REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(MILIMANI LAW COURTS)

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 28 OF 2016

IN THE MATTER OF AN APPLICATION BY TOM ODOYO OLOO FOR JUDICIAL REVIEW ORDER OF CERTIORARI

AND

IN THE MATTER OF GAZETTE NOTICE NO. 240 AND PUBLISHED ON 24TH DECEMBER 2015 AND PUBLISHED ON 22ND JANUARY 2016

AND

IN THE MATTER OF THE PURPORTED APPOINTMENT OF THE INTERESTED PARTIES AS INSPECTORS OF THE ANTI-COUNTERFEIT AGENCY

AND

IN THE MATTER OF THE ANTI-COUNTERFEIT ACT

AND

IN THE MATTER OF THE CONSTITUTION, 2010

AND

IN THE MATTER OF THE PUBLIC OFFICER ETHICS ACT

AND

IN THE MATTER OF THE LEADERSHIP AND INTEGRITY ACT

AND

IN THE MATTER OF THE PUBLIC SERVICE (VALUES AND PRINCIPLES) ACT, 2015

AND

IN THE MATTER OF THE NATIONAL VALUES AND PRINCIPLES OF GOVERNANCE

AND

IN THE MATTER OF THE VALUES AND PRINCIPLES OF PUBLIC SERVICE

IN THE MATTER OF

REPUBLIC …..…….....….....……APPLICANT

VERSUS

THE HONOURABLE ATTORNEY GENERAL.....1ST RESPONDENT

THE ANTI-COUNTERFEIT AGENCY…….....……..2ND RESPONDENT

CABINET SECRETARY, INDUSTRIALIZATION &

ENTERPRISE DEVELOPMENT…….....…….3RD RESPONDENT

AND

POLYCARP IGATHE……....….....…….INTERESTED PARTY

Ex parte: TOM ODOYO OLOO

JUDGEMENT

Introduction

1. By a Notice of Motion dated 3rd February, 2016 the *ex parte* applicant herein **Tom Odoyo Oloo,** seeks an order for certiorari removing into his Court for the purposes of being quashed and quashing Gazette Notice No. 240 dated 24th December, 2015 published on 22nd January, 2016.

Applicant's Case

2. According to the applicant, by way of Gazette Notice No. 2831 dated 17th April 2015 and published in the Special Issue of the Kenya Gazette on 27th April 2015 the Interested Party was purportedly appointed as the Chairman of the **Anti-Counterfeit Agency**, the 2nd Respondent herein (hereinafter referred to as "the Agency). This was despite the fact that this Court on 16th December 2015 in a judgment delivered and dated on the said 16th December 2015 in Judicial Review Miscellaneous Application No. 196 of 2015 quashed the appointment of the Interested Party vide the aforesaid Gazette Notice. It was averred that this Court did find, *inter alia*, that the appointment of the Interested Party was unconstitutional for failure to comply with the provisions of the Constitution especially Articles 10 and 232 and proceeded to quash the aforesaid appointment.

3. According to the Applicant, without complying with the express provisions of the Constitution and the provisions of section 6 of the ***Anti-Counterfeit Act*** (hereinafter referred to as "the Act") and further the judgment of this Court aforesaid, the 3rd Respondent proceeded to, within less than one week on 24th December 2015 and in a manner that reeks of executive impunity to re-appoint the Interested Party as the Chairman of the Board of Directors of the 2nd Respondent and to make the said re-appointment to take effect from 17th April 2015, the effective date that was the subject of this Court's orders of 16th December 2015. To the Applicant, the law is very clear and unambiguous in the manner and process of the appointment of the Chairman of the Board of Directors of the 2nd Respondent under the provisions of the ***Anti-Counterfeit Act*** which provides under section 6 that the Chairman of the Board of Directors of

the 2nd Respondent is appointed by the Cabinet Secretary responsible for matters for the time being to do with industrialization.

4. The Applicant explained that the appointment of the Chairman of the 2nd Respondent is a two-stage process and the Interested Party was not subjected to the 1st stage or process and therefore this procedural irregularity in the purported appointment can only be remedied by an appropriate order of certiorari quashing the said appointment. In his view, the 1st stage in the appointment process involves the appointment of a person by the 3rd Respondent as a director after which the appointment moves to the 2nd stage where the said director is in addition appointed as the Chairman of the Board of Directors of the 2nd Respondent.

