



Car Importers Association of Kenya v County Government of Mombasa (Constitutional Petition 47 of 2021) [2022] KEHC 8 (KLR) (25 January 2022) (Judgment)

Neutral citation: [2022] KEHC 8 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CONSTITUTIONAL PETITION 47 OF 2021
JM MATIVO, J
JANUARY 25, 2022**

BETWEEN

CAR IMPORTERS ASSOCIATION OF KENYA PETITIONER

AND

COUNTY GOVERNMENT OF MOMBASA RESPONDENT

JUDGMENT

1. The factual matrix preceding the institution of these proceedings is essentially common ground or principally uncontroverted. It is undisputed that sometimes in 2019, the Respondent blocked its online payment platform making it inaccessible to the Petitioners members to pay their annual trade licenses. Aggrieved by the inability to access the said platform, the Petitioner on behalf of its members sued the Respondent in Petition No. 8 of 2020, Car Importers Association of Kenya v County Government of Mombasa challenging the legality of the said decision and the Respondent's decision to relocate them to a site called Miritini.
2. Vide a judgment dated 17th March 2021, this court (Ogola J) allowed the Petitioner and issued several declarations in favour of the Petitioner as follows: -
 - a. A declaration that the Respondent has acted in a manner likely to threaten the rights and fundamental freedoms of the Petitioner's members by failure to involve the Petitioner in a decision likely to negatively affect their rights.
 - b. A declaration that the Respondent's failure to configure its electronic licensing system so as to allow members of the Petitioner's association to access the said system so as to apply and thereby obtain the annual trade licenses is in violation of Articles 10, 27, 43 and 47 of the Constitution.
 - c. The Respondent is hereby ordered and directed to configure its electronic system so as to allow members of the Petitioner's association identified at prayer (e) of the Petition to apply and



obtain the relevant trade licenses issued by the Respondent for all businesses carried out in the Respondent's jurisdiction.

- d. A declaration is hereby made that whereas the Respondent has constitutional and statutory duties to plan the City of Mombasa, and whereas the Respondent has the mandate to relocate the Petitioner's members from the Mombasa Central Business District to any other place within the City of Mombasa, such policy, plans, measures and actions leading to the making of such decision must be participatory, public driven through public participation and in accordance with constitutional values and principles. Until such a time that the said public participation has been done, the Petitioner's members identified in prayers (e) and (f) herein cannot be evicted, removed or relocated from the Mombasa Central Business District.
 - e. Each party to bear own costs of the Petition.
3. The point of divergence is that upon the system being opened pursuant to the above orders, the Petitioner claims that its members found that they were required to pay Kshs. 90,250/= per show room per year for the years 2019 and 2020 and Kshs. 110,250/= for the year 2021 per showroom in order for them to receive their trade licenses for the year 2021. The Petitioner's contestation is that the aforesaid requirement was unreasonable and untenable. As a consequence, the Petitioner states that its members have not renewed their trade licenses and they are apprehensive that the Respondent may prefer criminal charges against them for trading without County Government trading licenses. Additionally, the Petitioner avers that on the advent of Covid19, on 23rd April 2021 the Respondent's governor directed that there would be a 50% waiver on specified trade licenses and a 30% waiver on single business permits for the year 2021.
 4. Further, the Petitioner state that in a public participation forum organized by the Respondent which took place at Tononoka Social Hall on 25th September 2019, its members made a strong case for the trade licenses to attract a charge of Kshs. 45,000/= per showroom per year premised on the following grounds: -
 - a. That the applicable charges for trade licenses for sake of second-hand motor vehicles in Nairobi is Kshs. 20,000/= per year while those who carry on the business of selling motor vehicles, car wash and repairs pay Kshs. 50,000/= per year, thus the Respondent is charging about 4 times more for a similar license.
 - b. That the Petitioner did not reject the Petitioner's proposal of Kshs. 45,000/=.
 - c. That a levy of any amount in excess of Kshs. 45,000/= means that the amount was not subjected to public participation.
 5. The Petitioner's contend that in Petition No. 159 of 2018 consolidated with Petition 201 of 2019, the Respondent filed a Replying affidavit enclosing a report prepared on its behalf by a Department of the University of Nairobi which they adopted; hence the Respondent is bound by the said depositions to the effect that since the introduction of the monopoly of containerized cargo transportation from the Port of Mombasa to Nairobi, the economy of Mombasa has drastically declined.
 6. Also, the Petitioner claims that its members had legitimate expectation that their proposal of Kshs, 45,000/= had been approved. Further, the Petitioner states that the increase from Kshs. 90,250/= applicable in 2019 and 2020 to Kshs. 110,250/= per year per show room for the year 2021 amounts to grave, unwarranted and unreasonable conduct on the part of the Respondent for want of public participation; that the Respondent is estopped from reneging since they never replied to the Petitioners



letter dated 17th May 2021; that their conduct offends Article 35 of the Constitution and sections 87 to 95 of the County Governments Act.¹

