



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 317 OF 2018**

**IN THE MATTER OF ARTICLES 22(1), 25(C), 27, 28, (1) (A) (B), 41(A), 47(1), 48, 50 (1),  
50 (2) (B), 50 (2) (f), 50 (2) (i), 50 (2) (k) OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF ILLEGAL, UNCONSTITUTIONAL AND UNFAIR TERMINATION OF**

**PAUL KAKOKHA OKOITI FORM KENYA REVENUE AUTHORITY**

**IN THE MATER OF ENFORCEMENT OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS,**

**UNDER ARITCLES 35, 41, 47 AND 50 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF VIOLATION AND/OR THREATENED VIOLATION OF THE CONSTITUTION OF KENYA**

**AND THE ENFORCEMENT AND PROTECTION OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS**

**AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

**BETWEEN**

**PAUL MAKOKHA OKOITI.....PETITIONER**

**VERSUS**

**KENYA REVENUE AUTHORITY.....RESPONDENT**

**JUDGEMENT**

**PETITION**

1. The Petitioner through a Petition dated 27<sup>th</sup> August, 2018 and supported by Supporting Affidavit of even date seek the following orders:-

*a) A declaration that the Petitioner's rights under Article 35, 41, 47 and 50 have been breached and violated by the Respondent.*

*b) An order to delete Customs Entry Nos. 2008 MSA T810/11575656, 2008 MSA T810 1152471 and 2008 MSA T810 1157428 that do not exist from the Petitioner's show cause letter dated 29<sup>th</sup> May, 2009 enshrined under Article 35(2) of*

*the Constitution of Kenya, 2010.*

*c) Costs of the Petition*

*d) And such other orders as this Honourable Court shall deem just.*

#### **PETITIONER'S CASE**

2. The Petitioner was an employee of the Respondent from 1995 upto 2008 when on 21<sup>st</sup> July 2008 he was suspended and dismissed in February 2009. The Petitioner contend the Respondent has never given him written reasons for not providing him with charges contrary to **Articles 35 and 47 of the Constitution.**

3. The Petitioner aver that charge sheet letter dated 29<sup>th</sup> May 2008 contains misleading information that Customs Entry Numbers 2008 MSA T810/11575656, 2008 MSA T810 1152471 and 2008 MSA T810 1157428 that do not exist.

4. It is further Petitioner's case that he was unduly and un-procedurally terminated from service in utter disregard of his right to be given charges by the Respondent. It is averred that the Respondent failed to furnish the Petitioner with documents and other exhibits that they relied upon in arriving at their decision to dismiss him and that there are unreconcilable inconsistencies in evidence adduced by the Respondent.

#### **RESPONDENT'S CASE**

5. The Respondent filed a preliminary objection dated 15<sup>th</sup> October 2018 together with a Replying Affidavit sworn by Janet Lavuna on 15<sup>th</sup> October 2018. It is Respondent's case that:-

*a) The Petitioner has filed seven (7) other cases all related to his employment contract with the Respondent and listed in the Respondent's Replying Affidavit.*

*b) The Petition is Res-judicata as the issues raised in the Petition have been determined by various Judges.*

*c) The issue of whether or not the Petitioner's suspension and dismissal from employment of the Respondent was procedural is a matter which is pending in Nairobi ELRC No. 25 of 2013 and therefore is sub-judice as it is pending determination by a court of competent jurisdiction.*

*d) The Petitioner has proceeded to sue the Respondent's Advocate on record in the matters which have been determined, Ms Janet Lavuna, in her personal capacity and the said case by Nairobi CMCC No 4201 of 2017 is also pending before a Court of competent jurisdiction.*

*e) The petition is therefore an abuse of the Court process.*

#### **ANALYSIS AND DETERMINATION**

6. I have considered the Petition and supporting affidavit; the Respondent Replying Affidavit, the preliminary objection, the parties' rival submissions, and from the same the following issues arise for consideration:-

*a) Whether the application and Petition are res-judicata?*

*b) Whether the application and petition are also sub-judice by virtue of pending ELRC No.25 of 2013 Paul Makokha Okoiti vs. KRA and Chief Magistrate Civil Case No. 4201 of 2017, Paul Makokha Okoiti vs. Janet Lavuna?*

