



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
(CORAM: A.K. NDUNG’U)
ELECTION PETITION NO. 12 OF 2017
CONSOLIDATED WITH ELECTION PETITION NO. 10 OF 2017

AND

IN THE MATTER OF PARLIAMENTARY AND COUNTY ELECTION PETITION RULES 2017

AND

IN THE MATTER OF THE ELECTION FOR MEMBER OF THE NATIONAL ASSEMBLY FOR NYARIBARI CHACHE CONSTITUENCY

AND

IN THE MATTER OF TAXATION OF PARTY AND PARTY COSTS UNDER SCHEDULE VI OF THE ADVOCATES REMUNERATION ORDER

BETWEEN

DR. CHRIS MUNGA N. BICHANGE1ST PETITIONER/ APPLICANT

ZAHEER JHANDA..... 2ND PETITIONER

JAMES KENANI3RD PETITIONER

VERSUS

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION1ST RESPONDENT

JULIUS MEJA OKEYO 2ND RESPONDENT

RICHARD NYAGAKA TONGI 3RD RESPONDENT

RULING

1. The subject of this ruling is a preliminary objection raised by the 3rd respondent against the 1st petitioner’s application dated 18th November 2020. The 1st petitioner sought the following orders in the impugned application;

- a. Spent;
- b. That the motion be heard on priority basis as the applicant has been contacted by police who informed him to avail himself as regard to the warrant for recovery of Kshs. 2,000,000/= (Two Million) as costs of the Petition herein;
- c. That the honorable court be pleased to order stay of execution herein pending hearing and determination of this application;

- d. That the warrants of recovery issued herein be recalled and cancelled as the execution and taxation is illegal
- e. That the entire execution be set aside;
- f. That the Honorable court do make an order as to costs of this motion

2. The 1st petitioner swore an affidavit in support of his application claiming that he had been contacted by the police regarding warrants for recovery of costs in the petition herein yet he had never been served with a Bill of Costs, Notice of Taxation of costs or a proper Decree. He averred that the court had ordered the three petitioners to share the costs equally therefore, the attempt by the 3rd respondent to recover Kshs. 2,000,000/= from him was unlawful.

3. The 1st petitioner further averred that he had deposited a sum of Kshs. 1,000,000/= as security, which had been released to Okong'o Omogeni Advocates so the sum indicated in the warrants of recovery issued against him was overstated as his share should not exceed Kshs. 500,000/=. He deposed that the entire taxation process and execution proceedings including the warrants of arrest issued against him were irregular and ought to be set aside.

4. In response to that application, the 3rd respondent raised a preliminary objection contending that the firm of M/s Masinde & Co. Advocates had drawn the application dated 18th November 2020 in contravention of the mandatory procedure under Order 9 of the Civil Procedure Rules 2010. He also claimed that the application offended the doctrine of res judicata and was an abuse of court process.

5. The preliminary objection was argued by way of written submissions which I have duly considered. Two main issues emerged from the parties' arguments. The first was whether the application dated 18th November 2020 was brought in disregard of **Order 9 Rule 7** and **Order 9 Rule 9** of the **Civil Procedure Rules**.

6. **Order 9 Rule 7** provides;

7. Notice of appointment of advocate [Order 9, rule 7.]

Where a party, after having sued or defended in person, appoints an advocate to act in the cause or matter on his behalf, he shall give notice of the appointment, and the provisions of this Order relating to a notice of change of advocate shall apply to a notice of appointment of an advocate with the necessary modifications.

7. **Order 9 Rule 9** of the **Civil Procedure Rules** on the other hand stipulates;

9. Change to be effected by order of court or consent of parties [Order 9, rule 9.]

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

8. Learned counsel for the 3rd respondent contended that the firm of M/s Masinde & Co. Advocates have repeatedly violated the provisions of Order 9 of the Civil Procedure Rules, by filing the instant application despite the court orders in a ruling dated 15th May 2020. He observed that the firm had filed a Notice of Appointment of Advocates as opposed to a Notice of Change of Advocate as set out under Order 9 Rule 7. The firm had also failed to file an application to come on record as provided under Order 9 Rule 9 since judgment had been already been entered in the matter.

9. To support his submissions that the application was incompetent for failure by the firm of M/s Masinde & Co. Advocates to comply with Order 9 Rule 9, counsel relied on the cases of *Monica Moraa vs Kenindia Assurance Co. Ltd [2010]eKLR*, *Francis W. Ngariuku v Mereka & Co. Advocates [2019]eKLR*, *S.K. Tawadi v Veronica Muehlemann [2019]eKLR*, *Lalji Bhimji Sanghani Builders & Contractors v City Council of Nairobi [2012]eKLR*, *Stephen Mwangi Kimote v Murata Sacco Society*, *Jackson K. Kivinda v United Insurance Co. Ltd [2005]Eklr* and *Loise Wambui Karigu & Another v Joel Gatungo Kiragu & Another [2016]eKLR* where the courts held that the mandatory procedure set out under Order 9 Rule 9 had to be complied with for advocates to come on record after delivery of judgment.

