



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 15(N) of 2010

MESHACK ANGENG'O OMONDI.....CLAIMANT

VERSUS

ELDORET MUNICIPAL COUNCIL.....1ST RESPONDENT

ELDORET WATER AND SANITATION COMPANY LIMITED.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on 12th October, 2012)

RULING

The Claimant Meshack Angeng'o Omondi filed the memorandum of claim dated 22nd September, 2009, through Limo & Company Advocates. The 2nd Respondent's reply to memorandum of claim was filed on 22nd February, 2010 through Nyaundi Tuiyott and Company Advocates.

The Claimant at paragraph 4 of the memorandum of claim stated,

“4. The Claimant avers that the 1st Respondent engaged him in his employment as General worker to carry out Clerical duties between October 1992 until 9th September, 2002 when he was unlawfully dismissed by the 2nd Respondent”.

The 2nd Respondent pleaded in paragraphs 4, 5, 6, 7 and 8 of the 2nd Respondent's reply to memorandum of claim that the Claimant's cause of action was time barred. Accordingly the 2nd Respondent filed a notice of preliminary objection dated 18th February, 2010 seeking that the Claimant's claim be struck out or dismissed with costs for any or all of the following reasons:

1. That the claim was time barred by Section, 90 of the Employment Act, 2007.
2. That the Claim was Res judicata Elodret HCC Misc. Application No. 92 of 2003 (Republic Vs Eldoret Water and Sanitation Company Limited, Ex parte, Booker Onyango, Meshack Omondi Agengo and John Kwambai Rotich) and is an abuse of court process.
3. That no claim could be brought under the Law of Contract (Common Law) as the same is time barred under the provisions of the Limitations of Actions Act or the Public Authorities Limitations Act.
4. That the claim could not be sustained under the provisions of the Trade Disputes Act, Cap. 234, as the statute was repealed and the claim would, in any event, be out of time.

The 1st Respondent filed a statement of Defence on 17th February, 2010 through Gicheru & Company Advocates. On the same date the 1st Respondent filed a Notice of Preliminary Objection to the claim on the grounds that:

1. The Claimant's claim is frivolous and vexatious and is an abuse of the court process in view of the previous proceedings in the High Court and the Court of Appeal relating to the same subject matter.
2. The Claimant's claim is time barred both under the provisions of the Limitations Act, the Public Authorities Limitation Act and the Employment Act.
3. The Limitation periods stipulated by the mentioned statutes are absolute and the Claimant's purported claim therefore was extinguished.
4. The Claimant's claim against the 1st Respondent offended the provisions of Section 12 of the Local Government Act and was therefore *nullity ab-initio*.
5. The Claimant's claim was *Res-judicata*.

The 1st Respondent therefore prayed that the Claimant's claim against it be struck out with costs.

The two preliminary objections were heard on 27th April 2010. Counsel for the 1st Respondent made submissions as follows:

- (a) The 1st Respondent had raised points of law in the preliminary objection.
- (b) The claim was frivolous because the Claimant had instituted proceedings against the Respondent before Eldoret High Court in Miscellaneous Civil Application No. 97 of 2003. In that Application judgment was entered in favour of the 2nd Respondent by the Honourable Justice M.K. Ibrahim. Further the Claimant made an appeal in Civil Application No. Nairobi 247 of 2008 and a ruling in favour of the 2nd Respondent was given by the Honourable Justice Joyce Aluoch on 26th February, 2009. Counsel therefore submitted that the claim was an abuse of the court process.
- (c) That the claim was time barred under the provisions of Section 4(a) and (e) of the Limitation of Actions Act. The claim was founded on contract and the same claim had been brought when the cause arose on 9th September, 2002 and the claim being filed on 13th January, 2010. Further the claim was time barred under the Public Authorities Limitations Act and Section 12 of the Local Government Act so that the claim was bad in law *ab-initio*.