5. It was the applicant's contention that the 3rd Respondent breached the law and failed to observe the provisions of section 6 of the ***Anti-Counterfeit Act*** by not first appointing the Interested Party as a director of the 2nd Respondent before subsequently appointing him as the Chairman of the Board of Directors subject to compliance with the Constitution. It was further alleged that the 3rd Respondent failed in the impugned appointment to observe and comply with the provisions of the enabling statute and therefore the aforesaid appointment suffers from procedural impropriety and cannot be allowed to stand in a Country that professes the rule of law as one of its guiding values and principles.

6. To the applicant, the Chairman of the Board of Directors of the 2nd Respondent must by law meet certain qualifications under the provisions of the ***Anti-Counterfeit Act***. It was disclosed that there are obvious and clear matters to consider in the appointment of the Chairman of the Board of Directors of the 2nd Respondent which include but not limited to from serious, inexcusable and incurable conflict of interest issues that makes his appointment contrary to public interest and the legitimate expectations of the public to wit: -

(a) The Interested Party is presently the Managing Director of Vivo Energy, a complainant to the 2nd Respondent in matters counterfeiting especially in the energy sector.

(b) The Interested Party is presently the Chairman of Petroleum Institute of East Africa (PIEA), an umbrella body of intellectual property rights owners and a complainant to the 2nd Respondent as agent in matters counterfeiting in the energy sector.

(c) The Interested Party is also presently the Chairman of the Board of Directors of the 2nd Respondent, a body to which abuse of intellectual property rights is made by entities he is in control of as aforesaid.

(d) The Interested Party as Chairman and director of the 2nd Respondent is by law an inspector within the meaning of Section 22 of the Anti-Counterfeit Act and therefore vested with the powers to enforce measures to combat counterfeiting.

(e) The foregoing conflict of interest situation makes the Interested Party a partial participant in matters counterfeiting and therefore he cannot be expected to be impartial, fair and objective in dealing with members of the public suspected of engaging in counterfeiting.

(f) The Interested Party has a direct vested, beneficial and pecuniary interest in matters counterfeiting especially in the energy sector and therefore he is susceptible to use his position to victimize, zealously, industry competitors under the false guise of fighting counterfeiting.

7. It was the applicant's case that the impugned appointment of the Interested Party as the Chairman of the Board of Directors of the 2nd Respondent violates the national values and principles of governance and most importantly: -

(a) Participation of the people.

(b) The rule of law.

(c) Transparency.

(d) Accountability and

(e) Good governance.

8. To the applicant, the impugned appointment of the Interested Party as the Chairman of the Board of Directors of the 2nd Respondent did not involve participation of the people which could only be achieved by not only advertising the post for the public to participate but also affording each and every Kenyan an opportunity to participate either as candidates or otherwise. The applicant's position was that the appointing authority, the 3rd Respondent failed to observe these critical and self-evident national values and principles of governance in the appointment of the Interested Party as the Chairman of the Board of Directors of the 2nd Respondent which values are, *inter alia*, the following: -

a. Fair competition and merit as the basis of appointment.

b. Affording adequate and equal opportunities for appointment at all levels of the public service.

c. Involvement of the people.

9. The applicant contended that the aforesaid values and principles, among others, require that the vacancy, if any, of the Chairman of the Board of Directors of the 2nd Respondent be notified to the public and that the public be afforded an opportunity to apply since the qualifications are clearly provided by statute, the ***Anti-Counterfeit Act***. However, the appointment of the Interested Party was opaque, unilateral, exclusive, illegal, unconstitutional and shrouded in mystery to such an extent that the matters or factors that were considered in the appointment can only be said to constitute irrelevant considerations and therefore contrary to public interest and legitimate expectations. Further, the appointment of the Interested Party as the Chairman of the Board of Directors of the 2nd Respondent is marred by manifest procedural impropriety, illegality and non-compliance with the law.

