



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MILIMANI (NAIROBI)

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO.322 OF 2018

PETER SOLOMON GICHIRA.....PETITIONER

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT

WANYONYI WAFULA CHEBUKATI.....2ND RESPONDENT

RULING

1. The petitioner through a petition dated 18th September 2018 seeks the following orders:-

- a. That the Honourable Court be pleased to make a Declaration that the Respondents have violated Articles 35,47,73,75 and 232 of the Constitution of Kenya.
- b. That the Honourable Court be pleased to make a Declaration that Wanyonyi Wafula Chebukati, the 2nd Respondent herein, is unfit to hold public office by virtue of his violation of Articles 35,47,73,75 and 232 of the Constitution of Kenya
- c. That the Honourable Court be pleased to order that the Respondents bear the costs of this Petition.
- d. That the Honourable Court be pleased to grant any further orders it deems fit in the circumstances.

2. The 2nd Respondent filed a Replying affidavit by Wanyonyi Wafula Chebukati; sworn on 27th November 2018.

3. The 2nd Respondent subsequently filed a preliminary objection dated 13th May 2019 urging the court has no jurisdiction to entertain this matter because of the following:-

- a. That, the matters being canvassed by the Petitioner have already been determined in the High Court and in the National Assembly; and thus the Court is *functus* by *res judicata*;
- b. That, the Petitioner seeks to enforce a Judgment of a separate suit in this fresh suit. Enforcement of Court Judgments or Rulings is within the suit that gave the Orders;
- c. That, the Officers of Independent Electoral & Boundaries Commission have legal immunity from being sued in their individual capacities for official work and assignments;
- d. That, the Petitioner has no legal capacity as he is not *compos mentis*;
- e. That, the Petitioner is a vexatious litigant and doesn't deserve the Court's audience;
- f. That, the Petitioner has no legal or factual substratum and is only scandalous, frivolous and vexatious and intended to harass and intimidate the 2nd Respondent;

g. That, the Constitutional & Human Rights Division of the High Court is not a forum for ego trips or echo chamber for personal vanities.

4. On 27th May 2019 upon hearing the counsel the court directed that the preliminary objection dated 13th May 2019 be heard and determined first by way of written submissions. The 2nd Respondent filed and served submissions dated 6th June 2019 whereas the petitioner filed and served submissions dated 31st July 2019. The Attorney General for 1st Respondent did not file any submissions but urges that they support the Notice of Preliminary Objection by the 2nd Respondent.

5. I have very carefully considered the Notice of Preliminary objection dated 13th May 2019 and from the same the issues arising for consideration are as follows:-

a. Whether the suit is Res Judicata?

b. Whether the 2nd Respondent has legal immunity from this suit?

c. Whether the petitioner lacks legal capacity to sue?

d. Whether the petitioner is a vexatious litigant?

A. Whether the suit is Res Judicata?

6. Res Judicata as a principle deals with litigating a concluded matter and is usually raised in firm belief that penultimately re-litigating will not change the conclusion already reached by the court in the former trial. The rationale behind the doctrine of res judicata and issue of estoppel is that if a controversy in issue is finally settled and determined or decided by a court of competent jurisdiction, it cannot be re-opened. The rule of *Res judicata* is based on two principles; thus there must be an end to litigation and that no party should be vexed twice over the same cause.

7. The doctrine of *Res Judicata* is set out under **section 7 of the Civil Procedure Act** which 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."

8. The Civil Procedure Act also provides explanations with respect to the application of the *Res Judicata*. Explains 1 – 3 are as follows:-

"Explanation. —(1) The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. — (2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. — (3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other."

9. The 2nd Respondent in his Notice of Preliminary objection claims that this suit is Res Judicata as the issues raised in this petition are the same issue that were raised in Miscellaneous Application No. 273 of 2017 (JR). In the said petition the court declared that section 29(1) and (2) of the Elections Act No. 37 of 2016 null and void and that it contravenes Article 27(2) and (4) and Article 137(1) (d) of the constitution. Further the court compelled the 2nd Respondent to receive the petitioner's document for nomination and make determination thereon within 36 hours of the said receipt and furnish the petitioner with the reasons for its decision.

10. The petitioner's contention is that, the gist of the respondent's petition dated 8th September 2018 revolves around the question of violation of Article 35,47,73,75 and 232 of the constitution which touch on accountability, administration and others and nothing on the interpretation of the sections of the Election Act in the previous case. The petitioner therefore contends that the issue in this petition have not been heard and determined by a competent court.

11. The 2nd Respondent on the other end contends that the petition is canvassing similar issues that he had canvassed before the Honourable court and the National Assembly and which have been dealt with finality, that a final judgment in rem having been handed in Nairobi **HC JR Petition Number 234 of 2017**.

