



**Irungu & another v Attorney General & 2 others; High Court of Kenya & another
(Interested Parties) (Anti-Corruption and Economic Crime Petition 2 of 2022)
[2022] KEHC 11257 (KLR) (Anti-Corruption and Economic Crimes) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 11257 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION AND ECONOMIC CRIME PETITION 2 OF 2022**

EN MAINA, J

JULY 28, 2022

BETWEEN

DESMOND IRUNGU 1ST PETITIONER

NELSON KARANJA KINUTHIA 2ND PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

SPEAKER OF THE NATIONAL ASSEMBLY 2ND RESPONDENT

ETHICS & ANTI-CORRUPTION COMMISSION 3RD RESPONDENT

AND

THE HIGH COURT OF KENYA INTERESTED PARTY

ASSETS RECOVERY AGENCY INTERESTED PARTY

RULING

1. This ruling pertains to the 3rd respondents preliminary objection dated November 30, 2021 challenging the jurisdiction of this court to hear the petition herein which challenges the constitutionality of certain sections of the [Proceeds of Crime and Anti-Money Laundering Act](#) and which more specifically seeks orders that:-
 - “a) a declaration do issue that the Part VIII of the [Proceeds of Crime and Anti-Money Laundering Act](#) is a threat to [the Constitution](#) as it contravenes the limitation parameter/test set under article 24 of [the Constitution](#) to the extent that the overboard and indiscriminate limitation captures under the



impugned sections of law takes away constitutionally guaranteed rights and it is unreasonable, unjust and unfair in our open and democratic society.

- b) A declaration do issue that Part VIII of the *Proceeds of Crime and Anti-Money Laundering Act* establishes a presumption of guilt before trial thereby taking away the right to fair trial and thereby creating a room for unfair and unjustified convictions and loss of hard earned assets.
 - c) A declaration do issue that Part VIII of the *Proceeds of Crime and Anti-Money Laundering Act* specifically violates articles 31, 40 and 50 of *the Constitution* and therefore amounts to a breach of basis human rights provided under Chapter IV of *the Constitution*.
 - d) A declaration do issue to the extent that the outcome of criminal proceedings is key in making a decision on the forfeiture or otherwise of assets and money belonging to persons suspected of being involved in corruption activities.
 - e) A declaration do issue to the extent that the 3rd respondent is barred from moving to the High Court to seek forfeiture orders before the conclusion of criminal proceedings and only in the instance of a guilty verdict.”
2. The gist of the preliminary objection is that the issues raised in the petition are res judicata as the same were conclusively determined by the High Court in Mombasa in Petition No. 4 of 2019 *Stephen V. Mangira & another vs Senior Principal Magistrate, Shanzu & 9 others* [2020] eKLR; that this court lacks jurisdiction to grant the orders sought as there are proceedings for forfeiture pending before a court of concurrent jurisdiction and further because the court (the Constitutional Court where the Petition was initially filed) has no jurisdiction to hear and determine this Petition in view of the Practice Directions for the Anti-corruption and Economic Crimes Division contained in Gazette Notice No. 7262 dated June 26, 2018.
3. The preliminary objection was vehemently resisted by the petitioners who argue that:-
- “i) The preliminary objection raised by the 2nd interested party is not purely one of law but of fact as the orders sought in the petition are discretionary; that the preliminary objection was not pleaded in the pleadings and hence should not be a reason to dispose the suit.
 - ii. That the parties in this case are different from the parties in *Stephen V, Mangira & another versus Senior Principle Magistrate Shanzu & 9 others* [2020] eKLR
 - iii. That the issues in the Stephen Mangira case are totally different.
 - iv. That this court has jurisdiction to hear and determine the petition by dint of the practice directions in Gazette Notice No. 7262 of 2018.”
4. The only issue for determination is whether this petition is res judicata in view of the decision in Mombasa Petition No. 4 of 2019 *Stephen Mangira & Another Vs Senior Principal Magistrate, Shanzu & 9 others* [2020] eKLR.

Analysis and Determination

5. It is evident that in Mombasa Petition No. 4 of 2019 the court heard and determined similar issues as are raised in the instant Petition. Specifically, that court determined the issue of the constitutionality



of Part VII and Part VIII of the *Proceeds of Crime and Anti-Money Laundering Act*; whether the same negate the presumption of innocence and the right to fair trial. The same issues have also been raised in this petition.

6. The doctrine of Res judicata derives from section 7 of the *Civil Procedure Act* which states: -

“7. 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.