#### **A. WHETHER THE APPLICATION AND PETITION ARE RES-JUDICATA?**

7. The Respondent herein contend that the issues of provision of documents, deletion of entries and breach of the Petitioner's Constitutional rights are res-judicata as the same has been determined between the same parties in the following cases:-

a) JR No. 351 of 2011 – Paul Makokha Okoiti vs KRA;

b) JR No. 340 of 2013 – Paul Makokha Okoiti vs KRA & 5 others;

c) JR No. 117 of 2015 – Paul Makokha Okoiti vs KRA;

d) JR No. 300 of 2016 – Paul Makokha Okoiti vs KRA;

e) JR No. 13 of 2016 – Paul Makokha Okoiti vs KRA;

8. The Petitioner urges that the issue of provision of deleting of Custom Entries in the Petitioner's show cause letter dated 29<sup>th</sup> May 2008 has

never been determined by any competent court. The Petitioner contend that in JR No. 351 of 2011 – Paul Makokha Okoiti vs KRA, that on 10<sup>th</sup> February 2012 the Court issued unsigned Judgment in the matter contrary to the law amongst other accusations. In regards to JR No. 340 of 2011 – Paul Makokha Okoiti vs KRA; the Petitioner agree the matter was heard and determined. That the Trial Court denied him the orders of mandamus for production of documents by Kenya Revenue Authority in the Petitioner’s show case letter and to cross-examine witnesses. As regards JR No.117 of 2015 – Paul Makokha Okoiti vs KRA; the matter was heard and determined further as regards JR No. 300 of 2016 – Paul Makokha Okoiti vs KRA; the Petitioner contend the same was transferred to ELRC where it was registered as ELRC JR 13 of 2016 in which case the Petitioner was seeking an order of mandamus against the Respondent.

9. The doctrine of Res-judicata is well provided for in **Section 7 of the Civil Procedure Act**, where it is stated as follows:-

**“No court shall try any suit or issue in which the mater 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.”**

10. The elements which must be present before a suit or an issue is deemed res-judicata on account as a former suit are now well settled. The **Court of Appeal No. 174 of 2010 Kenya Commercial Bank Limited vs. Benjoh Amalgamated Limited (2017) eKLR** set out the elements which must be present before a suit is deemed res judicata as follows:-

- a) The suit or issue was directly and substantially in issue in the former suit.
- b) The 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 was raised.

11. The cases mentioned hereinabove and more specifically in the Replying Affidavit of Janet Lavuna sworn on 15<sup>th</sup> October 2018 under paragraph 4 and 5 of the aforesaid affidavit are on the same issues between the same parties. The same were heard by seven (7) different judges and determined substantively. In the judgement by Justice Leanola delivered on 20<sup>th</sup> January 2017 in JR. No. 351 of 2011 – Paul Makokha Okoiti vs KRA; The leaned Judge stated thus:-

**“The applicant risks being declared a vexatious litigant if his obsession with the issues above keep being raised before different judges.”**

12. In the instant Petition the petitioner seeks a declaration that the Petitioner’s rights under Article 35, 41, 47 and 50 have been breached and violated by the Respondent; an order to delete Customs Entry Nos. 2008 MSA T810/11575656, 2008 MSA T810 1152471 and 2008 MSA T810 1157428 that do not exists from the Petitioner’s show cause letter dated 29<sup>th</sup> May 2009 as enshrined under **Article 35(2) of the Constitution of Kenya 2010**.

13. The issues raised in the instant Petition are the same issues raised in the Replying Affidavit of Janet Lavuna sworn on 15<sup>th</sup> October 2018 at paragraph 4 thereto and under paragraph 7 of this judgment between the same parties. The Petitioner’s suit or issues raised has directly and substantially been in issue in the former suits; the former suits, were between the same parties or parties under whom they or any of them claim; the parties were litigating under the same title, the suits or issues were heard and finally determined in the former suit, and lastly the courts that formerly heard and determined the issues were competent to try the subsequent suit or the suits in which the issues were raised.

14. All the elements which must be present before a suit or issue is deemed to be res-judicata on account of former suit as set out in the **Civil Appeal No. 174 of 2010 Kenya Commercial bank Limited v. Benjoh Amalgamated Limited (2017) eKLR** have been met in this matter and as set out in the Respondent’s Replying Affidavit of Janet Lavuna filed in this Petition.

15. This Court further notes that the **Court of Appeal in Civil Appeal No. 174 of 2018 Kenya Commercial Bank Limited vs. Benjoh Amalgamated Limited (2017) eKLR** went on and held that

- a) The suit or issue was directly and substantially in issue in the former suit.
- b) The 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 was raised.

