



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 535 OF 2011

- 1. LEONARD O M BARAZA 1ST CLAIMANT**
- 2. PETER L SHIHONJERO 2ND CLAIMANT**

VERSUS

TRANSPARES (KENYA) LTDRESPONDENT

RULING

1. ON 1ST August 2011 the Respondent filed notice of preliminary objections. The matter has come up in Court severally when the Claimants were absent. On 2nd August 2011, the Court directed parties to address the preliminary objections filed by the respondent. On 13th March 2012 the matter Court not proceed as the Claimants was absent. On 29 March 2012; 18th April 2012; 14th May 2012; and 11th June 2012; 13th July 2015 the Claimants were absent. The Respondent filed Affidavit of Service sworn by Vincent Mamuyu Sabatia and sworn on 1st July 2015 noting the claimant was served, acknowledged service by stamping on the Notice but failed to attend Court as directed.

- 1. The Respondent thus filed written submissions on the filed preliminary objections. The objections are that;*
- 2. The Memorandum of Claim is drawn, signed and filed by an unqualified and incompetent person;*
 - a. The Court lacks jurisdiction to entertain this claim for the reasons that;*
 - b. The matter is res judicata, thee being a similar suit CMCC No. 1637 of 2010 touching on the same subject matter and parties, and which is still pending determination in court.*
 - c. The matter is res judicata the same having been heard and determined by a competent Court in CMCC No.1474 of 2006 touching on the same parties and the same subject matter.*
 - d. The claim herein is time barred pursuant to the limitation of Actions Act the same having been lodged way after the prescribed limited time, yet leave of Court and extension of time were neither sought nor obtained prior to the filing of the same.*

2.The Respondent also submitted that the suit is fatally defective and an abuse of the Court process as it has been filed by unqualified and incompetent person. The suit is also time barred as it was filed on **7th April 2011** based on breach of a service contract. The same matter arose on 26th august 2005 per the letter of dismissal issued to the claimant and was the cause of action in CMCC No.1474 of 2006 dated 15th March 2006 and filed in Court on 24th May 2006. Since the time the cause of action arose, it is over 6 year now and to file the matter before this Court as a Court of first instance is contrary to Limitations of Actions Act section 4(1).

3. The Respondent also submitted that the matter is *res judicata* as there is a similar suit **CMCC No 1637**

of 2010 filed by the claimant against the Respondent over the same cause of action and is pending determination. The Claimants is Leonard Baraza who filed the claim on 23rd June 2010 seeking similar prayers as herein and thus identical suit in existence.

4. The Respondent also submitted that the suit is res judicata as there exists CMCC No 1474 of 2006 touching on the same cause of action and similar parties with identical prayers as herein. This confirms the Claimants as vexatious litigants. Filing such suits as the Claimants have is contrary to principles outlined in **Lawi Duda & Others, Civil Suit No. 528 of 1998**. On 14th August 2006 the Court dismissed the matter and allowed the Claimants to file a new suit properly but the Claimants ignored this and filed suit after lapse of time.

Determination

Is the suit time barred?

Is the suit res judicata?

Is the suit properly filed?

5. The Claimants herein Leonard O M Baraza and Peter L Shihojero filed the suit herein dated 24th march 2011 was filed on **7th April 2011**. The suit is drawn and filed by Cornel L Shisanya as he recognised agent of the claimants. Cornel Shisanya has attached his Power of Attorney registered at Mombasa on 23rd February 2006. The claim is supported by the Verifying Affidavit of the 1st claimant, Leonard Baraza. Though the Power of Attorney is herein attached, the incapacity of the Claimants necessitating such application of filing of the suit through an agent who is not a union official or a legal representative and hence the need for an agent through Power of Attorney is not stated. The fact that the claim is supported by the Verifying Affidavit of the 1st claimant, who avers that he is an adult and competent to file the same is evidence that he had the capacity to equally file the suit in person and not through an agent which is not allowed under the Rules or the applicable statutory provisions that operationalise the work of this court. To file suit as the Claimants have is to go contrary to the set rules and procedure and without leave of the court. To allow agents who are not within the tripartite social dialogue in the employment and labour relations is to defeat the objectives of the court. The claim should be struck out to enable the claimant file the same as appropriate.

6. However, this are not the only issues herein. The suit is stated to be res judicata. The 1st Claimants in his Verifying Affidavit at paragraph 3 confirms that;

There were other suits in Court and there is no any previous suit pending as per the rulings made in them allowing this particular claim to be properly filed in this court. Which were the same matters arising between the parties herein.

7. Indeed suit no. CMCC 1637 of 2010 was filed in Mombasa by the 1st Claimants against the respondent herein. The suit related to the termination of the 1st Claimants by the Respondent and the Court made a ruling that the suit had been filed by an unqualified person under the provisions of section 21 of the Advocates Act and thus incompetent. The Claimants was allowed to file a suit properly. Previously cause No. CMCC 1474 of 2006 had been filed by both Claimants against the Respondent relating to their termination and the same was held to be incompetent as the Verifying Affidavit has been filed by a person not competent to do so. The Claimants were allowed to file a new suit procedurally.

8. The cause of action cited under CMCC 1637 of 2010 and CMCC 1474 of 2006 was the termination of the Claimants on 31st January 2006. The orders of the subordinate courts were a recognition that the Claimants had instituted the suits improperly and should be allowed to file fresh claims as appropriate. The use of Cornel Shisanya under the Power of Attorney or as an agent for the claimant was the core of contention. This is repeated herein in utter disregard to what the lower Court had directed. Equally where

the cause of action arose on 31st January 2006 upon the termination of the Claimants by the respondent, any claim that arose ought to have been filed before time lapsed on or before the 1st of February 2012. The suit herein is filed on 7th April 2011. Though within the allowed time duration, the Claimants have filed the same through an agent other than themselves in the name and style over Power of Attorney and as assessed above such suit should be struck out.

9.It therefore serves no useful purpose that the Claimants have been before courts this third time and repeated errors, been negligent and or filed each suit under the same manner and style through an agent in utter disregard of the directions of the court. With the assessment that the suit should be struck out for being incompetent, nothing remains for arbitration. The previous suits were herein as incompetent and thus do not exist for the matter herein to be held as res judicata.

10.Mention must be given on the conduct of the claimants. They are currently represented by Counsel, direction were given severally directing them to file their submissions with regard to the very serious preliminary objections noted by the respondent, were notified of the various dates in court but opted not to attend or file any submissions. The claimants were served with the preliminary objection notice way back in 2011 and to date have done nothing to aid their cause.

11.Matter raised herein by the respondent are not mere technicalities. They go to the substance of the claim and the claimants have failed to seize the moment and address the same. To be allowed to keep the matter alive for no justifiable reason or reasons is to put the respondent into unnecessary expense of retaining their Counsel at great costs. This is not the purpose of suits before the court. Justice is due to all the parties before the Court.

The preliminary objections herein noted by the Respondent and filed on 1st August 2011 are allowed to the extent that the suit herein is incompetent and must be struck out. Costs shall be awarded to the respondent.

Dated and Delivered at Nairobi this 23rd day of July, 2015.

M. Mbaru

Judge

In the presence of:

Court Assistant

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