



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 15 OF 2018

IN THE MATTER OF: THE PREAMBLE AND ARTICLES 1, 2, 3, 4 (2),
10, 11 (1) (2) (A), 19, 20, 21, 22, 23, 24, 27, 28, 29, 36, 44, 46, 47, 48, 50,
56, 62, 57, 73, 75, 94, 95, 96, 153, 159, 232, 258 and 259 OF
THE CONSTITUTION OF KENYA;

AND

IN THE MATTER OF: LEGAL NOTICE NUMBER 292 OF 2017,
UNDER KENYA GAZETTE SUPPLEMENT NO. 188;

AND

IN THE MATTER OF: PUBLIC HEALTH (CONTROL OF SHISHA SMOKING) RULES, 2017;

AND

IN THE MATTER OF: PUBLIC HEALTH ACT;

AND

IN THE MATTER OF: TOBACCO CONTROL ACT NO 4 OF 2017;

AND

IN THE MATTER OF: SECTION 5 AND 11 OF THE STATUTORY INSTRUMENTS ACT, 2013;

AND

IN THE MATTER OF: THE TOBACCO CONTROL REGULATIONS, 2014

SIMBA HASHEEM GEDOW.....PETITIONER

VERSUS

CABINET SECRETARY FOR MINISTRY OF HEALTH.....1STRESPONDENT

MINISTRY OF HEALTH.....2NDRESPONDENT

RULING

1. The petitioner herein filed an application dated 17th August 2018. However before the same could be canvassed, the respondents filed a Notice of preliminary objection dated 11th October 2018 and filed on even date. The said objection sought for the striking out of the petition in limine on the following grounds:

a) That the issues and the subject matter raised in the petition and the application herein are *res judicata* as they have been heard and determined in *Milimani Constitutional an Human Rights division Judicial review No.709 of 2017 consolidated with Judicial review case No.02 of 2018 Republic Vs_Ministry of Health, Cabinet Secretary Ministry of Health, The Honourable Attorney General Ex-Parte Peter Kennedy Amdany & Hussein Taher & 27 Others* which judgement was delivered on 26th July 2018.

b) That the petition therefore contravenes the provisions of section 7 of the Civil Procedure Act cap 21 laws of Kenya and should therefore be dismissed in limine.

c) That the petition is scandalous, frivolous vexatious and is an abuse of court process and should be dismissed in limine.

2. The preliminary objection was canvassed vide written submissions. The Respondent raised the issue of whether the application before the court is *res-judicata*. Counsel cited the provisions of Section 7 of the Civil Procedure Act and the case of **Uhuru Highway Development Limited v Central Bank of Kenya & 2 Others (1996) eKLR** that listed the 4 prerequisites to be met for a matter to be deemed as *res judicata*, to wit;

- a. A previous suit in which the same matter was in issue;
- b. The parties are the same or litigating under the same title;
- c. A competent court heard the matter in issue and determined
- d. The issue has been raised once again in a fresh suit.

3. With respect to the first requirement, counsel submitted that the parties in this petition are the same as those in Judicial Review Application 2 of 2018 consolidated with Judicial Review 709 of 2017 because in the cited cases, the applicants were persons engaged in the Shisha business of either consumption, trading, manufacture or importation thereof which is the same case here.

4. With respect to the issue of concurrent jurisdiction, counsel submitted that the cited cases were heard by a court constituted under Article 165(4) of the Constitution and cited the case of **Peter Nganga v Credit Bank Limited & 2 Others (2008) eKLR** where the court found that any judge of the High Court has jurisdiction to handle a constitutional matter.

5. On the issue of whether the cited cases were heard and concluded, counsel submitted that the court decided that the Shisha ban shall remain in force and this was the final decision that was rendered and therefore the question in Legal Notice 292 of 28th December, 2017 was substantively dealt with.

6. On the issue of whether the matter is directly and substantially in issue in both suits, counsel submitted that in the cited cases, the applicants were aggrieved by the decision in Legal Notice 292 of 2017 published by the cabinet secretary vide Kenya Gazette Supplement 188 dated 28th December, 2017 and this is the same grievance that the petitioner has in the instant petition. Therefore the same should be struck out with costs to the respondents.

7. The petitioner in his submissions submitted that the doctrine of *res judicata* cannot be applied in the instant petition because the petitioners are challenging the provisions of legal notice 292 of 2017 and its implementation is leading to the infringement of their constitutional rights.

8. On the issue of whether the instant petition/ application before court is *res-judicata*, counsel submitted that the court ought to look at the decision claimed to have settled the issues in question and the entire pleadings of the previous case and the instant one to ascertain whether the ingredients of *res judicata* have been satisfied and that they shall establish that the parties in the instant case and the cited case are different; that there is no concurrency of jurisdiction between this court and the one that handled the cited cases ; that the matter in the instant petition was not conclusively decided in the cited case and finally that the matter directly and substantially in issue in the instant petition is not the same as the matter directly and substantially in issue in the cited case.

