Mumira v Attorney General (Constitutional Petition E007 of 2020) [2022] KEHC 271 (KLR) (8 April 2022) (Ruling)

Neutral citation: [2022] KEHC 271 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CONSTITUTIONAL PETITION E007 OF 2020

JM MATIVO, J

APRIL 8, 2022

BETWEEN

PETER MUMIRA ..... APPLICANT

AND

ATTORNEY GENERAL ..... RESPONDENT

RULING

1. This ruling determines a Notice of a Preliminary Objection dated 2nd November 2022 filed by counsel for the Respondent, the Hon. Attorney General. The substance of the objection is that the Petitioner had filed Civil Suit No. 496 of 1999, Dr. Peter Mumira v National Bank of Kenya Ltd, The Commissioner of Police & The Hon. Attorney General which was determined, and, that, no appeal has been determined in the said case, so, the matter is *res judicata*.

2. The same day the Notice of Preliminary Objection was filed, the Petitioner filed an amended Petition introducing two new Respondents, namely, the Commanding Officer, Shimo La Tewa Government of Kenya Prison and the Inspector General of Police. The Amended Petition was filed without leave of this court. I will revert to this infraction later.

3. The Respondent's counsel submitted that prior to the Petition, the Petitioner had filed a Plaint dated 1st November 1999 being Mombasa High Court Civil Suit No. 496 of 1999 against the National Bank of Kenya Ltd, the Commissioner of Police and the Attorney General citing alleged breach of his rights while in Prison-by-Prison Officers and inmates. Counsel submitted that the said suit was dismissed for want of Prosecution. As a consequence, the Respondent submitted that this Petition is res judicata by dint of section 7 of the *Civil Procedure Act*[1] and cited *Njue Ngai v Ephantus Njiru & another*[2] and

1 Cap 21, Laws of Kenya.

2 {2016} e KLR.

Kenya Commercial Bank Ltd v Nenjoh Amalgamated Ltd[3] which decisions defined the ingredients of res judicata to include:- (a) that the suit or issue was directly and substantially in issue in the former suit; (b) that the former suit was between the same parties or parties under whom they or any of them claim; (c) that those parties were litigating under the same title; (d) that the issue was heard and finally determined in the former suit; (e) that 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.

4. Counsel submitted that the inclusion of new parties in the Amended Petition is aimed at circumventing the elements of res judicata. Counsel submitted that the Parties in this Petition and in the former suit, namely, High Court Civil Suit No. 496 of 1999 are the same and the claim is identical. Counsel relied on Njue Ngai v Ephantus Njiru Ngai & another (supra) which held that judgment includes dismissal of a proceedings or suit by way of dismissal for want of prosecution and argued that res judicata applies in the instant case.

5. The Petitioner's counsel submitted that the Preliminary Objection does not meet the threshold of a Preliminary Objection as defined laid in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors*[4] in that it does not raise a pure point of law, and that it was raised for the purposes of delaying these proceedings. Counsel argued that the issues raised in this Petition are different from those raised in the civil suit because the instant Petition is premised on alleged breach of rights. (Citing *Arnacherry Ltd v Attorney General*[5]). He submitted that the amendment sought to be introduced has nothing to do with the instant objection and that in as much as the Hon. Attorney General was a party in the previous suit, res judicata does not apply.

6. As alluded to above, the Petitioner's counsel filed an amended Petition dated 8th November 2021 without this court's leave. To my mind, the purported amendment offends Rule 18 of *The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 which provides that a party that wishes to amend its pleadings at any stage of the proceedings may do so with the leave of the Court. The purported Amended Petition filed without this courts leave in clear breach of the said provision.

7. The core ground raised in this Objection is is whether dismissal of a suit for want of prosecution is a permissible ground to sustain an objection founded on the doctrine of 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."

[3] {2017} e KLR.

[4] {1969} EA 696, 700.

[5] {2014} e KLR.

8. In *Qayrat Foods Limited v Safiya Ahmed Mohamed & 6 others*[6] the court cited *James Karanja alias James Kioi (Deceased)*[7] 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."

9. The Supreme Court in *Kenya Commercial Bank Limited v Muiri Cofee Estate Limited & another* stated the following regarding res judicata: -

> "(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.

10. 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. 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.

11. 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.[8]

12. Res judicata is provided for in Section 7 of the *Civil Procedure Act*.[9] 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.[10]

6 {2020} e KLR.

7 {2014} e KLR.

