



Njeru & another (Suing as the legal representatives of the Estate of Christopher White - Deceased) v Inspector General of Police & 6 others; Matanka & 2 others (Interested Parties) (Petition E228 of 2022) [2023] KEHC 21833 (KLR) (Constitutional and Human Rights) (15 August 2023) (Ruling)

Neutral citation: [2023] KEHC 21833 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E228 OF 2022
HI ONG'UDI, J
AUGUST 15, 2023**

BETWEEN

**EVANGELINE KARIMI NJERU 1ST PETITIONER
EMILY MUKAMI NJERU 2ND PETITIONER
SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF
CHRISTOPHER WHITE - DECEASED**

AND

**THE INSPECTOR GENERAL OF POLICE 1ST RESPONDENT
DIRECTOR OF CRIMINAL INVESTIGATIONS 2ND RESPONDENT
THE HON ATTORNEY GENERAL 3RD RESPONDENT
THE DIRECTOR OF PUBLIC PROSECUTIONS 4TH RESPONDENT
MARY WAIGWE MUTHONI 5TH RESPONDENT
PARTIALA DISTRIBUTORS LIMITED 6TH RESPONDENT
BRIAN MURIITHI MUTHOMI 7TH RESPONDENT**

AND

**FRANCIS KIAMBI MATANKA INTERESTED PARTY
MURIITHI MUTHOMI ASSOCIATES INTERESTED PARTY
NIRAV MAHESHKUMAR DAVE INTERESTED PARTY**



RULING

1. A preliminary objection dated September 29, 2022 was filed by M/s Berry Marindah on behalf of the 1st, 2nd and 4th Respondents. The main ground is that the Petition is res-judicata and this court lacks jurisdiction to deal with it. The reason being that the issues raised herein were determined on merits with finality vide Petition No. E002 of 2021 and a final judgment delivered on October 28, 2021 by Mrima J. Secondly that the Petition does not disclose a reasonable cause of action nor any constitutional issue capable of being entertained by this Court.
2. A second preliminary objection was raised by Kabugu & Company Advocates for the 7th respondent and 2nd Interested Party dated September 30, 2022. It raises the following grounds:
 - i. That the Petition does not disclose a reasonable cause of action.
 - ii. That the Petition as presented is filed in the wrong forum.
 - iii. That the Petition is speculative.
 - iv. That the Petition is incompetent and materially defective.
3. In response to the two preliminary objections the 1st petitioner (Evangeline Karimi Njeru) filed a replying affidavit sworn on October 17, 2022. She deponed that the gist of the Petition is on malicious prosecution and wrongful death; Further that the High Court has upheld some set of the facts herein, and that the Petition is driven by a subsequent set of facts directly linked to the ones previously used by the court to come to its determination. Thus, the Petition is not res judicata.
4. It's her averment that this Petition has raised issues which were not directly and substantially in issue in Petition No. E002 of 2021. That the two suits are materially different, as this Petition raises a totally different cause of action, based on violation of the deceased's constitutional rights.

The Parties' submissions

5. Joint submissions dated November 8, 2022 were filed by Kabugu & Co. Advocates for the respondents and interested parties, in support of the preliminary objections. On the threshold for a preliminary objection counsel relied on the case of *Mukisa Biscuits Manufacturing Company Limited v West End Distributors* [1969] E.A. 696 where it was stated:

“....A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.”
6. On whether the Petition discloses a reasonable cause of action he submitted that the litany of cited provisions is not substantiated with specificity as provided in the case of *Anarita Karimi Njeru v R.* Misc. Application No. 4 of 1979, Secondly the Petition refers to complaints of obtaining money by false pretences registered on November 15, 2020 and later the unfortunate death of Christopher White, at his home by his own hand. The petitioners however blame the respondents for the death.
7. Counsel submitted that the issue of the deceased's arrest, interrogation and detention was not found to have been unconstitutional by the Court in Petition No. E002 of 2021 *Christopher White and 2 others v Director of Public Prosecution and others*. The deceased was therefore never arraigned in court in any criminal case. On the alleged wrongful death counsel submitted that the same was full of



speculation on the deceased's state of mind, at the time of taking away his life. This does not therefore disclose a reasonable cause of action against the respondents and interested parties.

8. On whether the Petition was filed in the right forum counsel answers in the negative. He contends that if the allegations are made out they are tortious claims disguised as constitutional grievances, and the constitutional avoidance doctrine should be applied. He relied on the case of *Republic v Paul Kibara Kariuki, Attorney General and 2 others ex-parte Law Society of Kenya limited* where the court stated:

“Courts abhor the practice of converting every issue into a constitutional question and filing suits disguised as constitutional Petitions where in fact they do not fall anywhere close to violation of constitutional rights.”

