



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. E001 OF 2020

JOEL TITUS MUSYA T/A

MAKURI AUCTIONEERS.....PETITIONER

VERSUS

1. THE DIRECTOR OF PUBLIC PROSECUTIONS

2. THE DIRECTOR OF CRIMINAL INVESTIGATIONS

3. THE PRINCIPAL MAGISTRATE COURT-KWALE

4. MUNGAI KAMAU T/A MUNGAI KAMAU & CO. ADVOCATES

5. ANNE GLEBKE

6. ELIZABETH STOCKER.....RESPONDENTS

RULING

1. The Petitioner herein is a duly licensed Auctioneer by profession and describes himself as an Officer of the Court. The Petitioner has moved this Court under **Article 29, 31, 40, 50 (2)(I), 157 (4), 160 (1) (5) and 165 (3) (d), 4, 6, 7, all of the Constitution of Kenya, Section 6 of the Judicature Act and Section 4 (5) of the Government Proceedings Act.**

Background facts

2. That brief facts of this Petition are that on **6th March, 2017** the Petitioner was arrested, detained and charged despite being a judicial officer while executing a decree courtesy of the Warrants of Attachment and Sale issued by Court in **CMCC Civil Suit No. 543 of 2016 Kwale Anna Glebke v Elizabeth Stocker.**

3. He stated that the Warrants in **CMCC Civil Suit No. 543 of 2016 Kwale Anna Glebke v Elizabeth Stocker**, were still live and were to be returned to court on the **6th April, 2017**. It was stated that the Court had not cancelled or withdrawn the warrants nor was the Petitioner summoned to account for the same. The return of the warrants was some thirty (30) days away and the execution the process was still ongoing.

4. The Petitioner averred that he was arraigned in Court on the **6th March, 2017** before Hon. Betty Koech (SRM) in **Criminal Case No. 174 of 2017, R v Joel Titus Musya** to take a plea and answer to charges of stealing by agent from Messrs. Mungai Kamau T/a Mungai Kamau & Co. Advocates, the **4th** Respondent herein, the sum of **Kshs. 500,000/=** despite a live, lawful and ongoing execution process.

5. According to the Petitioner, the decision to charge him on charges of stealing by agent involved a rogue Magistrates then stationed at Kwale law courts, Prosecutors, police officers who wanted to force the premature release of **Kshs. 500,000/=** to Messrs. Mungai Kamau T/a Mungai Kamau & Co. Advocates before completion of the execution process.

6. The Petitioner contends that on the **1st March, 2017**, in the **CMCC Civil Suit No. 543 of 2016, Kwale, Anna Glebke v Elizabeth Stocker**, the **4th** Respondent made an ex parte application that a Notice to Show Cause be issued to the Petitioner for failing to remit the decretal sums realized and/or failing to update the instructing client in the execution process. The Notice to Show Cause application was allowed but the same was not extracted and served as it was premature, defective, irregular and brought in bad faith contrary to the law. The

Petitioner states that he was denied the right to be heard before the Notice to Show Cause was issued.

7. It was stated by the Petitioner that he was harassed, incarcerated, arraigned in court and put in custody in both **CMCC Civil Suit No. 543 of 2016, Kwale, Anna Glebke v Elizabeth Stocker** and **Criminal Case No. 174 of 2017, R v Joel Titus Musya**, for an execution process that he was assigned to do by the court.

8. The Petitioner claimed that he has filed the instant Petition to seek protection of this court from the unconstitutional and illegal trial that stems from a valid discharge of his duty to execute a court decree.

9. The Petitioner's claim in the Petition is that the Respondent's failure to accept its nomination infringed its constitutional rights as guaranteed under **Article 25, 28, 29, 47 and 50 all of the Constitution of Kenya**.

