REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO 340 OF 2013

REPUBLIC…..APPLICANT

VERSUS

KENYA REVENUE AUTHORITY .....RESPONDENT

1. **INVESTIGATING OFFICER)**

   (MR. CHEGE MARCHARIA)

2. **MRS. E. KHAGULI) PARTIES**
3. **MRS. T. ATEMO)**
4. **JOHN NJIRIANI)**

   COMMISSIONER GENERAL KRA)

5. **MRS. L MALINDA)**

EX-PARTE

PAUL MAKOKHA OKOITI

JUDGEMENT

The ex-parte applicant Paul Makokha Okoiti was at one time an employee of Kenya Revenue Authority (KRA). KRA is the respondent. He was dismissed from service with effect from 21st July, 2008. His dismissal from service has something to do with these proceedings. The applicant has on the face of his application named the Investigating Officer (Mr. Chege Macharia), Mrs. E Khoguli, Mrs. J. Atemo, Mr John Njiriani (Commissioner General, KRA) and Mrs. L Malinda as "parties".

On 4th October, 2013 this Court granted leave to the applicant to apply for an order of mandamus. Upon the grant of the said leave, the applicant filed a notice of motion dated 10th October, 2013 in which he prays for:

"AN ORDER OF MANDAMUS directed to the Kenya Revenue Authority to give to the Applicant, all the information required by the Applicant concerning his disciplinary proceedings, including those given in his request served on the Kenya Revenue Authority on 20th September, 2013, which were concealed, and the particular reasons for their concealment, certified by the Kenya Revenue

Authority."

The application is supported by the chamber summons application for leave, the statutory statement and the applicant's affidavit all dated 27th September, 2013.

The statutory statement reveals that the applicant was employed by KRA in 1996. His services were terminated in 2008. The applicant later filed Nairobi High Court Miscellaneous Civil Application No. 351 of 2011. He states in the statutory statement that **"the issue was slightly, partially determined. However the Applicant felt that he should pursue the case in the Industrial Court and therefore filed a case in court: Miscellaneous cause No. 25 of 2013."**

It is the applicant's case that KRA concealed some information and he needs the said information in order to properly prosecute the matter before the Industrial Court. That is why the applicant seeks an order of mandamus.

The respondent and the persons named as parties opposed the application through a preliminary objection dated 25th October, 2013 and a replying affidavit sworn on 27th November, 2013 by Mr. Nixon Kitonyi the respondent's Principal Human Resources Officer. The respondent in the first place opposes the naming of its officers as parties to these proceedings. It is the respondent's case that judicial review orders are not available against the said officers acting in their personal capacities. It is the respondent's view that the applicant has made his case a personal vendetta against the said officers whose only involvement in this matter was in exercise of their official duties.

The respondent asserts that the matter is *res judicata* as a suit being **Misc. Civil Application No. 351 of 2011 PAUL MAKOKHA OKOITI v. KRA** between the same parties litigating over the same issues had been heard and determined by a Judge in the Constitutional and Human Rights Division. In the alternative, the respondent contends that the suit is sub judice as it is the subject of an appeal in the Court of Appeal following an appeal filed by the applicant against the decision of Majanja, J in **Misc. Civil Application No. 351 of 2011.**

The respondent further argues that the applicant has also filed **Misc. Application No. 25 of 2013** in the Industrial Court and the Judge has even urged the applicant to withdraw these proceedings because the Industrial Court has sufficient jurisdiction to order for discoveries and production of documents, if need be.

The applicant swore an affidavit on 18th December, 2013 in response to the respondent's preliminary objection and replying affidavit. Through the said affidavit the applicant contends that the replying affidavit sworn by Nixon Kitonyi is defective and should be struck off. He avers that the said Nixon Kitonyi is not a party to these proceedings and he is therefore not competent to swear an affidavit since he is not privy to the facts of the case.

The applicant also filed several other documents which I need not specifically mention but which will be considered in this judgment.

After going through the papers filed in Court by the parties I find that the issues for determination are:

1. Whether the replying affidavit of the respondent and the "parties" is defective and should be struck out;
2. Whether this matter is *res judicata*;
3. Whether these proceedings are an abuse of the process of court considering the existence of Misc. Cause No. 25 of 2013 at the Industrial Court;
4. Whether the applicant is deserving of the orders sought; and
5. Who should have the costs of this application?

