



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO.275 OF 2018

IN THE MATTER OF ARTICLES 6 AND 7 OF THE SIXTH SCHEDULE OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF ARTICLES 2, 19, 20, 22, 23, 25, 29, 31, 35, 40, 50(1), 51 AND 165(3) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER SECTIONS 72(1), 72(3), 72(5), 74(1), 77(1), 77(2) AND 84(1) OF THE REPEALED CONSTITUTION OF KENYA

BETWEEN

RUMBA KINUTHIA.....PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL.....RESPONDENT

RULING

1. The Petitioner herein filed petition dated 2nd August 2018 praying for a declaration that his fundamental rights were contravened and violated by the Respondent's officers who are Kenya Government Servants, agents and/or employees in its institutions in the period of 7th October 1990 or thereabout for 14 days at various police stations and at the Nyayo House Torture Chambers. The petitioner further prays for a declaration that he is entitled of payment of damages and compensation for the spine injury sustained during the torture period. He claims that he is entitled to special damages and general damages.

2. The Respondent herein filed a Notice of Preliminary objection dated 4th December 2018 inviting the court to determine the same in *limine* and dismiss the petition with costs on the following grounds:-

1) The Petition herein is fatally defective, incompetent and abuse of the Court process. The petitioner has filed multiple suits; Misc. Application No.1408/2004 Rumba Kinuthia vs. AG and Petition No. 714 of 2009 Rumba Kinuthia vs. AG.

2) The Petition herein is res judicata and in applying the doctrine of re Judicata to this matter.

i) The issue in Misc. Application No. 1408 of 2004 of OS is directly and substantially the same as the issue in dispute in this petition in that in the former suit, the petitioner complains of arrest and incarceration by Kenya Government servants, agents, employees and institutions on diverse dates.

ii) The former suit involves the same parties, as the current suit that is Rumba Kinuthia as the Petitioner and the AG as the Respondent.

iii) Misc. Application No. 1409 of 2004 OS has been litigated before a High Court of competent jurisdiction and in fact Misc. Application No. 1408 of 2004 was determined to finality. The petitioner was awarded general damages of Kshs. 1.5 million. On the other hand Petition No. 714 of 2009 is currently pending before the High Court and is in fact coming up for hearing on the 5th Wednesday, 2018.

3) The matter has been filed in a wrong forum.

3. The petitioner filed affidavit in reply to the Notice of Preliminary Objection dated 4th December 2018, sworn on 12th December 2018. The petitioner in reply has asserted that the Notice of Preliminary Objection filed by the Respondent is misguided and a total misrepresentation of the facts to the court. That even if multiple suits has been filed, the petitioner urges each case is to be determined on its own merits and that Misc. Application No.1408 of 2004, as disclosed by the petitioner in his supportive affidavit in paragraph 38 was different from the present petition. The petitioner attached the court's decision to the application. That the judgment relied upon in the preliminary objection was set aside and court ordered a fresh trial and petitioner attaches decision to that effect in **Hcc & HCR P No. 714 of 2009** dated 4th November 2016. That fresh trial went before Hon. Justice Mativo, submission filed and set down for highlighting of the submissions and taking judgment date on 5th December 2018.

4. That on 5th December 2018, it is deponed by the petitioner the Respondent rushed to court in the morning and filed a Notice of Preliminary Objection identical to the current one, resulting in scuttling the finalization of petition No. 714 of 2009, and which was adjourned to 18th April 2019.

5. It is deponed by the Petitioner, that in Misc. Application No. 1408 of 2004 and Constitution Petition No. 275 of 2018 the subject matter is totally different in substance, as the injury causing permanent disability to the petitioner was never diagnosed or attended to in surgery until 2014 – 2017, many years after Misc 1408 of 2004 was lodged and determined. It is petitioner's averment that the cause of action in present suit arose in 2014 as a result of torture inflicted by agent of the Government of Kenya between 1990 and 1993 and thereby necessitating specialized surgery. That the issue of fractured spine never arose in Misc Application 1408 of 2004 as the same had not been discovered and/or diagnosed and the petitioner urges the matter is not *Res Judicata*. That the petitioner had not been compensated over the cause of action herein despite continuing to incur hefty medical bills as a result of the aforesaid injury occasioned by the Government agents or for his inability to carry on with his professional career as practicing lawyer now and in the future.