7. Further, the Petitioner states that the Respondent is bound by Articles 10, 47, 174 and 209 (3) (a) (b) and (c) of the Constitution to create a tax regime that would allow sustainable development as opposed to one which would destroy businesses. Also, it states that the Respondent cannot enrich itself through its own wrong doing having declined payment from the Petitioners members for 2019 and 2020, nor can it legally demand the payment retrospectively. The Petitioner contends that the Respondent's aforesaid actions amount to breach of Articles 35, 1 (1), 19, 35, 43, 47, 118, 232 (d), 209 (3) (a) (b) and (c) of the Constitution. As a consequence of the foregoing, the Petitioner prays for: -
- a. A declaration that the Respondent has violated the Petitioner's Members fundamental rights under Articles 10, 28, 35, 43, 47, 174, 209 and 232 of the Constitution and sections 87 to 95 of the County Governments Act.²
 - b. A declaration that on account of the Respondent' conduct the charges sought are not payable.
 - c. A declaration that Respondent has no basis to levy the said sum retrospectively.
 - d. A declaration that the Petitioners members are entitled to pay the sum of Kshs. 45,000/= per trade license per showroom for the year 2021 and that the said sum will hence forth apply unless lawfully reviewed.
 - e. A declaration directing the Respondent's failure to configure its electronic licensing system so as to allow the Petitioner's members to access the system so as to apply and obtain the trade licenses for 2021 upon paying Kshs. 45,000/= per year and the configuration to remain until the said sum is lawfully reviewed.
 - f. An order directing the Respondent to configure its electronic licensing system so as to allow the Petitioner's members as listed in prayer (f) to access the system so as to obtain their 2021 licenses.
 - g. A permanent injunction restraining the Respondent from interfering with the Petitioner's members business until the Respondent configures its electronic licensing system so as to allow the Petitioner's members to access the said system in order to apply and thereby obtain the annual trade licenses for 2021 and henceforth until the said rates of Kshs. 45,000/= per year per applicant is lawfully reviewed.
 - h. The costs of the Petition.
 - i. The honourable court do issue such orders and give such directions as it may deem fit to meet the ends of justice.

The Respondent's Replying affidavit

8. The Respondent's opposition to the case is contained in the Replying affidavit of Adil Ahmed Salim, its head of the sector in charge of Cess and Single Business Permits dated 30th June 2021. The substance of the Respondent's case is that this suit arises from Petition No. 8 of 2020 in which the Petitioner sought the Respondent to open payment system to enable its members to pay their annual operation licenses and also prayed that the court stops intended relocation of its members business to Miritini for want of due process.

¹ Act No. 17 of 2012.

² Act No. 17 of 2012.



9. It's the Respondent's case that pursuant to the said orders, the Respondent opened the payment system enabling the Petitioners to pay for their licenses but instead of paying they filed the instant Petition. Also, the Respondent states that during the public participation exercise preceding the enactment of the Mombasa County Finance Act, the Petitioner's members proposed a fee of Kshs. 45,000/= which they contend was not considered by the Respondent and as such they are challenging the said Act.
10. It is the Petitioner's case that in Petition No. 8 of 2021, the Petitioners did not seek to be exempted from paying the annual renewal fees for the year 2019 and 2020 but rather wanted the Respondent to open the payment system to enable them pay their annual licenses, and, having operated during the said period they are rightly required to pay for their licenses for the previous years.
11. Further, the Respondent contends that by the Petitioner saying that they are not required to pay fees for 2019 and 2020, they are trying to craft orders they never sought in the said case. Regarding the Petitioner's attempt to compare the charges with Nairobi rates, the Respondent contends that the Petitioner failed to disclose that in Mombasa they are charged according to the size of the show room, and, for the last 6 years preceding 2020, the charges have been Kshs. 90,200/= for 10 vehicles and above show room; Kshs. 44,750/= for 6 to 10 vehicles show room capacity; and Kshs. 29,750/= for a 1 to 5 vehicles show room capacity.
12. Additionally, it is the Respondent's case that the new charges are as per the current Finance Act are: - Kshs. 110,250/= for a 10 vehicles and above capacity show room; Kshs. 64,750/= for a 6 to 10 vehicles capacity show room and Kshs. 44,750/= for a 1 to 5 vehicles show room capacity. Further, 67 Petitioners have paid the charges for the years 2019, 2020 and 2021, and whereas Petition 8 of 2010 had 67 Petitioners, the instant Petition has 75, meaning, some of the Petitioners are riding on orders obtained in Petition 8 of 2020.
13. Also, the Respondent states that the Petitioner relies on annexure PO -8 which was issued to cushion those within the tourism sector which is inapplicable to the Petitioner's members businesses. Additionally, the Respondent contends that under sections 15 and 88 of the County Government Act, the Petitioner ought to have petitioned the Mombasa County Assembly if at all they had complaints touching on the Act before approaching this court which lacks jurisdiction to determine the issues.
14. Lastly, Regarding the Petitioners reliance on Petition 159 of 2018 which dealt with monopolization of transportation of containerized cargo from Mombasa to Nairobi, the Respondent contends that the issues in the said case and the UNCTAD report referred to by the Petitioners has no application to this case.

