Wafula & another v Royal Nairobi Golf Club & 3 others (Petition E431 of 2020) [2024] KEHC 5307 (KLR) (Constitutional and Human Rights) (3 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5307 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E431 OF 2020

LN MUGAMBI, J

MAY 3, 2024

BETWEEN

RICHARD CYOI WAFULA ..... 1ST PETITIONER

ERSKINE KILIRU ..... 2ND PETITIONER

AND

ROYAL NAIROBI GOLF CLUB ..... 1ST RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS ..... 2ND RESPONDENT

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS .... 3RD RESPONDENT

ATTORNEY GENERAL ..... 4TH RESPONDENT

JUDGMENT

1. The Petition dated 18th December 2020 is supported by the Petitioners' affidavits in support sworn on even date. The Petitioners seek the following reliefs against the Respondents:

    a. A declaration that the Petitioners do not owe the 1st Respondent any amount of money on account of any fraudulent transactions using the Petitioners membership cards.

    b. A declaration that the actions by the 1st Respondent in suspending the Petitioners as its members are in violation of the Petitioners' constitutional rights and thus null and void ab initio.

    c. A declaration that the publishing of the list of names, including those of the Petitioners, by the 1st Respondent is defamatory.

d. General damages

e. Costs of the suit.

f. Any other or further relief that the Court may deem fit to grant.

1st Petitioner's Case

2. On 11th March 2020, the 1st Petitioner received correspondence from the 1st respondent which informed that his member account had been credited Ksh. 635,900. The letter noted that this amount was not supported by corresponding entries to the 1st Respondent's bank account. As a result, the 1st Respondent's Board of Directors on 16th March 2020 resolved to suspend him pending investigation. On this day also, he was informed that he owed the club Ksh.670,000/= which he was directed to pay.

3. In response the Petitioner in a letter dated 23rd March 2020 denied crediting the alleged monies. He also communicated that at the stated time, he was far from the club house and so could not have made the impugned deposit. He was invited him for a hearing on 27th March 2020. He asserts that 1st Respondent frustrated the hearing causing him to protest in the letter dated 31st March 2020.

4. He moreover on 6th May 2020, wrote to the 1st Respondent requesting to have his account reinstated. The 1st Respondent instead vide a letter dated 7th December 2020 asked the Petitioner to pay the outstanding Ksh.511,500 within 14 days failure to which his name would be struck of the list of members.

5. The Petitioner takes issue with the Respondent's actions which are said to be in breach of the 1st Respondent's by - laws. He states that Article 14.1 (j) of the Club's by – laws provide that upon receiving a complaint the 1st Respondent should acknowledge receipt and conduct a hearing of the matter. A recommendation to the Board of Directors by the Committee should only be made once the hearing has been concluded. In view of this, he asserts that the decision to suspend him without granting him an opportunity to be heard was unconstitutional and in breach of its own by - laws and Articles of Association.

6. Furthermore, despite ordering for an investigation into the matter, the 1st Respondent failed to disclose its findings to him. He is further aggrieved that the 1st Respondent published a notice notifying of his debt which is defamatory. Consequently, the petition is brought against the 1st Respondent for violation of his constitutional rights under Articles 35, 36, 40 and 47 of the Constitution.

2nd Petitioner's Case

7. In like manner, the 2nd Petitioner avers that he received a letter dated 17th March 2020 from the 1st Respondent stating that he had been suspended from the club. In protest he wrote to the 1st Respondent the next day denying his involvement with the fraudulent transaction. He followed up with a letter dated 22nd March 2020 which answered all the allegations levelled against him.

8. He further depones that vide a letter dated 25th March 2020, the 1st Respondent notified him that he owed Ksh.622,810. Later on, on 15th April 2020, the 1st Respondent directed him to pay the owed amount of Ksh.876,730. He was further directed on 10th September 2020, to attend a hearing the next day which he protested to due to the short notice. He however on 15th September 2020 wrote to the 1st Respondent denying the impugned funds.