10. In the main, the Petition prays for the following: -

a) The Court pursuant to Article 165 (6) (7) of the Constitution pursuant to its supervisory jurisdiction over subordinate courts do call for the entire record of the proceedings pending before the (3rd Respondent) Principle Magistrate Court Kwale and make orders and give directions it considers appropriate to ensure the fair administration of justice by and for purposes of considering the propriety, legality, regularity and constitutionality with the aim of quashing the criminal prosecution against the Petitioner as an abuse of the due process of the law in :-

i) CMCC NO. 543 OF 2016 (KWALE) ANNA GLEBKE VESUS ELIZABETH STOCKER

ii) CR. CASE NO. 174 OF 2017 (KWALE) REPUBLIC VERSUS JOEL TITUS MUSYA

b) A DECLARATION that the Criminal prosecution of the Petitioner in CR. C NO. 174 OF 2017 is unconstitutional, illegal and without proper constitutional, legal or factual foundation and therefore null and void ab initio.

c) A DECLARATION that in execution of judgment and Decree through the warrants of Attachment and Sale of Judgment Debtors property pursuant to such judgment and Decree of the Court an Auctioneer under Article 160 (1) (3), 161 (1) and under S. 6 of the Judicature Act and S. 4(5) of the Government Proceedings Act is deemed by the law to be a member of the judiciary, an officer of the Court protected against the civil action or criminal prosecution in the discharge of his judicial duty and is not agent of the Plaintiff or her Advocates and cannot be liable to criminal charges of theft by agent while discharging his judicial duty.

d) A DECLARATION that the investigation, arraignment and subsequent criminal prosecution of the Petitioner in Criminal Case No. 174 of 2016 Kwale, Republic versus Joel Titus Musya and the warrants of arrest and all the subsequent and consequent penal proceedings against the Petitioner in CMCC NO. 543 of 2016 where he was arrested for contempt of Court pursuant to a warrant of arrest by the Hon. Mutai P. K. without a hearing imprisoned were actually done were malicious and his imprisonment and or detention was in excess of jurisdiction, in disregard of the law applicable, in gross violation of the rules of natural justice and in gross error and ignorance of the law and contrary to Articles 29, 31, 40, 50(1), 160(1), (5), 157 (4) (I) of the Constitution.

e) The Criminal proceedings and record in CRC NO. 174 of 2017 Kwale REPUBLIC VERSUS JOEL TITUS MUSYA be and is hereby recalled to the High Court and consequently quashed and the Petitioner be and is hereby set forth at liberty

f) Costs.

The Response

11. In response to the Application and Petition dated **28th September, 2020**, the 2nd Respondent filed a Replying Affidavit sworn on **6th November, 2020** by **No. 11467 Police Constable Abraham Kiplagat**, attached to the Directorate of Criminal Investigations, Msambweni Sub County. He has deponed that he was the investigating officer in respect to **Criminal Case No. 174 of 2017-KWALE, Republic v Joel Titus Musya** where the accused was charged with the offence of stealing by agent contrary to **Section 283 (c) of the Penal Code**.

12. He has stated that the complainant, the 4th Respondent made a complaint as against the Petitioner for stealing by agent the sum of **Kshs. 500,000/=** whereby he recorded a statement at the Police Station and adduced documentary evidence.

13. It has been deponed that the Petitioner herein was summoned to the police station where he was interrogated and admitted to committing the offence and after thorough investigations, the Petitioner's investigation file was forwarded to the 1st Respondent herein who directed that the Petitioner be charged with the offence of stealing by agent.

14. According to the 2nd Respondent, investigations were conducted independently, impartially and recommendations to the Petitioner herein procedurally done.

15. Further, that this application is *res judicata* to three applications that were filed before the High Court in an attempt to stay and quash the decision to prosecute the Petitioner, all which have been dismissed and they are as follows: **Criminal Revision No. 80 of 2017- Mombasa, Judicial Review Application No. 21 of 2017-Mombasa and Judicial Review No. 32 of 2017-Mombasa**.