Also see: *Muema Mativo v Director of Criminal Investigations & 2 others, HFC Limited (Interested Party)* 2021; and *KKB v SCM & 5 others* (Constitutional Petition 014 of 2020) [2022] KEHC 289 (KLR).

Counsel further submitted that from the facts stated by the Petitioners and the material provided the Petition is based on hearsay and imagination.

Petitioners / respondents' submissions

9. Their submissions are dated December 5, 2022 filed by MNW & Advocates LLP. On whether the Petition is res judicata counsel answered in the negative. He referred to section 7 of the *Civil Procedure Act* (CPA) which sets out the necessary elements for the said doctrine to be established. He further referred to the Court of Appeal decision in *Independent Electoral Boundaries Commission vs. Maina Kiai & others* [2017] eKLR which reiterated the said elements under section 7 of the CPA. Counsel added that the elements of res judicata are to be applied conjunctively and not disjunctively. Reference was made to the case of *Invesco Assurance Company Limited & 2 others v Auctioneers Licensing Board and another, Kinyanjui Njuguna & company Advocates & another (Interested Parties)* [2020] eKLR where it was held:

“A close reading of Section 7 of the Act reveals that for the bar of res judicata to be effectively raised and upheld, the party raising it must satisfy the doctrine's five essential elements which are stipulated to act in a conjunctive as opposed to disjunctive terms”

10. It is counsel's contention that the matter before this Court is quite different from what was in the previous petition. That the circumstances leading to the death of Christopher White have not been adjudicated upon before. That the issue in Petition No. E002/2021 was not about the death of Christopher White.
11. On the second issue as to whether the Petition is properly before this Court counsel answered in the affirmative. He submitted that the suit has been filed pursuant to the provisions of articles 10, 22, & 23 of *the Constitution*. He singled out article 10 which sets out the national values and principles which the Court must protect. He referred to the case of *Independent Electoral and Boundaries Commission exparte National Super alliance (NASA) Kenya & 6 others* [2017] eKLR where it was stated that:

“We hold the view that the national values and principles of governance enunciated in Article 10 of *the Constitution* are themselves justiciable whether or not there is a facilitative legislation, guidelines or framework...This court cannot shirk from its constitutional mandate of protecting *the Constitution*....”



12. Counsel therefore submitted that the issues raised relate to actions by public and state officers and cannot therefore be within the ambits of private law. Further that the reliefs and prayers sought fall within the provisions of articles 23 (3) which may be filed under the circumstances of article 22 thus falling within the characteristics of a constitutional Petition.
13. Counsel has finally submitted that the Petition raises a reasonable cause of action. That the petitioners have given a specific set of circumstances namely wrongful arrest and malicious prosecution leading to wrongful death. The cause of action is therefore premised on wrongful death resulting from events and circumstances arising from the respondents' actions. He contends that the Petition therefore falls within the four corners of the case of *Anarita Karimi Njeru v Republic* (supra).

Analysis and Determination

14. I have carefully considered the Petition plus the two preliminary objections filed herein by the respondents and interested parties. I have equally considered the submissions by counsel, the cited authorities and the law. The main issue for determination is whether the matter is res judicata in view of the decision in Petition E002/2021 – *Christopher White & 2 others v Inspector General of National Police Service & 4 others; Patiala Distributors Limited* (interested party).
15. The case of *Mukisa Biscuits Manufacturing Limited* (supra) is clear on the issue of what constitutes a preliminary objection. The Court observed as follows:

“...a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration.” In the same case Sir Charles Newbold, P., stated:

“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 preliminary objections does nothing but unnecessarily increase costs and on occasion confuse the issue, and this improper practice should stop.”

16. The preliminary objections raised herein are challenging this court's jurisdiction to hear this Petition based on the doctrine of res-judicata. They argue that the issues herein were dealt with and determined in Petition No. E002 of 2021 by Mrima J. An objection to the jurisdiction of the Court has been acknowledged as a preliminary objection that consists of a point of law. See the case of *Owners of the Motor Vessel "Lilian S" v Caltex Kenya Limited* 1989 KLR 1.
17. Based on the above principles and the law I find that the issue of res judicata is a point of law and the preliminary point raised herein fits its definition in the *Mukisa Biscuits* case (supra).

The necessary elements for res judicata to be proved are set out under Section 7 of the [CPA](#) and are as follows;

7. Res judicata

“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.”

