REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 184 OF 2016

BETWEEN

JEREMIAH MAINA (Suing on his behalf

And on behalf of the General Public)**.....PETITIONER**

AND

THE HONOURABLE ATTORNEY GENERAL.....1ST RESPONDENT

THE REGISTRAR OF SOCIETIES…….....…..…..2ND RESPONDENT

AND

NATIONAL NURSES ASSOCIATION OF KENYA…….....…….....INTERESTED PARTY

RULING

1. The Respondents have raised an objection *in limine* to the Petition herein. The Respondents contend that the issues raised by the Petitioner have been substantially dealt with previously in two suits heard and determined by a court of competent and even jurisdiction. The Respondents objections were contained in the Notice of Preliminary Objection filed, firstly, by the 1st Respondent on 13 June 2016, and secondly, by the 2nd and 3rd Respondents on 22 June 2016.

2. The preliminary objections were essentially to the effect that civil suits High Court Judicial Review Case No. 144 of 2015 (" JR No. 144")and High Court Judicial Review Case No. 99 of 2016 (" JR No. 99") raised substantially the same issue as are now raised in the instant petition, and which issues have been determined with finality by the High Court. Also in the mix was JR Case No 170 of 2015.Hon. Mr. Justice W. Korir rendered himself with finality in JR No. 144 on 21 August 2015, whilst Hon. Mr. Justice G.V. Odunga rendered himself also with finality in JR No. 170 on 28th September 2016.

3. The Petitioner opposed both preliminary objections. The Petitioner insisted that the issue raised as to *res judicata* was not suitable to be dealt with as a preliminary objection. The Petitioner also argued that the issues raised and determined by the courts in both JR No. 144 and JR No. 99 were different from the issues raised in the instant petition.

4. At the hearing of the Preliminary Objection on 5th October 2016, Mr. Jaoko appeared for the Interested Party (erroneously referred to as the 3rd Respondent by the parties). Mr. Jaoko contended that Mr. Justice W. Korir's judgment of 21 August 2015 settled all the issues and in particular the Petitioners complaints the JR No. 144. Mr. Jaoko insisted that the prayers sought by the Petitioner, in particular prayers Number 3,4, & 5 of the petition had been denied by the court in JR No 144 and this court could not revisit the same reliefs.

5. Ms. Ndegwa, appearing for the 1st and 2nd Respondents also reiterated the submissions by Mr. Jaoko. Ms. Ndegwa dubbed the petition *"a disguised appeal?* and contended that the court lacked the jurisdiction to entertain the petition. Counsel added that there was yet another suit still pending before the Chief Magistrates Court at Kisumu namely Civil Suit No. 557 of 2015. For completeness, counsel submitted that the Petitioner had never challenged the decision of the court in JR No 144.

6. The Petitioner appearing in person submitted that the principle of *res judicata* do not apply to judicial review cases. The Petitioner then distinguished the contest in JR No 144 from the instant petition by stating that the core issue in JR No 144 did not involve the letter of 11th May 2015 which is the subject of controversy in the instant petition. The Petitioner referred the court to the case of **George Kamau Kimani & 4 others *vs.* County Government of Trans Nzoia & Another [2014]eKLR** for the preposition that the doctrine of *res judicata* cannot constitute a good ground to be heard as a preliminary objection by way of a notice to like effect, leading to the suit being struck out.

7. From the Notices of Preliminary Objection as read and understood together with the pleadings filed herein and also the submissions by the parties, it is clear that two issues emerge for determination as this stage. First, does there lie a competent preliminary objection before me. Secondly, and if so, are the matters or issues raised in the instant petition similar or substantially similar to the issues raised and determined in JR No 144 or JR No 99 or in both cases.

8. The questions as to what ought to constitute a point to be raised *in limine* was long settled in the case of **Mukisa Biscuits Manufacturing Company Ltd *vs.* Westend Distributors Ltd [1969] E A 696** where the court was clear that the point raised in objection ought to be such as not to invite the court's discretion or a determination of any facts by the court. It ought to also be one capable of determining the claim with some finality.

