



**Samrudda Resources (Kenya) Limited v County Government of Taita Taveta (Constitutional Petition E018 of 2021) [2022] KEHC 10158 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 10158 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CONSTITUTIONAL PETITION E018 OF 2021**

**JM MATIVO, J**

**JULY 28, 2022**

**BETWEEN**

**SAMRUDDA RESOURCES (KENYA) LIMITED ..... PETITIONER**

**AND**

**COUNTY GOVERNMENT OF TAITA TAVETA ..... RESPONDENT**

**JUDGMENT**

1. The Petitioner's case is that the Taita Taveta County Government passed the Taita Taveta County Finance Act, 2018 pursuant to which it increased Cess on mining of Iron Ore from Kshs. 150/= per ton to Kshs. 1,000/= per ton, an increase of 850% without stake holder participation or involvement of the national government. It avers that it successfully challenged the said levy in Mombasa High Court Petition Number 29 of 2019 but the court ruled that the Respondent was charging Cess on transportation. Its appeal against the said decision is pending before the Court of Appeal.
2. It contends that in October 2020, the Respondent enacted the Taita Taveta County Finance Act, 2020 pursuant to which it imposed a levy of Kshs. 500/= per ton premised on 30% royalty under the *Mining Act*. It avers that under section 6 of the Act, minerals are vested in the national government in trust for the people of Kenya, with certain rights conferred to license holders subject to payment of the required fees and royalties under section 108 of the Act. It avers that because under section 183 of the Act, holders of Mineral Rights are obligated to pay 70% royalty to the National Government, 20% to the County Government and 10% to the local community, any further levy amounts to double taxation contrary to Articles 10 and 209(5) of *the Constitution*. It avers that the Fourth Schedule to *the Constitution* distributes functions between the National and County Government, while Article 186 (3) provides that a function or power not assigned by *the Constitution* or national legislation is a function or power of the National Government.



3. The Petitioner avers that the Respondent's decision to enact the said legislation imposing further levies is a gross abuse of its powers, and a violation of its constitutional rights and it is tantamount to double taxation. As a consequence, the Petitioner prays for : -
  - a. A declaration that collection of the sum of Kshs. 500 or any other sum by the Respondent for ore mined in Taita Taveta County in the pretext of an entitlement to 30% of the royalty is unlawful, unconstitutional and null and void.
  - b. An injunction to restrain the Respondent, the County Government of Taita Taveta from enforcing or levying the said sum of Kshs. 500 for iron ore under the Taita Taveta County Finance Act 2020.
  - c. A declaration that the Respondent is only entitled to a share of royalty payments at the rate of 20% to be distributed by the National Government from amounts paid to it and the Respondent is not entitled to any payment directly from the Petitioner.
  - d. Any other or such other relief as this court deems appropriate in the circumstances to grant.
  - e. Costs of and incidental to this Petition.
4. The Respondent filed the Replying affidavit sworn by a one Liverson Mighendi, its Country Secretary dated 28<sup>th</sup> May 2021. The substance of the affidavit is that this Petition is res judicata because it raises issues which were the subject of previous litigation between the same parties in Petition Number 29 of 2019 in which the court ruled that the cess levied was lawful because it was not a tax on the mineral but a charge for transportation of the mineral; that the said charges are Cess and not royalty; that this suit offends section 7 of the [Civil Procedure Act](#).
5. Additionally, the Respondent states that Article 209 (3) & (4) of [the Constitution](#) and the Taita Taveta County Finance Act, 2020 permits it to collect Cess for the transportation of iron, which levy was endorsed by the court in the earlier cited decision. Further, after enacting the said act, Cess on iron ore was reviewed from Kshs. 1000 to Kshs. 500/= which is levied for transportation and it should not be construed as royalties.
6. The Petitioner filed the further affidavit of Parag Pawar dated 27<sup>th</sup> July 2021. The nub of the affidavit is that this court has jurisdiction to address these matters; that this Petition is distinct from Petition 29 of 2019; that the Petitioner has preferred an appeal against the judgment in Petition No. 29 of 2019; that the instant Petition challenges the constitutionality of the Taita Taveta County Finance Act 2020; and, that the provisions of the [Civil Procedure Act](#) and Rules are inapplicable.
7. The Petitioner submitted that section 183 of the [Mining Act](#) obligates holders of Miners Rights to pay royalty to the Government of Kenya and not the County Government which is distributed as follows: - 20% to the County Government, 10% to the Community and 70% to the National Government.
8. It argued that it is mischievous and incongruous for the Respondent to legislate a 30% entitlement to be paid directly to it which is a violation of Articles 10, 209 (5) and 210 of [the Constitution](#). It cited sections 6 and 108 of [Mining Act](#) and argued that the County Government has no control over minerals vested in the National Government. It argued that the Respondent is perpetuating an illegality and dismissed the argument that the amount charged is Cess. It cited Base Titanium Limited v The County Government of Mombasa which held that a county does not have the authority to charge a Cess or levy tax where they do not offer anything in return, because levies are imposed for services rendered.
9. The Petitioner also submitted that the Supreme Court in the above case held that mobility of goods is governed by the [Kenya Roads Act](#), the Kenya National Highways Authority, the Kenya Urban Roads