On the first issue, the applicant submitted that the five persons he has named as "parties" in these proceedings are the only ones who should have replied to his application because they are the ones who

know the facts of the case. He submitted that the replying affidavit of Nixon Kitonyi is defective and it ought to be struck out. The applicant submitted that the Court ought to have commanded the "parties" to file affidavits and the Court cannot be heard to say that it cannot compel parties to a case to swear affidavits. He stated that where the respondent has failed to file a replying affidavit, then there will be no hearing and the next step is for the Court to issue the orders sought.

The applicant further submitted that Order 53 Rule 4(3) of the Civil Procedure Rules, 2010 (CPR) is clear that parties must file affidavits and the opposing party is entitled to those affidavits. The said sub-rule provides that:

"Every party to the proceedings shall supply to any other party, on demand, copies of the affidavits which he proposes to use at the hearing."

I have looked at the respondent's submissions dated 30th January, 2014 and it appears that there is no direct response to the issue raised by the applicant. The respondent, however, submits that the persons named by the applicant as "parties" were the officers of the respondent and they were acting in their official capacities. The respondent's case is that the applicant is misguided in demanding that each of the five officers should swear an affidavit.

I have considered the arguments on this particular issue. Judicial review proceedings are commenced in the name of the Republic. The actual beneficiary of the orders sought is named as the ex-parte applicant. In the case before me the ex-parte applicant is Paul Makokha Okoiti. The party against whom the relief is sought is called a respondent. In this case KRA is the respondent. Other parties to judicial proceedings are those who may be directly affected by the outcome of the proceedings. Such parties are referred to as interested parties. The five persons named by the applicant as "parties" are not respondents and neither can they be called interested parties. They are simply the employees of KRA and whatever they are alleged to have done was done in execution of their duties. Their actions are the actions of KRA and KRA is entirely responsible for their actions. I do not therefore understand why the applicant decided to name these five persons as "parties" in the face of his application. They will not be directly affected by the outcome of these proceedings. His application is against KRA and not KRA's employees. The naming of KRA's employees as parties was not necessary and they therefore needed not have sworn any affidavits.

Must a respondent or interested party file a replying affidavit in judicial review proceedings? Order 53 CPR or sections 8 and 9 of the Law Reform Act (Cap 26) do not make it compulsory for a respondent or an interested party to file an affidavit. The Court cannot force parties to respond to pleadings. Where a party, who has been served, fails to respond to an application, the Court will consider the material on record and make a decision on the same. If a party files an affidavit, that party is obligated to supply the affidavit to the other party on demand–**Order 53 Rule 4 CPR.** Where a party has not filed any affidavit, the opposing party cannot ask the Court to compel that party to file an affidavit.

In the case before me, the respondent has filed an affidavit through Nixon Kitonyi who avers that he works for the respondent as a human resource officer and he is familiar with the circumstances relating to the applicant's case. There is nothing defective about the said affidavit. The deponent has sworn that the facts he has stated are within his knowledge. The affidavit as sworn and presented to Court complies with **Order 19 CPR.** The applicant's prayer for the affidavit to be declared defective and struck off therefore fails.

The applicant submitted that where a respondent has not replied to a judicial review application, orders should issue automatically. This is a fallacious argument. Even where an application is not opposed, the Court must consider the matter before arriving at a decision as to whether to grant the orders or not. Orders are not granted as a matter of course. An applicant needs to establish that the orders are merited before they are granted.

The second issue is whether this matter is *res judicata*. Counsel for the respondent submitted that the issues raised by the applicant herein were the same issues raised in **Misc. Cause No. 251 of 2011** in

which he was the petitioner. The applicant's response to this assertion was feeble. The applicant instead resorted to the purported termination of all the matters he had previously filed. In that regard he filed in this Court a document dated 28th March, 2014 titled: **NOTICE TO COURT, RESPONDENT AND PARTIES.** The 1st paragraph of the said document states:

"TAKE NOTICE that following this Application for documents in order to proceed with other pending suits, the Applicant herein may withdraw earlier suits, as the limitation consideration will change vide the date the documents required herein are supplied."

The attempt to withdrawn the earlier suits cannot come to the aid of the applicant. **Misc. Cause No. 251 of 2011** was heard and determined by Majanja, J who delivered judgment on 10th February, 2012.

In his judgment, Majanja, J observed that:

"4. When this matter came up for directions on 15th December, 2011, it became apparent that the petitioner wants the court's assistance to obtain documents to enable him prosecute a suit for wrongful dismissal. Counsel for the KRA, requested for one month to trace the documents requested by the applicant which request I readily granted.

5. On 27th January, 2012, I directed the KRA to file an affidavit of documents setting out the documents in their possession and power in order to bring this matter to a conclusion.