16. On behalf of the 3rd Respondent, the Office of the Attorney General on behalf of the 3rd Respondents filed a Grounds of opposition dated the **28th October, 2020** and stated that the Petition and Application as filed are incompetent and fatally defective as they violate the 3rd Respondent's judicial immunity under **Article 160 (5) of the Constitution, Section 6 of the Judicature Act and Section 45 of the Judicial Service Act.**

17. It was stated that the High Court's role in calling for criminal proceedings of a trial is limited and not absolute. In particular, this Court's right is not absolute as the matters before the Kwale Court were scheduled for a defence hearing.

18. The Application and Petition are said to be incompetent, misconceived and an abuse of the court process as they seek direct orders that contravene **Section 193 A of the Criminal Procedure Code.**

19. Further it was stated by the 3rd Respondent that the Petition and Notice of Motion Application are inconsistent with **Sections 4(3), 12 and 16 all of the Government Proceedings Act.**

20. The 3rd Respondent has urged the Court to find that the Petition and Application seek untenable orders and they should be dismissed with costs.

21. The 4th Respondent has opposed the said Application vide a **Preliminary Objection dated the 5th October, 2020 and further filed a Replying Affidavit sworn by George Mungai Kamau, Counsel on the 9th October, 2020. The Preliminary Objection states: -**

1. That this application is Res Judicata since it offends Provisions of Section 7 of the Civil Procedure Act Cap 63 Laws of Kenya since a determination of the same issues raised in the Petition herein were made in Criminal Revision No. 80 of 2017, High Court of Kenya at Mombasa, Joel Titus Musya vs Republic, Judicial Review Application No. 21 of 2017, High Court of Kenya at Mombasa, Joel Titus Musya vs Hon. Mutai S.P.M. KWALE & 2 Others

2. That the application herein offends Provisions of Article 157 of the Constitution of Kenya 2010 and Section 6 of the Office of the Director of Public Prosecutions Act No. 2 of 2013.

3. That this Application offends provisions of section 193 A of the Criminal Procedure Code Cap 75 Laws of Kenya in that Concurrent Civil and Criminal proceedings is not a bar or cannot act as stay to any Criminal Proceedings.

22. In his Reply, the 4th Respondent further emphasizes that the application herein is *res judicata* as the following matters with similar parties and prayers have been handled by courts of similar and competent jurisdiction: -

i) Criminal Revision No. 80 of 2017- Mombasa, Joel Titus Musya v Republic – Ruling delivered on 19th June, 2017

ii) Misc. App. No. 21 of 2017- Mombasa Joel Titus Musya v Hon.Mutai SRM& 2 Others- withdrawn wholly on 15th June, 2017

iii) Misc. Civil Application No. 32 of 2017 (JR) -Mombasa Joel Titus Musya T/A Makuri Auctioneers v The Senior Principal Magistrate, Kwale & 2 Others- ruling issued on 15th June, 2017 wherein leave to file a Judicial Review Application was denied.

23. The 5th Respondent filed a Replying Affidavit sworn by **Anna Glebke on 10th November, 2020.** She has deponed therein that the Petition and Application dated 28th September, 2020 has been overtaken by events in terms of the stay of proceedings of **Civil Suit No. 543 of 2016, Anna Glebke v Elizabeth Stocker** as the matter was settled in 2017 and it is marked as such.

24. It has been deponed that the Petition dated **28th September, 2020** is an abuse of the court process as this court cannot revive or re-open a matter that was closed and fully determined.

25. Further, the 5th Respondent has stated that this application is *res judicata* as the applicant has filed various suits seeking similar remedies in which the 5th Respondent was an Interested Party and the same have been determined by courts of competent jurisdiction. An example cited is **Misc. Civil Suit No. 32 of 2017 (JR).**

26. The 5th Respondent indicates that she had instructed the 4th Respondent Messrs. Mungai Kamau T/a Mungai Kamau & Co. Advocates to appear on her behalf in **CMCC Civil Suit No. 543 of 2017 -Kwale** who had further given instructions to the Petitioner to recover the decretal sum awarded against the 6th Respondent for the sum of **Kshs. 500,000/=**, which the 5th Respondent confirms was recovered.

