



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 37 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 14th March, 2016)

FRANCIS JAMES KHASIRA.....CLAIMANT

VERSUS

PUBLIC SERVICE COMMISSION 1ST RESPONDENT

MINISTRY OF TRANSPORT 2ND RESPONDENT

THE ATTORNEY GENERAL3RD RESPONDENT

RULING

1. The 3rd Respondent's Preliminary Objection before Court is dated 27.04.2015, where the Respondent raises the following grounds:
 1. *The instant petition is res judicata;*
 2. *The Honourable Court is functus officio;*
 3. *The Petition is time barred;*
 4. *The Petition as drawn is incompetent, has no merit and is otherwise an abuse of the Court process.*
2. The parties agreed to dispose of the Preliminary Objection by way of submissions.
3. The Respondent submits on first limb of their Preliminary objection that the Petition is res judicata stating that the facts as alleged by the Petitioner giving rise to the instant Petition is that sometime in October 1991 disciplinary proceedings were instituted against him by the Permanent Secretary of the 2nd Respondent. The Charge sheet dated 22nd October, 1991, read, dismissal due to gross misconduct-insubordination and rudeness: Mr. Francis James Khasira, Senior Accountant (Job Group "L" P/No. 492042).
4. A committee was formed to investigate his conduct and before it released its investigations the Petitioner alleges that the 1st Respondent communicated to the Permanent Secretary of the 2nd Respondent on 20th July, 1995, who then conveyed the decision to retire him on the grounds of public interest on 26th July, 1995.
5. The Respondent further states that the Petitioner indicates in the current Petition that he filed a Suit being **High Court Civil Suit No. 964 of 1996** which was heard and determined on merit but

the Petitioner herein was unsuccessful vide the Judgment rendered on 28th November, 2001. The Petitioner attributes this to:

- a. ***The refusal by the 2nd Respondent from issuing him with all relevant evidence that was at the heart of proving his claim. Any chance of Appeal was barred as lack of such evidence would render his appeal trivial and destined to fail;***
 - b. ***Hiding of the Court file in the Court's strong room for about 2 years after the Judgment was read on the 28th of November, 2001 and denying him the right to appeal the decision in good time. When the Court file was retrieved the same was mutilated and incomplete and documents and proceedings, rulings among others were removed from the file further making it difficult for him to appeal or access justice;***
 - c. ***Apparent misconduct of the Honourable Judge Aganyanya as he then was, who heard Civil Suit No. 964 of 1996, and allegedly kept the file in his chamber between 28th November, 2001 and 14th July, 2003 frustrating the intended appeal. The Petitioner also alleges that the judge was responsible for the mutilation of the Court's record and manipulation of proceedings;***
 - d. ***Apparent misconduct of the Honourable Judge Musinga J, as he then was, who dismissed Miscellaneous App No. 142 of 2010 and kept the file in his chamber for almost 6 months.***
6. The said Miscellaneous Application No. 142 of 2010 for Judicial Review was dismissed on the ground that the Petitioner had failed to disclose material facts that Justice Aganyanya had heard and dismissed his suit No. 964 of 1996 on merit.
 7. The Respondent relies on the Court of Appeal case of **Nicholas Njeru Vs The Attorney General and 8 Others Civil Appeal No. 110 of 2011**; where it was held:

“The doctrine of res judicata is founded on public policy and is aimed at achieving two objectives namely, that there must be finality to litigation and the individual should not be harassed twice with the same account of litigation.”

8. They also rely on Section 7 of the Civil Procedure Act which provides that:-

“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 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.”

9. The Respondent further relies on the case of **James Katabazi and 21 Others vs The Attorney General of the Republic of Uganda EACJ** in which the doctrine was applied and stated thus on the doctrine of res judicata:
 - a. ***The matter must be directly and substantially in issue in the two suits;***
 - b. ***The parties must be the same or parties under whom any of them claim, litigating under the same title; and***
 - c. ***The matter must have been finally decided in the previous suit.***

10. They also cite the case of **E.T. vs. Attorney General & Another (2012) eKLR** where it was held:

“The Courts must always be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the Court.

The test is whether the Plaintiff in the second suit is trying to bring before the Court in another way and in the form of a new cause of action which has been resolved by a Court of competent jurisdiction.”

