



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 18 OF 2019

IN THE MATTER OF: VIOLATION AND INFRINGEMENT OF ARTICLES 10, 11, 112, 19, 20, 24, 27, 32, 33 AND 34 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: ARTICLES 2,3,8, 10, 11, 12, 19, 20, 21, 22, 23, 24, 27, 32, 33 AND 34 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: THE FILMS AND STAGE PLAYS ACT, CHAPTER 222 OF THE LAWS OF KENYA

BETWEEN

MICHAEL KIOKO.....PETITIONER

AND

THE KENYA CLASSIFICATION BOARD.....RESPONDENT

AND

HON. ATTORNEY GENERAL.....INTERESTED PARTY

JUDGMENT

1. The Petitioner herein is a male resident of Mombasa County while the Respondent is a board established under Section 11 of the Films and Stage Plays Act, Cap 222 of the Laws of Kenya with the mandate to regulate the creation, broadcasting, possession, distribution, and exhibition of films, to license and issue certificates to distributors and exhibitors of films; within the meaning of Section 15 of the Act.

The Petitioner's Case

2. The Petitioner filed Petition dated 18/02/2019 stating that the Respondent had on 27th April, 2018 published a statement on its website signed by its Chief Executive Officer, Dr. Ezekiel Mutua, banning the distribution, exhibition, broadcast and possession of the film "Rafiki" in Kenya. The Petitioner avers that on 7th June, 2018, he delivered a letter to the Respondent dated 31st May, 2018, demanding that the said statement be withdrawn but the Respondent has never withdrawn the decision and the film is still listed as banned films.

3. It is the Petitioner's case that the Respondent's decision infringes on the freedom of Kenyans to express themselves, seek, receive, and impart information or ideas including the freedom of artistic creativity. The Petitioner avers that the decision deliberately misinterprets the Constitution and the law to deny Kenyans the aforesaid rights and freedoms.

4. The Petitioner therefore prays for: -

i. A declaration that the decision of the Kenya Film Classification Board banning and/or restricting the film "Rafiki" is in violation of Articles 10, 11, 12, 19, 20, 24, 27, 32, 33 and 34 of the Constitution of Kenya, and is therefore null and void.

ii. Any other relief that this Honourable court deems fit to grant under the circumstances

iii. That each party bears its own costs of the Petition.

The Response

5. The Respondent opposed the Petition via a Notice of Motion dated 1st September, 2020 seeking prayers that:

i. This honorable court be pleased to strike out or dismiss the present Petition on the ground that the same is Res Judicata in view of the proceedings and decision of the court in NAIROBI HIGH COURT CONSTITUTIONAL PETITION NO. 313 OF 2018; WANURI KAHIU & ANOTHER VS. KENYA FILM CLASSIFICATION BOARD & 4 OTHERS

ii. The costs of the Application and the entire suit be awarded to the Respondent.

6. The Application is based on the grounds set out therein and supported by an Affidavit of **Dr. Ezekiel Mutua** dated 1st September, 2020.

7. The Respondent avers that the present petition raises the same issues which were substantially and directly in issue in the former suit being **Wanuri Kahiu & Another v Kenya Film Classification Board & 4 Others Nairobi High Court Constitutional Petition No. 313 of 2018** (hereinafter called the Nairobi Petition No. 313 of 2018) in which the decision and exercise of the discretion by the Board to restrict the film “*Rafiki*” was the main issue.

8. The Respondent avers that the former suit was determined by Justice J. Makau who declared that the exercise of discretion by the Board to “*Restrict*” the 1st Petitioner’s Film “*Rafiki*” was constitutional, proper and valid, and dismissed the petition.

Petitioner’s Response

9. The Petitioner in response to the Respondent’s Notice of motion filed Grounds of Opposition dated 7th September, 2020 opposing the Application as follows:

i. That the application is frivolous and brought in bad faith

ii. That the petition is not *res judicata*

iii. That the Court should sustain the petition rather than dismissing/striking it out

Submissions

10. **Mr. Kioko**, the Petitioner, submitted that Nairobi Petition No. 313 of 2018 was not brought for public interest like the present petition. Counsel submitted that the issue before this Court was not directly and substantially in issue before the Nairobi Petition No. 313 of 2018, and that the plea of *res judicata* ought to be invoked in constitutional litigation very sparingly and in the clearest of situations. Mr. Kioko submitted that the constitution does not create an offence against loving a person of the same sex as depicted in the film; the constitution does not proscribe marriage between persons of the same sex. Counsel argued that he does not see a reason why a film on lesbianism would be restricted while other films depicting corruption, theft, assaults, vigilantism and even murder are not restricted. Counsel submitted that under the Act, the Respondent could still apply lesser restrictive means including rating the film as had been done in other open democratic countries. Mr. Kioko argued that the decision of the Respondent fails the test of Articles 24, 33 and 10 and further violates Articles 8, 27, 32 and 33 of the Constitution.

11. **Mr. Sisule**, learned counsel for the Respondent submitted that the cause of action in the Nairobi Petition No. 313 of 2018 and in the present petition is the same; the issue in the former suit is patently similar to the issue in the present suit. Both suits seek to challenge the decision of the Board to classify the film “*Rafiki*” as restricted.

12. He submitted that the Petitioner cannot claim to challenge only the Public statement issued by the Board, and not the decision of the board to classify the film as restricted. The Petitioner challenges the contents of the statement issued to the public which in turn, communicated a decision made by the Board on the classification of the film “*Rafiki*”.