27. It is then stated that after the Petitioner recovered the said **Kshs. 500,000/=** as instructed on behalf of the 4th Respondent, he has since refused to hand over the said amount, and as a result criminal charges were preferred as against him.

28. The 6th Respondent filed a **Replying Affidavit** sworn on **30th October, 2020** by **Elizabeth Stocker.** She disputes that the Petitioner was allocated any warrants by the 3rd Respondent, the Principal Magistrates Court, Kwale in **CMCC No. 543 of 2016 Kwale Anna Glebke v Elizabeth Stocker.**

29. It has also been stated by the 6th Respondent that by virtue of the proceedings in **CMCC No. 543 of 2016, Kwale, Anna Glebke vs Elizabeth Stocker,** execution proceedings for the sum of **Kshs. 1, 484, 944.19/=** were taken out against her and warrants of attachment

issued to the Petitioner to recover the said amount.

30. That on the **15th February, 2017**, she issued a cheque of **Kshs. 500,000/=** to the Petitioner as a down payment for the decretal amount and she subsequently settled the suit with the 5th Respondent herein. Further, the 6th Respondent has stated that the Petitioner realized an amount of **Kshs. 500,000/=** from her and that she was not aware that the Petitioner was required to return the warrants to the Court on the **6th April, 2017**.

Directions of the Court

31. The Court' directions were that parties file responses together with submissions to the Petition dated **28th September, 2020** as well as the Preliminary Objection dated **5th October, 2020**. The Petitioner filed his submissions on the **27th January, 2021**. The 1st and 2nd Respondent filed submissions on the **11th February, 2021**, the 3rd Respondent filed on **12th November, 2020** while the 4th Respondent filed submissions on **11th February, 2021** to the Preliminary Objection dated **5th October, 2020**. The 5th and 6th Respondents did not file any submissions. Parties relied on their written submissions in their entirety and the same were highlighted before court on the **24th March, 2021**.

The Petitioners submissions

32. The Petitioner has submitted that the 1st, 2nd and 4th Respondent hatched an unconstitutional, illegal and unprocedural scheme with the aid of rogue judicial officers and police officers to have him arrested and charged in **Criminal Case No. 174 of 2017 R v Joel Titus Musya**, Kwale. According to the Petitioner, the charges were spurious and unfounded.

33. It has been submitted that the charges stem from an illegality and that in exercising of its powers under **Article 157 of the Constitution**, the 1st Respondent did not act in the interest of administering justice, but in blatant abuse of the legal process.

34. The Petitioner submits that he was being coerced to illegally and prematurely release **Kshs. 500,000/=** to the 4th Respondent before the completion of the execution process contrary to the express directions on the Warrants as were issued by court.

35. It is the Petitioner's contention that no sooner had he been released in **Criminal Case No. 174 of 2017, R v Joel Titus Musya** on a **Kshs. 200,000/=** cash bail, he was arrested and taken to court vide **CMCC No. 543 of 2016, Kwale, Anna Glebke vs Elizabeth Stocker** where the 4th Respondent had obtained a Notice to Show Cause *ex parte* and he was arrested for Contempt.

36. It is the Petitioner's claim that the Notice to Show Cause was issued *ex parte*, not extracted nor served, hence premature, defective and irregular. He has stated that it is malicious for him to be arrested twice on the same subject matter.

37. The Petitioner has stated that in execution of a Decree by warrants of Attachment and sale of judgment debtors' property, an Auctioneer, **under Article 160(1) (3) and 161 (1) both of the Constitution, Section 6 of the Judicature Act and Section 15 of the Penal Code**, is a member of the judiciary, an officer of the court and not an agent of the Decree Holder/Plaintiff. He has stated that he ought not to have been arrested as he was not an agent of the 4th Respondent but was performing his functions as a judicial officer. He has added that the Decretal sum did not belong to the 4th Respondent and that he was never entrusted to deliver the same to the 4th Respondent.

