



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURT

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW NO. 553 OF 2016

IN THE MATTER OF SECTIONS 87 & 116(2), OF THE COUNTY

GOVERNMENT ACT NO 29 OF 2012 LAWS OF KENYA.

-AND-

IN THE MATTER OF SECTIONS 3(a) & (c), SECTION 4(1), (2), 3(a), (b) & (c),

(4), SECTION 5, SECTION 7(1) & (2) AS WELL AS SECTIONS 8 AND

11 OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015.

-AND-

IN THE MATTER OF SECTION 118, OF THE TRAFFIC ACT, CAP 403

-AND-

IN THE MATTER OF ARTICLE 10(2)(a), 47, 48, 50(1), 159 AND PART 2, OF THE

4TH SCHEDULE OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

-AND-

IN THE MATTER OF SECTIONS 1A, 1B, 3 & 3A OF THE

CIVIL PROCEDURE ACT, CAP 21 LAWS OF KENYA

-AND-

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

-AND-

**IN THE MATTER OF APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI
CALLING**

**UP & QUASHING THE NOTICE BY THE COUNTY GOVERNMENT OF NAIROBI DATED
11TH NOVEMBER, 2015 BANNING MOTORCYCLES (BODA BODA) OPERATORS
FROM FERRYING PASSENGERS IN NAIROBI'S CENTRAL BUSINESS DISTRICT.**

-AND-

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF MANDAMUS
AGAINST THE COUNTY GOVERNMENT OF NAIROBI, DIRECTING THE SAID COUNTY
GOVERNMENT TO UNDERTAKE PUBLIC STAKE-HOLDER CONSULTATION BEFORE
DEVELOPING AND ISSUING ANY NOTICE ON MOTORCYCLE OPERATORS IN
NAIROBI'S CENTRAL BUSINESS DISTRICT AND ERSTWHILE DIRECT
THE DESIGNATION AND ALLOCATION OF PARKING BAYS/SLOTS
FOR THE EX-PARTE APPLICANTS**

-AND-

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF
PROHIBITION
AGAINST THE COUNTY GOVERNMENT OF NAIROBI AND THE INSPECTOR GENERAL
OF
POLICE FROM EVICTING OR IN ANY WAY HOWSOEVER RESTRAINING THE EX-PARTE
APPLICANT'S MEMBERS FROM FERRYING PASSENGERS TO AND FROM
NAIROBI'S CENTRAL BUSINESS DISTRICT**

-AND-

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

COUNTY GOVERNMENT OF NAIROBI.....1ST RESPONDENT

INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

-AND-

**UNITED BODA BODA WELFARE ASSOCIATION Suing through
its Chairman KIMANI WA NDUTHI.....*Ex-parte* APPLICANT**

RULING

1. In these proceedings the ex parte applicant herein, **United Boda Boda Welfare Association**, contends that the 1st Respondent herein, the County Government of Nairobi (hereinafter referred to as the “County”) by way of a Notice in *Nation Daily Newspaper* dated the 11th of November, 2015 dubbed “**BAN OF MOTORCYCLES (BODA BODA) OPERATORS FORM CENTRAL BUSINESS DISTRICT**”; issued through its County Secretary purportedly banned the members of the applicant from ferrying passengers to and from the Central Business District in Nairobi.

2. The said Notice according to the applicant, provided as follows:

Pursuant to the provisions of the Traffic Act CAP 403 of 2014 of the Laws of the Republic of Kenya, the Nairobi City County Government wished to inform all motorcycle (boda boda) operators ferrying passengers to and from the Central Business District (CBD) that such activities have been banned with immediate effect.

Any operator and passenger found contravening this law will be arrested for an offence punishable by hefty fines and long jail terms as provided for in the Traffic Act. Motorcycles ferrying goods are exempted.

Motorcycles operators must also note that the Nairobi City County Government has not designated any parking slots in the CBD.”

3. According to the applicant, no reasons, rationale, justification or cause of such adverse arbitrary action was availed despite the rights of the Applicant’s members to earn a living being abridged and worse still no public or stake-holder meetings and/or consultations howsoever were ever conducted preceding this Notice; as mandatory required by law. It was further averred that the notice is itself ambiguous and betrays the discrimination and irrationality behind the Notice, to the extent that Motorcycles in themselves appear permitted to access any part of the CBD and indeed even motorcycles ferrying goods are permitted to access any part of the CBD: the restraint being curiously limited to carrying passengers.

4. It was the applicant’s case that the 1st and 2nd Respondents and their Agents have since and acting on the strength of the unlawful notice issued by the County Government instituted “crack-down” initiatives against members of the Applicant- which initiatives continue to deny the Applicant’s members a fair opportunity to earn a lawful income.

