



**REPUBLIC OF KENYA**

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

**CAUSE NO.667 OF 2013**

**HUMPHREY IRUNGU MUGO.....CLAIMANT**

**VERSUS**

**KENYA KAZI SERVICES LIMITED.....RESPONDENT**

**RULING**

1. The respondent has filed their preliminary objections to the claim herein on the grounds that;
  1. *The present suit as taken out, drawn and filed is incompetent, fatally defective and unsustainable in law or at all.*
  2. *The proceedings herein offend the principle of res judicata as provided in section 7 of the Civil Procedure Act Cap 21 Laws of Kenya in view of the fact that there was a previous suit before this honourable court being Industrial Cause No.228 of 2012 (hereinafter called the earlier suit) in which the subject matter was directly and substantially in issue as in the proceedings herein.*
  3. *In whole, the applicant herein is a vexatious and frivolous litigant and the proceedings herein an abuse of the court process.*
2. Both parties filed their written submissions.
3. The respondent submitted that the claimant had filed Industrial Cause No.228 of 2012 on a matter directly and substantially in issue herein. On 6<sup>th</sup> February 2013 the court delivered a ruling striking out the suit with costs to the respondents. The current suit has been filed without material disclosure of that previous fact. This claim ought to be struck out with costs. Under section 7 of the Civil Procedure Act the claimant ought to disclose the existence of the former suit as held by the Court of Appeal in **Bahaduraju Ebrahim Shamji versus Ali Noor Jamal & Other, Appeal No.2010 of 1997**. Where the claimant has concealed material facts and made false averments, the court inherent power is to strike out the suit as held in **Reve. Madara Evans Okanga Dondo versus Housing Finance Company of Kenya HCCC 262 of 2005 (Nakuru)**. This suit ought to be struck out with costs.
4. In reply and submissions, the claimant states that there was a previous suit Cause No.228 of 2012 where the respondent filed objections and on the court assessment, it was held that section 47 (1) of the Employment Act was not a blanket cover for limitation on grounds of time as this related to matters referred for adjudication to the Labour Officer. That section 7 of the Civil Procedure Act on *res judicata* apply where a suit is filed raising matters directly and substantially in issue in a former suit between the parties. The court should then look at the *res judicata* principle with regard to entire proceedings raised in the previous suit to ascertain whether similar issues have been determined before. In this regard, Cause No.228 of 2012 was struck out to enable the claimant access to other options available. The case never proceeded on merit and was struck out on a technicality based on the description of the respondent. The objections herein should be dismissed with costs.

**Determination**

5. A subsequent suit is distinct from a previous suit. A subsequent suit cannot therefore amount to *res judicata*. See the rules as set out in **GR Mandaria versus Rattan Sign [1969] EA 118**. This court In **Wycliffe Bengi versus Regnal Oil (K) Limited, Cause No.1175 of 2010**, held that a matter that has been struck out is similar to being deleted from the records. It does not exist. It cannot be a bar to new litigation on the grounds that the new suit is *res judicata*.

6. There is no dispute that the earlier suit in Industrial Cause No.228 of 2012 was between the same parties to this case and the same was decided by a court of competent jurisdiction. It is, however, settled law that a matter is *res judicata* when it has been heard and determined on merit as held in **Kibogy versus Chemweno, [1981] KLR 35** and **Wanguhu Vs Kania, [1987] KLR 51**. The claimant’s earlier case, that is Cause No.228 of 2012, having been struck out on a technicality, I hold that this matter is not *res judicata*.

**The preliminary objection raised by the respondent and filed on 17<sup>th</sup> June 2015 are hereby dismissed with costs to the claimant.**

Delivered in open court at Nairobi this 25<sup>th</sup> day of November 2015.

**M. MBARU**

**JUDGE**

In the presence of:

.....

.....