10. It was contended that whereas the appointing authority under the ***Anti-Counterfeit Act*** is the 3rd Respondent, there are clear statutory guidelines and factors for the said Cabinet Secretary to consider in the appointment of the Chairman of the Board of Directors of the 2nd Respondent. It was therefore averred that the process leading to the appointment of the Interested Party as the Chairman of the Board of Directors of the 2nd Respondent having been opaque and shrouded in mystery was therefore exclusive, discriminative, selective and involved considerations other than those provided by statute. The Applicant asserted that in the present legal and constitutional dispensation every appointment to public office must abide by the law and that any appointment that is contrary to law is null and void *ab initio* and cannot and should not be allowed to stand. To the Applicant, it is in the interest of justice, public interest, the rule of law, accountability for public exercise of power, fair and expedient in all circumstances of the case that the application be allowed as the appointment of the Interested Party as the Chairman of the Board of Directors of the 2nd Respondent has been made in contempt of the judgment of this Court of 16th December 2015 aforesaid and is therefore an affront to the rule of law.

11. In a further affidavit it was deposed that a judicial restatement of the law governing the appointment by the 3rd Respondent of the Chairman of the Board of Directors of the 2nd Respondent was made by this Honourable Court on 16th December 2016 in Judicial Review Application No. 196 of 2015 (*R v. The Honourable Attorney General & 2 Others ex parte Tom Odoyo Oloo*) in which the Court held that the appointment of a person to the Chairmanship of the Board of Directors of the 2nd Respondent must abide with the Constitution and the applicable statute and proceeded to quash the appointment of the Interested

Party as the Chairman of the Board of Directors of the 2nd Respondent because the said appointment was contrary to the Constitution and the applicable statute and further failed the Constitutional test as provided, *inter alia*, by Articles 10 and 232 of the Constitution.

12. The Applicant asserted that the aforesaid judgment was never appealed against by the Respondents therein and who are the same Respondents in the present application and was largely accepted as a good restatement of the law by the Respondents herein. However, the 3rd Respondent, in spite of being aware of the said judgment having been duly served, proceeded in an act of great impunity, barely one week later to appoint the same Interested Party to the position of Chairman of the Board of Directors of the 2nd Respondent without abiding by the law and the Constitution.

13. It was the applicant's position that a vacancy in the office of or absence of the Chairman of the Board of Directors of the 2nd Respondent can neither cripple it nor make it incomplete and incapable of having Board of Director's meetings since Parliament, in enacting Paragraph 3(5) of the First Schedule to the ***Anti-Counterfeit Act*** made it quite clear that ordinary members of the Board of Directors can convene a meeting and provided the manner in which they can do so and if the Board of Directors in the absence of the Interested Party have failed to meet then that is either ignorance of the law on their part or gross and criminal dereliction of duty that this Honourable Court cannot consider or sympathize with.

14. It was contended that the law envisaged at section 3(2) of the ***Anti-Counterfeit Act*** that the 2nd Respondent can be sued and therefore it should at all times put in place measures to deal with court proceedings against it. To the Applicant, these proceedings are legitimate, sound and grounded in the Constitution and are neither frivolous nor vexatious and have an overwhelming chance of success. In his view, the 2nd and 3rd Respondents are engaged in illegalities and gross violations of the Constitution and therefore their acts with regard to the position of the Interested Party are invalid under Article 2 (4) of the Constitution and therefore it is absurd for the 2nd Respondent to allege that the proceedings herein have no merit and are only meant to paralyze the operations of the 2nd Respondent. It was contended that the worst violation of any law is a violation of the Constitution and that any violation of the Constitution is inexcusable and that even if it leads to a shut-down in order to ensure that the Constitution is respected, obeyed and followed so be it.

