

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 217 OF 2015

ATIIMA CLARKSON MBATARU..... CLAIMANT

VERSUS

DHABITI SACCO LIMITED..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, December, 2016)

RULING

The claimant filed the memorandum of claim on 10.12.2015 through Ngunjiri Michael & Company Advocates. The claimant prayed for terminal benefits at Kshs. 3, 218, 274.65 being salary arrears for 2007 to 2014; leave allowance for 2007 to 2014; leave days due; overtime pay for 2007 to 2014; and service pay for 19 years completed service. The claimant also prayed for issuance of a certificate of service, interest at court rates and costs of the suit.

At paragraph 4 of the memorandum of claim the claimant has pleaded that he was summarily dismissed from his employment through a letter dated 20.08.2014 but contested the dismissal on the grounds that it was unfair vide Nyeri Industrial Court Cause No. 120 of 2014 seeking reinstatement and payment of his dues as per the CBA and an order for costs. At paragraph 5 the claimant has stated that the court decided that the claimant's dismissal was not unfair and as such his prayers could not be granted.

The respondent filed the memorandum of defence on 01.04.2016 through Mbaabu M'Inoti & Company Advocates. The respondent prayed that the claim be dismissed with costs. At paragraph 11 of the memorandum of defence the claimant pleaded that the suit was *res judicata* having been settled in Nyeri Industrial Court Cause No. 120 of 2014.

The only issue for determination is whether the present suit is *res judicata* in view of the determination in the said previous suit between the parties.

Res-Judicata is an affirmative defence barring the same parties from litigating a second law suit on the same claim or any other claim arising from the same transaction or series of transactions and that could have been, but was not raised in the first suit (See Black's Law Dictionary, 9th Edition). The three essential elements are:

- a. an earlier decision on the issue;
- b. a final judgment on the merits; and
- c. the involvement of the same parties, or parties in privities with the original parties.

The doctrine of *res judicata* aims at ensuring that litigation comes to an end. An issue that has been conclusively decided upon by a competent judicial authority must not find itself before the same or other competent judicial authority for reconsideration.

In the present case, there is no dispute that the parties were the same ones in the previous suit and suing in the same capacities as the claimant and the respondent respectively. There is no dispute that the previous suit like the present suit related to the employment relationship between the parties and which had been

terminated by way of summary dismissal. In the present suit the claimant seeks to make claims and prayers flowing from that summary dismissal. The court finds that with due diligence, the claimant should have raised all the claims (including the ones urged in the present suit) in the previous suit. Further the court has considered that the prayers for salary arrears, leave allowance, leave days, and overtime arrears were all in the nature of continuing injuries (under section 90 of the Employment Act, 2007) to be claimed in a suit filed within 12 months from the date of the cause of action being the date of the summary dismissal on 20.08.2014. The 12 months of limitation lapsed on or about 20.08.2014 and the suit was filed outside the time of limitation on 01.12.2015. The court considers that such belated filing of the suit would operate as an impetus to uphold the preliminary objection.

In view of the court's findings, the preliminary objection is hereby upheld.

In conclusion the respondent's preliminary objection that the suit is *res judicata* is hereby upheld and the claimant's suit is hereby dismissed with costs.

Signed, dated and delivered in court at **Nyeri** this **Friday, 2nd December, 2016.**

BYRAM ONGAYA

JUDGE