



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU
CAUSE NO. 174 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

ELIJAH MIDOGO OCHIENG CLAIMANT

-Versus-

THE EXECUTIVE DIRECTOR, THE TRUSTEES,

KENYA LAKE CONFERENCE S.D.A CHURCH RESPONDENT

RULING

Before me for determination is an application by the Respondent by way of notice of motion under section 3, 3A, 7 and 8 of the Civil Procedure Act. The Respondent seeks orders that the court be pleased to strike out the claim and/or dismisses the same with costs to the Respondents on grounds that:-

- a) The Respondent herein filed Nairobi Industrial Case No.1004 of 2012 which was later transferred to Kisumu Industrial Court and renumbered Kisumu Industrial Case No.26 of 2013 against the same Defendant Trustees, Kenya Lake Conference S.D.A of which the Respondent herein is a trustee thereof.
- b) The prayers sought in this case are similar to the prayers sought in Kisumu Industrial Claim No.26 of 2013.
- c) The court in Kisumu Industrial Case No.26 of 2014 exhaustively and comprehensively heard the matter by viva voce evidence and pronounced a judgement on 21st November, 2014. The Respondent has settled the full decretal sum and costs in Kisumu Industrial Case No.26 of 2013.
- d) The issue of law and facts which the court made a decision on in Kisumu Industrial Case No.26 of 2013 are the same issues in respect of this case.
- e) The witnesses in Kisumu Industrial Case No.26 of 2013 are the same witnesses who have recorded statements in respect of the matter herein.
- f) This matter falls under the principle of res judicata.
- g) It shall be a waste of judicial time to litigate over a matter already decided.
- h) This suit is bad in law and ought to be struck out.

The application is supported by the affidavit of **TOBIAS OKEYO PANYAKO**, the 1st Respondent who is also the Executive Director of the 2nd Respondent. He depones in the Affidavit that the Claimant herein Elijah Midigo Ochieng and 4 others being Wilson Ayugi Ajuoga, Thomas Juma Oula, James Ngoche and Obuya Barnabas were Claimants in Kisumu Industrial Court Cause No.26 of 2013 (formerly Nairobi Industrial Court Cause No.136 of 2012 and 1004 of 2012) in which the same cause of action was determined in a Judgement delivered on 21st November, 2015.

When the application came up for hearing on 15th February, 2016 I directed that parties proceed by way of written submissions. I also directed that the ruling in this application will apply to Cause No.175 of 2015, 176 of 2015, 177 of 2015 and 178 of 2015 filed by **BARNABAS OBUYA, JAMES ARONY NGOCHE, THOMAS JUMA OULA** and **WILSON OYUGI AJUOGA** respectively.

The applicants filed their written submissions on 23rd February 2016. The Claimant (who is the Respondent in the application) filed grounds of opposition on

4th August 2015 as follows:-

1. *That the Applicant's application lacks merit.*
2. *That the matter is not res judicata.*
3. *The applicant has not complied with Order 11 CPR or Pre-trial Direction.*

The Claimant did not file written submissions by 1st March 2016 and was on 2nd March 2016 granted leave to file submissions within 7 days. By 10th March, 2016 when the case was mentioned for purposes of fixing date for ruling the Claimant had still not filed written submissions.

I have perused the Judgement of Wasilwa Judge delivered on 21st November 2014 and the Memorandum of Claim herein.

In the Judgement the 1st Claimant who is also the Claimant in the present suit was awarded the following:-

- | | |
|--|------------------------|
| 1. 1 month salary in lieu of notice | Kshs. 57,130.80 |
| 2. 12 months salary as damages for
unlawful termination =12 x57,130.80= | <u>Kshs.685,569.60</u> |

Total **Kshs.742,700.40**

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In the present suit the Claimant seeks the following:-

- a) *Pay slips and salary arrears from March 2012,*
- b) *Statutory deduction from March 2012,*
- c) *Pension,*
- d) *Costs of this suit and Interest,*
- e) *Any other relief which this Honourable Court may deem fit and just to grant.*

The clause of action in cause no.26 of 2013 was wrongful termination of Employment of the claimants, among them Elijah Midigo Ochieng the Claimant herein. In that case the Claimant herein and his co-claimants, sought the remedies of reinstatement, general damages, costs and interest. At paragraph 6 of the Claim herein he avers that "there is no other suit pending and there has been no previous proceedings in any court between the claimant and the Respondents over the same subject matter.

This averment is obviously not correct as both the cause of action in cause 26 of 2013 and the present suit (Cause 174 of 2015) relate to the termination of employment of the claimant. Section of the civil procedure act provides

7. 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.

The Claimant's suit herein is an abuse of court process as it relates to the cause of action in Cause No. 26 of 2014 and the issues raised in the suit were raised or should have been raised in the said Cause No.26 of 2013. The Claimant's suit is therefore *res judicata* and he is estopped from filing a suit on the same cause of action.

For this reason the application herein succeeds. I therefore strike out the Claimants suit herein with costs to the Applicant/Respondent.

This order applies to file Nos. 175 of 2015, 176 of 2015, 177 of 2015 and 178 of 2015.

Ruling Dated signed and delivered this 26th day of May, 2016

MAUREEN ONYANGO

JUDGE