



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO.438B OF 2018

BONIFACE NYAMU.....PETITIONER

VERSUS

HON. MIKE SONKO MBUVI ALIAS MIKE SONKO.....RESPONDENT

JUDGMENT

1. The Petitioner through a petition brought pursuant to Articles 6,10,12,23,28,32,33,40,42,69,70,73 of the Constitution of Kenya 2010 dated 5th December 2018 prays for the following reliefs:-

A) A Declaration that the Respondent has engaged in different acts of gross misconduct that are insulting to the people of Nairobi and violated the obligations conferred to him under the Constitution which is against the constitutional rights of the people of Nairobi County and is therefore unfit to hold any public office paving way for fresh gubernatorial election in Nairobi county.

B) Any other relief that this Honourable Court may deem fit and just to grant in the interest of justice.

C) Costs of this petition.

2. The petitioner's petition is supported by the petitioner's supporting affidavit sworn on 5th December 2019 and further affidavit sworn on 11th June 2019 by the petitioner.

3. The petition is premised on various grounds *inter-alia*; that the County Government of Nairobi is not constitutionally constituted after the resignation of the former Deputy Governor and the subsequent refusal of the respondent to nominate another Deputy Governor; that the behaviour of the Respondent has demeaned the office of the Governor of Nairobi County; that the petitioner in support has enumerated several incidences of unbecoming behaviour of the Governor of Nairobi County. In his petition running from 1st May 2018 to 5th December in 2018 and urges, that the Respondent is a state officer who is not exercising his powers under the relevant enabling legislation or statutory instruments, and in blatant breach and/or in violation of the provisions of the constitution in his inactions.

4. The petitioner has given particulars of violations of the constitution and pointed, that the Respondent has breached Article 73; dealing with responsibility of leadership; has infringed Article 28 dealing with human dignity; has infringed freedom of conscience, religion, belief and opinion: Article 39 dealing with freedom of movement and freedom of expulsion; has infringed objects of devolution under Article 179 dealing with County Executive Committees and has infringed protection of public officers under Article 236 of the constitution.

Respondent's Case

5. The Respondent is opposed to the petition and relies on the Replying affidavit dated 8th March 2019. The Respondent contend the petition is barred by the Doctrine of Res Judicata, the issue herein having been fully canvassed in the constitutional court (Hon. Lady Justice Okwany) in Nairobi constitutional petition No. 200 of 2018 (John Migwi Waici vs Mike Sonko Mbuvi (2019) eKLR.

Analysis and determination

6. I have very carefully considered the petition, affidavit in support and annexures; the Replying affidavit, the Notice of Preliminary Objection; the Counsel rival written and oral submissions, and from the above the issues arising thereto for consideration are as follows:-

a) Whether this court has jurisdiction to hear and determine this petition for violation of Doctrine of exhaustion?

b) Whether the petition is barred by Doctrine of Res Judicata by virtue of Nairobi Constitutional Petition No. 200 of 2018 John Migwi Waigi vs Mike Sonko Mbuvi?

A) Whether this court has jurisdiction to hear and determine this petition for violation of Doctrine of exhaustion?

7. The Respondent through his Replying affidavit dated 8th March 2019 under paragraph 6 contends, that this court is divested of jurisdiction to make a finding on Respondent's suitability to hold the office of Nairobi City County Governor and as such the petitioner's plea in the petition would be a transgression of the constitution.

8. The petitioner submission is, that this court is clothed with the requisite jurisdiction to hear and determine this petition under **Article 165(3) of the constitution. Article 165(3) (a) – (e)** provides:-

"3) Subject to clause (5), the High Court shall have—

(a) Unlimited original jurisdiction in criminal and civil matters;

(b) Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) Jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(d) Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of —

(i) The question whether any law is inconsistent with or in contravention of this Constitution;

(ii) The question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) Any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) A question relating to conflict of laws under Article 191; and

(e) Any other jurisdiction, original or appellate, conferred on it by legislation."

9. The petitioner contends that this petition falls under all the categories listed under Article 165(3) of the constitution. That the petitioner intends to protect right of the residents of Nairobi County; seeks an interpretation of Article 176 of the constitution as read together with Article 179 of the Constitution of Kenya 2010 and further seeks to determine what remedy voters have in case upon being voted; a leader becomes unfit to hold public office. Further, the petition seeks to protect the supremacy of the Constitution of Kenya, a role clearly stipulated is to be undertaken by the High Court of Kenya.

10. In the instant petition, the petitioner has pleaded generalized matters and has made statements of various alleged constitutional violations against Respondent in the petition. The petitioner under paragraph IV in the last page of the petition in the penultimate paragraph of the petition stated:-

"In totality, the aforementioned acts against the Petitioner and the people of Nairobi by the Respondent are unfair, unreasonable, irrational, illegal and decisions have been taken or made in abuse of power and mala fides in contravention of Article 47 of the constitution and sections 4, 5 and 7 of the Fair Administrative Action Act."

