REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 15 OF 2019

MAGAWI MAXWELL ODHIAMBO.....PETITIONER

VERSUS

THE UNIVERSITY OF NAIROBI.....RESPONDENT

JUDGMENT

1. The Petitioner, Magawi Maxwell Odhiambo, through his petition dated 14th January, 2019 alleges violation of his constitutional rights by the Respondent, University of Nairobi. His case is that his suspension from the University of Nairobi in 2016 for allegedly participating in student riots violated his rights provided under Articles 27, 28, 37, 43 and 47 of the Constitution.

2. The Petitioner therefore seek orders as follows:

> **a) A declaration be made that the Petitioner's fundamental rights and freedoms under Articles 27, 28, 37, 43 and 47 of the Constitution of Kenya, 2010 have been contravened and violated by the Respondent herein;**
>
> **b) A declaration be made that the Petitioner is entitled to the payment of damages and compensation to be assessed by the court for violation and contravention of his fundamental human rights and freedoms by the Respondent herein as provided for under Articles 27, 28, 37, 43 and 47 of the Constitution of Kenya, 2010;**
>
> **c) Costs of the petition; and**
>
> **d) Any other orders, writs and directions that the Honorable Court considers appropriate and just to grant for purposes of the Petitioner's constitutional rights.**

3. The Respondent opposed the petition through a document dated 15th July, 2019 titled 'Reply to Petition'. It is asserted that the claim that the Petitioner's constitutional rights were violated has not been established, and that the dispute is *res judicata* and an abuse of the court process.

4. By claiming that the petition is *res judicata*, the Respondent has called into question this Court's jurisdiction to entertain the petition. Whenever a question of jurisdiction arises, the same should first be addressed by the Court before it delves into other issues in the matter-see **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1.**

5. The Respondent's assertion that this petition violates the doctrine of *res judicata* and is an abuse of the court process is premised on the undisputed fact that the Petitioner and two others had sued the Respondent in respect of their suspension in **Republic v University of Nairobi Ex-parte Lazarus Wakoli Kunani & 2 others [2017] eKLR.**

6. The Petitioner's reply to the Respondent's case is found in a further affidavit sworn in support of the petition on 17th October, 2017. It is the Petitioner's averment that in **Republic v University of Nairobi Ex-parte Lazarus Wakoli Kunani & 2 others [2017] eKLR (Nairobi High Court Judicial Review No. 219 of 2016),** the Court determined that the Respondent's decision to expel him from college was made by a body lacking jurisdiction. The Petitioner contends that the current petition seeks constitutional remedies for contravention of rights and fundamental freedoms.

7. The Petitioner's deposition is that parties have a wide choice when accessing justice. He avers that Article 47 of the Constitution, as read

with the provisions of Section 5(2) of the Fair Administrative Action Act, 2015 (FAA Act), establishes a non-exclusive approach to challenge of administrative action. The Petitioner additionally contends that the cited provision of the FAA Act permits bifurcation or a split approach for remedies.

8. In the written submissions dated 30th October, 2019, the Petitioner did not address the challenge to this Court's jurisdiction by the Respondent apart from the statement at paragraph 42 that:

> **"It is worth noting that the Respondent did not appeal the determination of this Honourable Court in Republic v University of Nairobi Ex-parte Lazarus Wakoli Kunani & 2 others [2017] eKLR."**

9. On its part, the Respondent briefly submitted that the Petitioner's right to fair administrative action under Article 47 of the Constitution had already been addressed in **Republic v University of Nairobi Ex-parte Lazarus Wakoli Kunani & 2 others [2017] eKLR** and the Petitioner granted appropriate relief and adjudicating on the same issue would violate the principle of res judicata.

10. The Respondent contended that the Petitioner was not entitled to any compensation as he had already chosen the judicial review platform to get relief on the issue which he has again brought before this Court through this petition. Reliance is placed on the decision in **Apondi v Canuald Metal Packaging [2015] E.A. 12** for the holding that litigation of similar issues and facts cannot done in installments and different venues. Also cited in support of the assertion that the res judicata principle applies to this case is the decision in **Charles Kanyi Njagua v Nairobi County Government & another [2018] eKLR.**

11. The Court is urged to find that the parties in the petition are the same with the parties in **Republic v University of Nairobi Ex-parte Lazarus Wakoli Kunani & 2 others [2017] eKLR** and the two matters are in respect of a similar cause of action.