10. This court was urged to reject any plea that striking off the application would be a violation of the Constitution. Reference was made to the case of *Stephen Mwangi Kimote (supra)* where the court held that Order 9 did not impede the right of a party to be represented by an advocate of his choice but imposed orderliness in civil proceedings. In that case, the court dismissed submissions that the provisions of Order 9 Rule 9 were a mere technicality.

11. Counsel also referred to the decision of Kiage JA in the case of *Nicholas Kiptoo Arap Korir Salat v IEBC [2013]eKLR* and the case of *Stanley Ng'ethe Kinyanjui v Tony Ketter & 5 Others [2015]eKLR* where it was held that the Constitution was not meant to aid in circumventing rules of procedure.

12. For his part, learned counsel for the 1st petitioner countered that since this was an election petition, they were not required to seek leave

to come on record as argued by the respondent. He referred to the case of **Anthony Njomo Maina v Jane Njeri Kamande & 3 Others** where the court held that Order 9 Rule 9 of the Civil Procedure Rules did not apply to election disputes hence it was not necessary to seek leave to come on record.

13. The second issue for determination was whether the 1st petitioner's application dated 18th November 2020 was res judicata. The 3rd respondent's counsel argued that the application was res judicata as the parties were the same as those in the application dated 21st December 2019. The issues that were in issue in the current application were also directly and substantially in issue in the earlier application. He added that the ruling dated 15th May 2020 had been made by a court of competent jurisdiction which decided the matter fully. The applicant had not challenged the jurisdiction of the court that issued the ruling and should not be allowed to re-litigate issues which had been determined.

14. In rebuttal, counsel for the 1st petitioner contended that the plea of res judicata could not be raised as a point of preliminary objection. He relied on the cases of **Henry Wanyama Khaemba vs Standard Chartered Bank Ltd & Another [2014]eKLR**, **Muhu Holdings Ltd vs James Muhu Kangari [2017] eKLR**, **Enterprises Ltd v Kenya Railways Corporation, Kisumu HCCC No. 22 of 1999**, **Avtar Singh Bhamra & Another vs Oriental Commercial Bank Kisumu HCCC No. 53 of 2004**, **Stanly Thuo Murunyu v Alice Waruguru Ngugi & 3 Others [2018] eKLR** in support of this position.

15. He also relied on the case of **George Kamau Kimani & 4 others vs County Government of Trans Nzoia & Another [2014]eKLR** where the court held;

"I have considered the points raised by the 1st Defendant. All those points can be argued in the normal manner. They do not qualify to be raised as Preliminary Objection. The best way to raise a ground of res judicata is by way of Notice of Motion where pleadings are annexed to enable the court to determine whether the current suit is res judicata. Professor Sifuna did not raise the issue of res judicata by way of Notice of Motion."

16. Reference was also made to the case of **Margaret Nyiha Gatambia & 2 Others v Peninah Ngechi Njaaga & 3 others [2019]eKLR** where the court similarly held that the best way to raise the issue of res judicata was by way of a Notice of Motion where pleadings could be annexed to allow the court to consider whether the issues in the previous suit were similar to the issues in the suit in issue.

17. Counsel submitted that a determination of whether a matter was res judicata, would involve probing of evidence which meant that the issue could not be determined through a preliminary objection.

18. A preliminary objection is a pure point of law which if argued can dispose of a suit at the first instance. In the seminal case of **Mukisa Biscuit Co. v West End Distributors Ltd 1969 EA 696**, Sir Charles Newbold, P held thus;

"A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion..."

19. The 1st petitioner contends that a plea of res judicata does not constitute a preliminary objection as it would require the court to receive evidence to determine whether an issue was res judicata.

20. **Section 7** of the **Civil Procedure Rules** defines the principle of res judicata thus;

"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".

21. Courts have previously held that the doctrine of res judicata is applicable to applications within a suit. In the case of **Mburu Kinyua vs Gachini Tuti [1978] Klr 69 At 81**, for instance, Law J. A. held;

"...an Applicant whose application to set aside an ex parte judgement has been rejected has a right of appeal. Alternatively, he may apply for a review of the decision...He can only successfully file a second application if it is based on facts not known to him at the time he made the first application. If the facts were known to him, his second application will be dismissed as res judicata, as happened here..."

22. Similarly, the Court of Appeal in **Uhuru Highway Development Limited v Central Bank of Kenya & 2 others [1996] eKLR** held as follows on a preliminary point of objection raised on the ground that an application was res judicata;

"... 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"

23. Unlike the cases referred to by the 1st petitioner, this court would not need to receive evidence to enable it determine whether the application dated 18th November 2020 is res judicata. Both the application dated 18th November 2020 and the previous application dated 21st December 2019 were filed within the course of this very proceedings.