18. I have considered the submissions by all counsel on this point. It is true that not all the parties herein are the same as those in Petition No. E002/2021. The new parties herein are the petitioners, the 5th respondent and all the 3 interested parties, who have all been brought on board by the petitioners who are the legal representatives of the Estate of Christopher White who was the 1st Petitioner in Petition No. E002 of 2021.
19. The petitioners argue that because of this element of the parties not being the same, in both Petitions, the preliminary objection based on the doctrine of res-judicata must fail. The reason they cite is that the said doctrine must be applied conjunctively.
20. There is no dispute that the Petition herein is founded on the alleged wrongful death of the deceased (Christopher White). It is pleaded by the Petitioners that the respondents subjected the deceased to harassment, disrepute, intimidations, arrests, unlawful searches, discrimination.
21. In this Petition the petitioners only annexed a copy of the favourable orders that the deceased got in Petition No. E002/2021. The judgment therein which I have read shows that the said Petition was partly successful. A perusal of the pleadings therein shows at paragraph 7 of the Judgment, some of the prayers which are as follows:
 - “ 58. A declaration that the arrest, intimidation and harassment of the 1st petitioner on 30th October 2020 was unconstitutional illegal, null and void.
 60. An order for general damages directed against the Respondents for unlawful arrest and detention of the 1st petitioner’s passport being passport No. LT 380386.”
22. In the Judgment in Petition No. E002/2021 Justice Mrima dealt with the issue as to whether the arrest, interrogation and detention of the 1st petitioner Christopher White was contrary to *the Constitution* under paragraphs 234 – 245. Mrima J stated as follows:
 - “ 241. There were three main parties at the time the 1st Petitioner was arrested. They were the 1st Petitioner, the officers of the 2nd Respondent and a Co-Director of the Interested Party. Apart from the averments by the 1st Petitioner which were opposed by the 2nd Respondent, there is no other evidence to corroborate any side. Therefore, on a preponderance of probability, and given the constitutional and legal mandate of the police, the allegation that the arrest of the 1st Petitioner was in any way contrary to *the Constitution* remain unproved.
 242. As to whether the 1st Petitioner was intimidated and harassed after being arrested, again this Court finds no such evidence on record. There is no dispute that when the 1st Petitioner was arrested he was later joined by his several Counsel as he was held by the officers of the 2nd Respondent. None of the counsel swore any disposition on the manner in which the 1st Petitioner was handled by the police.



243. By placing the evidence by the 1st Petitioner and the Respondents side by side, this Court is not satisfied that the Petitioners have in any way proved that the interrogation and detention of the 1st Petitioner was unconstitutional.
244. This Court, however, reiterates that the police have a duty to investigate any complaint laid with them and to take appropriate action which may include the arrest of the one against whom the complaint was made. The police will be failing in their mandate if they fail to investigate a complaint and make appropriate decisions thereto.
245. As such, this Court finds that the allegation that the arrest, interrogation and detention of the 1st Petitioner was contrary to *the Constitution* was not proved and is for rejection. The issue is, therefore, answered in the negative.
246. The Petition has partly succeeded. Whereas the Petitioners have failed to prove that the arrest, interrogation and detention of the 1st Petitioner was unconstitutional, they have proved that the prosecution of the 1st petitioner in the Criminal Case cannot stand.”
23. A very clear finding was made by Mrima J on the issues raised herein as forming the basis of the claim for the wrongful death. These particular issues cannot therefore be revisited by this court, in a fresh petition. If the petitioners were aggrieved by those findings they ought to have appealed against the Judgment on the specific findings.
24. The fact that some of the parties herein were not parties in the earlier Petition is not sufficient reason to make this court ignore the fact that the issues were heard and determined by Mrima J. I am duly guided by the finding in the case of *Belize Port Authority Shipping Services Limited v Eurocaribe Shipping Services Limited & dba Michael Colin Galley duty free shop; Fort street Tourism village Limited (interested party)* where the Court held:
- “The doctrine of res judicata in the modern law compounds three distinct components which nevertheless share the same underlying public interest that there should finally n litigation and that a party should not be twice vexed in the same matter the same components are:
1. Cause of action estoppel, which, where applicable is an absolute bar to mitigation between the same parties or their privies.
 2. The issue estoppel, which where applicable also prevents the re-opening of particular points which have been raised and specifically determined in previous litigation between the parties, but is subject to an exception in special circumstances and
 3. Henderson v Henderson abuse of process, which gives rise to a discretionary bar to subsequent proceedings, depending on whether in all the circumstances, taking into account all the relevant facts and the various interests of justice, a party is misusing or abusing the process of the court, by seeking to raise it, the issue which could have been raised before.”
25. My finding is that the issues relied on by the Petitioners in forming the basis of their claim that the respondents are responsible for the deceased’s death were already determined in Petition No. E002 of 2021 and cannot be revisited by this Court.



26. The upshot is that the preliminary objections raised herein have merit and I allow them. The result is that this court lacks jurisdiction to hear this petition. The same is thus struck out with costs to the respondents. The same to be paid by the petitioners jointly.
27. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 15TH DAY OF AUGUST 2023 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT

