



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NO. 187 OF 2020**

**DR. PETER KITONYO.....PETITIONER**

**VERSUS**

**CABINET SECRETARY, MINISTRY OF PUBLIC SERVICE,**

**YOUTH & GENDER AFFAIRS.....1<sup>ST</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**CPA EDWIN MAKORI.....3<sup>RD</sup> RESPONDENT**

**INSTITUTE OF CERTIFIED PUBLIC**

**ACCOUNTANTS OF KENYA.....4<sup>TH</sup> RESPONDENT**

**MS IRENE KIMACIA.....5<sup>TH</sup> RESPONDENT**

**KEVIN AMNGANGA.....6<sup>TH</sup> RESPONDENT**

**TRUNEX LIMITED.....7<sup>TH</sup> RESPONDENT**

**OSMAN MOHAMED KASSIM.....8<sup>TH</sup> RESPONDENT**

**ABDISALAM SHAIKH MOHAMMED.....9<sup>TH</sup> RESPONDENT**

**RULING**

1. The Petitioner through a Petition dated 22<sup>nd</sup> May 2020 seek several reliefs being as follows:-

*a) A declaration that the announcement, arrangement and release of election timetable by the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> respondents for elections slated to be held on 29<sup>th</sup> June 2020 and 30<sup>th</sup> June 2020 for a position of a member of the 5<sup>th</sup> respondent's Council representing Nairobi/Central/North Eastern region is illegal, unreasonable, unlawful and violation of the constitutional rights of the petitioner and the 5<sup>th</sup> respondent's members.*

*b) An order of injunction restraining the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> respondents from organizing, carrying on, conducting elections for or replacing the petitioner as a representative of Nairobi Central/North Eastern region in the 5<sup>th</sup> Respondent's Council until his statutory term comes to an end or otherwise directed by the court.*

*c) A declaration that regulation 4(3)(b) of Human Resource Management Professionals (Elections to the Council) Regulation 2015, published on 12/6/2015 in legal notice number 114 of 2015 is ultra vires Section 7(1)(d) of the Human Resource Management Professionals Act, 2012 which is the parent Act and as such it is unconstitutional to the extent that it requires a candidate for position of a member to the Council of Institute of Human Resource Management to have at least ten (10) years' human resource working experience, five (5) of which must have been at the senior management level.*

*d) Consequent to the unconstitutionality of regulation 4(3)(b) of Human Resource Management Professionals (Elections to the Council) Regulations 2015, published on 12/6/2015 in legal notice in notice number 114 of 2015, the same be and is hereby declared to have neither force of the law nor effect.*

*e) A declaration that regulation 4(3)(a) of Human Resource Management Professionals (Elections to the council) Regulations 2015, published on 12/6/2015 in legal notice number 114 of 2015 is ultra vires Section 7(1)(a) of the Human Resource Management Professionals Act, 2012 which is the parent. Act and as such it is unconstitutional to the extent that it requires a candidate for position of the chairperson of the Council of Institute of Human Resource Management to have at least ten (15) years' human resources working experience, ten (10) of which must have been at the senior management level.*

*f) Consequent to the unconstitutionality of regulation 4(3)(a) of Human Resource management Professionals (Elections in the council) Regulations 2015, published on 12/6/2015 in legal notice number 114 of 2015, the same be and is hereby declared to have neither force of the law nor effect.*

*g) A declaration that Rule 14 of Human Resource Management Professionals (Elections to the Council) Regulations 2015, published on 12/6/2015 in legal notice number 114 of 2015 does not give the 1<sup>st</sup> Respondent discretion to decide, decline, amend or remove any person elected under the Act from assuming the office elected to in the 5<sup>th</sup> respondent's Council.*

*h) A declaration to hat any word, phrase, sentence or provision in Rule 14 of Human Resource Management Professionals (Elections to the Council) Regulations 2015, published on 12/6/2015 in legal notice number 114 of 2015 which appears or may appear to give the 1<sup>st</sup> Respondent discretion to decide, decline, amend or remove any person elected under the Human Resource management Professionals Act, 2012 from assuming the office elected to in the 5<sup>th</sup> respondent's Council is ultra vires the Act and it is unconstitutional to that extent.*