9. He depones that the 1st Respondent on 7th December 2020, as well instructed him to pay Ksh. 541,915, failure to which his name would be struck off from the Club's list of members. He argues that this

amount was not justified since he had not utilized the same. The 1st Respondent's actions are hence said to be defamatory. He moreover contends that he is not conversant with the 1st Respondent's payment system hence could not have made the alleged fraudulent deposits on his card. For these reasons, he is certain that the 1st Respondent violated his constitutional rights.

10. The Petitioners allege that they were denied an opportunity to be heard, the right to access information, the freedom of association which includes the right to join or participate in activities of an association of any kind and that the actions by the Respondent were meant to arbitrarily deprive them the right to property.

Respondents' Case

11. In response the 1st Respondent's Honorary Secretary, Christine Sabwa, filed a replying affidavit sworn on 22nd February 2021. She deposed that at the 1st Respondent's members are ordinarily issued with pre-paid membership cards which they use to access and pay for the services at the club.

12. Members thus top up money in the cards as a pre-condition for continuing to enjoy the 1st respondent's services.

13. She depones that around March 2020, the 1st Respondent discovered that although its bar sales had gone up, the increase was not proportionate with what was getting into the bank account. It thus conducted an internal review which revealed that 150 club members cards had been irregularly topped up with Electronic Money Value (EMV) transactions. The deposits were not supported by a corresponding entry in the 1st respondent's bank account.

14. As a result, she wrote to the petitioners on 11th March 2020 informing them of the discrepancy. She went on to ask the petitioners to supply the requisite supporting documentation for the EMV transaction.

15. Following the 1st Respondent's meeting with the Petitioners on various dates, it was determined that their preliminary responses were not satisfactorily.

16. As a consequence, the Board of Directors resolved to reserve the impugned credits as follows: the 1st petitioner's account fell into debit of Ksh.670,900 and the 2nd petitioner, Ksh.798,890. She avers that by virtue of the 1st respondent's, By - law 3.2, members with debit balances are not allowed to access the Club's services and facilities until the same is cleared. The decision was communicated to the petitioners on 19th March 2020.

17. Furthermore, the petitioners were informed that a membership Committee would be formed in line with Article 20 of the Memorandum and Articles of Association, read in conjunction with By-law 14.1, to hear their matter. The 1st Respondent vide a letter dated 25th March 2020 invited them for their respective hearing. They were also informed that they were entitled to a single witness.

18. She asserts that on the day of the hearing, 27th March 2020, the 1st petitioner brought two witnesses whom the 1st respondent refused to admit. This is since the 1st petitioner had not informed the Committee of his witnesses in advance. This in turn caused a commotion which led to the 1st petitioner and the witnesses being removed from the meeting. Soon after due to the COVID 19 pandemic, the 1st respondent was unable to run its normal operations and so had to reschedule the hearings to a later date when its operations resumed. This resolution was communicated to the petitioners on 27th April 2020.

19. She as states that in view of this matter the 1st petitioner proceeded to file Judicial Review Misc. Application No. 126 of 2020- R vs Royal Nairobi Golf Club. ex parte Richard Cyoi Wafula & Another

which has since been determined. It is argued that the instant petition is an abuse of court process by virtue of the principle of res judicata. Additionally, that the petition is in breach of the principle of constitutional avoidance. She adds that the reliefs sought are not constitutional in nature but based on contract and tort law.

20. In closing, she asserts that the 1st respondent did not violate the petitioners' rights as alleged. She states that it is clear that its investigations and its conclusion into the matter were undertaken in accordance with the 1st Respondent's Memorandum and Articles of Association, Amended and Restated Articles of Association and By-laws.

