Madara v Gitonga & 17 others; Waweru & 2 others (Interested Parties) (Petition E012 of 2024) [2024] KEHC 7649 (KLR) (25 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7649 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

PETITION E012 OF 2024

OA SEWE, J

JUNE 25, 2024

BETWEEN

JAMES NYAMWATA MADARA ..... PETITIONER

AND

BENJAMIN GITONGA ..... 1ST RESPONDENT

FEISAL ABEI ..... 2ND RESPONDENT

P. MUNYAO ..... 3RD RESPONDENT

BENJAMIN WANGAMATI ..... 4TH RESPONDENT

JOSEPH WELOBA (AS THE CURRENT MANAGEMENT BOARD OF MOMBASA PARENTS CLUB) ..... 5TH RESPONDENT

ALI MOHAMED SALIM ..... 6TH RESPONDENT

DR UZEL JEAN ..... 7TH RESPONDENT

TAMIMI LEWA CHIBORORO ..... 8TH RESPONDENT

DR BENJAMIN MUNYWOKI ..... 9TH RESPONDENT

DOMINIC MUANGE ..... 10TH RESPONDENT

BETTY MUCHIRI ..... 11TH RESPONDENT

JANE ONYANGO ..... 12TH RESPONDENT

TIMOTHY KIREMA ..... 13TH RESPONDENT

CAROLINE CHEMUTAI ..... 14TH RESPONDENT

ANGELA LENGERED ..... 15TH RESPONDENT

MARY KERICH ..... 16TH RESPONDENT

REBECCA LEMALOM ..... 17TH RESPONDENT

YASIR ABDULKARIM (AS THE NEWLY ELECTED MANAGEMENT BOARD OF THE MOMBASA PARENTS CLUB) ..... 18TH RESPONDENT

AND

MAJOR (RTD) MOSES WAWERU ..... INTERESTED PARTY

DANIEL TANUI ..... INTERESTED PARTY

ALI MANDHRY ..... INTERESTED PARTY

RULING

1. The Notice of Motion dated 8th June 2024 was filed by the 6th to 11th and 16th to 18th respondents. It was filed pursuant to Article 53(1)(b) of the Constitution, Sections 8 and 13 of the *Children Act*, Rules 3(8), 23, 24 and 25 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules for several orders. Some of the prayers are now spent. The outstanding ones are:

    (a) That the Court be pleased to partially discharge, vary and/or set aside the Court Orders dated 23rd May 2024 and instead issue an order allowing the 6th to 18th respondents herein as the newly elected Management Board to manage the School/Club on interim basis pending the hearing and determination of the arbitration process.

    (b) That costs of the application be provided for.

2. The application was premised on the grounds that on the 23rd May 2024, the Court issued orders that the disputed election of the new Board of Management of Nyali School be referred to arbitration; that in the meantime, the assumption of office of the newly elected Management Board be suspended and that the outgoing Board of Management of the Club to oversee the running of the School. The applicants averred that, in view of the new developments, including the resignation of a good number of the members of the old Board, the best interest of the pupils of the School is now compromised and the school is on the verge of total collapse. They further averred that the parents have lost confidence in the outgoing Board and are unwilling to entrust any funds to the care of the old Board.

3. The applicants further averred that, in appreciation of the dire situation of the School, several meetings by stakeholders have been held since the orders of 23rd May 2024, but these have not yielded any solution to the impasse at the School. They therefore posited that it is in the best interest of the pupils of the School that the orders sought be granted to save the School from total collapse.

4. The application was premised on the affidavit of Omar Babu and Ali Mohamed (the 6th respondent). Mr. Omar, the acting Principal of Nyali Primary School averred that the School is currently in dire situation because 80% of the parents have declined to pay school fees. He explained that several meetings have been held at the School between the parents, the National Security Team, the County Executive Committee Member for Education, Mombasa County, Nyali Sub-County Education Officer, the old Board and the newly elected Board members to discuss the stalemate and restore peace but no solution was formalized or presented to Court as a consent for adoption. Mr. Omar was apprehensive that, unless the orders sought are granted, the School is facing imminent closure.

5. Mr. Mohamed, on his part, averred that he was part of the Old Board and therefore could assert that the Board has since so disintegrated due to resignations that the School is on the verge of collapse. He further averred that, although on the 17th June 2024, Mr. Ramadhan Kimanthi issued a letter purporting to reconstitute the Management Board by co-opting of new members to the old Board, that purported cooption not only contravenes *the Constitution* of the Club but was also not validly made due to lack of quorum.

