



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 34 OF 2017

In the matter of the Constitution of Kenya 2010

In the matter of the old Constitution of Kenya-(Repealed)

In the matter of the Universities Act 2012

In the matter of the Kenyatta University Act 1985, Cap 210

In the matter of Kenyatta University Charter 2013

In the matter of Kenyatta University Statutes 2013

In the matter of Kenyatta University Statutes 1993

In the matter of Leadership & Integrity Act 2012

In the matter of Rules of Natural Justice

In the matter of Fair Administrative Action Act 2015

In the matter of defamation Act 2012 {1972}

**In the matter of Discrimination, Negligent, Infringement of Rights, Unlawful withdrawal/Recall of
PHD, unlawful deprivation of property and compensation**

BETWEEN

DR. ELENA D. KORIR.....PETITIONER

VERSUS

KENYATTA UNIVERSITY.....1ST RESPONDENT

THE SENATE, KENYATTA UNIVERSITY.....2NDRESPONDENT

THE VICE-CHANCELLOR,

KENYATTA UNIVERSITY.....3RDRESPONDENT

THE DEPUTY VICE-

CHANCELLOR (ACADEMIC).....4THRESPONDENT

THE DEPUTY VICE-CHANCELLOR

(ADMINISTRATION).....5TH RESPONDENT

RULING

Introduction

1. The background information relevant to this ruling is that the Petitioner herein filed High Court Misc Application No. 1285 of 2007 against the first, second and third Respondents seeking two judicial review orders, namely, an order of certiorari to quash the decision of the respondents contained in a letter dated 5th December 2007 deleting the Petitioner's name from the Graduation list and denying the Petitioner conferment of a Doctor of Philosophy Degree and an order of mandamus directing the Respondent to confer the Petitioner a Doctor of Philosophy Degree which she studied and qualified. In a judgment rendered on 16th March 2009, Dulu J granted the said orders.

2. The Respondent avers that it complied with the said judgment to avoid being cited for contempt. The Petitioner was graduated and the PHD conferred upon her on 26th June 2009. However, the Respondent exercised its rights of appeal and lodged an appeal against the said decision at the Court of Appeal being Civil Appeal No. 72 of 2013. In a judgment rendered on 4th March 2016 the Court of Appeal allowed the appeal, and set aside the orders granted by the High Court and substituted it with orders dismissing the Petitioners suit.

3. After the successful appeal, the Senate Executive Committee convened a meeting on 16th March 2016 where the Petitioners case was discussed and it was resolved that the Petitioners PHD degree be recalled since the several committees that had been established to investigate the quality of her work had cast doubts on the quality of her data in addition to other complaints.

Notice of Preliminary objection

4. On 22nd March 2017, the Respondents' counsel filed a notice of a preliminary objection in this case citing res judicata on grounds that the issues raised in this case were conclusively determined by the Court of Appeal in the above case and urged this court to dismiss the Petition.

5. In response, the Respondent argued that this petition alleges violation of constitutional rights, hence it is different from the previous suit and urged the court to dismiss the objection.

6. Because res judicata is a dispositive issue, at the hearing of the preliminary objection, I asked the parties to supply the court with copies of pleadings filed in the High Court Case which had not been annexed to the application. The copies were provided to the court on 13 December 2017.

Definition of a preliminary objection

7. A preliminary objection must first, raise a point of law based on ascertained facts and not on evidence. Secondly, if the objection is sustained, that should dispose of the matter. A preliminary objection is in the nature of a legal objection not based on the merits or facts of the case, but must be on pure points of law.

8. Discussing what constitutes a preliminary objection, Law JA in *Mukisa Biscuit Manufacturers Ltd vs. Westend Distributors Ltd*^[1] said:-

"...so far as I am aware, a preliminary objection consists of a pure point of law which has been

pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration."

9. In the words of Sir Charles Newbold P at page 701, B:-

"...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. **The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.**"(Emphasis added)

10. Useful guidance can be obtained from the decision in **Omondi vs. National Bank of Kenya Ltd & Others**^[2] where it was held that:-

"The objection as to the legal competence of the Plaintiffs to sue.....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..."

11. Thus, a preliminary objection may only be raised on a "pure question of law." To discern such a point of law, the Court has to be satisfied that there is **no** proper contest as to the facts. The facts are deemed agreed, as they are *prima facie* presented in the pleadings on record.

12. In [law](#), a **question of law**, also known as a **point of law**, is a question that must be answered by applying relevant legal principles to interpretation of the law.^[3] Such a question is distinct from a **question of fact**, which must be answered by reference to facts and [evidence](#) as well as inferences arising from those facts.

13. In [law](#), a **question of fact**, also known as a **point of fact**, is a question that must be answered by reference to facts and [evidence](#) as well as inferences arising from those facts. Such a question is distinct from a question of law, which must be answered by applying relevant legal principles. The answer to a question of fact (a "**finding of fact**") usually depends on particular circumstances or factual situations.^[4]

Whether the grounds raised in this objection are pure points of law

14. The Petitioner pleads in paragraph 162 of the Petition she is aggrieved by the withdrawal of her PHD degree by a letter dated 10th October 2016. A reading of the facts relied upon in the Petition and the reliefs sought demonstrates that the crux of this Petition is the withdrawal of the same PHD which was the subject of the previous litigation.

15. 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.

16. As **Somervell L.J.** stated ^[5] 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. The case is founded on the same cause of action, namely, the withdrawal of the Petitioners PHD degree.

17. 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.^[6]

18. 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 judgments involved the 'determination of questions that are necessary for the determination of the present case and substantially determine the outcome of this case.'

19. *Res Judicata* is one of 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.^[7]

20. 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.^[8] The rule of *res judicata* presumes conclusively the truth of the decision in the former suit.^[9]

21. 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.

22. In *Lotta vs. Tanaki*^[10] 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 *Gurbachan Singh Kalsi vs. Yowani Ekori*^[11] 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. However, it is trite that the mere addition of parties in a subsequent suit 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.^[12]

Disposition

25. I have carefully studied the pleadings filed in the High Court, the judgment rendered by the High Court, the record of appeal filed in the Court of Appeal and the Court of Appeal judgment. It is evidently clear that the issues raised in this Petition are substantially the same as those determined in the previous proceedings. They all relate to the withdrawal of the Petitioners PHD degree which was the subject of the determination in the High Court and the Court of Appeal. I am persuaded that the plea of *res judicata* raised in this case succeeds.

26. Further, all the issues raised in this case are matters that could have been raised in the previous suit because they are all grounded on the primary complaint, which is the withdrawal of the PHD degree.

27. Applying the principles laid down in the law and authorities as discussed above authorities, the conclusion becomes irresistible that the preliminary objection raised in this case succeeds. Consequently, I hereby dismiss this Petition with no orders as to costs.

Orders accordingly.

Signed, Delivered, Dated at Nairobi this 19th day of December 2017

John M. Mativo

Judge

[1] {1969} E.A 696 AT PAGE 700

[2] {2001} KLR 579; [2001] 1 EA 177

[3] Proffatt, John (1877). *A Treatise on Trial by Jury, Including Questions of Law and Fact* (1986 reprint ed.). Buffalo, NY: William S. Hein & Co. [ISBN 9780899417073](#).

[4] *"Question of fact"*. Legal Information Institute. [Cornell University Law School](#).

[5] In *Greenhalgh v Mallard* (1) (1947) 2 All ER 257

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

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

[8] *Ibid*

[9] *Ibid*

[10] {2003} 2 EA 556

[11] **Civil Appeal No. 62 of 1958**

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