Authority and the Kenya Rural Roads Authority, so, if at all any Cess is owing, it would be owing to the National Government and not the County Government.

10. The Respondent did not file submissions despite being afforded time to do so nor did they attend court despite being served.

11. For starters, a pertinent question which warrants early resolution is whether the issues raised in these proceedings are res judicata as pleaded by the Respondent in its Replying affidavit. This is a point of law which this court cannot ignore. It common ground that the Petitioner filed Constitutional Petition Number 29 of 2019, Samruddah Resources (Kenya) Ltd v County Government of Taita Taveta filed by the Petitioner herein against the Respondent. The Petitioner's grievance in the said Petition is eloquently captured in the following paragraphs extracted from the court's judgment dated 4<sup>th</sup> May 2020: -

1. At the heart of the petition herein dated 8/4/2019 is the Finance Act 2018 passed by the Respondent relating to the levy of various charges, taxes, licence fees and cess in respect of matters stated therein.
2. The Petitioner alleges to be engaged in inter-a-lia the licensed mining and export of iron ore from the Taita Taveta County. The Petitioner avers that the Respondent, County Government of Taita Taveta, has been levying a charge of Kshs. 150.00 per ton of iron ore, but that the said charge has been arbitrarily and unilaterally increased to Kshs. 1000.00 per ton. This purported increase by Kshs. 850.00 has been occasioned without any involvement by stakeholders, and indeed without any participation of all interested parties whatsoever, and even the reasons necessitating the increase have not been given.
3. The Petitioner avers that under the provisions of the *Mining Act* (No. 12 of 2016), every mineral in its natural state in, under or upon land in Kenya is the property of the Republic of Kenya and is vested in the National Government in trust for the people of Kenya and that the County Government, once it receives its share of royalties, cannot again purport to levy any further taxes on the mineral. The Petitioner avers that under Section 183 of the said Act holders of mineral rights are obliged to pay royalty to the government in respect of the mineral. That royalty is then distributed 70% to the National Government, 20% to the County Government and 10% to the community where the mining operations occur. Hence, the Petitioner avers, any further levy of monies in the form of taxation is tantamount to double taxation and goes against the national principles stipulated in Article 10 of *the Constitution* as well as Article 209 (5) of *the Constitution*.
4. The Petitioner further avers that any further levies of taxes by the Respondent is not only a gross abuse of the Respondent's powers and a violation of the Petitioner's rights under *the constitution*, but also amounts to unjust enrichment by the Respondent, while that conduct at the same time makes it virtually impossible for the Petitioner to profitably engage in the business of mining the iron ore. The Petitioner states that the proposed charge by way of cess is simply intended to stifle the Petitioner's business in which the Petitioner has heavily invested.

12. The Petitioner in the said case sought the following orders: -



- a. A declaration that collection of cess by the Respondent for iron ore mined in Taita Taveta County is unlawful, unconstitutional and null and void;
  - b. An injunction to restrain the Respondent, the County Government of Taita Taveta, from enforcing of levying cess for iron ore illegally and unlawfully under the Taita Taveta County Finance Act 2018;
  - c. Any other or such other relief as this Honourable Court deems appropriate in the circumstances to grant; and
  - d. Costs of and incidental to this petition.
13. The above excerpts are lifted from the judgment in Constitutional Petition Number 29 of 2019, Samruddah Resources (Kenya) Ltd v County Government of Taita Taveta. The question before me is whether the instant Petition can surmount the hurdle erected by the doctrine of res judicata. The Black's law Dictionary defines res judicata as follows: -

“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.”

