REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI MILINMANI LAW COURTS

JUDICIAL REVIEW DIVISION MISC. CIVIL APPLICATION NO. 685 OF 2017

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY

FOR ORDERS OF PROHIBITION, DECLARATION

AND

RESTRICTION BY SATYA BHAMA GANDHI AND IN THE MATTER

OF ARTICLES 2 (1) AND 2 (2),20, 22,23,25(A) AND (C),29 (D), 39, 47, 49,

157 (10), (11), AND 159 OF THE CONSTITUTION OF KENYA.

AND

IN THE MATTER OF SECTIONS 4 (1), (2) AND (30, 6, 7 AND 9 (1)

OF THE FAR ADMINISTRATIVE ACTION ACT NO.4 OF 2015 AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE

RULES, THE LAW REFORM ACT CAP 26

BETWEEN

SATYA BHAMA GANDHI.....APPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

THE CHIEF MAGISTRATES COURT, KIBERA.....2NDRESPONDENT

THE INSPECTOR GENERAL OF THE

NATIONAL POLICE SERVICE.....3RDRESPONDENT

AND

UNITED BANK OF

AFRICA (KENYA) LIMITED.....INTERESTED PARTY

RULING

Introduction

1. This Ruling disposes a preliminary objection citing res judicata raised by ***Njoki Kihara*** *counsel for the DPP. The objection was also supported by counsel for the Interested Party.*

2. The background information relevant to this determination is that pursuant to leave of this Court, the ex parte applicant filed the Notice of Motion dated ***19th*** *January 2018 seeking:- (a) A Prohibition prohibiting the continuance of Kibera Chief Magistrates Criminal Case No. 4029 of 2015, Republic vs Satya Bhama Gandhi; and* ***(b)*** *A Declaration that the initiation, maintenance and prosecution of the applicant in Kibera Chief Magistrate Criminal Case No. 4029 of 2015,* ***Republic vs Satya Bhama Gandhi****, is an abuse of the criminal justice and is in contravention of the applicant's constitutional right and freedoms and security of the person and the right to secure the protection of the law.*

3. The grounds relied upon are:- ***(i)*** *that the first and third Respondent's caused the applicant to be charged in Kebera Chief Magistrates' Criminal Case No.* ***4029*** *of 2015,* ***Republic vs Satya Bhama Gadhi*** *for obtaining money from the Interested Party by false pretense, yet they have not accorded her well-grounded written reasons why they chose to charge her against the provisions of Article* ***47 (2)*** *of the Constitution and section 4 (2) of the Fair Administrative Action Act;* ***(ii)*** *that the applicant has never been given formal written notice or adequate information of the charges as required under Section* ***4 (3)*** *of the Fair Administrative Action Act;* ***(iii)****That the applicant was charged over three years ago, the first and second Respondents have never keen to prosecute the case, that the dispute is civil but has been criminalized, that the DPP to act independently;* ***(v)****That this Court has jurisdiction under Article* ***165 (6)*** *to ensure fair administration of justice.*

Interested Party's Replying Affidavit.

4. ***Fred Chumo****, the Interested Party's Company Secretary swore the Replying Affidavit dated* ***5th*** *March 2018. He avers that the charges arise from criminal conduct, and that the ex parte applicant upon being charged instituted Constitutional Petition number* ***487*** *of 2015 involving the same parties, seeking similar prayers as sought in these proceedings which was dismissed on* ***28th*** *February 2017.*

The first Respondent's Preliminary Objection.

5. **Njoki Kihara**, counsel for the DPP filed a preliminary objection under consideration on **17th** April 2018 stating that the issues raised herein were heard on merits and finally decided in NBI HC Pet. No. **487** of 2015, hence this case is Res Judicata. She submitted that the issues raised in this Judicial Review application were determined by Onguto J. on **28th** February 2017. She submitted that the matter involves same parties, the same subject matter, it was heard and determined by a competent Court, hence, *Res Judicata*[1]applies. Her submissions were adopted by counsel for the Interested Party.

6. The ex parte applicant's counsel admitting the existence of Constitutional Petition No. **487** of 2015 argued that the current application has as *"its main ground violation of the Right to a Fair Administrative Action which was not raised in the earlier Petition."* He submitted that these proceedings challenge the procedure and that Article **159** permits this Court to overlook technicalities.

Determination

7. In Petition Number 487 of 2015,the judgment shows the first Petitioner was **Satya Bhama Gandhi,** the *ex parte* applicant herein. Paragraph one of the judgment shows that the applicant herein and second Petitioner in the said Petition commenced the petition claiming that the DPP had maliciously prosecuted him. The offence disclosed in the Petition is the same offence as in this application. The case number challenged is Criminal Case No. 4029 of 2015,the same case number being challenged in these proceedings.