6. The Respondent filed submissions to the Notice of Preliminary objection on 29th April 2019 whereas the petitioner filed his submissions on 26th April 2019. I have considered the Notice of Preliminary Objection and the petitioner's reply to the Notice of Preliminary objection as well as the parties rival submissions, and the issues arising thereto for consideration can be reduced to the following:-

a) Whether the petition herein is fatally defective, incompetent and an abuse of the court process and whether the petition is res judicata and whether issues raised herein are directly and substantially same as issues indispute in both Misc. Application No.1408 of 2004 Rumba Kinuthia vs The AG and in petition No.714 of 2009 Rumba Kinuthia vs Attorney General?

b) Who should bear the costs of the Notice of Preliminary Objection?

A) Whether the petition herein is fatally defective, incompetent and an abuse of the court process and whether the petition is res judicata and whether issues raised herein are directly and substantially same as issues indispute in both Misc. Application No.1408 of 2004 Rumba Kinuthia vs The AG and in petition No.714 of 2009 Rumba Kinuthia vs Attorney General?

7. The Respondent filed preliminary point of law urging the petitioner has filed multiple suits and referred to **Misc. Application No. 1408 of 2004 Rumba Kinuthia vs AG and petition No. 714 of 2009 Rumba Kinuthia vs AG** without attaching the court's decision on the same; but has attempted in its submissions to give brief layout of the facts and orders sought in each case as well as the outcome. The petitioner on the other hand has disagreed with the Respondent urging the issues raised in the different cases are not similar and that the court has not given final orders. I find that in this matter the facts as given by the Respondent are disputed by the petitioner and in a situation where facts of a case on points of law are indispute a preliminary point of law cannot be successfully raised or upheld.

8. The doctrine of *Res judicata* is embodied or anchored under **section 7 of the Civil Procedure Act**, where it is provided 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 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."

9. It is clear from the provision of **Section 7 of the Civil Procedure Act**, that the ingredients of Res judicata are:-

a) The issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit.

b) The former suit should be between the same parties or parties under whom they or any of them claim, litigating under the same title.

c) The court or tribunal before which the former suit was litigating was competent to try such subsequent suit and finally determined the suit.

10. In the case of **KCB vs Benjoh Amalgamated Ltd [2017] eKLR** it was stated thus:-

"The elements of res judicata have been held to be conjunctive rather than disjunctive. As such, the elements reproduced below must all be present before a suit or an issue is deemed res judicata on account of a former suit;

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."

11. Further in the case of **Independent Electoral and Boundaries Commission vs Maina Kiai & 5 others**, Nairobi CA Civil Appeal No.105 of 2017 [2017] eKLR, 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."

12. I now turn to consider each element of *Res judicata* herein in regard to the present case and in doing so will be in a position to determine whether there is any merit in the Notice of Preliminary Objection as raised before this court.

13. Whether the issue or suit was directly and substantially in issue in the former suit. The Respondent contend that the issues indispute in H.C. Misc No. 1408 of 2004 (O.S) are directly and substantially the same as the issues indispute in current petition. In addition the Respondent urges in both cases the facts are similar and involved the same parties; same circumstances and that in both cases the petitioner is/was seeking for declaration of violation of rights and compensation for the violation of the rights.

14. The petitioner in his affidavit, in reply to the Notice of Preliminary Objection under paragraph 13–17 both inclusive, dated 12th December 2018 contends the issues in the current petition are materially and substantially different from those raised in both **HC Misc Application No. 1408/2004 Rumba Kinuthia vs AG and HC Petition No. 714 of 2009 Rumba Kinuthia vs AG**. The Petitioner has further averred, that HC Petition No. 714 of 2009 is still pending determination before High Court at Nairobi and this cannot be relied upon to persuade this court that the present petition is *Res judicata*. The petitioner's petition is based on the cause of action that arose in 2014; which issue was not canvassed in the previous **HC Misc. Application No. 1408 of 2004 Rumba Kinuthia vs AG** as the petitioner contends the diagnosis happened after judgment had been delivered in the said **HC Misc Application No. 1408 of 2004 Rumba Kinuthia vs AG**, and the petitioner in his current petition has disclosed the existence of the said suit in a bid to distinguish the present suit from the previously filed suits in which everything involved different causes of action albeit involving the same parties. I therefore find that it is not in dispute that the former suits which the Respondent rely on in support of the Notice of Preliminary Objection herein were indeed between the same parties with the correct parties in the present petition and that the parties in the current petition, are litigating under the same title. However, the Respondent has failed to controvert the petitioner's contention that all the three suits involved different issues and different causes of action as between the parties and have no relation to the present suit.