15. The Applicant asserted that he is a citizen injured and perturbed by the violations of the Constitution and the law in the appointment of the Interested Party as the Chairman of the Board of Directors of the 2nd Respondent and that he has every right to bring proceedings to put an end to those violations of the law and the Constitution under Article 258 of the Constitution and to say that he was working in cohorts with persons unknown is to cheapen serious Constitutional and legal issues and urged the Court to treat the same with the contempt it deserves. It was the Applicant's case that judicial review proceedings is all about, *inter alia*, fair hearing and that it is the law of this Country in judicial review proceedings that "all persons directly affected" should either be made parties or served with the Notice of Motion as provided under Rule 3(2), (3) & 4 and Rule 6 of Order 53 of the ***Civil Procedure Rules*** and that the 2nd Respondent is a person "directly affected" by these proceedings and is therefore a right party to these proceedings as acknowledged by the 2nd Respondent in the Replying Affidavit.

16. It was averred that in judicial review proceedings there is no concept known as "cause of action" per se as that is a civil law concept and that judicial review is neither criminal or civil.

17. With respect to the applicability of the doctrine of *res judicata*, it was averred that the doctrine is a civil law concept not applicable to the facts and particular circumstances of this case and clarified that he had at no time challenged Gazette Notice No. 240 dated 24th December 2015 published on 22nd January 2016. It was therefore the applicant's case that "Res judicata' does not apply at all and is a misconception of the law by the Respondent. In his view, the entire judicial review application is proper and appropriate in both substance and procedure and is specific to the issues for determination by this Honourable Court and cannot therefore be the subject of frivolity or vexation or abuse of the court process or any such concept. To the contrary, this application raises serious issues of public law and Constitutionalism and

should be taken very seriously by the 2nd Respondent instead of dwelling on non-issues and orchestrated side shows like flimsy and flippant "preliminary objections" that are neither here nor there.

18. It was disclosed that the Interested Party had not even attempted to hid his obvious and blatant conflict of interest since whenever court documents are served upon him, he always directs that the same be received by the Legal Officer at Vivo Energy Kenya Limited.

Respondents' Case.

19. On behalf of the Respondent, the following preliminary objections were pleaded:

1. **That the issues canvassed in support of the said application are res judicata**

2. **That the application does not disclose cause of action against the 2nd respondent**

3. **That the application is fatally and incurably defective.**

4. **That the application is frivolous, vexatious and an abuse of the court process.**

5. **That the application is bad in law and lacks merit.**

20. Apart from the said objections, the Respondent averred that vide a gazette notice number 240 dated 24th December, 2015 and published on 22nd January, 2016, the Cabinet Secretary, Industrialization and Enterprises Development, the 3rd respondent, appointed one **Polycarp Igathe** (Interested Party) as the chairman of the board of directors of the agency pursuant to the powers vested in the 3rd respondent in accordance with the provisions of section 6 of the ***Anti-Counterfeit Act***.

21. In the Respondent's view, the agency, its board of directors or any other official have no role to play in the nomination, appointment, and gazettement of the chairman of the board of directors. The Respondent asserted that the notion that the appointment of the chairman of the agency is a two stage process as alleged by the applicant is farfetched and lacks any legal backing and has never been the case since the position of the director of agency is distinct and autonomous from that of the chairman hence, it is a misconception to purport that the director is in addition to be appointed as the chairman of the board of directors. According to the Respondent, the appointment of the director of the agency is done by the Board of Directors of the agency as envisaged under section 10 of the ***Anti-Counterfeit Agency Act*** and the Cabinet Secretary has no role to play in his appointment. To the Respondent, as far of the Agency is concerned, the appointing authority that is the 3rd respondent, exercised its mandate under the law having followed the appointment criteria set out under section 6 of the ***Anti-Counterfeit Act***.

22. The Respondent disclosed that the operations of the agency had been greatly crippled by the nonexistence of a chairman due to the orders issued on 2nd February, 2016 in that the chairman is the only convener and chair of the board meeting in whose nonexistence the board remains incomplete and incapable of being legally constituted. It was averred that the core functions of the agency is to combat counterfeiting , trade and other dealings in counterfeit goods in Kenya and currently the market is experiencing immense challenges of fake counterfeit products, which we are unable to fight due to the impediments brought about by the existence of this suit. It was therefore averred that this suit is not based on any merits, but it's a scheme to paralyze the operations of the agency through frivolous and vexations proceedings by the ex parte applicant working in cahoots with other persons whose interests are unknown to the agency which group of persons have been behind several court cases, which agency is forced to defend thereby directing its resources from the fight against counterfeiting.