The Petitioner's further affidavit

15. Mr. Peter Otieno, the Petitioner's National Chairman swore the further Affidavit dated 27th July 2021. The nub of the affidavit is that the Respondent having declined to collect trade licenses for 2019 and 2020 should not blame the Petitioners, and that during the said period the Petitioners operated dismally because they were forced to close down for fear of being harassed and arrested by the Respondent's officers while others were arraigned in court.
16. The Petitioner also contends that the Respondent has not cited any law authorizing them to collect trade licenses in arrears nor does the fact that some Petitioners have paid justify an illegality and, in any event, the said payments were not made voluntarily. Lastly, that tax legislations are construed in favour of the tax payer and there was no public participation for the year 2021 and that the charges are exorbitant.

The Petitioner's advocates submissions



17. The Petitioner’s counsel submitted that in 2019, the Respondent unreasonably refused to allow the Petitioner’s members to renew their trade licenses by locking up its online systems prompting the Petitioners to file Petition No. 8 of 2020 seeking inter alia an order directing the Respondent to configure its electronic licensing system to allow its members and to apply and obtain annual trading licenses and the court allowed the Petition. He argued that in compliance with the said order, the Respondent opened the system sometimes in March 2020, but upon applying for the 2021 licenses, the Respondent demanded that they pay for the trade licenses in arrears for 2019 and 2020 prior to being issued with the 2021 licenses. Further, that the Respondent increased the fees for 2021 without conducting public participation.
18. He submitted that the demand for trade licenses in arrears means that the Respondents want to benefit from their own wrong doing and cited *John Kipkoech Rotich & 29 others v Drinks Regulation Committee ex parte John Kipkoech Rotich T/A Silent Pub & 29 others*³ in support of the proposition that no person should benefit from his own mistakes.
19. Emphasizing absence of jurisdiction to charge the arrears, counsel cited Owners of the Motor Vessel “*Lillan S*” v *Caltex Oil (Kenya) Limited*⁴ and argued that the Respondent has not shown any law permitting it to collect the fees in arrears. To fortify his argument, he argued that Article 210 of the Constitution provides that no taxation may be imposed, waived or varied except as provided by legislation. He argued that the license fees is a form of taxation and that the Respondent as a state organ is subject to Articles 10 and 47 of the Constitution. Further, he argued that the Respondent’s decision to lock access to the online payment was declared unconstitutional by the court in Petition No. 8 of 2020 which decision the Respondent never appealed against. Also, he submitted that the finance act relied upon by the Respondent does not provide for payment in arrears and cited *Saqib Shabbaz & 2 others v Kenya Revenue Authority & 2 others*⁵ in support of the proposition that taxation legislation must be interpreted strictly.
20. Counsel submitted that to the extent that the payment of arrears lacks statutory backing, then its an illegality and cited *Macfoy v United Africa Co. Ltd*⁶ in support of the proposition that a nullity is a nullity and nothing can stand on nothing. He also cited *Holman v Johnson*⁷ cited in *Susan Wakuthii Kibata & another v Elizabeth Njoki Murage*⁸ for the holding that no court will lend its aid to an illegal act. He argued that since the Respondent’s actions were declared illegal, they cannot be allowed to stand. He further relied on *Mistry A. Singh v Serwana Wofunira Kulubwa*⁹ which held that a court cannot enforce an illegal contract. He argued that the Respondent breached Articles 10 and 47 of the Constitution, so, it should not benefit from its illegal actions.
21. Additionally, counsel submitted that public participation flows from the sovereign will of the people in Article 1 and it is a key pillar in the objects of devolution under Article 174. He argued that once a court finds that there was no public participation, it is obliged to strike down the decision and cited *Robert*

³ {2019} e KLR.

⁴ {1989} e KLR.

⁵ {2021} e KLR.

⁶ {1961} 2 ALL ER 1169 at 1172.

⁷ {1775-1802} ALL ER 98.

⁸ {2017} e KLR.

⁹ {1963} EA 408.



*N. Gakuru and others v Governor, Kiambu County and 3 others*¹⁰ which held that public participation applies both at the National or County Government level and it applies to the process of legislative enactment, financial management and planning.

22. Counsel submitted that no public participation was conducted prior to increasing the license fees and cited *Car Importers Association of Kenya v Kenya Revenue Authority & 3 others*¹¹ where the court nullified a decision for want of public participation. He submitted that the Petitioner's evidence that no public participation was conducted since 2019 was not rebutted and relied on *Linus Nganga Kiongo & 3 others v Town Council of Kikuyu*.¹²
23. He also relied on the Supreme Court decision in *Base Titanium Ltd v The County Government of Mombasa & another*¹³ which held that the County Government has no right to levy charges where they are unable to demonstrate that they provided a particular service. Further, he submitted that the fact that some members have paid the license fees is irrelevant because the payment cannot legalize an illegal act.

