REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 433 OF 2012

REPUBLIC…….....……..……APPLICANT

VERSUS

CITY COUNCIL OF NAIROBI……..…….....RESPONDENT

VINEYARD HOLDINGS LIMITED.....1ST INTERESTED PARTY

DIRECTOR GENERAL, .

NATIONAL MUSEUMS OF KENYA…....…….....2ND INTERESTED PARTY

RULING

1. By a Notice of Preliminary Objection dated 18th September, 2013 the Respondent herein contends that the proceedings herein are *res judicata* as the matter in issue has already been heard and determined on merit in Nairobi Miscellaneous Application No. 313 of 2009 (hereinafter referred to as the former case).
2. In support of the said objection the Respondent attached the said notice a copy of the judgement in the said Nairobi Miscellaneous Application No. 313 of 2012 which was between Republic on one hand and City Council of Nairobi on the other as applicant and respondent respectively. **Dr. John Nyamu** T/A Vineyard Holdings was named as an interested party while Nairobi City Market Stall Holders Associiation which was suing through its office bearers, **Meshack Mbuthia Machaaria**, **Mary Elsa Achola** and **Samuel Mbuthia Ngokonyo** was named as the ex parte applicants.
3. Although technically the Republic was the applicant, in reality the aggrieved parties were the ex parte applicants.
4. In her submissions **Ms Boyani**, learned counsel for the Respondent contended that these proceedings were commenced two months after the earlier case had been determined. According to her in the former case the Court considered the arguments by the parties and looked at the merits and gave a judgement which judgement has not been appealed against.
5. Learned counsel submitted that in the present suit the same orders sought in the earlier suit are being sought. To her the issue of the Gazette Notice was within the knowledge of the applicant at the time the former suit was commenced hence it is not a new matter to this suit. Counsel submitted that parties should bring forward their whole case and not litigate in parts. In support of her submissions, learned counsel relied on **Pancras T Swai vs. Kenya Breweries Ltd [2006] eKLR, Mombasa Maize Millers Limited vs. Hassan Sura Dele & Another [2013] eKLR**.
6. It was further submitted that the parties are the same in both maters apart from the 2nd interested party. However it was submitted that the addition of parties does not necessarily make it new matter and reliance was placed on **Prof. Christopher Mwangi Gakuu vs. Kenya National Highways Authority & 5 Others [2013] eKLR**.

7. Learned counsel further submitted that the matter in the present suit was directly in issue in the former suit as that it related to the same property and the issue was about eviction of the applicants' members therefrom. It was submitted that the Gazette Notice only recognises that the building is a monument and that the property is a public property hence not the main issue. It was submitted that the former suit was determined by a Court of competent. Learned Counsel cited **Republic vs. Minister for Agriculture & 6 Others & Another [2013] eKLR** in support of this line of submission.
8. It was therefore submitted that the applicant ought not to be allowed to continue litigating this matter by merely adding parties and prayers hence the application ought to be dismissed with costs to the Respondents.
9. On behalf of the applicant, **Mr Miyare** submitted that in these proceedings the Court is presiding over a public law matter and that jurisdiction is conferred by the law. In his view jurisdiction to deal with a mater has to be invoked in accordance with the laid down procedure and this being a judicial review matter, the relevant procedures are in Order 53 under which the wordings are in mandatory terms hence a party must conduct the issues under the said rules.
10. With respect to the former decision, it was submitted that the curt did recognise that there was a failure to comply with the procedures and found that the motion did not constitute a proper and valid application for judicial review. According to learned counsel, the court having found that an issue of jurisdiction was involved, it could not have gone into the merits. It was submitted that for a matter to be *res judicata* there must have been proceedings determined by a Court of competent jurisdiction.
11. It was submitted that the issues raised in the instant application and the issues in the former have never been determined on merits since a determination ought to be a lawful one and not a purported determination.
12. It was further submitted that the doctrine does not apply to judicial review proceedings. In learned counsel's view, the previous proceedings were no judicial review proceedings and any determination arrived at does not concern the present proceedings. The court was therefore urged to dismiss the preliminary objection. In support of the submissions, learned counsel cited **The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) KLR 1**, **Republic vs. Board of Management of the National Hospital Insurance Fund ex parte COTU [2006] eKLR**, **Helmut Martin Muller & Another vs. Saidia Kwa MOYO Foundation (NGO) [2010] eKLR**.
13. On behalf of the 2nd interested party, it was submitted that the preliminary objection is misplaced since the prayers sought in the two matters are completely different. It was submitted that the 2nd interested party herein was not a party to the former suit and was not even aware of the same. According to the learned counsel the orders sought are eviction and this being matter of public law it would be fair to let the matter go to hearing since the prayers are different and the parties are similarly different save that the 2nd interested party ought to have been joined in the former proceedings..
14. It was further submitted that the doctrine of *res judicata* does not apply to judicial review proceedings.
15. But before I deal with the issues herein it is important to determine whether or not *res judicata* can be raised as a preliminary objection. 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."**

16. I therefore hold that the doctrine of *res judicata* was properly taken in these proceedings.
17. It is important to revisit the legal principles guiding the applicability of the doctrine of *res judicata*.
18. 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".