12. Once a matter is found to offend the principle of *res judicata* the trial court is expected to down its tools as it is no longer authorized to continue hearing the matter. My statement finds affirmation in the decision of the Court of Appeal in **Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR** where it was held that:

> **"The practical effect of the *res judicata* doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties –because it is the court itself that is debarred by a jurisdictional injunct, from entertaining such suit."**

13. Vice-Chancellor Sir James Wigram pronounced the doctrine of *res judicata* in **Henderson v Henderson [1843] 3 Hare 100** as follows:

> **"[W]here 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 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 judgment, 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."**

14. The principle is established and explained in Section 7 of the Civil Procedure Act, Cap. 21 as follows:

> **"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."**

15. The Court of Appeal in **Independent Electoral & Boundaries Commission v Maina Kiai & 5 others [2017] eKLR** explained the role of the *res judicata* doctrine as follows:

> **"The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure and sure and certain justice."**

16. Any party seeking to rely on the principle of *res judicata* needs to demonstrate that the suit or issue was directly and substantially in issue in a former suit; that the former suit was between the same parties or their agents; and that the issue was heard and finally determined in the other matter by a court of competent jurisdiction. The conditions have been laid down in several decided cases including the already cited case of **Independent Electoral & Boundaries Commission v Maina Kiai & 5 others [2017] eKLR** where it was held that:

> **"Thus, for the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;**
>
> **(a) The suit or issue was directly and substantially in issue in the former suit.**
>
> **(b) That former suit was between the same parties or parties under whom they or any of them claim.**
>
> **(c) Those parties were litigating under the same title.**
>
> **(d) The issue was heard and finally determined in the former suit.**
>
> **(e) 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."**

17. The question is whether the doctrine of res judicata is applicable in the circumstances of this case. In **Republic v University of Nairobi Ex-parte Lazarus Wakoli Kunani & 2 others [2017] eKLR,** the ex-parte applicants, who included the Petitioner herein, sought to quash the decision to suspend them from studies by the University of Nairobi. Their case was majorly premised on the argument that their rights to fair administrative action were violated by the university. The Court ruled in their favour and nullified the decision suspending their studies.

18. It is observed straight away that the Petitioner is again alleging violation of Article 47 of the Constitution despite the fact that the violation of his right to fair administrative action was remedied in the previous case. This automatically renders the claim res judicata in respect of the alleged violation of Article 47.

19. The Petitioner's claim in the previous petition was premised on alleged violation of constitutional rights. In the instant suit he introduces other constitutional provisions and claims that his rights under those provisions were also violated by the Respondent. Nothing stopped him from making a claim in respect of those rights at the time he filed his judicial review application. The impression one gets upon reading the petition is that the Petitioner has decided to allege other violations of the Constitution in order to support his claim for damages. It is, however, noted that nothing stopped him from seeking damages at the time he first came to Court. In my view, his petition offends the rule of res judicata.

20. The doctrine of *res judicata* bars a party from claiming additional remedies in respect of a cause of action, between the same parties or their agents, that has been determined by a court of competent jurisdiction. In **Aspi Jal & Another v Khushroo Rustom Dadyburjor 2013 (1) CLR (SC) 1043,** the Supreme Court of India while addressing the principles applicable to the doctrine of *sub judice,* which are similar to those of *res judicata,* held that:

> **"However, we hasten to add then when the matter in controversy is the same, it is immaterial what other relief is claimed in the subsequent suit."**

21. One of the objectives for enforcing the *res judicata* principle is to discourage piecemeal litigation between the same parties over the same cause of action. Any claim arising from a particular cause of action should encompass all the allegations and seek all the remedies that can be sought by the claimant. The courts discourage litigation in installments. In **Apondi v Canuald Metal Packaging [2005] 1 EA 12** (as cited in **Otieno, Ragot & Co. Advocates v City County of Nairobi & 2 others [2015] eKLR**) it was held that:

> **"A party is at liberty to choose a forum which has the jurisdiction to adjudicate his claim, or choose to forego part of his claim and he cannot be heard to complain about that choice after the event and it would be otherwise oppressive and prejudicial to the other parties and an abuse of the Court process to allow litigation by instalments."**

22. I am alive to the caution by the Court of Appeal in **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR** that the doctrine of *res judicata* **"should only be invoked in constitutional litigation in the clearest of the cases"** and **"must be sparingly invoked and the reasons are obvious as rights keep evolving, mutating, and assuming multifaceted dimensions."** Nevertheless, the same Court affirmed the availability and applicability of the principle to constitutional matters when it stated that **"[w]e accordingly do not accept the proposition that Constitution-based litigation cannot be**

subjected to the doctrine of *res judicata*."

23. In the case at hand, the Petitioner is seeking remedies in respect of a cause of action upon which he had sued the Respondent herein before a Court of competent jurisdiction. The cause of action has not evolved since then. There was no continuation of the violation of the Petitioner's constitutional rights and fundamental freedoms. His right to sue over the incident of his suspension is therefore spent by virtue of the doctrine of *res judicata*. This Court is thus prohibited from entertaining this petition. The end result is that this petition has no merit. It is dismissed.

24. Ordinarily, costs are not awarded in cases of this nature. However, this petition borders on abuse of the court process. The Respondent should not have been dragged to Court again. In the circumstances the Respondent is entitled to costs against the Petitioner. The Petitioner is consequently directed to meet the Respondent's costs in respect of this litigation.

Dated, signed and delivered virtually at Nairobi this 25th day of February, 2021.

W. Korir,

Judge of the High Court