The Respondent's advocates submissions

24. The Respondent's counsel distinguished the decision in *John Kipkoech Rotich & 29 others* (supra) on grounds that the reasoning in the said case is inapplicable to the instant case. She submitted that the question of the relocation of the Petitioners to Miritini and the locking of the payment system were resolved in Petition No. 8 of 2020 and that the court did not fault the Respondent's decision to charge the annual license renewal fees.
25. Counsel submitted that the Petitioners are not faulting the Respondent for charging annual renewal fees but just want the court to state that the pendency of the suit absolved them from the charges. She submitted that in *John Kipkoech Rotich* (supra) the court declined to interfere with the Respondent's mandate to renew licenses. She also argued that in *Saqib Shahbaz & 2 others* (supra) the issue was the Respondents failure to follow procedure in levying taxes but not the taxes. Counsel also distinguished the decision in *Mistry A. Singh* (supra) argue that there is no illegality in the instant case.
26. She argued that following the public participation in 2020 the charges were revised and that the revision of the charges is what triggered the instant Petition. Further, the Petitioner's suggested amounts did not factor the capacity of the show rooms. She also argued that the Petitioner ought to have Petitioned the County Assembly under sections 15 and 88 of the *County Governments Act*. She distinguished *Robert Gakuru* case arguing that it dealt with constitutional validity of a county legislation as opposed to the instant Petition in which the Petitioners are looking for an avenue to justify a lower fee of Kshs. 45,000/= . She submitted that in granting such an order, the court would be usurping the mandate of the county assembly. She also distinguished the facts of this case from those in *Base Titanium Ltd v County Government of Mombasa & another*.
27. She argued that since the Petitioners never petitioned the County Assembly in accordance with the above provisions, this court has no jurisdiction to entertain this matter. Further, counsel argued that the waiver notice cited by the Petitioners does not apply to their business. Lastly, she submitted that the additional petitioners in the instant Petition who were not parties in Petition No. 8 of 2020 lack the locus standi to present this Petition.

¹⁰ {2014} e KLR.

¹¹ {2019} e KLR.

¹² {2012} e KLR.

¹³ Petition No. 22 of 2018.



Determination

28. Undeniably, Petition No. 8 of 2020 has featured prominently in the instant Petition. For example, the orders issued in the said Petition and the facts which triggered it have been referred to severally. Despite the close connection between the 2 Petitions, the Petitioner did not attach the pleadings in the said case. However, I find comfort in the fact that the learned judge in his detailed judgment dated 17th March 2021 graphically captured the nub of the Petitioner's case and the reliefs sought in the amended Petition dated 16th June 2020.
29. The Petitioner's grievances in Petition No. 8 of 2021 as captured in the said judgment is twofold. One, it challenged the constitutional validity of an impending relocation of its members from the Mombasa City Centre to Miritini for want public participation. Two, its members were aggrieved by the Respondent's decision to block its members from the Respondent's on-line payment platform making it impossible for them to pay and obtain their annual trade licenses. The Petition was founded on alleged breach of Articles 35, 1 (1), 10, 47, 118 and 174 of the Constitution among others. The declarations sought were reproduced earlier, so, it will add no value to rehash them here.
30. A reading of the prayers sought in the instant Petition and the prayers sought in Petition No. 8 of 2020 reveals that prayer (e) in the instant Petition is substantially similar to prayer (e) in Petition No. 8 of 2020. The only difference is that in the earlier suit, the Petitioner sought for the re-opening of the platform for them to pay, while in the instant Petition, they seek for the platform to be opened to pay "Kshs. 45,000/= " per show room per year.
31. Also, closely similar prayer (e) of the instant Petition is prayer (d) of Petition No. 8 of 2020 in which the Petitioner sought a declaration that the Respondents failure to configure the said system was breach of Articles 10, 27, and 47 of the Constitution. Additionally, prayer (f) of the instant Petition seeks an order directing the Respondent to configure the system while prayer (f) of the earlier Petition, the Petitioner sought a declaration that failure to configure the system violated several Articles of the Constitution.
32. Prayers (g) of the instant Petition and prayer (f) of Petition No. 8 of 2020 are deployed in identical nomenclature, that is "a permanent injunction restraining the Respondent from interfering with the Petitioner's members business until the Respondent configures its electronic licensing system so as to allow members of the Petitioner's association to access the said system..." The only difference is that whereas in the earlier suit the Petitioner proceeds to state that "... so as to apply and thereby obtain the annual trade licenses" in the instant Petition, the Petitioner states "in order to apply and thereby obtain the annual trade licenses for the period 2021 and henceforth until the said rates of Kes. 45,000/ = per year pr applicant is lawfully reviewed one way or the other."
33. Even though the above similarity raises pertinent questions of law, none of the Parties addressed the issue. The first point of law which pops up is res judicata which is defined in the Black's law Dictionary as: -

"An issue that has been definitely settled by judicial decision; An affirmative defense barring the same parties from litigating a second law suit on the same claim, or any other claim arising from the same transaction or series of transaction and that could have been but was not raised in the first suit. The three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties."