9. On the question whether the issues are identical in both suits, counsel submitted that the issues for determination in the cited case were 1) whether the procedure leading to enactment of the Legal Notice breached the law for lack of public participation and 2) Whether the 2nd Respondent abused discretionary power under Section 36(m) of the Public Health Act and whether the CS acted in favour of the Public interest/health. According to the counsel these are not the same as those in issue in the instant petition. According to counsel, the issues for determination in the instant petition are 7-fold summarised as whether the petitioner's rights under Articles 27, 28, 29, 44, 46 of the Constitution were violated and whether the Gazette notice 292 of 2017 is void for failure to comply with the Statutory Instruments Act and Articles 10, 18 and 174 of the Constitution and finally whether the failure by the 1st Respondent to table rules concerning counties in both houses contravened the Statutory Instruments Act and Articles 6 (2) and 189(2) of the Constitution.

10. Counsel submitted that the prayers sought in the cited case are different with the ones in the instant petition. In the cited case, the applicants sought an order of Certiorari to quash the Legal Notice 292 of 2017 and an order of Prohibition to issue to restrain the cabinet secretary from making further notices. In the instant petition, the petitioner seeks declarations that the petitioners rights under Articles 27, 28, 29, 44, 46 of the Constitution have been violated and that the Gazette notice 292 of 2017 is void for failure to comply with the Statutory Instruments Act and Articles 10, 18 and 174 of the Constitution and finally the failure by the 1st Respondent to table rules concerning counties in both houses contravened the Statutory Instruments Act and Articles 6 (2) and 189(2) of the Constitution.

11. On the aspect of concurrent jurisdiction, counsel submitted that the cited case was filed and heard in the Judicial Review Division of the High Court, whereas the instant petition was filed in the Constitutional and Human Rights Division of the High Court and the courts do not issue the same orders and hence they do not have concurrent jurisdiction.

12. On the aspect of parties to the cited case and the instant petition, counsel submitted that Application 709 of 2017 was not heard to its conclusion and the parties were manufacturers, importers, users, retailers, advertisers, promoters and distributors of Shisha. They argue that the instant petition relates to the loss that the petitioner's business will suffer and therefore the parties in the cited case are not similar to the ones in the instant case.

13. On the issue of whether the cited case was conclusively decided, counsel submitted that the cited case did not determine the issues on merit particularly violation of constitutional rights and advised that the parties ought to have ventilated their issues in a different forum. Counsel concluded by seeking the court to dismiss the preliminary objection with costs to the petitioner/applicant.

14. I have considered the submissions and the authorities presented. I find the issues for determination are firstly whether this petition is Res judicata; Secondly whether the issues raised in the petition are wholly or substantially similar to issues raised in a concluded suit namely JR No. 709 of 2017 Milimani as consolidated with JR No. 2 of 2018(hereinafter referred to as the cited case) where judgement was delivered on 26th July 2018.

Whether the issues raised in this Petition are *res judicata*

15. To ascertain whether the Court addressed the issues herein, it is necessary to closely examine the issues raised in the cited case and the issues presented in this case. Paragraph six of the judgement reads in part:-

"The judicial review application is predicated on the grounds set out on the face of the Notice of Motion namely: that it is just and equitable for the court to review the impugned notice for it does not comply with the law; that the legal notice was issued without proper involvement and consultation with the industry stakeholders; that the Cabinet Secretary acted unprocedurally and ultra vires as the regulations as gazetted were contrary to section 5(1) of the Statutory Instruments Act; that under section 36 of the Public Health Act Cap 242 Laws of Kenya, he did not act within his powers; that the legal notice failed to indicate the chemical composition of Shisha, its health hazards or any communicable diseases that may be contracted if any and that the legal notice had paralysed the operations of the applicants as they are in long-term leases for the Shisha premises"

16. Paragraph 8 reads that

"It was the exparte applicant's case that the Legal Notice Number 292 of 2017 banning the sale and importation of Shisha by the Ministry of Health was unconstitutional as it contravenes the fundamental rights in the Constitution this being Articles 10,19(2),20(2) (3) (f), 27,35 (3) 40(1) 47(1) (2), 165 (3) (b) and (d) (ii)"

17. **Unlike** what counsel for the petitioner had stated in his submissions, the court framed 5 issues, namely:-

i). Whether the Cabinet Secretary for Health acted ultra vires his powers in issuing the impugned Shisha ban Gazette Legal Notice

ii). Whether Shisha business is licensed to be undertaken in Kenya"

iii). Whether any new issues were introduced in the affidavits of the exparte applicants"

iv) Whether the exparte applicants are entitled to the prayers sought

v).What orders should the court make?