19. 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."

20. 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".**

21. However, I must say here that 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.

22. In the cases of **Mburu Kinyua vs. Gachini Tuti [1978] KLR 69; [1976-80] 1 KLR 790** and **Churanji Lal & Co vs. Bhaijee (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.".**

23. 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.

24. It has also been contended that the doctrine of *res judicata* does not apply to judicial review

proceedings.

25. *Res Judicata*, strictly speaking is provided under section 7 of the ***Civil Procedure Act*** which in the preamble to the Act is "*An Act of Parliament to make provision for procedure in civil courts*". However, it is now well settled that judicial review applications are neither criminal nor civil in nature. See **Commissioner of Lands vs. Kunste Hotels Ltd (1995-1998) 1 EA 1.**
26. In **Commissioner of Lands vs. Hotel Kunste Ltd** (supra) and **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354** it was held that Judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal and the ***Civil Procedure Act*** does not apply since it is governed by sections 8 and 9 of the ***Law Reform Act*** being the substantive law and Order 53 of the ***Civil Procedure Rules*** being the procedural law. Therefore strictly speaking section 7 of the ***Civil Procedure Act*** does not apply to judicial review proceedings. In fact in **Republic vs. Judicial Service Commission *ex parte* Pareno [2004] 1 KLR 203-209** it was held that *res judicata* does not apply to judicial review. See also **Re: National Hospital Insurance Fund Act and Central Organisation of Trade Unions (Kenya) Nairobi HCMA No. 1747 of 2004 [2006] 1 EA 47.**
27. This, however, does not mean that the Court is powerless where it is clear that by bringing proceedings a party is clearly abusing the court process. Whereas *res judicata* may not be invoked in judicial review the Court retains an inherent jurisdiction to terminate proceedings where the same amount to an abuse of its process. One of cardinal principles of law is that litigation must come to an end and where a court of competent jurisdiction has pronounced a final decision on a matter to bring fresh proceedings whether as judicial review proceedings or otherwise would amount to an abuse of the process of the court and would therefore not be entertained. The Court in terminating the same would be invoking its inherent jurisdiction which is not a jurisdiction conferred by section 3A of the ***Civil Procedure Act*** as such but merely reserved thereunder. In **Kenya Bus Services Ltd & Others vs. Attorney General and Others [2005] 1 EA 111; [2005] 1 KLR 743** it was held:

"It is trite law that an *ex parte* order can be set aside by the judge who gave it or by any other judge. The Civil Procedure Rules provide for this. Our Constitution does assume the existence of supportive Civil Procedure regime in so far as the same is not inconsistent with the Constitution. There is nothing inconsistent with the Constitution in the act or principle of setting aside of *ex parte* orders for good reasons. If an order obtained in a Constitutional application is incompetent or improperly obtained there cannot be any valid reason why the court would not have the jurisdiction to set it aside. Setting aside would be properly justified on grounds of doing justice and fair play and good administration of justice and therefore in furtherance of public policy...Where there is no specific provision to set aside the courts power or jurisdiction would spring from the inherent powers of the court. Whereas ordinary jurisdiction stems from the Act of Parliament or statutes, the inherent powers stem from the character or the nature of the court itself – it is regarded as sufficiently empowered to do justice in all situations. The jurisdiction to exercise these powers was derived, not from statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason such jurisdiction has been called "inherent". For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent the process being obstructed and abused. Such a power is intrinsic in a superior court, its very lifeblood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction, which is inherent in a superior court of law, is that which enables it to fulfil itself as a court of law. The judicial basis of this jurisdiction is therefore the authority of the Judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner. The need to administer justice in accordance with the Constitution occupies an even higher level due to the supremacy of the constitution and the need to prevent the abuse of the Constitutional provisions and procedure does occupy the apex of the judicial hierarchy of values. Therefore the Court does have the inherent powers to prevent abuse of its process in declaring, securing and enforcing Constitutional rights and freedoms. It has the same power to set aside *ex parte* orders, which by their very nature are provisional." See *The Reform of Civil Procedure Law and Other*

Essays in Civil Procedure (1982) By Sir Isaac J H Jacob and **WEA Records Limited vs. Visions Channel 4 Limited & Others (1983) 2 All ER 589; R vs. Land Registrar Kajiado & 2 Others Ex Parte John Kigunda HCMA No. 1183 of 2004.**

28. As was stated by **Kimaru, J** in **Stephen Somek Takwenyi & Another vs. David Mbuthia Githare & 2 Others Nairobi (Milimani) HCCC No. 363 of 2009**:

"This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilised legal process it is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract *res judicata* rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it".

