



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 53 OF 2014

(Formerly HCCC No. 84 of 2012 at Nyeri)

PETER MUCHAI MUHURA..... PLAINTIFF

VERSUS

TEACHERS SERVICE COMMISSION..... DEFENDANT

(Before Hon. Justice Byram Ongaya on Friday 19th June, 2015)

RULING

The plaintiff filed a plaint on 17.04.2012 through Muthui Kimani & Company Advocates. The plaintiff prayed for judgment against the defendant for:

1. A declaration that the plaintiff's dismissal was unlawful.
2. General damages for unlawful dismissal and payment of accumulated unpaid salaries and allowances for the period between 1st June 2000 to 13th August 2010 and lump sum gratuity.
3. Costs of the suit.
4. Interest on (b) and (c) above at court rates.

The defendant filed the statement of defence on 25.05.2012 through Patricia Naeku Advocate. The defendant prayed that the suit be dismissed with costs. At paragraph 3 the defendant stated that the suit was not tenable in law as it grossly offended section 7 of the Civil Procedure Act and Rules. The defendant also filed the notice of preliminary objection on 25.05.2012 on the grounds thus:

1. The plaintiff's suit was time barred by virtue of section 3 of Public Authorities Limitation Act Cap.39, Laws of Kenya.
2. The plaint as filed and served is not tenable in law as it offends substantive provisions of section 7 of the Civil Procedure Act Cap. 21 Laws of Kenya.

The defendant also filed a notice of motion on 19.06.2012 under Order 51 Rule 1 and 4 of the Civil Procedure Rules 2010 and section 3, 3A, & 7 of the Civil Procedure Act for Orders:

1. That the honourable court be pleased to order that the plaintiff's suit as filed by the plaint dated 16.04.2012 as *res judicata* pursuant to section 7 of the Civil Procedure Act.
2. That the honourable court be pleased to dismiss the plaintiff's suit as filed vide the plaint dated 16.04.2012 with costs to the defendant.
3. That the honourable court be pleased to order that the plaintiff's suit is frivolous, vexatious and an abuse of the court process.

4. That the defendant be at liberty to apply for such further orders or directions as the court may deem fit and just in the circumstances.
5. That the costs of the application be in the cause.

It was the defendant's grounds and submissions that the suit be dismissed on the ground prior to the present suit the plaintiff filed Judicial Review Application No. 53 of 2010 in the High Court at Nyeri. That application was heard and dismissed on 3.06.2011. The dispute between the parties was thereby disposed with finality and the present suit was *res judicata*.

The plaintiff opposed the application by filing on 27.06.2012 the replying affidavit of Peter Muchai Muhura. It was submitted for the plaintiff that the judicial review proceedings questioned the *ultra vires* exercise of discretion by the respondent as a public body in a prayer for judicial review orders and not the kind of the reliefs now prayed for in the present suit.

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 privity 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.

The judicial review application was made under the provisions of Order 53 of the Civil Procedure Rules. Being a judicial review proceeding under order 53 of the Civil Procedure Rules, it was submitted for the plaintiff that the High Court confined itself to the procedural considerations and not merits of the case. In arriving at the decision in that application, Serگون J found that the respondent had not breached the rules of natural justice; or the regulations and rules that governed the employment of the plaintiff, the applicant in the judicial review proceedings. The court in evaluating the substance or the merits of the plaintiff's termination then stated as follows:

“...First the applicant was given a chance to explain himself. He admitted to the accusation that he deserted duty because he was mentally ill. The respondent requested him to explain the reasons why he did not apply for sick leave, a right which he was entitled to. The applicant failed to offer any reasons. The respondent, like any prudent employer, would not just reinstate an employee who had not communicated with it for more than 10 years. The applicant gave no reasons why he did not apply for sick leave. The respondent is vested with the powers to terminate the services of any teacher under its employment if such an employee contravenes the terms and conditions of his contract of employment.”

It is the opinion of this court that in the ruling in the judicial review proceedings the court considered both the merits and procedural propriety of the plaintiff's termination. In that application, the High Court was determining an application for the prerogative orders of certiorari and mandamus and at the same time considering the merits of the reasons for the termination of the applicant's employment. The court then concluded that the reasons for termination were valid and the plaintiff had been accorded due process of natural justice as per applicable rules and regulations.

The judicial review application was filed on 23.11.2010 and the ruling was delivered on 3.06.2011 long after the promulgation of the Constitution of Kenya, 2010 sometimes on 27.08.2010. Under sub-Article 22 (1) of the Constitution, every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. Under Sub-Article 23(3) in any proceedings under Article 22, a court may grant appropriate relief including:

- a. a declaration of rights;
- b. an injunction;
- c. a conservatory order;
- d. a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
- e. an order for compensation; and
- f. an order of judicial review.

Thus, under the cited provisions, it is possible for a litigant to apply for and pray for both compensatory relief and orders of judicial review in the same pleading. Thus in judicial review proceedings under the current constitutional dispensation, other substantive remedies as provided for in the Constitution are available under the same proceedings and the court in such proceedings, which appears to have been the case in the said judicial review application no. 53 of 2010, is entitled to delve into both procedural and substantive or merit issues. It is the opinion of this court that the barriers or ridge or valley between judicial review proceedings and the ordinary actions as they were has been collapsed by the Constitution of Kenya, 2010. The Constitution has opened avenues to access to justice and all stipulated remedies in the same proceedings; ordinary action or prescribed application. Thus, litigants need not file separate processes to access the different available remedies. It is true that universal procedural rules have not yet fully evolved in our judicial system to keep pace with the constitutional liberation of litigants; a legitimate and urgent project towards full realization of the constitutional principles in Article 159 that justice shall not be delayed; justice shall be administered without undue regard to procedural technicalities; and the purpose and principles of the Constitution shall be protected and promoted.