34. In *Qayrat Foods Limited v Safiya Ahmed Mohamed & 6 others*¹⁴ the court cited *James Karanja alias James Kioi (Deceased)*¹⁵ which outlined the ingredients of res judicata as: -

“For the doctrine of Res Judicata to apply, three basic conditions must be satisfied. The party relying on it must show: - (a) That there was a former suit or proceeding in which the same parties as in the subsequent suit litigated; (b) the matter in issue in the latter suit must have been directly and substantially in issue in the former suit; (c) that a court competent to try it had heard and finally decided the matters in controversy between the parties.”

35. In *Gurbachan Singh Kalsi v Yowani Ekori*,¹⁶ the former East African Court of Appeal stated: -

“Where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgement, 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...No more actions than one can be brought for the same cause of action and the principle is that where there is but one cause of action, damages must be assessed once and for all...A cause of action is every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.”

36. A more detailed illumination of the doctrine is to be found in the Supreme Court of Kenya decision in *Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another* thus:

“[52] Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights.

[54] The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine 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.

[58] Hence, whenever the question of res judicata is raised, a Court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether

¹⁴ {2020} e KLR.

¹⁵ {2014} e KLR.

¹⁶ Civil Appeal No. 62 of 1958.



these are the same in the subsequent case. The Court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a Court of competent jurisdiction

[59] That Courts have to be vigilant against the drafting of pleadings in such manner as to obviate the res judicata principle was judicially remarked in *E.T v. Attorney-General & Another*, (2012) eKLR, thus: “The Courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes 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 a form of a new cause of action which has been resolved by a Court of competent jurisdiction.”

37. A reading of the above jurisprudence shows that if any judicial tribunal in the exercise of its jurisdiction delivers a judgment or a ruling which is in its nature final and conclusive, the judgment or ruling is res judicata. If in any subsequent proceedings (unless they be of an appellate nature or review) in the same or any other judicial tribunal, any fact or right which was determined by the earlier judgment or ruling is called in question, the defence of res judicata can be raised. This means in effect that the judgment or ruling can be pleaded by way of estoppel in the subsequent case.
38. Admittedly, the most lucid exposition of res judicata is to be found in the words of Somervell L.J.¹⁷ who stated that res judicata covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them. It is basic law that a litigant will not be allowed to litigate a matter all over again once a final determination has been made. Generally, a party will be estopped from raising issues that have been finally determined in previous litigation, even if the cause of action and relief are different. The purpose is obviously to prevent the repetition of lawsuits between the same parties, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions by the different courts on the same issue.¹⁸
39. By now it is clear that the requirements for res judicata are that the same cause of action, the same relief involving the same parties was determined by a court previously. In assessing whether the matter raises the same cause of action, the question is whether the previous judgment involved the ‘determination of questions that are necessary for the determination of the present case and substantially determine the outcome of the case.
40. I have in several previous decisions opined that Res Judicata is one of the factors limiting the jurisdiction of a court. This doctrine requires that there should be an end to litigation or conclusiveness of judgment where a court has decided and issued judgment then parties should not be allowed to litigate over the same issues again. This doctrine requires that one suit one decision is enough and there should not be many decisions in regard of the same suit. It is based on the need to give finality to judicial decisions. Res Judicata can apply in both a question of fact and a question of law. Where the court has decided based on facts it is final and should not be opened by same parties in subsequent litigation.¹⁹
41. Also, in my several past decisions, I have stated that a judicial decision made by a court of competent jurisdiction holds as correct and final in a civilized society. Res judicata halts the jurisdiction of the court. That is why it is one of the factors affecting jurisdiction of the court. The effect of this is that

¹⁷ In *Greenhalgh vs Mallard (1)* (1947) 2 All ER 257.

¹⁸ *Caeserstone Sdot-Yam Ltd vs World of Marble and Granite 2000 CC and others 2013 (6) SA 499 (SCA) paras 20-21.*

¹⁹ <http://www.kenyalawresourcecenter.org/2011/07/res-judicata.html> -Accessed on 16 December 2017.



the court is prevented from trying the case in limine i.e. from the beginning.²⁰ The rule of res judicata presumes conclusively the truth of the decision in the former suit.²¹ Res judicata, also known in the US as claim preclusion, is a Latin term meaning "a matter judged." This doctrine prevents a party from re-litigating any claim or defence already litigated. The doctrine is meant to ensure the finality of judgments and conserve judicial resources by protecting litigants from multiple litigation involving the same claims or issues.

