



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NYERI**

**PETITION NO. 14 OF 2019**

**IN THE MATTER OF ARTICLE 22 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF SECTION 4 AND 5(B) OF THE ACCESS TO INFORMATION ACT**

**AND**

**IN THE MATTER OF RULE 9(1)**

**AND**

**IN THE MATTER THE TEACHERS SERVICE COMMISSION (CODE OF CONDUCT AND ETHICS FOR TEACHERS  
REGULATION 2015)**

**AND**

**IN THE MATTER OF SECTION 75 OF THE EMPLOYMENT ACT**

**EPHRAIM MWANGI GACHIGUA.....PETITIONER**

**VERSUS**

**TEACHERS SERVICE COMMISSION.....1<sup>ST</sup> RESPONDENT**

**THE BOM THOGOTO TEACHERS COLLEGE.....2<sup>ND</sup> RESPONDENT**

**THE MINISTRY OF EDUCATION.....3<sup>RD</sup> RESPONDENT**

**MR. IMANYARA KINOTI.....4<sup>TH</sup> RESPONDENT**

**MR. JASON KABERIA.....5<sup>TH</sup> RESPONDENT**

**MR. FRANCIS WAINAINA.....6<sup>TH</sup> RESPONDENT**

**MRS. NANCY MACHARIA.....7<sup>TH</sup> RESPONDENT**

**MRS. MARY ROTICH.....8<sup>TH</sup> RESPONDENT**

**MR. KIHUMBA KIMOTHO.....9<sup>TH</sup> RESPONDENT**

**MR. JAMES MUGUNA.....10<sup>TH</sup> RESPONDENT**

**CATHERINE K. LENAIRSHI.....11<sup>TH</sup> RESPONDENT**

ABDIRIZAK H. FARAH.....12<sup>TH</sup> RESPONDENT

LOISE NYASEDA.....13<sup>TH</sup> RESPONDENT

### RULING

1. The Petitioner seeks various reliefs against the Respondents and the 1<sup>st</sup>, 4<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 12<sup>th</sup> and 13<sup>th</sup> Respondents (hereafter referred to as the Respondents) vide a preliminary objection dated 30<sup>th</sup> September 2019 assert the court is devoid of jurisdiction as the Petition herein is *res judicata* as the matters in issue were dealt with to finality in the ELRC case No. 215 of 2017. The Petitioner in reply argues that the Petition is not *res judicata* as the earlier claim related to the issue of illegal demotion and that the Petition dealt with hours of work, pay during interdiction, access to information, abrupt transfers, unlawful interdiction and discrimination of teachers among others. Parties consented to canvas the motion through written submissions.

2. The Respondents submitted that the suit should be struck out for being *res judicata* as the petition was bad in law, frivolous and an abuse of the court. The Respondents submitted that the suit that preceded the Petition sought reinstatement of the Claimant (Petitioner) to the post of principal with full salary and benefits from January 2013, general damages for the unlawful demotion, loss of career progression and advancement, humiliation and psychological torture. The Respondents submit that the Petition herein raises the same issues that were substantially in issue in the suit that was determined by the Court. The Respondents cited the treatise **Judicial Hints on Civil Procedure** by Richard Kuloba on the meaning of *res judicata*. It was submitted that from the definition of the term *res judicata* it was clear that the Petitioner is barred from agitating similar matters upon adjudication of the same by the court. The Respondents submit that the issues in dispute are directly and substantially the same and cited the case of **Pop-In Kenya Ltd & 3 Others v Habib Bank AG Zurich 1990 eKLR** and the case of **John Florence Maritime Services Ltd & Another v Cabinet secretary for Transport and Infrastructure & 3 Others [2015] eKLR** where the court held, *inter alia* citing with approval the dicta in **Henderson v Henderson [1843] 67 ER 313** stating thus:

*“The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by 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.....”*

The Respondents urged the dismissal of the Petition which was carefully choreographed by filing a petition and inclusion of more Respondents.