8. In the said Petition, the *ex parte* applicant cited ulterior motive, abuse of court process, abuse of powers of the DPP, abuse of the right o Fair Administrative Action, and freedom of torture and discrimination. In his judgment at paragraph 30, the learned judge stated that he considered the applicants rights under Articles **27,29, 39, 47,48** and **49** of the Constitution and found that the alleged violations were not proved. The Court declined to prohibit the prosecution and dismissed the Petition on **28th** February 2017.

9. Fully aware that the Petition was dismissed, the *ex parte* applicant instituted these proceedings seeking to terminate the same criminal case. I find it disturbing that the *ex parte* applicant did not disclose to the Court the existence of the said Petition.No appeal was preferred against the said judgment.

10. Its trite law that 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) in the same or any other judicial tribunal, any fact or right which was determined by the earlier judgment is called in question, the defence of *res judicata* can be raised. This means in effect that the judgment can be pleaded by way of estoppel in the subsequent case.

11. As **Somervell L.J**. stated [2] *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. All the facts raised in this case, including the alleged violation of constitutional rights or violation of statutory provisions are matters that could have been raised in the previous proceedings. In fact all the matters raised herein including violation of Article **47** rights were raised and considered in the said Petition. The case is founded on the same cause of action, same issues, same facts, and same circumstances.

12. It is trite law that 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.[3]

13. The requirements for *res judicata* are that the same cause of action, for the same relief and 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.

14. *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.[4]

15. 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 and 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.[5] The rule of *res judicata* presumes conclusively the truth of the decision in the former suit.[6]

16. Also known in the US as claim preclusion, *res judicata* 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.

17. **The doctrine of *res judicata* is provided for in Section 7 of the Civil Procedure Act**[7] **and its object 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 Section 7 therefore 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.**[8]

18. In ***Gurbachan Singh Kalsi vs. Yowani Ekori***[9] the former East African Court of Appeal stated as follows:-

> ***"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."***

19. However, it is trite that the mere addition of parties in a subsequent suit or omission of a party or party's as has happened in this case does not necessarily render the doctrine of *res judicata* inapplicable since a party cannot escape the said doctrine by simply undertaking a cosmetic surgery to his pleadings. If the added parties peg their claim under the same title as the parties in the earlier suit, the doctrine will still be invoked since the addition of the party would in that case be for the sole purpose of decoration and dressing and nothing else.[10]

20. The civil justice system depends on the willingness of both litigants and lawyers to try in good faith to comply with the rules established for the fair and efficient administration of justice. When those rules are manipulated or violated for purposes of delay, harassment, or unfair advantage, the system breaks down and, in contravention of the fundamental goal of the Civil Procedure Rules, the determination of civil actions becomes unjust, delayed, and expensive. This Judicial Review Application presents a worrying trend on increase in cases of abuse of the judicial process.

21. Clearly, this Judicial Review Application, is founded on issues that have been dealt with in the above Petition. To me this suit constitutes abuse of Court process. It is trite law that the Court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused. The black law dictionary defines abuse as "Everything which is contrary to good order established by usage that is a complete departure from reasonable use "An abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use".[11]

22. The concept of abuse of court/judicial process is imprecise. It involves circumstances and situation of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents.[12]

23. The situation that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-

> ***(a)*** *Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.*

(b) *Instituting different actions between the same parties simultaneously in different court even though on different grounds.*

(c) *Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and respondent notice.*

(d) *Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.*

(e) *Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.**[13]***

(f) *Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.*

(g) *Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.*

(h) *Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent.**[14]***

24. In the words of **Oputa J.SC** (as he then was)[15] abuse of judicial process is:-

> *"A term generally applied to a proceeding which is wanting in bona fides and is frivolous vexations and oppressive. In his words abuse of process can also mean abuse of legal procedure or improper use of the legal process."*

25. Justice Niki Tobi JSC observed:-[16]

> *"that abuse of court process create a factual scenario where appellants are pursuing the same matter by two court process. In other words, the appellants by the two court process were involved in some gamble a game of chance to get the best in the judicial process.''*

26. It's settled law that a litigant has no right to purse *paripasua* two processes which will have the same effect in two courts either at the same time or at different times with a view of obtaining victory in one of the process or in both. Litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks.

