



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**CONSTITUTIONAL PETITION NO. 38 OF 2016**

**IN THE MATTER OF ARTICLES 3, 10, 19, 20, 22(1), (1), 29, 35(1), 73, 159(2d), 165, 201 AND 227 AND 73 OF THE  
CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF THE NON-GOVERNMENTAL ORGANIZATIONS COORDINATION BOARD**

**AND**

**IN THE MATTER OF CONSTITUTIONAL PETITION FOR ACCESS TO INFORMATION, RIGHTS AND FUNDAMENTAL  
FREEDOMS**

**AND**

**IN THE MATTER OF TRANSPARENCY AND ACCOUNTABILITY OF PUBLIC BODIES TO THE PUBLIC,  
ACCOUNTABILITY IN PUBLIC PROCUREMENT AND LEADERSHIP AND INTEGRITY OF PUBLIC OFFICERS**

**AND**

**IN THE MATTER OF PUBLIC PROCUREMENT AND DISPOSALS ACT (NO.3 OF 2005), PUBLIC FINANCE MANAGEMENT  
ACT (NO.18 OF 2012), LAWS OF KENYA**

**BETWEEN**

**MICHAEL JUMA OTIENO.....PETITIONER**

**VERSUS**

**THE EXECUTIVE DIRECTOR OF**

**NON-GOVERNMENTAL ORGANIZATIONS COORDINATION BOARD...1<sup>ST</sup> RESPONDENT**

**NON-GOVERNMENTAL ORGANIZATIONS COORDINATION BOARD..2<sup>ND</sup> RESPONDENT**

**RULING**

**Introduction:**

1. The Petitioner through a Petition dated 28<sup>th</sup> January 2018 seeks declaratory orders that the Petitioner has a constitutional rights to access information from the respondent on how the Non-Governmental Organizations Coordination Board procured services and instructed the firm of Otiemo Yogo Ojuro and Company Advocates to represent it in the listed matters and that the information sought should be supplied to the Petitioner forthwith by the Respondents.

The petitioner sought several other declaratory orders not Article 35(1) of the Constitution of Kenya.

2. The Respondents filed a Notice of Motion dated 18<sup>th</sup> June 2019 seeking the following orders:-

**a) THAT this honourable court be pleased to dismiss the petition herein as the issue sought to be addressed in the petition herein had already been decided**

**b) THAT the costs of this application be provided for.**

3. The Respondents in the application dated 18<sup>th</sup> June 2019 avers that the issues sought to be addressed in the petition herein had already been determined by Hon. Justice Majanja in Kisumu High court Petition No. 6 of 2012 consolidated with Petition Number 8 and 9 of 2014.

4. The Petitioner through a preliminary objection on point of law dated 6<sup>th</sup> September 2019 raised a preliminary objection to the Respondents application dated 18<sup>th</sup> June 2019 on the following grounds:-

**a) The applicant's application offends Section 7 of the Civil Procedure Act**

**b) Applicant's application offends Order 19 rule 3 of the Civil Procedure Rules as the deponent of the affidavit dated 18<sup>th</sup> June 2019.**

**c) The applicant's application is incompetent, frivolous and abuse of the process of court.**

#### **ANALYSIS AND DETERMINATION**

5. I have considered the Respondent's application dated 18<sup>th</sup> June 2019 and the Petitioner's preliminary objection on the points of law dated 6<sup>th</sup> September 2019 and from the same the issues for considerations are as follows:-

**a) Whether the application offends Section 7 of the Civil Provisions Act?**

**b) Whether the application offends Order 19 Rule 3 of the Civil Procedure Rules as regard the deponent's affidavit dated 18<sup>th</sup> June 2019?**

#### **A. Whether the application offends Section 7 of the oral provisions Act?**

6. The Petitioner in his preliminary objection contend that the Respondents application offends **Section 7 of the Civil Procedure Act**. Section 7 of the Civil Provision Act provides:-

***"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."***

7. The petitioner contention is that the application dated 18<sup>th</sup> June 2019 is Res Judicata as it raises similar issues as the applicant's affidavit dated 27<sup>th</sup> March 2017. It is further contended that issues raised in the Applicant's instant application are similar to the issues that were before this court and in which the court rendered itself on 23<sup>rd</sup> May 2019.

8. For a suit to be declared res judicata the party urging that the suit is res judicata has to demonstrate the following:-

a) The suit or the issue in which the matter is directly and substantially in issue has been directly and substantially been in issue in a former suit.

b) The suit was between the same parties or between parties under whom they or any of their claim, litigating under the same title in a Court of competent jurisdiction to try such subsequent suit or the suit in which such issues has been subsequently raised.

c) That the suit has been heard and finally decided by such Court.

9. In the instant suit, the Petitioner has alleged the suit to be res judicata but has not proved the ingredients of the Res judicata. The petitioner has not demonstrated that the suit or the issue in this matter has directly and substantially been directly and substantially in issue in the former suit; between the same parties and between parties under whom they or any of them claim, litigating vide the same title, in a court competent to try the suit in which such issue has been subsequently raised and that the suit or issue has been heard and determined with finality.

10. The Petitioner has not specifically set with specificity in his submissions the particulars of the former case, issues in which the matter was directly and substantially in issue in the former suit; the parties between whom they or any claim, litigated under same. The same title has similarly not been disclosed; nor the outcome of the suit. In view of the aforesaid the petitioner has failed to demonstrate that the Respondents application dated 18<sup>th</sup> June 2019 is res judicata.

#### **B. Whether the application offends Order 19 Rule 3 of the Civil Procedure Rules as regard the deponent's affidavit dated 18<sup>th</sup> June 2019?**

11. The petitioner contend that the application dated 18<sup>th</sup> June 2019 offends Order 19 Rule 3 of the Civil Procedure Rules, **Order 19, rule 3 of Civil Procedure Rules** provides: -

***“3. (1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove: Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.”***

12. In the petitioner’s written submission he has not bothered at all to elaborate on the above preliminary objection to demonstrated how the respondents affidavit offends Order 19 Rule 3 of Civil Procedure Rules as contended in the preliminary objection, that the applicants application offends **Order 19 rule 3 of Civil Procedure Rules** in respect of the affidavit dated 18<sup>th</sup> June 2019.

I find other than alleging the petitioner has not shown that the affidavit is not confined to such facts as the deponent is able on his own knowledge to prove. It is always the duty of he who alleges to prove under **Section 107 of the Evidence Act** that the facts alleged exists. The Court should not be left to speculate what the party wanted to say on points of law once raised. In the instant preliminary objection I find no sufficient material have been put forward to articulate on the petitioners’ preliminary objection in the absence of such materials facts. I find the said ground has no merits.

13. The upshot is that the petitioner’s preliminary objection is without merit and is dismissed with costs.

**Dated, signed and delivered at Nairobi this 12<sup>th</sup> day of March 2020.**

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**J. A. MAKAU**

**JUDGE**