9. The Supreme Court of Kenya has lately also, in my view, expanded the sphere of preliminary objections. In the case of **Hassan Ali Joho *vs*. Suleiman Said Shabhal & 2 others SCK Petition No 10 of 2013 [2014]eKLR,** the court stated as follows:-

> ***"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?.***

10. Then in **Independent Electoral & Boundaries Commission *vs.* Jane Chepngerer & 2 others [2015]eKLR**, the Supreme Court made it clear that focus ought to be on the purpose rather than the nature of the objection. If it serves the purpose of sparing, the sparce judicial time and saving the scarce court resources then the objection ought to be heard immediately. So held the court

> ***"[21] The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection— against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits."*** [emphasis is mine]

11. Effectively the Supreme Court was affirming that the itemized grounds of preliminary objections in

the *Mukisa Biscuits* case merely constituted examples: See also **Kalpana Rawal & 2 others *vs.* Judicial Service Commission & 6 others [2016]eKLR.**

12. In the instant case, the Petitioner while placing reliance on the case of **George Kamau Kimathi & 4 others *vs.* Trans Nzoia & Another [2014]eKLR** contended that a plea of *res judicata* ought not be ground for an objection *in limine*. The court in **George Kamau Kimathi & 4 others *vs.*Trans Nzoia & Another** (supra) held that the plea of *res judicata* ought to be raised *"by way of notice of motion where pleadings are annexed to enable the court determine whether the [sic]current suit is res judicata?.* That certainly may be so, but what of where the pleadings of the previous suit as well as the judgment have been annexed by the parties and are not in controversy? I hold the view that where the pleading as well as judgment of any previous suit is not in controversy and the same is placed before the court, then, the plea of *res judicata* may be raised *in limine* and duly urged. It is indeed a *"fundamental issue?* being raised when the doctrine of *res judicata* is invoked and it would be appropriate to haves such issues settled fast. The form of raising the issue ought to not unnecessarily burden the court, especially in the less formalistic constitutional litigation arena.

13. I find that the preliminary objections as raised before the court by the Respondents and the Interested Party through notices are appropriately before the court. The judgments in question have been exhibited and they have not generated any controversy. The parties to the previous proceedings have also not challenged the judgments by way of review of appeal. The only task then left for the court is to place the said judgments next to the instant pleadings and make a determination whether there has been a multiplicity or duplicity of the cases.

14. I now come to the main question whether the principle of *res judicata* applies to the facts and circumstances of this case.

15. In the case of **Aggrey Chiteri Vs. Republic Hccc No 260 of 2015 [2016]eKLR,** this court stated that in matters involving the enforcement of the Bill of Rights, a plea of *res judicata* must be considered with abundant caution as rights and fundamental freedom may be violated multiple times even after a court decision has been handed down. The court was however *"clear that constitutional claims are not imperious to claim of res judicata and sub judice?.*

16. I would still have no quarrel with those principles. The policy behind the *res judicata* dogma is that parties to a judicial decision should not afterwards be allowed to re-litigate the same question. Consequently, the court has an inherent jurisdiction to invoke and apply the doctrine in appropriate circumstance and ensure that the process of the court is not abused: see **Henderson *vs.* Henderson [1843] Hare 99** and **Pop In (Kenya) Ltd & others *vs.* Habib Bank AG Zurich [1990] KLR 609.**

17. The subtratum of the current petition is founded upon Article 47 of the Constitution. The Petitioner's compliant is that the Respondents never afforded the petition fair administrative action when they wrote their letters of 11 May 2015 and 13 October 2015.

18. The precursor to the letters was however the special general meeting of the National Nurses Association of Kenya which resulted in the election of various officials. The Petitioner has impugned the elections claiming inter alia, that his rights under Article 38 of the Constitution have been violated. In asking this court to, by way of formal relief, remove to this court and quash the two letters dated 11 July 2015 and 13 October 2015 the Petitioner effectively has challenged the elections of the officials effected through the Special General Meeting on 8 May 2015. The Petitioner has effectively attacked the entire process that led to and affirmed the elections held at the Special General Meeting as procedurally unfair and also contrary to Articles 35, 38 and 47 of the Constitution.

19. It is not in dispute that the Petitioner as well as the Respondents and the Interested Party were parties to and participated in the proceedings in JR No 170 of 2016. It is also not in contest that the Petitioner together with others and the Respondents were parties to and participated in the proceedings in JR No 144. Finally, it is also not in contest that the Petitioner and the Respondent as well as officials of the Interested party National Nurses Association of Kenya were parties to and participated in the proceedings

in JR No 99.

20. In JR No 99, where the Petitioner was impleaded as an Interested Party, the challenge by the ex parte applicant was propriety (or better, impropriety) of a letter dated 26 February 2016 which purported to reverse the letter of 11 July 2015 and 13 October 2016. It is unclear whether this suit has been determined with finality.

21. JR No 144 has however been determined with finality. The determination was on 21st August 2015 by Hon. Mr. Justice W. Korir, a Judge of this court.

