



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO 128 OF 2015

MICHAEL MUTINDA MUTEMIPETITIONER

VERSUS

ATTORNEY GENERALRESPONDENT

RULING

Introduction

1. The petitioner, Mr Michael Mutinda Mutemi, has filed the present petition dated 7th April 2015 seeking the following order:
 - a. *That the court finds as unconstitutional the actions of the respondent's agents – the police of brutally beating the petitioner, causing grievous bodily harm, and also finds unconstitutional the holding of the petitioner in police cells for five days without producing petitioner in court, without a court order, without allowing a visit from the petitioners family or a friend, or without informing petitioner the reason for is incarceration, and that the respondent compensates the petitioner for the socio – economic, psychological, mental and bodily damages incurred by the petitioner with costs.*
2. Annexed to the petition is a verifying affidavit in which the petitioner confirms the contents of the affidavit as true to the best of his knowledge. He also sets out in detail in the petition the facts giving rise to the petition. The claim is based on his arrest and prosecution in Criminal Case No. 2317 of 2004 in which he was charged with the offence of robbery with violence.
3. The respondent opposes the petition and has filed a notice of preliminary objection dated 21st July 2015 in the following terms:
 1. *That the suit herein is incompetent and a gross abuse of the court's process.*
 2. *That this petition is res judicata as the same has been litigated in the Chief Magistrate Court as CMCC No 12419 of 2005. The petitioner later filed an appeal in the High Court being Civil Appeal No 419 of 2011.*
 3. *The petitioner has not disclosed any cause of action against the respondent.*
 4. *That the court has no jurisdiction to hear this matter as the same was heard and*

determined by the High Court.

4. In her submissions on behalf of the respondent, Ms. Mwangi submitted that the respondent was seeking to strike out the petition on the basis that it was *res judicata*. The basis of this was that the issues raised in the petition had been litigated in two courts. This was in **CMCC No 12419 of 2005 – Michael Mutinda Mutemi vs Attorney General** in which the Magistrate’s Court dismissed the civil claim. The petitioner then filed an appeal, being **High Court Civil Appeal No 419 of 2011**, which was heard and determined.
5. Ms. Mwangi relied on the provisions of section 7 of the Civil Procedure Act with respect to what amounts to *res judicata*. It was her submission that the petitioner in this case was the plaintiff before the Chief Magistrate’s Court and was also the appellant, while the Attorney General was the defendant and the respondent in the initial suit and the appeal respectively.
6. The subject matter of the civil case and the appeal, according to Ms. Mwangi, was Criminal Case No 2317 of 2004 and the treatment of the petitioner by the police before and during trial.
7. Counsel referred the Court to the plaint, the defence and the judgment of the Magistrate, Hon. Muchelule (as he then was). She submitted that the petitioner had sued the same parties over the same subject matter as in this petition. She pointed out in particular that paragraph 5 of the petition is similar to paragraph 3 of the plaint, while paragraph 9 of the petition is similar to paragraph 4 of the plaint. She observed that to show that the petitioner knew what he was doing, paragraph 11 of his petition is taken out of the judgment of Hon Muchelule, the Presiding Magistrate.
8. Counsel relied on the decision in the case of **Gordon vs Gordon 59 So. 2d. (1952)** and **E. T. vs Attorney General and Another High Court Petition No. 212 of 2011**. She submitted further, in reliance on the case of **Njangu vs Wambugu & Another**, Nairobi **HCCC No. 2340 of 1991** (unreported) that if parties are allowed to litigate endlessly, there would be no meaning to the principle of *res judicata*. It was also, in her view, untenable for the petitioner to argue that his first claim was a civil claim while the present matter is a petition. Ms. Mwangi also asked the Court to consider whether it has jurisdiction to hear the matter when it had already been before a court of concurrent jurisdiction.
9. She also asked the Court, in striking out the petition, to find that this is a case in which the petition should pay costs. This was because he knows the rules and procedures of the court as he represents himself; and further, that the Court should take judicial notice that this is not the first matter that the petitioner is bringing that is *res judicata*; that he failed to disclose that he was before other courts on the same subject matter.
10. In response to the preliminary objection, the petitioner filed written submissions dated 6th July 2015 which he highlighted at the hearing. He denied that his petition was misconceived, or that it was *res judicata*. It was his submission, first, that his claim in CMCC No 12419 of 2004 was about malicious prosecution while this petition was about his rights under Articles 25(a), 28, and 29(a)-(f) of the Constitution. He observed that he had outlined clearly in his petition that the petition arises as a result of actions specifically done against him by police officers from Riruta Police Station on 17th March 2004.
11. It was his contention that the issues litigated in this petition have never been the subject of litigation before any court, nor were they part of Civil Suit Number 12419 of 2005. It was also his contention, with respect to the respondent’s argument that his case arose in relation to Criminal Case, No 2317 of 2004 in Kibera Law Courts, that the said case was a result of events at Kabete Police Station and not Riruta Police Station. His case was that he was “arrested by two police stations”, Riruta and Kabete. He alleges that “*one police station, which is Riruta Police Station, caused malicious damage on (his) body*”. He claims that he was arraigned in court by officers from Riruta Police Station in Criminal Case No 2065 of 2004, a case that, according to the petitioner, was concluded some years later.