11. The Respondent has in his Replying affidavit responded on the alleged violations of chapter 6 of the Constitution of Kenya 2010. Chapter 6 of the constitution under **Article 73(1) (a) (b) of the constitution** provides:-

"1) Authority assigned to a State officer—

(a) Is a public trust to be exercised in a manner that—

(i) Is consistent with the purposes and objects of this Constitution;

(ii) Demonstrates respect for the people;

(iii) Brings honour to the nation and dignity to the office; and

(iv) Promotes public confidence in the integrity of the office; and

(b) Vests in the State officer the responsibility to serve the people, rather than the power to rule them."

12. The petitioner's petition is premised on the Respondent's alleged violations or infringements of chapter 6 of the Constitution of Kenya touching on leadership and integrity. The constitutional and statutory mandate to exhaustively investigate and prosecute a violator is vested in the Ethics and Anti-Corruption Commission.

13. The Respondent in his Replying affidavit dated 8th March 2019 under paragraph 2(g) has specifically stated that:-

"The Petitioner has NOT exhausted the remedies availed by the Constitution and the Leadership & Integrity Act for the resolution of such of the claims he makes before the Court, having breached the doctrine of exhaustion of remedies prior to invocation of the High Court Constitutional jurisdiction."

14. The petitioner has not in his further affidavit or any other affidavit rebutted the Respondent's objection yet the law is clear that where there is a laid out procedure to be followed in resolving a dispute, that procedure must be exhausted prior to invoking the court's jurisdiction.

15. Under Article 79 of the constitution, the legislation to establish the Ethics and Anti-corruption Commission is conferred upon Parliament to enact legislation incepting and circumscribing the mandate of the Ethics and Anti-corruption Commission. The operative state; **(ACECA)** mandates the **EACC** to investigate and recommend to Director of Public Prosecution (**DPP**) the prosecution of any acts of corruption or violation of codes of ethics or other matters prescribed under the Act or any other law enacted pursuant to Chapter six of the constitution. Further pursuant to provisions of section 11(1) (d) of **EACC** Act, upon concluding its investigation, the **EACC** reports to the **DPP**, who examines the report, evidence gathered and makes an independent decision on whether to prosecute or not. This is expressly conceded to by the petitioner in paragraph 38 of his undated supplementary affidavit filed on 12th June 2019. I find that the petitioner cannot claim to be ignorant of the mandatory procedure and mandate of **EACC** on matters of Ethics and Integrity in leadership, and even if ignorant, ignorance of law is no defence. In this matter no evidence has been produced to demonstrate that the petitioner ever lodged a single complaint with **EACC** on the allegations he has levelled against the Respondent in this petition before court to **EACC** and was ignored.

16. The issues of integrity could be overwhelming the Respondent but it is not for this court to determine whether issues are well founded. The forum herein is not appropriate. I am satisfied that the Petitioner has access to the appropriate alternate forums.

17. Where the Constitution has placed faith on various institutions to undertake certain mandate and functions, this court must also oblige and extend that faith to those institutions or organs and support them in their mandate. I find that I should do what is required of this court by declining to entertain the instant petition in its entirety.

18. I am aware, that in this petition the petitioner claims that under Article 47 of the constitution his rights have been breached. However it is clear under section 9(2) of the Fair Administrative Actions Act, it is provided that the High Court or a subordinate court under subsection (1) "shall not review on administrative action or decision under the Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. **Section 9(3) of the said Act** provides that:-

"The High Court or a subordinate court, shall, if it is not satisfied that the remedies referred to in sub-section (2) have been exhausted, direct that an applicant shall first exhaust such remedy before instituting proceedings under sub-section (1)."

In this petition I am not satisfied, that the petitioner had undertaken any steps nor has he demonstrated he had taken any efforts to meet the above set threshold or at all.

19. In **Krystalline Salt Limited vs Kenya Revenue Authority [2019] eKLR**, the Hon. Mr. Justice Mativo held on the primacy of the doctrine of exhaustion thus:-

"The principle running through decided cases is that where there is an alternative remedy, or where Parliament has provided a statutory appeal process, it is only in exceptional circumstances that an order for Judicial Review would be granted. In determining whether an exception should be made, and Judicial Review granted, it is necessary for the court to look carefully at the suitability of the appeal mechanism, in the context of the particular case, and ask itself what, in the context of the internal appeal mechanism is the real issue to be determined, and whether the appeal mechanism is suitable to determine it."

20. It is my finding that in myriads decisions of the courts have made it clear that where there is an alternative remedy or where the statute provides a statutory process or procedure to be followed; that procedure should be followed before a party opts to institute a matter in court in complete defiance of the clear statutory provision. It should be understood, that where an obligation is created by a statute and a specific remedy is provided by that statute, the persons seeking the remedy are deprived of any other means of enforcement. In the case of **Republic vs Public Procurement Administrative Review Board & another ex-parte Selex Sistemi Intergrati Nairobi HCMA No. 1260 of 2007 (2008) KLR 728**, it was stated ouster clauses are effective as long as they are not unconstitutional, consistent with the main objectives of the Act and pass the test of reasonableness and proportionality.

