



**Duncan Otieno Waga v Attorney General (Cause 89 of 2013)
[2013] KEELRC 251 (KLR) (31 July 2013) (Ruling)**

Duncan Otieno Waga v Attorney General [2013] eKLR

Neutral citation: [2013] KEELRC 251 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 89 OF 2013
ON MAKAU, J
JULY 31, 2013**

BETWEEN

DUNCAN OTIENO WAGA CLAIMANT

AND

ATTORNEY GENERAL RESPONDENT

RULING

1. The claimant was retired on medical grounds from the police force in the year 2008. He filed a constitutional Petition Number 94 of 2011 at Nairobi challenging the constitutionality of the said retirement. The grounds for the petition was that it was discriminatory and in violation of his rights as enshrined under the *Persons with Disability Act* of 2003 and the convention on the Rights of Persons with Disabilities.
2. After hearing the petition, the court struck out the petition on ground that it was not grounded on a right guaranteed under the Bill of Rights enacted in the constitution but right recognized by the constitution but enforceable elsewhere.
3. Consequently the claimant filed the present claim on April 24, 2013 seeking the same orders he sought in the Petition 94 of 2011. The respondent filed grounds of opposition and a preliminary objection (PO) threto on the following points of law:
 1. that the claim is *res judicata*'
 2. that the constitution of Kenya 2010 cannot apply retrospectively to cover the claim whose cause of action arose before its promulgation,
 3. The claimant is guilty of suppressing material particulars and abusing the process of court.



4. The court lacks jurisdiction to hear and entertain the claim.
4. The parties agreed to file written submission which I have carefully gone through and considered in this ruling.
5. I have no hesitation in dismissing ground (c) and (d) of the PO Paragraph 21 of the claim has revealed that the parties herein were involved in similar proceedings before the High Court in Petition 94 of 2011 which was struck out on June 19, 2012. As such the claimant is not guilty of suppressing material particulars.
6. As regards the jurisdiction of this court, Section 12 and 20 of the *Industrial Court Act* read with Article 162 (2) (a) of the Constitution gives this court the exclusive jurisdiction to determine disputes relating to employment and labour relations including a claim for human rights violation or threat thereto.
7. The broad jurisdiction of this court is demonstrated by the preamble to the said Act which states;

“An Act of parliament to establish the Industrial court as a Superior Court of record, to confer jurisdiction on the Court with respect to employment and labour relations and for connected purposes”
8. The court therefore asserts its jurisdiction of this dispute which deals with the termination of services by his employer. In such a dispute, the court has the jurisdiction to make or decline make the orders sought by the claimant after the hearing of the parties. The respondent knew that and even submitted that the HC Petition No 94 of 2011 that the said petition should have been filed in this court.. The fourth ground of objection therefore has no merit and must fail.
9. As regards the first ground of objection, the court has carefully read through the authorities cited by the parties on the subject of res judicata and they all agree that the key factor to consider is whether a competent court has made a final determination on the merits about the subject matter.
10. The decision by Majanja J, in Petition 94 of 2011 in my view did not conclusively determine the matters in dispute on the merits. No wonder he used the words” strike out” instead dismiss the Petition. The ratio decidedi in the said decision was that the rights guaranteed under the statute and the convention under which the claimant moved the court were not provided for under the Bill of rights in the constitution and as such could not be enforced by the High Court under Article 22 of the Constitution. The court was therefore of the view that the claimant could enforce such rights before another forum. That view must have been provoked by the respondent counsel's submission that the petition ought to have been filed before the Industrial court. Consequently I agree with the claimants submission that striking out of proceedings does not mean dismissal of the same. The first ground of the PO therefore also fails. The second ground of the PO is upheld in view of the decision by Majanja J, that the constitution is not retrospective by dint of Article 263 and 264 thereof. The court cannot therefore be moved under the constitution to invalidate, except by express provision, what was otherwise legal before its promulgation. The court will therefore not revisit that matter in the present claim.
11. However in view of my earlier findings with respect to first, third and fourth grounds of the PO, the suit will proceed to full determination after the close of the pleadings. The respondent is therefore at liberty to defend the suit by filing defene and calling evidence.
12. In summary therefore the Preliminary Objection is dismissed with costs save for ground number 2 thereof.

Orders accordingly.



SIGNED DATED AND DELIVERED THIS 31ST DAY OF JULY 2013.

ONESMUS MAKAU

JUDGE