6. Mr. Mohamed deposed that the operations of the School have ceased due to the mistrust that the parents have towards the old Board. He believes the purported reconstitution will not make a difference and pointed out that out of 1025 pupils, the enrolment as at 18th June 2024 was only 130 pupils.

7. The application was opposed by the 4th respondent who is a member of the outgoing Board of Management. In his Replying Affidavit sworn on 18th June 2024, he confirmed, in his capacity as the Treasurer to the old Board, that four members of the Board resigned on 14th June 2024. He however added that the remaining board members convened a virtual meeting later during the day to discuss the issue of resignation and how to come up with a possible solution to ensure peace and tranquility prevails in the School.

8. The 4th respondent further stated that by virtue of Article 31 of the Club's Constitution, which provides for co-opting of members to the Board, some members of the Club were co-opted and therefore the Board is intact and ready to discharge its mandate. He made reference to the affidavit of the current Chairman of the Club, Mr. Ramadhan Kimanthi, sworn on 18th June 2024 in which Mr. Kimanthi confirmed that the Board held an emergency meeting to address the issue of the vacancies created by the resignations of some of the Board members; and that pursuant to Article 31 of the Club's Constitution, the remaining Board members co-opted new officials. Mr. Kimanthi further deposed that the School has resumed and was confident that there would be no further interruptions. He also confirmed that the Board as reconstituted is ready to discharge its functions and mandate to safeguard the best interests of the pupils and in furtherance of the constitutional objectives of the Club.

9. On behalf of the 12th to 14th respondents, a Notice of Preliminary Objection was filed herein dated 11th June 2024. They contended that the question of whether the Court should vary and/or set aside the court order permitting the outgoing Board of Mombasa Parents Club to oversee the running of the School/Club is *res judicata,* since the applicants sought similar orders vide their previous application dated 3rd April 2024, which application was dismissed by the Court on 23rd May 2024. Their contention is that the issue cannot be revisited except through appeal.

10. In addition to their Notice of Preliminary Objection, the 12th, 13th and 14th respondents relied on the Replying Affidavit sworn by Mr. Timothy Kirema on 12th June 2024. They took issue with the fact that they were included in the instant application without their consent or instructions. They therefore seek that the application be withdrawn and or dismissed. They reiterated their readiness to participate in the arbitration process and in proof thereof exhibited a copy of a letter written by their Advocates with a view of initiating the arbitration process.

11. Mr. Kirema then embarked on a detailed account as to how the applicants, acting in cahoots with the acting Principal of the School, Mr. Omar Babu, and a section of the parents, hatched and executed a plan to frustrate the operations of the School by the old Board of Management. He therefore averred that, to allow the applicants to run the school before the issues in controversy about their election are resolved through arbitration will only bring more acrimony because the applicants had started running the affairs of the Club without involving the 12th, 13th or 14th respondents.

12. The application was urged orally on 19th June 2024 due to its urgent nature. Counsel for the applicants relied on the supporting affidavits sworn by Omar Babu and Ali Mohamed. They emphasized their contention that the operations of the School have since come to a standstill following the resignation of key members of the old Board; and that it is in the interest of justice to grant the orders sought.

13. On behalf of the 1st to 5th respondents, Mr. Wangila conceded that the 1st, 2nd, 3rd and 5th respondents have indeed resigned from the Management Board of the Committee. On the instructions of the 4th respondent, he nevertheless urged the Court to decline the prayers sought by the applicants. He insisted that the remaining members of the old Board, along with the co-opted members, are in control of the operations of the School.

14. On behalf of the 12th, 13th and 14th respondents, Mr. Oluga relied on the Replying Affidavit sworn by Mr. Timothy Kirema. He reiterated the assertion that the application is a replication of the application dated 3rd April 2024, and is therefore *res judicata*. Counsel also pointed out that his clients were not consulted and therefore are not party to the prayers sought on their behalf by the applicants. Counsel highlighted the manner in which the acting Principal, Mr. Omar, has supported the applicants and a section of the parents to frustrate the old Board with the objective of painting the old Board in bad light and to frustrate it from performing its mandate. He accordingly urged for the dismissal of the application dated 8th June 2024.