14. In Qayrat Foods Limited v Safiya Ahmed Mohamed & 6 others the court cited James Karanja alias James Kioi (Deceased) 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.”

15. Kenya's Apex Court in Kenya Commercial Bank Limited v Muiiri Coffee 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.

[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 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.”

16. 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.
17. Arguably, the most articulate elucidation of res judicata was pronounced by Somervell L.J. 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. 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. 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.
19. Granted, 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.
20. 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 the court is prevented from trying the case in limine i.e. from the beginning. The rule of res judicata presumes conclusively the truth of the decision in the former suit. 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.

21. The object of res judicata 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 res judicata as articulated in section 7 of the >/akn/ke/act/1924/3 Civil Procedure Act 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.
22. As was held in *Gurbachan Singh Kalsi v Yowani Ekori*, by the former East African Court of Appeal: -

“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.”
23. A reading of the Petitioner’s grievance as captured in the judgement rendered in earlier case and the issues distilled and determined by the learned judge in the said suit leave no doubt that the issues presented in both suits are strikingly similar. In both suits, the Petitioner questioned the constitutional and legal validity of the levy charged. The only difference is that in the instant Petition, the Petitioner seeks to challenge the decision to levy Cess under the 2020 while in the previous suit is related to a 2018 legislation. However, the grounds and arguments in both suits are substantially if not wholly similar.
24. The issue whether the Petitioner had a valid mining license was raised and determined in the previous suit. The same issue has been raised in the instant Petition. The court in the previous Petition also addressed the question whether the Cess levied on the mineral was a tax or whether it was a tax on a service offered by the Respondent. The court held that the Cess charged was on the transportation of the mineral, not on the mineral. In fact, the court relied on *Base Titanium v County Government of Mombasa & another* which held that under Article 209(4) of *the Constitution*, the County Government has authority to impose charges for services that they provide which include road transport services.
25. The grounds cited in support of the instant Petition and the averments in support of the Petition are substantially similar to the grounds raised and determined in the earlier Petition. Mere addition of one or two grounds in a subsequent suit or omission of a party or party’s does not necessarily render



- the doctrine of res judicata inapplicable because a party cannot escape the wrath or res judicata by simply undertaking a cosmetic surgery to his pleadings or introducing new grounds to secure the earlier refused orders.
26. If the added grounds 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 stands on the same grounds cited and determined earlier and are raised to simply to re-litigate the same issues, the doctrine will still be invoked because citing a new ground or adding a new prayer would in that case be for the sole purpose of decoration and dressing and nothing else. Res judicata covers issues which could have been raised in the earlier proceedings. The test here as I see it is whether had the earlier Petition succeeded, would the Petitioner have filed the second Petition. Looking at the prayers sought in both suits, it is manifestly clear that had the Petitioner succeeded in the earlier Petition, it would not have filed the instant Petition because it would add no value. The instant Petition offends the doctrine of res judicata and on this ground, it collapses. I dismiss it on this ground.
  27. Perhaps I should add that 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. 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).
  28. 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. 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. The court pronounced itself on the first application. This court is being invited to sit on appeal on the same decision. I decline the invitation to travel along this forbidden route.
  29. Notwithstanding my above finding, I will address the case on merits. The Petition as drawn has manifest shortcomings. The Petitioner is essentially aggrieved by the provisions of a County Legislation which imposed a levy. Its argument is that it creates what it calls double taxation. It is argued that the levy imposed violates Articles of *the Constitution*. This argument is attractive. But that is how far it goes. If at all the Petitioner wanted to mount a case on the legality and constitutional validity of the County legislation, then one wonders why it never sought a prayer that the provisions in questions are unconstitutional mount an argument to that effect. In absence of a prayer to that effect one wonder how the Petitioner sought to impugn a levy which is charged pursuant to a county legislation which is still in force. This omission effectively renders the Petitioners challenge on the constitutional validity if the levy unsustainable.
  30. In view of my analysis of the facts, the law and the conclusions arrived at herein above, it is my finding that this Petition fails. Accordingly, I hereby dismiss the Petitioner's Petition dated 22<sup>nd</sup> March 2021 with no orders as to costs.

**SIGNED, DATED AT MOMBASA THIS 27<sup>TH</sup> DAY OF JULY 2022**

**JOHN M. MATIVO**

**JUDGE**



**SIGNED, DATED AND DELIVERED AT MOMBASA THIS 28TH DAY OF JULY 2022**

**OLGA SEWE**

**JUDGE**

