REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 212 OF 2011

BETWEEN

E.T .....PETITIONER

VERSUS

THE ATTORNEY GENERAL .....1ST RESPONDENT

J.N.K.....2ND RESPONDENT

RULING

Introduction

1. The petitioner, E.T, claims that he is the son of the 2nd respondent, J.N.K. In the petition dated 24th October 2011, he avers that he was born out of a union between J.N.K and one L. M.T in the year 1966.

2. The gravamen of his claim is that the 2nd respondent has refused or failed to recognize him as his son thereby subjecting him to mental anguish, dejection, ridicule and odium. He alleges, *inter alia*, that he has been denied the use of the name of his paternal grandfather's name contrary to Kikuyu custom and as such he has lost all the benefits that accrue to him by virtue of his pedigree and lineage. He has also been denied parental love and society derived from such association.

3. As against the 1st respondent he avers that his rights have been breached as the state, through its laws such as the ***Births and Deaths Registration Act*** **(Chapter 149 of the Laws of Kenya)** excludes the mandatory disclosure of the identity of the father thereby perpetuating illegal concealment. In this respect the state has also failed to protect the family unit as a basic unit of society by failing to compel the 2nd respondent to recognise the petitioner as his son.

4. As a result the petitioner claims that his rights and fundamental freedoms have under **Articles 27, 35** and **44** of the Constitution as read with **Article 16(3)** of the **Universal Declaration of Human Rights**, **Articles 17, 18, 22** and **27** of the **African Charter of Human and People's Rights** have been infringed.

Petitioner's Case

5. The petitioner seeks the following reliefs in his petition;

(1) A declaration that the 2nd respondent's failure and or refusal to recognise the petitioner as his son is unconstitutional and therefore unlawful and illegal.

(2) An order compelling the registrar of births and deaths to amend the petitioner's register of births to indicate that the 2nd respondent is the father of the petitioner.

(3) General damages.

(4) An order for the refund of filing fees paid for this petition.

(5) Costs of this petition

(6) Such other orders as this Honourable Court shall deem just.

6. The petition is supported by the affidavit sworn on 24th October 2011 which reiterates the contents of the petition. There is additional affidavit sworn by the petitioner on 18th November 2011 and another affidavit sworn on 18th November 2011 by L.M.T.

7. Together with the petition, the petitioner also filed a Chamber Summons dated 24th October 2011 which sought an order that, '*this Honourable Court be pleased to issue an order compelling the 2nd respondent to undergo a DNA test to confirm whether he is the father of the petitioner herein.'*

8. In her affidavit, L.M.T states that she had an intimate relationship with J.N.K and as a result of the union, the petitioner was born. What is important for purposes of this ruling is that sometime in the year 2007 together with her son, she filed a suit against the respondent namely ***Nairobi HCCC No. 832 of 2007 LMT & E T Kv Njenga Karume*** (hereinafter "the suit").

9. The suit, commenced by way of plaint filed by the firm of *Mugambi & Company Advocates*, sought the following prayers;

(i) A declaratory judgment that the second plaintiff (E T K) is the biological son of the defendant.

(ii) An order that a DNA test be carried out between thesecond plaintiff and the defendant to determine the paternity of the second plaintiff.

(iii) General damages to the first and second plaintiffs.

(iv) Costs of the suit.

10. The 2nd respondent filed a defence dated 16th January 2008 through the firm of *Kimani Kahiro and Associates* denying the allegations set out in the plaint.

11. After the close pleadings, the parties entered into negotiations to resolve the matters in the suit. During the negotiations, the plaintiffs through their advocates filed a notice of withdrawal dated 3rd April 2008. The court record was duly endorsed on 4th April 2008 as follows;

Notice of withdrawal of suit filed by M/S Mugambi & Co., Advocates for the Plaintiffs.