15. Mr. Shimaka for the petitioner and Mr. Oloo for the interested parties also made their submissions. Mr. Shimaka was in agreement with and essentially adopted the submissions by Mr. Wangila and Mr. Oluga. Mr. Oloo, on his part, reiterated the neutral position taken by the interested parties and rooted for the appointment of an interim Caretaker Committee to oversee the operations of the School pending arbitration.

16. A preliminary objection having been raised on the ground of *res judicata,* the Court is obliged to first and foremost consider the objection before engaging in a merit consideration of the application, if need be. As was pointed out in Mukisa Biscuits Manufacturers Ltd v West End Distributors Ltd [1969] E.A 696, it was held that:

> ...a Preliminary Objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration."

17. In this instance, the objection goes to the jurisdiction of the Court to entertain and determine the instant application; and therefore is a fit and proper issue to raise *in limine*. In the Owners of Motor Vessel "Lillian s" v Caltex Oil (K) Ltd [1989] KLR 1 the Court of Appeal held:

> Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

18. The Court of Appeal further stated (per Nyarangi, JA) that:

> ...it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it..."

19. Res judicata is provided for in Section 7 of the *Civil Procedure Act*. The provision states:

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

20. In an explication of the doctrine in Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another [2016] eKLR, the Supreme Court of Kenya held:

> (52) Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights. ...
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> ...
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> (54) The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively....
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> (58) Hence, whenever the question of res judicata is raised, a Court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The Court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a Court of competent jurisdiction. This test is summarized in Bernard Mugo Ndegwa v James Nderitu Githae & 2 Others, [2010] eKLR, under five distinct heads: (i) the matter in issue is identical in both suits; (ii) the parties in the suit are the same; (iii) sameness of the title/claim; (iv) concurrence of jurisdiction; and (v) finality of the previous decision.

21. Similarly, in the case of *Registered Trustees Africa Gospel Church v Kamunge & 2 others; National Land Commission (Interested Party) (Civil Appeal (Application) E756 of 2022*) [2023] KECA 1117 (KLR) (22 September 2023) (Ruling), the Court of Appeal relied on the Muiri Coffee Case (supra) and held:

> 16. The object of res judicata is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgement or ruling between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. Res judicata contemplates 5 conditions which, when co-existent, will bar a subsequent suit. The conditions are: (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; (ii) the former suit must have been between the same parties or privies claiming under them; (iii) the parties must have litigated under the same title in the former suit; (iv) the court which decided the former suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit. (See Lotta v Tanaki [2003] 2 EA 556)...
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> ...

18. A litigant is estopped from raising issues that have been finally determined in previous litigation, even if the cause of action and relief are different. The purpose is obviously to prevent the repetition of lawsuits between the same parties, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions by the different courts on the same issue. Res Judicata is one of the factors that limit a court's jurisdiction. This doctrine serves a salutary purpose, which is key to the due administration of justice. It is based on the need to give finality to judicial decisions. Res Judicata can apply in both a question of fact and a question of law, so, where the court has decided based on facts it is final and should not be opened by same parties in subsequent litigation.

19. The key point here is that a judicial decision made by a court of competent jurisdiction holds as correct and final in a civilized society. Res judicata halts the jurisdiction of the court to protect the finality of the decision. The effect is that the court is prevented from trying the case in limine..."

22. The same position was taken by the Supreme Court in Communications Commission of Kenya & 5 others v Royal Media Services & 5 others [2014] eKLR as follows:

(317) The concept of res judicata operates to prevent causes of action, or issues from being relitigated once they have been determined on the merits. It encompasses limits upon both issues and claims, and the issues that may be raised in subsequent proceedings. In this case, the High Court relied on "issue estoppel", to bar the 1st, 2nd and 3rd respondents' claims. Issue estoppel prevents a party who previously litigated a claim (and lost), from taking a second bite at the cherry. This is a long-standing common law doctrine for bringing finality to the process of litigation; for avoiding multiplicities of proceedings; and for the protection of the integrity of the administration of justice all in the cause of fairness in the settlement of disputes.

23. It is therefore plain that *res judicata* is as applicable to main suits as it is to interlocutory applications. In Uhuru Highway Development Ltd v Central Bank of Kenya & 2 Others, Civil Appeal No. 36 of 1996, the Court of Appeal pointed out that:

There is not one case cited to show that an application in a suit once decided by courts of competent jurisdiction can be filed once again for rehearing. This shows only one intention on the part of the legislature in India and our *Civil Procedure Act*. That is to say, there must be an end to applications of a similar nature; that is to say further, wider principles of res judicata apply to applications within the suit. If that was not the intention we can imagine that the courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation..."