24. The record shows that the firm of M/s Masinde & Co. Advocates filed a Notice of Appointment on 23rd December 2019. By doing so, the firm effectively replaced the firm of M/s Oguttu, Ochwangi, Ochwal & Company Advocates which had been acting for the 1st petitioner at the time judgment was entered on 28th February 2018.

25. Contemporaneously with the Notice of Appointment, M/s Masinde & Co. Advocates filed an application dated 21st December 2019, which I find to be a replica of the present application dated 18th November 2020. The 1st petitioner filed the application dated 21st December 2019, protesting execution proceedings commenced by the 3rd respondent to recover costs from him. The orders sought in that application read as follows;

- a. This motion be certified as urgent and be heard ex-parte in the first instance to avoid any hardship on the part of the applicant;
- b. The motion be heard on priority basis as the applicant's moveable property have been proclaimed by Hegeons Auctioneers in execution of warrants issued by the Honorable court risk being auctioned irregularly during the pendency of this motion;
- c. That temporary stay of execution do issue staying the execution of decree herein as no decree has been drawn and approved in the manner prescribed by the Civil Procedure Rules rendering the execution incompetent and unlawful;
- d. The warrants of attachment issued herein be recalled and cancelled and the auctioneers be ordered to file his bill of costs for taxation by the Honorable Court and a determination be made as to who pays the auctioneers charges;
- e. The entire execution be set aside;
- f. The honorable courts do make an order as to costs of this motion.

26. The 3rd respondent filed a preliminary objection against the application dated 21st December 2019 contending that the firm of M/s Masinde & Co. Advocates who had filed the application was not properly on record as the firm had not complied with Order 9 Rule 9 of the Civil Procedure Rules.

27. The preliminary objection was argued before the taxing master who rendered her decision on the application on 15th May 2020. In the ruling, the taxing master found that the provisions of Order 9 of the Civil Procedure Rules applied to taxation causes in Election Petitions and upheld the 3rd respondent's preliminary objection to the application. The taxing master then issued the following orders;

- a. That the firm of Masinde and Company Advocates to follow all the required steps under Order 9 of the Civil Procedure Rules to ensure they are properly on record for the applicant before the applications dated 21/12/2019 can be heard on merit;
- b. Given the current Covid-19 pandemic and taking into account the challenges that are there in terms of service, I order the Applicants to comply with my directive within 40 working days from the date of this ruling failure of which the application will stand dismissed.

28. There is no indication that the orders set out above were complied with or that an appeal was preferred against the decision of the taxing master. Instead, the 1st petitioner opted to file the application dated 18th November 2020, which seeks a stay of execution proceedings on grounds similar to the application dated 21st December 2019.

29. The initial application dated 21st December 2019 pitted the 1st petitioner against the 3rd respondent, who are the same parties in the present application. The issues raised in the instant application were also directly in issue in the earlier application.

30. The grounds upon which the 1st petitioner sought stay of execution proceedings in the application dated 21st December 2019, were that he had never been served with the Bill of Costs in the Petition and hence the entire taxation process and execution was a nullity. He also claimed that he had not been served with Notice to Show Cause and that no decree had been issued in the manner set out under the Civil Procedure Rules before execution proceedings commenced. He further claimed that the amounts sought from him were excessive and not in line with the order of the superior court and ruling on taxation. These were the same grounds upon which the subsequent application dated 18th November 2020 were based.

31. The taxing master's jurisdiction to hear and determine the application dated 21st December 2019 was not contested.

32. In the case of **Uhuru Highway Development Limited** the Court of Appeal urged for a broader application of the doctrine of res judicata. It held;

If Mr. Sharma's and Mr. Rebello's arguments to the effect that the doctrine of res judicata applies only to suits concluded after a hearing on issues litigated upon and not to interlocutory applications, an impossible and intolerable situation would arise. A party who fails to stop a statutory sale would go from judge to judge until he may get orders suitable to him. The doctrine of res judicata would be far too limited. It should not be so and must not be allowed to be so. We have no hesitation whatsoever in saying that the general principles of res judicata cannot be limited by section 7 of the Civil Procedure Act and that the section (Section 7) is not exhaustive.

33. The prerequisites for applying the doctrine of res judicata were all met in this case. The 3rd respondent's contention that the application

dated 18th November 2020 is res judicata is found to be merited.

34. The question of whether the firm of M/s Masinde and Company Advocates was properly on record is similarly barred by the doctrine of res judicata as the issue was canvassed and exhaustively dealt with by the taxing master in the ruling dated 15th May 2020. It cannot be raised as an issue before this court unless it is by way of appeal.

35. In sum, I find the preliminary objection meritable. With the result that the application dated 18th November 2020 is hereby dismissed with costs to the 3rd respondent.

Dated, signed and delivered at Kisii this 17th day of June, 2021.

A. K. NDUNG'U

JUDGE