B) Whether the petition is barred by Doctrine of Res Judicata by virtue of Nairobi Constitutional Petition No. 200 of 2018 John Migwi Waigi vs. Mike Sonko Mbuvi?

21. The petitioner raises an issue as regards, whether Nairobi County Government is legally constituted and as per Article 179 and 176 of the Constitution of Kenya. The Respondent contention is that this matter is entirely on all four *res judicata* vide the decision of Hon. Lady Justice **Okwany as rendered in John Waigi Migwi vs Governor Mike Mbuvi Sonko & another; Jubilee party (Interested party) (2019) eKLR**; which decision was made on 30th April 2019 during the pendency of these proceedings and that no appeal has been lodged

against the said decision, therefore the matter is urged by the Respondent, that it has been decided with finality and on merit.

22. The thrust of the **petition No. 200 of 2018 John Waigi Migwi vs H.E. Governor Mike Mbuvi Sonko & another; Jubilee Party (Interested party) (2019) eKLR** is well set out under paragraphs 14 and 15 of the judgment being as follows:-

"It is the petitioner's case that the Nairobi County Executive Committee is illegally constituted as the Deputy Governor is a member of the committee hence the absence of a substantive holder of that office implies that it is not properly constituted under Article 179(2) of the Constitution, and that by extension, the decisions of the said Executive Committee are illegal and all subsequent actions flowing from such decisions ought to be quashed.

According to the petitioner the 1st Respondent's deliberate delay in nominating a qualified person to the office of the Deputy Governor exposes the County to further disruption in service delivery in the event that a vacancy occurs in the Office of the Governor."

23. The issue for consideration is whether the same issue is pleaded in the instant petition. The petitioner's petition in the last un-paginated page under paragraph 2, it is the same issue that was pleaded in the previous case which is pleaded in this petition. In the judgment of **John Waigi Migwi vs Governor Mike Mbuvi Sonko & another, Jubilee Party (Interested party) supra**, at paragraphs 40 and 41, Hon. Lady Justice Okwany while dismissing the petition held:-

"40. My finding is that while Article 179(1) and (2) provides for the composition of the County Executive Committee, nowhere in the said Article is it stated that the absence of the Governor of his Deputy renders the decisions of the said committee null and void. In any event, the petitioner has not demonstrated with certainty the specific decisions of the Nairobi County Executive Committee to be quashed through an order of certiorari."

24. The same issues are pleaded in the present petition and it would be wrong and contrary to the law to allow the same issues to be re-litigated again.

25. **Section 7 of the Evidence Act** provides:-

"Facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts or facts in issue, or which constitute the state of things under which they happened or which afforded an opportunity for their occurrence or transaction are relevant."

From the above I find that section 7 of the Civil Procedure Act, espouses the doctrine of Res Judicata as a principle of law of general application as understood within the meaning of Article 10(2) of the constitution. The Court of Appeal held in the case of **John Florence Maritime Services Limited & another vs Cabinet Secretary for Transport and Infrastructure & 3 others (2015) eKLR**, that res judicata applies to constitutional petitions and that the doctrine of res judicata is a bar to subsequent proceedings involving proceedings involving same issue as had been finally and conclusively decided by a competent court in a prior suit between the same parties or their representatives. The Court of Appeal went on to state as follows:-

"The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon.

It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably.

In a nutshell, res judicata being a fundamental principle of law may be raised as a valid defence. It is a doctrine of general application and it matters not whether the proceedings in which it is raised are constitutional in nature. The general consensus therefore remains that res judicata being a fundamental principle of law that relates to the jurisdiction of the court, may be raised as a valid defence to a constitutional claim even on the basis of the court's inherent power to prevent abuse of process under Rule 3(8) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

On the whole, it is recognized that its scope may permeate broad aspects of civil law and practice. We accordingly do not accept the proposition that Constitution-based litigation cannot be subjected to the doctrine of res judicata."

26. In the instant petition the issues in dispute are clearly substantially the same as in the cited decided previous case. The respondent in the two suits are the same, being His Excellency the Governor of Nairobi City County, and the petitioner, herein is litigating under the same title as the claimant in **John Waigi Migwi vs Governor Mike Mbuvi Sonko & another, Jubilee Party (supra)**, as a Nairobi County resident voter. The earlier claim having been determined by a competent court, I find the ingredients of res judicata are fully satisfied in the Respondents objection. I find that the Respondent's preliminary objection dated 7th October 2019 on the petition being barred by the doctrine of *Res judicata*, to have been preferred as the issues raised in the instant petition were fully canvassed in Hc. Petition No. 200 of 2018 and fully determined by a competent court. The issues were substantially the same as in the present petition. The Respondent in the two petitions is the same and the petitioner is litigating under the same title as the claimant in the previous petition which has fully been determined by a competent court.

27. In view of the foregoing I find that the court has no jurisdiction to hear and determine this petition due to the petitioner's violation of Doctrine of exhaustion and want of jurisdiction of this court to try and determine this petition.

28. The petition is a public interest matter and I direct each party to bear its own costs.

Dated, signed and delivered at Nairobi this 5th day of December, 2019.

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J .A. MAKAU

JUDGE