



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION

CONSTITUTIONAL PETITION NO. 41 OF 2016

**IN THE MATTER OF: ARTICLE 10, 47, 73, 79,157,201,232,250 (1) AND 252 OF THE
CONSTITUTION OF KENYA 2010**

-AND-

IN THE MATTER OF: KENYA RED CROSS SOCIETY ACT

IN THE MATTER OF: THE ETHICS AND ANTI-CORRUPTION COMMISSION ACT

IN THE MATTER OF: ANTI-CORRUPTION AND ECONOMIC

CRIMES ACT

-BETWEEN-

STANLEY KIPLANG'AT CHERUIYOT.....1ST PETITIONER

ROSE CHEPKIRUI KOSITANY.....2ND PETITIONER

CHRIS KIPKOECH MAGERER.....3RD PETITIONER

JOHN CHERUIYOT RONO.....4TH PETITIONER

KIPNG'ETICH SAMMY KIRUI.....5TH PETITIONER

BENARD KIPNG'ENO CHIRCHIR.....6TH PETITIONER

PETER KIPNG'ETICH ROTICH.....7TH PETITIONER

CORAZON CHEPKOECH.....8TH PETITIONER

PHILIP CHERUIYOT.....9TH PETITIONER

JOEL KIPRUTO ARAP LANG'AT.....10TH PETITIONER

BENARD KIPKORIR KOSGEI.....11TH PETITIONER

MICHAEL KIPLANG'AT CHERUIY.....12TH PETITIONER

CHIRCHIR KIPKOECH EZEKIEL.....13TH PETITIONER

-VERSUS-

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION...2ND RESPONDENT

R U L I N G

1. Before the Court is the Petition filed by the Petitioners on 15th December, 2016 seeking orders as follows:

a) A declaration that within the intendment of Article 10 of the Constitution the Respondents are bound to discharge their public duties in line with the rule of law.

b) A declaration that within the intendment of Article 47(1) of the Constitution, the Respondents are bound to provide administrative action that is lawful, and procedurally fair.

c) A declaration that within the intendment of Article 47(1) of the Constitution, the Respondents cannot take administrative actions with an effect on a person's rights and freedoms without giving valid reasons for the same.

d) A declaration that within the intendment of Article 79 and resonating Article 250(1) of the Constitution, the 2nd Respondent cannot investigate and make recommendations for prosecution in the absence of at least three Commissioners in office.

e) A declaration that within the intendment of Article 79 and resonating Article 250(1) and 157(11) of the Constitution, the 1st Respondent cannot prefer charges on anyone based on a Report of the 2nd Respondent made in the absence of at least three Commissioners in office.

f) An order of Judicial Review in the nature of Certiorari do issue to bring into the honorable court for purposes of quashing the Report of the 2nd Respondent recommending prosecution of the Petitioners.

g) An order of Judicial Review in the nature of Certiorari do issue to bring into the honorable court for purposes of quashing the charges preferred by the 1st Respondent as against the Petitioners.

2. Filed contemporaneously with the petition is an application of even date seeking conservatory orders, to stay the proceedings in **Kericho Anti-Corruption Court Criminal case No. 1 of 2015** and **Nyamira Cr. Case No. 776 of 2016**, pending the hearing and determination of the Petition.

3. A Preliminary Objection (hereinafter P/O) dated 23rd January, 2017 has been raised with regard to the application by the 1st Respondent, the Director of Public Prosecutions (hereinafter the DPP). It raises the following issues:

a) THAT the issues raised in the Petition have directly and substantially been determined by the High Court of Kenya at Bomet in **Constitutional Petition No.7 of 2015 Stanley Kiplang'at Cheruiyot & Others vs DPP & Another**.

b) THAT the matter in issue and orders sought in the Petition have been heard on merit and finally decided by the court in **Bomet High Court Constitutional Petition No.7 of 2015 Stanley**

Kiplang’at Cheruiyot & Others vs DPP & Another and the same was dismissed.

c) **THAT** the institution of this Petition between the same parties on the same subject matter is an abuse of the court process

d) **THAT** the Application/ Petition is therefore *Res Judicata*

e) **THAT** the Petition be struck out in limine.