12. The petitioner submitted that he was picked from his house by officers from Kabete Police station and confined at Kabete Police station for 5 days. Out of this arrest by Police from Kabete Police Station, he stated that he was charged in Criminal Case No 2317 of 2004. It was his submission that the Kabete Police Station (officers) did not assault him but only confined him for 5 days without producing him in court. It was his contention therefore that the issue of *res judicata* does not arise in respect of this petition as the petition is about two police stations unconstitutionally handling him. He was also of the view, so far as I understand his submission, that a person should be allowed to come to court more than once or twice (on the same matter) as courts are people's last resort.
13. He maintained that this petition has been lodged as he was seeking justice, and he should not be penalised with costs as costs may scare away litigants.
14. In her submissions in reply, Ms. Mwangi observed that the petitioner had only given his case a facelift and called it a petition. She observed that in his petition, at paragraphs 4 and 5, he alleged that he was arrested by officers from Riruta Police Station, which is a police post, on 17th March 2004, while at paragraph 5 he refers to being arrested by officers from Kabete Police Station on 21st March 2004, a five day difference. According to the respondent, the petitioner was arrested over the same complaint made by one person, a Mr. Kinyanjui Ngoima, whom he says was his co-director.
15. In his case before the Chief Magistrate's Court, he was seeking damages for his arrest and confinement at Kamiti, the same matters that he has now brought before this Court. It was her submission therefore that the present petition is *res judicata* and should be struck out.

Determination

16. I have read the pleadings of the parties, and considered their respective oral and written submissions with regard to the preliminary objection by the respondents.
17. The issue for my determination is whether this petition is *res judicata*, the issues it raises having been determined by a court of competent jurisdiction, at first instance and on appeal.
18. It is important first to consider the law with regard to the principle of *res judicata*. As submitted by the respondents, the law with respect to when a matter is considered to be *res judicata* is set out in section 7 of the Civil Procedure Act, Cap 21 Laws of Kenya, in the following terms:

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

19. The Civil Procedure Act then gives explanations with respect to the application of the principle. Explanations 1-3 state as follows:

Explanation. (1)—The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation.(2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

20. The term “*res judicata*” is also defined in **Black's Law Dictionary (9th Edition)** at page 1425 as follows:

“Latin 'a thing adjudicated' 1 an issue that has been definitively settled by judicial decision. 2. An affirmative defence barring the same parties from litigating a second law suit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been – but was not – raised in the first suit. The three essential elements are 1. an earlier decision on the issue, (2) a final judgment on the merits, and (3) the involvement of the same parties, or parties in privity with the original parties.....”

21. Various legal decisions in this and other jurisdictions have also addressed the meaning, application and implication of the principle. In **Nicholas Njeru vs Attorney General & 8 Others (2013) eKLR**, the Court of Appeal expressed itself as follows:

“This doctrine has been applied in a number of cases including; Reference No. 1 of 2007 EACJ, James Katabazi & 21 Others -vs- The Attorney General Of The Republic Of Uganda where the court stated that for the doctrine to apply;

-The matter must be directly and substantially in issue in the two suits.