Thus, this case is distinguishable from this court's opinion in **Meshack Angeng'o Omondi –Versus- Eldoret Municipal Council And Another [2012]eKLR** where it was stated thus,

“However, the same cannot be said of Judicial Review proceedings in the former Constitutional dispensation in which a litigant could only allege procedural issues and not issues of merits, and, seek only prerogative orders of mandamus, certiorari or prohibition but not compensatory remedy in the same pleadings. In view of the remedies available in judicial review application that locked out declaration and compensatory remedies as prayed for in the memorandum of claim, the court finds that Judicial Review Application No. High Court Misc. Application of 2003 at Eldoret was not an earlier decision on issues raised in the claim, and, it was not a final judgment on merits of the case in the claim. Taking into account the findings, the court holds that the doctrine of *Res-judicata* does not apply in the instant case. This finding and holding also applies to the court of Appeal decision in Booker Onyango, Meshack Omondi Ageng'o and John Kwambai Rotich – Versus – Eldoret Water Sanitation Company Limited, Civil Application No. Nairobi 247 of 2008 in which the applicants were seeking leave to file an appeal out of time against the High Court decision in HC Misc. Application No. 97 of 2003 at Eldoret.”

The court further upholds its opinion in **Professor Elijah Biama –Versus- University of Eldoret and 2 Others [2014]eKLR** thus,

“...The court holds that a venture to distinguish the manner a litigant approaches or ought to approach the court merely on the basis of the remedy or the situ (prescription of the right or fundamental freedom as embedded in the Constitution or legislation or other formal source) of the right or fundamental freedom in issue is long dead under the former constitutional dispensation as the new constitutional order prescribes and favours universal approach towards the realization of the rights and fundamental rights irrespective their primary formal situ. In the opinion of the court, future measures of aligning court procedures to the new constitutional order will entail universal procedure for realization and enforcement of the rights and freedoms irrespective the formal source or residence of the right or fundamental freedom because the Constitution incorporates all as part of the Bill of Rights. If every dispute that comes to court entails enforcement of some legitimate right or fundamental freedom which the Constitution has incorporated in the constitutional Bill of Rights, then, in the court's opinion, time for a universal procedure by which parties should move the court has come and it would be pursuit in vanity to

look for and attempt to sieve rights and fundamental freedoms that are expressly provided for in the Bill of Rights as was the case in the days of Harrikson –Versus- Attorney General of Trinidad and Tobacco (1980) AC 265. For the time being that the universal procedure is not in place, it is the opinion of the court that litigants will not be faulted for the option they shall adopt of the myriad procedural options that continue to peep their souls from the former constitutional dispensation to the new constitutional order.”

Again the court has considered and followed the opinion by Majanja J. in Geoffrey Otieno Ogola – Versus- Homa Bay Boys’ High School and 2 Others [2014]eKLR where the High Court declined to strike out a plaint seeking to enforce fundamental rights and freedoms upon the submission that the plaintiff ought to have filed a petition as provided under the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. The court held that it was enough that the plaint disclosed the claim with sufficient clarity and allowing the plaint was in accordance with Article 159(2) (d) which enjoined the court to administer justice without undue regard to procedural technicalities.

In the present case the plaintiff chose to file the Judicial Review Application No.53 of 2010 at Nyeri and prayed for prerogative orders of judicial review and not the other remedies as now prayed for in the plaint. It was open for the plaintiff to file a suit seeking composite prayers including judicial review orders and the remedies now prayed for in the present suit. As observed by the court earlier, the Constitution allowed the plaintiff to file such suit seeking composite remedies but at the same time the court is alert that the Constitution was young and the plaintiff may have honestly proceeded under the previous dispensation of such remedies being obtainable in distinct procedural approaches of application for judicial review then ordinary action as it came to pass. In view of that consideration, it is the court’s opinion that each party would bear own costs of the suit and the present application.

The court has considered that the judicial review application considered both procedure and merits that lead to the plaintiff’s interdiction then dismissal. The court found that the reasons for interdiction and dismissal were valid and the plaintiff was afforded natural justice in accordance with the applicable regulations and rules. The plaintiff did not appeal against the findings of the High Court as he must have been satisfied with the findings. In such circumstances, the court finds that no purpose will be served by allowing the present suit to go on full hearing as all issues in dispute were considered and decided upon in the judicial review application; it is indeed *res judicata* as submitted for the defendant in the present suit.

In conclusion, the application filed for the defendant on 19.06.2012 is allowed with orders as follows:

1. The plaintiff’s suit filed by the plaint dated 16.04.2012 is *res judicata* in view of the previously heard and determined High Court Judicial Review Application No. 53 of 2010 at Nyeri and the suit is dismissed.
2. Each party shall bear own costs of the suit and the application.

Signed, dated and delivered in court at Nyeri this Friday, 19th June, 2015.

BYRAM ONGAYA

JUDGE