42. Res judicata is provided for in Section 7 of the *Civil Procedure Act*²² and its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgement between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. The scheme of Section 7 contemplates five conditions which, when co-existent, will bar a subsequent suit. The conditions are:- (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; (ii) the former suit must have been between the same parties or privies claiming under them; (iii) the parties must have litigated under the same title in the former suit; (iv) the court which decided the former suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit.²³
43. I have carefully read the facts in Petition No. 8 of 2020 as detailed in the court judgment. I have compared them with the facts disclosed in the instant Petition. As pointed out above, some of the prayers sought in the instant Petition are strikingly similar to earlier sought orders or if granted, the orders will have substantially if not wholly of the same effect. I have placed the above tests for res judicata side by side with the facts before me. I am persuaded that the above tests are satisfied in this case.
44. The other important question is whether a litigant can evade the doctrine of res judicata by adding more grounds on the earlier cause of action or adding new parties. Unarguably, the closure of the Respondent's online payment platform is a common denominator in the two suits. The issue was decided in the earlier suit and the Respondent was ordered to re-open the system. The new ground added in this suit is that the Petitioner claims that upon accessing the system, they discovered that they were required to pay the license fees in arrears for 2019 and 2020. The other argument is that the amount sought is excessive and the Respondent ought to have considered the Kshs. 45,000/= they proposed during the public participation held in 2019.
45. The above two arguments are attractive. But that is how far they go. Mere addition of parties in a subsequent suit or omission of a party or party's or introduction of new grounds or a new prayer(s) as has happened in this Petition does not necessarily render the doctrine of res judicata inapplicable. A party cannot escape the wrath of res judicata by simply undertaking a cosmetic surgery to his pleadings or introducing new grounds to secure the earlier refused orders or obtain orders which ought to have sought in the earlier suit. For example, what prevented the Petitioners in the earlier suit from seeking a prayer that the court orders that license fees not to be paid for 2019, 2020 or during the pendency of the suit. What prevented the Petitioners from seeking a prayer that the court orders that they pay the Kshs. 45,000/= they had proposed during public participation. No matter which angle we view the facts as presented, these two suits are similar and the orders now sought could have been sought in the

²⁰ Ibid.

²¹ Ibid.

²² Cap 21, Laws of Kenya.

²³ See *Lotta v Tanaki* {2003} 2 EA 556.



earlier suit. The law as I understand is if the added grounds, parties or prayers peg the claim under the same title as the parties in the earlier suit, or if the added grounds or prayer(s) still stand on the same grounds cited and determined earlier, they if the subsequent suit seeks to simply to re-litigate the same issues, the doctrine will still be invoked.²⁴ Res judicata covers issues which could have been raised in the earlier proceedings. The issues raised in the instant Petition could have been raised in the earlier suit. This Petition offends the doctrine of res judicata.

46. Complementary to the doctrine of res Judicata is the conception that, when a judicial tribunal becomes functus officio in respect of a particular case, its powers and jurisdiction are exhausted in respect of that issue.²⁵ A judicial tribunal, after giving a decision as to the merits of a case, ceases to exist as an instrumentality in its previous form or at all, or is deprived of all the judicial functions it previously possessed, it is functus officio in respect of the issues decided. (See *Nyandoro & Company Advocates v National Water Conservation & Pipeline Corporation and Kenya Commercial Bank Group Limited (Garnishee)*²⁶).
47. A court which, after a trial, has given a valid decision determinative of right, liability or status, has no jurisdiction to recall it whatever mistakes may have been made in facts or law.²⁷ This test is applicable only if there happens to have been a "final" and "determinative" decision, after a trial; and that a judicial tribunal becomes functus officio in this sense only in relation to a particular matter, not in respect of all matters. For a judicial tribunal to become functus officio, it must have delivered a valid judgment, decree or order of a final and conclusive nature and res judicata must have come into existence.
48. Equally important is the fact that an orderly system of litigation requires that each party puts his or her best foot forward. It contemplates that judgment will be rendered after each party has done so. Litigation by instalments is not to be encouraged. There is a strong interest in finality, which should only be departed from in exceptional circumstances. Parties make strategic decisions in the course of litigation, and except in narrow circumstances they must be held to those decisions. After the trial is complete and judgment is issued, there is a danger of a party to go about reconstructing his case. Equally, there is a danger of a party procuring evidence after the trial and judgment so as to re-construct his case. That is why reopening a case after judgment is restricted to review on highly restricted grounds under Order 45 of the Civil Procedure Rules, 2010 as opposed to filing a new suit. This is because when all of the various factors, tests and considerations are taken together, the importance of the integrity of the trial process - the search for the truth through evidence - is an overarching consideration and a party should not be vexed with the same suit or issues which ought to have been determined in the earlier suit.
49. Court proceedings are based on an adversarial process, one party advances a position that is then rebutted by the defendant and a decision is made. Disruption of this process, by 'case splitting,' is an abuse of court process. In *Davidson v Patten*,²⁸ it was held: -

[7] It's an old trial maxim that Plaintiffs must exhaust their evidence at the outset. They cannot split the case. In other words, they cannot rely on one set of facts, and when these have been shaken by the opponent, try to adduce more or other facts. The Plaintiff must

²⁴ *Republic vs Registrar of Societies - Kenya & 2 Others Ex-Parte Moses Kirima & 2 others* [2017] eKLR.