12. The 2nd Respondent avers further the sub stratum of the instant petition is the alleged order issued in Nairobi High Court Judicial Review Miscellaneous Application No. 273 of 2017. A cursory look at the present petition specially paragraphs 4,7,9,10,11 and 13 it is clear what the petitioner has pleaded in Nairobi High Court Judicial Review Miscellaneous Application No. 273 of 2017 in seeking present orders in this petition. From the contents of the present petition and the earlier petition, it is clear the present petition is a re-litigation of the former suit, and in view this amounts to re-canvassing issues that ought to have been dealt in the previous case. I find the present petition is an attempt by the petition to have another bite at the cherry.

13. In the case of **Independent Electoral and Boundaries Commission vs. Maina Kiai & 5 others, Nairobi CA Civil Appeal No. 105 of 2017 [2017]**, (in ages 4 – 46 of our authorities) the Court of Appeal in dismissing a plea of *res judicata* held that:-

"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 parties 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 formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."**

14. In this petition there is no dispute both the petitioner and the Respondents participated in both the **Miscellaneous Application No. 273 of 2017 (JR)** and in the current petition. I find that the subject matter is not different and even if it was, it is an issue that ought to have been raised and dealt with in the previous case. I cannot find the difference between the two petitions and the two adverse serve or have similar issues. It does not matter that one was a Judicial Review and the other is a petition. I further find that notwithstanding the invocation of diverse Articles of the constitution on the face of the petition, a plain reading of the key averments as well as the prayers disclose that this is a continuation of the previous suit filed by the petitioner. I therefore find that this suit is *Res Judicata*.

B. Whether the 2nd Respondent has legal immunity from this suit?

15. The 2nd Respondent's assertion is that the officers of Independent Electoral and Boundaries Commission have legal immunity from being sued in their individual capacity for official work and assignments. The 2nd Respondent in support of the aforementioned proposition relies on the provisions of **section 15 of the Independent Electoral Boundaries Commission Act No. 9 of 2011** which states:-

"Nothing done by a member of the Commission or by any electoral officer shall, if done in good faith for the purpose of executing the powers, functions or duties of the Commission under the Constitution or this Act, render such member or officer personally liable for any action, claim or demand."

16. **Black's Law Dictionary, Tenth Edition at page 808 "Good faith"** is defined as follows:-

"A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage."

17. From the aforesaid definition good faith stands for faithfulness to one's duty or obligation, it is concerned with ones integrity and commitment to duty. This requires one to be faithful while performing his duties, as a public officer. The petitioner contention is therefore that the 2nd Respondent did not act in good faith in that orders were already given by court compelling the Respondent to receive the applicant's documents for nomination and make a determination thereon within 36 hours of the said receipt and furnish the petitioner with the reasons for its decision, however the petitioner did not abide by the given orders.

18. The 2nd Respondent urges by dint of **section 15 of IEBC Act No. 9 of 2011**, he is protected, insulated against personal or individual liability. It should however be noted that legal immunity does not come into defence where one acts in bad faith. The legal immunity is only available to an officer from personal liability for things he has done in good faith in the course of exercising his duties.

19. In the case of **Central Bank of Kenya & Another vs Ratilal Automobiles Limited & others Civil Application No. 247 of 2006**, the court held that:-

"Judicial power in Kenya vests in the courts and other tribunals established under the Constitution and it is a fundamental tenet of rule of law that court orders must be obeyed and it is not open to any person to choose whether or not to comply with or to ignore such orders as directed to him or them by the court of law."

20. I agree with petitioners submissions that court orders are essential for maintenance of the use of law and order and that the authority and the dignity of courts should be upheld all the times. The courts orders are not meant for cosmetic purposes and are meant to be complied with strictly. In the case of **Teacher's Service Commission vs Kenya National Union of Teachers & 2 others Petition No. 23 of 2013:-**

".....It is about preserving and safeguarding the rule of law. A party who walks through the justice door with a court order in his hands must be assured that the order will be obeyed by those to whom it is directed. A court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this court will not be the one to open that door. If one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option."

21. The 2nd Respondent as provided by **section 15 of the IEBC Act No. 9 of 2011**, is not only a member of the commission but the chairman of the commission, for him not to be protected from personal liability for things done it has to be demonstrated he acted in bad faith; for whenever where he acts in good faith for the purpose of executing the powers, functions or duties of the commission under the constitution or the **IEBC Act** he is protected from personal liability for things done in good faith. In the instant petition, I find the 2nd Respondent has legal immunity for things done in good faith. It has not been shown that the 2nd Respondent acted in bad faith in this suit and as such the 2nd Respondent is protected and insulated against personal or individual liability under **section 15 of the IEBC Act No. 9 of 2011**.

C. Whether the petitioner lacks legal capacity to sue?

22. The 2nd Respondent contention is, that the petitioner lacks requisite mental capacity to bring a legal action; as referring to an annexure to the 2nd Respondents' Replying Affidavit a charge sheet of the petitioner having been charged with attempted suicide.

23. The 2nd Respondent relies on the case of **Patrick Sang'anyi Ongeri vs Republic [2015] eKLR**, (in page 70 – 71 of our authorities) Justice L. Kimaru held *inter-alia*:-

"He was further charged with the offence of attempted suicide contrary to Section 226 of the Penal Code.