15. I now turn to consider whether the issues were heard and finally determined in the former suit. The Respondent's position is that the issues were heard and determined and for the court to even consider or even attempt to determine the current petition would be a kin to re-opening **High Court Misc Application No. 1408 of 2004 Rumba Kinuthia vs AG**, which is frowned upon by the doctrine of *Res judicata*.

16. In the case of **John Florence Maritime Kservices Ltd & Another vs Cabinet Secretary for Transport and Infrastructure & 3 others** [2015] eKLR the court stated as follows:-

"The doctrine of *res judicata* has two main dimensions: cause of action *res judicata* and issue *res judicata*. *Res judicata* based on a cause of action, arises where the cause of action in the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. Cause of action *res judicata* extends to a point which might have been made but was not raised and decided in the earlier proceedings. In such a case, the bar is absolute unless fraud or collusion is alleged. Issues *res judicata* may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant and one of the parties seeks to re-open that issue."

17. Considering the pleadings and contents of the affidavit in reply and affidavit in support of the petition, the cause of action has been pleaded that it arose in 2014 when the decision in **HC Misc. Application No. 1408 of 2004** had already been delivered, I find the issues raised herein could not have been determined and the same issues could not be deemed to have been determined in **High Court No. 714 of 2009 Rumba Kinuthia vs AG** as the said petition is still pending determination at the High Court at Nairobi.

18. On whether 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, there is no doubt that the court previously seized of the matter at the hearing and determination of **HC Misc Application No. 1408 of 2009 Rumba Kinuthia vs AG** had the requisite competent jurisdiction to try and determine the issues raised in the present suit. However it should be noted the cause of action, the subject of the present suit had yet to occur when the said **HC Misc. Application No. 1408 of 2009 Rumba Kinuthia vs AG** was tried and determined and as such I find the issues raised in the present petition were never pleaded in the previous suit.

19. In the case of **National Rainbow Coalition (NARK Kenya). v Independent Electoral and Boundaries Commission (I.E.B.C.) & 3 others [2017] eKLR** the court defined a preliminary objection thus:

"A preliminary objection must first, raise a point of law based on ascertained facts and not on evidence. Secondly, if the objection is sustained, that should dispose of the matter. A preliminary objection is in the nature of a legal objection not based on the merits or facts of the case, but must be on pure points of law. In Dismas Wambola vs Cabinet Secretary, Treasury & Others I observed that it may be noted that preliminary objections are narrow in scope and cannot raise substantive issues raised in the pleadings that may have to be determined by the court after perusal of evidence."

20. Upon considering the Notice of Preliminary Objection as drawn and filed and in view of the above quoted authorities and bearing in mind the findings, thereto, I find the Notice of Preliminary Objection cannot be sustained as it does not raise only pure points of law but floats around the doctrine of Res judicata and in the process raises issues that can only be determined by way of evidence on facts arising from the present petition, as issues raised cannot be canvassed or determined in the interim but through full hearing of the suit.

B) Who should be the costs of the Notice of Preliminary Objection?

21. Under **section 27 of the Civil Procedure Act** it is provided:-

"(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such."

22. In view of the above it is always fair and justifiable that costs should follow the event. The succeeding party should reap the fruits of his success. I therefore find that a successful party should get costs unless court for good cause decides otherwise. I find no basis for deciding otherwise.

23. The upshot is that the Notice of Preliminary Objection dated 4th December 2018 is without merits and is

accordingly dismissed with costs to the petitioner.

Dated, signed and delivered at Nairobi this 26th day of September, 2019.

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J .A. MAKAU

JUDGE