



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
MILIMANI LAW COURT
CONSTITUTION AND HUMAN RIGHTS DIVISION
PETITION NO. E38 OF 2016

**IN THE MATTER OF ARTICLES 3, 10, 19, 20, 22(1), (1), 29, 35(1), 73, 159(2)(d), 165, 201, AND
227 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA (2010)**

AND

**IN THE MATTER OF CONSTITUTIONAL PETITION FOR ACCESS TO INFORMATION,
RIGHTS AND FUNDAMENTAL RIGHTS AND FREEDOMS**

AND

**IN THE MATTER OF TRANSPARENCY AND ACCOUNTABILITY OF PUBLIC BODIES TO
THE PUBLIC, ACCOUNTABILITY IN PUBLIC PROCUREMENT AND LEADERSHIP AND
INTEGRITY OF PUBLIC OFFICERS**

AND

**IN THE MATTER OF PUBLIC PROCUREMENT AND DISPOSAL ACT (NO. 3 OF 2005),
PUBLIC FINANCE MANAGEMENT ACT (NO. 18 OF 2012) LAWS OF KENYA**

BETWEEN

MICHAEL JUMA OTIENO.....PETITIONER

VERSUS

THE EXECUTIVE DIRECTOR OF NON-GOVERNMENTAL

ORGANIZATIONS CO-ORDINATION BOARD.....1ST RESPONDENT

NON-GOVERNMENTAL ORGANIZATIONS

CO-ORDINATION BOARD.....2ND RESPONDENT

OTIENO YOGO OJURO AND

COMPANY ADVOCATES.....3RD RESPONDENT

JUDGMENT

THE PETITION

1. The Petitioner through an Amended Petition dated 28th May 2019 seek the following reliefs:

a) A declaration that the Petitioner has a constitutional right to access information from the Respondent on how the NGOs Coordination Board procured services and instructed the firm of Otieno Yogo Ojuro and company Advocates to represent it in the above listed matters and that the information sought should be supplied to the Petitioner forthwith by the Respondent.

b) A declaration that the information being sought is in possession of a public body and that he 1st Respondent being a public officer and holding his/her office in public trust has a constitutional duty to provide the Petitioner with the information sought as required of him by Article 35(1) of the Kenyan Constitution.

c) A declaration that the Respondent's refusal to furnish the Petitioner with the information sought violates the Constitution of the Republic of Kenya and the rights and freedoms of the Petitioner.

d) An Order directing the Respondents jointly and severally to supply the Petitioner with all the information and documents relating to how it procured the services of the firm of Otieno, Yogo, Ojuro and Company Advocates to represent it in the above listed matters within seven days from the date the judgment is delivered.

e) A declaration that the alleged representation of the NGOs Coordination Board by the firm of Otieno Yogo Ojuro and Company Advocates in the above listed matters is illegal, invalid, null and void in the absence of documentary proof of the existence of legally binding procurement procedures.

f) A declaration that in the absence of the aforesaid proof then any payments to the firm of Otieno Yogo Ojuro and Company Advocates by the NGOs Coordination Board were illegal and that the costs being sought from the Petitioner are invalid, null and void.

g) Costs of the Petition to be met by the Respondent

h) That the Applicant be entitled to damages to be quantified by the Court.

i) Any such order as the Court deems fit and expedient to grant for the end of justice to be met.

RESPONDENTS RESPONSE

2. The Respondents are opposed to the Petitioner's Petition and in doing so filed a preliminary objection dated 6th June 2016 setting out the following grounds:-

The application and entire suit offends the provision of Section 6 of the Civil Procedure Act as the issues raised herein, previously been determined and / or pending in:-

a) Kisumu Court of Appeal Civil Appeal No.27 of 2011 Michael Juma Otieno v Executive Director Non-Governmental Organization Coordination & Anor.

b) Kisumu High Court Civil Suit No. 248 of 2014 Michael Juma Otieno v Executive Director Non – Governmental Organization Coordination & 2 others

c) Kisumu High Court Petition No. 6 of 2012 Michael Juma Otieno v Executive Director Non –

Governmental Organization Coordination

d) Kisumu High Court Petition No. 8 of 2014 Michael Juma Otieno v Executive Director Non – Governmental Organization Coordination

e) Kisumu High Court Petition No. 9 of 2014 Michael Juma Otieno v Executive Director Non – Governmental Organization Coordination And the defendant shall seek that the Petition be struck out with costs.

