



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA
AT NAIROBI
CAUSE NO.1579 OF 2014
KENYA SCIENTIFIC RESEARCH INTERNATIONAL
TECHNICAL AND INSTITUTIONS WORKERS' UNION.....CLAIMANT
VERSUS
BLACK & BEAUTY PRODUCTS LIMITED.....RESPONDENT
RULING

1. The Respondent, Black & Beauty Products Limited, in their Replying Affidavit filed on 24th Septembers and filed in response to the claimant's application dated 5th September 2014 have at paragraph 3(b) raised objections to the application and suit that the same is *res judicata* thus;

The present application and indeed the entire matter is res judicata and the applicant is clearly a vexatious litigant seeking orders where none are to be made. Notice of preliminary objection is hereby issued thereof.

2. The objection is based on the grounds the Respondent submitted to be that the Claimant has filed the suit without clean hands and by failing to disclose to the court that the same claim was subjection of Industrial Cause No.1363 of 2012 which was heard and orders recorded on 24th May 2014. The orders made have not been complied with and therefore the Claimant is not deserving of the orders now sought in the current suit. The Claimant has never achieved the simple majority rule with the Respondent and the check off forms sent to the Respondent was obtained through fraud, collusion and deceit without the knowledge of the employer. There is no credible information that the Claimant has been able to gain access at the Respondent premises so as to access the employees therein. In any event there is a rival union in the same industry the Kenya Union of hair and Beauty Salon Workers also seeking recognition with the employer and subject of Industrial Cause Noi.1041 of 2013 where the Claimant herein is named as the 2nd Respondent. The matter herein having been addressed under Cause No.1363 of 2012 is therefore *res judicata*.

3. In reply, the Claimant submitted that under cause No.1363 of 2012, the claimants got orders for access at the Respondent premises to enable recognition. The claim before court relates to union dues deductions. Once access was granted by the court, the Claimant was able to recruit 51%-plus employees of the Respondent and has now submitted check off forms seeking deduction of union dues. The cause herein is fundamentally different from the previous one. The different dispute has been reported to the Minister as under section 66 of the Labour Relations Act and without conciliation, the Claimant filed the matter in court. The suit is not *res judicata* and such objections should be dismissed.

Issues:

Whether the suit is *res judicata*; and

Whether the suit and application should terminate at this point.

4. Where a claim in a subsequent suit is distinct from a previous suit, the same cannot be found to be the same or to amount to *res judicata*. The court will therefore look at key elements in assessing if a suit has gone against the *res judicata* rule as set out in **GR Mandaria versus Rattan Sign [1969] EA 118** where the Court held that;

To constitute a decree there must be the following essential elements:

- 1. There must be an adjudication;*
- 2. The adjudication must have been given in a suit;*
- 3. It must have determined the rights of the parties with regard to all or any of the matters in controversy in the suit;*
- 4. Such determination must be a conclusive determination.*

*Where the plea for res judicata is dismissed it is not a preliminary decree as opposed to where it is allowed. In the latter situation an appeal lies as of right. The same situation occurs where a preliminary issue alleging misjoinder, limitation, lack of jurisdiction or *res judicata* is raised.*

5. To these essential elements, the case of **Abok James Odera versus John Patrick Machira [2001] Civil Application No. 49 of 2001**, added that;

... there must be;

- i. A previous suit in which the matter was in issue;*
- ii. The parties were the same or litigating under the same title;*
- iii. A competent court heard the matter in issue;*
- iv. The issue had been raised once again in a fresh suit.*

Res judicata applies to suits as there must be an end to litigation.

6. Therefore as set out above in **Abo James Odera** case, the *res judicata* rule to apply the court must interrogate any previous suit or suits as to whether the parties were the same, whether the matter was heard and determined. There is Cause No.1363 of 2012, I note the parties were the same and herein and the matter was heard and determined. However the issues raised herein must be looked at with regard to the issues that arose in the previous cause. The orders sought by the Claimant in Cause No.1363 of 2012 were;

- 1. The honourable court be pleased to order the Respondent to allow the Claimant to access its premises*
- 2. The honourable court be pleased to order and direct the Respondent to allow its employees to talk to the union officials/officers.*
- 3. The honourable court be pleased to order and direct the Respondent to allow its workers to join and participate in union activities.*

4. *The honourable court be pleased to order and direct the Respondent to pay the costs of this suit.*

7. A look at the current suit, the orders being sought by the Claimant are;

1. *The honourable court should direct the Respondent to deduct monthly union dues from the workers who signed check off system from accordingly as members according to appendix.....*

2. *The honourable court should order and direct the Respondent to deduct monthly union dues from the date these union members signed the check off system forms.*

3. *The honourable court should order and direct the Respondent to pay the union dues from their account because they violated section 48 of Labour Relations Act 2007 when the workers had already signed check off system forms as members*

4. *The honourable court should order and direct the Respondent s to pay the costs of this suit.*

8. A scrutiny of both suits and the orders sought for the court determination are fundamentally different in both suits. Cause No.1363 of 2012 in the main is seeking access to the Respondent premises by the Claimant to enable the claimant's officials and or officers to talk to the Respondent employees so as to be able to participate in union activities whereas in Cause No. 1579 of 2014 [current suit] the main issues are that the Claimant has members in the Respondent employ who have submitted check off forms and the Respondent has not effected the deduction and should therefore be made to pay for these undeducted union dues.

9. Without going into the merits of the main suit, a cursory look at the two claims, one notes a distinctive difference. The prayers are different and the cause of action thus different even though between the same parties as in the previous suit. One employer with similar employees may be faced with different issues, complaints and conflicts at the workplace and within unionisation. This is the nature of labour relations.

10. Therefore even though there was a determination of rights of the parties with regard to all or any of the matters in controversy in Cause No1363 of 2012; which determination was conclusive, the Claimant is not precluded from raising any other subsequent claim of rights under any other suit. A good solution would be to file any subsequent claim with regard to similar parties and matters in the same vain in one Cause, but this is not a requirement that makes the suit fatal where the cause of action and orders sought are different. I find that in this case, though the parties are similar and have a history of suits as between them, the orders sought herein arise from a different cause of action and thus the suit is not *res judicata*.

Objections by the Respondent are therefore dismissed. I will award costs to the claimant.

Delivered in open Court at Nairobi this 30th day of September 2014.

M. Mbaru

JUDGE

In the presence of:

Lilian Njega: Court Assistant

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