*i) A declaration that the process undertaken by the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents in failing to gazette the petitioner's name as duly elected member of the 5<sup>th</sup> respondent's Council in elections held on 15<sup>th</sup> March 2019 and 16<sup>th</sup> March 2019 was unprocedural, unconstitutional and in breach of Human Resource Management Professionals (Elections to the Council) Regulations 2015, published on 12/6/2015 in legal notice number 114 of 2015.*

*j) A declaration that there existed no valid appeal or contest against the victory of the petitioner as a member of the 5<sup>th</sup> respondent's Council representing Nairobi/Central/North Eastern region in elections held on 15<sup>th</sup> March 2019 and 16<sup>th</sup> March 2019.*

*k) A declaration that the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents violated constitutional rights of the petitioner and the 5<sup>th</sup> respondent's members to freedom of expression in the way they handled the process after the elections for the members to the 5<sup>th</sup> respondent's Council held on 15<sup>th</sup> March 2019 and 16<sup>th</sup> March, 2019.*

*l) A declaration that the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents violated the petitioner's constitutional rights to access to information by consistently failing to provide the petitioner with information on proceedings, decisions, status or outcome of complaint, contests or appeals against his victory in elections for members to the 5<sup>th</sup> respondent's Council held on 15<sup>th</sup> March 2019 and 16<sup>th</sup> March, 2019.*

*m) That an order directing the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents to supply the petitioner with proceedings, decisions, letters, documents and all information they have in respect of appeals, complaints, contestations or protests field or forwarded to them by the 9<sup>th</sup> and 10<sup>th</sup> respondents in respect of the elections for members of the 5<sup>th</sup> respondent's Council held on 15<sup>th</sup> March 2019 and 16<sup>th</sup> March, 2019 on the basis that he was not able to represent Nairobi/Central/North Eastern region because he failed, resided and worked in Nairobi.*

*n) A declaration that the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> respondents violated the petitioner's constitutional rights to equal treatment and protection against discrimination by frustrating, contesting, opposing and failing to publish his name as an elected member of the 5<sup>th</sup> respondent's Council in elections for members to the 5<sup>th</sup> respondent's Council held on 15<sup>th</sup> March 2019 and 16<sup>th</sup> March, 2019 on the basis that he was not able to represent Nairobi/Central/North Eastern region because he hailed, resided and worked in Nairobi.*

*o) A declaration that the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents violated the petitioner's constitutional rights to fair administrative action in the way they handled the process after the elections for the members to the 5<sup>th</sup> respondent's Council held on 15<sup>th</sup> March 2019 and 16<sup>th</sup> March, 2019.*

*p) An order directing 1<sup>st</sup> Respondent to within 30 days or such time as the court may deem fit formally appoint the petitioner by way of publishing in official Kenya Gazette his name as a duly elected member of the 5<sup>th</sup> respondent's Council pursuant to elections held on 15<sup>th</sup> march 2019 and 16<sup>th</sup> March 2019.*

*q) An order directing the 5<sup>th</sup> and 6<sup>th</sup> respondents to within 30 days or such time as the court may deem fit withdraw, correct and recall their letter dated 28/3/2019 addressed to the 1<sup>st</sup> respondent to the extent that it informs and advises the 1<sup>st</sup> respondent to decline appointment of the petitioner as a member of the 5<sup>th</sup> respondent's Council and insinuates or states that the petitioner was not qualified to be elected as a member of the 5<sup>th</sup> respondent's Council.*

*r) An order directing the 5<sup>th</sup> and 6<sup>th</sup> respondents to within 30 days or such period as the court may deem fit withdraw, correct and recall their communication to the members of the 5<sup>th</sup> respondent's Council was nullified by the court.*

*s) Damages to the petitioner as the court may assess for violation of the petitioner's constitutional rights to be met by the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> respondents.*

*t) The respondents do pay the costs of this petition.*

2. The Petitioners simultaneously filed the Petition with an application dated 22/5/2020 seeking the following orders:-

*a) Spent*

*b) That conservatory orders do issue restraining the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> respondents from organising, supervising, conducting or making any further arrangements for elections for Nairobi/Central/North Eastern until hearing and determination of this application.*

*c) That conservatory orders do issue restraining the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> respondents from organising, supervising, conducting or margin any further arrangements for elections for position of a member of the 5<sup>th</sup> Respondents Council representing a region known as Nairobi/Central/North Eastern until hearing and determination of this Petition.*

*d) That the costs of this application be met by the respondents.*

3. The Application is premised on the grounds on the face of the application and more specifically on grounds (a) to (k). It is further supported by affidavit by Peter Kitonyo sworn on even day and all attached annexures thereto.