Deputy Registrar

The Agreement

12. It appears from the letter dated 16th June 2008 from the firm of *Mugambi & Company Advocates* to the 2nd respondent, that the sum of Kshs.5,000,000/= was agreed upon to settle the matter. This sum was paid over a period of time culminating in the execution of an **Agreement to Adjust Compromise and Discontinue suit dated 5th December 2008** (hereinafter "the Agreement") by the parties in the presence

of their advocates.

13. For purposes of this decision it would be appropriate to set out the full contents of the Agreement. It provides as follows;

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 832 OF 2007

LMT ..... 1ST PLAINTIFF

E T K.....2ND PLAINTIFF

VERSUS

JNK..... DEFENDANT

AGREEMENT TO ADJUST, COMPROMISE AND DISCONTINUE SUIT (ORDER XXIV RULE 6 CIVIL PROCEDURE RULES)

THIS AGREEMENT*made this 5th day of December 2008 between* ***L M T*** *and* ***E T K****both care of MUGAMBI & COMPANY ADVOCATES, Consolidated Bank House P.O. Box 42650-00100 Nairobi (Hereinafter called "the plaintiffs" of the one part and* ***JNK****of care of KIMANI KAHIRO AND ASSOCIATES, ADVOCATES (hereinafter called the "Defendant") which expression shall include his estate, heirs, personal representatives and assigns) of the other part.*

WHEREAS

(a) The plaintiffs have instituted this suit against the defendant claiming the several reliefs set out as prayers (1) to (4) of the Plaint filed herein.

(b) The defendant has filed a Written Statement of Defence denying any and all liability to the Plaintiffs or either of them.

(c) The Plaintiffs and the Defendant have agreed to compromise and discontinue this suit in the manner hereinafter appearing pursuant to the provisions of Order XXIV rule 6 of the Civil Procedure Rules;

NOW THIS AGREEMENT WITNESSETH

1. ***IN CONSIDERATION*** *of the payment of the sum of Kenya Shillings Five Million (Ksh.5,000,000/-) which sum is inclusive of all the damages, costs, interest and disbursements arising from this suit paid by the Plaintiffs to the Defendant on or before the execution of this Agreement (Receipt where of the Plaintiffs hereby acknowledge) the Plaintiffs wholly withdraw and discontinue the present suit against the defendant and they further wholly renounce and abandon any and all claims against the Defendant arising from this suit whether or not specifically claimed in the prayers to the plaint and the Plaintiffs further hereby discharge and indemnify the Defendant, his Estate, personal representatives, heir and assigns from and against all claims and demands present or to come in respect of the reliefs sought against the Defendant in the present suit and the Plaintiffs hereby confirm that the said sum is paid to them by the Defendant without admission of any liability on the part of the Defendant, his Estate, heirs and assigns to the Plaintiffs or either of them.*

2. For the avoidance of doubt the parties hereto agree that this present suit shall stand withdrawn for all purposes (including appeal or review) upon filing this Agreement in court without further order.

IN WITNESS WHEREOF *this Agreement has been executed by the day and year first above written.*

Signed by the said: LMT

In the presence of : D.P. MUGAMBI ADVOCATE

Singed by the Said: E T K

In the presence of: D.P. MUGAMBI ADVOCATE

Signed by the said: J N K

In the presence of E.K. KIMANI ADVOCATE

Drawn by:

Kimani Kahiro & Associates

Advocates,

Loita House, 14th Floor,

Loita Street

P.O. Box 8325-00100,

NAIROBI

14. The Agreement was filed in court on 15th December 2008 and endorsed by the court in the following terms;

Upon reading the Notice to Discontinue suit dated 05th December 2008 and filed herein on 11th December, 2008 by LMT and E T K, the 1st and 2nd Plaintiff herein, the following order is hereby recorded:-

That the plaintiff wholly withdraws and discontinue the present suit against the Defendant and they further wholly renounce and abandon any and all claims against the defendant arising from this suit whether or not specifically claimed in the plaint.

