



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO.1217 OF 2007

IN THE MATTER OF AN APPLICATION FOR ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER SECTIONS 70,75,77,82 AND 84 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE CONSOLIDATED BANK OF KENYA ACT (NO.5) OF 1991 AND LEGAL NOTICE NO.136 OF 2002

AND

IN THE MATTER OF THE SALE AND TRANSFER OF THE ASSETS AND LIABILITIES OF NATIONWIDE FINANCE COMPANY LIMITED

BETWEEN

KIRAGU HOLDINGS LTD.....1ST PETITIONER
MUMBU HOLDINGS LTD.....2ND PETITIONER
KBKANNNE INVESTMENTS LTD.....RD PETITIONER
TAGAKA HOLDINGS LTD.....4TH PETITIONER
P.J. KIRAGU MWANGL.....5TH PETITIONER
ALEX KIBAKI MURIITHI.....6TH PETITIONER
J.K. MBUU.....7TH PETITIONER
MARY WAITHERA GACHUI.....8TH PETITIONER

VERSUS

THE HON. MINISTER FOR FINANCE.....1ST RESPONDENT
THE HON. ATTORNEY GENERAL.....2ND RESPONDENT
THE CENTRAL BANK OF KENYA.....3RD RESPONDENT
THE CONSOLIDATED BANK OF KENYA LTD.....4TH RESPONDENT
THE PERMANENT SECRETARY TO THE TREASURY...5TH RESPONDENT
PRIVATIZATION COMMISSION.....6TH RESPONDENT

RULING

1. The petitioners through a Notice of Motion dated 11th February 2019 sought various conservatory orders pending hearing and determination of the suit herein.
2. The 4th Respondent opposed the application and filed grounds of objection dated 6th February 2019 urging the application should be dismissed for being Res Judicata.
3. I have perused the application, the grounds of opposition and counsel rival submissions and the issue arising for consideration is as follows:-

a) Whether the petitioners' application dated 11th February 2019 is Res Judicata?

4. The 4th Respondent's contention as set out in the grounds of opposition is, that the petitioners' application dated 11th February 2019 relates to a matter which was directly and substantially in issue in the petitioners' previous application dated 22nd October 2009, which application is said to have been heard and finally decided by this Honourable Court by Hon. Justice Musinga J, as he then was, on 8th December 2010, when the same was dismissed with costs.
5. The 4th Respondent contend, that the petitioners in seeking for issuance for the conservatory orders, have failed to disclose to this Honourable Court, that they had brought up a similar application dated 22nd October 2009, in this matter, which application was considered and a ruling issued on 8th December 2010.
6. The principle of *Res judicata* is codified by **section 7 of the Civil Procedure Act (Cap 21) Laws of Kenya**, which section provides 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."

7. In **DSV Silo vs The Owners of Sennar (1985) 2 ALL ER 104**, which has been cited with approval in **Bernard Mugo Ndegwa vs James Nderitu Githae and 2 others [2010] eKLR** and **Gitau Kamau vs Ndungu Kamau & another [2017] eKLR** the Court stated the following requirements for establishing, that a matter is res judicata:-

- a) **The matter in issue is identical in both suits;**
- b) **That the parties in the suit are substantially the same;**
- c) **There is concurrence of jurisdiction of the court;**
- d) **That the subject matter is the same; and**
- e) **That there is a final determination as far as the previous decision is concerned.**

8. The Respondent submitted that it is important for court in dealing with a preliminary objection to consider, that the preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings (**see Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd (1969) E A 696**). In **JN & 5 others vs Board of Management, St. G. School Nairobi & another (2017) eKLR**, Hon Justice Mativo stated as follows:-

"So far as I' am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

9. The 4th Respondent from its pleadings has raised a preliminary objection to the effect, that the present application by the petitioners seeking conservatory orders is Res Judicata. The point raised by the 4th Respondent is a point of law, which arises by clear application out of the pleadings and which if argued as a preliminary point may dispose the application before court. It is narrow in scope and cannot raise substantial issues raised in the pleadings that may have to be determined by consideration of the evidence.

10. The **Black Law Dictionary Tenth Edition at page 1371** defines preliminary objection as follows:-

"In a case before an international tribunal, an objection that, if upheld, would render further proceedings before the tribunal impossible or unnecessary."

In view of the above as the preliminary objection raised by the 4th Respondent is intended to have the proceedings before this court rendered impossible for want of jurisdiction, I am satisfied further no evidence is required on the part raised as once upheld the proceedings will

terminate, therefore the issue raised by the 4th Respondent is a preliminary objection and is properly before this court.

11. I have considered the petitioners' application dated 22nd October 2009 and the present application dated 11th February 2019 and the two are no doubt similar and raises similar issues as the present application. The application dated 22nd October 2009 was dismissed as per the court's Ruling issued on 8th December 2010. The decision was made by a court of competent jurisdiction to try the application.

12. Further and upon perusal of the court record and both applications, it is revealed that the matter in issue in both application is the same, the parties are the same in both applications, ruling was issued by court of competent jurisdiction to try the matter, thus this court, the subject matter in both the applications is the same and lastly the court made a final determination on this issue in its ruling of 8th December 2010. The requirements for establishing, that a matter is *Res Judicata* as set out under section 7 of the Civil Procedure Rules have all been established by the 4th Respondent.

13. In **Uhuru Highway Development Ltd vs Central Bank of Kenya and 2 others Civil Appeal No. 36 of 1996**, the court stated thus:-

"There is not one case cited to show that an application in a suit once decided by courts of competent jurisdiction can be filed once again for rehearing. This shows only one intention on the part of the legislature..... That is to say, there must be an end to applications of similar nature: that is to say further, wider principles of res judicata apply to applications within the suit."

14. It would be therefore wrong and unjustly costly to allow a party once he loses an application in a matter to re-introduce the same afresh on the same terms seeking similar or same orders as if that is allowed, there would be no end to litigation and no court orders would be final, resulting to all parties in a matter being subjected to a cynical cycle of perpetual litigation from which there may be no respite.

15. The upshot is that the 4th Respondent preliminary objection is meritorious. I proceed to make the following orders:-

a) The petitioner's application dated 11th February 2019 is Res Judicata by virtue of court's Ruling in respect of an application dated 22nd October 2009 delivered on 8th December 2010.

b) The application dated 11th February 2019 is dismissed with costs as the same is Res Judicata.

Dated, signed and delivered at Nairobi this 28th day of November, 2019.

.....

J .A. MAKAU

JUDGE