



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Obindah v Otwal & Manwa Associate Advocates & another (Constitutional
Petition 31 of 2022) [2023] KEHC 18412 (KLR) (31 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18412 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CONSTITUTIONAL PETITION 31 OF 2022**

PM MULWA, J

MAY 31, 2023

BETWEEN

JOHN OUNDO OBINDAH PETITIONER

AND

OTWAL & MANWA ASSOCIATE ADVOCATES 1ST RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS 2ND RESPONDENT

RULING

1. The petitioner approached this court by a Petition dated August 19, 2022 seeking the following orders:
 - i. A declaration that the criminal proceedings in Kiambu High Court Criminal Revision Application No E031 of 2020 Otwal & Manwa Associates vs Director of Criminal investigations were conducted in a manner that violate the petitioner's right to a fair trial.
 - ii. A declaration that the acts and omissions of the Respondent are in complete contravention of the Petitioner's rights and freedom as provided for under the Constitution of Kenya.
 - iii. A declaration that the petitioner's right as a victim to participate in criminal proceedings was violated.
 - iv. An order quashing the Criminal proceedings in high Court Criminal Revision Application No E031 of 2020
 - v. Any other relief the court deems fit.
 - vi. Costs and interest of the petition.
2. The gist of the petition is that the petitioner was a complainant and victim in Kiambu Chief Magistrate Court Misc Criminal Application No 451 of 2020. The DPP sought orders to have evidence obtained from the 1st Respondent's computers, which orders were set aside through the Criminal Revision No



E031 of 2020 based on section 134 of the Evidence Act. The failure of the DPP to inform the petitioner of the existence of the application for revision prejudiced his right to be heard and amounted to an infringement of fundamental freedom in the Bill of Rights.

3. The petition is supported by the annexed affidavit of the petitioner sworn on August 19, 2022 reiterating the grounds of the petition.
4. The 1st Respondent opposed the petition by way of notice of preliminary objection dated September 30, 2022 and filed on October 3, 2022, citing the following grounds;
 - i. That the issues raised in the petition are *res judicata* as they were subjected to misc criminal no 451 of 2020, which was heard, determined, and closed on May 20, 2021 by Hon Lady Justice Kasango in Criminal Revision E031 of 2020.
 - ii. The petition is grossly incompetent, incurably defective, frivolous, vexatious and an abuse of the court process and ought to be struck out in limine.
 - iii. That in that regard, the court lacks jurisdiction to entertain this petition and the same ought to be struck out.
5. The court directed the Petition and the Notice of Preliminary Objection to be dispensed by way of written submissions.

Petitioner's submissions

6. By the submissions filed on March 14, 2023, counsel submits on two fronts. On the first issue of whether the Petition is *res judicata* counsel submits that the previous suit and the current suit are different. In Kiambu CM Criminal 451 of 2020 the 2nd respondent sought and was granted orders to have access to the emails of the 1st respondent. Aggrieved by the orders the 1st respondent applied to the High Court for revision on the grounds of client-attorney's privilege.
7. The current petition arises out of the conduct of the criminal proceedings in High Court Criminal Revision No E031 of 2020 which violated the petitioner's rights under the Constitution. In the criminal revision the petitioner was not allowed to raise the exceptions in the advocate-client privilege. The proceedings in the earlier suit were by the respondents while the petitioner was the victim or complainant. The current petition the petitioner has instituted the suit on his own behalf.
8. Counsel submits the petition is not *res judicata* and that the issues in the petition could not be adjudicated in the lower court, the petition raises issues of infringement of petitioner's rights which were not determined at the revision stage.
9. Secondly, counsel submits that the petitioner was not a party to the criminal proceedings and thus the proper party to appeal was the DPP. It is submitted that the ruling by Hon Lady Justice Kasango left the petitioner with no avenues to seek redress for the impunities he suffered.
10. Counsel urged the court to find the Preliminary object is incompetent, an abuse of the court process and dismiss the same. He relied on the case of Constitutional Petition No E392 of 2021 between Geonet Technologies Limited vs the Ministry of ICT & others

1st Respondent's submissions

11. In its submissions filed on February 22, 2023, the 1st Respondent contends the petition filed is frivolous and an abuse of the court process. The issues raised in the current petition were raised in Kiambu Misc Criminal Case No 451 of 2020 which issues were finally determined in Kiambu High Court Criminal



Revision No E031 of 2020. The petitioner is introducing a new cause of action. He relied on the case of *E T V vs Attorney General & Anor* [2012] eKLR where Majanja J stated that “the courts must be vigilant to guard against litigants evading the doctrine of *res judicata* by introducing the new cause of action so as to seek the same remedy before the court. The test is whether the Plaintiff in the second suit is trying to bring before the court in another way and in the form a new cause of action which has been resolved by a court of competent jurisdiction.”

