



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1789 OF 2015

[FORMERLY HCC NO 230 OF 2009]

GEORGE OCHIENG ODODA.....1ST CLAIMANT

SIMON M. MAHUGU.....2ND CLAIMANT

BONIFACE K. NGUI.....3RD CLAIMANT

JOHN YAA KATANA.....4TH CLAIMANT

JOSEPH MUTISO.....5TH CLAIMANT

JAMES WAWERU & OTHERS.....6TH CLAIMANT

VS

KENYA RAILWAYS RETIREMENT BENEFITS SCHEME.....RESPONDENT

RULING

1. This ruling flows from the Respondent's application dated 28th May 2015 seeking the following orders:

a. That the Claimants' suit be dismissed on the ground that the issues raised therein are *res judicata* and in the alternative; the suit has abated as no summons to enter appearance were extracted and served on the Respondent as required by law;

b. That the orders of injunction granted on 9th October 2009 be set aside.

2. The application which is supported by the affidavit of Simon Nyakundi sworn on 28th May 2015 is based on the following grounds:

a. That the Claimants had filed another suit at the High Court in Nakuru being *George Ochieng Ododa & 84 Others v Kenya Railways Corporation (Civil Case No 397 of 1998)*;

b. That prayer (d) sought against the Defendant in Civil Case No 397 of 1998 is similar to the prayers sought against the Respondent in the instant case;

c. That the Claimants' suit as per plaint dated 27th April 2009 confirms that there is a relationship between the Defendant in Civil Case No 397 of 1998 and the Respondent herein as the former is a sponsor of the latter;

d. That the issues raised in this case are therefore *res judicata*;

e. That the Respondent's Advocates were supplied only with a plaint through the Claimants' letter dated 13th April 2015;

f. That the Claimants failed to take out summons to enter appearance within the stipulated time;

g. That the Claimant's continue to enjoy injunction orders granted on 9th October 2009.

3. In the supporting affidavit sworn by the Respondent's Chief Executive Officer, Simon Nyakundi on 28th May 2015, he depones that the Claimants had filed HCCC No 397 of 1998 in which judgment was delivered on 7th May 2011 dismissing the claim. Nyakundi further depones that Kenya Railways Corporation (KRC) is the sponsor of the Respondent herein and the Claimants are former employees of KRC and by extension members of the Respondent.

4. In a replying affidavit sworn by the 2nd Claimant, Simon M. Mahugu, he depones that it is not true that the issues raised in this case are *res judicata*. Mahugu adds that the application now before the Court is premised on mere technicalities aimed at subverting justice.

5. There are two issues for determination in this application:

a. Whether the issues raised in this case are *res judicata*;

b. Whether the Claimants' failure to take out summons to enter appearance within the stipulated time is fatal to their case.

6. The aim of *res judicata* as a legal principle is to prevent multiple litigation of issues between the same parties. As held by the Court of Appeal in **Hon. Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi [2014] eKLR** the essence of *res judicata* is to bring litigation to closure so that the same issues and parties do not keep showing up in court. Section 7 of the Civil Procedure Act bars a court from trying a suit whose subject matter has been substantially litigated upon by the same parties and finally determined by a court of competent jurisdiction. The ingredients of the the principle of *res judicata* are; same parties, same issues and a final determination of the issues by a court of competent jurisdiction.

7. The Respondent submits that the issues raised by the Claimants in this case were determined by the High Court in Nakuru HCCC No 397 of 1998. From the pleadings before the Court, the subject matter of the Claimants' claim is their occupation of houses formerly owned by the KRC which are now under the Respondent's control. The Claimants' expectations appear to have been that they would continue occupying these houses until payment of their terminal benefits by their former employer, KRC.

8. The Respondent contends that since KRC is its sponsor, the determination in Nakuru HCCC No 397 of 1998 which was in favour of KRC extinguishes the Claimants' claim against the Respondent.

9. I have looked at this case in light of Nakuru HCCC No 397 of 1998 and have formed the opinion that the similarity in subject matter and the relationship between the Respondent and KRC do not by themselves render the issues raised in the current case *res judicata*.

10. With regard to the Claimants' failure to take out summons within the stipulated time, the only thing to say is that this is a procedural requirement that cannot be used to invalidate an otherwise competent claim.

11. The result is that the Respondent's application fails and is dismissed. The cost of this application will be in the cause.

12. It is so ordered.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 19TH DAY OF
FEBRUARY 2016**

LINNET NDOLO

JUDGE

Appearance:

Mr. Ndungu for the Claimants

Mr. Bosire for the Respondent