



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION. NO. 391 OF 2015
JOSEPH NJUGUNA & 28 OTHERS..... PETITIONERS
VERSUS
GEORGE GITAU T/A THE EMMAUS SCHOOL.....1ST RESPONDENT
KENYA NATIONAL EXAMINATION COUNCIL.....2ND RESPONDENT
RULING

Introduction

1. The 1st Respondent's grounds of opposition dated 16th September 2015 and filed herein on 17th September 2015 raise a pertinent question as to whether the doctrine of *sub judice* as encapsulated under Section 6 of the Civil Procedure Act (Cap 21), applies to Constitutional Petitions as well.
2. The relevant grounds state as follows:-
 - i. That the matter is *sub judice* and an abuse of court process in view of a substantially similar matter that is pending before the Chief Magistrates Court at Thika being Civil Suit Number 982 of 2014.
 - ii. The Petitioners enjoy similar orders to those being sought in the instant suit which orders were granted by consent in Civil Suit Number 982 of 2014 at the Thika Chief Magistrate's Court.
3. It is on the basis of the said grounds that the 1st Respondent seeks that this court strikes out the Petition. The 1st Respondent until recently operated an institution of basic education known as Emmaus School ('the school').

Background

4. The Petition herein was commenced on 16th September 2015. Alongside the Petition, the Petitioner also filed an application pursuant to Article 23(3) (b) & (c) of the Constitution. The application sought conservatory orders and in particular a mandatory order for the re-opening of the school, hitherto operated and managed by the 1st Respondent. The Petitioner also sought orders as against the 1st Respondent for the provision of all amenities appurtenant to a school in

operation.

5. The Petition was pegged on the grounds that the 1st Respondent closed the school prior to notifying the Petitioners. The Petitioners, who commenced these proceedings on behalf of several minors, also complained that in increasing the school fees arbitrarily to levels unaffordable by the minors and their parents and also in closing the school without any notice, the 1st Respondent was not only in breach of the various provisions of the Basic Education Act (No. 14 of 2013) but also violated the minors constitutional rights to education, fair administrative action and the right to be protected against psychological torture.

The Objection *in limine* and the response

6. The gist of the objection is that the parties have been involved in similar litigation previously. An order, by the consent of the parties, was recorded for the continued operation of the school so long as the Petitioners and other students continued to pay school fees. The litigation is stated to be Civil suit No. 982 of 2014 filed before the Chief Magistrates Court at Thika. A copy of the consent recorded on 2nd February 2015 has been availed to the court.
7. The Petitioners deny that the suit before the Magistrate's court is similar in any way to the instant petition. The Petitioner also states that not only are the Plaintiffs in the earlier suit different from the Petitioners but also the defendant- respondent in the earlier suit is non-existent.
8. The Petitioners also state that the reliefs sought are markedly different.
9. The Petitioners' response is contained in a Replying Affidavit filed by the Petitioners' authorized representative Joseph Njuguna on 23rd September 2015.

The Arguments

10. On behalf of the 1st Respondent, Mr. Chiuri contended that the suit filed before the Magistrate's court is markedly similar to the instant Petition. Counsel also stated that the claim was similar or substantially similar as did the reliefs sought as well as the parties to the two legal proceedings. Counsel invited the court to invoke the provisions of Section 6 of the Civil Procedure Act and stay or strike out the instant Petition for being an abuse of the process.
11. Mr. Chege Kamau for the Petitioners held the contrary view and submitted likewise. Counsel submitted that the two actions were distinct and different as were the parties involved. Counsel also asserted that the Chief Magistrate's Court has no jurisdiction to handle Constitutional matters. Thirdly, counsel stated that the causes of action were also completely different. One claim sought to restrain the 1st Respondent's negligence. The other claim sought to restrain the Respondents' continued violation of or threatened violation of the Petitioners Constitutional rights.
12. For completeness, counsel concluded his submissions by stating that Article 159 (2) (d) of the Constitution actually shielded and prevented the instant Petition from being defeated through technicalities. Counsel relied on the cases of **Arnacherry Limited –v- Attorney General [2014] eKLR** and **CJK –V- KK [2011] eKLR**.
13. The brief submissions by the 2nd Respondents counsel Mr. Nyachio were neither in opposition nor in support of the Preliminary Objection. Mr. Nyachio simply pointed out that the 2nd Respondent has put measures in place to ensure that the National Examinations were undertaken at the school which is a registered examination centre.