Taking into consideration the totality of the facts of this case, it is clear that the Appellant lacked the requisite mental capacity to commit the offence."

24. Further in the case of **Republic vs Michael Ribcke Robel [2013] eKLR**, (in Pages 72 – 77 of our authorities) Justice Odera held;

"11. Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved."

Does the presumption that he was at the material time of sound mind hold true for the accused"It later transpired that he had tried to commit suicide.

Doubt has arisen regarding the mental status of the accused. Accused is to be set at liberty forthwith...."

25. The burden of proof lies with he who alleges. The 2nd Respondent alleges the petitioner herein has no legal capacity to sue on an allegation that he was charged with attempted suicide. There is no evidence that the petitioner was ever convicted of attempted suicide nor is there medical Report exhibited on the petitioner's mental status showing that he is of unsound mind.

26. **Section 11 of the Penal Code** provides as follows:-

"Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved."

The law is clear that every person is presumed to be of sound mind and to have been of sound mind at any time which comes to question until the contrary is proved. The burden of proof lies with the 2nd Respondent in this petition. The 2nd Respondent has not only asserted but has to prove the correctness of his assertion. The fact that the petitioner was charged with attempted suicide contrary to section 226 as read with section 36 of the penal code, does not in itself amount to evidence of guilt. The conviction or acquittal with such an offence would not amount to one having unsound mind. There is need of production of a medical report where one is said to be proved to be unsound mind.

27. This is on constitution petition filed by the petitioner herein. **Under Article 22(1) of the Constitution** it is clearly presided that every person has the right to institute court proceedings; that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened.

28. In view of the aforesaid I find that the 2nd Respondent has failed to demonstrate that the petitioner lacks capacity to sue. I accordingly find no evidence for this court to hold the petitioner lacks capacity to sue and accordingly dismiss this preliminary point of objection.

D. Whether the petitioner is a Vexatious Litigant?

29. The 2nd Respondent in his Notice of Preliminary Objection contents the petitioner is a vexatious litigant.

30. The **Black's Law Dictionary, Tenth Edition at page 1075** defines **Vexatious Litigant** as follows:-

"A litigant who repeatedly files frivolous law suits."

31. In the case of **Samuel Kahiu vs Jacinta Akinyi Assistant County Commissioner Iloodokilani Ward/Division & another [2018] eKLR**, (in pages 56 – 57 of our authorities) the Court held *inter-alia*:-

"i) Whether the application is vexatious, frivolous and an abuse of courts processes. To begin with, I will look at what amounts to a vexatious litigation in the following words.

"It is a legal action, which is brought regardless of its merits, solely to harass or subdue an adversary. It may take the form of primary frivolous lawsuit or may be repetitive, burdensome and unwarranted filing of meritless motions in a matter which is otherwise a meritorious cause of action."

32. The vexatious proceedings Act, 2012 is an Act of parliament, which was enacted to prevent abuse of the process of the High Court and other courts by the institution of vexatious legal proceedings. Section 2(1) of the said Act provides as follows:-

"1. If, on an application made by the Attorney General under this section, the High Court is satisfied that any person has habitually and persistently and without any reasonable ground instituted vexatious proceedings, whether civil or criminal, and whether in the High Court or in any subordinate court, and whether against the same person or against different persons, the court may, after hearing that person or giving him an opportunity of being heard, make an order declaring such person to be a vexatious litigant."

33. The 2nd Respondent is urging the petitioner is a Vexatious Litigant, but has not demonstrated that the petitioner is such a litigant who repeatedly files frivolous law suit. It has not been demonstrated that the petitioner qualifies to be termed as a vexatious litigant nor has the 2nd Respondent demonstrated the petitioner has liability and persistently and without any reasonable ground instituted vexatious proceedings of whatever nature in the High Court or in any subordinate court; and whether against the same person or against different persons. Further under the vexatious proceedings Act, 2012 for one to be declared a Vexatious Litigant an application is required to be made by the Attorney General under **section 2(1) of the Act** but not by the 2nd Respondent or any other person.

In view of the above I am not satisfied that the 2nd Respondent has proved that the petitioner is a Vexatious Litigant. This ground also falls.

34. Upon consideration of the 2nd Respondent's preliminary objection, I find that it succeeds only on the grounds of *Res Judicata* and on the ground of the 2nd Respondent having legal immunity from this suit, however I find no merit in the other grounds on the alleged petitioner lacking legal capacity to sue and an allegation of being a Vexatious Litigant.

35. To that extent the 2nd Respondent's Preliminary objection succeeds on two grounds and fails in two grounds. I therefore uphold the 2nd Respondent's Preliminary Objection, but as all grounds did not succeed I direct each party to bear its own costs.

Dated, signed and delivered at Nairobi this 6th day of February, 2020.

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J .A. MAKAU

JUDGE