18. Similarly, unlike what the Petitioner submitted, the trial court in the cited case observed that

"It is worth noting that the 1st set of applicants in JR 2 of 2018 never filed their substantive notice of motion after leave to apply was granted. They were required to do so within the stipulated timeframe in accordance with the conditions for leave of court and having failed to do so means that the court is no longer seized of their application and the leave granted accordingly terminates. The Court had nonetheless the duty to state their case which was initially consolidated with the second applicant's case"

19. The court then went ahead to address the issue of **whether the provisions of the Statutory Instruments Act, Act No. 23 of 2013 were complied with by the Cabinet Secretary and what would be the effect of such a finding on the Regulations.** The court found that *"therefore the applicants have proved their case, that on the whole, the Cabinet Secretary, when issuing the legal notice banning the use,*

manufacture, sale, offer for sale of Shisha did not comply with the procedural requirements under the Statutory Instruments Act."

20. From the foregoing, I find that what was listed as issues 6 and 7 by the petitioner herein were conclusively handled in the cited case.

21. The court in the cited case went ahead to address the issue of **whether Shisha business is licensed to be manufactured, sold or consumed in Kenya** and resolved that *"I find that there is no evidence to show that Shisha business as conducted by the applicants was unlicensed in Kenya."* The court later observed that it had not *"delved into the merits of how Shisha smoking is useful or harmful to health,"* however the court found that *"There is sufficient material before this court as presented by the respondents that Shisha consumption is most likely to cause more harm to public health of the country and that the alleged harm or potential harm outweighs the economic and social gain to the traders, employees and consumers of the Shisha substance"* and in seeing the bigger picture of the greater public good refused to lift the ban on Shisha Smoking in the cited case. In this regard, I find that by implication, issues 1 to 5 of the petitioner's petition were resolved in finality because the court recognized the harm to members of the public in allowing smoking of shisha. I find that revisiting the same issues would not only be an academic exercise for the jugular of the petitioner's complaint has already been addressed in the cited case. The court that handled the said case had concurrent jurisdiction just like this court and it would be improper for this court to deal with the issues again. Indeed the crux of the matter in the cited case was about the legal notice number 292 of 2017 which is still the petitioner's gravamen herein. Even though the court in the cited case pointed out that the applicants ought to have addressed their claims in the proper forum, nonetheless the court delivered a decision and upheld the legal notice aforesaid which had banned the issue of Shisha within the country. I note that the cited case involved several parties who are believed to comprise even the petitioner herein as it involved several business persons and companies Hence I find that he was one of those litigating under those who had filed that case. Section 7 of the Civil Procedure Act raises several pre requisites to be met for a matter to be deemed res judicata. These set out in the case of **Uhuru Highway Development Limited v. Central Bank of Kenya & 2 Others (1996)eklr** as follows:

- i) A previous suit in which the same matter was in issue.
- ii) The parties are the same or litigating under the same title.
- iii) A competent court heard the matter in issue and determined it.
- iv) The issue has been raised once again in a fresh suit.

Looking at the above issues, I find that the petitioner's grievances herein appear to have been resolved in the cited case. Litigating this case again regarding the subject legal notice will only be an academic exercise and is unnecessary.

22. I find it necessary to consider the reliefs sought in this Petition. These are summarized as declarations that the petitioners rights under Articles 27, 28, 29, 44, 46 of the Constitution have been violated and that the Gazette notice 292 of 2017 is void for failure to comply with the Statutory Instruments Act and Articles 10, 18 and 174 of the Constitution and finally the failure by the 1st Respondent to table rules concerning counties in both houses contravened the Statutory Instruments Act and Articles 6 (2) and 189(2) of the Constitution, and find that in line with my reasoning above, making declarations in respect of the violation of the petitioners rights under Articles 27, 28, 29, 44, 46 of the Constitution would be a mere academic exercise. Similarly the issue of a finding on the failure by the 1st Respondent to table rules concerning counties in both houses contravened the Statutory Instruments Act and Articles 6 (2) and 189(2) of the Constitution was addressed in the cited case. What is left of the petition that is substantial is a finding that Gazette notice 292 of 2017 is void for failure to comply with the Statutory Instruments Act and Articles 10, 18 and 174 of the Constitution and I hold the view that the same would be an academic exercise for the same was already handled in the cited case.

23. I shall now address what I framed as the first issue for determination. On what constitutes *res judicata*, I adopt the following passage in the dictum of Wigram V-C, in **Henderson vs Henderson(1843) 67 ER 313** as it summarizes *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 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."