4. The Petitioner further filed a Notice of Motion dated 23<sup>rd</sup> June 2020 seeking the following reliefs:-

*a) Spent.*

*b) That conservatory orders do issue restraining the 1<sup>st</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> respondents from presenting, publishing, gazetting or in any other ways appointing the 10<sup>th</sup> respondents from presenting, publishing, gazetting or in any other way appointing the 10<sup>th</sup> respondent or any other person as duly elected member of the 5<sup>th</sup> respondent's council representing a region known as Nairobi/Central/North Eastern until hearing and determination of this application and notice of motion dated 22/5/2020.*

*c) That conservatory orders do issue restraining the 1<sup>st</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> respondents from presenting, publishing, gazetting or in any other way appointing the 10<sup>th</sup> respondent or any other person as duly elected member of the 5<sup>th</sup> respondent's Council representing a region known as Nairobi/Central/North Eastern until hearing and determination of the main petition.*

*d) That this application be heard together with notice of motion dated 22/5/2020.*

*e) That the costs of this application be met by the respondents.*

5. The application is premised on the grounds on the face of the application thus (a) to (j) and the supporting affidavit sworn by Peter Kitonyo on 23<sup>rd</sup> June 2020.

6. The 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Respondents filed a Notice of Preliminary Objection to the Notice of Motion and Petition dated 22<sup>nd</sup> May 2020 and sought to have the same struck out on the following grounds:-

*a) The Petition is a gross abuse of the court process. The Petitioner has disclosed having filed a Judicial Review Application Number 233 of 2019 (former suit) upon the failure by the 1<sup>st</sup> Respondent to appoint and gazette him as the duly elected Council Member of the Institute of Human Resource Management which suit was heard and finally determined against the Petitioner by Justice Mativo in his well-reasoned judgment dated 7<sup>th</sup> May, 2020 and appearing on page 140 of the Application.*

*b) Where a court of competent jurisdiction has pronounced a final decision on a matter which decision has not been challenged or upset by a superior court, to bring fresh proceedings whether as Judicial Review or constitutional Petition or otherwise would no doubt amount to a gross abuse of the court process and this court is clothed with inherent powers to terminate such proceedings.*

*c) The Petition is res-judicata Judicial Review Application No. 233 of 2019 which was heard and finally determined by a competent court between the same parties and on the sae misuses. The former suit was dismissed with costs and not struck out. The Petitioner has sought to have the same issues and matters that were directly and substantially in issue in the former suit to be canvassed in the present petition.*

*d) The High Court is fanctus officio since the High Croute has already pronounced itself in the matter in the Judgment delivered on 7<sup>th</sup> may 2020. As such this court cannot purport to alter or change the learned Judge's decision on whether the petitioner*

*should be appointed as the council member of the 5<sup>th</sup> Respondent.*

***e) The Petitioner has no right to file these proceedings in light of Rule 13(4) of Human Resource Management Professionals (Elections to Council) Regulation, 2015.***

7. The 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Respondents further rely on the Replying Affidavit by Kevin Manganga, the 7<sup>th</sup> Respondent, sworn on 30<sup>th</sup> June 2020.

8. The application is further opposed by the 10<sup>th</sup> Respondent through an affidavit by Abdisalam Sheikh Mohamed, sworn on 29<sup>th</sup> June 2020 and Replying Affidavit of Irene Kimacia, the 6<sup>th</sup> Respondent sworn on 15<sup>th</sup> June 2020;

9. When the Applications and Preliminary Objection came up for directions; the Court directed both the Preliminary Objection and the application be heard together. The court gave directions to the filing of submissions in support and in opposition of the parties rival positions.