Applicant/Respondent’s Case

4. Learned State Counsel Mr. David Ndege filed submission on behalf of the DPP on 7th February, 2017 upon which he relied during the hearing on even date. He urged that the institution of the current petition is between the same parties and on the same subject matter as the earlier petition and is thus an abuse of the court process.

5. Counsel invoked the doctrine of *Res Judicata* which he urged is based on two principles. First, that there must be an end to litigation and secondly, that a party should not be vexed twice over the same cause. He cited the decision in **Omondi vs National Bank of Kenya Ltd & Others [2001] EA 177**. He also submitted on the five conditions contemplated in **Section 7 of the Civil Procedure Act** which, when co-existent, will bar a subsequent suit and stated that those conditions are available in the present case, and are a bar to this court entertaining the matter.

6. Counsel argued that the issues raised and the orders sought in the **Bomet case** were determined by the High Court. That it was therefore not open to the Petitioners to re-open them by fresh litigation, regardless of the Petitioners’ attempt at reframing issues in order to persuade the court to issue orders that were declined by a court of similar jurisdiction. He urged the court to remain vigilant and guard against litigants who ingeniously try to avoid the application of *res judicata*. He cited the decision in **E.T v Attorney General [2012] eKLR**.

7. Counsel contended that the Petitioners are reintroducing the same matters in the current Petition in a different way and expression, by invoking different articles of the Constitution which they had liberty to raise in the earlier petition. He argued that the Petition is *res judicata* as the report that the Petitioners are relying on in the current Petition, is the same Report on which they relied in the earlier Petition and which they claimed was deeply flawed and misguided. He referred the court to the holding in **Julia Odhiambo Ogina vs Andrew Horace Omondi ELC No. 515 of 2013** to compound his arguments.

8. Counsel submitted that the Petitioners and Respondents in the current Petition were the same parties in the **Bomet case** and that the core of the subject matter of the Petitioners’ case is largely the issue of investigation and prosecution of the Petitioners. That the additional issue regarding the constitution of the 2nd Respondent the Ethics and Anti-Corruption Commission (hereinafter the EACC) at the time of the investigation and the decision to charge the Petitioners, was settled in the case of **Michael Sistu Mwaura Kamau & 12 Others vs Ethics and Anti-Corruption Commission & 4 Others [2016] eKLR**.

9. Counsel urged that the **Michael Kamau** case relied on by the Petitioners in regard to the constitution of the EACC did not prohibit the DPP from prosecuting anyone and had held that the resignation of members of the commissioners of the EACC did not render the Commission non-existent. Counsel asserted that the constitution of the EACC was the same as before the Petitioners filed the first Petition and for the Petitioners’ to raise it now is a mischievous afterthought as it was well within their power to raise it in the earlier petition.

10. Counsel argued that the Application as well as the Petition filed before the court are frivolous, vexatious and an utter abuse of the court process, as the matter was finally determined on its merit by a court of competent jurisdiction. He urged the court to strike out both the application and the Petition with costs to the Respondents as the Petitioners have only framed the issues in the Petition differently, but are seeking the same orders against the same parties.

11. In her oral submissions Learned State Counsel Ms. Regina Jemutai appearing for the EACC, added her voice to that of Mr. Ndege to urge that the Petition was *res judicata* as it was exactly the same as the earlier petition. She stated that both petitions seek to stop the prosecution of the petitioners and that the elements required to be present for *res judicata* to apply as stated in **Uhuru Highway Development Ltd v Central Bank [1996] LLR 2126 (CAK)**, are available in the current case.

12. Ms. Jemutai contended that the only new issue that has been introduced in the current case is the constitution of the EACC, which in any case is not new as it has been settled in other matters and specifically in the **Michael Kamau** case, which the Petitioners have heavily relied upon. She submitted that the investigations took place before the Petitioners instituted their first suit on 8th November, 2015, four months after the Commissioners resigned from EACC on 12th May 2015, yet they did not raise the issue at the time.

13. Counsel urged that the Petitioners should have brought the case wholesomely before the court in the first place, instead of attempting to remedy a part of the case which they omitted in the first instance. She thus prayed that the Application be dismissed with costs to the Respondents.