Determination

14. I have perused the petition. I have also perused the affidavit of Joseph Njuguna sworn on 23rd September 2015 together with the annexures thereto which include the pleadings in the suit filed before the Chief Magistrate's Court. The submissions by counsel have also been considered wholly.
15. The doctrine of *sub judice* is provided for under Section 6 of the Civil Procedure Act (Cap 21).

- The said statute, as the preamble states, is a piece of legislation to make provision for procedure in the civil courts. With regard to procedural issues for Constitutional matters commenced under Article 22 of the Constitution, the Constitution has itself provided that the procedure to guide such proceedings is to be found in the rules made by the Chief Justice under clause 3 of Article 22. The rules are already in force. They were promulgated via a legal Notice No. 117 of 2013. They make no reference to the Civil Procedure Act and the rules thereunder being applicable to such Constitutional matters and proceedings. Constitutional petitions are no ordinary civil proceedings. It is common knowledge that the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2012, otherwise known as the Mutunga rules are chiefly the guiding factors in Constitutional litigation. This is besides the Constitution itself, its values and principles.
16. The *sub judice* dogma is however not a simple technicality. It is a rule of substance. It is intended to ensure that parties do not abuse the court process. It is also intended to ensure that the overriding objectives in litigation is achieved without disproportionate expenditure both by the court and the parties.
 17. The Civil Procedure Act and the rules made thereunder may not strictly speaking apply to proceedings commenced under Article 22 of the Constitution but it must be remembered that the court always has the inherent powers to make such order as are intended to achieve the ends of justice. Such orders may include orders for termination of proceedings and or stay of proceedings. Where therefore the court process is under siege through a multiplicity of suits between the same parties, nothing will stop the court from exercising its inherent powers. A multiplicity of suits may not lead to the values and principles of the Constitution being achieved in so far as expeditious resolution of disputes is concerned. The court must therefore always be vigilant and ensure that there is no abuse of judicial authority and process through the filing of several suits. Indeed, Rule 3(8) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice & Procedure Rules 2013 expressly states that nothing in the said rules limits or affects the court's powers to issue such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.
 18. In so much as it is certainly doubtful that the provisions of Section 6 of the Civil Procedure Act are applicable to proceedings commenced under Article 22 of the Constitution, the inherent powers of the court allows the invitation of the doctrine of *sub judice* where appropriate with the resultant order. The inherent power should however only cautiously be exercised to help preserve not only the dignity and integrity of the court but also the dispute resolution process.
 19. The 1st Respondent has alleged that the Petitioners have filed and obtained similar or substantially akin orders and reliefs in a previous suit. The suit is stated to be CMCC No. 892 of 2014 at Thika. It is said that the same is still pending.
 20. I have read the pleadings. I have also read the order which was filed by consent of the parties on 2nd February 2015. The parties are dissimilar. They are not the same parties who have moved the court in the instant petition. That cannot be disputed. Apart from the Respondent, the Petitioners herein are not the same claimants before the Chief Magistrates court.
 21. Secondly, the reliefs being sought are also markedly distinct. I will however not belabor that point as, ideally, when considering whether a matter is *sub judice*, it should be the substance of the claim and petition which should bother the court rather than the prayers sought.
 22. Thirdly, the substance of the claim before the Chief Magistrates court is also different from what the Petitioners herein have tendered as the substratum of their case. The subject matter covers the same school but the substance of the claims are different. On the one hand a claim in negligence has been laid against the Board of Management of the School. On the other hand there are substantive allegations, though yet to be proven, of violations of the Constitution and infringement of fundamental rights. The two causes of action are distinct. Even if the parties were similar or litigating on behalf of the others, it cannot be deemed that there exists a multiplicity of suits.
 23. Finally, it is also important to note, as Mr Kamau correctly pointed out that the jurisdictions of the two courts are not the same. Until such time as Parliament will act under Article 23(2) of the Constitution, the subordinate courts have no jurisdiction to hear and determine applications for

redress of a denial, violation or infringement of or threat to a right or fundamental freedom under the Constitution. Only the High Court and the specialized courts under Article 162 (2) can adjudicate matters Constitution.

Disposal

24. The upshot is that even though the court has an inherent jurisdiction to ensure that the court process is not abused through the filing of multiple suits by the same parties over the same subject matter, in the instant case and in my judgment there does not exist any multiplicity of suits capable of being equated as abusive of the process of the court.
25. I would dismiss the objection raised by the 1st Respondent. It is so dismissed with costs to the Petitioners.
26. Orders accordingly.

Dated, Signed and Delivered at Nairobi this 5th day of October 2015.

J. L. ONGUTO

JUDGE