10. I have very carefully considered the two applications by the Petitioners/Applicant; the Notice of Preliminary Objection by the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Respondents; the Replying Affidavits; and parties submissions, and from the above the issues arising thereto for consideration are as follows:-

***a) Whether the Application and the entire Petition is barred by the doctrine of Res Judicata?***

***b) Whether the Petitioner has met the threshold for granting of conservatory orders?***

**A. WHETHER THE APPLICATION AND THE ENTIRE PETITION IS BARRED BY THE DOCTRINE OF RES JUDICATA?**

11. The 5<sup>th</sup> – 8<sup>th</sup> Respondents in their preliminary objection urge that this Petition is Res Judicata by virtue of Judicial Review Application No.233 of 2019 which was heard and finally determined by a competent court between the same parties and on the same issues. It is contended that the former suit was dismissed with costs and not struck out. It is urged that the Petitioner has sought to have the same issues and matters, that were directly and substantially in issue in the former suit to be canvassed in this present Petition.

12. The Petitioner in response urges this Petition is not Res Judicata as only 1<sup>st</sup>, 3<sup>rd</sup>, and 5<sup>th</sup> Respondents were party in the Judicial Review. That the 5<sup>th</sup> to 8<sup>th</sup> Respondents seem to suggest that the parties in the Judicial Review were litigating under the same title as the current one, which the Petitioner state was not the case. It is averred that in this Petition, the Petitioner is litigating as both a Citizen of this Country and a member of the 5<sup>th</sup> Respondent, seeking to declare some provisions of the law and Respondents' conduct as unconstitutional and a violation of his rights and those of the members of the 5<sup>th</sup> Respondent. He urges in the Judicial Review 233 of 2019 he was seeking to enforcing results of a legal process under administrative law in the honest belief, that there was no impediment to his appointment.

13. The Petitioner further assert that although the underlying issue in the Judicial Review was election of 15<sup>th</sup> and 16<sup>th</sup> March 2019, the crux of the matter in the Petition is violation of constitutional rights following the elections and outcome of the Judicial Review.

14. The Petitioner further aver that the issue, in the two matters are not the same. It is urged the prayers in the Judicial Review were different from the ones in this Petition. It is contended thus where prayers are different the issue cannot be said to be the same. It is stated that the Judicial Review was premised on the available facts, that election had been held and applicant had been left out of the gazette without reason, whereas the Respondents came with a story of pending appeals which the court believed. That the trial Judge was categorical, that the issue of constitutionality as the regulations was not before him, and that the issue of applicants qualification was pending determination before the 1<sup>st</sup> Respondent hence he declined to interfere.

15. The Petitioner contention is that what was before the trial Judge in the Judicial Review matter was whether the Applicant deserved to be appointed as per regulation 14. The Petitioner contend that the Judge found that he was not entitled to the appointment because there were pending appeals.

16. The Petitioner urges that he has demonstrated that this Petition and Judicial Review were different.

17. **Section 7 of the Civil Procedure 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:***

***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.*

***Explanation.(4)—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.***

***Explanation. (5)—Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.***

***Explanation. (6)—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”***

18. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents support the Preliminary Objection raised by the 5<sup>th</sup> to 8<sup>th</sup> Respondents and in doing so reiterate that the present proceedings in its entirety are first, res judicata and secondly an abuse of the Court process. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents place their reliance in the decision in the case of ***Satya Bhama Gandhi v. Director of Public Prosecutions & 3 Others (2018) eKLR*** where it was stated thus:-

***“Its trite law that if any judicial tribunal in the exercise of its jurisdiction delivers a judgment or a ruling which is in its nature final and conclusive, the judgment or ruling is res judicata. If in any subsequent proceedings (unless they be of an appellate nature) in the same or nay other judicial tribunal, any fact or right which was determined by the earlier judgment is called in question, the defence of res judicata can be raised. This means in effect that the judgment can be pleaded by way of estoppel in the subsequent case.”***

19. In determining whether the present suit is Res Judicata, I am under obligation to consider whether this suit or issues raised thereto have been directly and substantially in issue in the Judicial Review case referred thereto, between the same parties or between parties under whom they or any of them claim, litigating under the same title, before a court competent to try such subsequent suit or the suit in which such issue has been subsequently been raised, heard and final decision given.

20. The Central issue in this Petition is the rights of the Petitioner to be elected and appointed to the office and the Respondents to gazette him accordingly and ensure he occupies that office.

