



**Hussein & 3 others v Muslim Bhadal Jamat Committee & 2 others; Sodha & another (Interested Parties) (Constitutional Petition E032 of 2022) [2023] KEHC 22299 (KLR) (6 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 22299 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CONSTITUTIONAL PETITION E032 OF 2022**

**OA SEWE, J**

**JULY 6, 2023**

**BETWEEN**

**YUNUS HAROON HUSSEIN ..... 1<sup>ST</sup> PETITIONER  
ANWARALI ABDULA ..... 2<sup>ND</sup> PETITIONER  
MOHAMED RAFIQ HAROON ..... 3<sup>RD</sup> PETITIONER  
MOHAMED FARUK ELIAS HASSAN ..... 4<sup>TH</sup> PETITIONER**

**AND**

**THE MUSLIM BHADAL JAMAT COMMITTEE ..... 1<sup>ST</sup> RESPONDENT  
THE MUSLIM BHADALA JAMAT BOARD OF TRUSTEES .. 2<sup>ND</sup> RESPONDENT  
THE MUSLIM BHADALA JAMAT OFFICE BEARERS ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**JAFARALI KASSAM SODHA ..... INTERESTED PARTY  
IRFAAN JAFARALI ..... INTERESTED PARTY**

**RULING**

- 1) Before the Court for determination is the Notice of Motion dated 28<sup>th</sup> July 2022. It was filed by the petitioners under various provisions of the [Constitution](#) of Kenya, 2010, notably Articles 2 and 22 thereof as well as Rule 4(1) and (2) and Rule 23(1) of the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules, 2013](#), for orders that:
  - (a) Spent
  - (b) The Court be pleased to issue a conservatory order staying the implementation and the decision of the respondents to conduct any annual general meeting and/or elections



threatening to discriminate, marginalize, racially profile, illegally and unconstitutionally contravene Articles 2(4), 19, 27, 28 and 36 of the Constitution and in breach of Clause No. 8 of the Revised Constitution and Rules of the Muslim Bhadala Jamat of Mombasa dated 17<sup>th</sup> January 1976 pending the hearing and determination of the Petition;

- (c) An interim order be issued to the Registrar of Companies to conduct an urgent inquiry, inspection and investigation into the conduct on the discrimination of the members of the association under Article 27 of the Constitution and the inquiry, inspection and investigation into the Constitution of the members of the respondent bodies with a view of suspending all activities pending the hearing and determination of the application inter partes;
  - (d) That the Court be pleased to issue a conservatory order suspending the occupation of office of all persons in their illegal capacity as members of the respondent bodies herein known as the Muslim Bhadala Jamat Committee, the Muslim Bhadala Jamat Board of Trustees, the Muslim Bhadala Jamat Office Bearers pending the hearing and determination of the Petition;
  - (d) that the Court be pleased to issue, as an affirmative action in line with Article 27(6) and Article 56 of the Constitution, a conservatory order to the effect that an ad hoc task force committee be established to assume the immediate roles of the suspended respondents, which shall be constituted of one nominated member from each clan of all the Muslim Bhadala Jamat clan members within Mombasa including but not limited to the Grana clan for equality, inclusivity and for the interim representation and implementation of the rights of the members.
  - (e) That the transitional ad hoc task force committee be ordered to report to this Court on a regular basis on their dealings with the affairs of the Muslim Bhadala Jamat community.
  - (f) That costs of the application be provided for.
- (2) The application was premised on the grounds that, on or about the 26<sup>th</sup> June 2022, a conflict erupted amongst the different clan members of the Muslim Bhadala community on account of the fact that the respondents, as committee and board members, had initiated arrangements for the annual general meeting to the exclusion of the Grana clan, to which the petitioners belong. The petitioners further averred that the 1<sup>st</sup> respondent was registered on or around 19<sup>th</sup> October 1954 as a non-political society to provide for and safeguard its members' interests.
- (3) The petitioners explained that the genesis of the alleged infringements can be traced to the letter dated 15<sup>th</sup> November 2018 which called for special general elections to be held on 25<sup>th</sup> November 2018; and that because the respondents purported to exclude members of the Grana clan on the allegation that they were not bona fide Bhadals, chaos ensued leading to cancellation of the elections upon police intervention. Hence, the contention of the petitioners was that they have been discriminated against as a clan; and that their rights to participate in the affairs of the Muslim Bhadala Jamat Community and elections are threatened with violation.
- (4) The application was supported by the affidavit sworn by the 1<sup>st</sup> petitioner on 29<sup>th</sup> July 2022 and the documents annexed thereto. He confirmed that the Petition had been filed purely on the basis of the interests of the members of the Muslim Bhadala Jamat, especially the Grana clan who have been discriminated against by the respondents. He attached a copy of the letter dated 15<sup>th</sup> November 2018 as Annexure "YHH-3" in which it was stated that "...only Bona Fide Bhadala's will be allowed to attend and take part in this important Jamat exercise...". The 1<sup>st</sup> petitioner further stated that, in spite of written complaints to the respondents against their acts of discrimination, they persisted and instigated violence against the petitioners; which incident was reported to Makupa Police Station on 4<sup>th</sup> July 2022. A copy of the OB entry was exhibited as Annexure YHH-6 to the 1<sup>st</sup> petitioner's affidavit.