2nd Respondent's Case

21. The 2nd respondent's response and submissions are not in the court file or CTS.

3rd Respondent's Case

22. In reply, the 3rd respondent did not file a response to the petition however filed its grounds of opposition dated 19th January 2021 to the application. The opposition is on the basis that:

    i. The application lacks clarity and precision in setting out the alleged directives in relation to the 3rd respondent.

    ii. The Application discloses no cause of action as against the 3rd respondent as the matter relates to the conduct of the 1st respondent and not the prosecution.

    iii. The orders sought are therefore not tenable against the 3rd respondent as the applicant does not show how the 3rd respondent has a duty in the matter raised.

    iv. Article 157 of the Constitution is to the effect that the 3rd respondent shall institute criminal proceedings only where a criminal offence has been committed.

    v. Section 24 of the National Police Service Act mandates the police to investigate any complaint brought to their attention in order to determine whether a criminal offence has been committed.

    vi. It is in the public interest that complaints made to the police are investigated and the perpetrators of crimes are charged and prosecuted.

    vii. The 3rd respondent accordingly prays that the applicants Application against the 3rd respondent be dismissed.

4th Respondent

23. The 4th respondent was struck off from the proceedings on 23rd February 2021.

Parties' Submissions

Petitioner's Submissions

24. The Petitioners' through Anyoka and Associates Advocates filed submissions dated 12th May 2021 and further supplementary submissions dated 18th September 2023.

25. On whether the Petitioners were afforded an opportunity to be heard before the impugned decision was made, Counsel relying on the Petitioners' averments submitted that the decision to expel the

Petitioners was done hastily without granting the Petitioners a right to fair hearing and a fair administrative action under Article 47 of the Constitution. Equally was in breach of their right to due process and natural justice owing to the manner in which the disciplinary process was conducted against the Petitioners.

26. It is noted that Article 14.1(i) of the 1st respondent's by-laws provides that a complaint ought to be sent to the Honorary Secretary in writing clearly indicating the nature of the complaint. Upon the Honorary Secretary receiving the said complaint, a member should be granted notice indicating the complaint received and requesting a written response within 7 days.

27. Accordingly, it is argued that there was a constitutional and statutory obligation placed on the 1st respondent to give the Petitioners prior and adequate notice of the nature and reasons for the proposed administrative action and an opportunity to be heard and to make representations in that regard.

28. Reliance was placed in Geothermal Development Company Limited vs. Attorney General & 3 Others (2013) eKLR where it was held that:

> "As a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against it. Elementary justice and the law demands that a person be given full information on the case against him and given reasonable opportunity to present a response. This right is not limited only in cases of a hearing as in the case of a court or before a tribunal, but when taking administrative actions as well."

29. Like dependence was placed in Gathigia vs. Kenyatta University Nairobi HCMA No. 1029 of 2007 (2008) KLR 587.

30. Further it is submitted that Article 20(d) of the Club's by- laws provides that the Board should act on a recommendation by the disciplinary committee before making any decision. In this case however, Counsel argued that the 1st Respondent's decision was tainted with procedural impropriety. In support reliance was placed in R vs. Vice Chancellor JKUAT Misc. Appl. No. 30 of 2007 where it was held that:

> "If the principles of natural justice are violated in respect of any decision, it is, indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principles of justice. The decision must be declared as no decision."

31. Other cases which the Petitioner cited as being on point are: Ridge vs. Baldwin [1963] 2 All ER 66, Onyango Oloo vs. Attorney General [1986-1989] EA 456, Board of Education vs. Rice; [1911] AC 179, Msagha vs. Chief Justice & 7 Others Nairobi HCMCA No. 1062 of 2004 (Lessit, Wendo & Emukule, JJ on 3/11/06) (HCK) [2006] 2 KLR 553, Baker vs. Canada (Minister of Citizenship & Immigration) 2 S.C.R. 817 6, Selvarajan vs. Race Relations Board [1976] 1 All ER 12 and Egal Mohamed Osman vs. Inspector General of Police & 3 Others (2015) eKLR.