21. Looking at paragraph 14 of the Petitioner’s supporting affidavit sworn on 22<sup>nd</sup> May 2020 it is deponed thus:-

***“That I have raised the issue of regulation 14 because as it shall be shown in paragraphs hereinbelow, the 1<sup>st</sup>, 5<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> respondents have argued elsewhere that the said regulation empowers the 1<sup>st</sup> respondent to veto elections results.”***

22. The above-mentioned issue now in its re-packaged form was clearly raised and determined by this Court in the Judicial Review proceedings No. 233 of 2019. The Petitioner herein seeks to stop the scheduled election on the basis of the fact that he still retains rights to be elected and appointed into office pursuant to the elections. It is clear that he prays that this court again proceeds and make an order compelling the Respondents to declare him a duly elected and Gazette him.

23. The arguments reiterated under paragraph 14 of the Petitioner’s supporting affidavit were made in the previous proceedings in Judicial Review No. 233 of 2019 where the Petitioner was the Ex-parte Applicant.

24. The issue of whether or not there existed any pending appeals was raised and determined by the Court in the Judicial Review No. 233 of 2019. I find under explanation No.3 under ***Section 7 of the Civil Procedure Act***; for a matter to be covered under the principle of Res Judicata, it must have been alleged by one party and either denied or admitted by the other. In this Petition it is indeed admitted by the Petitioner that the issue of Appeals formed part of the Judicial Review proceedings.

25. It is trite that once an issue is raised in the pleadings of parties and even before Judgment in Judicial Review 233 of 2019, it was encumbrance upon the Petitioner to either write to the Respondents seeking any particulars he needed to enable the Court come to conclusive determination of the issues in controversy between the parties; instead of purporting to seek information after delivery of Judgment principally to dress up his claim before Court.

26. The Petitioner’s attempt to cherry pick one issue after another which formed or ought to form the subsistence of his case cannot be entertained. The Petitioner’s attempt to do so is caught up with ***Explanatory No. 4 of Section 7 of Civil Procedure Act***, which covers not just matters actually raised in the former suit but which might or ought to have been raised as a ground of defence or attack. The law clearly deems those to have been matters directly and substantially in issue.

27. From the reading of ***Explanatory No. 4 of Section 7 of the Civil Procedure Act***, the reason for introduction of the words “might or ought to have been raised” targets situation such as the one presented in this Petition; where a party waits for the Court to delivered judgment on his case, cherry picks it and use the gaps in his case identified by the court; proceed to make cosmetic changes to his case and lodges a fresh case based on the same facts and seek the same relief so as to have a second bite at the cherry.

28. It is clear from perusal of the prayers in this Petition (c) to (h); the Petitioner seeks to have a declaration that ***Regulation No. 4(3)(b) of the Human Resource Management Professionals (Election to Council) Regulation 2015*** unconstitutional. In the background of these reliefs sought, one is called upon to consider the Judgment of this Court in Judicial Review No. 233 of 2019 and more specifically on page 166 of the Petition where Hon. Justice Mativo; states as follows:

**“39. The applicant’s counsel argued that Regulation 4(3)(b) is ultra vires the provisions of section 7(1)(d) of the Act. I must admit that this is a highly attractive argument. However, this argument, appealing as it sounds, collapses not on one but on several fronts. First the question whether the provision of the Regulations are ultra vires the provisions of the Act was not a pleaded issue in this case. Before me is judicial review application seeking specific reliefs listed earlier. There is no invitation or prayer inviting the court to determine the question whether any of the provisions in the Regulations offend any of the provisions of parent Act.”**

**“49. Whereas it is correct statement of the law that provisions of subsidiary legislation cannot override the substantive legislation, the issue in the case cited by the applicant’s counsel is different from the issues in this case. In the said case, the subsidiary legislations under challenge had donated jurisdiction to the Water Appeals Board which was not expressly provided for under the parent act. In the instant case the Act clearly provides that the elections to the council are to be conducted in a manner provided in the Regulations.” (Emphasis added).**

