REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
Misc Appli 1544 of 2004

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY WAY OF CERTIORARI AND PROHIBITION

and
IN THE MATTER OF KISUMU HIGH COURT SUIT NO. 112 OF 2004 M/S QUASAR LIMITED – V – METRO PETROLEUM

and
IN THE MATTER OF THE CRIMINAL PROCEDURE CODE CHAPTER 75 OF THE LAWS OF KENYA

AJIM JIWA RAJWANI…….
……...APPLICANT

VERSUS

CHIEF MAGISTRATE LAW COURT NAIROBI

METRO PETROLEUM LIMITED

THE COMMISSIONER OF POLICE……...
……..RESPONDENTS

R U L I N G

The applicant has filed a preliminary objection, under five specific heads.

The 2nd respondent contested those objections on the basis that they had already been substantially raised before Justice Makhandia on 25th November 2004 and the judge subsequently gave his ruling; and it was therefore argued that the objections now raised by the applicant were res judicata.

In the submissions before us learned counsel for the applicant, Mr. Otiende Amollo, argued that the 2nd respondent's application dated 21st August 2004 was incompetent and misconceived. It was contended that this application invoked Order LIII Civil Procedure Rules, and section 84 of the Constitution, (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules, 2001 and other statutes and that it cited many other provisions and rules. Such a combination of statutes was said to be fatally defective.

The applicant's counsel further argued that the 2nd respondent's application ought to have been made by way of Chamber Summons and particularly under Order VI rule 13 of the Civil Procedure Rules which provides that the same ought to be made by Chamber Summons. Accordingly he argued that the 2nd respondent's application having come by way of Notice of Motion, was defective and must be dismissed.

The applicant's counsel advanced an argument that at the time of filing of the 2nd respondent's application dated 21.8.2004, there were no proceedings pending and since that was the position, the 2nd respondent ought to correctly have come by Originating Summons. Counsel in advancing this argument stated that since leave had been granted to the applicant there was no pending proceeding capable of being struck out since the applicant had not, at the time, filed the substantive Notice of Motion.

Counsel also argued that Order LIII was a special jurisdiction, which gives the court power by virtue of sections 8 and 9 of the Law Reform Act, and that being so, counsel argued that the 2nd respondent's application resting also on Order VI rule 13 of the Civil Procedure Rules was misconceived and incompetent. The applicant's counsel also argued that the prayers sought by the 2nd respondent were misconceived, because as matters now stand the only thing that can be challenged is the substantive notice of motion.

Lastly counsel attacked the 2nd respondent's supporting affidavit and the further affidavit. Some of the attacks related to the title, failure to state that the deponent had authority to swear the affidavit on behalf of the 2nd respondent, and to the fact that it made reference to matters that related to the application for leave.

In response, learned counsel for the 2nd respondent, Mr. Ngatia, argued that the objections raised were res judicata, the same issues having been raised before a competent court, and so the same could no longer be raised. He said that the applicant was estopped from raising the same issues. Counsel relied on the case of HOYSTEAD AND OTHERS V TAXATION COMMISSIONER [1925] ALL E.R. 56, from which the following passage may be quoted.

> **"I believe I state the rule of the court correctly when I say, that 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 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 judgment, but every point which properly belong to the subject of litigation, ……".**

We have considered Justice Makhandia's ruling, of 3rd December 2004 and we are in agreement with the submissions made by the 2nd respondent's counsel that indeed the arguments in favour of the preliminary objection are res judicata. It is clear that the judge heard argument on whether or not the 2nd respondent's application was competent. The following passage in the judgment may be quoted:

> "**I agree with counsel for the applicant that the mere citation of a constitutional provision in the intitulement of an application does not in itself make the application a constitutional matter. What is important in my view are the prayers sought in the application…….Having perused the prayers in the application dated 21.8.2004 I hold and I am satisfied that they do not seek any constitutional relief."**

The judge proceeded to consider whether civil and criminal proceedings could proceed concurrently.

The applicant's counsel before us argued that some parts of the judge's ruling were obiter. We find that we cannot accept that argument because the judge was addressed on the competence of the application, and his determination, as held in HOYSTEAD CASE (ibid) must be taken by us to cover all the points touching on the competence of the entire application. This indeed is the wider meaning of res judicata. The applicant, in any case did file a notice of appeal against Justice Makhandia's ruling; and we are of the view that it would not be safe for us to entertain the preliminary objections again while the matter is already the subject matter of a pending appeal. Entertaining the matter again boarders on our

sitting on appeal of a brother of co-ordinate jurisdiction and we strongly resist the temptation to rule on any of the points raised for this reason.

We find and hold that, indeed, the arguments raised by the applicant are caught by the rule of res judicata, which rule is found in Section 7 of the Civil Procedure Act (Cap 21); and it forbids re-litigation of similar issues, or litigation by instalments. This rule does cover all the points which would have been raised in the adjudication and were not raised. We are, therefore, of the view that the preliminary objection cannot be entertained.

In the concluding paragraph Justice Makhandia made a finding, with which we are in agreement, that the application to be heard on merit is the main application seeking judicial review orders, dated 21.8.2004.

The orders of this court are as follows: -

> (**1) That the applicant's preliminary objection dated 1st September 2004 is dismissed. However in view of the intended appeal we order that the costs in respect of this objection abide the outcome of the application for judicial review.**
>
> **(2) Arising from the above we are in a position now to allocate a hearing date in respect of the 2nd respondent's application dated 21st August 2004.**

Dated and delivered at **NAIROBI** this 8th July 2005.

J. G. NYAMU

JUDGE

J. B. OJWANG

JUDGE

MARY KASANGO

JUDGE