



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

PETITION NO. E005 OF 2021

IN THE MATTER OF ARTICLES 10,21, 23, 25, 27, 40, 47, 50, 73, 159(2) AND 232 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF THE COMPANIES ACT, 2015

AND

IN THE MATTER OF THE MEMORANDUM AND ARTICLES OF ASSOCIATION, KENYA SEED COMPANY LIMITED

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)
PRACTICE AND PROCEDURE RULES, 2014.**

BETWEEN

- 1. PAUL KANDIE.....1ST PETITIONER/APPLICANT**
- 2. LIBESSEE LEVIS SAGALA.....2ND PETITIONER/APPLICANT**
- 3. FRANCIS MUSAU NDAMBUKI.....3RD PETITIONER/ APPLICANT**
- 4. SYMON CHEROGONY.....4TH PETITIONER APPLICANT**
- 5. DR. NATHANIEL K. TUM.....5TH PETITIONER/APPLICANT**
- 6. SOET KENYA LIMITED.....6TH PETITIONER/APPLICANT**

AND

- 1. THE CABINET SECRETARY, MINISTRY OF AGRICULTURE,
LIVESTOCK, FISHERIES & CO-OPERATIVES.....1STRESPONDENT**
- 2. THE HON. ATTORNEY GENERAL.....2ND RESPONDENT**
- 3. KENYA SEED COMPANY LIMITED.....3RD RESPONDENT**
- 4. FRANCIS A. OKWARA.....4TH RESPONDENT**
- 5. ALICE CHESIRE.....5TH RESPONDENT**

6. GITONGA M.N. KAMITI.....6TH RESPONDENT
7. KIPKORIR ARAP MNJO.....7TH RESPONDENT
8. SAMUEL MECCA.....8TH RESPONDENT
9. AGRICULTURAL DEVELOPMENT CORPORATION.....9TH RESPONDENT

RULING

Before Court for determination is the Notice of Motion dated 29th June, 2021 in which the 3rd to 8th Respondents seek orders that;

1. Spent.

2. The 3rd to 8th Respondents/Applicants be granted leave to respond by way of rebuttal to issues raised in the respective Supplementary Affidavits sworn and filed on 8th June, 2021 by the

Petitioners/Respondents and Further Written Submissions dated 8th June, 2021 and filed in court on 9th June, 2021 for that purpose leave be granted to file Supplementary Replying Affidavits sworn by the following persons:

a. Fred Oloibe

b. Wilkister M. Simiyu

c. Francis A. Okwara

d. Alice Chesire

e. Gitonga M. N. Kamiti

f. Kipkorir Arap Menjo

g. Samuel Mecca

3. Upon such leave being granted, the proposed Supplementary Replying Affidavits attached hereto as already sworn and commissioned be deemed as having been duly filed subsequent to leave of this Honourable Court being granted and upon payment of the requisite court fees.

4. In default of this Honourable Court granting prayers numbers 2 and 3 above as prayed, for the sake of creating a level playing ground for all the parties, the Petitioners written submissions dated and filed in Court on 24th May, 2021 be struck out and expunged from the Court record on the grounds that the same were filed 6 days late (in contravention of the Court's directions given on 11th May, 2021), without seeking extension of time from Court.

5. Pending hearing and determination of this application, there be stay of further proceedings in this matter.

6. Such further or other further orders as this Honourable Court may deem fit and just to grant in the circumstances of this case and Application being granted.

The application is premised on the grounds on the face of the Notice of motion and is supported by the Affidavit sworn by Kimamo Kuria Advocate, on 29th June, 2021.

The genesis of this application is this Court's ruling of 29th June, 2021 that expunged the 3rd to 8th Respondents' Supplementary Replying Affidavits sworn on 16th June, 2021.

The 3rd to 8th Respondents' /Applicants' Case

It is the 3rd to 8th Respondents' case that the impugned Supplementary Replying Affidavits were only expunged from this court's record purely on a technical ground being that they had been filed without leave of court. The 3rd to 8th Respondents, are now seeking leave of court to file and serve Supplementary Replying Affidavits to rebut to new issues, denials and or assertions raised in the Supplementary Affidavits sworn by Dr. Nathaniel K. Tum and Symon Cherogony on 8th June, 2021 and the further written submissions both filed on 9th June, 2021.