29. Hon. Justice Mativo in his judgment clearly remarked that the basis of unconstitutionality was not pleaded by the Petitioner. I find nothing has been shown which prevented the Petitioner not to have specifically pleaded the unconstitutionality in that case instead of having to vex the Respondents with another prayer. The Court in Judicial Review 233 of 2019 was ready, willing and available to consider the issue but it was not pleaded. The law do not in my view allow a party to choose to litigate in piece meal and later seek to “rectify” the same in subsequent pleadings. I do not agree a party can seek to relitigate same subject matter by seeking to re-frame his prayers with the aim of seeking a different result over the same subject matter. This is not in my view only Res Judicata but also an abuse of the court process. I find the Petitioner herein has been caught up with the ground of Res Judicata. Explanation No. 4 of Section 7 of the Civil Procedure Act clearly provides:-

**“Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.”**

30. The expanded nature of doctrine of issue of “estoppel” clearly brought applies as much as stated under explanation No. 4 above.

31. It is trite that in a given matter when it becomes the subject of litigation in, and of adjudication in a court of competent jurisdiction, the Court, requires the parties to that litigation to bring forward their whole case, not by piece meal, and the court will not except under special circumstances, permit the same parties to re 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 because of either negligence or, inadvertence or otherwise.

32. I find that in the instant Petition, it does not matter whether the reliefs in this petition is expanded and multiplied, the overall issue of this petition remain intact thus: **“the rights of the Petitioner to be elected and appointed to the office and the obligation of the Respondents to gazette him accordingly and ensure he occupies that office.”** This Court has carefully examined and re-examined the entire reliefs and none of them departs from this clear thread running in the entire petition herein.

33. The Respondents in support of the above proposition relies on the case of **Satya Bharna Gandhi v. Director of Public Prosecutions & 3 Others (2018) eKLR** where the Court held as follows:

**“As sovereign L. J. stated [2] res judicata covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them. All the facts raised in this case, including the alleged violation of constitutional rights or violation of statutory provisions are matters that could have been raised in the previous proceedings. In fact all the matters raised herein including violation of Article 47 rights were raised and considered in the said Petition. The case if founded on the same cause of action, same issues, same facts, and same circumstances.”**

34. It is clearly noted that the instant petition relates to the previous elections not the present election. It is clear that all that is raised in this Petition seeks to validate the Petitioner’s claim to a win in the previous election which could have been raised before the Judicial Review forum, which was first choice of forum; and having chosen the forum over any other forum as at then; the Petitioner is bound by the decision that emanated from the forum he had voluntarily chosen as it was competent court to handle, all and any issue, arising out of the previous elections and his gazette process.

35. In the instant Petition, it is clear from the pleadings as drawn and filed that this Court is faced with mere repetition of the law suit and multiplication of causes of action. There is nothing that can be said, that the parties in Judicial Review were not litigating under the same title as the current one; or that the issues in the two matters are not the same or this Court did not determine the matter with finality. In the case of **Satya Bham Gandhi v. Director of Public Prosecutions & 3 others (Supra)** the Court held:-

**“It is trite law that a litigant will not be allowed to litigate a matter all over again once a final determination has been made. Generally, a party will be 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.”**

36. The Petitioner further seek declaration that the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents (who were parties in JR 233 of 2019) in failing to gazette the Petitioner’s name as duly elected member was un-procedural and unconstitutional and further seeks through the said orders for the Respondent to be compelled to declare the Petitioner as the duly elected candidate and gazette his name accordingly.

37. The issue of failure to gazette and appoint the Petitioner was indeed the Central issue in dispute in JR 233 of 2019. One of the prayers

sought by the Petitioner was as follows:-

***“An order of Mandamus directing the Respondents within 30 days to jointly initiate, cause and publish in the official Kenya Gazette a notice to the effect that the applicant is a duly elected member of the 2<sup>nd</sup> Respondent’s Council.”***

38. The said prayer was accordingly dismissed on merits. Having been considered and dismissed on merits, the same is now not upon to challenge. The Petitioner seek to challenge the new elections sought to be conducted by the 5<sup>th</sup> Respondent, on the only basis, that he still ought to be the one to be gazetted and appointed to the very position the Court, in Judicial Review Judgment, declined to order the 1<sup>st</sup> to 5<sup>th</sup> Respondents to Gazette his name. I find that may not be possible as this matter is not only Res Judicata but an abuse of the Court process.