27. It is not open for the applicant herein to institute these Judicial Review proceedings after losing the Petition challenging the same criminal trial. The two processes are in law not available to the applicant. He ought to have appealed against the above mentioned decision if he was dissatisfied. The Applicant cannot lawfully file this Judicial Review proceedings and seek similar reliefs relying on substantially the same grounds as the Petition referred to above. The pursuit of the second process, that is this Judicial Review Application constitutes and amounts to abuse of court/legal process."[17]

28. Multiplicity of actions on the same matter between the same parties even where there exist a right to bring the action is regarded as an abuse.[18] The abuse lies in the multiplicity and manner of the exercise of the right rather than exercise of right *per se*. The abuse consists in the intention, purpose and aim of person exercising the right, to harass, irritate, and annoy the adversary and interface with the administration of justice.[19]I find no difficulty in concluding that this Judicial Review Application is based on similar grounds as the Petition referred to above.

29. This obstacle to the efficient administration of justice is not immovable. Courts need not and should not wait for lawyers and litigants to initiate proceedings where there is substantial reason to believe that the processes of the court have been abused. Tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which such abuse cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception, fraud and blatant abuse of judicial processes.

30. All courts have an inherent or implied jurisdiction to prevent their processes from being used as an instrument of oppression. Courts are able to modify their procedures to avoid such prejudice and take any steps that are necessary to prevent an abuse of process.[20]The concept of abuse of process extends to the use of the court's processes in a way that is inconsistent with two fundamental requirements arising in Court proceedings. These are, *first*, that the Court protect its ability to function as a Court of law by ensuring that its processes are used fairly by State and citizen alike. The *second* is that unless the Court protects its ability to function in that way, its failure will lead to an erosion of public confidence. The court's processes will be seen as lending themselves to oppression and injustice.[21]

31. The concept of abuse of process overlaps with the obligation of a Court to provide a fair trial. The content of these obligations cannot, however, be stated exhaustively or analytically. These obligations rely on intuitive judgments formed by experience.[22]The obligation on a court is to provide a fair trial *in accordance with law*. The due administration of justice is a continuous process. Courts must be vigilant to ensure that public confidence in the administration of justice is maintained.[23]

Disposition

32. It is clear that the issues raised in this application are substantially the same as those determined in the Petition. It is beyond argument that the plea of res judicata succeeds. I am also persuaded that this application is a clear abuse of Court process. This Court has power and duty to protect its processes from being abused. I strongly hold that the applicant and his advocate should not go unpunished for abusing this Court's processes. Such flagrant abuse of Court processes must be brought to a halt.

33. Courts are not powerless when it comes to dealing with such misconduct. The doctrine of abuse of process, based upon the inherent authority of every court to control its process and those persons who come before it, is a power incidental and necessary to the exercise of substantive jurisdiction. That power, together with rules of court and statutory provisions, enables the court to dismiss or strike claims which are frivolous and vexatious. In addition, it may be exercised to discipline litigants and lawyers guilty of misconduct. It is regrettable that this power has been used only grudgingly, sparingly and in blatant cases.

34. The two cases were filed and prosecuted by an advocate. This brings into focus a lawyers duty to the Court. A lawyer's duty to the court is a fundamental obligation that defines a lawyer's role within the adversarial system. However, lawyer's duties are not carried out in a vacuum. While facing financial and competitive pressures, lawyers must fulfill and balance their duties to the client, opposing counsel, the administration of justice and society.[24]

35. A lawyer's duty to the court relates to his or her status as a professional who serves, not only clients, but also the public interest. On admission to the Roll of Advocates, lawyers take an oath in the name of the Almighty God to at all times uphold the rule of law and administration of justice and to discharge their duties as advocates of the High Court of Kenya. E.W. Roddenberry's 1953 article *Achieving Professionalism* states:-

> *"It was probably inevitable that certain occupations requiring public avowals of faith or purpose should become known as professions. Originally, there were three: medicine, law, and theology. They were dignified by that title and set apart from other occupations because they were more than a livelihood: they represented a calling to some higher satisfaction than a commercial gain...Although rigorous asceticism was seldom required, doctors, lawyers and clergymen demonstrated enough selflessness down through the years to gain general respect."*[25]

36. As E.W. Roddenberry suggests, dedication to serving the public good is not a matter of blind altruism. Rather, it is a foundation upon which lawyers earn the confidence of the community and, as a result, are able to play their essential role in the administration of justice. [26]In other words, a lawyer may not be able to act in a way that serves the client's best interests if doing so would put the administration of justice and the community's confidence in the profession at risk.