BACKGROUND

3. In the instant Petition the Petitioner predominantly seeks for orders to effect that he be granted access to information by the 2nd Respondent on how it procured the services of the 3rd Respondent to represent it in various legal matters as listed by the Petitioner in his Petition. The Petitioner also sought orders to the effect that the alleges representation of the 2nd Respondent by the 3rd Respondent is illegal, null and void in the absence of a documentary proof of legally binding procurement procedures, a declaration that in the absence of aforementioned proof than any payments made to the 3rd Respondent by the 2nd Respondent were illegal and that the costs being sought from the Petitioner by the 3rd Respondent are invalid, null and void and that the costs of the suit plus damages be quantified by the Court.

4. It is Respondent's contention that the prayer concerning access to information on procurement of the 3rd Respondent by 2nd Respondent is Res judicata by virtue decision in Kisumu High Court Petition No. 6 of 2012 consolidated with Kisumu High court Pet No. 8 and 9 of 2014 and Kisumu High Court Misc Civil Application (JR) No. 7 of 2011.

ANALYSIS AND DETERMINATION

5. I have carefully considered the Petition herein, the Preliminary Objection, parties rival submissions and from the aforesaid, only single issue arise:-

a) Whether this Court has jurisdiction to hear and determine this Petition by virtue of being Res Judicata.

6. The Respondents contended that the prayer concerning access to information on the procurement of the 3rd Respondent by the 2nd Respondent is Res judicata as the issue thereto had already been conclusively dealt with in Kisumu High court Petition No. 6 of 2012 as consolidated with Kisumu High Court Petition No. 8 and 9 of 2014.

7. The Petitioner urges that the matter is not Res judicata contending the procurement records, the Petitioner is requesting for in this Petition are related to the year 2011, which Petitioner contended is relevant to documents of 3rd Respondent Legal Service by the 2nd Respondent in the year 2021 and 2014. The Petitioner aver that the Respondents failed to produce in this Court procurement documents to prove that the 3rd Respondent was legally retained to represent the 2nd Respondent in 2011 and 2014.

8. The Petitioner further sought reliance in the case of **William Odhiambo Ramogi & 2 others v Attorney General & 6 others [2018] eKLR**, where the Judges asserted that in human rights matters, the rule of **res judicata** must be sparingly invoked and only when the reasons are obvious as rights keep on evolving, mutating, and assuming multifaceted dimensions and concluded that:-

“57. We have already delineated the issues raised in the present Petition above. From the foregoing exposition it is evident that the matter herein is not res judicata Constitution Petition No. 9 of 2016 and Civil Appeal No. 15 of 2017. The parties in the matter are different, and the issues raised are substantially distinguishable. While the harbor function was an issue raised in the aforementioned matters, it was only discussed to the extent that it relates to the Kenya Ferry Services and the Likoni Channel and not the operations of the Port of Mombasa by the 3rd

Respondent, Kenya Ports Authority.”

9. The Petitioner submitted that the procurement documents so far furnished to him by the 3rd Respondent show that the 3rd Respondent applied for consideration as a legal services provider with the 2nd Respondent in 2012 yet the contentious representation periods in this Petition took place in 2011 and 2014.

10. Looking at the prayers in the Petitioner’s Petition, the Petitioner do not seek procurement documents for the period between 2011 and 2014 but clearly seeks access of information on how NGOs coordination Board procured Services and instructed the firm of Otieno Yogo Ojuro and Company Advocates. I find there is no request for information for the period submitted in the Petitioner’s submissions. It is trite that each party is bound by its own pleadings and no party can change or substitute its pleadings through the use of craft of submissions.

11. In the copy of Judgment attached to Respondent’s submissions in the case of ***Michael Juma Otieno v Executive Director Non-Governmental Organization*** consolidated in ***Kisumu Misc Application No. 7 of 2011*** filed by the Petitioner herein Michael Juma. The Petition sought an Order of Mandamus to compel the Non-Governmental Organization Co-ordination Board to register new CEPAD officials elected during the special annual general meeting held on 29th October 2010. The Respondent and Interested parties in that case were represented by the firm of Otieno, Yogo, Ojuro & Company Advocates (“the firm”). The suit was struck out with costs to the Respondent and there are currently proceedings for recovery of costs.

