



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE NO 1103 OF 2016**

**ELIAS MUDAKI NGAYWA.....CLAIMANT**

**VERSUS**

**THE PRINCIPAL SECRETARY**

**MINISTRY OF TOURISM.....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. By notice dated 9<sup>th</sup> August 2016, the Respondent raised a preliminary objection to the Claimant’s claim on the following grounds:

- a) That the suit is time barred and offends the provisions of Section 90 of the Employment Act, 2007;
- b) That the claim is *res judicata*;
- c) That this Court is *functus officio*;
- d) That the suit is incompetent, has no merit and is an abuse of the court process.

2. In a replying affidavit sworn by the Claimant on 26<sup>th</sup> September 2016, he depones that the matter herein is not *res judicata* since in the previous suit, he sought a determination that he was wrongfully terminated while in the current case, he seeks reinstatement.

3. Regarding limitation of time, the Claimant states that the parties had been engaged in correspondence regarding his reinstatement. The Claimant adds that Article 159(d) of the constitution enjoins the Court to render substantive justice without undue regard to technicalities.

4. The issue for determination in this ruling is whether the Claimant’s claim is properly before the Court. The primary question is whether the issues raised in the claim are *res judicata*.

5. As held by the Court of Appeal in *Nicholas Njeru v Attorney General & 8 Others [2013] eKLR* the doctrine of *res judicata* is grounded on public policy and is aimed at assuring finality to litigation.

6. 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.

7. It is not in dispute that prior to filing the present suit, the Claimant had filed CMCC No 2648 of 2006 which was fully heard and judgment rendered on 6<sup>th</sup> May 2011. A perusal of the documents filed in Court reveals that both the parties and the subject matter in CMCC No 2648 of 2006 and in the current claim are exactly the same. The only difference is that the Claimant now seeks the additional prayer of reinstatement.

8. This Court therefore finds that the issues raised in the current claim were fully ventilated and finally determined by a court of competent jurisdiction in CMCC No 2648 of 2006. These issues are therefore *res judicata* and cannot be reopened for retrial.

9. In light of the foregoing finding I have no reason to delve into the issues of limitation and *functus officio* which are now superfluous.

10. The final verdict is that 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 20<sup>TH</sup> DAY OF DECEMBER 2016**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Ng'ang'a for the Claimant

Mr. Odukenya for the Respondent