Counsel for the 2nd Respondent submitted on the grounds of objection as set out in the preliminary objection filed for the 2nd respondent. The claim being time barred, ought to be dismissed and struck off with costs.

Counsel for the Claimant in opposing the preliminary objections submitted as follows:

- (a) The Employment Act, 2007 having come into operation on 26th October, 2007 and the claim filed on 13th January, 2010, the same was not time barred under Section 90 of the Act.
- (b) The doctrine of *Res-judicata* does not apply to the Industrial Court and the respondents were not parties at the time the HCC Misc. Application No.92 of 2003 was filed.
- (c) The submissions for the respondents were misplaced because Section 12 of the Labour Institutions Act, 2007 conferred exclusive jurisdiction. Thus the Limitation of Actions Act was no longer material as the Employment Act, 2007 had been enacted.

(d) The repeal of an Act by Parliament does not extinguish a course of action.

Accordingly, Counsel for the Claimant submitted that the preliminary objections be dismissed with costs.

On 14th May, 2010, the court directed that the ruling would be delivered on 25th May, 2010 at noon. The ruling was not delivered as schedule hence this ruling.

The main issues for determination are whether the cause is *Res-Judicata* and whether it is time barred.

Res-Judicata is an affirmative defense 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.

In this case, the Respondents have produced a copy of the judgment in Republic -VS – Eldoret Water and Sanitation Company Limited Ex parte Booker Onyango, Meshack Omondi Ageng'o and John Kwambai Rotich, High Court Miscellaneous Civil Application No. 97 of 2003 at Eldoret. The Claimant in this case, Meshack Angeng'o Omondi was obviously a party to the High Court Application. That was a judicial review application made under the provisions of Order 53 of the Civil Procedure Rules and Sections 8 and 9 of the Law Reform Act. Being a judicial review proceeding under order 53 of the Civil Procedure Rules, the High confined itself to the procedural considerations and not merits of the case. In arriving at the decision in that application, the learned Judge stated:

“I do hold that there was due process and the principles of natural justice were not violated. The Applicants were given the opportunity to be heard and they were heard. There are no allegations of unfairness or bias in the decision. In fact I think the claim of the breach of natural justice was based on the claim that it is the Council as body which has the right to terminate the services or employment of the applicants and not the company. I do not think that is the true position due to the unique arrangements in the relationships of the parties, Agency Agreement and the new contracts of employment. I therefore find that the Applicants are not entitled to orders of certiorari, prohibition and mandamus as applied for. As a result, the application must fail. It is hereby dismissed”.

In that application, the High Court was determining an application for the prerogative orders of certiorari, prohibition and mandamus. The judgment was delivered on 17th April, 2008 long before the promulgation of the Constitution of Kenya, 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, in Article 22 Court proceedings, it is possible for a litigant to apply for and pray for both compensatory relief and orders of judicial review in the same pleading. 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 second issue for determination is whether the cause is time barred. It is not disputed that the dismissal leading to the filing of the case was on 9th September, 2002. It is also not disputed that the case was filed on 13th January, 2010 being over seven years from date of the cause of action. The Claimant has prayed for a declaration that he was unlawfully dismissed from employment by the 1st Respondent and for compensation for the unlawful dismissal. In the circumstances, the court finds that the claim and the cause of action is governed by the provisions of the Employment Act, 2007. Section 90 of the Act provides,

“90. Notwithstanding the provisions of Section 4(1) of the Limitation of Actions Act, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect of default complained or in the case of continuing injury or damage within twelve months next after cessation thereof”.

The cause of action was on 9th September, 2002 and the case was filed on 3rd January 2010. In view of the provisions of Section 90 of the Employment Act, 2007, the Court finds that the cause is time barred. On that ground the court upholds the preliminary objections filed for the Respondents.

In conclusion, the memorandum of claim is struck out with costs.

Signed, dated and delivered this 12th day of October, 2012.

BYRAM ONGAYA
JUDGE