22. The Petitioner who was one of the ex parte applicants in JR No 144 had impugned the special general meeting of the National Nurses Association of Kenya. The Petitioner with his co-applicants complained about a letter dated 16 April 2015, which had directed that the special general meeting of 8 May 2015 be held. The court declined at the *ex parte* stage to grant any order to stay the intended directions for a special general meeting. The court also at an interlocutory inter partes stage declined to stay the contents of letter of 11 May 2015. The court in its final judgment of 21st August 2015 however held that the letter of 16th April 2015 should never have been issued as the Respondent *(Registrar of societies)* had no powers under section 18 of the Societies Act to issue the letter and the directions contained.

23. The applicants' including the Petitioner, in JR No 144, had sought to have the letter of 15 April 2015 quashed. The applicants had also sought orders of prohibition to bar the Respondents including the Interested Party from adopting any action taken in compliance with the letter of 16 April 2015. Effectively, if granted, the orders would have meant that the meeting of 8 May 2015, the letter of 11 July 2015 and also the letter of 13 October 2015 would have been voided. The court in JR No 144 reviewed the entire case and dealt with the issues. The court was conscious that the Special General meeting had been held. The court was also conscious of the fact that the letter of 11 May 2015 had been written affirming the new officials elected on 8 May 2016. The court found the Applicants' conduct wanting. The applicants had been accused of material non-disclosure. The court had earlier declined to stay the letter of 11 May 2015 (that was on 20 May 2015).

24. In its final judgment, the court affirmed the elected officials and for the lack of candor on the part of the applicants also declined to grant orders to vacate or quash the letter of 16 April 2015.

25. Then in JR Case No 170 of 2015, Mr. Justice G.V. Odunga rendered himself on 28 September 2016. That was long after this petition had been filed. The Petitioner herein was impleaded as an Interested Party. Once again, at the centre of the dispute was the removal of certain interim officials of the National Nurses Association of Kenya who had been elected. The Respondent had apparently on 26th March 2016 removed the interim officials. Odunga J issued an order of mandamus compelling the Respondent (Registrar of Societies) to reinstate the recognized officials of the National Nurses Association of Kenya.

26. The decision by Odunga J settled for the time being, the question as to who are the recognized officials of the National Nurses Association of Kenya.

27. It is to be noted that both JR Case No 99 of 2016 as well as the two settled cases JR No 144 and JR Case No 170 of 2015 were grounded on the Fair Administrative Action Act, 2015. The instant petition is pegged largely to Article 47of the Constitution.

28. The Fair Administrative Action Act, 2015 is a derivative statute enacted pursuant to Article 47(3) of the constitution with the purpose of promoting the right to fair administrative action under Article 47(1). Effectively, a party moving the court under Article 47 would not be expected to simultaneously move the court under order 53 of the Civil Procedure Rules and the Fair Administrative Action Act. Both encourage challenges to procedural impropriety.

29. In the instant case, the Petitioner has been involved previously in litigation where the procedural impropriety of the Respondents in making certain decisions was challenged. The net effect of the petition

was and still is a challenge on the capacity of and propriety of the officials, stated in the Respondents letter of 11 May 2015, to hold office. The Petitioner challenges the events which led to the endorsement of the particular officials. The process included the letter of 16 April 2015 and the subsequent meeting of 8 May 2015.

30. In the previous suits the same challenge was basically raised. The court in JR No 144 declined to grant the Petitioner and his co-applicants any orders. In one way or the other, JR Case No 170 of 2015 also addressed the issue as to the officials of the National Nurses Association of Kenya**.** In my view consequently, it would be inappropriate for this court to revisit the issue. The court is of equal and concurrent jurisdiction as the courts which dealt with in JR No 144 and JR Case No 170 of 2015. It is also faced with an issue substantially similar to those addressed by the courts in both cases. To revisit the issue which centers around the propriety of the officials of National Nurses Association of Kenya to be in office would not augur well for our system for administration of justice.

31. It is clear to me that in a rather round-about manner the Petitioner is involved in piecemeal litigation, yet litigation must be brought to an end. The Petitioner, by his own admission, is involved in collateral attacks on the current office bearers. There have been various cases. Some have been determined, some have not. The litigation may unnecessarily be vexing. It may also be costly. Public policy demands that vexatious and costly litigation be not encouraged. In my view, this is one instant where the court must intervene. Even though the claim was premised on the Constitution, the doctrine of *re judicata*, as I have endeavoured to demonstrate by a cross study of the previously determined cases involving the parties herein, would be appropriately applicable to this case and I apply the same.

32. The result is that I hold that the issues now raised by the Petitioner herein are *res judicata* and so is the petition. The Preliminary objections succeed.

33. I have to protect the court process from further abuse and also from the apparent lottery approach by the Petitioner.

34. I consequently strike out the petition but make no order as to costs.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **31st day** of **October** 2016.

J.L.ONGUTO

JUDGE