39. I further find that the mere fact of addition of more new parties to a suit does not alter the matter to be outside the ambit of Res-Judicata. In the *Satya Barma Gandhi v. Director of Public Prosecution & 3 Others (supra)*, it was held as regards this issues as follows:-

***“However, it is trite that the mere addition of parties in a subsequent suit or omission of a party or party’s as has happened in this case does not necessarily render the doctrine of re judicata inapplicable since a party cannot escape the said doctrine by simply undertaking a cosmetic surgery to this pleadings. If the added parties peg their claim under the same title as the parties in the earlier suit, the doctrine will still be invoked since the addition of the party would in that case be for the sole purpose of decoration and dressing and nothing else.”*** (Emphasis added).

40. It has not been demonstrated in this Petition that these added parties peg their defences outside the already adjudicated rights of the Petitioner to alter the matter to be outside the ambit of Res Judicata. The Petitioner in his Petition seek to litigate his entitlement to be gazetted as per the result of the previous election he contested incomplete disregard of the forthcoming elections. I consider this mere addition of more parties in the instant petition, are merely for the purposes of decoration of the suit since at the core of the Petitioner’s case is an order seeking that he be declared as the proper occupant of the elective seat in the council and that the Respondents be compelled to declare him as such.

41. In the case of *John Florence Maritime Services Limited & another v. Cabinet Secretary for Transport and Infrastructure & 3 Others (2015) eKLR* the Court held:

***“The cause of action in the JR as well as in the Petition was substantially the same, being the imposition of certification levies by the 4<sup>th</sup> respondent through the 3<sup>rd</sup> respondent... However, the main respondent against whom orders were sought and would have been executed is the 3<sup>rd</sup> respondent. Would it not be vexed twice over the same issue? ... They cannot be allowed to reopen the same case now on constitutional grounds. The appellants’ claims of violations of their rights and freedoms would and could have been raised within JR and determined therein.”***

42. I have very carefully considered the pleadings in *JR 233 of 2019 Republic v. Cabinet Secretary, Ministry of Public Service, Youth & Gender Affairs & 2 Others; Joseph Vincent Onyango & 2 Others and Peter Kitonyo* and Judgment by Hon. Justice John Mativo delivered on 7<sup>th</sup> May 2020; the preliminary objection dated 15<sup>th</sup> June 2020; Counsel rival submissions and authorities in support. From the same I find that the cause of action in the Judicial Review No. 233 of 2019 as well as in the instant petition herein; is substantially the same, being; ***“that the central issue is the rights of the Petitioner to be elected and appointed to the office and the obligation of the Respondents to gazette him accordingly and ensure he occupies that office.”*** The entire reliefs in this Petition do not depart from this clear thread running in the entire Petition herein. The Petitioner is trying to reopen the already decided case in the Judicial Review. I find the Petition is res Judicata by virtue of judgment delivered in Judicial Review No. 233 of 2019, which was heard and finally determined by a competent court between the same parties and on same issues. The former suit was dismissed with costs and not struck out. The Petitioner in the instant Petition is seeking to have the same issues and matters that were directly and substantially in issue in the former suit to be canvassed in the present Petition. It will be injustice to allow the Respondents to be vexed twice over the same issue. There has to be an end to litigation and more specifically where a matter is Res Judicata.

43. In view of the aforesaid, I find further, the High Court is *functus officio*. The High Court has already pronounced itself in this matter in its judgment on 7<sup>th</sup> May 2020. This Court cannot purport to alter or change the Judgment delivered on 7<sup>th</sup> May 2020 so as to allow the Petitioner to be appointed as the Council member of the 5<sup>th</sup> Respondent

44. Having come to the conclusion that this matter is Res Judicata I find the Court has no jurisdiction to proceed on to consider the other issues already set out but to down its tools and leave this mater at this point.

45. The upshot is that the Notice of Preliminary Objection by 5<sup>th</sup> – 8<sup>th</sup> Respondents succeeds. I proceed to make the following orders:-

***a) The Petition herein is Res Judicata by virtue of the Judgment delivered in Judicial Review Application No. 233 of 2019 on 7<sup>th</sup> May 2020.***

***b) The application and the Petition BE AND IS HEREBY dismissed with costs to the Respondents.***

**Dated, Signed and Delivered at Nairobi on this 3<sup>rd</sup> day of August, 2020.**

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**J. A. MAKAU**

**JUDGE**