12. It is further noted, in the said Judgment, that in order to challenge the appointment of the firm to represent the Respondent in ***Kisumu HC Misc. Civil Application No. 7 of 2011***, the Petitioner lodged ***Petition No. 6 of 2012*** in which it alleged the Respondent procured the firm’s services without due process to represent them in the matter and that since the firm represented both the Respondent and other Interested Parties in that case, the representation was likely to lead to a conflict of interest. The Petitioner also applied for an order under Article 35 of the constitution, which protects the right to information held by the State, directing the Respondent to supply it with documents relating to the procurement of legal services from the firm and a consequent declaration that the firm’s engagement by the Respondent was null and void.

13. It is noted that in ***Petition No. 8 of 2014*** the Petition applied for an Order directing the Respondent to furnish it with documents leading to the procurement of legal services from the firm and declarations that representation of the Respondent by the firm in ***Kisumu HC Misc. No. 7 of 2011*** was, ***“an imposition, null and void and therefore not binding on the Respondent if the procurement on record are not supplied to the Petitioner.”*** It also sought a declaration that the firm had a conflict of interest as it represented the Respondent and some of the Interested Parties.

14. In addition in ***Kisumu Petition No. 9 of 2014***, the Petition applied for an Order directing the Respondent to furnish it with documents leading to the procurement of legal services from the firm. It also applied for several declarations among them a declaration, “the alleged representation of the [Respondent] by the firm... in ***Civil Suit No. 16 of 2011*** in the High Court at Kisumu ...I s illegal, fraudulent, null and void in the absence of proof of existence of appropriate procedures through documentary evidence that services were obtained through a legal process.” In the case cited, ***Kisumu HCCC No. 16 of 2011***, the Petitioner had sued the Respondent, Martin Luther Omondi Ocholla and Christine Awuour Otiri for damages for defamation on account of an advertisement placed in a local newspaper claiming that he was not an official of CEPAD.

15. In the Judgment, the Court noted that the correct thread running through the Petitions, is that the Petitioner has invoked ***Article 35 of the Constitution*** which establishes a right to freedom of information from the State to seek information on how the Respondent procured services of the firm.

16. In response and in support of the allegation, that this Petition is Res judicata the Respondents sought reliance on the Judgment of Honourable Justice David Majanja, in ***Kisumu High Court Petition No. 6 of 2013 Michael Juma Otieno vs. Executive Director Non-Governmental Organization Board*** as

consolidated with **Petition No. 8 and 9 of 2014** where the learned Judge under paragraph 6 and 7 stated as follows:-

“When the matter came up for directions on 30th June 2016, I directed the respondent to file an affidavit containing all the information sought by the petitioner in the consolidated petitions. The respondent filed a replying affidavit sworn by Lindon Otieno sworn on 15th July annexing minutes of the respondent’s tender committee and other correspondence between it and the petitioner. On 8th August 2016, the petitioner requested to have the following documents; the advertisement notice, minutes or report of the tender opening, minutes or report of the evaluation committee and minutes of the technical committee. I directed the respondent to facilitate the petitioner to access the documents through its advocate. The petitioner claimed that he did not get access to the documents so I directed the respondent’s counsel to obtain all the documents and furnish them to the petitioner. The respondent through the affidavit of Geoffrey Yogo sworn on 16th August 2016 furnished all the documents requested for by the petitioner and ordered by the Court.”

17. The Trial Judge in his Judgment proceeded to record as follows:-

“ I have considered all the documents furnished and I find and hold that the respondent has complied with its obligation under Article 35 of the Constitution to facilitate access to information. Likewise, counsel for the petitioner confirmed that all the documents had now been furnished.”

18. In view of the uncontroverted pleadings and there being a Judgment of a competent Court, I have no doubt that the prayer concerning access to information on the procurement of the 3rd Respondent by 2nd Respondent has already been dealt with and the issue fully determined, noting that the Petitioner was granted all the information he was seeking and even his Counsel confirmed so. The Petitioner herein cannot now claim otherwise and if he did not seek all the information he needed then, he cannot seek the same in subsequent Petition as he is barred, by the principle of Res judicata, from seeking such information that he failed to seek then.

19. **Section 7 of the Civil Procedure** clearly bars this Court from dealing with a matter that is said to be res judicata. The said Section provides:-

“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.”

