



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO 2115 OF 2015**

**CAPTAIN J.N. WAFUBWA.....CLAIMANT**

**VERSUS**

**THE DEFENCE COUNCIL.....RESPONDENT**

**RULING**

1. This ruling proceeds from a preliminary objection raised by the Respondent by notice dated 7<sup>th</sup> June 2016. The objection is based on the following grounds:

a. That the suit is *res judicata* in that it has been litigated upon severally in various courts as follows:

i. HCCC No 674 of 1993: the High Court ordered that the Claimant's benefits and pension be assessed at the rank of Major despite his having retired as a Captain;

ii. Civil Appeal No 278 of 2003: the Claimant challenged the High Court decision and sought to have his benefits assessed at the rank of Lieutenant Colonel. The Attorney General cross appealed and the Court of Appeal reversed the decision by the High Court;

iii. HC Petition No 715 of 2006: the Claimant applied for orders directing the Minister for Finance/Treasury to assess his benefits for services rendered under Military law. The application was dismissed on the ground that it was an abuse of the court process in light of the Court Appeal decision in Civil Appeal No 278 of 2003;

iv. JR Misc. Civil Application No 368 of 2009: the Claimant sought a review of the decision of the Court of Appeal in Civil Appeal of 278 of 2003. The High Court dismissed two related applications dated 3<sup>rd</sup> May 2011 and 10<sup>th</sup> February 2012 noting that the High Court could not review a decision of the Court of Appeal. Earlier on 13<sup>th</sup> April 2011, the High Court had dismissed a related application observing that the matter was *res judicata*;

v. HC JR Misc. Civil Application No 79 of 2013: the Claimant alleged that the then Permanent Secretary of Defence had failed to facilitate payment of his benefits. The Claimant had failed to clear with his service (Kenya Air Force) to enable the processing of his benefits and for instructions to be issued to the Director of Pensions to release his pension. The application was dismissed on the grounds that Judicial Review remedies were not applicable and the Claimant was relying on a Court of Appeal decision (CA No 278 of 2003) that had dismissed his case;

vi. HCCC Misc. Application No JR 454 of 2014: this is the most recent application filed by the

Claimant seeking orders of Mandamus to compel the Minister for Finance and Treasury to reassess his terminal benefits in compliance with Military law. The High Court dismissed the application on the ground that it did not meet the threshold for Judicial Review;

vii. The Claimant filed a petition with the National Assembly for review of the assessment of his benefits which was found to be vexatious.

2. In its written submissions filed on 9<sup>th</sup> August 2016, the Respondent states that the Claimant retired from service in 1993 upon attaining the mandatory retirement age at the rank of Major in accordance with the Armed Forces Act and the Terms and Conditions of Service. Since his retirement, the Claimant had made several unsuccessful attempts in court seeking to have the Defence Council compelled to reinstate him and to review his pension assessment and retirement benefits.

3. The Respondent states that in the current claim, the Claimant has raised the same issues and has relied on similar facts as those obtaining in the cases already determined.

4. The essence of the doctrine of *res judicata* is to guard against multiple litigation on the same set of issues. Faced with this matter, the Court of Appeal in *Nicholas Njeru v Attorney General & 8 Others [2013] eKLR* stated as follows:

***“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 that the individual should not be harassed twice with the same account of litigation”.***

5. 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.

6. In opposing the preliminary objection, the Claimant sought to make distinctions among the several cases filed by him over the years. I have looked at these distinctions and find that they constitute a mere splitting of hairs.

7. *Res judicata* has a twin sister known as issue estoppel which was described by the House of Lords in *Arnold & Others v National Westminster Bank PLC (1991) 2 A.C* as follows:

***“Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue.”***

8. The ingredients of the twin principles of *res judicata* and issue estoppel are; same parties, same issues and a final determination of the issues by a court of competent jurisdiction.

9. In my view, the issues over which the Claimant has litigated upon in the multiple cases enumerated by the Respondent have to do with his retirement and the subsequent assessment of his retirement benefits. These are the same issues now before me and I find that the Court lacks the jurisdiction to retry these issues.

10. Consequently, the Claimant’s claim is struck out with no order for costs.

11. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI**

**THIS 18<sup>TH</sup> DAY OF NOVEMBER 2016**

**LINNET NDOLO**

**JUDGE**

Appearance:

Captain J.N. Wafubwa (the Claimant in person)

Miss Chege for the Respondent