37. A lawyer's duty to the court also helps define the limits of the zealous representation of a client. The need to create ethical boundaries within an adversarial system was addressed by Gavin MacKenzie in his article *The ethics of advocacy* thus:-

> *"Adversarial tactics tend to escalate despite the best of intentions in a competitive system. Lawyers adopt adversarial tactics...because to refrain from doing so would put their clients at a competitive disadvantage relative to the clients of lawyers who show no such restraint…We should be sceptical of justifications of questionable conduct that appeal to the ethics of the adversary system."**[27]***

38. We can distil a lawyer's duty to the court to three:- **(a)** to use tactics that are legal, honest and respectful to courts and tribunals; **(b)** to act with integrity and professionalism while maintaining his or her overarching responsibility to ensure civil conduct; and **(c)** to educate clients about the court processes in the interest of promoting the public's confidence in the administration of justice. [28]The duty to the court is also important because there are consequences for lawyers who do not uphold it.

39. One such consequence is that the lawyer can be ordered to pay costs personally. I find that this is a proper case for such an order. Consequently, I dismiss this Judicial Review application with costs to the first Respondent and the Interested Party and order that the applicant and his advocate shall jointly pay the costs of these proceedings on a **50-50** basis. Such costs to be assessed by the taxing master of this Court.

40. I note with concern that the Criminal case is said to have been pending in Court since 2015. I order that *Kibera Chief Magistrates Criminal Case No. **4029** of 2015, Republic vs Satya Bhama Gandhi proceeds for hearing and final determination.*

41. I further direct the Deputy Registrar of this Honorable Court to forward a copy of this Ruling to the to the Director of Public Prosecutions for information and to the Council of the Law Society of Kenya for information and appropriate action.

Orders accordingly.

Signed, Delivered, Dated at Nairobi this **21st** day of **June** 2018.

John M. Mativo

Judge

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[1] Counsel relied on *John Njue Nyaga vs. Attorney General & Others* {2016} eKLR, *John Florence Maritime Services Limited & Another*

vs Cabinet Secretary for Transport and Infrastructure {2015} eKLR and *E.T. vs A.G & Another* {2112}eKLR

[2] In *Greenhalgh vs Mallard* (1) (1947) 2 All ER 257.

[3] *Caeserstone Sdot-Yam Ltd vs World of Marble and Granite 2000 CC and others* 2013 (6) SA 499 (SCA) paras 20-21.

[4]http://www.kenyalawresourcecenter.org/2011/07/res-judicata.html -Accessed on 16 December 2017.

[5] Ibid.

[6] Ibid.

[7] Cap 21,Laws of Kenya.

[8] See ***Lotta vs. Tanaki* {2003} 2 EA 556.**

[9] Civil Appeal No. 62 of 1958.

[10] *Republic vs Registrar of Societies - Kenya & 2 Others Ex-Parte Moses Kirima & 2 others* [2017] eKLR.

[11]Black Law Dictionary, Sixth Edition Black, Henry Campbell, Black Law Dictionary Sixth Edition, Continental Edition 1891- 1991 P 990 P 10-11.

[12] *Public Drug Co V Breyerke cream Co*, 347, Pa 346, 32A 2d 413, 415.

[13] *Jadesimi vs. Okotie Eboh* (1986) 1NWLR (Pt 16) 264.

[14] (2007) 16 NWLR (319) 335.

[15] In the Nigerian case of *Amaefule & other Vs The State.*

[16] *Agwusin vs Ojichie*

[17] Supra.

[18]Ibid.

[19] Ibid.

[20] *Clyne vs New South Wales Bar Association* (1960) 104 CLR 186; *Barton v R* (1980) 147 CLR 75; *Connelly vs DPP* {1964} AC 1254; *Neill vs County Court of Victoria* {2003} VSC 328.

[21] *Clark vs R* {2016} VSCA 96 at [14].

[22]*Jago vs District Court of NSW* (1989) 168 CLR 23; {1989} HCA 46; *Ridgeway vs R* (1995) 184 CLR 19; [1995] HCA 66).

[23] *Moevao vs Department of Labour* {1980} 1 NZLR 464; *Jago vs District Court of NSW* {1989} 168 CLR 23; {1989} HCA 46.

[24] Furlong, Jordan "Professionalism Revived: Diagnosing the Failure of Professionalism among Lawyers and Finding a Cure" (Keynote Commentary delivered at the Chief Justice of Ontario's Tenth Colloquium on the Legal Profession March 28, 2008) online: <http://www.lsuc.on.ca/media/tenth_colloquium_furlong.pdf>.

[25] Roddenberry, E.W. "Achieving Professionalism" (1953) 44 *Journal of Criminal Law, Criminology, and Police Science* at 109.

[26] Ibid.

[27] MacKenzie, Gavin "The ethics of advocacy", *The Advocates' Society Journal (September, 2008)* at 26-7.

[28] Robert Bell and Caroline Abela, *A Lawyer's Duty to The Court*, Available at www.weirfoulds.com/a-lawyers-duty-to-the-court.