



Consumer Federation of Kenya v Cabinet Secretary for Environment & Forestry & 3 others; Kenya School of Government & another (Interested Parties) (Petition E072 of 2020) [2021] KEELRC 1461 (KLR) (20 January 2021) (Ruling)

Consumer Federation of Kenya v Cabinet Secretary for Environment & Forestry & 3 others; Kenya School of Government & another (Interested Parties) [2021] eKLR

Neutral citation: [2021] KEELRC 1461 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E072 OF 2020
M MBARÚ, J
JANUARY 20, 2021**

BETWEEN

CONSUMER FEDERATION OF KENYA PETITIONER

AND

**CABINET SECRETARY FOR ENVIRONMENT & FORESTRY 1ST
RESPONDENT**

ATTORNEY GENERAL 2ND RESPONDENT

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 3RD
RESPONDENT**

ETHICS & ANTI-CORRUPTION COMMISSION 4TH RESPONDENT

AND

KENYA SCHOOL OF GOVERNMENT INTERESTED PARTY

MAMO BORU MAMO INTERESTED PARTY

RULING

1. The ruling herein relates to objections filed by the 3rd respondent, National Environment Management Authority and on the grounds that;

Preliminary objections in the nature of Res Judicata and Sub Judice on the grounds that-



- a) There are several other causes filed in this very court and seeking similar orders as against the same respondents:-
 - i) Nairobi ELRC JR 5 of 2020 – pending before court;
 - ii) Nairobi ELRC 168 of 2019 – concluded;
 - iii) Nairobi Court of Appeal Nai 17 of 2020 – pending before court.
- b) The matters are substantially the same as issues directly or substantially in issue in these stated causes are the same in the current petition and the parties litigating thereof are identical or claiming under similar umbrellas of ‘public interest’.
- c) This petition is Sub Judge ELRC JR 5 of 2020 and Court of Appeal Nai.17 of 2020. No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.
- d) Reasons therefore, this petition is for striking out with costs.

The parties agreed and filed written submissions.

2. The 3rd respondent submitted that in reply to the petitioner’s application, the 3rd respondent filed an affidavit sworn by its Chairman John Konchellah and which affidavit produced the evidence necessary to support the Preliminary Objection. This affidavit listed the legion matters occasioning the issue of res judicata and sub judice herein.
3. The objections made are with merit and should be allowed. The appointment of the 2nd IP has gone through several court cases advanced by entities acting under a purported public interest.

ELRC Misc.167 of 2019 – Kenya Council of Employment and Migration Agencies v NEMA & others;

ELRC Misc. 168 of 2019 – Kenya Council of Employment and Migration Agencies v NEMA & others;

ELRC Misc. 44 and 45 of 2020 – Kenya Council of Employment and Migration Agencies v NEMA & others; and Court of Appeal Civil Application Nai.17 of 2020 – Kenya Council of Employment and Migration Agencies v NEMA & others.
4. All these suits challenge the recruitment process of the 2nd IP as Director General of the 3rd respondent.
5. In ELRC JR 5 of 2020 – Kenya Council of Employment and Migration Agencies v NEMA & others and in ELRC Petition E072 of 2020 – Consumer Federation of Kenya (COFEK) v NEMA and others these suits address the 3rd respondent recruitment of the 2nd IP as director general.
6. In this regard, ELRC 167 of 2018 was concluded as it was overtaken by events and the applicant filed an appeal and other matters remain pending before court.
7. The 3rd respondent submitted that The principle of res judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded



in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue.

8. The practical effect of the res judicata doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties – because it is the court itself that is debarred by a jurisdictional injunction, from entertaining such suit as held in the case of Republic of Kenya v National Environment Management Authority & another: Ex Parte: Joint Ven Investments Limited and in the case of 360 Degrees Apartments Residents Association(Interested Party) [2020] eKLR.

Section 7 of the [Civil Procedure Act](#), 2010 provides that;

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

9. the mere addition of parties in a subsequent suit does not necessarily render the doctrine of res judicata inapplicable since a party cannot escape the said doctrine by simply undertaking a cosmetic surgery to his pleadings. If the added parties peg their claim under the same title as the parties in the earlier suit, the doctrine will still be invoked since the addition of the party would in that case be for the sole purpose of decoration and dressing and nothing else.
10. where persons litigate bona fide in respect of a public right claimed in common by themselves and others, all persons interested in such right shall, for the purposes of the section, be deemed to claim under the persons so litigating.
11. The cases filed against the respondents are all matters filed before this court and addressed to the very respondents as respondents. What has changed is purely cosmetic- case numbers and the fact that the previous cases were filed as causes and judicial reviews and not a petition as the current one. In essence, the claimants have now attempted all avenues in achieving its singular cause, that the 2nd interested party is incompetent to be the Chief Executive Officer of the 3rd respondent.
12. This Petition is not only res judicata but also sub judice since some of the earlier litigations are still pending and ask that this honourable court does see through the façade of public interest advanced and strike out this petition for being res judicata and sub judice as well.
13. 1st respondent and 2nd IP submitted that The circumstance in which a preliminary objection may be raised was explained by the Court of Appeal in the case of Mukisa Biscuits Manufacturing Ltd (1969) EA 696 as follows;

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.



