REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL. PETITION NO. 391 OF 2019

SUZAN GENERAL TRADING JLT T/A SUZAN DUTY FREE....PETITIONER

VERSUS

KENYA REVENUE AUTHORITY.....1ST RESPONDENT

COMMISSIONER OF DOMESTIC TAXES.....2ND RESPONDENT

KEYSIAN AUCTIONEERS.....3RD RESPONDENT

AND

DIPLOMATIC DUTY FREE.....INTERESTED PARTY

RULING

1. Through the notice of preliminary objection dated 14th October, 2019, the Kenya Revenue Authority, Commissioner of Domestic Taxes and Keysian Auctioneers who are the respective 1st, 2nd and 3rd respondents seek to terminate the petition filed on 2nd October, 2019 by Suzan General Trading JLT T/A Suzan Duty Free mainly on the ground that the petition is *res judicata* based on the fact that the issues raised herein were adjudicated in **Nairobi High Court Judicial Review Miscellaneous Application No. 287 of 2018, Republic v The Kenya Revenue Authority & 2 others ex-parte Suzan JLT T/A Suzan Duty Free.**

2. None of the parties before me question the doctrine of *res judicata* as preached by the **Vice Chancellor, Sir, James Wigram in Henderson v Henderson (1843) 3 Hare 100** that:

> **"[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."**

3. In **Virgin Atlantic Airways Limited v Zodiac Seats Limited [2013] UKSC 46,** the United Kingdom Supreme Court highlighted the circumstances under which the principle of *res judicata* applies as follows:-

> **"17. Res judicata is a postmanteau term which is used to describe a number of different legal principles with different juridical origins. As with other such expressions, the label tends to distract attention from the contents of the bottle. The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is "cause of action estoppel". It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings. Secondly, there is the principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages: see *Conquer v Boot* [1928] 2KB 336. Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given upon it, and the claimant's sole right as being a right upon judgment. Although this produces the same effect as the second principle, it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as "of a higher nature" and therefore as superseding the underlying cause of action: see *King v***

Hoare **(1844) 13M & W 494, 504 (Parke B). At common law, it did not apply to foreign judgments, although every other principle of res judicata does. However, a corresponding rule has applied by statute to foreign judgments 1982: see Civil Jurisdiction and Judgments Act 1982, section 34. Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties: *Duchess of Kingston's Case* (1976) 20 St Tr 355. "Issue estoppel" was the expression devised to describe this principle by Higgins J in *Hoysted v Federal Commissioner of Taxation* (1921) 29 CLR 537, 561 and adopted by Diplock LJ in *Thoday v Thoday* [1964] P 181, 197 – 198. Fifth, there is the principle first formulated by Wigram V-C in *Henderson v Henderson* (1843) 3Hare 100, 115, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones. Finally, there is the more general procedural rule against abusive proceedings, regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger."**

4. Locally the principle of *res judicata* finds legislative footing in Section 7 of the Civil Procedure Act, Cap. 21 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.

***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."**

5. In **Independent Electoral & Boundaries Commission v Maina Kiai & 5 others [2017] eKLR; Civil Appeal No. 105 of 2017**, the Court of Appeal listed the hurdles that a party invoking the doctrine of *res judicata* should surmount as follows:-

"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."

6. The Court of Appeal went ahead and explained the importance of the principle of *res judicata* by stating that:-

"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 a 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 certain justice."

7. The nature of the principle is that once the party raising it meets all the conditions, the litigation is brought to a complete halt. It is important therefore that the court should ensure that all the ingredients have been fully met before a plea of *res judicata* is upheld. It should not be used as a roadblock by a party to deny the other party access to the river of substantive justice.

8. That a case that has been fully adjudicated cannot evade the doctrine of *res judicata* by introducing new causes of action In the subsequent suit was established in **E. T. v Attorney General & another [2012] eKLR** when Majanja, J correctly warned 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."**

9. Addition of new parties to the subsequent suit will not kill a valid plea of *res judicata* as was stated in **George W. M. Omondi & another v National Bank of Kenya Ltd & 2 others [2001] EA 177; [2001] eKLR** that **"parties cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action in a subsequent suit."**

10. I bring the discussion on the law on the rule of *res judicata* to conclusion by stating that the doctrine is applicable to constitutional litigation but it should sparingly be invoked for the reasons that rights keep on evolving, mutating, and assuming multifaceted dimensions. This principle of law is found in the Court of Appeal judgment in **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR** where it was held that:-

> **"The general consensus therefore remains that *res judicata* being a fundamental principle of law that relates to the jurisdiction of the court, may be raised as a valid defence to a constitutional claim even on the basis of the court's inherent power to prevent abuse of process under Rule 3(8) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. On the whole, it is recognized that its scope may permeate broad aspects of civil law and practice. We accordingly do not accept the proposition that Constitution-based litigation cannot be subjected to the doctrine of *res judicata*. However we must hasten to add that it should only be invoked in constitutional litigation in the clearest of the cases. It must be sparingly invoked and the reasons are obvious as rights keep on evolving, mutating, and assuming multifaceted dimensions."**