Dated this 15th day of December 2008

DEPUTY REGISTRAR

2nd Respondent's Case

15. In response to the Petitioner's case, the 2nd respondent filed a Notice of Preliminary Objection seeking that the petition and chamber summons dated 24th October 2011 filed by the petitioner be struck out on the following grounds;

(1) The issues raised in this petition were in issue in ***HCCC No. 832 of 2007*** *which was settled by the parties. This petition is accordingly debarred by application of the principles of res-judicata and/or issue estoppel.*

(2) The petition seeks to advance feigned issues while in essence it is an extortion bid.

(3) The petition seeks to circumvent the pleadings and consent recorded in ***HCCC No. 832 of 2007*** *and is*

a clear abuse of the process.

16. The 2nd respondent also filed a replying affidavit sworn on 7th November 2011 which supported the preliminary objection and set out the pleadings in ***HCCC No. 832 of 2007***.

Submissions

17. The preliminary objection filed by the 2nd respondent was argued before me on 1st December 2011. I limited the arguments based on the proceedings and orders in ***HCCC No. 832 of 2007*** and the Agreement.

18. Mr Ngatia, advocate for the second respondent, submitted that the preliminary objection is based on the facts that are common ground. The fact of suit is first disclosed in the replying affidavit sworn on the 7th November 2011. Counsel submitted that both suits are identical in several respects. In first suit, the petitioner together with his mother jointly filed the case against the 2nd respondent. In the present case, the 2nd respondent is referred to as the biological father. A DNA test and general damages are sought in both suits. In the first case, the petitioner has a surname, E.T.K. In the second case he is E.T.

19. Mr Ngatia further submitted that for purposes of the preliminary objection, he relies on the order recorded by the Deputy Registrar in ***HCCC No. 832 of 2007*** which should be given full effect. That order, was endorsed on the court record on 15th December 2008, is clear in its terms, purport and effect and is a consequence of a valid agreement between the parties and since that date, the two parties have never challenged the validity of the agreement or consent recorded. Consequently, as a matter of public law there is a final adjudication on the status of the petitioner. Counsel added that the petitioner withdrew, abandoned and renounced the claim for paternity. By these unchallenged facts, the second case is *res judicata* and an abuse of process.

20. Mr Ngatia relied on several cases to support the preliminary objection. In the case of ***Flora Wasike v Destino Wamboko*****[1982 – 88] 1 KAR 625** the Court of Appeal held that a consent is binding on the parties and like a contract it can only be set aside on grounds of fraud or mistake. In this case there is no request in the petition or in the proceedings to set aside the judgment or agreement freely recorded. In the case of ***Richard Kariuki v Leonard Kariuki & Another*** **Nairobi Misc. Civil App. No. 7 of 2006 (Unreported),** the High Court Court considered whether the principle of *res judicata* is applicable in cases of enforcement of fundamental rights and freedoms of the individual under the Constitution. The court concluded that fundamental principles of law and public policy like *res judicata* are valid and applicable in constitutional matters.

21. Counsel urged the court to adopt these findings and declare litigation must come to an end as parties cannot litigate matters already settled under different names or use a constitutional grievance as a cover to re-open closed matters. He referred to the case of ***Hunter v Chief Constable of the West Midlands*** **[1982] AC 529** particularly the judgment of Lord Diplock. He submitted that the true character of the 2nd case is an attack on the consent orders made in the first case. This, he asserted, is a collateral attack which must not be permitted. He further submitted that this Court retains power to stop an abuse of process and as such the preliminary objection must be allowed and the suit struck out.

22. Mr Kangata, who represented the petitioner, opposed the preliminary objection on the basis of written submissions dated 21st November 2011. He stated that the preliminary objection does not raise a pure point of law in accordance with principles enunciated in the case of ***Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd [1969] EA 696*** as the facts as of the case are contradicted.