24. It is therefore untenable that the applicants have come back to this Court, seeking that the Court be pleased to partially discharge, vary and/or set aside the Court Orders dated 23rd May 2024 and instead issue an order allowing the 6th to 18th respondents herein as the newly elected Management Board to manage the School/Club on interim basis pending the hearing and determination of the arbitration process. Untenable because in their application dated 3rd April 2024 they sought the exact same orders following the ex parte orders made herein by Hon. Mutai, J. on 29th March 2024, which the Court confirmed by the impugned ruling upon dismissing their application.

25. The Court having taken that decision, the only option open to the applicants was the appeal route. It is therefore my finding that the application dated 8th June 2024 is res judicata, notwithstanding that it was filed not in respect of the orders of 29th March 2024 but for the variation of the orders issued

herein on 23rd May 2024. Accordingly, I agree entirely with the position taken by Hon. Majanja, J. in E.T. v Attorney General [2012] eKLR that:

> The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi v National Bank of Kenya Limited and Others [2001] EA 177 the court held that, 'parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.' In that case the court quoted Kuloba J., in the case of Njangu Vs Wambugu and another Nairobi HCCC No.2340 of 1991 (unreported) where he stated, 'If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata..."

26. It is therefore my considered finding that the application dated 8th June 2024 is for dismissal. The same is hereby dismissed with no order as to costs.

27. It is nevertheless manifest from the material presented herein that, the Chairman, Secretary and Treasurer of the old Board who have been sued herein as the 1st, 2nd, 3rd and 5th respondents, have since resigned. The letters of resignation have been annexed to the Replying Affidavits filed by the 4th respondent, the 13th respondent and Ramadhan Kimanthi. It has further been brought to the attention of the Court that the affairs of the school are yet to return to normalcy, in spite of the confidence exuded by the old Board. In the detailed affidavit of the 13th respondent it was conceded that the School is in a deplorable state.

28. Article 53(2) of *the Constitution* mandates the Court to take into account the best interests of a child. It states:

> "A child's best interests are of paramount importance in every matter concerning the child."

29. In the same vein, Section 8 of the *Children Act*, No. 29 of 2022 is explicit that:

(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies—

(a) the best interests of the child shall be the primary consideration;

(b) the best interests of the child shall include, but shall not be limited to the considerations set out in the First Schedule.

(2) All judicial and administrative institutions, and all persons acting in the name of such institutions, when exercising any powers conferred under this Act or any other written law, shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to —

(a) safeguard and promote the rights and welfare of the child;

(b) conserve and promote the welfare of the child; and

(c) secure for the child such guidance and correction as is necessary for the welfare of the child, and in the public interest.

30. It is manifest from the affidavits filed in respect of the instant application that the disputation has had an adverse effect on the education of the children enrolled at Nyali School. It was in acknowledgment of this crisis that the Trustees of the School, who are also the interested parties in this matter, proposed that a caretaker committee be appointed to take care of School pending arbitration. Their counsel, Mr. Oloo, reiterated their proposal in his submissions.

31. The Court has powers, under Rule 3(8) of the Mutunga Rules to make such orders as are appropriate to meet the ends of justice. It provides:

> (8) Nothing in these rules shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

32. Accordingly, following the resignation of a good number of the members of the old Board, and granted the need for the School to resume full operations as soon as possible for the benefit of the pupils, it is hereby ordered that:

    (a) A Caretaker Committee be and is hereby appointed comprising the following:

        (i) The County Executive Committee Member for Education, Mombasa County, as the Chairman.

        (ii) Three members of the old Board, to be appointed by the CEC Member for Education.

        (iii) Three members of the new Board, to represent their divergent interests as follows: one member to represent the applicants, one member to represent the 1st to 5th respondents and one member to represent the 12th, 13th and 14th respondents.

        (iv) Two members to represent the trustees.

    (b) The mandate of the Caretaker Committee shall include the Terms of Reference proposed by the interested parties vide paragraph 17 of the Replying Affidavit sworn by Major (RTD) Moses Waweru on 17th May 2024.

    (c) The mandate of the Caretaker Committee to subsist pending arbitration and/or further orders of the Court.

    (d) The period for arbitration is hereby extended by one more month. A Settlement Agreement to be filed before the Court on or before the 25th July 2024.

    It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 25TH DAY OF JUNE 2024

OLGA SEWE

JUDGE