Further, the 3rd to 8th Respondents contend that, unless leave is granted as prayed, the 3rd to 8th Respondent's would be seriously prejudiced in that; their already filed written submissions would be rendered meaningless to the extent that they rely on or refer to the contents of the said proposed Supplementary Affidavits, crucial evidence in favour of their case will be shut out, their right to fair hearing as granted under

Article 50 of the Constitution of Kenya 2010 will have been violated and lastly such denial would only unfairly favour the Petitioners whose false averments would pass un rebutted.

The Petitioners' Case

The Petitioners opposed the application vide a Replying Affidavit sworn by Dr. Nathaniel K. Tum the 5th Petitioner herein on 5th July, 2021. The gist of the said affidavit is that the application by the 3rd to 8th Respondents' is incompetent, bad in law and ought be struck out with costs. That further, this

instant application is an abuse of court process since the prayer sought for leave to respond to the issues raised in the Supplementary Affidavits sworn on 5th June, 2021 by the Petitioners herein is res-judicata, untenable in law and must be rejected with costs. Further, that this court is functus officio with regard to the prayers being sought in this instant application and therefore cannot legally entertain the reliefs sought.

Further, it was their contention that where a court has issued orders parties are required to comply with the said orders for the expedient dispensation of justice. That the 3rd to 8th Respondents, are not exempt from complying with the rules of procedure and court orders.

Lastly the petitioners prayed that the application be dismissed with costs to allow the determination of the Application dated 23rd April, 2021.

ANALYSIS AND DETERMINATION

I have carefully considered the facts of this case, the affidavits filed by both parties, the submissions by both counsels and the relevant law and authorities. I find that the main issues for determination in this application are:

a. Whether this application is *res judicata*?

b. Whether this court should grant the 3rd to 8th Respondents leave to file their Supplementary Replying Affidavits?

Whether this application is *res judicata*?

The doctrine of *res judicata* is set out in the *Civil Procedure Act* at *Section 7* as follows:

“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 can 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.”

The Civil Procedure Act also provides explanations with respect to the application of the *res judicata* rule. Explanations 1-3 are in the following terms:

“Explanation. (1)—The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. (2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.”

In essence therefore, the doctrine implies that for a matter to be *res judicata*, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merits by a Court of competent jurisdiction. The Court in the English case of ***HENDERSON VS HENDERSON (1843-60) ALL E.R.378***, observed thus:

“...where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”

The Court of Appeal in the case of ***Kamunye and Others –vs- Pioneer General Assurance Society Ltd [1971] EA 263 at 265***, stated as follows:

"The test as to whether or not a suit is barred by Res Judicata seems to me to be - is the plaintiff in the second suit trying to bring before the court, in another way and in the form of a new cause of action a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon? If so, the plea of Res Judicata applies not only to points upon which the first court was actually required to adjudicate but every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time. The subject matter in the subsequent suit must be covered by the previous suit for Res Judicata to apply?"

Similarly, in **The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, Nairobi CA Civil Appeal No. 105 of 2017 [2017] eKLR** in which 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."**

It therefore follows that a Court will as well invoke the doctrine in instances where a party raises issues in a subsequent suit, wherein he/she ought to have raised the issues in the previous suit as between the same parties. The doctrine of *res judicata* is intended to bring litigation to an end; it is intended to bar a person who has had his day in a court of competent jurisdiction where his case was concluded from re-litigating the case afresh. In essence it saves judicial precious time and cost of litigation. In sum, it prevents the abuse of the court process.

Counsel for the Petitioners, has submitted that 3rd to 8th Respondents' application is *res judicata*, this court having already rendered itself on matters of leave being raised in this instant application. Further, the Petitioners contended that this court became *functus officio* when it pronounced itself on the issues of leave on 22nd June, 2021. To buttress their submissions the

Petitioners relied on the case of **Raila Odinga & 2 others V The Independent Electoral & Boundaries Commission & 3 others [2013] eKLR**.