14. in the facts of this case, there are several suits filed being ELRC JR NO. 5 OF 2020 and ELRC NO 168 OF 2019. The issues in dispute in the present suit were the same issues which were in dispute in the above mentioned cases and the parties are the same.

res judicata is defined as A thing adjudicated. An issue that has been definitely settled by judicial decision.

Section 7 of the *Civil Procedure Act* provides that;

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.

15. In the matter of George W M Omondi & another v National Bank of Kenya Ltd & 2 others [2001] eKLR the court stated that;

Parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit. They are bound to bring all their case at once. They are forbidden from litigating in instalments.

16. in *Mwani Njangu v Meshack Mbogo Wambugu and another Nairobi HCCC No.2340 of 1991* the court held that;

If a litigant were allowed to go on forever re-litigating the same issue with the same opponent before Courts of competent jurisdiction, merely because he gives his case some cosmetic face-lift on every occasion he comes to a Court, then I do not see what use the doctrine of res judicata plays.

17. The Court of Appeal in Nyeri in Civil Appeal No 110 of 2011, between Nicholas Njeru and Hon Attorney General & 8 others held as follows as pertains to res judicata; “

The doctrine of res judicata is founded on public policy and is aimed at achieving two objectives namely, that there must be finality to litigation and that the individual should not be harassed twice with the same account of litigation.

18. The Petition herein is not only res judicata but also sub judice since some of the earlier cases are still pending before court. In the final analysis, we aver that the Petitioner’s Petition does not hold water and pray that the same be dismissed with costs.

19. Petitioner submitted that a preliminary objection cannot be raised if any fact pleaded by the adverse party is to be ascertained as held in the *Mukisa Biscuit Manufacturing Co. Ltd. v. West End Distributors Ltd* [1969] E.A. 696 that;

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, on occasion, confuse the issues. This improper practice should stop.



20. in *Kartar Singh Dhupar & Co. Ltd v Lianard Holdings Limited* [2017] eKLR the court cited examples that qualifies a preliminary objection inter alia as;

an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

21. in the case of *El-Busaidy v. Commissioner of Lands & 2 others* [2002] 1KLR the court held that;

The preliminary objection herein was raised by the Defendants. Can it be said that they do accept the facts as pleaded by the Plaintiff to be true; in which case they could then apply the provisions of section 136(1) to it to make the Plaintiff's pleadings a nonstarter" But the Defendants defend this suit because they do not accept the Plaintiff's facts as pleaded. Clearly therefore, the Defendant's preliminary point is not based on a commonly accepted set of facts and the set of facts herein would not therefore be the basis of a preliminary point of objection and a point of law as understood and accepted in our jurisdiction.

22. The petitioner also submitted that the issue of competency of the Director General of the 3rd Respondent as pointed out in the 3rd Respondent's Affidavit of 18th November 2020, goes to the root of the matter, pouring over and examining of the documents of the Petitioner cannot be avoided by this Court. this is purely a factual issue and as such falls outside the purview of a preliminary objection hence can only be dealt with by Court hearing and determining the petitioner's suit was filed.

23. the preliminary objection as raised by the 3rd Respondent is fatally defective, pointless and the same should be dismissed with costs.

24. On the issue that the petition is sub judice, the petitioner submitted that the subject matter of the dispute concerns the substantive recruitment process of the 3rd Respondent's Director General as opposed to the suits cited in the 3rd Respondent's Preliminary Objection which were entirely challenging the manner in which the advertisement of the vacancy of the position of Director General was made. The parties are different, the facts are different, the issues raised are different and the orders sought are different. The Petitioner was never a party.

in the case of *Njue Ngai v Ephantus Njiru Ngai & another* [2016] eKLR;

in order to rely on the defence of res judicata there must be: (i.) a previous suit in which the matter was in issue; (ii.) the parties were the same or litigating under the same title (iii.) a competent court heard the matter in issue; (iv.) the issue has been raised once again in a fresh suit.

25. the present suit is not res judicata and sub judice as such the 3rd respondent is involved in delay tactics, waste of judicial time and occasion unnecessary costs on the petitioner. these objections should be dismissed with costs.

Determination

26. The twin issue for determination in this regard is whether the petition herein is res judicata and or sub judice.

27. The law pertaining to the doctrine of res judicata is captured under the provisions of Section 7 of the [*Civil Procedure Act*](#) which states;

No court shall try any suit 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 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.