23. It was the Respondents' case that the agency has been improperly joined as a party in these proceedings for the reason that it is not the appointing authority of the chairman hence there is no cause of action against it. It was further averred that the applicant's application is fatally and incurably defective, frivolous, vexatious and an abuse of the court process and ought to be dismissed with costs.

Determinations

24. I have considered the application, the affidavit filed in support of and in opposition to the application, the submissions filed and the authorities relied on.

25. The first issue for determination is whether these proceedings are res judicata. According to the Respondents the issues the subject of these proceedings were determined in **Republic vs. Attorney General & 3 Others Ex-Parte Tom Odoyo Oloo [2015] eKLR.** In that case, this Court on 16th December, 2015 issued an order of certiorari removing into this Court for the purposes of being quashed Gazette Notice No. 2831 dated 17th April 2015 published on 27th April 2015 appointing the Interested Party as the Chairman of the Board of Directors of the 2nd Respondent.

26. According to the *ex parte* applicant these were provoked by the 3rd Respondent's decision, less than one week after the delivery of the said judgement, on 24th December 2015 to re-appoint the Interested Party as the Chairman of the Board of Directors of the 2nd Respondent and to back date the said re-appointment to 17th April 2015, the effective date that was the subject of this Court's orders of 16th December 2015. On the part of the Respondents, it was averred that vide a gazette notice number 240 dated 24th December, 2015 and published on 22nd January, 2016, the Cabinet Secretary, Industrialization and Enterprises Development, the 3rd respondent, appointed the Interested Party as the chairman of the Board of Directors of the agency pursuant to the powers vested in the 3rd respondent in accordance with the provisions of section 6 of the ***Anti-Counterfeit Act***.

27. It is therefore clear that the appointment which is the subject of these proceedings had not been made as at the time of the delivery of the earlier decision. This calls for a discussion on the circumstances under which the doctrine of *res judicata* can be successfully invoked. In **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".**

28. In **Gurbachan Singh Kalsi vs. Yowani Ekori Civil Appeal No. 62 of 1958 [1958] EA 450** 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…In the instant case, in the first action brought by the respondent the fact which it would be necessary for the appellant to prove was that no work had been done under the contract by the defendant while in the second action the fact which it would be necessary for the plaintiff to prove was that though the work had been begun it had not been completed and inferior materials had been used. Clearly these are distinct, inconsistent and mutually destructive allegations. Inconsistent or mutually destructive pleas cannot be said to be such as ought to have been raised in the former suit. It follows that the fact that the respondent had previously brought an unsuccessful action based upon an allegation of nonfeasance, did not stop him from bringing a second action based on misfeasance, which, in the circumstances of the case, could not have been joined with the first."

29. However, if it is true that the matters complained of in the latter case arose subsequent to the delivery of the earlier ruling and could not therefore be the subject of that earlier application, the plea *res judicata* would not be available. In this respect it was held in **Mburu Kinyua vs. Gachini Tuti [1978] KLR 69; [1976-80] 1 KLR 790** and **Churanji Lal & Co vs. Bhaijee (1932) 14 KLR 28** that:

"...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 principle of estoppel per *rem judicatam* may apply to a decision made in the course of execution proceedings and not in a suit. It may be assumed that the principle would apply to other interlocutory applications. The binding force of the previous judgement depends not upon the provision of the Indian Act (which corresponds to section 7 of the Kenya Civil Procedure Ordinance); but upon general principles of law...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. The admission by the appellant that he was without assets and could not pay the cost was a fact which entirely changed the aspect of the case, and the respondent could not, by reasonable diligence, have discovered that fact when he made the first application for security for costs because the appellant could not then be found: the officers of the court had failed to find the appellant and the respondent did not know where he was. It has not been suggested, or if it has, there is no evidence to support the suggestion, that the respondent could have discovered whether the appellant had or had not assets sufficient to pay the costs without interrogating the appellant. There was no receiving order in bankruptcy or anything of that kind which a search would have

brought to light. The circumstances at the date of the first application were that the appellant's whereabouts were unknown and it was not known to the respondent and could not by reasonable diligence be ascertained whether he could or would not pay the costs: the circumstances at the date of the second application were that he had been traced and had admitted on oath that he had no assets and could not pay. That was an entire change in circumstances and the principle of res judicata did not prevent the learned Vice-President from making the order which he made on the second application...The power to order security for payment of costs under rule 60 of the Court of Appeal Rules is a discretionary power which, under the rule, may be exercised at any time. It is, of its nature, a discretion intended to be exercised according to the circumstances existing at the time of the hearing of the application and can be exercised again if the circumstances change materially".

