



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

PETITION NO. 39 OF 2017

IN THE MATTER OF ARTICLE 22(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE CONTRAVENTION OF FUNDAMENTAL RIGHTS

AND

**FREEDOMS UNDER ARTICLES 2(1), 3(1), 10(1) (2), 19(2), 20(2), 22, 23, 24, 27(1), 28, 36, 40, 42, 43, 258, 259 & 260 OF THE
CONSTITUTION OF KENYA, 210**

AND

**IN THE MATTER OF THE VIOLATION OF THE FREEDOM OF ASSOCIATION UNDER ARTICLE 36 OF THE
CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF THE RIGHT TO PROPERTY UNDER ARTICLE 40 OF THE CONSTITUTION OF KENYA 2010

BETWEEN

EVA NYAWIRA WAHEIREPETITIONER

VERSUS

PETER MURIUKI, PERIS MWANGI

AND GEORGE GITUKU

(BEING SUED AS THE OFFICIALS OF

FOREST COURT WELFARE ASSOCIATION)

MEMBLEYPARK ESTATE.....1ST RESPONDENT

SECURITY GROUP AFRICA LIMITED (SGA)...2ND RESPONDENT

COUNTY GOVERNMENT OF KIAMBU.....3RD RESPONDENT

RULING

1. The background to the Petition filed by **Eva Nyawira Waheire** on 31st October 2017 is as follows. The Petitioner resides at Membley Park Estate Phase Two, Ruiru in her own two-bedroom house, erected on a land parcel described as **LR. No. 20728/242**. In the year 2013, several residents of Membley Park formed and subsequently registered an association known as **Forest Court Welfare Association**

Membley Park Estate (the association), the 1st Respondent. At the material time **Peter Muriuki, Peris Mwangi** and **George Gituku** were officials of the association. Some of the objects of the association were provision security and other essential services to members/residents and the maintenance of the estate infrastructure.

2. The second Respondent, **Security Group Africa Ltd** was one of the companies periodically contracted to provide security services in the material period. The Petitioner's dispute with the 1st Respondent broke out around 2014 when, according to her the 1st Respondent made it mandatory that all residents become members of the association and that the members contribute certain sums of money to finance the objects of the association.

3. Thus in February 2016, the Petitioner filed a **Civil Suit No.427 of 2016** in the Chief Magistrate's Commercial Court, Nairobi against **Peter Muriuki** and the then security company, **Airview Security Services Ltd**. Seeking the following orders:

- a) A permanent in junction restraining the defendants or their servants or agents from compelling the Plaintiff to join or act as a member of Forest Court Neighborhood Association and or to contribute towards the activities of the said association.
- b) A permanent injunction to restrain the Defendants or their servants or agent from compelling the Plaintiff to contribute towards the activities and or services of the Airview Security Services Ltd, operating within Forest Court, Membley Park.
- c) A permanent injunction restraining officials of Airview Security Services from assaulting and harassing the Plaintiff, her guests and children or compelling them to use the gate installed at the estate and/or opening the gate for themselves.
- d) An order that the Defendants and or their servants and agent provide a convenient access route to the Plaintiff's home for the Plaintiff, her children and visitors.
- e) An order that the 1st Defendant being an unregistered association ceases from acting and or purporting to act as a resident association within Forest Court Membley Park Estate.

4. By a motion brought under certificate of urgency, the Petitioner had also sought in the interim, the grant of temporary orders corresponding to the prayers in the plaint. It appears that, upon hearing the petitioner's motion, the court granted certain orders vide a ruling delivered on 28th July 2016. The gist of the resultant orders was to restrain the Defendants in the cause from harassing and intimidating the Petitioner and her children, pending the hearing and determination of the suit, and an order directing the Defendants to create a convenient access route for the Petitioner and her children or visitors to her home and that the Petitioner be allowed unfettered access to her home.

