



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

(CORAM: CHERERE-J)

PETITION No. 11 of 2018

IN THE MATTER OF IN THE MATTER OF ARTICLES 20, 22(1) (3) (a), 23(1),

28, 35(1) (b), 47(1), 48, 165(2) (b) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACT NO. 4 OF 2015 AND

SECTION 26 OF THE LIMITATION OF ACTIONS ACT

AND

IN THE MATTER OF SECTION 3, 3A OF THE CIVIL PROCEDURE ACT CAP 21

LAWS OF KENYA AND ALL ENABLING PROVISIONS OF THE LAW

BETWEEN

DANIEL OMARE BARONGO.....PETITIONER

AND

CHEMELIL SUGAR COMPANY LIMITED.....RESPONDENT

JUDGMENT

Background

1. Sometimes in 2015, the petitioner filed NYANDO SPMCC 36 OF 2015 against the respondent seeking the following orders:

- i. Kshs. 36,000/-
- ii. General damages
- iii. Costs of the suit

2. In a judgment dated 17th July, 2016, the petitioner's claim was dismissed with costs to the respondent.

3. Being dissatisfied with the lower court judgment, the petitioner filed KISUMU HIGH COURT CIVIL APPEAL NO. 61 OF 2016. In a judgment dated 3rd August, 2017, the petitioner's appeal was dismissed with costs to the respondent.

Petitioners' Case

4. The petitioner's main grievance is that he lost the two cases mentioned above due to the respondent's failure to release to him some vital documents. He now seeks the following orders:

i. Availability form and cane availability form and authority to harvest cane by the respondent is irregular and denies the petitioner his fundamental rights

ii. Declaration that the respondent provides the petitioner documents in (i) above

iii. Costs of the petition

Respondents' case

5. The respondent's case is contained in a response to petition filed on 4th September, 2018. The respondent contends that the subject matter in this petition is *res judicata* the same having been determined in **NYANDO SPMCC 36 OF 2015** and **KISUMU HIGH COURT CIVIL APPEAL NO. 61 OF 2016**.

Analysis and Determination

6. I have considered the Petition and the Response to Petition annexures thereto as well as oral submissions made for both parties.

7. Before delving into the issue of merits, I shall first deal with the issue of whether or not this petition is *res judicata*.

8. Section 7 of the **Civil Procedure Act, Cap 21** states as follows:-

“No court shall try any suit or issue in which the matter directly and substantially in issue (emphasis ours) has been directly and substantially in issue in a former suit (emphasis ours) between the same parties(emphasis ours) or between parties under whom they or any of them claim (emphasis ours), litigating under the same title (emphasis ours), in a court competent to try such subsequent suit(emphasis ours) or the suit in which such issue has been subsequently raised (emphasis ours) and has been heard and finally decided by such court”.

9. I appreciate the reverence with which the said doctrine is held in legal practice and pay due deference thereto to the case of **HOYSTEAD AND OTHERS V TAXATION COMMISSIONER, (1925) ALLER REP 56** at 62 where it was stated that:-

“The admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started with a view of obtaining another judgment upon a different assumption of fact;..... Parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the court of the legal result either of the construction of the documents or the weight of certain circumstances. If this was permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted....”

10. I am equally persuaded by the words of the Court of Appeal of Tanzania in **LOTTA VS TANAKI & OTHERS [2003] 2 EA 556 (CAT)** where the Court held as follows:-

*“It's object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgment between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit”. Further that “a person does not have to be formally enjoined in a suit, but he will be deemed to claim under the person litigating on the basis of a common interest in the subject matter of the suit”. See also **E.T VS ATTORNEY GENERAL & ANOTHER (2012) eKLR**.*

11. The word 'suit' is defined in Section 2 of Civil Procedure Act, Cap 21, as: - ***“All civil proceedings commenced in any manner prescribed”***. Bearing that definition in mind, I find and hold that the proceedings before **NYANDO SPMCC 36 OF 2015** and **KISUMU HIGH COURT CIVIL APPEAL NO. 61 OF 2016** are suits.

12. The next question is what was directly and substantially in issue in the said suits is the same subject matter in this petition. The record reveals that the issue in dispute before the lower court and this involved a breach of contract allegedly between the petitioner and the respondent for cane harvesting. The Petitioner had a right to ask for whatever documents he wished to have from the respondent in those two cases but he did not. From the foregoing, I am satisfied that that the issue in this Petition has already been determined and is therefore *res judicata*.

13. The final issue is whether the doctrine of *res judicata* applies and can be raised as a bar to constitutional petitions. The court of Appeal in **John Florence Maritime Services Limited & Another versus Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR** stated as follows:-

*“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)** (emphasis ours) 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. However, we must hasten to add that it should only be invoked in constitutional litigation in the clearest of the cases. It must be sparingly invoked and the reasons are obvious as rights keep on evolving, mutating, and assuming multifaceted dimensions”.

14. The principle was reiterated by the same court in *John Njue Nyaga v Attorney General & 6 others [2016] eKLR* when it dismissed a Constitutional Petition on the ground that it was *res judicata ab initio*.

Disposition

15. Litigation must come to an end. The upshot of my analysis is that this Petition is devoid of merit and it is hereby dismissed with costs to the respondent.

DATED AND DELIVERED THIS 6TH DAY OF DECEMBER 2018

T.W. CHERERE

JUDGE

Delivered in open court in the presence of-

Court Assistant - Felix

Petitioner - Present in person

For the Respondent - Mr Orieyo