30. In **Kanorero River Farm Ltd. & 3 Others vs. National Bank of Kenya Limited Nairobi (Milimani) HCCC NO. 699 of 2001 [2002] 2 KLR 207,** the defendant chargee had initially sought to exercise its statutory power of sale over the properties belonging to the plaintiffs and the plaintiffs filed a suit challenging the validity of the statutory notices and sought an injunction restraining the defendant. The parties later recorded a consent by which they agreed to have the application settled and the defendant be at liberty to issue fresh notices. The defendant thereafter issued fresh notices of their intention to exercise its statutory power of sale and the plaintiff once again filed suit challenging the validity of those statutory notices, claiming that the statutory power of sale had not arisen and that the intended sale was in contravention of the mandatory provisions of the Auctioneers Rules. The defendant opposed the application on the grounds that the issue was *res judicata* and that the application was incompetent. **Ringera, J** (as he then was) held as follows:

"The question is whether in those circumstances the plaintiffs could institute a fresh application for interlocutory relief. In the Court's judgement provided the fresh application is grounded on new facts, which could not have been relied on in the earlier application, it would not be precluded by the doctrine of *res judicata*. That is precisely the case here. The consent order allowed the defendant to serve fresh statutory notices… A new factual situation was created. It could not have been the intention of the parties when they recorded the consent and the law itself could not possibly contemplate that those fresh notices and other consequential steps taken pursuant to them could not be challenged on proper legal grounds. If the opposite were the case, the defendant would have in effect been given *carte blanche* to realise its security without necessarily complying with all the necessary and pertinent legal requirements provided it had issued fresh notices. It would have been permissible for it, for example, to issue defective notices or flout with impunity the provisions of the Auctioneers Rules, 1997. No court of equity would countenance that. A fundamental assumption of the consent order was that competent statutory notices would be served and the defendant would comply with the law. In the circumstances of this case, the doctrine of *res judicata* does not preclude the application now before the court".

31. What comes out from the foregoing is that where a Court has nullified the first process, the body or authority whose decision has been nullified is not entitled to ignore the decision in its fresh undertaking. If it does so a party aggrieved would still be properly entitled to move the Court which nullified the earlier decision for the nullification of the subsequent process undertaken in disregard of the findings that led to the nullification of the earlier decision hence the subsequent proceedings would not by that mere fact fall foul of the doctrine of *res judicata*. See also **Kibundi vs. Mukobwa & Another Meru HCCC No. 390 of 1992 [1993] KLR 777**.

32. In the earlier decision this Court clearly made findings as to why the decision could not stand. It is alleged that the 3rd Respondent in his decision under challenge in these proceedings did not correct the said mistakes but simply repeated the same. In fact it is alleged that the impugned decision purported to backdate the appointment to the time of the decision which was nullified. In my view if that position is correct, not only would *res judicata* not apply but the decision of the 3rd Respondent would have been mischievously and maliciously arrived at. Such action would obviously be frowned at as it would amount

to turning judicial proceedings into a circus and amount to abuse of judicial process as well as abuse of power as the Respondent would then be seeking to achieve a collateral purpose.

33. In such circumstances the bringing of fresh proceedings based on the new facts would not be barred since the second challenge would then arise out of the changed circumstances given rise to by circumstances arising after the first decision of the 3rd Respondent. To contend therefore that the applicant ought to have appealed against the second decision of the 3rd Respondent is to miss the point.

34. It is therefore my view that the Applicant herein was properly within his rights to commence these proceedings and this Court is properly seised of these proceedings.