23. Mr Kangata argued that in his view the suit was not withdrawn by the consent. It was withdrawn on 3rd April 2008 by a letter written by *Mugambi & Co., Advocates* and filed in court in accordance with the provisions of ***Order 24 rule 1*** of the ***Civil Procedure Rules*** and the minute endorsing the withdrawal recorded on 4th April 2008. In his view, under the ***Civil Procedure Rules***, the plaintiff retains his power to file another suit and there is no requirement to serve the notice of withdrawal.

24. Counsel further stated that the 2nd respondent was informed of this fact by the letter dated 16th June 2008 which set out the terms of negotiation. The settlement was pursuant to the withdrawal of the suit and the consent filed and endorsed on the court record on 15th December 2008 consequently is null and void *ab initio* as the suit had been withdrawn by the time the consent was filed. Both parties knew that in December 2008 that the suit had been withdrawn and the consent is an acknowledgement of this fact and has no legal effect.

25. Counsel further contended that even assuming the consent is proper, it is against public policy. The consent vitiates the petitioner's rights to justice and the right to be heard. The consideration of the consent was to shield 2nd respondent from legal responsibility. Counsel insisted that the right to access to justice was a right in the Constitution and a parent cannot enter into an agreement with a child to forebear his legal obligations. The court was referred to ***Halburys Laws of England, Volume 8 at page 120*** to support this proposition. Counsel submitted that the consideration of Kshs. 5,000,000.00 was inadequate which demonstrates undue influence and that the consent is tainted with undue influence. He maintained that the courts cannot enforce a void agreement. Counsel referred to the case of ***Leonard Njonjo Kariuki v Njoroge Kariuki*** **Nairobi Civil Appeal No. 26 of 1979 (Unreported)** where the Court held that a void contract cannot be enforced.

26. Counsel for the petitioner contended that in the previous case, the parties were litigating in their private capacities and in this case the enforcement of fundamental rights and freedoms is a matter of public law and the petitioner represents millions of illegitimate children. That the 2nd respondent is a proper party to the proceedings as he is directly affected by these proceedings.

27. Mr Kangata also submitted that estoppel is not a substantive rule of law but is a matter of evidence as was held in the case of ***Benson Muiruri v KENYAC*** **Nairobi Civil Appeal No. 190 of 2001 (Unreported)**. Estoppel cannot be pleaded and form the basis of the preliminary objection when the facts are subject of inquiry.

28. Counsel also referred to the cases of ***Maharaj v Attorney General of Trinidad and Tobago*** **(No. 2) [1978] 2 All ER 670** and ***Rashid Allogoh and Others v Haco Industries Limited*** **Nairobi Civil Appeal No. 110 of 2001 (Unreported)** where the courts has stated that the access provided by **section 84** of the Constitution should be unhindered and unlimited.

29. Counsel also referred to **Article 24** of the Constitution dealing with limitation of rights and fundamental freedoms. He submitted that the 2nd respondent is attempting to limit the petitioner's rights and such limitation must satisfy the criteria of **Article 24**. He argued that the doctrine of *res judicata* and **section 7** of the **Civil Procedure Act** does not measure up to this limitation. For **section 7** to limit the rights, there must be stated certain rights that are to be derogated. **Article 24(2)(a)** does not apply to (b) and (c). I was urged to the court to look at all the circumstances of the case and to assess the limitation.

30. Mr Kangata submitted that the previous suit was not heard on its merit and the court did not adjudicate on any issues. Moreover, the orders sought in the two suits are not the same as one is an ordinary civil suit and the other raises constitutional issues. He referred to the case of ***John Mungai Murango and Another v Samson Njenga Mungai*** **Nairobi Civil Appeal No. 129 of 2002 (Unreported)**. Counsel also contended that the issues against the Attorney General are different and this matter can continue as such.

31. Counsel finally submitted that consent raises constitutional issues and this court is entitled to revoke the agreement as it is being used to deny the petitioner his constitutional rights. Counsel urged me to look at the matter in light of the values of the Constitution which is retrospective and applies to the agreement.