38. The Petitioner has also stated that his continued prosecution is calculated to aid a manifested injustice and thus his arraignments in **Criminal Case No. 174 of 2017, R v Joel Titus Musya** and **CMCC No. 543 of 2016, Kwale, Anna Glebke vs Elizabeth Stocker** violated his rights and fundamental freedoms as provided for under **Article 25, 28, 29, 47 and 50 all of the Constitution of Kenya**.

39. In a response to the 2nd & 3rd Respondent's submissions, the Petitioner submitted that **Section 193 A of the Criminal Procedure Code** cannot oust the court's jurisdiction as provided for under **Article 165 (6) (7) of the Constitution**. It was stated that a statutory provision in an Act cannot be read to defeat express provisions of the Constitution.

40. The Petitioner has stated that the 2nd and 3rd Respondents have not refuted the Petitioner's claim on judicial immunity from prosecution as a Judicial Officer and enjoys immunity as provided for under **Section 4(5) of the Government Proceedings Act**.

41. On res judicata, the Petitioner acknowledged that he filed **Criminal Revision No. 8 of 2017** and **Judicial Review No. 21 of 2017**. He stated that **Judicial Review No. 21 of 2017** was withdrawn and that **Criminal Revision No. 8 of 2017** was not based on the provisions of the Constitution but **Section 362 of the Criminal Procedure Code** which clothes the court with revisionary jurisdiction. It was submitted that this Petition has been brought under constitutional supervisory jurisdiction.

42. According to the Petitioner, **Article 165 (6) (7) of the Constitution** gives this court unlimited power to exercise supervisory powers over the subordinate courts.

43. It was submitted that in **Criminal Revision No. 8 of 2017**, the court did not exercise its constitutional jurisdiction as it was not moved to consider the purport of **Article 160, 161 and 165 (6), (7) all of the Constitution, Section 4 (5) of the Government Proceedings Act, Section 6 of the Judicature Act and Section 15 of the Penal Code**.

44. The Petitioner has insisted that the decision in **Criminal Revision No. 8 of 2017** was *per incuriam* as it did not consider the following three questions on the Petitioners immunity as a judicial officer being exempted from any action or liability in execution of judicial functions; whether a criminal trial is constitutionally outlawed and expressly barred under **Article 160(5) of the Constitution** and can a

criminal trial stand in the face of its manifest unconstitutionality and illegality.

45. Lastly, the Petitioner has submitted that there is no fetter or limitation on the exercise of the supervisory jurisdiction granted to this court under **Article 165 (6) (7) of the Constitution** and **Section 7 of the Civil Procedure Act** and **Section 362 of the Criminal Procedure Code** cannot interfere with such a power. Reliance was placed on the case of **SATNAM SINGH BAHRA v JOSEPH MUNGAI GIKONYO T/A GARAM INVESTMENTS [2011] eKLR.**

The 1st and 2nd Respondent's submissions

46. The 1st and 2nd Respondent have submitted that the instant

application is *res judicata* since the Petitioner had filed similar applications before courts of competent jurisdiction. It has been stated that the Petitioner filed in Mombasa, **Criminal Revision No. 80 of 2017, Judicial Review Application No. 21 of 2017 and Judicial Review No. 32 of 2017.**

47. While referring the Court to **Section 7 of the Civil Procedure Act**, it was submitted that the Petition dated **28th September, 2020** is an abuse of the court process and an attempt by the Petitioner to evade the Criminal trial being **Criminal Case No.174 of 2017 (R v Joel Titus Musya).**

48. It has been stated that the Petitioner is guilty of non-disclosure of the existence of previous suits, some of which his current advocate on record ably represented him.