16. Upon consideration of the pleadings; parties rival submission as well as authorities relied upon and previous decisions in the cases referred to in the Respondent's Replying affidavit and submission and the Petitioner's submission as well, I find that the Respondent has established all elements that must be present before a suit or an issue is deemed res-judicata on account of former suit. In view whereof I find that the Petition herein is res-judicata and the same amounts to an abuse of the Court process.

**B. WHETHER THE APPLICATION AND PETITION ARE ALSO SUB-JUDICE BY VIRTUE OF PENDING ELRC NO.25 OF 2013 PAUL MAKOKHA OKOITI VS. KRA AND CHIEF MAGISTRATE CIVIL CASE NO. 4201 OF 2017, PAUL MAKOKHA OKOITI VS. JANET LAVUNA?**

17. Stay of suits are provided for under **Section 6 of the Civil Procedure Act** which provides that no court shall proceed with the trial of any suit or proceedings, in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same partes, or between parties under whom they or any of their claim; litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

18. The Respondent under paragraph 10(ii) of the Replying of Janet Lavuna, sworn on 15<sup>th</sup> October 2018 depone that this matte is sub-judice as it is also pending before the Industrial Court in Industrial Cause No. 25 of 2013 Paul Makokha Okoiti vs. KRA. The matter is averred to still be pending before the ELRC division, Nairobi.

19. The issue of whether or not the Petitioner, suspension and dismissal from employment of the Respondent was procedural and indeed in accordance with the relevant law and regulations and all matters relating to his employment contract are issues which are directly and substantially in issue Nairobi ELRC No 25 of 2013 Paul Makokha Okoiti vs. KRA, a previously instituted suit or proceeding between the same parties, litigating under same title and which is still pending in the same court or any other court having jurisdiction in Kenya to grant the relief claimed. There is no denial from the Petitioner that, the issue in this case relates to dismissal of the petitioner from employment of the Respondent, whether it was procedural and inaccordance with relevant laws and regulations, that the same is still pending determination before a Court of competent jurisdiction and that it cannot therefore be litigated in the current Petition by virtue of provisions of **Section 6 of the Civil Procedure Act**.

20. This Court is guided by the decision in the case of *Thiba Min. Hydro Co. Ltd v. Josphat Karu Ndwinga (2013) eKLR* where it was held that:-

***It is not the form in which the suit is framed that determines whether it is sub-judice. Rather it is the substance of the suit... There can be no justification in having the two cases being heard parallel to each other. That would not only be an affront to the sub-judice rule but would also be in violation of the overriding objective of the Civil Procedure Act which requires under Section 1B that there be an efficient use of the available judicial and administrative resources. Having considered the above, I am satisfied that the plea of sub-judice has properly been invoked in this case.*** (Emphasis mine)

21. Similarly in the case of *Kenya Planters Co-operative Union Limited vs. Kenya Co-operative Coffee Millers Ltd & another (2016) eKLR* the Court stated that **Rule 28 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013** provides that nothing shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the end of justice or to prevent abuse of the process of the Court. The Court further held that:-

***“A matter which is still pending in court un-decided or still under consideration is therefore sub-judice.... I hold the view that a Constitutional Petition is amenable to the sub-judice rule just like any other civil proceeding and that explains the insertion of the words “or proceeding” in Section 6 of the civil Procedure Act. While this court affirms the Petitioner’s right to approach it to enforce a Constitutional right, it must also be made clear that his court has a duty to ensure that its process is not abused.”*** (Emphasis added)

22. I further note that under **Rule 3(8) of the Mutunga Rules**, it is explicitly stated that:

***“Nothing in these Rules shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary to the ends of justice or to prevent abuse of the process of the Court.”***

23. In view of the above I find no good reason for a party to file two similar suits simultaneously and have the same heard parallel to each other. This would be going clearly against the sub-judice rule and a violation of the overriding objective of the **Civil Procedure Act** which is required under **Section 1A of Civil Procedure Act** to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes guided by the Act. Allowing two parallel suits to be heard at the same time would amount to inefficient use of the available judicial and administrative resources. Having considered the submissions and facts of this matter, I have no doubt that the Respondent's plea of sub-judice has properly been raised and is correctly invoked in this case.

24. **The upshot is that the application and Petition by the Petitioner against the Respondent is Res-judicata, sub-judice and an abuse of the Court process and the same is accordingly dismissed with costs.**

**Dated and Signed at Nairobi on this 4<sup>th</sup> day of February, 2021.**

**Delivered electronically at Nairobi on this 25<sup>th</sup> day of February, 2021.**

**J. A. MAKAU**

**JUDGE**