11. The Court of Appeal went ahead and laid down the principles governing the doctrine of *res judicata* as follows:-

> ***"From our expose of the doctrine above, we are now able to formally answer the issues isolated for determination in this appeal earlier as follows:-***
>
> ***i) The doctrine of res judicata is applicable to constitutional litigation just as in other civil litigation as it is a doctrine of general application with a rider, however, that it should be invoked in constitutional litigation in rarest and in the clearest of cases.***
>
> ***ii) There is no legal requirement or factual basis for the submission that the doctrine must only be invoked and or ventilated through a formal application. It can be raised through pleadings as well as by way of preliminary objection.***
>
> ***iii) The ingredients of res judicata must be given a wider interpretation; the issue in dispute in the two cases must be the same or substantially the same as in the previous case, parties to the two suits should be the same or parties under whom they or any of them is claiming or litigating under the same title and lastly, the earlier claim must have been determined by a competent court.***
>
> ***iv) The appellants were accorded an opportunity to be heard against the claim of res judicata."***

12. In light of the stated law, the only question to be answered in this ruling is whether the petition herein is *res judicata*. Mr Nyiha for the Petitioner submitted that by the powers granted to it by Articles 22 and 23(1) & (3) of the Constitution, this court has jurisdiction to hear and determine the petition. Although the plea of *res judicata*, if upheld, results in the court declining jurisdiction, such a decision is based on the fact that the court does not have jurisdiction on the cause of action or the issues raised. The global jurisdiction given to this court by the Constitution is not being challenged in such circumstances. That this court has jurisdiction to handle the issues raised in the petition is not in doubt. The respondents are however saying that owing to circumstances peculiar to the petition, the doctrine of *res judicata* bars the court from entertaining the petition.

13. On the applicability of the doctrine of *res judicata* to the facts of this case, counsel for the Petitioner submitted that the subject matter of the petition has not been litigated upon before any court of competent jurisdiction. His case is that the issue of the infringement and violation of the rights and freedoms of the Petitioner by the respondents has never been filed at any other time and decided by any court in the Republic of Kenya. Counsel cited the decision in the case of **John Florence Maritime Services Limited (supra)** for the proposition that *res judicata* based on a cause of action, arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. Further, that issue based *res judicata* arises where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided but in subsequent proceedings between the same parties involving a different cause of action to which the decided issue is relevant one of the parties seeks to re-open that issue.

14. Pointing to the petition, counsel urged that in the present situation, the Petitioner seeks to fault the arbitrary and illegal actions of the respondents in raiding and attaching the Petitioner's properties on 30th September, 2019. Further, that the respondents' actions were taken without issuance of any demand for payment of taxes and without issuance of a distress order.

15. It is the Petitioner's case that **Nairobi H. C. J. R. Misc. Application No. 287 of 2018** faulted the process which the Kenya Revenue Authority (KRA) took in deciding to attach property belonging to the ex-parte applicant therein for a tax liability owed to KRA by a different company. It is the Petitioner's position therefore that there is a clear and stark difference between the cause of action in the two cases.

16. It is the petitioner's firm position that the main issue the court is being called upon to adjudicate on in the present petition is whether the respondents' arbitrary and illegal actions of 30th September, 2019 violated the Petitioner's rights under Articles 27, 31(b), 47, 48 and 50 of the Constitution. This, the Petitioner submits, is strikingly different from what was adjudicated upon in **J. R. Misc. Application No. 287 of 2018**, whereby the ex-parte applicant therein faulted the process through which the respondents in that cause sought to attach and sell its properties on account of an alleged tax liability owed by a different company.

17. In his oral submissions, counsel for the Petitioner accused the Judge in **J. R. Misc. Application No. 287 of 2018** of recusing herself and abdicating jurisdiction on the matter. He consequently submitted that the judicial review matter was therefore not decided on merit hence the doctrine of *res judicata* is not applicable in this case. Further, that the Interested Party herein was not a party in the previous case and the doctrine is not therefore applicable because the former case was between parties who are different from the parties in the present case.

18. Mr. Munge who appeared for the Interested Party did not file any pleadings. He however indicated to the court on 8th October, 2019 that the Interested Party was supporting the Petitioner's case.