49. The 2nd Respondent has submitted that under **Article 157 (4) of the Constitution**, they obligated to comply with directives of the Director of Public Prosecutions and that the Petitioner is not immune to criminal process. Further, he states that the Judicature Act is not a refuge for criminal acts committed by judicial officers. Reliance was placed on the case of **Stephen Muregi Chege v Inspector General of Police & 3 others [2018] eKLR.**

The 3rd Respondent's submissions

50. It was stated by the 3rd Respondent that under **Article 160 (5) of the Constitution** as read with **Section 6 of the Judicature Act** and **Section 45 of the Judicial Service Act**, a member of the judiciary is not liable in an action done or omitted in good faith in the lawful performance of a judicial function. The 3rd Respondent has referred the court to the Supreme Court case of **Bellevue Development Company Ltd v Francis Gikonyo & 3 others [2020] eKLR,** where it was stated that there exist systems in law to correct errors committed by judicial officers such as the 3rd Respondent, in discharge of their duties.

51. That the 3rd Respondent being a judicial officer, has not acted *ultra vires* to his required duties in **Kwale CMCC Civil Suit No. 543 of 2016.** It was stated that the 3rd Respondent is unquestionably immune as no actions that intentionally and plainly prevented the litigants in **Kwale CMCC Civil Suit No. 543 of 2016** from enjoying their Constitutional and statutory rights.

52. The 3rd Respondent has submitted that the application and petition herein have been filed in contravention of **Section 193 A of the Criminal Procedure Code** as the Office of the Director of Public Prosecutions is constitutionally mandated to institute and prosecute criminal proceedings and in addition to such power may direct the Inspector General of Police to investigate any information or allegation of criminal conduct.

53. The decision by the Director of Prosecutions to charge the Petitioner cannot be challenged by any person or authority unless there is proof that the same has been abused. This position was highlighted by the Court in **Communications Commission of Kenya v Office of the Director of Public Prosecutions & another [2018] eKLR.**

54. It was submitted that **Section 193 A of the Criminal Procedure Code** does not allow for stay, prohibition or delay of a criminal proceeding due to any other pending civil proceedings. It was stated that the Petition and Application herein should not be a reason for stay, prohibition or delay of **Criminal Case No.174 of 2017 (R v Joel Titus Musya).**

55. Lastly, the 3rd Respondent has submitted that the Petition and application are inconsistent with **Sections 4(5), 12 and 16, all of the Government Proceedings Act** in that the 3rd Respondent should not be a party to the Petition herein as he has been sued in his capacity as a judicial officer who is immune to such legal proceedings.

The 4th Respondent's submissions

56. The 4th Respondent has submitted that there is on record a **Preliminary Objection** dated the **5th October, 2020** that states that the application herein is *res judicata*, and the Petition offends **Article 157 of the Constitution, Section 6 of the Office of the Director of Public Prosecutions Act No. 2 of 2013** and **Section 193 A of the Criminal Procedure Code.**

57. It is the 4th Respondent's submission that the current Petition is the fourth suit by the Petitioner and he has not disclosed to this court that there have been various suits that have been determined with finality by the High of Kenya at Mombasa.

58. That the main prayer in all the multiple suits is to quash the criminal proceedings before the Kwale Law Courts, and decisions in the said

matters have already been issued on the said prayer and no appeal has been filed as against them.

59. The 4th Respondent has relied on the case of **Kivanga Estates Limited v National Bank of Kenya [2014] eKLR** to emphasize that this court should not tolerate the filing of multiple suits in similar courts of competent jurisdiction, as it is an abuse of the court process.

60. It has been stated that staying of a criminal proceeding is a draconian measure which should rarely and be sparingly invoked in the current constitutional dispensation where the 2nd Respondent are independently reviewed by the 1st Respondent.

61. The 4th Respondent has submitted that the question as to when the warrants of attachment were to be returned to court, remittance of the recovered amount, and on whose instructions the Petitioner was acting on, is a matter of viva voce evidence that can only be determined by the trial court.