32. Counsel for the 1st respondent, Ms Ndegeri, submitted that this matter was a private matter between the petitioner and the 2nd respondent and the 1st respondent should not be involved in the matter. She urged me to dismiss the matter on this basis.

The Preliminary Objection

33. Sir Charles Newbold in the case of ***Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd (Supra at p. 701B)*** stated that, *"a preliminary objection in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."*

34. The central question for my consideration is whether these proceedings should proceed in light of the Agreement and proceedings in ***HCCC No. 832 of 2007***. The issue is grounded on undisputed and admitted facts; that is, the Agreement and the proceedings. Any conclusions I reach are based on the legal effect of these uncontroverted and admitted facts. I am not required to enter into any evidential inquiry and as such I find that this issue is in the nature of a preliminary objection.

35. Counsel for the petitioner has argued that estoppel is a matter of evidence and any argument based on estoppel cannot form the basis of a preliminary objection. In my view, the question is not whether or not estoppel is a matter of evidence but whether the facts upon which the arguments are made are undisputed or admitted so as to bring the matter within the definition of a preliminary objection. As I have held, the preliminary objection is grounded on uncontroverted and admitted facts.

36. I will also not deal with the second ground of the preliminary objection as to whether the petition seeks to advance feigned issues while in essence it is an extortion bid. This argument would require me to deal with evidential matter including the intentions of the parties which matters cannot be the subject of a preliminary objection as defined.

Applicable Constitution.

37. Another preliminary issue I must decide is which Constitution is applicable to the subject matter; the Constitution or the former Constitution. The Agreement subject of the preliminary objection was entered into on 5th December 2008. It was entered into with the understanding of the parties under a specific legal regime governing the rights and obligations of the parties.

38. The Constitution that was promulgated on 27th August 2010 is effective from that date. It is not retrospective nor does it upset legal rights accrued or already vested prior to promulgation unless specifically provided (see the case of ***Joseph Ihuro Mwaura and 82 Others v the Attorney General and Others*** **Nairobi Petition No. 498 of 2009 (Unreported)** *at para 26)*. However, under **section 7** of the **Sixth Schedule** this court is to construe the law in force immediately before the effective date with the necessary adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution.

39. It against this background that I shall construe the Agreement and proceedings subject of this objection under the former Constitution.

Nature and effect of the Agreement

40. A compromise agreement is a contract whereby the parties make reciprocal concessions in order to resolve their differences and thus avoid litigation or to put an end to one already commenced. When it complies with the requisites and principles of contracts, it becomes a valid agreement which has the force of law between the parties.

41. When a compromise agreement is given judicial approval, it becomes more than a contract binding upon the parties. Having been sanctioned by the Court it is a determination of the controversy and has the force and effect of a judgment and is covered by the doctrine of *res judicata*.

42. The petitioner's counsel argued that by the time the Agreement was filed and the consent order endorsed, there was no suit capable of being compromised as the withdrawal of the suit by the petitioner had been endorsed by the court on 4th April 2008 and in terms of the **Order 24 rule 1** of the ***Civil Procedure Rules*** and once the withdrawal was endorsed by the court, the suit ceased to be in existence

and the Agreement could neither be filed not endorsed by the consent.

43. I think the issue is resolved by the terms of the Agreement. The recital acknowledges that a suit had been filed and defended by the 2nd respondent and parties agreed to compromise the suit. Clause (2) of the Agreement amounts to a consent to withdraw the suit as part of the Agreement.

44. Thus, while the notice of withdrawal dated 3rd April 2008 was unilateral, its effect was varied when the parties agreed to have the suit withdrawn, compromised and adjusted by the Agreement. The Agreement of the parties so filed was thereafter endorsed by the court. The order is still part of the record and has not been set aside and it is to be given full effect. I do not see any impediment in law by parties to a suit setting aside an order of withdrawal and substituting it with an Agreement settling the matters in the pleadings and the court endorsing such a course.