19. Ms Gitau for the respondents stated that in **J. R. Misc. Application No. 287 of 2018**, the Petitioner herein, who was the ex-parte applicant in that cause, was seeking orders of mandamus and prohibition with regard to the respondents' notice of distress dated 9th July, 2019. The issue of the distress was premised on the respondents' intention to recover import duty incurred by the Interested Party herein, Diplomatic Duty Free Ltd, which has since transferred its business to the Petitioner. Counsel submitted that the said tax demand was based on Section 46 of the Tax Procedures Act, 2015. She submitted that the said case was heard and determined through a judgment delivered on 23rd September, 2019 where P. Nyamweya, J held that the matter was not properly before the court and the ex-parte applicant ought to have first exhausted the remedy provided by Section 52 of the Tax Procedures Act, 2015.

20. Ms Gitau submitted that it is after they moved to execute the demand for the tax that the Petitioner filed this petition. Her position is that the core issue in this petition is the respondents' action of recovering taxes from the Petitioner and that was the main issue in the judicial review proceedings. According to her, no new cause of action has arisen. Further, that the Petitioner had filed an appeal in respect of the Judicial Review judgment in the Court of Appeal and had at the same time filed an appeal at the Tax Appeals Tribunal. She therefore termed the Petitioner's action of moving to this court as forum shopping and an abuse of the court process. She urged the court to dismiss the petition with costs.

21. Among the prayers sought in the instant petition are:-

> **"(a) A declaration that the actions of the respondents on 9th July, 2018 and 30th September, 2019 proclaiming and attaching the Petitioner's property pursuant to a warrant of distress dated 9th July, 2019 (sic) are unconstitutional and in breach of the fundamental rights and freedoms of the Petitioner.**
>
> **(b) An order do issue lifting and cancelling the warrant of distress dated 9th July, 2019 and the proclamations of the Petitioner's property made on 9th July, 2018 and 30th September, 2019 and any attachment subsequent thereto."**

22. In the notice of motion, as cited in the judgment dated 23rd September, 2019, in **J. R. Misc. Application No. 287 of 2018,** one of the orders sought was:-

> **"[A]n order of prohibition against the 1st, 2nd and 3rd Respondents do issue prohibiting the said respondents whether by themselves, their servants, agents, officers, or howsoever otherwise from any manner whatsoever unlawfully acting or continuing to act upon, or enforcing or continuing to act upon, or enforcing or continuing to enforce, or maintaining or continuing to maintain in relation to the Applicant and its property the warrant and notice of distress dated 9th July, 2019 and addressed to Diplomatic Duty Free Limited and subsequent proclamation and attachment of the Applicant's property made on 9th July, 2018."**

23. In her judgment P. Nyamweya, J identified one of the issues to be determined as:-

> **"Whether the Respondent acted illegally, unreasonably or in bad faith in proclaiming the Appellant's property to effect the payment of the taxes due to it by Diplomatic Duty Free Ltd."**

24. Looking at the pleadings and the decision of P. Nyamweya, J, it is clear that the central issue in the Judicial Review Application and this petition is the respondents' demand for taxes owed by the Interested Party herein from the Petitioner.

25. Whether the Petitioner's case was about process or violation of constitutional rights, the core issue touched on collection of taxes owed to the taxman by the Interested Party. The Petitioner cannot then be heard to say that it put forward the issue of process in the Judicial Review Application and left the main meal being the violation of constitutional rights for digestion in this petition. That would amount to splitting of issues and the doctrine of *res judicata* frowns on such actions.

26. It is indeed true that the Interested Party was not a party in the Judicial Review Application. The absence of the Interested Party in that case and its presence in the current case does not create a new cause of action. It is the Petitioner who commenced the Judicial Review Proceedings and it was aware that it may have been necessary to include the Interested Party in those proceedings. It did not do so. It cannot now introduce the Interested Party in an attempt to defeat the principle of *res judicata*. After all, the dispute here is between the principal parties to the petition.

27. In my view, the respondents have clearly established that the doctrine of *res judicata*, as enunciated in the cited case law, is squarely applicable to the circumstances of this case. The cause of action, the parties and the issues are all the same. The dispute was heard and determined by a court of competent jurisdiction. Whether the learned Judge in the Judicial Review matter abdicated jurisdiction, as alleged by the Petitioner, is not a matter that can be determined by this court. It is an issue for the appellate court to decide. Consequently, the only finding I can make is that **J. R. Misc. Application No. 287 of 2018** was determined on merit. The plea of *res judicata* as raised by the respondents has met all the conditions required by the law. Their Notice of Preliminary of Objection dated 14th October, 2019 is therefore allowed and the court finds that the petition herein is *re judicata*. For that reason the petition is dismissed.

28. Ideally, costs are not awarded in constitutional petitions so as to keep the courts' doors open to those whose rights and fundamental freedoms may have genuinely been violated or threatened. In this case, however, it is clear that the petition was not filed in good faith. The respondents should not be taken to different fora with the Petitioner hoping that one of the cases may bear fruits. This kind of conduct should be punished. As such, I award costs to the respondents against the Petitioner.

Date, Signed and Delivered at Nairobi this 31st day of October, 2019.

W. Korir,

Judge of the High Court