6. In compliance with my order the affidavit of Sally Kidake sworn on 2nd February, 2012 was duly filed on the respondent's behalf. Annexed to the affidavit were several documents, documentary customs entries and input reports. It appears from the affidavit that some of the documents requested by the petitioner did not exist or had wrong numbers. Given the lapse of time between these proceedings and the time petitioner was dismissed, she also deponed that KRA was retrieving more documents from its archives which it would give to the petitioner.

7. Mr. Okoiti was not satisfied with the documents supplied. He also wanted additional documents including investigation reports. These documents he asserted were necessary to prosecute his suit against KRA for wrongful dismissal."

I have quoted the said judgment at length so as to clearly show that the issues being raised by the applicant herein were addressed by Majanja, J in his judgement.

The doctrine of *res judicata* is couched in Section 7 of the Civil Procedure Act, Cap 21 of the Laws of Kenya in the following words:

"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 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."

The Court (Majanja, J) in the case of **EDWIN THUO V ATTORNEY GENERAL & ANOTHER NAIROBI HIGH COURT PETITION NO. 212 OF 2012,** observed as follows with regard to the doctrine of *res judicata*:

"The courts must always be vigilant to guard against litigants evading the doctrine of *res judicata* by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff is in the second suit is trying to bring before the court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction. In the case of *Omondi v National Bank of Kenya Limited and Others* [2001] EA 177 the court held that, *'parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in*

a subsequent suit.' **In that case the court quoted Kuloba J., in the case of** ***Njangu v Wambugu and Another*** **Nairobi HCCC No. 2340 of 1991 (Unreported) where he stated,** ***'If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata ....' "***

Although the applicant issued a fresh demand notice before filing this matter, it is clear that the documents he wants this Court to compel the respondent to produce are the same documents he was pursuing in the matter that was heard and determined by Justice Majanja. The applicant is taking the Court and the respondent in circles. I therefore agree with the respondent that this matter is *res judicata* and the applicant's case should fail on that ground alone.

Justice Majanja gave sound advice to the applicant as to what he should do about his case when he told him that:

"11. The petitioner contemplates filing an action against the respondent for wrongful dismissal in the very near future, the court with jurisdiction to determine the case will have full powers to order full discovery. The court having powers to order discovery will consider what is relevant and what is not for purposes of the proceedings before it ....."

The applicant initially complied with that sound advice and filed **Misc No. 25 of 2013** at the Industrial Court but later changed his mind and filed this matter. The applicant's action is an abuse of the court process. It therefore follows that the applicant's decision to file these proceedings amounts to an abuse of the court process. The third issue is therefore answered.

Although I have already indicated that this application is for dismissal, I will nevertheless proceed to consider the fourth issue. The fourth issue is whether the applicant is deserving of the orders sought. The applicant heavily relied on the decisions in **Nairobi High Court Misc. Cause No. 359 of 1983, REPUBLIC v. THE PUBLIC SERVICE COMMISSION EXPARTE JOPLEY CONSTANTINE OYIENG** and **Nairobi High Court Misc. Civil Application No. 282 of 1982, JOPLEY CONSTANTINE OYIENG v. PERMANENT SECRETARY MINISTRY OF ECONOMIC PLANNING AND DEVELOPMENT** to demonstrate that the orders he seeks can be granted. The applicant in the two cases appears to be the same person. In Misc. Civil Application No. 282 of 1982 the Court quashed a letter dismissing the applicant from the public service. I do not see the relevance of that particular decision to this matter as in the case before me the applicant is asking for an order of mandamus to compel the respondent to give him certain documents.

In **Misc. Cause No. 359 of 1983** the applicant was granted an order directing the respondent to give him copies of the disciplinary proceedings which had led to his dismissal from the public service. What has been placed before the Court by the applicant is the order of the Court. The same was arrived at by consent and the order that was issued was not an order of mandamus. Again, I do not find the relevance of the said decision to the case before me.

The applicant has clearly indicated that he intends to use the documents he is seeking in filing a civil suit against the respondent. His is not a matter that calls for issuance of the remedies available in public law. He has knocked on the public law door with a view to getting information for use in a contractual matter which falls into the private law realm. I do not think an order of mandamus can issue in such circumstances. As was pointed to him by Majanja, J, the Judge who will try his case will apply the CPR when appropriately moved. The remedies that the applicant seeks in these proceedings can as well be given to him in the case before the Industrial Court.

Considering the reasons aforesaid, it goes without saying that the applicant's application has no merit. The same is dismissed with costs to the respondent.

Dated, signed and delivered at Nairobi this 21st day of May, 2014

W. KORIR,

JUDGE OF THE HIGH COURT