



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**CONSTITUTIONAL PETITION NO. 10 OF 2018**

PURITY KANANU.....1<sup>ST</sup> PETITIONER

GITONGA MITHIKA.....2<sup>ND</sup> PETITIONER

VERSUS

VERONICA KARIMI

MBUI NJERU SUBLOCATION.....1<sup>ST</sup> RESPONDENT

MINISTER FOR INTERIOR & COORDINATION.....2<sup>ND</sup> RESPONDENT

INSPECTOR GENERAL OF POLICE.....3<sup>RD</sup> RESPONDENT

THE HON. ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....5<sup>TH</sup> RESPONDENT

MOSES MUGO (KYENI NORTH EAST LOCATION).....6<sup>TH</sup> RESPONDENT

GEORGE NJAGI KYENI NORTH EAST SUBLOCATION...7<sup>TH</sup> RESPONDENT

**RULING**

**A. Introduction**

1. This is a ruling for the respondents' amended notice of preliminary objection 30<sup>th</sup> October 2019 filed in response to the petition filed herein.
2. It is the respondents case that this court lacks jurisdiction to entertain the instant petition based on the doctrine of *res judicata* as a similar petition in **Nairobi Milimani Constitutional Petition No. 447 of 2016** whereby the 1<sup>st</sup> petitioner herein is the 14<sup>th</sup> petitioner therein has since been determined by court and as such the instant suit is an abuse of court process.
3. It is the respondents' case that the petitioners lack *locus standi* to seek the benefits of the judgement in Nairobi Petition 447 of 2018 since they have not been licenced under the Gaming Act to carry out gaming activities.
4. It is the respondents' case that the petitioners are in violation of Section 6 of the Civil Procedure Act having brought a similar petition in Chuka Petition No. 10 of 2018 which was dismissed for being *sub judice* due to the pending matter namely Nairobi Petition 447 of 2016.
5. Despite service, there is no response from the petitioners' herein.

**B. Respondents' Submissions**

6. It is submitted that the instant petition is an attempt to call on this court to sit on a matter that has already been heard and determined by a court of competent jurisdiction, **Samuel Kahiu & 373 Others v Betting Control & Licensing Board & 6 Others; Association of Gaming**

**Operators - Kenya & Another (Interested Parties) [2019] eKLR** in which the current 1<sup>st</sup> petitioner was the 14<sup>th</sup> petitioner.

7. The respondents further submit that the filing of the instant petition was done in clear violation of the principle of *sub judice* as provided in section 6 of the Civil Procedure Act since the 1<sup>st</sup> petitioner was already a party in two other petitions, one in **Nairobi Milimani Constitutional Petition No. 447 of 2016** and the other one in **Meru High Court Petition No. 10 of 2018** a fact which the petitioners clearly depone on in their supporting affidavit.

8. The respondents rely on the cases of **Theresa Costabir v Alka R.H. Sherma & Another [2015] eKLR** which discussed the doctrine of *res judicata* as well as the case of **Uhuru Highway Development Limited v Central Bank of Kenya & 2 Others [1996] eKLR** which set out the pre requisites to be met for a matter to be deemed *res judicata*.

9. The respondents further submit that the lack of being licensed to operate betting business makes the petitioner's business illegal and thus the lack the *locus* to seek justice as they are law breakers and consequently the instant petition is an abuse of the court process and ought to be dismissed.

10. It is imperative to note that the petitioners were swerved with the notice of amended objection and the hearing notice but did not respond to it or even file submissions. The petitioner only made one appearance in court and seem to have lost interest in their petition.

### **C. The Determination**

11. The respondents raise a preliminary issue of *res judicata* which I find necessary to dispose of first. It is contended that this petition is *res judicata*, based on the fact that a similar petition in **Nairobi Milimani Constitutional Petition No. 447 of 2016** whereby the 1<sup>st</sup> petitioner herein is the 14<sup>th</sup> petitioner therein has since been determined by court and as such the instant suit is an abuse of court process.

12. The respondents further state that the filing of the instant petition was *sub judice* as it was filed during the pendency of **Nairobi Milimani Constitutional Petition No. 447 of 2016** and the other one in **Meru High Court Petition No. 10 of 2018** a fact which the petitioners clearly depone on in their supporting affidavit.