5. The ruling provoked an appeal by the Defendants which was lodged to the Environment and Land Court, Nairobi, being **ELC APPEAL No. 65 of 2016** and a motion seeking to stay execution of the lower court's orders. Matters did not rest there, as the Petitioner subsequently moved the lower court on 2nd August 2016 seeking to have the Defendants punished for contempt of court for their alleged disobedience of the court's orders. The Defendants also filed an application on 25th August seeking an order that the Petitioner's suit had abated due to the Petitioner's failure to take out and serve summons to enter appearance as stipulated in Order 5 rule (1) sub-rule 6 of the Civil Procedure Rules.

6. In a ruling delivered on 8th November 2016, the lower court found no merit in and dismissed the Petitioner's motion while allowing the Defendant's motion, and therefore declaring the suit in the lower court to have abated. It does not appear that this decision was appealed.

7. The Petitioner lodged the present petition in the High Court at Nairobi on 31st October 2018. The facts of the Petition repeat the averments contained in the previous suit, in the main and the Petitioner further avers that previous court action and reports to the police and the County Government (the 3rd Respondent herein) have failed to avail redress and protection against the violation of her rights by the 1st and 2nd Respondent.

8. On the stated facts, the Petitioner pleads violation of her right to be treated with dignity and to freedom from discrimination (Article 27 and 28 of the Constitution); right to freedom of association, (Article 36 of the Constitution) and the right to property and a clean and safe environment (Articles 40 and 42 of the Constitution). The prayers in the petition are for:

- a) A permanent injunction to restrain the Respondents and their servants/agents from compelling the Petitioner to join or act as a member of Forest Court Neighborhood Association and/or contribute towards activities of the said association.
- b) A permanent injunction to restrain the 1st Respondent or their servants or agents from compelling the Petitioner to contribute towards activities and services of the 2nd Respondent, Security Group Africa Ltd, operating within Membley Park Estate.
- c) A permanent injunction to restrain the 2nd Respondent or any other security company in future to be hired by the 1st Respondent to replace them by themselves or their servants or agents from assaulting and harassing the Petitioner, her family, friends, visitors and forcing them to use the gate erected at the estate and or/opening the gate for themselves.
- d) An injunction to restrain the Respondents and their servants from interfering with her property rights which encompass free access and exit from her property using whatever available entry point and quiet possession of the said property.
- e) An order directing the Respondents to create a convenient route for the Petitioner, her family and visitors to access her residence.

f) An order against the 1st Respondent to cease compelling residents including the Petitioner to join the association and to make payments to the association.

g) An order to require the 1st and 2nd Respondent to compensate the Petitioner for the violation of her stated constitutional rights.

9. A memorandum of appearance was filed by the Respondents on 1st December 2017, and subsequently the Petitioner instructed the firm of **Arusei and Co. Advocates** who filed a notice of change of advocates on 16th April 2018. The said firm filed two motions under certificate of urgency, on 20th June 2018 and on 30th August 2018, respectively, the Respondents having filed their responses on 1st August 2018 and on 28th August 2018.

10. The Petitioner's motion filed on 20th June 2018 seeks leave to amend the Petition while the later one seeks conservatory orders against the Respondents. On 21st June 2018 this court directed that the application filed on 20/6/18 be set down for hearing in the registry, and the Petitioner set down the motion for hearing on 18th October 2018. The second motion has no hearing date despite the order by **Kimaru J** on 12.9.18 that the Petitioner takes dates in the registry.

11. On 26th September 2018 the Respondents filed a notice of preliminary objection to the motion filed on 20th June 2018 which is the subject of this ruling. The grounds of the preliminary objection are stated to be that:

1) The Petition herein is *res judicata* as the Petitioner had previously filed **Civil Case No. 427 of 2016** in which:

a) The matters in issue in the petition were directly and substantially in issue

b) The issues raised in the suit were heard and finally determined by a court of competent jurisdiction vide the ruling delivered on 8th November, 2016. (The findings of the court in the said ruling are amplified).

2) No appeal was filed from the ruling delivered on 8th November 2016

3) The present petition is a duplication, bad in law and an abuse of the court process and should be struck out *in limine*

4) The petition offends Section 7 of the Civil Procedure Act and ought to be dismissed.