11. In the Case of E.T. the Court adopted a passage in the dictum of **Wigram V-C, in Henderson V Henderson (1843) 67 ER 313;**

“... where a given matter becomes the subject of litigation in, and adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward, as part of the subject in contest but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence might have brought forward at the time.”

12. The Respondent states that Petitioner has admitted that he had filed a similar suit before the High Court seeking the same Orders as in the instant Petition which suit was heard and determined on merit.

13. The Parties in Civil Suit 964 of 1996, Miscellaneous Application No. 142 of 2010 and the current Petition are the same and the issues for determination are the same. It is on these grounds that the Respondent states that the Petition is *res judicata* and ought to be dismissed.

14. The Second limb of the 3rd Respondent’s Preliminary objection is that the Court is *functus officio*. They rely on the case of **Telkom Kenya Limited Vs John Ochanda and 996 Others (2014) Eklr;** where the court of Appeal held as follows:

“functus officio is an enduring principle of law that prevents the re-opening of a matter before a Court that rendered the final decision, thereon.”

15. The Respondent submits that the parties to the three suits filed by the Petitioner are the same, the issues under litigation are the same and indeed a final Judgment was given on the merits of the case. They state that the only avenue available to the Petitioner lies with the Court of Appeal. The Petition therefore ought to be dismissed.

16. The Respondent’s third limb in the Preliminary Objection is that the Petition is time barred. They state that the Petitioner was dismissed in 1995. The current Petition was filed in 2014, 19 years later. The Petitioner states that the report of the commission to investigate him was released on 23rd November, 2011, but no explanation for the delay has been tendered. The Respondent cites the case of **Michael Maina Nderitu Vs Kenya Power and Lighting Company Limited Industrial Cause Nol. 34 of 2010** where Nduma Nderi J stated:

“The fact of the matter is that employment contracts like other commercial contracts were subject to the provisions of the Limitations of Actions Act Cap 22 of the Laws of Kenya at the time with regard to Limitations but presently the limitation is governed by Section 90 of the Employment Act 2007 which has reduced the limitation period in employment matters to three (3) years.”

17. In the current Petition, the Respondent states that no leave to extend the period within which to file the case was sought prior to filing. They also state that Sections 27 and 28 of the Limitations of Actions Act Cap 22 limits extension of time for filing cases to actions based on negligence, nuisance or breach of duty but not to contracts. They submit that the Petition was filed is time barred and ought to be struck out.

18. Finally the Respondent states that the Petition lacks merit and is otherwise an abuse of the Court Process.

19. The Petitioner filed submissions on 2nd March, 2016 responding to the Preliminary objection and state as follows:

“That the Petition before Court seeks the determination of the Petitioners Rights which have been continuously violated’ denied, infringed and threatened. Which include access to information under Article 35(1), Labour relations under Article 4(1), fair administrative action Article 47 (1) and access to justice Article 48, fair hearing Article 50(1). He states that these rights guaranteed to the petitioner and can therefore not be dismissed on grounds of res judicata and functus officio. These rights must be addressed and determined by Court and not be barred by the law”.

20. They cite Article 22 (1) provides that:

“Every person has the right to institute Court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.”

21. Article 22 has not restricted a time limit to institute a suit when a right has been violated.

22. The Petitioner urges the court to be guided by the principles set out in ***Bashesar Noth Vs. The Commissioner of Income Tax, Delhi and Rajasthan (1959) Supp. 1. S.C.R. 528;*** where it was held:

- a. ***That the right given to citizens under article 22(1) is itself a fundamental right and cannot be circumscribed or curtailed except as provided by the constitution.***
- b. ***The citizens have ordinarily the right to invoke article 22(1) for appropriate relief if their fundamental rights are illegally or unconstitutionally violated.***

23. The Petitioner alleges that his rights were violated by the respondents and he has a constitutional right to commence suit in order to ventilate the said violations. They further state that that any decision arising out of a procedure that is flawed, irregular and contrary to the law must be addressed under the ambit of the Bill of Rights. *Res Judicata* applies to a final and conclusive decision made by a Court of competent jurisdiction.

24. What constitutes a final and conclusive decision depends on the merits of the case before the Court. In the Petition before the Court, the previous proceedings lacked in merit since disclosure and production of all relevant documents was not done.