8 *http://www.kenyalawresourcecenter.org/2011/07/res-judicata.html -Accessed on 16 December 2017.*

9 Cap 21, Laws of Kenya.

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

13. The Respondent's counsel relied on *Njue Ngai v Ephantus Njiru Ngai & Another*[11] in which the court addressing the question whether a dismissal of a suit for non-attendance of the Plaintiff or for want of prosecution, amounts to a judgment reviewed previous decisions and referred to *Jowitt's Dictionary of English Law*[12] which defines a judgement as a :- the decision of a court; the decision or sentence of a court on the main question in a proceeding or/one of the questions, if there are several." The court also referred to *Mulla's Indian Civil Procedure Code*,[13] which reads:-:"Judgment" means the statement given by the judge on the grounds of a decree or order," "Judgment – in England, the word judgment is generally used in the same sense as decree in this code" and concluded that a judgment is a judicial determination or decision of a court on the main question(s) in a proceeding and includes a dismissal of the proceedings or a suit under Rule 4(1) of Order 1XB or under any other provision of law which is not a bar to the Plaintiff to apply for the dismissal to be set aside.

14. From the jurisprudence discussed earlier, it is clear that the previous suit must have been determined conclusively and a final Judgment rendered on the merits. Even in Njue Ngai v Ephantus Njiru Ngai & Another, the court in the above underlined sentence, the court cited authorities/decisions stating that there must be a determination on the main questions. Turning to this case, the question is whether a dismissal for want of prosecution can be termed as a final determination on merits. In *Cosmas Mrombo Moka v Co-operative Bank of Kenya Limited & another*[14] the High Court dismissed a similar objection as raised in this Petition declining to buy the arguments raised in this Petition. Also, in *Moses Mbatia v Joseph Wamburu Kihara*[15] the court held that dismissal of a suit for nonattendance or want of prosecution is not synonymous with a suit that has been heard and determined. On this ground alone, the Respondent's argument that dismissal of a suit for want of prosecution constitutes res judicata collapses

15. In any event, courts have over the time expressed the view that the doctrine of res judicata should not be applied rigidly because there are limited exceptions which allow a party to attack the validity of the original judgment, even outside of appeals. These exceptions—usually called collateral attacks—are typically based on procedural or jurisdictional issues, based not on the wisdom of the earlier court's decision but its authority or on the competence of the earlier court to issue that decision. In addition, in matters involving due process, cases that appear to be res judicata may be re-litigated. Examples are establishment of a right to counsel or where a citizen's liberty is taken away.

16. In developing exceptions to the res judicata doctrine, it is instructive to look at the exceptions admitted by other jurisdictions. In Amtim Capital Inc[16] the Court of Appeal for Ontario, Canada, stated that the purpose of res judicata is to balance the public interest in finality of litigation with the public interest of ensuring a just result on the merits. The court found that the doctrine is intended to promote orderly administration of justice and is not to be mechanically applied where to do so would create an injustice.

11 {2016} e KLR.

12 2nd ed p. 1025

13 13th Ed Vol 1 p 798.

14 {2018} e KLR.

15 {2021} e KLR.

16 *Amtim Capital Inc v Appliance Recycling Centres of America* 2014 ONCA 62.

17. In 2015, the Constitutional Court of South Africa in *Molaudzi v The State*[17] dealt with the question of when a court would be allowed to depart from its own earlier decision in the context of criminal law. Drawing from foreign jurisprudence, the court was able to reconsider its own previous final order by relying on the exceptions to the doctrine of res judicata. The relaxation of the doctrine effectively started in *Boshoff v Union Government*[18] where it was held that the strict requirements for a plea of res judicata should not be understood literally in all circumstances and applied as an inflexible or immutable rule. Botha JA[19] added that in particular circumstances these requirements may be adapted and extended to avoid the unacceptable alternative that courts cling to old doctrines with literal formalism. Scott JA summarized the development of the law as follows: -

> " [T]he ambit of the exceptio rei judicata has over the years been extended by the relaxation in appropriate cases of the common-law requirements that the relief claimed and the cause of action be the same . . . in both the case in question and the earlier judgment. . . Each case will depend on its own facts and any extension of the defence will be on a case-by-case basis. . . Relevant considerations will include questions of equity and fairness not only to the parties themselves but also to others. As pointed out by De Villiers CJ as long ago as 1893 in Bertram . . . 'unless carefully circumscribed, [the defence of res judicata] is capable of producing great hardship and even positive injustice to individuals."[20] (Emphasis added)

18. In the United Kingdom, res judicata is known as cause of action estoppel or issue estoppel.[21] In rare instances the court may reconsider its own previous judgments. In Pinochet, the House of Lords observed: -

> " In principle it must be that your Lordships, as the ultimate court of appeal, have power to correct any injustice caused by an earlier order of this House. There is no relevant statutory limitation on the jurisdiction of the House in this regard and therefore its inherent jurisdiction remains unfettered....
>
> However, it should be made clear that the House will not reopen any appeal save in circumstances where, through no fault of a party, he or she has been subjected to an unfair procedure. Where an order has been made by the House in a particular case there can be no question of that decision being varied or rescinded by a later order made in the same case just because it is thought that the first order is wrong."[42] (Emphasis added.)