62. It has been stated that every citizen, irrespective of their position in the society is entitled to lodge a complaint and there is a legitimate expectation that once an offence is established, the law takes its course. The 4th Respondent has referred the court to the case of **Republic v Attorney General & 4 Others, Ex parte Applicant Peter Kenneth Kariuki Gathii [2014] eKLR**.

63. Further, that **Section 6 of the Judicature Act** provides for immunity of judicial officers only in civil matters and not in criminal matters. Finally, that the Petitioner went beyond his mandate and thus cannot seek refuge or immunity as a judicial officer.

Analysis and determination

64. Having considered all the pleadings and written submissions by the parties, the common issue that arises, that need to be determined first is whether the Petition dated **28th September, 2020** is *res judicata*.

65. The question on whether this matter is *res judicata*. The principal of *re judicata* is found in **Section 7 of the Civil Procedure Act** which provides that: -

“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.”

66. The Court of Appeal in the case of **Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR** set the following elements to consider when dealing with the doctrine of *res judicata*, the court held: -

“... 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....”

67. In view of the above, this court is enjoined to determine whether the petition herein is *res judicata*. It has not been denied by the Petitioner there have been previous suits filed by him. In all the responses by the Respondents herein, they have claimed that the application and Petition herein are *res judicata* to the following suits: -

i) *Criminal Revision No. 80 of 2017- Mombasa, Joel Titus Musya v Republic – Ruling delivered on 19th June, 2017*

ii) *Misc. App. No. 21 of 2017- Mombasa Joel Titus Musya v Hon. Mutai SRM& 2 Others- withdrawn wholly on 15th June, 2017*

iii) *Misc. Civil Application No. 32 of 2017 (JR) -Mombasa Joel Titus Musya T/A Makuri Auctioneers v The Senior Principal Magistrate, Kwale & 2 Others- ruling issued on 15th June, 2017 wherein leave to file a Judicial Review Application was denied.*

68. I have looked at *Misc. App. No. 21 of 2017- Mombasa* where the parties were *Joel Titus Musya v Hon. Mutai SRM, The Attorney General and George Mungai Kamau T/A Mungai Kamau & Co. Advocates* and the same was withdrawn on the **19th June, 2017** and thus cannot be *res judicata* as it was neither heard nor determined.

69. Another claim on *res judicata* is based on *Misc. Civil Application No. 32 of 2017 (JR) -Mombasa Joel Titus Musya T/A Makuri*

Auctioneers v The Senior Principal Magistrate, Kwale, The Attorney General and Anna Glebke which was filed on **15th June, 2017** *ex parte*, under a certificate of urgency and a Ruling dismissing the said application was issued. The court found that it is within the subordinate court's mandate to guard the due appreciation of its process and also to interrogate on whether an officer of the court entrusted with execution has failed to do so.

70. There is further *Criminal Revision No. 80 of 2017- Mombasa, Joel Titus Musya v Republic* where a Ruling was delivered on 19th June, 2017 that dismissed the said revision application.

71. In *Misc. Civil Application No. 32 of 2017 (JR) -Mombasa Joel Titus Musya T/A Makuri Auctioneers v The Senior Principal Magistrate, Kwale, The Attorney General and Anna Glebke*, the Petitioner sought for the following orders: -

