



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CONSTITUTION AND HUMAN RIGHTS DIVISION
PETITION NO. 3 OF 2016
(FORMERLY NRB. H.C.PETITION NO.513 OF 2015)

KYALO KAMINA.....PETITIONER

VERSUS

KENYA UNIVERSITIES AND COLLEGES

CENTRAL PLACEMENT SERVICE.....1ST PETITIONER

THE KENYA MEDICAL TRAINING COLLEGE.....2ND PETITIONER

THE ATTORNEY GENERAL.....3RD PETITIONER

RULING

1. Introduction

These proceedings were commenced in Nairobi by way of a Petition dated 19th November, 2015 supported by an Affidavit of Kyalo Kamina of even dates and filed on the same day. Subsequently the petitioner filed a Notice of Motion Application dated 30th November, 2015 under Certificate of Urgency seeking temporary injunctive orders pending the hearing and determination of the substantive Petition but which was subsequently abandoned.

2. The Preliminary Objections:

By a preliminary objection dated 25th January, 2016 and filed in court on 25th January, 2016, the 2nd Respondents seeks the striking out of the entire petition with costs *in Limine*. The Preliminary Objection is premised on grounds that:

- a) The subject matter of this petition is similar and or substantially similar to two other matters, namely Eldoret High Court Constitutional Petition No.12 of 2015 and Nakuru High Court Constitutional Petition No.40 of 2015 both of which are pending before courts of competent and concurrent jurisdiction.

b) The subject matter of this petition is similar and/or substantially similar and/or relates to issues raised and compromised by consent in Judicial Review Proceedings, namely Nairobi High Court Miscellaneous Civil Application No.291 of 2015, in a court of competent and concurrent jurisdiction

c) Sections 1A, 1B, 3A, 5, 6 and 7 of the Civil Procedure Act expressly bars this court from entertaining the instant petition.

d) The entire petition as laid is *sub judice*, *Resjudicata*, frivolous, vexatious, a monumental procedural and substantive legal nullity and an unmitigated abuse of the court process.

3. Directions

Directions were given on the 10th March, 2016 that the said Preliminary Objection be disposed off by way of written submissions. On record are submissions by petitioner, the 1st Respondent, the 2nd Respondent and the 3rd Respondent. No submissions are filed on behalf of the 4th Respondent and I note from the record that the 4th Respondent has not been actively participating in these proceedings.

4. The 2nd Respondent 's submissions:

The 2nd respondent submits that the 1st Respondent and the 2nd Respondent embarked on the process of admitting students to the Kenya Medical Training Institute separately during the 2014/2015 Academic year. Each party claimed the exclusive right to admit students to the 2nd Respondent.

This state of affairs elicited the following cases in the High Court:

i) Eldoret Constitutional Petition No.12 of 2015.

ii) Nakuru Constitutional Petition No.40 of 2015

iii) Nairobi Judicial Review Miscellaneous

Application No.291 of 2015 (hereinafter previous suits). Cases Nos.(i) and (ii) are still pending at the High Court sitting at Eldoret and Nakuru respectively.

The 3rd suit was compromised by consent of both parties on 15th October, 2015. That compromise was by way of a written and filed consent by the 1st Respondent, the 2nd Respondent and the 3rd Respondent herein. That consent reads:

“That by consent of both parties, this suit be and is hereby marked as withdrawn and each party bears its own costs.”

It is the 2nd Respondent's case that the petitioner herein has instituted these proceedings raising the same issues as raised in the suits above mentioned seeking similar prayers as those sought in the previous suits.

The petitioner's suit becomes the 4th suit the2nd Respondent is confronted with over the same issues.

It is urged that the petitioner's suit is *sub judice* and *Res judicata*. It is urged that the court is expressly barred from presiding over a matter which is expressly and/or impliedly prohibited by any law (Section 5 of Civil Procedure Act). The 2nd Respondent submits that **Section 6** of the **Civil Procedure Act** bars this court from presiding over a matter which has similar or substantially similar issued pending before a court of competent jurisdiction. It does not matter whether or not all the parties in the former suit are parties in the current suit.

On *res judicata*, it is the 2nd Respondent's submission that the 3rd previous suit was compromised by the

withdrawal by consent of parties. All other settlements that preceded the withdrawal are binding on the parties. It would constitute *res judicata* for any party to purport to re-open the same issues for fresh litigation.

The petition is also challenged as an abuse of the court process for raising issues which have been raised and are pending or concluded in the previous suits above.

In conclusion, the 2nd Respondent submits that the Preliminary Objection is merited on all limbs. It is not in the interest of this court nor of either party to sustain this petition. The petitioner can seek to be enjoined in other pending proceedings to ventilate his issues.

The submissions of the petitioner and the 1st Respondent overlap and I will summarize the same together.

It is urged that the Preliminary Objection was raised before Justice Mumbi Ngugi sitting at Nairobi. The 2nd Respondent insisted the matter was *res judicata* and *sub judice* and ought to be struck out but the court overruled the 2nd respondent and ordered the transfer and consolidation of this matter.

It is submitted that the Preliminary Objection is thus raised again in bad faith. The petitioner urges that his prayers are different from those in Petition No. 40 of 2015.

The withdrawal of Nairobi Judicial Review No.291 of 2015 does not meet the criteria for application of the principles of *res judicata* in accordance with **Section 7** of the **Civil Procedure Act**.