²⁵ See *Godfrey Kiptum, Acting Commissioner of Insurance Regulatory Authority v Blue Shield Insurance Company Limited and Beth N. Mugai & Jean M. Ngenji & Director of Criminal Investigations, Misc. Cause No. 238 of 2017*.

²⁶ Miscellaneous Civil Application No. 241 of 2019.

²⁷ (1943-4) 68 C.L.R. at p. 590.

²⁸ 2003 ABQB 996 (Alta. Q.B.) at para. 7.



present the case in its entirety before the defendant is called upon to choose whether to elicit its own evidence. This rule allows the Defendant to know the case to be met and plan the defence. (*Allcock Laight & Westwood Ltd. v. Patten, Bernard and Dynamic Displays Ltd.*, [1976] 1 O.R. 18 (Ont. C.A.), per Schroeder J.A., at pp. 21-22) 29

50. The above prohibition applies equally after a case has concluded and a final decision is rendered. There should be a point where the litigation is completed. After close of the trial, and delivery of judgment, a party has an opportunity to reflect on what it ought to have done at the trial to strengthen its case and may therefore after the fact seek evidence to shore up that case or use the new found evidence to mount a new suit essentially based of the earlier decided case but disguised as a new case premised on new grounds. Courts must scrutinize any subsequent suits based on substantially similar decided issues to and decline this abusive ‘tactical’ approach to litigation.²⁹
51. Notwithstanding my findings on the above discussed issues, I will now address the Petition on merits. For starters, I will address the Respondent’s argument that the Petitioner’s members ought to have Petitioned the County Assembly under sections 15 and 88 of the *County Governments Act*.³⁰ The said sections provide: -
15. Right to petition county assembly
- (1) A person has a right to petition a county assembly to consider any matter within its authority, including enacting, amending or repealing any of its legislation.
 - (2) The procedure for the exercise of the right to petition a county assembly under subsection (1) shall be as set out in the Petition to County Assemblies (Procedure) Act and in the Standing Orders of the relevant county assembly.
88. Citizens right to petition and challenge
- (1) Citizens have a right to petition the county government on any matter under the responsibility of the county government.
 - (2) Citizen petitions shall be made in writing to the county government.
 - (3) County legislation shall give further effect to this section.
52. My reading of the above sections leaves me with no doubt that they do not in any manner oust this court’s jurisdiction. The two sections do not fall under the category of provisions which create the doctrine of exhaustion of remedies. The said argument fails.
53. I now turn to the Petitioner’s argument that the demand for arrears is not justified and that it lacks legal basis. The Petitioner in Petition 8 of 2020 sought s payer that the Respondent be directed to configure its electronic licensing system so as to allow its members to access the system so as to apply and thereby obtain the annual trade licenses. A reading of the detailed judgment in Petition No. 8 of 2020 shows that the payment for the licence fees for 2019 and 2020 was not an issue in the said case. The issue was the Petitioner’s members inability ability to access the system. Their plea was allowed by the court. After the Respondent re-opened the system pursuant to the court order the narrative changed. They now contend that the law does not permit payment of arrears. The argument my be appealing. However, the key question is what prevented the Petitioner in Petition No. 8 of 2020 to

²⁹ See *Alberta v. B.M. {2009} ABCA 258, at para. 33.*

³⁰ Act No. 17 of 2012.



include a prayer that effect seeking an express order that during the pendency of the dispute, they be exempted from paying the license fees.