12. The preliminary objection was urged before the court on 18th October 2018. Miss Maina for the 1st and 2nd Respondents reiterated the grounds in the notice of preliminary objection, and juxtaposing the pleadings and prayers in the previous civil suit and this petition, asserted that they were similar; that the cause and issues raised in both suits are similar and between the same parties; that the issues were finally determined in the former suit and that the issues raised in the instant petition are *res judicata*. Counsel relied on two decisions of the High Court in **Okiya Ombata Okoiti v Communications Authority of Kenya [2015] e KLR** and **Kiriinya M. Mwenda v Nairobi City Council and 2 Others [2018] e KLR**. She urged the court to dismiss the petition.

13. For her part, Miss Keter for the Petitioner argued that the petition had no relation to the previous civil suit as the former has been brought in respect of the breach of the Petitioner's constitutional rights, a matter that could not have been handled in the lower court which lacked jurisdiction over constitutional matters. In her view therefore, the petition is not *res judicata* and the preliminary objection raised does not muster the threshold in **Mukisa Biscuits Manufacturing Company v West End Distributors (1969) E.A. 696** raising what she considers to be factual issues. Turning to distinguish the prayers in the previous suit, she argued that the prayers in this petition are declarations in respect of violation of the Petitioner's rights. She urged the court to dismiss the preliminary objection.

14. In a brief rejoinder Miss Maina stated that the question to be considered is whether the previous suit and this petition raise the same issues substantially raised and determined in the previous suit. She adverted once more to the similarity in the prayers in both matters. In her view, what the Petitioner has done is dress up the same facts with the cloak of constitutional issues.

15. The court has considered the pleadings herein and in the determined lower court suit as well as the submissions by the respective counsel on the preliminary objection. In addition, the court has considered the proceedings in the lower court case.

16. The principle or doctrine of *res judicata* is embedded in Section 7 of the Civil Procedure Act which states that:

17. This principle applies with equal force to ordinary suits and to constitutional matters. See **Silas Make Otuke v Attorney General and 3 Others [2013] e KLR Mombasa Petition No. 44 of 2013**. In that case, the 3-Judge bench observed that:

“Although the Constitutional principles for fair hearing under Article 50 (1), access to justice under Article 48, promotion and protection of the Bill of Rights under Articles 22, and enforcement of the Constitution under Article 258 would generally call for full inquiry into disputes that may be resolved by operation of law consistently with the rule of law, the principle of *res judicata* as a cardinal principle for the finality of litigation and for the prevention of abuse of the Court process must be in-built in any constitutional litigation that may be preferred for that purpose.

We agree with the Privy Council decision in Thomas v. The AG of Trinidad and Tobago (1991) LRC (Const) 1001, cited in E.T. v. Attorney General & Anor. [2012] eKLR, where the Board was “satisfied that the existence of a Constitutional remedy as that upon which the appellant relies does not affect the application of the principle of *res judicata*” and referred to a

decision of the Supreme Court of India; Daryao and others v The State of UP and Others (1961) 1 SCR 574, 582-3 where Gajendragkar J held that the principle of *res judicata* was applicable in cases under Article 32 of the Constitution of India - 'But, is the rule of *res judicata* merely a technical rule or is it based on high public policy? If the rule of *res judicata* itself embodies a principle of public policy which in turn is an essential part of the rule of law then the objection that the rule cannot be invoked where fundamental rights are in question may lose much of its validity. Now, the rule of *res judicata* as indicated in S. 11 of the Code of Civil Procedure has no doubt some technical aspects, for instance the rule of constructive *res judicata* may be said to be technical; but the basis on which the said rule rests is founded on considerations of public policy. It is in the interest of the public at large that a finality should attach to be binding decisions pronounced by Courts of competent jurisdiction, and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation. If these two principles form the foundation of the general rule of *res judicata* they cannot be treated as irrelevant or inadmissible even in dealing with fundamental rights in Petitions filed under Art. 32'. See also Charo Kazungu Matsere & 273 Ors. v Kencent Holdings Limited & Anor. Mombasa H.C Constitutional Petition 136 OF 2011, [2012] eKLR and Booth Irrigation v. Mombasa Water Products Ltd. (Booth Irrigation No. 1) Nairobi HC Misc. Appl. NO. 1052 of 2004.