12. The doctrine of *res judicata* as envisaged in section 7 of the *Civil Procedure Act* ousts the jurisdiction of a court to try any suit or issue which had been finally determined by a court of competent jurisdiction. The petitioner was the complainant in Kiambu CM Criminal Application No 451 of 2020 which was instituted by the 2nd respondent against the 1st respondent after a complaint was made by the petitioner. Aggrieved, the 1st respondent sought revision in HC Criminal Revision No E031 of 2020 and the judge determined the matter and to date, no appeal has been filed.
13. It was further submitted that the subject matter in the previous litigation and the current petition is the same and both the former suit and the current petition are between the same parties.
14. Counsel urged the court to dismiss the petition with costs for being *res judicata*.

Analysis and determination

15. I have considered the Petition, Preliminary Objection and submissions as filed, and the issue for determination is whether this court has the jurisdiction to hear the Petition following the respondent’s objection that the same is *res judicata*.
16. In the case of *Mukhisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696 a preliminary objection was described as one “...in the nature of a demurrer, to raise a pure point of law which is argued on the assumption that facts pleaded by either side are correct. When successfully argued the objection disposes the entire suit.
17. The Respondent has urged the court to down its tools for lack of jurisdiction. In *Owners of Motor Vessel Lillian’s v Caltex Oil (Kenya) Ltd* [1989] KLR 1, it was stated- “Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
18. Section 7 of the *Civil Procedure Act* provides:

“No Court shall try any suit or issue in which the matter directly or 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 a such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”
19. In considering the issue of *res judicata* the court must be satisfied that the matters in issue are similar to a former suit, between the same parties under the same title and have been conclusively determined by a court of competent jurisdiction.
20. The High Court is vested with the jurisdiction to entertain applications for redress of the violation of fundamental freedoms in the Bill of Rights as envisaged in Article 23(1) of the *Constitution*, thus; “The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights”. In determining applications for redress of violation of fundamental rights the court



should be vigilant and ensure it assesses the nature of the claim as raised to avoid duplicity of suits and different judgments.

21. The petitioner seeks redress from this court on his infringed right to fair trial and hearing in Kiambu CM Criminal Application No 451 of 2020. The orders sought by the DPP in the trial court was to access the emails of the 1st respondent and these were vacated by the High Court in Criminal Revision No E031 of 2020.
22. This court having considered the current petition notes that the orders sought if granted will overturn the decision of the High Court in the Criminal Revision. That will be tantamount to aiding the petitioner achieve what he failed to achieve in the trial court.
23. The Supreme Court in its judgment in *John Florence Maritime Services Limited & Another vs Cabinet Secretary Transport & Infrastructure & 3 Others* (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) found that the doctrine of *res judicata*, applies to Constitutional Petitions. This is what the court partly stated: - 81. We reaffirm our position as in the Muiri Coffee case that the doctrine of *res judicata* is based on the principle of finality which is a matter of public policy. The principle of finality is one of the pillars upon which our judicial system is founded and the doctrine of *res judicata* prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively...”.
24. The apex court went further to state “[82] If we were to find that the doctrine does not apply to constitutional litigation, the doctrine may very well lose much of its legitimacy and validity. We say this in light of the fact that constitutional tenets permeate all litigation starting with the application of article 159 of the *Constitution* in both civil and criminal litigation, and its application now embedded in all procedural statutes. Further article 50 on right to fair hearing and article 48 on access to justice are fundamental rights which every litigant is entitled to. Such a holding may very well lead to parties, that whenever they need to circumscribe the doctrine of *res judicata*, they only need to invoke some constitutional provision or other”.
25. This court agrees with the 1st respondent’s counsel that the petitioner cannot seek to achieve what he lost through the filing of the petition. The doctrine of *res judicata* ensures there is a finality to suits.
26. In the circumstances therefore taking into account the above provision I am of the considered view that the petition is *res judicata*.
27. Consequently, the petition dated August 19, 2022 is struck out for want of jurisdiction. There will be no orders as to costs.

Orders accordingly.

RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KIAMBU THIS 31ST DAY OF MAY, 2023.

.....

P M MULWA

JUDGE

In the Presence of:

Kinyua/Duale – Court Assistants

N/A - for petitioner



Mr Chomo h/b for Mr Otwal. - for 1st Respondent

Mr Gacharia - for 2nd Respondent