45. I therefore hold that the Agreement duly filed and endorsed by a court order on 15th December 2008 is valid and constitutes a court decision determining all the issues set out in the pleadings and the Agreement.

46. Compromises negotiated and agreed upon by the parties to litigation are favoured and encouraged by the courts and parties are bound to abide by them and since they have the force of law, no parties can discard them unilaterally. I therefore hold that the Agreement subject of the preliminary objection is a valid agreement signed by parties where each party took a benefit that has now been endorsed by a court.

47. The law concerning the status of consent orders has been stated in several cases among them ***Flora Wasike v Destino Wamboko*** **(supra)** where the Court of Appeal stated as follows, ***'It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried ..... In Purcell vs. FC Trigal Ltd (1970) 3 All ER 671, Winn LJ said at 676: "It seems to me that if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract."***

48. This general principle is so well established in our legal system and this court cannot by a judicial side wind disregard it. See the case of ***Hirani v Kassam*** **[1952] 19 EACA 131**, ***Brooke Bond Liebig Ltd v Mallya*** **[1975] EA 266**, ***Diamond Trust Bank of Kenya Limited v Ply and Panel Limited & Another*** **[2004] EA 31** amongst others.

Issue estoppel and *res judicata*

49. The 2nd respondent has attacked the petition on the basis that the claim is debarred by *res judicata* and/or issue estoppel. Issue estoppel is a broad principle that prevents a party from relitigating an issue of fact or law that has been determined by a prior order or judgment. *Res judicata*, though part of the issue estoppel, applies specifically to a final determination of a matter by a court of competent jurisdiction.

50. A consent judgment is a judgment whose terms are settled and agreed to by the parties and having been sanctioned by the court, the consent has the effect of *res judicata* in respect of the matters dealt and it is this respect I shall consider the matter.

51. The rationale behind the said doctrine of *res judicata* and issue estoppel is that if the controversy in issue is finally settled or determined or decided by the court, it cannot be re-opened. The rule of *res-judicata* is based on two principles; there must be an end to litigation and the party should not be vexed twice over the same cause.

52. The general principle of *res-judicata* is captured in **section 7** of the ***Civil Procedure Act*** which provides that:-

7. 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.

53. For the operation of the doctrine of *res judicata* first, the issue in the first suit must have been decided by a competent court. Second, the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar. Third, the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title (see the case of ***Karia and Another v The Attorney General and Others*** **[2005] 1 EA 83, 89)**.

54. In so far as the first issue is concerned, I have already held that the Agreement between the parties having been sanctioned by the court constitutes a determination of the matters contained in the pleadings and the Agreement.

55. The second issue concerns the substance of the dispute. The dispute concerns the paternity of the E.T otherwise known as E.T.K in the former suit. In the first suit the petitioner and his mother sought a declaration that the J.N.K is the biological father and in this respect a DNA test was sought. In the present suit, the determination of the paternity of the petitioner is necessary for the declarations sought to be granted. The petitioner has also filed an interlocutory application seeking an order for a DNA test. I conclude that in whatever manner the prayers are couched the issue to be resolved is one of paternity and that issue was resolved by the Agreement filed and adopted by the court in the former suit.

56. The parties in the first suit were the petitioner and his mother. In the present case, the petitioner has sued alone though his mother has filed a substantial replying affidavit to support the petitioner. Unlike in the former case, the Attorney General has been joined as a respondent to elevate the private law dispute to one of public law.

57. 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 ....'***

58. In my view the addition of the Attorney General and the exclusion of the petitioner's mother, who was present in the first suit are merely cosmetic changes which do not affect my conclusions. The issue of paternity of the petitioner is the common thread running through both suits and it is the matter that was compromised by the Agreement endorsed by the court. It cannot be re-opened merely by elevating the issue to one of public law and packaging it differently as an enforcement action and thereafter adding the Attorney General as party to evade the general principle.