24. When *res judicata* is raised, a court of law should always look at the decision claimed to have settled the issues in question and the entire pleadings of the previous case and the instant case- to ascertain; **(i)** what issues were really determined in the previous case; and **(ii)** whether they are the same in the subsequent case and were covered by the decision of the earlier case. One more thing; the court should ascertain whether the parties are the same or are litigating under the same title and that the previous case was determined by a court of competent jurisdiction.

25. The test of determining whether a matter is *res judicata* was also summarized in **Bernard Mugo Ndegwa -vs- James Nderitu Githae and 2 Others, (2010) eKLR** as follows: - **(a)** The matter in issue is identical in both suits; **(b)** the parties in the suit are the same; **(c)** sameness of the title/claim; **(d)** concurrence of jurisdiction; and **(e)** finality of the previous decision. This means in effect that the judgment can be pleaded by way of estoppel in the subsequent case.

26. Paragraphs 6 and 9 above captures what the parties presented as the issues raised in this case. These can be summarized as follows; summarised as whether the petitioner's rights under Articles 27, 28, 29, 44, 46 of the Constitution were violated and Whether the Gazette notice 292 of 2017 is void for failure to comply with the Statutory Instruments Act and Articles 10, 18 and 174 of the Constitution and finally whether the failure by the 1st Respondent to table rules concerning counties in both houses contravened the Statutory Instruments Act

and Articles 6 (2) and 189(2) of the Constitution.

27. The issues that were presented to the court by the applicants in the cited case were that **Whether the procedure leading to the enactment of the Legal Notice breached the law for lack of Public Participation and Whether the 2nd Respondent abused discretionary power under Section 36(m) of the Public Health Act and whether the CS acted in favour of the Public Interest/Health.**

28. The issues framed by the said court were as follows:

- i. Whether the Cabinet Secretary for Health acted ultra vires his powers in issuing the impugned Shisha ban Gazette Legal Notice*
- ii. Whether Shisha business is licensed to be undertaken in Kenya*
- iii. Whether any new issues were introduced in the affidavits of the exparte applicants*
- iv. Whether the exparte applicants are entitled to the prayers sought; and*
- v. What orders should the court make.*

29. Upon analysing the issues presented to the Court and framed by the court as summarized above, and upon careful consideration of the decision rendered in the cited case and the issues raised in this Petition and applying the above tests, the conclusion as found above is that issues 6 and 7 were finally resolved and that by implication, the issues 1 to 5 of the petitioner's petition were resolved in finality because the court recognized the harm to members of the public in allowing smoking of shisha.

30. In addressing issues 6 and 7 that is raised by the petitioner in the instant case, that is "whether the Public Health (Control of Shisha Smoking) Rules, 2017, being Legal Notice No 292 of 2017 published in the Kenya Gazette Supplement 188, Legislative Supplement No 93 of 2017 are void in their entirety having failed to comply with the applicable provisions of the Statutory Instruments Act 2013 and Articles 10, 118 and 174 of the Constitution that require participation of those likely to be affected by the impugned legal notice?" and "whether the failure by the 1st Respondent to table the rules concerning counties in both houses contravenes the applicable provisions of the Statutory Instruments Act and Article 6(2), Article 189(2) of the Constitution and thus invalidated the said rules" the court in the cited cases found that "therefore the applicants have proved their case, that on the whole, the Cabinet Secretary, when issuing the legal notice banning the use, manufacture, sale, offer for sale of Shisha did not comply with the procedural requirements under the Statutory Instruments Act." The said finding covered all that was about the gazette notice and it is needless for this court to delve into issues pertaining to the validity of the said gazette notice.

31. In addressing what are listed as the issues 1 to 6 of the instant petition, the court found that "There is sufficient material before this court as presented by the respondents that Shisha consumption is most likely to cause more harm to public health of the country and that the alleged harm or potential harm outweighs the economic and social gain to the traders, employees and consumers of the Shisha substance" and in seeing the bigger picture of the greater public good refused to lift the ban on Shisha Smoking in the cited case. Therefore I find that addressing the said issues raised by the petitioner that were resolved in the cited cases would be an academic exercise for the crux of the petitioner's complaint has already been addressed in the cited case. *A priori*, my reading of the decisions in the cited cases is that it is much wider and covers all the questions presented before the court in the instant case.

32. In view of my findings as herein above enumerated, I find and hold that this preliminary objection dated 11th October 2018 has merit. The same is upheld with the consequence that the petitioner's notice of motion and the petition dated 17th August 2018 be and are hereby dismissed in limine. As the petition has a semblance of a public interest litigation, I order that each party to bear their own costs.

Orders accordingly.

Signed, Delivered, Dated at Machakos this 20th day of June, 2019.

D.K. KEMEI

JUDGE