Objection dated 8th June, 2015 was filed at the High court on the same date.
 10. The same seeks to strike out the Applicant's Originating Summons dated 2nd May, 2014 and filed on 8th August, 2014 on the grounds that;
 - a. The Applicant's Originating Summons is resjudicata, the issues raised in the Originating Summons were substantively in the Preliminary Objection filed in the Employment and Labour Relations Court in Cause No. 1150 of 2013 where a Ruling was made by the Principal Judge Honourable Justice Nduma Nderi on 4th April, 2014, thus the Originating Summons Application offends the provisions of Section 7 and 8 of the Civil Procedure Act, Cap. 21 Laws of Kenya. A copy of the Ruling delivered on 4th April, 2014 is attached to the preliminary objection.
 11. The Respondent submitted relying on the case of Mukhisa Biscuits Manufacturing Co. Ltd – Vs – West End Distributors Ltd [1969] E.A. 696 that the issue of resjudicata goes to the jurisdiction of the court to entertain this matter and needed to be disposed of at the first instance.
 12. That the Applicant had not come to court with clean hands since did not disclose to the court that the issue in the Originating Summons had already been handled by the Employment and Labour Relations Court in Cause No. 1150 of 2013 between the Applicant and the Respondent.
 13. The preliminary objection as filed in the Employment and Labour Relations Court in Cause No. 1150 of 2013 where a Ruling was delivered by this court is attached to the preliminary objection.
 14. The court was referred to Section 7 and 8 of the Civil Procedure Act, Cap. 21 Laws of Kenya 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 issues by such court.”
 15. It was the Respondent's submission that the Applicant's Originating Summons seeking leave to file suit out of time whose subject matter was dismissal from employment of the Applicant in 2004 by Kenya Commercial Bank due to allegations of obtaining money by false pretense was the same dispute in Employment and Labour Relations Court Cause No. 1150 of 2013, which had been dismissed by the court in the Ruling delivered by Nduma J. on 4th April, 2014 for having been filed out of time contrary to Section 4(1) of the Limitation of Actions Act, Cap. 22 of the Laws of Kenya. That the Application was therefore an abuse of the court process and is prejudicial to the Respondent's interests that are protected by statute.

Response

16. The Claimant/Applicant filed a Reply to the Preliminary Objection on 23rd July, 2015 stating

inter alia;

That the objection is premised on the old Constitution and that it does not conform with the current Constitution and the Rules of natural justice.

17. That Section 22 of the Limitation of Actions Act Cap. 22 of Laws of Kenya permits extension of limitation period beyond six years in cases of disability and in that case, time starts to run from the date when the person ceases to be under disability notwithstanding that the prescribed period of limitation has expired.

18. That the Claimant was arrested and was in custody of police and subsequently the Claimant had to prove her innocence in the criminal case facing her hence the delay in filing the suit.

19. That Article 159 (2) of the Constitution of Kenya 2010 contemplates that justice shall be administered without undue regard to the procedural technicalities.

Determination

20. The Claimant/Applicant did not address the issue of resjudicata raised in the Preliminary Objection at all, in the Reply filed on 23rd July, 2015.

21. It is without doubt that the suit filed at the High Court in Misc. Application No. 509 of 2014 and subsequently transferred to this court and registered as Cause No. 1037 of 2014 is,

a. between the same parties being Eunice Chebukwa Wanjala –Vs- Kenya Commercial Bank as Employment and Labour Relations Court Cause No. 1150 of 2013,

b. that the issue in dispute in both cases is alleged wrongful and unlawful dismissal of Eunice Chebukwa Wanjala by her previous employer Kenya Commercial Bank Ltd on 12th June, 2004,

c. That in Employment and Labour Relations Court Cause No. 1150 of 2013, the issue of the suit having been filed out of time was heard and determined by the court and a Ruling was delivered by Nduma J. on 4th April, 2014, in which the court relied on the decision of court of Appeal at Nairobi in **Divecon Ltd – Vs – Saurani [1995 – 1998] E.A 48 at 49** which found,

“the words of Section 4(1) were clear beyond any doubt and meant that no one had the right or power to bring an action founded in contract after the end of six years from the date on which the course of action occurred” and the court found that it lacked jurisdiction to entertain the suit and dismissed the same,

d. That the Claimant/Applicant did not appeal this Ruling but instead filed the subsequent suit at the High Court seeking the court to grant the Applicant leave to file the same suit out of time,

e. That the Claimant/Applicant did not disclose in the Misc. Application No. 509 of 2014 filed at the High Court the existence of Employment and Labour Relations Cause No. 1150 of 2013 that had been heard and determined on the same issue of limitation of time, the Applicant was again raising at the High Court.

22. It is the court's considered finding that the Claimant/Applicant did not approach the court with clean hands.

23. The court further finds that the issue raised in the subsequent suit has already been determined by this court in the ruling in Cause No. 1150 of 2013 delivered on 4th April, 2014.

24. The suit is resjudicata and the court has no jurisdiction to visit the same issue between the same

parties again.

25.The entire suit is dismissed with costs to the Respondent.

Dated and delivered in Nairobi this 15th day January 2016.

MATHEWS N. NDUMA

PRINCIPAL JUDGE