59. There is no doubt that a compromise was reached and that its effect was to bring the claim resulting to an end such that the attack on the Agreement is a collateral challenge. It is not permitted and amounts to an abuse of the court process which this court retains jurisdiction to stop.

60. I adopt the dictum of Lord Diplock in the case of ***Hunter v Chief Constable of West Midlands Police & Others*** **(Supra)** where he stated, ***'The inherent power which any court of justice must possess to prevent misuse of procedure which, although not inconsistent with the literal procedural rules,***

would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people.'

Limitation of fundamental rights and freedoms

61. I am aware that these proceedings are brought to enforce fundamental rights and freedoms. My obligation in considering such an application is to decide whether the facts disclosed in the petition disclose a breach of the bill of rights entitling a party to relief. The purpose of **Article 23** of the Constitution is to ensure that the access provided to the court is unhindered and devoid of obstacles that diminish those rights. Indeed this was the holding in the cases of ***Rashid Allogoh & Other v Haco Industries Limited*** **(supra)** and the ***Maharaj v Attorney General of Trinidad and Tobago (supra)***.

62. I am also guided by the sentiments of Drake J in the case of ***North West Water Limited v Bummie & Partners [1990] 3 AUER 547, 561*** where he stated,***"I think great caution must be exercised before shutting out a party from putting forward his case on grounds of issue estoppel or abuse of process. Before doing so the court should be quite satisfied that there is a real or practical difference between the issues to be litigated in the new action and that already decided and the evidence may be properly be called on those issues in the new action."***

63. Section 70 of the Constitution recognises that fundamental rights and freedoms of an individual may be limited in a manner that ensures that the enjoyment of rights and freedoms do not prejudice the rights of others or the public interest.

64. In the case of ***Thomas v The Attorney General of Trinidad & Tobago*** **[1991] LRC(Const) 1001,** the Privy Council stated that it was, ***'satisfied that the existence of a constitutional remedy as that upon which the appellant relies does not affect the application of the principle of res judicata.'*** The Board referred to a decision of the Supreme Court of India, ***Daryao and others v The State of UP and Others (1961)*** **1 SCR 574, 582-3** where Gajendragkar J stated, ***'But, is the rule of res judicata merely a technical rule or is it based on high public policy? If the rule of res judicata itself embodies a principle of public policy which in turn is an essential part of the rule of law then the objection that the rule cannot be invoked where fundamental rights are in question may lose much of its validity. Now, the rule of res judicata as indicated in s. 11 of the Code of Civil Procedure has no doubt some technical aspects, for instance the rule of constructive res judicata may be said to be technical; but the basis on which the said rule rests is founded on considerations of public policy. It is in the interest of the public at large that a finality should attach to be binding decisions pronounced by Courts of competent jurisdiction, and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation. If these two principles form the foundation of the general rule of res judicata they cannot be treated as irrelevant or inadmissible even in dealing with fundamental rights in petitions filed under Art. 32'.***

65. In the case of ***Richard Nduati Kariuki v Leonard Nduati Kariuki & Another*** **Nairobi Misc. Civil Appl. No. 7 of 2006 (Unreported)**, the Court had an opportunity to consider the effect of an agreement resolving a succession matter on a case involving enforcement of fundamental rights and freedoms. In that case the parties had settled the Succession Cause by consent whereupon the applicant moved the court by way of originating summons to set aside the consent on the grounds that his fundamental rights were violated. The respondent sought to strike out the summons on the ground that it was *res judicata* and the matter had been compromised by an agreement.