35. Section 6(1) of the ***Anti-Counterfeit Act, 2008*** as amended by the ***Statute Law Miscellaneous Amendment Act, 2014***, provides that the Chairman of the Anti-Counterfeit Agency is to be appointed by the Cabinet Secretary from amongst the members appointed under paragraph (h) thereof which provides for two members appointed by the Cabinet Secretary not being public officers, and who hold a degree from a university recognised in Kenya and have at least ten years' experience in matters relating to (i) intellectual property rights; (ii) consumer protection, or (iii) trade. In **Republic vs. Attorney General & 3 Others Ex-Parte Tom Odoyo Oloo** (supra) this Court held that for a person to qualify as a Chairman of the Counterfeit Agency, he or she must have been appointed under section 6(1)(h) of the Act under which he is required to possess the qualifications stipulated thereunder. The Applicant contends that the Interested Party herein was not prior to his appointment as a chairman appointed under section 6(1)(h) of the Act. This contention has however not been controverted by the Respondent.

36. In the said earlier decision, this Court expressed itself as follows:

> **"In this case it is contended that the interested party ought not to have been appointed to the position for which he was appointed by the President due to conflict of interest. Although the interested party was served, according to the affidavit of service filed herein, he declined to sign the same. Similarly, the respondents have not filed any replying affidavit to controvert the issues raised by the applicant. Therefore the factual averments remain wholly uncontroverted."**

37. In these proceedings the 3rd Respondent has not shown how he has subsequent to the earlier decision resolved this issue of conflict of interest on the part of the interested party. The Applicant on his part is emphatic that the said conflict still persist and has deposed that the document served on the Interested Party are still being received by the organisations whose interests are likely to be in conflict with the applicant's on behalf of the applicant.

38. In **Democratic Alliance vs. The President of the Republic of South Africa & 3 Others, (case no. 263/11) (2011) ZA SCA 241** it was held that:

> **"An objective assessment of one's personal and professional life ought to reveal whether one has integrity. In The Shorter Oxford English Dictionary on Historical Principles (1988), inter alia, the following are the meanings attributed to the word 'integrity': 'Unimpaired or uncorrupted state; original perfect condition; soundness; innocence, sinlessness; soundness of moral principle; the character of uncorrupted virtue; uprightness; honesty, sincerity.' Collins' Thesaurus (2003) provides the following as words related to the word 'integrity': 'honesty, principle, honour, virtue, goodness, morality, purity, righteousness, probity, rectitude, truthfulness, trustworthiness, incorruptibility, uprightness, scrupulousness, reputability.' Under 'opposites' the following is noted: 'corruption, dishonesty, immorality, disrepute, deceit, duplicity.'… *On the available evidence the President could in any event not have reached a conclusion favourable to Mr Simelane, as there were too many unresolved questions concerning his integrity and experience*."** [Emphasis added].

39. One of the values and principles of public service under Article 232(1)(c) of the Constitution is impartial provision of services. In my view public services cannot be seen to have been impartially

provided if the persons providing the same are patently conflicted. Similarly conflict of interests calls into question whether the person is capable of being transparent and accountable.

40. Whereas this Court cannot in these proceedings conclude whether or not the Interested Party was a proper person to chair the Board of Directors of the Agency, the appointing authority in light of the earlier decision of this Court ought to have resolved the issues which led to the earlier decision before purporting to appoint the Interested Party to the same position.

41. In my view the decision purporting to appoint the Interested Party as the Chairperson of the Agency cannot therefore be allowed to stand on two grounds. First, the process of appointment of the said Interested Party was tainted with procedural impropriety. Secondly, the appointing authority failed to take into consideration relevant materials to wit the Interested Party's suitability for the said position taking into account his perceived conflict of interest.

42. In the premises I find merit in the Notice of Motion dated 3rd February, 2016.

Order

43. An order of certiorari is accordingly issued removing into this Court for the purposes of being quashed the Gazette Notice No. 240 dated 24th December, 2015 published on 22nd January, 2016 which Gazette Notice is hereby quashed.

44. The applicant is awarded the costs of these proceedings to be borne by the 3rd Respondent.

45. It is so ordered.

Dated at Nairobi this 23rd day of September, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Mutuma for the 2nd Respondent

CA Gitonga