- 1. THAT this matter be certified as urgent and service be dispensed with in the first instance.**
- 2. THAT the Applicant be granted leave to apply for Judicial Review Orders in the nature of**
 - a) Orders for certiorari to remove into this Honourable court against the Respondent to quash the ruling delivered by the 1st Respondent sitting in Kwale in CMCC NO. 543 of 2016 between ANNA GLEBKA -VS ELIZABETH STOCKER & ANOTHER, delivered on 3rd May 2017**
 - b) Orders for certiorari to remove into the Honorable court and quash the ruling of the 1st Respondent of detaining the Applicant in Civil jail on 10th May, 2017 if he would not have deposited Kshs. 500,000.00 into the Judiciary account.**
 - c) Orders for certiorari to quash all the proceedings against Applicant in Civil suit No. 543 of 2016.**
 - d) Orders of prohibition to prohibit the 1st Respondent from detaining the Applicant in Civil jail on 10th May 2017 or any subsequent dates**
 - e) Orders of Mandamus compelling the 1st Respondent to withdraw the suspended sentence on civil jail against the Applicant.**
- 3. THAT the grant of leave operate as a stay of the decision of honorable Mutai Senior Principal Magistrate, Kwale Law courts**
- 4. THAT cost of this Application be in course.**

72. A look at the Ruling as delivered on **19th June, 2017** it shows the orders as sought by the Petitioner in *Criminal Revision No. 80 of 2017- Mombasa, Joel Titus Musya v Republic* were: -

- (a) That there be stay of the criminal proceedings in Kwale being criminal case number 174 of 2017 pending the hearing and determination of this application.**
- (b) That the Applicant be heard on this Application *ex parte* in the first instance and on a priority basis thereafter.**
- (c) That the learned Honourable Judge varies the lower courts orders and discharge the Applicant herein from the charges of stealing by agent.**
- (d) That a declaration that the charges against the applicant herein are malicious, pre-mature and hence violation of his fundamental human rights to a fair trial.**
- (e) That this court grants any other relief that it deems fit and just to grant.**

73. From comparing the prayers in the Petition to the prayers in *Criminal Revision No. 80 of 2017- Mombasa, Joel Titus Musya v Republic* and *Misc. Civil Application No. 32 of 2017 (JR) -Mombasa Joel Titus Musya T/A Makuri Auctioneers v The Senior Principal Magistrate, Kwale, The Attorney General and Anna Glebke*, the pleadings therein, submissions and rulings of the court delivered on **15th June 2017** and **19th June 2017**, it is not in dispute that the subject matter in the previous litigations and the current suit is the same.

74. The parties herein vary from one suit to another but I find the substrata of the suit herein is the same as those filed in *Criminal Revision No. 80 of 2017- Mombasa, Joel Titus Musya v Republic* and *Misc. Civil Application No. 32 of 2017 (JR) -Mombasa Joel Titus Musya T/A Makuri Auctioneers v The Senior Principal Magistrate, Kwale, The Attorney General and Anna Glebke*. It is worth noting that **Order 1 Rule 9 of the Civil Procedure Rules** asserts that no suit shall be defeated by reason of misjoinder or non-joinder of parties.

75. In the case of **E.T.V –v- Attorney General & Another (2012) eKLR**, Majanja J stated that: -

“...The courts must be vigilant to guard against 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 a new cause of action which has been resolved by a court of competent jurisdiction....”

76. In applying the case of **Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others (supra)** to the facts before me, it is clear that the Petitioner seek to litigate on issues that were raised or ought to have been raised in the earlier proceedings as they were relevant to the issues that were decided by the courts in those cases. The Petitioner cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action in a subsequent suit.

77. In my view, by filing this Petition and Application, the Petitioner is trying to litigate on a concluded matter by bringing issues or causes of action which rightly could have been raised in the former suits or have already been determined in the said suits.

78. For the above reasons, I find and hold that the Preliminary Objection dated **5th October, 2020** by the 4th Respondent has merit and the same is allowed. The Petitioner's Petition dated **28th September, 2020** is hereby dismissed.

79. The 4th Respondent shall have the costs and the same be borne by the Petitioner.

It is hereby so ordered.

SIGNED and DATED at MOMBASA this 26TH day of JULY, 2021.

D. O. CHEPKWONY

JUDGE

DELIVERED VIRTUALLY at MOMBASA this 30TH day of JULY, 2021.

A. ONG'INJO

JUDGE