The Respondent/Petitioners' Case

14. The Petitioners opposed the P/O vide the Supplementary Affidavit sworn by the 1st Petitioner on 1st February, 2017 on their behalf. The 1st Petitioner argued that the current suit is not *res judicata* as it does not raise issues directly and substantially determined in the **Bomet case**, formerly **Nairobi Constitutional Petition No. 510 of 2015**.

15. He deposed that the issue raised during the **Bomet Case** was whether the Petitioners, as county officials could be legally charged for conducting what they deemed to be a non-crime. Further that the 2nd Respondent failed to consider all relevant evidence, by refusing to record statements from external auditors, or review their report which exonerated the Petitioners of any culpability, in the alleged loss of monies through the procurement process. This issue, he contended, has not been raised in the current Petition.

16. The 1st Petitioner deposes also that the issue underpinning the current Petition, which is the composition of the EACC at the time of investigation and submission of the Report recommending the Petitioners' prosecution, was not raised in the **Bomet Case** as the Petitioners were not aware of the implications and only learnt of the same after the fact, in light of other cases filed regarding the same issue.

17. The 1st Petitioner argued that the fact that both the previous and current Petitions challenge the EACC report and the charges preferred by the DPP is not a bar to the Petitioners' raising of a new cause of action, neither can the new cause of action be denied on the premise that the two Petitions are between the same parties.

18. He asserted that the Petitioners will suffer prejudice should their prayers not be granted, as the absence of stay will occasion the proceeding of their criminal cases to judgment and possible conviction before the Petition is heard. The 1st Petitioner opined that the constitutional question whether the EACC was prudent in conducting investigations and making recommendations, for prosecution in the absence of a quorum of commissioners, is not an evidentiary one to be determined by a subordinate Court. The matter requires interpretation by the High Court first before such proceedings can be initiated.

19. The 1st Petitioner submitted that the Petitioners have sought separate orders for quashing the EACC report and the charges preferred against them by the DPP. He urged that the rights of private citizens facing criminal trials and possible withdrawal of their freedom cannot be trumped by the safeguarding of public interest.

20. At the hearing on 7th February, 2017 Learned Counsel Mrs. Njeri Kamau held brief for Learned Counsel Mr. Manyonge Wanyama for the Petitioner and restated what the 1st Petitioner had deposed, adding that the elements necessary for the doctrine of *res judicata* to be invoked are absent in the current suit. She emphasized that the substantial issue in contention is the composition of the EACC at the time of making the report and the recommendation made to the DPP for prosecution of the Petitioners.

21. Counsel urged that since the current petition did not raise the question of illegality of the investigation by the EACC, the Respondents' Counsels' submission that the current Petition is *res judicata* was incorrect. She urged the court to stay the proceedings in the criminal cases until the current Petition is heard and determined as their continuance would occasion prejudice to the Petitioners. Further that the court would be fulfilling its Constitutional mandate under **Article 165** of the **Constitution** by doing so.

Issues for Determination

22. From the foregoing respective parties' positions, the emerging issue for determination is whether the doctrine of *res judicata* applies to the petition currently before the court, so as to sustain the P/O and warrant the dismissal of the suit.

Analysis and Determination

23. A Preliminary Objection was defined in the case of **Mukisa Biscuit Company – vs- Westend Distributors Limited (1969) EA 696 at page 701** thus;

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and occasion confusion of the issues. This improper practice should stop”.

I have therefore considered the rival arguments to establish whether what the DPP has raised pure points of law, capable of sustaining the Preliminary Objection, and extinguishing the petition.

24. As regards the doctrine of *res judicata*, **Section 7** of the **Civil Procedure Act** provides as follows:

“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.”

I shall therefore consider the arguments on both sides to establish whether the conditions set out in Section 7 obtain in the petition before me.

25. For the purpose of **section 7** the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court. The matter referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other. Any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

26. Section 7 also provides that any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused. Lastly, under the said section, where persons litigate bona fide in respect of a public right, or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

27. In sum, the test in determining whether a matter is *res judicata* as provided under **section 7** is therefore as set out here under:

- i) The matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit;
- ii) The former suit must have been between the same parties or privies claiming under them litigating under the same title.
- iii) The court which decided the former suit must have been competent to try the subsequent suit;
- iv) The matter in issue must have been heard and finally decided in the former suit.