Explanation. (1)—The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. (2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. (4)—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. (5)—Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. (6)—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

7. There is now a long line of cases dealing with this doctrine. In the case of *Kenya Commercial Bank Limited v Muiru Coffee Estate Limited & another* [2016] eKLR the Supreme Court of Kenya stated:-

“(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. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights. Such a perception has a basis in comparative jurisprudence; in the Ugandan case of Hon. Norbert Mao v. Attorney-General, Constitutional Petition No. 9 of 2002; [2003] UGCC3, the petitioner brought an action on behalf of 21 persons from his constituency, for declarations under Article 137 of the Uganda Constitution, and for redress under Article 50 of that Constitution. The matter arose from an incident in which officers of the Uganda Peoples Defence Forces attacked a prison, and abducted 20 prisoners, killing one of them. Unknown to the petitioner, another action had already been filed under Article 50, seeking similar relief;



and Judgment had been given in Hon. Ronald Reagan Okumu v. Attorney-General, Misc. Application No.0063 of 2002, High Court HCT 02 CV MA 063 of 2002. The Constitutional Court dismissed the petition, on a plea of res judicata, declining the petitioner's pleas that certain important constitutional declarations now sought, had not been accommodated in the earlier Judgment.

.....

- (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.
- (55) It emerges that, contrary to the respondent's argument that this principle is not to stand as a technicality limiting the scope for substantial justice, the relevance of res judicata is not affected by the substantial-justice principle of Article 159 of *the Constitution*, intended to override technicalities of procedure. Res judicata entails more than procedural technicality, and lies on the plane of a substantive legal concept.

The Court then held that: -

- (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^{3/4}to ascertain the issues determined in the previous case, and whether 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. This test is summarized in Bernard Mugo Ndegwa v. James Nderitu Githae & 2 Others, (2010) eKLR, under five distinct heads: (i) the matter in issue is identical in both suits; (ii) the parties in the suit are the same; (iii) sameness of the title/claim; (iv) concurrence of jurisdiction; and (v) finality of the previous decision.
- (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. In the case of *Omondi v. National Bank of Kenya Limited and Others*, (2001) EA 177 the Court held that, ‘parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.’ In that case the Court quoted Kuloba J., in the



case of *Njangu v. Wambugu and Another* Nairobi HCCC No.2340 of 1991 (unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before Courts of competent jurisdiction merely because he gives his case some cosmetic face-lift on every occasion he comes to Court, then I do not see the use of the doctrine of res judicata.....’

8. The same court arrived at the same finding in the case of John *Florence Maritime Services Limited & another v Cabinet Secretary, Transport and Infrastructure & 3 others* [2021] eKLR where it stated:-

“ 81. We reaffirm our position as in the Muii 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. To further bolster our position we borrow from the decision from India in *Karam Chand another v Union Of India and others* on 24 April, 2014 where it was restated the principles upon which the doctrine of res judicata is founded as follows:

29.it is clear that the rule of res judicata is mandatory in its application and should be invoked in the interest of public policy and finality. The matter which have actually been decided would also apply to the matters which have been impliedly and constructively decided by the court. These principles are to be applied to preserve the doctrine of finality rather than frustrate the same. The doctrine of res judicata is the combined result of public policy so as to prevent repeated taxing of a person to litigation. It is primarily founded on the following three maxims:

- (1) nemo debet bis vexari pro una et eadem causa: no man should be vexed twice for the same cause.
- (2) interest republicae ut sit finis litium: it is in the interest of the State that there should be an end to a litigation; and
- (3) res judicata pro veritate occipitur: a judicial decision must be accepted as correct.

.....The doctrine of res judicata is conceived not only in the larger public interest which requires that all litigation must sooner than later come to an end but is also founded on equity, justice and good conscience.”

Holding further that the doctrine applied to constitutional matters the Court stated:-



86. We restate the elements that must be proven before a court may arrive at the conclusion that a matter is res judicata. For res judicata to be invoked in a civil matter the following elements must be demonstrated:
- a. There is a former Judgment or order which was final;
 - b. The Judgment or order was on merit;
 - c. The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
 - d. There must be between the first and the second action identical parties, subject matter and cause of action.”
9. Applying the principles in the above Supreme Court cases to this case I find, with due respect, that the issues herein do not meet the test for res judicata. In the first instance the same fails the last test in the John Florence Maritime Services Limited case in that between the Stephen Mangira case and this Petition the parties are neither identical nor litigating under the same titles and the subject matter and cause of action are not the same. It is also instructive that the judgment in the case of Stephen v Mangira, as written, pertained and was intended to affect only the parties therein and was not a judgment in rem against the whole world. It is also not a final judgment on the issues raised such as would warrant this court to fold its hands and say that the issue was determined by that court hence I must down my tools.
10. In the upshot the preliminary objection has no merit and it is dismissed. Costs shall however be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 28TH DAY OF JULY, 2022.

E N MAINA

JUDGE