The said case was not heard and determined on merit but was compromised by the parties.

It is urged that the Preliminary Objection fails to meet the parameters laid down in the case of **Mukisa Biscuit Manufacturing Company Limited V. West End Distributors & Another**, [1969] E.A. 696.

I have had occasion to consider the Preliminary Objection and the submissions for and against. Of determination are three (3) issues:

1. Has the Preliminary Objection been decided by this court (Hon. Mumbi Ngugi, J. sitting at Nairobi).
2. Whether the issues raised in this petition have been heard and finally decided in a competent court.
3. Whether this petition is *sub judice*

On issue No.1, I have had regard to the record of court on 3th February, 2016. The petitioner sought to have this petition consolidated with petitions Nos.40 of 2015 at Nakuru and 12 of 20015 at Eldoret. That application was vehemently opposed by the 2nd respondent. It was submitted then that the court had no jurisdiction to deal with the matter as there were two (2) pending matters being Petitions No.12 of 2015 at Eldoret and Petition No.40 of 2015 at Nakuru. The petitioner was aware of these 2 petitions raising the same issues and this petition was thus *sub judice*.

The court in its decision expressed itself thus:

“From the submissions of the parties before me this morning, the core of the objection to the present petition is that there are two other petitions raising the same issues as this petition.

These are Eldoret High Court Petition No.12 of 2015 and Nakuru High Court Petition No.40 of 2015.

The fact that there are other petitions, does not, in my view render this petition a nullity. While I will not go into the merits or otherwise of the Preliminary Objection with regard to

jurisdiction, I believe the constitutional dictates under Article 159 require that this petition be transferred to Nakuru High Court with a view to its consolidation with petition No.40 of 2015. I should add that this will not be the first time that a number of petitions on the same issue arising in different courts have been consolidated and dealt with together.

Consequently, my orders are that this petition be transferred to the Nakuru High Court for consolidation with Petition No.40 of 2015.”

From the above, it is clear that Mumbi, J made a finding that the existence of the other petitions does not make this petition a nullity. By making an order for consolidation, the court opened a window for the petitioner to ventilate his issues together with other citizens with similar grouses against the Respondents. The judge thus pronounced herself on the issue of *sub judice*.

The petitioner's petition is not affected by the *subjudice* rule. **Section 6** of the **Civil Procedure Act** provides:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

Before court are different parties in Petition Nos.12 of 2015 (Eldoret), Petition No.40 of 2015 (Nakuru) and the instant petition. The only common thing in the three (3) petitions is the similarity of issues raised.

In such instances and as Mumbi, J. correctly stated, the available path to follow is that of consolidation so that the issues are ventilated together.

The principle of consolidation of suits was re-stated in the case of **Stumberg and another V. Potgieter**, (1970) EA 323 where the court held:

“Where there are common questions of law or fact in actions having sufficient importance in proportion to the rest of each action to render it desirable that the whole of the matters should be disposed of at the same time, consolidation should be ordered,”

The principle has been recently expounded by the Supreme Court in **Law Society of Kenya V. Centre for Human Rights and Democracy & 12 others**, SCK Petition No.14 of 2013 [2014] Eklr where it stated that:

“[39] The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes and to provide a framework for a fair and impartial dispensation of justice to the parties. Consolidation was never meant to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party that oppose it. In the matter at hand, this court would have to be satisfied that the appeals sought to be consolidated turn upon the same or similar issues. In addition, the court must be satisfied that no injustice would be occasioned to the respondents if consolidation is ordered as prayed.”

From the foregoing, the question whether the petition herein is *sub-judice* answers in the negative. The petitioner is a different party but with similar issues with other litigants and the open route as already stated above and ordered by Mumbi, J. is consolidation.

Which leaves issue No.3 on whether the petition herein is *res judicata*.

Res judicata is defined in Black's Law dictionary in the following terms:

“An issue that has been definitely settled by judicial decision.”

The three (3) essential elements as can be seen from **Section 7** of the **Civil Procedure Act** are:

1. An earlier decision on the issue
2. A final judgment on the merits.
3. Involvement of the same parties or parties in privity with the original parties.

In our instant suit, the 2nd respondent's case is that the matter herein is *res judicata* as J.R. No.291 of 2015 in which the 1st Respondent had sued the 2nd and 3rd Respondents was withdrawn by consent of the parties. It is urged that before the withdrawal, there were engagements between the parties and the 2nd respondent had a legitimate expectation that the issues as raised by the suit - J.R. No.291 of 2015 and concluded could so rest as concluded.

A withdrawal in my considered view does not constitute a final judgment on the merit

From the record, the consent dated 13th October, 2015 reads:

“By consent of both parties, this suit be and is hereby marked as withdrawn and each party to bear its own costs.”

From that withdrawal, there is no indication of what the terms of settlement were. Even if they were there, that would not constitute a decision on the merits of the case.

Most important, the petitioner was not a party to those proceedings neither was he a party in privity with the original parties.

Certainly, the petitioner's suit is not *res judicata*.

With the result that the Preliminary Objection herein is without merit. The same is dismissed with costs to the petitioner and the 1st Respondent.

Directions are hereby given that this petition be mentioned together with petition No.40 of 2015 before this court today for directions as to hearing.

Dated, Signed and Delivered at Nakuru this 16th day of June, 2016

A. K. NDUNG'U

JUDGE