19. In Singapore, the Court of Appeal distinguished between its powers regarding criminal and civil appeals. With regard to criminal appeals it appears to consider itself a creature of statute and not

17 (CCT42/15) [2015] ZACC 20; 2015 (8) BCLR 904 (CC); 2015 (2) SACR 341 (CC) (25 June 2015).

18 Boshoff v Union Government 1932 TPD 345.

19 See also *Hyprop Investments Ltd and Others v NSC Carriers and Forwarding CC and Others* [2013] ZASCA 169; 2014 (5) SA 406 at para 14 and *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* [1994] ZASCA 19; 1995 (1) SA 653 (A) (Kommissaris) at 669F-H

20 *Smith v Porritt and Others* {2007} ZASCA 19; 2008 (6) SA 303 (SCA) at para 10.

21 A distinction is made between "cause of action estoppel" and "issue estoppel". In the first case— "the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter." (*Arnold v National Westminster Bank [1991] 2 AC 93* (HL) at 104.) In the second case— "a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue." (Arnold at 105.)

equipped with the power to revisit any final criminal decisions.[22] In respect of civil matters, it finds that it has inherent jurisdiction to achieve a variety of results. In *Taylor and another v Lawrence and another*[23] the civil division of the Court of Appeal held that: -

> "The need to maintain confidence in the administration of justice makes it imperative that there should be a remedy. The need for an effective remedy in such a case may justify this court in taking the exceptional course of reopening proceedings which it has already heard and determined. What will be of the greatest importance is that it should be clearly established that a significant injustice has probably occurred and that there is no alternative effective remedy. The effect of reopening the appeal on others and the extent to which the complaining party is the author of his own misfortune will also be important considerations."

20. In India, Article 137 of *the Constitution* provides that "Subject to the provisions of any law made by Parliament or any rules made under Article 145, the Supreme Court shall have power to review any judgment pronounced or order made by it."[24] The Supreme Court of India has held that this power is reserved for the correction of serious injustice. It is for the correction of a mistake, not to substitute a view.[25] The ordinary position is that a judgment is final and cannot be revisited. The power to review is statutory. It can be exercised when there is a patent and obvious error of fact or law in the judgment.[26] The injustice must be apparent and should not admit contradictory opinions.[27]

21. The High Court of Kenya in *Benjamin Koech v Baringo County Government & 2 others; Joseph C. Koech (Interested Party)* after reviewing decided cases held that exceptional circumstances such as fraud, mistake or lack of jurisdiction may constitute special circumstances to remove the operation of the doctrine of res judicata. However, no special circumstances have been cited in this case. The issue here is whether res judicata applies after a case is dismissed for want of prosecution. Whereas I agree with the reasoning in Cosmas Mrombo Moka v Co-operative Bank of Kenya Limited & another (supra) and Moses Mbatia v Joseph Wamburu Kihara (supra) that a suit dismissed or struck out for nonattendance or want of prosecution is not synonymous with a suit that has been heard and determined on merits, there is yet another important issue which was not addressed in the said cases, which is, whether it is open for a party to file a fresh suit based on the same facts and circumstances after the earlier suit is dismissed for want of prosecution. My view is that it is not open for a party to file a fresh suit after the earlier suit is dismissed for want of prosecution.

22 Where significant or manifest injustice would result should the order be allowed to stand, the doctrine ought to be relaxed in terms of sections 173 and 39(2) of *the Constitution* in a manner that permits this Court to go beyond the strictures of rule 29[79] to revisit its past decisions. This requires rare and exceptional circumstances, where there is no alternative effective remedy. This accords with international approaches to res judicata. The present case demonstrates exceptional circumstances that cry out for flexibility on the part of this Court in fashioning a remedy to protect the rights of an applicant in the position of Mr Molaudzi.

23 {2002} EWCA Civ 90.

24 *Constitution of India, 1950.*

25 *Choudhury "Review Jurisdiction of Supreme Court of India: Article 137" Social Science Research Network (4 April 2012*), available at http://dx.doi.org/10.2139/ssrn.2169967.

26 *A T Sharma v A P Sharma* AIR 1979 SC 1047.

27 *M/s Northern Indian Caterers (India) Ltd v Lt Governor of Delhi* AIR 1980 SC 674.

22. In my view, the proper cause of action for the Petitioner was to either apply to set aside the order dismissing the Petition for want of prosecution or apply for review the order or prefer an appeal against the dismissal. It is not open for the Petitioner to instate a fresh suit disguised as a constitutional Petition replicating the same issues now camouflaged as breach of constitutional rights. Such an approach is impermissible and if allowed, it would create endless litigation and open a window for parties to evade orders dismissing suits for want of prosecution or for non-attendance and then file fresh suits vexing Respondents twice with the same suit. On this ground alone, I find and uphold the Notice of Preliminary Objection and dismiss the Petitioner's Petition dated 21st September 2020 with no orders as to costs.

Right of appeal

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8 TH DAY OF APRIL 2022

JOHN M. MATIVO

JUDGE