

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

OF KENYA AT NAIROBI

CAUSE NO. 2405 OF 2012

DAVID NYUMU MUCHIRU.....CLAIMANT/RESPONDENT

VERSUS

STANDARD CHARTERED BANK (K) LTD..RESPONDENT/APPLICANT

RULING

1. The Respondent/Applicant's notice of motion application dated 6th February 2015 and filed on 9th February 2015 seeks that the Claimant's memorandum of claim be struck out and the suit dismissed with costs. The application is based on the premise that the suit is *res judicata*. In support of the notice of motion application an affidavit sworn by Jane Chege and the grounds on the face are annexed. There is also a further affidavit sworn by Jane Chege on 5th May 2015 and filed on 11th May 2015. The grounds are that the suit is *res judicata* as the Claimant (then grievant) was a beneficiary of a consent order in Industrial Cause No. 256 of 2009 which was compromised in favour of the grievants therein. The Respondent asserted that the memorandum of claim is frivolous and vexatious fit for dismissal.

2. The Claimant/Respondent was opposed and filed a replying affidavit sworn on 18th February 2015 and filed on 19th February 2015. In it, he deposed that the compromised suit left out the computation of his 5 years terminal dues as the years applied were 25 instead of 30 years. He deposed that the issue in Industrial Cause No. 256 of 2009 was dealing with the underpayment of his terminal dues which is very different from the current claim for his underpaid pension. He thus asserted that the suit is not *res judicata* as the issues are entirely different.

3. The application was urged on 22nd June 2016 by Mr. Burugu for the Respondent/Applicant and Mr. Kinyanjui replied for the Claimant/Respondent. Mr. Burugu submitted that the Respondent/Applicant sought the striking out of the claim and dismissal on grounds that the suit is *res judicata*. He submitted that the suit is *res judicata* and violates the principle that litigation must come to an end. He stated that the Claimant filed cause No. 256 of 2009 through unions on his behalf. He submitted that the Claimant sought terminal dues from 1965 to 1970, a period of 5 years and the Claimant in his present suit alleges that he was paid pension dues for 25 years instead of 30. He stated that the Claimant is seeking for something already determined by the consent filed by parties. He submitted that the suit was conclusively determined and that the subject matter is the same, the suit was initiated for the Claimant, it was heard in a competent jurisdiction and finally settled by consent which consent has neither been disputed nor varied. He submitted that *res judicata* applies to every point that lies in the case and that a court has to go further and ascertain if the issues arose in the previous suit. He stated that parties cannot litigate by instalment and that suits would only end once a party's ingenuity ended. He relied on the case of **Nicholas Njeru v Attorney General & 8 others [2013] eKLR**. He submitted that the claim seeks dues that are not specifically pleaded and thus cannot be specifically proved and that as the claim stood the Claimant cannot vouch for the figure due to him and how the figure is arrived at. He submitted that the suit is an abuse of the court process and thus urged the Court to dismiss the suit.

4. Mr. Kinyanjui, in opposing the application, submitted that the Claimant sought the resolution of pension dues. He admitted that there was Cause No. 256 of 2009 which was seeking terminal dues and that the matter was concluded after parties reached a consent. He submitted that the Respondent continued paying pension on the assumption that the Claimant had worked for 25 years and not 30 years.

He stated that the issue of pension could not have been resolved before the terminal dues were paid. He submitted that the issue of the years worked was a matter that was different from the previous suit and therefore the Claimant's claim was not *res judicata*. He stated that the issue in Cause 256 of 2009 was terminal dues which are paid only once whereas the issue in this claim is pension which is paid on a monthly basis during the lifetime of a member and is calculated on the number of years an employee has worked. He submitted that there was no proper basis for the plea of *res judicata*.

5. In a brief reply, Mr. Burugu submitted that the issue was *res judicata* as the claim drafted tells a different story from the replying affidavit by Claimant. He stated that the claim is couched in a manner as to show that the Claimant seeks something that was already determined.

6. The Respondent raises the plea of *res judicata* and states that the suit should be dismissed with costs to the Respondent. The Claimant asserts that the suit is not *res judicata* as the issues in dispute are entirely different and the plea of *res judicata* cannot arise.

7. *Res judicata* in legal parlance is literally a thing adjudicated and refers to an issue that has been definitively settled. **Black's Law Dictionary Ninth Edition** defines *res judicata* as an issue that has been definitively settled by judicial decision. *Res judicata* as a rule of law is that once a competent Court makes a determination on an issue between the parties in a suit on the matters litigated upon in that suit, it is not open for any of the parties to litigate upon those matters again. It is an absolute bar to litigation over the same issues. The Civil Procedure Act Chapter 21 Laws of Kenya, makes provision under *Section 7* 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.

8. It is clear 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 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. A consent compromising a suit is a final determination of a matter and thus fits in the confines of the provisions of Section 7 of the Civil Procedure Act. When a matter is res judicata, a Court such as this one has no business going into the merits of the suit as to do so would be a waste of judicial time and misuse of the parties' time.*

9. In the claim before the Court, the Claimant seeks the resolution of the issue regarding payment of his pension. In Industrial Cause No. 256 of 2009, the Claimant was seeking the determination of terminal dues. In the pleadings before the Court, it is clear that there was a dispute as to the length of service which was the basis of the payment of terminal dues. As was held in the case of **Nicholas Njeru v Attorney General** (*supra*) the matter before the Court is *res judicata* as the issue is substantially in issue in the previous suit and the Claimant is barred from litigating on it whether in his name or under another. In the premises the application by the Respondent/Applicant is successful and the Claimant/Respondent's suit is thus dismissed with costs to the Respondent/Applicant.

Orders accordingly.

Dated and delivered at Nairobi this 13th day of July 2016

Nzioki wa Makau

JUDGE