- (5) At paragraphs 25 to 49 of the Supporting Affidavit, the petitioners endeavoured to show that members of the Grana clan have always been issued with community birth certificates with “Adam Grana” as their surname; and that they have been making monetary contributions, including payment of membership subscription fees, towards the activities of the Muslim Bhadala Jamat Association. Thus, the petitioners were apprehensive of the evinced intention on the part of the respondents to exclude them from the Association’s election exercise.
- (6) The respondents opposed the application. They relied on the Replying Affidavit sworn on 25<sup>th</sup> October 2022 by Shiraz Mohamed Thaim. The affiant averred, inter alia, that the Petition and the instant application are res judicata; the same issues having been determined between the parties or between parties under whom they were litigating, in Mombasa High Court Civil Case No. 106 of 2018 in which a final decision was rendered on 23<sup>rd</sup> August 2022. They annexed copies of the Judgment delivered in the previous suit together with other pertinent documents to buttress their averments.
- (7) There is no gainsaying that res judicata is a plea that goes to the jurisdiction of the Court, and which, if successfully raised, has the potential of disposing of the entire suit; for Section 7 of the [Civil Procedure Act](#), Chapter 21 of the Laws of Kenya, does provide that:
- “No Court shall try any suit or issue in which the matter 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...and has been heard and finally decided by such Court.”
- (8) Moreover, it is now settled that res judicata as a principle applies to applications as well, and can only be invoked, in the case of an application, where a similar application has been filed after a determination, on the merits or by consent, in respect of the same subject matter in a previous application. Hence, in [Uburu Highway Development Ltd v Central Bank of Kenya & 2 Others](#)) Civil Appeal No. 36 of 1996), the Court of Appeal made this point 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 in India and our [Civil Procedure Act](#). That is to say, there must be an end to applications of a similar nature; that is to say further, wider principles of res judicata apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation...”
- (9) I have accordingly perused the Notice of Motion dated 22<sup>nd</sup> November 2018, the Supporting Affidavit and the Replying Affidavit filed in the former suit and noted that the very issues raised therein are the same issues that have been raised in the instant application. For instance, prayer 2 of the Notice of Motion dated 28<sup>th</sup> July 2022 is a replication of Prayer 2 of the Notice of Motion dated 22<sup>nd</sup> November 2018, while prayer 4 of the instant Notice of Motion corresponds neatly with prayer 3 in the earlier Notice of Motion filed in Mombasa HCCC No. 106 of 2018. It is also plain that the affidavits filed in respect of the two applications contain more or less similar averments.
10. It is indubitable that a court of concurrent jurisdiction heard and determined the earlier application on merit; thereby granting orders pending the hearing and determination of the main suit. The main suit was likewise heard and determined on merit vide the judgment dated 23<sup>rd</sup> August 2022. The suit was dismissed and the officials and members of the Muslim Bhadala Jamat Mombasa ordered to call



for an Annual General Meeting in accordance with the Constitution of the Society. It is plain, then, that the instant application is indeed res judicata.

- (11) In Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR the Court of Appeal explained that:

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”

- (12) It matters not that the dispute is now disguised as a constitutional petition by different players suing on behalf of the disgruntled members of the Muslim Bhadala Jamat Association of Mombasa; for res judicata applies, not only on the basis of facts expressly pleaded, but also those that ought to have been pleaded in the first instance. Accordingly, I agree entirely with the position taken by Hon. Majanja, J. in E.T. v Attorney General [2012] eKLR that:

“The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of *Omondi Vs National Bank of Kenya Limited and Others* (2001) EA 177 the court held that, ‘parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.’ In that case the court quoted Kuloba J., in the case of *Njangu Vs Wambugu and another* Nairobi HCCC No.2340 of 1991 (unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata...’

- (13) Moreover, in *Lali Swaleh Lali & Others v Stephen Mathenge Wachira & Others* Civil Application No. 257 1994 Nairobi (unreported), the Court of Appeal held that:

“On the issue of Res judicata, it would, in our view, require, the skills of a spin doctor to say that the judge was wrong.” The learned judge in the trial court had held that an application for interlocutory injunction having been decided on the principles laid down in the *Giella v Cassman Brown*, a similar application cannot be brought once again even in a subsequent suit when a former suit, in which the application was dismissed, stood struck out on account of the proceedings therein being incontestably bad.”

- (14) In the result, the Notice of Motion dated 28<sup>th</sup> July 2022 is hereby struck out with costs for being res judicata.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 6<sup>TH</sup> DAY OF JULY 2023**



**OLGA SEWE  
JUDGE**

