REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 260 OF 2015

AGGREY CHITERI…………………………………..……....………….. PETITIONER

VERSUS

REPUBLIC ……………………………………………..……….…… RESPONDENT

RULING

1. The principle of *res judicata* applies in law to bar subsequent proceedings when there has been adjudication by a court of competent and concurrent jurisdiction which conclusively determined the rights of the parties with regard to all or any matters in dispute: see **Mandavia -v- Rattan Singh [1965] EA 118**. It is intended to ensure the protection and propagation of the public policy that " parties to a judicial decision should not afterwards be allowed to re-litigate the same question": see Miller J in **Crown Estate Commissioners -v- Dorset County Council [1990]1 All E R 19,23**.
2. The court consequently has an inherent jurisdiction even where it is not expressly conferred to invoke this principle in appropriate circumstances and ensure too that the process of court is not abused.

The Preliminary Objection

3. In the instant case, the Respondent promptly raised an objection that the Petition herein was claim-precluded as the Petitioner had previously filed a similar or substantially similar claim seeking a new trial on the basis that new and compelling evidence had become available. The Respondent states that the previous claim, being High Court Constitutional Petition No. 380 of 2013 sought the same orders and stated the same grounds. The earlier Petition ,continued the Respondent, was heard and determined on its merits by Hon Justice Majanja . Petition No. 380 of 2013 was dismissed on 30 May 2014. One year later the Petitioner filed this Petition.
4. Additionally, the Respondent submitted that the instant Petition is also an abuse of the process as there is still pending another Petition before this court where the Petitioner is a party and where the Petitioner once again is seeking substantially similar orders. The pending petition was stated to be HCCP No. 618 of 2010. The correct file number is however Criminal Miscellaneous Application No 618 of 2010 filed at Nairobi. The Parties are stated as Joseph Kahinga & 11 Others v Attorney General.
5. The Petitioner's brief reply was that Petition No. 380 of 2013 was different from the present matter as it dealt with fair trial and tampering of the court file, while the current Petition deals with the discovery of new and compelling evidence. The Petitioner also stated that the Criminal

Miscellaneous Application No. 618 of 2010 was also different from the current petition.

6. The question is whether this court, sitting as a constitutional court can invoke the doctrine of *res judicata* and if so whether the ingredients of the doctrine of *res judicata* have been established by the Respondent who has placed reliance on the doctrine.
7. It would be important to note that in matters involving the enforcement of the Bill of Rights , where the Petitioner claims that his rights have been violated or are about to be violated a plea of *res judicata* must be considered with abundant caution. Rights may be violated multiple times and repeatedly or even after court decisions have been rendered and it would not mean that the claim is being re-litigated. The evidence may show otherwise.
8. The court no doubt, however, has the inherent jurisdiction to stall any abuse of its process: see **Rule 3(8)** of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice & Procedure Rules, 2013**. The filing of a Petition when a similar one has already been adjudicated upon with finality would amount to abuse of the process of this court. Likewise, the filing of a Petition when a similar one is pending, would also amount to abuse of the process of this court. The claimant in both instances would be estopped from so proceeding.
9. In the current Petition, the Petitioner's claim may be summarized simply as follows. The Petitioner was convicted of robbery with violence in Criminal Cases No 1453 of 2003 and 7201 of 2006. He thereafter appealed to the High Court and then to the Court of Appeal. Both his appeals were dismissed and the death sentence that had been meted to the Petitioner affirmed. The Petitioner however claims he had no knowledge of the trials and only became aware of the same following communication between the High Court and the Court of Appeal. The Petitioner states further that there is new and compelling evidence pursuant to Article 50(6)(b) of the Constitution which would entitle the Petitioner to a review of the case before the Court of Appeal as he was not ,by virtue of not accessing the record, afforded a fair hearing. The Petitioner however does not state the exact nature of the new and compelling evidence but seeks orders that he be served with copies of all the proceedings, from the lower courts to the Court of Appeal.
10. In Petition No 380 of 2013, the Petitioner claimed that the Court of Appeal had also relied on missing records and or records which had been tampered with to affirm his conviction and sentence. He sought a retrial. He was denied. The court determined that the Petitioner had been accorded a fair hearing by the Court of Appeal. The court also determined that the Court of Appeal had dealt with the issue of missing or tampered evidence.
11. In Criminal Misc Appl. No. 618 of 2010, the Petitioner is listed as the 10th Applicant. The Applicants therein are challenging the death sentence in so far as they were never accorded a chance to offer their mitigation after conviction or before the sentence was pronounced. The Applicants also challenge the death sentence in so far as it is a mandatory sentence, stating that it is cruel and contrary to Articles 26 and 50(2)(p) of the Constitution.
12. For starters, it is evident that the current Petition cannot be deemed as an abuse of the process by reason of the existence of Criminal Misc Appl. No. 618 of 2010. The issues are patently different and could possible also not be litigated under the same cause. The mere fact that in Criminal Misc Appl. No. 618 of 2010, the Petitioners also seek a retrial is not enough to make the two causes symmetrical. Where the principle of *sub judice* is being prompted, what ought to be looked at is the substance and not the reliefs. In the instant case, I am satisfied that the two cases are not similar.
13. With regard to Petition No. 380 of 2013, it would appear that the substance is similar even though the reliefs sought are different. In the previous Petition, the Petitioner sought orders for a re-trial on the basis that new and compelling evidence had emerged. In the current Petition, the Petitioner seeks an order for release to the Petitioner of the original court proceedings also on the basis that new and compelling evidence has emerged. In Petition No 380 of 2013, Majanja J found as a fact that there was no new or compelling evidence to warrant interference with the Court of Appeal's decision. Majanja J also found that the Court of Appeal had dealt with the issue of missing and tampered evidence in detail before finalizing the hearing of the appeal. In my view the Petitioner is seeking a re-litigation of the same matter, that is ; as to new and compelling evidence. The only difference is that before the Court of Appeal and on the basis of alleged new and compelling evidence the Petitioner had sought that his conviction be set aside. Then before this Court (Majanja J) the petitioner once again relying on the concept of new and compelling evidence sought to have a retrial. Now the Petitioner, once again on the basis of alleged new and compelling

evidence seeks to have orders for release of the same evidence for purposes of review of his case.

14. The issue of new and compelling evidence has previously been substantially in issue concerning the Petitioner's case. It is still the main issue with the complaint focusing on the allegedly tinkered evidence or record. The Petitioner unfortunately has also not identified with specificity the said new and compelling evidence.
15. I am left with no doubt that the Petitioner is simply seeking to re-litigate over the same matter. The revised relief is simply a ruse. To obtain court proceedings should not invite a constitutional petition, especially where there is no evidence that the same has been requested or demanded.
16. This Petition ought to be struck out for being an abuse of the process of the court. It is so struck out but with no order as to costs.
17. Orders accordingly.

Dated, signed and delivered at Nairobi this 26th day January, 2016.

J.L.ONGUTO

JUDGE