13. **Mr. Makuto** for the Attorney General submitted that Section 29 of the Films and Stage plays Act provides for a statute-based appeal mechanism under which dispute relating to licensing and classification of films can be addressed. Counsel submitted that the Petitioner did not make any effort to use the appeal mechanism provided for under the **Films and Stage Plays Act** before coming to Court with this petition. Counsel submitted that just like in Nairobi Petition No. 313 of 2018, the jurisdiction of this Court was prematurely invoked.

Determination

14. I have carefully considered the Petition, the Application, the Affidavits and the submissions. Before proceeding to the substance of the petition, this Court must first deal with the preliminary issue as to whether the Petition is *res judicata*.

15. The principal of *res judicata* is found in Section 7 of the Civil Procedure Act Cap 21, Laws of Kenya which provides that:

“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.”

16. Justice Weldon Korir in *Christopher Orina Kenyariri t/a Kenyariri & Associates Advocates v Salama Beach Hotel Limited & 3 others* [2017] eKLR stated that:

“My understanding of the *res judicata* principle is that it is meant to lock out from the court system a party who has had his day in a court of competent jurisdiction from re-litigating the same issues against the same opponent. Surely it would be a waste of the courts’ valuable time if there was no tool for arresting such mischief.”

17. In *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR), the Court of Appeal held that:

“Thus, for the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

- a) The suit or issue was directly and substantially in issue in the former suit.
- b) That former suit was between the same parties or parties under whom they or any of them claim.
- c) Those parties were litigating under the same title.
- d) The issue was heard and finally determined in the former suit.
- e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

18. In the instant case, the question is whether the Respondent has satisfied the conditions for the application of the principle of *res judicata* in view of the facts of this case.

19. In the former suit *Nairobi Petition No. 313 of 2018* the Petitioner therein was aggrieved by the decision of the Respondent in classifying the film “*Rafiki*” as restricted and the Respondent’s warning against the exhibition or distribution of the film “*Rafiki*” anywhere within the Republic of Kenya. The Petitioner challenged the constitutionality of some sections of the Films and Stage Plays Act, cap 32 specifically on the basis that the Sections of the Act, the guidelines and the decision itself offend the freedom of expression including the freedom of artistic creativity under Articles 33(1), Article 34, Article 35 and Article 50 (2).

20. In the current petition, the Petitioner is also against the decision by the Respondent that banned the distribution, exhibition, broadcast and possession of the film “*Rafiki*” in Kenya. He has sought a declaration that the Respondent’s decision is in violation of Articles 10, 11, 12, 19, 20, 24, 27, 32, 33 and 34 of the constitution.

21. I have taken time to read the judgment attached by the Respondent to the supporting Affidavit and marked EM-3. The reason for the suit was the decision by the Respondent to restrict the film “*Rafiki*”. This happens to be the same reason for the current petition. The main issue raised by the Petitioner in the previous petition was that the Respondent therein limited the Petitioner’s right to freedom of expression. This is the same issue that is coming out clearly from the current petition. It is clear that the issue and cause of action in both petitions is the same.

22. On the issue of parties, the Petitioner is different; the Respondents are same apart from the Interested Party. In the case of *Henry Wanyama Khaemba v Standard Chartered Bank of Kenya Limited, Civil Case 560 of 2006*, it was stated thus:

“The doctrine of *res judicata* prohibits parties by suing in bits and pieces or giving a subsequent case a legal face lift by removing parties who are part of the earlier dispute and/or case filed and determined... ”I accept the submissions by counsel for the defendants that the doctrine of *res judicata* would apply not only to situations where a specific matter between the same persons litigating in the same capacity has previously been determined by a court of competent jurisdiction but also to situations where either matters which could have been brought in were not brought in or parties who could have been enjoined were not enjoined. Parties cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action in a subsequent suit. They are bound to bring all their case at once. They are forbidden from litigating in installments”. (Emphasis added)

23. In *Okiya Omtatah Okioti v Communications Authority of Kenya & 14 Others, Petition No.59 Of 2015*, the Court stated that:

“The rationale behind the provisions of Section 7 above entrenching the doctrine of *res judicata* is that if the controversy in issue is finally settled, determined or decided by a competent Court, it cannot be re-opened. The doctrine is therefore based on two principles; that there must be an end to litigation and that a party should not be vexed twice over the same cause.”

24. In as much as the petitioner in the present petition is different, the Respondents are the same; the cause of action is the same. The petitioner has argued that the current petition has been brought for the interest of the public. However, the problem is the cause of action which has already been exhausted in the Nairobi Petition No. 313 of 2018.

25. The Court in the Nairobi Petition No. 313 of 2018 held that:

“(a) The jurisdiction of this court has been prematurely invoked.

(b) The right to freedom of expression under article 33 of the constitution is not absolute, and is subject to limitation but only to the extent and in the circumstances provided under Article 24 of the Constitution.

(c) ...

(d)The exercise of the discretion by the Board in the decision to “restrict” the petitioner’s film “Rafiki” is constitutional, proper and valid.”

26. The Petitioner is therefore seeking to declare unconstitutional what has already been declared constitutional by a court of competent jurisdiction. I accept the submissions by the Respondent that the petition herein is res judicata, with the consequence that the petition herein is herewith struck out with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 19TH DAY OF APRIL 2021

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Mr. Kioko for Petitioner

Mr. Makuto for Interested Party

Mr. Andrew Mwangi for Respondent

Ms. Peris Court Assistant