29. I associate myself with the holding in **Karuri & Others vs. Dawa Pharmaceuticals Company Limited and Others [2007] 2 EA 235** that nothing can take away the courts inherent power to prevent the abuse of its process by striking out pleadings or striking out a frivolous and vexatious application and that baptising such matters constitutional cannot make them so if they are in fact plainly an abuse of the court process.
30. Accordingly the Court may in proper cases invoke its inherent jurisdiction to make such orders as may be necessary for the ends of justice or to prevent abuse of its process and this may be done where the principles of *res judicata* would be applicable.
31. This then leads me to the issue whether the said principles apply to this case. From the copy of the judgement in Civil Application No. 313 of 2009 "B", the former suit, it is clear that the parties were Republic vs. City Council of Nairobi as the Respondent and **Dr John Nyamu** T/A Vineyard Holdings as the interested party. The orders which were sought in the said matter were in substance a prohibition prohibiting the 1st Respondent therein pursuant to the Notice dated 30th April, 2009 from threatening to remove the members of the applicants from LR No. 209/1855 and secondly an order prohibiting the interested party from proceeding with the proposed development on the same property. Both orders were ought pending the hearing and determination of the intended application by the applicant for judicial review.
32. The Court rightly in my view found that the application as framed was improper and incompetent. The Court could have stopped at that stage and struck out the application thus giving the applicant the opportunity to come back with a proper or competent application assuming the application was yet to be heard. However, the Court proceeded to consider the merits of the application and after doing so found that the application was not only incompetent but was also devoid of merit.
33. The first issue for consideration is whether the matter directly and substantially in issue in this suit was directly and substantially in issue in the former suit. That both matters are in respect of the same property is not in question. That both applications are seeking to bar the respondent from relocating the members of the applicant from the suit property is similarly not in doubt. The only difference is in respect of the second prayers in both applications. Whereas in the former suit what was sought was an order barring the interested party from developing the suit property, the second prayer in the suit premises seeks to compel the Respondent to comply with the Gazette Notice No. 5024 which allegedly reverted the suit property to the Respondent for the purposes of public use as a market. That this is a new prayer is not in doubt. However the mere fact that it is a new prayer would not of itself remove the mater from the purview of *res judicata* if the prayer was

available to the applicant at the time they made the first application. It is contended which contention is not seriously disputed that the said Gazette Notice was in existence at the time of the institution of the former suit and therefore ought to have formed part thereof.

34. As indicated hereinabove, 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 an application for an order of mandamus, the law as a general rule requires a demand by the applicant for action and refusal as a prerequisite to the granting of an order, though there are exceptions to the rule. See **The District Commissioner Kiambu vs. R and Others Ex Parte Ethan Njau Civil Appeal No. 2 of 1960 [1960] EA 109; R vs. The Brecknock And Abergavenny Canal Co. 111 ER 395** and **R vs. The Bristol and Exeter Railway Co 114 ER 859.**
35. Therefore strictly speaking for the remedy of mandamus to be said to have been available to the applicants in the former suit, there has to be proved that a demand had been made. That demand however could be excepted but the exception would be an exercise of discretion and as was held in **Mukisa Biscuits Manufacturing Ltd. vs. West End Distributors Ltd. Civil Appeal No. 9 of 1969 [1969] EA 696,** a preliminary objection cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.
36. The matter before me however is a preliminary objection and it is incompetent or me to find that the failure by the applicants to send a demand in order for them to be entitled to an order for mandamus was due **to** negligence, inadvertence, or even accident. I am therefore not satisfied that the Respondent has satisfied this first requirement that the matter directly and substantially in issue in the instant suit was directly and substantially in issue in the former suit.
37. With respect to the issue whether the former suit was between the same parties or privies claiming under them, it is my view that the mere fact that there is an interested party in these proceedings who was not a party to the former proceedings would not remove the matter from the ambit of res judicata. It must be noted that no orders are being sought against the new party herein hence the substantive parties in both suits are the same.
38. As to whether the parties must are litigating under the same title in both matters, it is clear that the parties' positions have not changed and that they are in the same position they were in the former suit.
39. On the issue whether the court which decided the former suit was competent to try the subsequent suit, I am similarly satisfied that both the Court which tried the former suit and this suit are not only competent but it is the same suit. The mere fact that a matter is incompetently before the Court is not the same thing as saying that the Court is incompetent to try the matter as was submitted by **Mr Miyare**. Further the incompetency of a matter does not necessarily deprive the Court of the jurisdiction as to remove the matter from the ambit of *res judicata*.
40. On the issue whether the matter in issue must have been heard and finally decided in the former suit, I am satisfied that with respect to the first prayer, that issue was heard and finally determined since the decision of the Court whether rightly or wrongly was on merit and to re-litigate the same would amount to an abuse of the process of the court even if *res judicata* would not strictly speaking apply.
41. Having considered the foregoing, the inescapable conclusion I come to is that with respect to the prayer for mandamus, this preliminary objection was not properly taken. Accordingly I decline to allow the objection and sought. As I have partly agreed with the Respondent each party to bear own costs of the objection.

Dated at Nairobi this day 27th of May 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Arusei for Mr Miyare for the Applicant

Mr Bitta for Mr Muruiki for the interested party

Miss Boyani for the Respondent

Cc Kevin