The 3rd to 8th Respondents, have submitted that no previous application for leave whether formally or orally has ever been made by them and that the issue of leave has not been heard and determined finally or otherwise by this court. They relied on the case of **Suliman Said Shahbal Vs IEBC [2014] eKLR** in support of their arguments.

This court rendered a ruling on an oral application made by Counsel for the Petitioners on 22nd June, 2021. The only issue for determination was whether the 3rd to 8th Respondents sought leave of court before filing their Supplementary Affidavits sworn and filed on 16th June 2021. This court held that;

"Unfortunately, the 3rd to 8th Respondents went ahead and filed Supplementary Replying Affidavits without seeking leave of court. Accordingly, the Petitioners' application to have 3rd to 8th Respondents Supplementary Affidavits expunged from the court's record is merited."

As to whether the issue was heard and finally determined in the former application; the Applicants in the instant application seek leave of court to file Supplementary Replying Affidavits to rebut the new issues raised by the Petitioners in the Supplementary Affidavits sworn by Dr. Nathaniel K. Tum and Symon Cherogony on 8th June, 2021. It is my finding that the prayers sought by the 3rd to 8th Respondents herein are not similar to the prayers sought by the Petitioners in the former application which has since been heard and determined. In essence, the Petitioners in former application sought to have this court expunge the Supplementary Replying Affidavits of the 3rd to 8th Respondents that had been filed without leave of court. Accordingly, I find that the issues raised by the 3rd to 8th Respondent in this instant application have not been dealt with before and therefore this application is not barred by the doctrine of *res judicata*.

Whether this court should grant the 3rd to 8th Respondents leave to file their Supplementary Replying Affidavits?

It is without doubt that the 3rd to 8th Respondents herein did not seek leave of this court to file the said expunged Supplementary Replying Affidavits. The 3rd to 8th Respondents now seeks leave of this Court to file their Supplementary Replying Affidavits to rebut the new issues raised by the Petitioners in their Supplementary Affidavits and further written Submissions on record.

Article 159 (2) of the Constitution is clear that in exercising judicial authority courts and tribunals shall be guided by principles including; justice shall be administered without undue regard to procedural technicalities. This is not to say that procedural rules should be essentially disregarded.

However, courts have inherent jurisdiction to prevent a miscarriage of justice, especially where the adverse party will not be prejudiced in any way if the orders sought are granted. An express denial in this case would be restricting the 3rd to 8th Respondents right of access to justice which is a Constitutional right envisaged under Article 48 of the Constitution of Kenya.

In ***Equity Bank Limited v West Link MBO Ltd Civil Application (Appeal) No 78 of 2011***, it was held that:

“Courts of law exist to administer justice and in doing so, they must of necessity balance between the competing rights and interests of different parties but within the confines of the law, to ensure the ends of justice are met. Inherent power is the authority possessed by a court implicitly without it being derived from the constitution or statute.”

A court of law ought not to act in darkness without the full facts of the case before it. Legal disputes are best determined by evidence and such evidence need be availed wholly to the court provided that no side is prejudiced by being put in a situation where it cannot adequately contest and test the accuracy and authenticity of evidence availed.

The 3rd to 8th Respondents in this case seek leave of court to file Supplementary Replying Affidavits to rebut the new issues raised by the Petitioners in their Supplementary Affidavits. I find that justice will not be properly served by obstructing them from availing the entire materials they consider important in the determination of the matter.

The converse is that, the Petitioners are also at liberty to avail any further evidence and materials desirable in their case.

The upshot, therefore, is that the 3rd to 8th Respondents’ application dated 29th June, 2021 and filed on 30th June, 2021 is merited. Accordingly, I do grant the 3rd to 8th Respondents leave of court to file and serve their Supplementary Replying Affidavits within 7 days from today. Upon service the Petitioners have 7 days to file further affidavit if they deem it necessary.

Mention on 12/10/2021.

Interim orders extended.

S.M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 5th Day of August, 2021

In the presence of:-

Mr. Kimaino Kuria for the 3rd to 8th Applicants

Mr. Mathai for the 5th and 6th petitioners alongside the firm of Nyairo for all the petitioners/Respondents

Ms Gladys – Court Assistant