5. It was disclosed that the Applicant members had hitherto lodged a Constitutional Petition No 521 of 2015 dated 20th November, 2015 at the High Court in Nairobi, under which Petition the Applicants – under the advice of their then Counsel on record Messer Nyabena Nyakundi & company Advocates – had sought reprieve for what they understood to be a violation of their various Constitutional rights and had presented the following questions for adjudication:-

a. In which legal entity does the law vest the mandate to regulate public transport matters in Kenya:

b. In who does the law vest the mandate to register societies and associations in respect of Motorcycle Operators vis-à-vis the mandate to allocate and designate parking bays/slots:

c. An apparent conflict between national and County legislation vis-à-vis the exercise of functions of regulating public transport; and which legislation ought to supersede: and,

d. Apparent discrimination & differential treatment against various players in the public transport – taxi operators i.e. two (2)-wheeled operators on the one hand and three (3) & four (4) wheeled operators on the other.

6. The applicant averred that the afore-questions were responded to in the considered Judgment of **Onguto, J** dated the 31st of October, 2016, which unfortunately dismissed the petition by the Applicant's members.

7. It was the applicant's view that the specificities and Parties in the constitutional petition are distinguishable from those before Court under this Application for judicial review.

8. According to the applicant, its members remain gravely prejudiced and it hence implore this Court to exercise its discretion in allowing the applicant an opportunity to ventilate the matters in this Application. Further, the Applicant was genuinely apprehensive that its members will be subjected to arbitrary arrests, impounding of the motor-cycles and continued levying of 'fines' in the continued quest to earn a legitimate income whereas in the postulation of the impugned notice the 1st Respondent acted in irrationally, in violation of the law by specifically failing to consider the representations and concerns of the applications before undertaking publication of a law that violates their lawful rights. It was contended that the members of the Public often rely heavily on the services rendered by the applicants members not just because of their affordability in term of pricing for their services, but also their convenience and ability to beat/avoid the infamous 'Nairobi traffic-jam'.

9. The applicant's case was that the action by the 1st Respondent quite literally accords preferential treatment to the Applicants' business competitors i.e. the 3-wheeled and 4-wheeled operators who now have no competition from the convenience availed by the members of the Applicant which is certainly unduly hindering innovative business methods and investments.

10. It was asserted that prima facie the County under the Rules of Natural Justice as read with provisions of sections 3, 4, 5, 7, 8 and 11 of the **Fair Administrative actions Act, 2015**; sections 87 and 116 of the **County Governments Act** and Article 47 of the **Constitution** unequivocally oblige the County to not only undertake meaningful public participation in enacting public policy but also to act in their best interest.

11. The applicant noted that in disallowing the Pet 521 of 2015, the Hon Court observed at paras 50 thereof, that no relief had been sought neither had any representations been advanced before Court on violation of Article 47 – which would otherwise somewhat invoke similarities and possibly bar the suit herein and thus the suit herein is proper before Court. To the applicant, there is an apparent breach of the law that ought to be adjudicated upon, more so flowing from the observation by the hon. Court in Pet 521 of 2015; and indeed the deprivation of a source of livelihood and fend for oneself – the very of essence of human beings.

12. The applicant therefore sought the following orders:

1. THAT the Honourable Court be and is hereby pealed to grant Orders of certiorari calling up & quashing the notice by the County Government of Nairobi dated 11th November, 2015 banning motorcycles (boda boda) operators from Nairobi's central business district;

2. THAT the Honourable Court be and is hereby pleased to grant Orders of mandamus against the County Government of Nairobi, directing the said county government to undertake public stake-holder consultation before developing and issuing any notice on motorcycle operators in Nairobi's central business district and erstwhile direct the designation and allocation of parking bays/slots for the ex-parte applicants;

3. **THAT** the Honourable Court be and is hereby pleased to grant orders of PROHIBITION against the County Government of Nairobi and the Inspector General of Police from evicting or in any way howsoever restraining the ex-parte applicant's members from ferrying passengers to and from Nairobi's central business district;

4. **THAT** the Honourable Court be and is hereby pleased to stay any and/all execution and/or otherwise enforcement of the Notice by the County Government of Nairobi dated 11th November, 2015 and dubbed "BAN OF MOTORCYCLES (BODA BODA) OPERATORS FROM CENTRAL BUSINESS DISTRICT" pending the Hearing and determination of the Application herein;

5. **THAT** this Honourable Court be and is hereby pleased to grant any further Orders it may deem fit; and,

6. **THAT** the costs of the Application be in the Cause.

13. Before the application could be heard the 2nd and 3rd Respondent objected to the application on the ground that the same was *res judicata*. That objection was argued in line and is the subject of this ruling.

14. In his submissions, **Mr. Makokha**, learned counsel for the County Government contended that the notice the subject of these proceedings was issued on 11th November, 2015 and that it was the same notice which was the subject of petition 521 of 2015. The same was dealt with by **Mumbi Ngugi, J** vide a ruling dated 19th February, 2016 as well as the judgement of **Onguto, J** of 31st October, 2016. Whereas the applicant is an association of various Saccos, it was submitted that it is admitted that the petitioners in petition 521 were the applicant's members hence they are the same persons now coming as an umbrella body.

15. It was submitted that the issues complained of in the said petition are the same as the issues in this application since they revolve around the same notice and raised the same issues as the powers of the County Government, lack of public participation and discrimination all of which were addressed in the said judgement.