Accordingly, we unhesitatingly find that the principle of *res judicata* is applicable to Constitutional litigation and its relevance is not affected by the substantial justice principle of Article 159 of the Constitution which overrides technicalities of procedure”.

See also Kiriinya Mwenda’s case (supra)

18. The court further stated that:

“Similarly, the learned authors of Mulla, Code of Civil Procedure, 18th Ed. 2012 at p. 293 have observed that the principle of *res judicata* as a judicial device for finality of court decisions is subject to the special circumstances of fraud, mistake or lack of jurisdiction – “The principle of finality or *res judicata* is a matter of public policy and is one of the pillars on which a judicial system is founded. Once a judgment becomes conclusive, the matters in issue covered thereby cannot be reopened unless fraud or mistake or lack of jurisdiction is cited to challenge it directly at a later stage. The principle is rooted to the rationale that issues decided may not be reopened and has little to do with the merit of the decision.”

19. The successful invocation of the doctrine of *res judicata* requires, firstly, that the same or substantially the same cause or issue be in dispute in both the present and concluded matter, and secondly that the dispute involves the same parties or parties litigating under the same title, and thirdly that the issue or cause has been finally determined by a court of competent jurisdiction. See **Henderson v Henderson (1843) Hare 00, 115.**

20. In the instant matter, I do not doubt that the present petition meets the first and second limb of the above requirements. The submission by the Petitioner to the contrary rings hollow even upon a cursory comparison of the pleadings in the Petition and in the lower court case. However, with regard to the 3rd limb, the position appears to be that the suit in lower cause was not determined on merits but was declared abated by the ruling delivered on 8th November 2016.

21. The Respondents, while emphasizing some of the so-called ‘ final findings’ in that ruling (relating to the contempt motion) have paid scant attention to the lower court’s decision regarding the declaration on the abatement of the suit. Indeed, none of the parties addressed the court directly on this score. The issues raised in the former suit were not determined finally on merits in the said ruling as the case had not been heard. The lower court’s findings with regard to the contempt motion cannot by any stretch of imagination be described as final determinations of the suit. Secondly, the effect of the finding that the suit had abated was that suit ceased to exist, and any interim orders issued thereunder automatically discharged. **Black’s Law Dictionary Tenth Edition** defines abatement *inter alia* as

“The suspension or defeat of a pending action for a reason unrelated to the merits of the claim.”

22. Section 8 of the Civil Procedure Act provides that:

“Where a Plaintiff is precluded by (the) rules from instituting a further suit in respect of a particular cause of action, he shall not be entitled to institute a suit in respect of that cause of action.”

23. The suit in the lower court was declared abated pursuant to the provisions of Order 5 Rule 1(6) of the Civil Procedure Rules. There is no provision in that Order or elsewhere in the Civil Procedure Rules precluding the filing of a further suit in respect of a suit rendered abated under Order 5 Rule 1 (6) of the Civil Procedure Rules. In juxtaposition, Order 24 rule 7(1) of the Civil Procedure Rules, for instance, expressly provides that where a suit abates or is dismissed under that Order (which deals with the death and bankruptcy of parties) no fresh suit may be brought on the same cause of action.

24. Thus, while it is true that the Petitioner herein did not appeal against the abatement of her suit in the lower court, it seems to me that subject to the Limitation of Actions Act, she could well have filed a fresh civil suit on the same cause of action.

25. The Petitioner elected instead to file a constitutional petition. The petition in my view raises substantially the same issues in the lower court suit, but in the circumstances of this case cannot be deflected through the invocation of the principle of *res judicata*. The preliminary objection is therefore without merit and is dismissed with costs to the Petitioner.

DELIVERED AND SIGNED AT KIAMBU THIS 13TH DAY OF JUNE 2019

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C. MEOLI

JUDGE

In the presence of:

Mr. Ruiru holding brief for Mr. Arusei for the Petitioner

Respondent – No appearance

Court Assistant – Kevin/Nancy