20. In addition to the above the doctrine of Res judicata has been dealt with in myraids of cases. The Respondents placed reliance in the case of the ***Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR)***, where the Court of Appeal set out the elements that are required to be satisfied for a matter to be declared to be res judicata being as follows:-

“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

a) The suit or issue was directly and substantially in issue in the former suit.

b) That former suit was between the same parties or parries under whom they or any of them claim.

c) Those parties were litigating under the same title.

d) The issue was heard and finally determined in the former suit.

e) The court that formally heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

21. The purpose of the principle of Res judicata is to lock out from the Court system, a party who has had his day and opportunity to canvass its case in a Court of competent jurisdiction, from re-litigating on the same issues against the same opponent. I find that it has been demonstrated that the Petitioner herein, already had his day in the Court but keeps on badgering the Respondents herein, with same issue and with unjustified Petitions on the same subject matter. I find from the Judgment by Hon. Justice David Majanja; what information the Petitioner wanted and sought had already been supplied prior to the filing of the instant Petition. In view whereby I find the suit is res judicata.

22. From the pleadings and parties submissions, it has been demonstrated that the 3rd Respondent won a tender and was retained by the 2nd Respondent, as part of its panel of advocates in legal matters after having followed due process in the tendering process, and as such whatever remuneration, that was paid to them by the 2nd Respondent was legal and above board. In addition thereto, the Respondents provided to the Petitioner the required and sought documents, showing how the relationship between the 1st and 2nd Respondent came to be and how all the procedure was followed by the 3rd Respondent in tendering process before being chosen to act for the other Respondents herein.

23. On the issue of costs, it is trite that costs, follow the events. I find the cases which the Petitioner seek to be exempted from paying costs legally due to the 3rd Respondent were decided by competent Courts of concurrent jurisdiction with this Court. It is noted further that by a Ruling of Hon. Lady Justice Nyamweya, (as she then was) in Kisumu High Court Misc Civil Application No. 7 of 2011, the Petitioner's application was dismissed with costs. In the said (JR) Application the learned Judge, held that the Applicant, who is the Petitioner herein, had filed the (JR) application in his own capacity rather than on behalf of CEPAD and as such was personally liable to pay the costs. This fact was further upheld by Hon. Mr. Chemitei J, in the applicant's subsequent application dated 2/7/2014 wherein the said learned Judge aligned himself with the ruling of Nambuye J (as she then was), that the Petitioner having acted on his own motion rather than on behalf of CEPAD, was personally liable to pay the Respondent's assessed costs of Kshs.163,152. It is further noted that one Mr. Ochola, who was the then chairman of CEPAD, drove the last nail on the Petitioner's coffin when he denied the Petitioner's claim, that he had filed the (JR) application on behalf of the organization, stating that the Petitioner had acted without the blessings of the organization and as such was on his own personally liable for the costs.

24. The decision challenged herein on costs, was issued by court of concurrent jurisdiction. I find that this court cannot seat on appeal on judgment of Court of concurrent jurisdiction nor purport to review decision of Judges of concurrent jurisdiction sitting in different High Court's in the Country. For clarity, I would like to state the Constitutional and Human Rights Division, is a Division of the High Court, whose jurisdiction is no different from jurisdiction of other Divisions in the High Court. This Petition should not be seeking to challenge decisions of Judges of concurrent jurisdiction. It is misconceived, bad in law and an abuse of the Court process.

25. I find the Petitioner's recourse do not lie in filing several Petitions, if he felt aggrieved by initial High Court decisions. He should have filed an appeal which he did not. I find that an attempt to canvass on issues of costs before this courts unjustified and uncalled for, as this is not the correct forum to address the issue, as this Court, as already pointed out, cannot sit on appeal on the judgment of court of concurrent jurisdiction or review various decisions made in other High Courts in the Republic of Kenya.

26. In view of the aforesaid, I find that litigation has to come to an end. I note the parties herein have already been litigating over the issues identified in the instant Petition and several decisions rendered by courts of competent jurisdiction. The Petitioner failed to lodge an appeal against any of the several

decisions but instead choose to file myriads of Petitions and Application in the High Court, which unfortunately failed to succeed. This I find however, was improper on Petitioner's part.

27. The upshot is that the issue herein was directly and substantively in issue in the former suit, between same parties; litigating under the same title; the issue having been heard and determined by a competent Court, which determined the issue with finality, I find the instant Petition to be Res judicata.

28. The Petitioner's Petition is dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15TH DAY OF JULY, 2021.

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J. A. MAKAU

JUDGE