13. Under the principles of *res judicata*, the court is barred from entertaining a matter by the same parties or those acting on their behalf, over the same issue or subject matter where the issue has been conclusively determined by a court of competent jurisdiction. Section 7 of the Civil Procedure Act is clear on *res judicata* and acts as a bar to such future proceedings as a way of bringing litigation to an end. It is in that regard that the section 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.”*

14. In the case of **Henderson v Henderson [1843] 67 ER 313**, the court stated with regard to the doctrine of *res judicata*;

*“...where a given matter becomes the subject of litigation in and 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 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 cases, not only to points upon which the court was actually required by 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...”*

15. The point emphasized in the above decision is that parties should plead the whole of their case whenever they have the opportunity to do so rather than file cases in piece meal, thus save the court's time in dispute resolution instead of opening new litigation that could have been resolved in the previous litigation.

16. There are arguments that the doctrine of *res judicata* may not apply to constitutional petitions. (See **Wycliffe Gisebe Nyakina v AG & another [2014] eKLR**; **Okiya Omtata Okiiti & another v AG & others [2014] eKLR** and **Issack Kamau Kabira & 3 others v Commissioner of Lands & 7 others [2014] eKLR**).

17. However, as the Court of Appeal observed in **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR**, *res judicata* is a bar to subsequent proceedings involving same the issue as had been finally and conclusively decided by a competent court in a prior suit between the same parties or their representatives. The court went on to state that;

*“The rationale behind *res judicata* is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. *Res judicata* ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without *res judicata*, the very essence of the rule of law would be in danger of unraveling uncontrollably. In a nutshell, *res judicata* being a fundamental principle of law may be raised as a*

valid defence. It is a doctrine of general application and it matters not whether the proceedings in which it is raised are constitutional in nature. The general consensus therefore remains that res judicata being a fundamental principle of law that relates to the jurisdiction of the court, may be raised as a valid defence to a constitutional claim even on the basis of the court's inherent power to prevent abuse of process under Rule 3(8) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. On the whole, it is recognized that its scope may permeate broad aspects of civil law and practice. We accordingly do not accept the proposition that Constitution-based litigation cannot be subjected to the doctrine of res judicata. However, we must hasten to add that it should only be invoked in constitutional litigation in the clearest of the cases. It must be sparingly invoked and the reasons are obvious as rights keep on evolving, mutating, and assuming multifaceted dimensions.” (Emphasis)

18. Flowing from the above observation, *res judicata* is a valid defence that applies in both civil proceedings and in Constitutional petitions. It is intended to serve the purpose of saving the precious time of the court and in bringing litigation to an end.

19. The *res judicata* principle locks out from litigation a party who has had his day in court in similar issues involving the same parties in a court of competent jurisdiction from re-litigating the same issues. If allowed, it would be a waste of valuable judicial time if there was no tool for arresting such mischief by parties.

20. The respondents refer to the petition of **Samuel Kahiu (supra)**, which was determined on the 25<sup>th</sup> June 2019 in Nairobi High Court Constitutional Division. The petitioners therein petitioned the court's intervention as the actions and omissions of the respondents therein to crackdown on, confiscate and destroy their gaming machines violated their fundamental rights and freedoms protected under Articles 27, 28, 29, 40, 47 and 50 of the Constitution. These issues are similar to the ones the issues raised by the petitioners herein against the respondents in their petition filed on the 19<sup>th</sup> September 2018.

21. However, the present petition and the former were filed roughly a month apart. I am in agreement with the respondent that the filing of the instant petition duplicated that of **Samuel Kahiu** in regard to issues between the same parties as far as the 1<sup>st</sup> petitioner is concerned. Judgment in the Samuel Kahiu Petition was delivered on 25/06/2019.

22. The respondent did not explain whether the 2<sup>nd</sup> petitioner was a party in the Nairobi Petition. However, the two petitioners seem to have lost in their petition after it was intimated that a preliminary objection was to be filed by the respondents. The two made only one appearance in court for taking directions and never attended court again this risking dismissal of their petition for want of prosecution. This objection was therefore not opposed.

23. Accordingly, it is my considered view that applying the stated law to the facts before me, it is clear that entertaining the instant proceedings initiated by the petitioners amounts to reopening a matter that was adjudicated and determined by a court of competent and concurrent jurisdiction.

24. It is my finding that the issues in this petition are similar to those that we heard and determined by a court of competent jurisdiction between the same parties. Section 7 of the Civil Procedure Rules calls for this court to declare this petition *res judicata*. The respondents' amended preliminary objection dated 30<sup>th</sup> October 2019 is hereby upheld.

25. The undated petition filed on the 19<sup>th</sup> September 2018 is hereby dismissed with costs to the respondents.

26. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 30<sup>TH</sup> DAY OF JANUARY, 2020.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Mati for Siro for all the Respondents**