3. The Petitioner submitted that the suit was not covered by the doctrine of *res judicata* as the matters in issue in this Petition relate to flawed TSC procedures, the unlawful interdiction of teachers and failure by TSC to state the Petitioner’s hours of work. The Petitioner submitted that the preliminary objection by the Respondents is a further attempt to further shield the Respondents from justice. The Petitioner submitted that the preliminary objection was raised in respect of the 1<sup>st</sup>, 4<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 12<sup>th</sup> and 13<sup>th</sup> Respondents and that the inference was that the rest of the Respondents who had not sought termination of the petition or supported the preliminary objection or raised a preliminary objection of their own are willing to defend themselves at the hearing stage. The Petitioner submitted that the doctrine of *res judicata* requires that the matter previously determined was between the Petitioner and 2 defendants while the current Petition was between the Petitioner, TSC and 12 other parties each having different issues. The Petitioner submitted that Cause No. 215 of 2017 resulted in a ruling not a judgment. The Petitioner submitted that most of the issues raised in the petition took place after 10<sup>th</sup> April 2018 when the Ruling of the court was given. The Petitioner submits that the issues raised in the Petition in June 2019 are still ongoing and have not been deliberated upon or judgment entered. The Petitioner thus sought the dismissal of the preliminary objection and order the matter do proceed to hearing where the same will be judged on merit and judgment entered. The Petitioner sought that the Petition be heard in the High Court at Nyeri.

4. The Petition as crafted and drawn seeks to obtain relief for the Petitioner Mr. Ephraim Mwangi Gachigua, pitting him against his erstwhile employer and some fellow workers and some of his supervisors. Between the suit and Cause No. 215 of 2017, there is a marked similarity. He takes umbrage even in this Petition against the demotion and transfer that led to his earlier suit. *Res judicata* is the Latin phrase for a matter already judged. In this context, *res judicata* refers to the legal doctrine that seeks to bar or preclude continued litigation of a case on same issues between the same parties. It applies where the party suing seeks relief against a party sued under the same head and will include aspects of the suit that would have been in issue but excluded in the earlier suit. The essence is to bar endless litigation as a party coming to court should bring their entire claim not aspects of it in piece meal. Considering the doctrine of *res judicata* and the matter before me, it is clear the Petition is a thinly disguised suit for the same reliefs the Petitioner had sought as claimant in Cause No. 215 of 2017 Ephraim Mwangi Gachigua v Teachers Service Commission which was litigated to conclusion by dint of the Ruling of the court delivered on 10<sup>th</sup> April 2019. It matters not that the suit was not heard to conclusion with evidence being taken and a decision rendered. It was determined by a court with jurisdiction that the suit he had preferred as Cause No. 215 of 2017 was time barred and therefore improperly before court. This Petition is simply an effort to circumvent the limitation period which the Petitioner is well aware set in in 2016 when he ought to have moved against his former employer. It matters not that some of the Respondents did not object to the suit. That does not breathe life to a dead suit. The Petition is dismissed for being *res judicata* and an abuse of the court process. Costs to the successful 1<sup>st</sup>, 4<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 12<sup>th</sup> and 13<sup>th</sup> Respondents.

5. This decision was rendered online in keeping with the express consent by parties to the waiver of Order 21 Rule 1 and 3 of the Civil Procedure Rules and in line with the Chief Justice’s Practice Directions to Mitigate COVID-19 dated 16<sup>th</sup> March 2020 and the Kenya Gazette Notice 2357 of 20<sup>th</sup> March 2020 issued in Vol. CXXII No. 50. In line with the Practice Directions of the Chief Justice and the statement he made in the NCAJ address to the Nation of Kenya when the Judiciary and the other stakeholders in the administration of justice agreed to scale down operations to mitigate the effects of COVID-19, execution of the judgment is automatically stayed for 14 days.

It is so ordered.

**Dated and delivered at Nyeri this 30<sup>th</sup> day of March 2020**

**Nzioki wa Makau**

**JUDGE**