66. The court held that the respondent having signed the consent letter which settled the matter was now estopped from relitigating the same issues under the guise of a constitutional grievance. In coming to its conclusion the court relied on the decision in ***Booth Irrigation v Mombasa Water Products Limited (Booth Irrigation No.1)*** **Nairobi HCMisc. App. No. 1052 of 2004 (Supra)** where the court held that, ***'Although Constitutional Applications should be heard on merit, I find that there is nothing that would prevent a challenger of the alleged contravention moving this court to demonstrate that the application does violate fundamental principles of law including public policy for example the matter raised was res judicata. Res judicata is in turn based on the principle grounded on public policy that litigation at***

some point must come to an end. Res judicata is a fundamental principle of our law.' In respect of consent orders the court further stated, ***'An equally cherished principle of our law is that a consent order or decree can only be set aside only on the grounds of fraud or mistake or any other grounds which would vitiate a contract. The court cannot prevent a party from demonstrating at the preliminary stage that there has not been any challenge to the consent or that the matter is res judicata and therefore there cannot be possibly be contravention under section 84 of the Constitution and that the application does breach fundamental principles of law.'***

67. What the decisions I have cited and considered show is that whether the issue before me approached as an attack on a consent judgment, issue estoppel, *res judicata* or an abuse of process of court, the principles upon which the court acts in such circumstances are clearly within the limitations to fundamental rights and freedoms envisaged under **section 70** of the Constitution. I therefore hold that as long as the Agreement remains binding on the parties, neither party can circumvent the effect and consequences of this Agreement by attacking it under the guise of a petition to enforce fundamental rights and freedoms.

Position of the Attorney General

68. I would be remiss if I did not deal with the position of the Attorney General in this matter. I have set out the prayers in the petition at paragraph 5 above. Prayer (2) seeking to compel the Registrar of Births to indicate that the 2nd respondent as the father of the petitioner is dependent on a finding of paternity. In other words, the claim against the 1st respondent cannot be severed from that against the 2nd respondent. Once the claim against the 2nd respondent fails, that against the 1st respondent must also fail.

69. I have also studied the petition. The petition discloses a personal action. It does not purport to be made on behalf of a group or a class of persons who are in similar circumstances as the petitioner and who are seeking relief for breach of fundamental rights and freedoms against the State as represented by the 1st respondent. It is a personal and private action for specific relief which I have now held cannot lie.

70. To allow the petition to proceed only against the 1st respondent would be to engage the court in an academic discussion. This court's jurisdiction under **section 84** of the former Constitution and **Article 22 and 23** of the Constitution is to enforce fundamental rights and freedoms where the same are threatened, infringed and or violated and is exercisable in a proper case, controversy or dispute (see the case of ***Peter Kaluma v Attorney General*** **Nairobi Petition No. 79 of 2011 (Unreported)** and ***John Harun Mwau & Others v Attorney General & Other Nairobi*** **Petition No. 65 of 2011 (Unreported)**). As the case against the 2nd respondent has collapsed, there is nothing left for determination as against the 1st respondent.

Conclusions

71. I must emphasise that this decision is not a determination of the petitioner's paternity. That issue was determined by agreement of the parties in filed in ***HCCC No. 837 of 2007*** and endorsed by that court. What I have determined in this decision is whether the petitioner can bring this suit despite existence of an agreement endorsed by the court.

72. My conclusion is that the petitioner's claim is an attempt to circumvent a binding agreement that has been entered into by the parties. It is a collateral attack on the Agreement duly endorsed by the court and therefore constitutes an abuse of the court process. I have no choice but to uphold the 2nd respondent's preliminary objection and strike out the petition.

73. In view of the fact that this is an application for the enforcement of fundamental rights and freedoms, I am not inclined to make any order for costs and each party shall bear their own costs.

DATED and **DELIVERED** at **NAIROBI** this **27th** day of **JANUARY 2012**

D. S. MAJANJA

JUDGE

Mr M. Kangata instructed by Muchoki Kangata & Company

Advocates for the Petitioner

Ms Ndegeri, Litigation Counsel, instructed by the State Law Office

for the 1st Respondent

Mr F. Ngatia instructed by Ngatia & Associates Advocates for the 2nd

Respondent.