28. Akiwumi, Tunoi and Shah JJA in the case of **Uhuru Highway Development vs Central Bank [1996] LLR CAK 2126** summarized the test in *res judicata* as follows:

- (i) There must be a previous suit in which the matter was in issue;
- (ii) The parties must be the same or litigating under the same title;
- (iii) There must be a competent court which heard the matter in issue;
- (iv) The issue must have been raised once again in a fresh suit;

29. From the record it is not in dispute that the parties in the **Bomet case** and the current petition are the same, or that the court which decided the former suit being the High Court at Bomet, was competent to try the subsequent suit. It is also not in dispute that the subject matter of the current Petition is exactly the same as in the earlier petition.

30. It is observed that the specific orders that the Petitioners are inviting the court to grant in this suit, are the same as in the earlier suit, to wit; that the court do quash the charges preferred against the Petitioners by the DPP, together with the EACC report that formed the basis of those charges. The criminal cases whose proceedings the court has been called upon to stay and subsequently quash being **Kericho Anti-Corruption Court Criminal case No. 1 of 2015** and **Nyamira Cr. Case No. 776 of 2016** are also the same in the two suits.

31. It has been deposed that the issue underpinning the current Petition, which is the composition of the EACC at the time of investigation and submission of the Report recommending the Petitioners' prosecution, was not raised in the **Bomet Case** as the Petitioners were not aware of the implications and only learnt of the same after the fact, in light of other cases filed.

32. Richard Kuloba in his book, *Judicial Hints on Civil Procedure, 2nd Edition*, states that:

“The plea of res judicata applies not only to points upon which the first Court was actually required to adjudicate but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time. The subject matter in the subsequent suit must be covered by the previous suit for res judicata to apply”

33. Madan, Wambuzi and Law JJA in the case of **Mburu Kinyua vs Gachini Tuti [1978] KLR 69-82 pg 71-73** the court rendered itself thus on the question of *res judicata*:

“... where a given matter becomes the subject of litigation in, and adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of the matter which might have been brought

forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, in advertence or even accident, omitted part of their case.

The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.”

34. Wigram V.C in **Henderson v Henderson (1843) 67 ER 313** summarized *res judicata* as follows:

“...where a given matter becomes the subject of litigation in, and adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies. Except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.”

35. The principle of *Res judicata*, or claims preclusion, prevents the re-litigation of a claim or cause of action that has been finally adjudicated, as well as related matters that, with the use of diligence, should have been litigated in the prior suit. A subsequent suit will be barred if it arises out of the same subject matter of a previous suit and which through the exercise of diligence, could have been litigated in a prior suit. See **Barr v Resolution trust Corp. 837 S.W. 2d 627 (1992)**.

36. From the foregoing, jurisprudence suit is *res judicata* if it is brought to court to remedy failure in a first suit, which was dismissed due to an inadvertent omission of part of that case. A litigant cannot file another suit to remedy failure of a first suit which was dismissed for lack of merit.

37. It is therefore inconsequential that the Petitioners have framed their grounds for determination differently, by introducing the issue of the constitution of the EACC. The reliefs sought in the current petition and those sought in the **Bomet case** are identical and with regard to the same issues as stated above. The matter directly and substantially in issue in the current suit was directly and substantially in issue in the **Bomet case**, in which it was heard and finally decided.

38. The Petitioners cannot avail themselves of the defence of ignorance of the implication of the constitution of the EACC upon their case, to have a second bite at the cherry and reintroduce a suit which was properly heard and finally determined on merit, by a court of competent jurisdiction. The issue should have been canvassed in the previous case instead of instituting the petition afresh. Equity aids the vigilant and not the indolent.

39. In sum, I am satisfied from the foregoing that the Preliminary Objection filed on 23rd January, 2017 falls on all fours with **Section 7 Civil Procedure Act** and the existing jurisprudence. In the premise the Preliminary Objection is sustained.

SIGNED DATED and DELIVERED in open court this 1st day of **March, 2017**

L. A. ACHODE

JUDGE