



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

PETITION NO. 4 OF 2019

SAMUEL MAHINDU & 25 OTHERS.....PETITIONERS

VERSES

TRANS NZOIA COUNTY GOVERNMENT....1ST RESPONDENT

THE FINANCE COUNTY EXECUTIVE.....2ND RESPONDENT

RULING

1. What is before this court for determination is the preliminary objection by the respondent dated 7th October, 2019 in which they have sought to have this petition dismissed for the reason that the same is *res judicata*.

2. When the same came up for hearing this court ordered that it be disposed of by way of written submissions which the parties have complied.

3. The Applicant has relied on the provisions of Section 7 of the Civil Procedure Act as well as the decision in the Constitutional Petition number 97 of 2016 in Nairobi. In that case the court declared that;

“a declaration that the County Finance Acts are unconstitutional to the extent that they require the petitioners who are regulated by the Pharmacy and Poisons Act cap 244 Laws of Kenya to pay trade licences.”

4. They further relied on the case of **PETER NDUNGU & 39 OTHERS VS. COUNTY ASSEMBLY OF NYANDARUA (JUDICIAL REVIEW NO.8 OF 2017)** in which the court agreed with the decision of Mativo J in Petition No. 97 of 2016 above.

5. The Respondent counteracted the above vide their submissions dated 30th November, 2019 in which they argued that the issues raised in the two cited authorities may not have been necessarily similar. They argued further that the parties are different in this matter as well. They contended that each county government is autonomous and thus its actions cannot be lumped together with the rest of the counties.

6. Having read the authorities cited and relied on by the Applicant, as well as their respective submissions, the provisions of Section 7 of the Civil Procedure are clear. It states that;

“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.”

7. It's clear that the parties herein are different from those cited in the authorities and although they may be referring to the same professional bodies, I find it untenable to rely on the authorities from my colleagues as cited by the Applicants. The Petitioners are different as well as the counties.

8. Hon. Mativo J stated in the Nairobi petition that;

“The other difficulty I have is that the petitioners allege that the County Finance Acts are unconstitutional and contradict the provisions of the Pharmacy and Poisons Act. [30] It is common knowledge that each County Assembly passed its Finance Act. The Petitioners did not specify which specific provisions they claim to be unconstitutional or contradicting the Pharmacy and Poisons Act. The petition makes a blanket condemnation of all the Finance Acts in the 47 Counties and leaves

it to the court to guess which sections are under attack. The assumption is that all are identical and contain similar provisions”.

9. The court appreciated the difficulty in which it faced when all the counties were lumped together and for the same reason I find that relying on the above cited authorities at this juncture may be prejudicial to the petitioners. The best way is to determine the totality of the issues raised in the petition and at the appropriate time take into account the issues arrived at in the said decisions.

10. For the forgoing reasons the preliminary objection is disallowed with no orders as to costs.

Dated, signed and delivered in open court at Kitale this 8th day of April, 2020.

H. K. CHEMITEI

JUDGE

8/04/2020