16. On the part of the 3rd Respondent, the Court was urged by its learned counsel, **Miss Ngelechei**, to uphold the objection.

17. The applicant, through its learned counsel, **Mr. Lusi**, however opposed the objection. According to him, the applicant herein must be allowed the opportunity to renew its earlier proceedings in order to determine whether the issues are in fact similar. It was averred that the proceedings in the earlier proceedings had not been availed before this Court and having failed to avail the same the application seeking to strike out these proceedings ought not to be sustained.

18. It was submitted that the conditions necessary for the principle of *res judicata* to be sustained had not been satisfied since in the earlier judgement the issues relation to *res judicata* had not been raised. It was therefore contended that the issues raised herein have never been determined on merits.

19. I have considered the issues raised before me.

20. That a preliminary objection can be properly based on *res judicata* is not in doubt. In **Omondi vs. National Bank of Kenya Ltd & Others [2001] KLR 579; [2001] 1 EA 177** it was held that:

"The objection as to the legal competence of the Plaintiffs to sue (in their capacity

as directors and shareholders of the company under receivership) and the plea of *res judicata* are pure points of law which if determined in the favour of the Respondents would conclude the litigation and they were accordingly well taken as preliminary objections...In determining both points the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters...What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done *ex debito justitiae* (as of right) but as a matter of judicial discretion."

21. It is however important to revisit the legal principles guiding the applicability of the doctrine of *res judicata*.

22. In the case of Lotta vs. Tanaki [2003] 2 EA 556 it was held as follows:

"The doctrine of *res judicata* is provided for in Order 9 of the Civil Procedure Code of 1966 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 9 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".

23. In the case of Gurbachan Singh Kalsi vs. Yowani Ekori Civil Appeal No. 62 of 1958 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."

24. In the case of Apondi vs. Canuald Metal Packaging [2005] 1 EA 12 Waki, JA stated as follows:

"A party is at liberty to choose a forum which has the jurisdiction to adjudicate his

claim, or choose to forego part of his claim and he cannot be heard to complain about that choice after the event and it would be otherwise oppressive and prejudicial to other parties and an abuse of the Court process to allow litigation by instalments”.

25. The mere addition of parties in a subsequent suit 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. Under explanation 6 to section 7 of the **Civil Procedure Act**, where persons litigate *bona fide* in respect of a public right claimed in common by themselves and others, all persons interested in such right shall, for the purposes of the section, be deemed to claim under the persons so litigating.

26. In the cases of Mburu Kinyua vs. Gachini Tuti [1978] KLR 69; [1976-80] 1 KLR 790 and Churanji Lal & Co vs. Bhajjee (1932) 14 KLR 28 it was held that:

“However, caution must be taken to distinguish between discovery of new facts and fresh happenings. The former may not necessarily escape the application of the doctrine since parties cannot by face-lifting the pleadings evade the said doctrine. In the case of *Siri Ram Kaura vs. M J E Morgan* Civil Application No. 71 of 1960 [1961] EA 462 the then East African Court of Appeal stated as follows:

“The general principle is that a party cannot in a subsequent proceeding raise a ground of claim or defence which has been decided or which, upon the pleadings or the form of issue, was open to him in a former proceeding between the same parties. The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of *res judicata*...The law with regard to *res judicata* is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in a litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show you that this is a fact which entirely changes the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have been ascertained by me before...The point is not whether the respondent was badly advised in bringing the first application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when he made his first application.”.

27. It is therefore clear that parties are not to evade the application of *res judicata* by simply conjuring up parties or issues with a view to giving the case a different complexion from the one that was given to the former suit. In this case the applicant cannot by simply raising an issue under Article 47 of the Constitution escape the dragnet of *res judicata* if due to negligence, inadvertence, or even accident they had failed to plead the same in the earlier suit.

28. In this case the applicant concedes in paragraph 11 of the supporting affidavit that that its members lodged the said petition. Accordingly the applicants herein were privy to the earlier proceedings. That they failed to bring all their issues in the earlier proceedings cannot justify the

bringing of the instant proceedings. The doctrine of *res judicata* is based on three maxims. First, that no man should be vexed twice over the same cause. Secondly, that it is in the interest of the state that there should be an end to litigation and, thirdly, that a judicial decision must be accepted as correct. See **Evelyn Kowido & Another T/A Evedel Enterprises vs. Bamburi Supermarkets Ltd Mombasa HCCA No. 18 of 2006.**

29. I have considered the issues raised herein and it is my view that the issues raised herein could have properly formed the subject of the earlier proceedings if the applicants had been properly advised.

30. One other issue that has attracted my attention is that contrary to the provisions of Order 53 rule 1(2) of the ***Civil Procedure Rules***, there was no statement accompanying the application for leave.

31. In the premises the preliminary objection succeeds and this application is struck out but with no order as to costs.

32. It is so ordered.

Dated at Nairobi this day 30th of May 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Makokha for the 1st Respondent

CA Mwangi