25. The Petition before the Court seeks for the observance, respect, protection, promotion and fulfillment of the Petitioner’s rights. He states that this Court therefore is his Court of last resort to have his day in Court and to be afforded an opportunity to be heard on full facts and on documents which were previously not disclosed to him in order to enable him to seek redress.

26. He states that the document not disclosed to the petitioner concerns the decision of the tribunal that recommended his retirement in public interest which to date has not been availed to him hence no reasons were proffered to him demonstrating why he was sent into retirement.

27. The other document not availed to him concerned the findings of the tribunal that led to a letter of retirement being issued. The letter was issued to him by the then Permanent Secretary who had no authority to inform the petitioner of his retirement in public interest since any such communication had to be made by the tribunal itself. This was in his opinion a breach of regulation 34 of the Public Service Commission Regulations under Cap 185 Laws of Kenya.

28. He states that his termination was based on:

- i. **Misapplication of Cap 185 of the Laws of Kenya;**
- ii. **an ultra vires exercise of power by the Permanent Secretary;**
- iii. **An abuse of law as stated under Cap 185 of the Laws of Kenya, and;**
- iv. **Lacking in jurisdiction hence manifest errors in law were made as detailed under paragraphs 19-50 of the affidavit sworn by the Petitioner in support of the Petition.**

29. The Petitioner urges the Court not to determine the Preliminary objection without giving heed to the chain of events showing the violation of the Petitioner's rights. In seeking the determination of his rights it cannot be said that he is abusing the court process. The fact that his case heard without essential documents, the Petitioner states, means that his case was not heard and determined on merit.

30. The Petitioner further states that this Court should not direct its mind toward the adjudication of the previous proceedings but should ask itself whether the Petitioner was accorded a fair trial and the Judgment was pronounced on his rights that are now a subject of this Petition. He relies on the case of **Evans Vs Bartlam (1937) 2 All E.R. 646**, where it was held that Courts should not pass judgments that are not properly adjudicated.

31. The Petitioners have also submitted that the res judicata rule has exceptions and this is in cases where a case has not been decided on merit.

32. They submit that: "where a case is decided on merit there is a principle of finality" but that the "justice principle" on the other hand will favour reopening certain matters predicated on the basis that the object of litigation is to do justice. They cited **Taylor and Another vs. Lawrence & Another (2002) ALL ER 353** where the Chief Justice Lord Woolf dealt with both the justice principle and finality principle and held that:

"The Court had implicit powers to do that which was necessary to achieve the due objective of an appellate Court, namely to correct wrong decisions so as to ensure justice between the Litigants involved and to ensure public confidence in the administration of justice not only by remedying wrong decisions but also by clarifying and developing the law and setting precedents".

33. They submitted that this Court has the overriding objective to do justice.

34. On issue of *functus officio*, the Petitioner has submitted that this Court is not functus officio as it is being approached to make a determination on the violation of Petitioner's rights who has left his employment.

35. On the issue of limitation of time, the Petitioner has submitted that the matter is not time barred as matters under Article 22 of the Constitution do not have time limits within which they should be filed and therefore the issue of time does not arise.

36. I have examined the submissions on both parties. It is apparent that the Petitioner did file High Court Civil Suit No. 964 of 1996, which case was heard by Hon Judge Aganyanya (as he then was) and a Judgment rendered on 28th November 2001.

37. The Petitioner contends that he was denied his rights as the case was not heard on merit as vital documents were missing. The doctrine of *res judicata* as submitted by the parts forbids a Court re-opening a case heard conclusively by another Court of concurrent jurisdiction.

38. Justice Aganyanya (as he then was) heard this case in High Court case No. 965/1996 conclusively whether on merit or not. It is at that point that the Claimant should have taken up the matter either on review or appeal if he was not satisfied. Coming up with the same case 15 years later is in my

view an abuse of the Court process because this matter was concluded and this Court cannot reopen it at this point.

39. Assuming even that the matter had not been concluded – it is still time barred as the Claimant filed it without seeking leave of Court to do so.

40. It is my finding that this entire claim is an abuse of the Court process it is *re judicata* and time barred. I find the Preliminary Objection has merit and I allow it and dismiss the entire claim accordingly with costs to the Respondents.

Dated and delivered in open Court this 14th day of March, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Respondent

No appearance for Petitioner