28. The doctrine of res judicata is explained in a plethora of decided cases. In the recent case of the Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others (2017) eKLR, the Court of Appeal held as follows;

Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in distinctive but conjunctive terms:

- a) The suit or issue was directly and subsequently in issue in the former suit.
- b) The former suit was between the same parties or parties under whom they or any of them claim.
- c) Those parties were litigating under the same title.
- d) The issue was heard and finally determined in the former suit.
- e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

29. The doctrine of res judicata is therefore meant to lock out from the court system a party who has had his day in a court of competent jurisdiction from re-litigating the same issues against the same opponent. The question therefore is whether the 3rd respondent objections raised have satisfied the conditions for the principle of res judicata in view of the facts of this case. See Pangaea Holdings LLC & another v Hacienda Development Ltd & 2 others [2020] eKLR.

30. The 3rd respondent case is that there are Nairobi ELRC JR 5 of 2020 – pending before court; Nairobi ELRC Misc. 168 of 2019 – concluded and Nairobi Court of Appeal Nai 17 of 2020 – pending before court.

31. In ELRC MISC APPL. NO 168 of 2019 the applicant is seeking leave to institute Judicial Review proceedings. The Applicant alleges that the 3rd respondent's action of appointing Mr Laban Gichohi (the 5th Respondent) as the Acting Chief Procurement Officer was unprocedural and unconstitutional. He avers that the said

32. Mr Gichohi does not have a Degree as required by the law. He further posits that Mr Gichohi does not meet the legal requirements that the holder of that office must meet because he does not have a Senior Development Certificate from the Kenya School of Government (the 3rd Interested Party). His main prayers in the main Judicial review is an order of Certiorari quashing the 2nd Respondents decision to appoint Mr Gichohi to fill the aforementioned position.

33. upon being granted leave, the applicant filed JR NO 05 OF 2020. This is the main application following leave that was granted in MISC 168 of 2019. As indicated in MISC 168 of 2019, the cause of action was the appointment of Mr Laban Gichohi (the 5th Respondent) as the Acting Chief Procurement Officer by the third Respondent. The facts and reasons advanced by the Applicant in Misc App No 168 of 2019 are similar.

34. Additionally, there is MISC APPL. NO 45 of 2020. This application is related to 168 of 2019 in that it involves the same subject matter, appointment of the Acting Chief Procurement Officer by the 3rd Respondent. On 27th December 2019, the 3rd Respondent Ms Evangeline Kinya Ratanya (the 10th



Respondent herein) as Acting Chief Procurement Officer effectively replacing Mr Laban Gichohi (the 5th Respondent). the main prayer in this application is that the court be pleased to enjoin the 10th Respondent and the Ministry of Foreign affairs (5th Interested party) to the main matter, JR 05 of 2020. Just like in 168 of 2019, the Applicant is aggrieved by the appointment of the 10th Respondent in the aforementioned office. He argues that the 3rd Respondent should appoint the Chief procurement officer with terms of reference that are clear as required by the Constitution , EMCA and the HR manual. He further avers that the 10th Respondent, being a diplomat is not qualified for that position.

35. The instant petition is premised on the facts that the 1st and 3rd respondents (CS Environment and NEMA) have acted ultra vires and in violation of the Constitution when they appointed the 2nd interested party, Mamo Boru Mamo as the director general of the 3rd respondent on the grounds that the qualifications and work experience requirements made in the advert for the position is contrary to the eligibility criteria prescribed by section 10(1)(c) and (2) of the EMCA; that there was no due diligence conducted on the 2nd interested party to verify his certificates; that the 1st and 3rd respondents filed or abused the legal requirements under article 35 of the Constitution to ensure the certificates held by the 2nd interested party belonged to a deceased person from Baringo county; and therefore the 2nd interested party should not enjoy from the proceeds of fraud and has is not with clean hands.
36. As outlined above, the principles of res judicata are meant to stop a party from re-litigating the same issues against the same opponents but in this case, the suits referenced addressed, it is clear that the causes of action in the instant petition weighed against Nairobi ELRC JR 5 of 2020 and Nairobi ELRC 168 of 2019 are different and relates to different parties. Thought the ground relates to the appointment of officers within NEMA who is a respondent in all the suits, the fundamental issue in dispute in the referenced suits is different.
37. With regard to the suits being sub judice and that there exists Nairobi Court of Appeal Nai 17 of 2020, such appeal and or matter having arisen from other suits unrelated to the instant petition, the sub judice rules does not apply.
38. Accordingly, objections by the 3rd respondent are hereby found without merit and are dismissed. costs shall abide the petition.

DELIVERED IN OPEN COURT AT NAIROBI THIS 20TH DAY OF JANUARY, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistance: Okodoi

..... and