-The parties must be the same or parties under whom any of their claim, litigating under the same title; and

-The matter must have been finally decided in the previous suit (see Uhuru Highway Development Limited vs Central Bank & 2 Others – Civil Appeal No. 3 of 1996.”

22. In the English case of **Henderson vs Henderson (1843-60) ALL E.R.378**, the Court expressed the following view:

“...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 case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, 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.”

23. The question is whether, in this petition, the petitioner has sought to resurrect or, in the words used by Ms. Mwangi, give a facelift to a matter that he had already brought before a court of competent jurisdiction, had been heard and a decision rendered, and had even proceeded on appeal to the High Court on the issue. If the respondent is correct, then the petitioner would be doing exactly what the *res judicata* rule seeks to prevent.

24. A consideration of the pleadings in **Chief Magistrate’s Court Case No. 12419 of 2005 Michael Mutinda Mutemi vs Attorney General** and **Paul Ngoima Kinyanjui and High Court Civil Appeal No. 419 of 2011** reveals the following:

1. The petitioner had filed the civil claim for malicious prosecution relating to his arrest on 21st March 2004 on the complaint of the 1st defendant. Charges were preferred against him on 26th March 2004. He was tried and acquitted on 19th November 2004.

ii. In his judgment dated 19th August 2008, the Hon. Muchelule, CM (as he then was) considered the

respective cases of the parties. He dismissed the claim on the basis, first, that the requisite notice had not been served on the Attorney General, but also on the merits in that the petitioner had not established malice in his prosecution.

iii. In his Memorandum of Appeal against the decision of Muchelule, Chief Magistrate, the petitioner states that the Chief Magistrate erred in not considering, among other things, that the appellant was arrested and charged in Kibera Criminal Case No. 2317 of 2004.

25. Can the petitioner now make the distinction that his earlier case related to his treatment by one police station, and not another? He alleges in his petition that on 17th March 2004, officers from Riruta Police Station went to his place of work and viciously beat him up, causing him bodily harm as well as mental and psychological injuries. He further states that on 21st March 2004, officers from Kabete Police Station picked him up from his home and held him in custody for five days without producing him in court or allowing him access to his family.

26. He also makes various allegations regarding the withdrawal of money by his then business partner, who was also the complainant in the criminal charges against him. He also alleges, at paragraph 11 of the petition, that he later discovered that he was framed for aggravated robbery so as to prevent him from obtaining a P3 form and in order to plunder his then successful business.

27. It is noteworthy that in **Chief Magistrate Court Civil Case No. 12419 of 2005** the petitioner had sued the Attorney General and his former business partner, Paul Kinyanjui Ngoima, who was the complainant in the criminal case against him. He could have, in that suit, made the allegations of mistreatment and abuse that he alleges in this petition, but did not. The claim for malicious prosecution was based on the very same facts and circumstances as are at the core of this petition.

28. The circumstances of this case fall squarely within the rubric of what the *res judicata* rule seeks to prevent. As succinctly articulated in the **Henderson vs Henderson** case (*supra*), the law does not allow a party to bring litigation afresh in respect of a matter which could have been brought forward as part of the original suit, but was not. It does not matter that such failure to bring the entire claim was due to “*negligence, inadvertence, or even accident.*” As held in that case, “*The plea of res judicata applies...not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, 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.*”

29. The rationale for the *res judicata* rule, as Majanja J observed in the case of **E. T. vs Attorney General and Another** (*supra*), is that there must be an end to litigation, and a party against whom a claim has been brought and determined should not be vexed twice over the same subject or cause.

30. In the circumstances, I find that the present petition is *res judicata*, being a claim between the same parties, over the same subject matter, and raising issues that were determined or ought to have been placed before the court of competent jurisdiction that dealt with the previous suit between the parties.

31. With regard to costs, and while the petitioner pleads that he should not be condemned to costs as this will discourage others, it must be borne in mind that the tax payer is also put to considerable and unnecessary expense when the state has to defend claims that are unmerited, and particularly so, as in this case, where the issues in dispute had already been heard and determined.

32. In the circumstances, the petition is hereby struck out with costs to the respondent.

Dated Delivered and Signed at Nairobi this 13th day of November 2015

MUMBI NGUGI

JUDGE

Mr. Michael Mutinda Mutemi, Petitioner in person

Ms Mwangi instructed by the State Law Office for the respondent