54. The argument that the Petitioners did not trade during the said period cannot help. The point is whether the Petitioner is litigating matters which ought to have been litigated in the previous Petition. The Petitioners cited several Articles in support of the proposition that no tax can be levied except as provided by legislation. The reverse is also correct. Article 210 of the Constitution also provides that no tax may be waived or varied except as approved by legislation. It follows that if the tax was lawfully due, then this court cannot now declare it illegal just because it was not paid owing to a pending suit. All the issues arising from the dispute ought to have been resolved once and for all in the earlier suit.
55. The Petitioner argues that the license fees was increased without public participation. On the other hand, the Petitioner says during the public participation in 2019, its members proposed Ksh. 45,000/= which was not considered. As a consequence, the Petitioner invites this court to declare that they are entitled to pay the Kshs. 45,000/= which they proposed. By its own admission, the Petitioner states that there was public participation. On the other hand, they claim the license fees was increased without public participation. One of the two versions must be incorrect.
56. From the Petitioner's own documents, they were paying Kshs. 90,250/=; Kshs. 93,375/= Kshs. 45,050/= ; Kshs. 44,750/= and Kshs. 29,750/=, Kshs. 34,050/= , Kshs, 48,8875/= in 2018. (See page 15, 16, 17, 18, 19, 20, 21, 22,23, 24 to 75. During this period the amount paid was not an issue nor was it an issue in Petition No. 8 of 2020. I see no reason why it's an issue now.
57. Also, Public participation does not mean that the Petitioner's views must prevail. What matters is whether the Respondent undertook public participation that in any meaningful sense meets the threshold appropriate for public participation. Justice Sachs in *Minister of Health and Another v New Clicks South Africa(Pty) Ltd and Others*³¹ at para. 630, noted that "... What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case."
58. In the Mui Basin Case³² a three-judge bench of the High Court considered relevant case law, international law and comparative jurisprudence on public participation and culled the several practical elements or principles which both the Court and public agencies can utilize to gauge whether the obligation to facilitate public participation has been reached in a given case. The court inter alia stated that the right of public participation does not guarantee that each individual's views will be taken as controlling; the right is one to represent one's views – not a duty of the agency to accept the view given as dispositive.
59. In the Doctors for life case, the court went on to hold that "in determining whether there was public participation in any particular case, the Court will consider what has been done in that case. The question will be whether what has been done is reasonable in all the circumstances. In the instant case the Petitioner is double speaking. On one hand, it is stating that its view of Kshs. 45,000/= was not considered. On the other hand, the Petitioner is arguing that there was no public participation. As stated earlier, one version must be wrong.
60. Also, as stated above, in 2018, the Petitioners were paying higher sums than they are suggesting. They are now inviting this court to declare that its members are entitled to pay Kshs. 45,000/= per trade

³¹ 2006 (2) SA 311 (CC)

³² *In the Matter of the Mui Coal Basin Local Community {2015} eKLR*



license. Such an invitation has no basis in law. It is an invitation to descend to the arena of performing the Respondents functions. I decline the said invitation.

61. The Petitioner argues that the amounts charged are unreasonable. The Respondent has lucidly explained that in arriving at the amounts charged, it considered that the fees had not been increased for the last 6 years and also it considered the vehicle capacity of the space occupied by the individual traders and categorized the charges accordingly. To me, these are reasonable and relevant considerations which extinguish the Petitioner's attempt to draw a parallel with charges in Nairobi blindly without elaborating how the Nairobi charges were arrived at.
62. Lastly, the Petitioner seeks several declarations as listed earlier. The tests for granting declaratory reliefs were settled in *Durban City Council v Association of Building Societies*³³ and confirmed in *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd.*³⁴ The court must first be satisfied that the applicant is a person interested in an existing, future or contingent right or obligation; and if so, the court must decide whether the case is a proper one for the exercise of its discretion.
63. The first leg of the enquiry involves establishing the existence of the necessary condition precedent for the exercise of the court's discretion. An applicant for the declaratory relief satisfies this requirement if he succeeds in establishing that he has an interest in an existing, future or contingent right or obligation. Only if the court is satisfied, does it proceed to the second leg of the enquiry.
64. The other stage of the enquiry relates to whether the public officer is authorized or obliged by law to render the impugned decision. The first answer to this question lies in the constitutional principle of legality. Organs and officials of state are only empowered to act to the extent that their powers are defined and conferred by the constitution and/ or by statute. Any conduct by an organ or official of state beyond their constitutional and/ or statutory powers violates the principle of legality. The answer to this test lies in the Respondent's statutory powers. I have no doubt in my mind that Respondent's powers to charge license fees are founded on the law. Applying the above tests to this case, I am not persuaded that the Petitioner has established grounds for the court to grant the declaratory reliefs sought.
65. The Petitioner prays for an injunction restraining the Respondent from interfering with the Petitioners members business until the Respondents configure its electronic licensing system so as to allow the members to access the system and pay trade license for 2021 and henceforth until the rates of Kshs. 45, 000/= per year is lawfully reviewed. It has been said that 67 of the Petitioners members now before the court have already paid the new fees. The argument that the payment was not voluntary is not convincing. In any event an injunction is a discretionary remedy and it is granted on sound principles of law and evidence. No convincing case was argued before me to support the prayer for injunction.

Disposition

66. In view of my analysis of the facts, the law and the authorities herein above, I find and hold that this Petition fails in its entirety. Accordingly, I hereby dismiss the Petition dated 10th June 2021 with no orders as to costs.

SIGNED, DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 25TH DAY JANUARY 2022

JOHN M. MATIVO

³³ 1942 AD 27 at 32

³⁴ 2005 (6) SA 205 (SCA) at para 15 to 17.



JUDGE