32. For this reason, it was argued that the 1st Respondent's actions did not adhere to the principles of fairness and so did not meet the dictates of Article 50 of the Constitution due to the 1st Respondent's failure to issue reasonable notice. Equally that the dispute process was merely conducted to tick a legal criterion hence not meaningful in view of the constitutional threshold. The Petitioners as such urged the Court to award them general damages of Ksh.5,000,000/- for the pain, stress and anxiety caused to them.

33. On whether the instant matter is res judicata, Counsel argued that matter herein is a constitutional petition seeking enforcement of rights and not a judicial review application as was JR. MISC.NO. 126 of 2020. He further argued that the reliefs sought herein are declaratory orders not the prerogative

order of certiorari as was sought in the cited case. In essence it was argued that the Judicial Review process revolved around the 1st respondent's decision-making process and not the merits of the decision which the instant petition is concerned with.

34. Reliance was placed in Sangani Investment Limited vs Officer In Charge, Nairobi Remand and Allocation Prison (2007) 1 EA 354 where it was held that:

> " A declaration does not fall under the purview of judicial review for the simple reason that the court would require viva voce evidence to be adduced for the determination of the case on merits. Judicial Review on the other hand is only concerned with the reviewing of the decision making process....
>
> Under judicial review, the court's jurisdiction is restricted to issue of orders of mandamus, certiorari and prohibition which of necessity are confined to review of decisions whose propriety is in question. As earlier stated, judicial review is about reviewing the process through which the decision was made to determine whether the process was indeed fair and not about the merits or demerits of the decision."

35. Like dependence was also placed in Republic vs DPP & 2 Others , ex parte Francis Njakwe Maina & Another(2015) eKLR, Republic v. Chesang (Ms) Resident Magistrate & 2 others Ex parte Paul Karanja Kamunge t/a Davisco Agencies & 2 others [2017] eKLR, Republic v County Government of Mombasa Ex Parte Outdoor Advertising Association of Kenya (2018) eKLR and John Florence Maritime Services Limited & Anor v Cabinet Secretary , Transport and Infrastructure & 3 Others Supreme Court Petition No. 17 of 2015.

36. Turning to the principle of constitutional avoidance, Counsel submitted that this argument was misplaced as the key issue revolves around violation of constitutional rights which this Court has jurisdiction to entertain. Additionally, that it is impossible to decide the matters herein without reaching a constitutional conclusion. This argument was anchored in the fact that the Petitioners had demonstrated the clear violation of their right to a fair hearing, right to access the information held by the 1st respondent following its investigations, freedom to associate and their right to property by the 1st Respondent.

37. Reliance was placed on KKB v SCM & 5 others (Constitutional Petition 014 of 2020) [2022] KEHC 289 (KLR) where exceptions to this doctrine were outlined as follows:

> " i) Where the constitutional violation is so clear and of direct relevance to the matter,
>
> ii) In the absence of an apparent alternative form of ordinary relief; and
>
> iii) Where it is found that it would be a waste of effort to seek a non-constitutional resolution of the dispute."

38. Reliance was also placed in Anarita Karimi Njeru vs Republic (1979) eKLR, Trusted Society of Human Rights Alliance vs Attorney General & 2 others (2012) eKLR, President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others (CCT16/98) 2000 (1) SA 1 and Judicial Service Commission v Mbalu Mutava & Another [2014] eKLR and Republic vs. Non-Governmental Organizations Co-ordination Board Ex-parte Evans Kidero Foundation (2017) eKLR.

39. In light of this, Counsel reiterated that the Petitioners were entitled to the reliefs sought. In support, he cited Siewchand Ramanoop vs. The AG of T&T, PC Appeal No 13 of 2004 where it was stated that:

> "When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened... An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice."

40. Further reliance was also placed on Peters vs. Marksman & Another (2001) 1 LRC.

1st Respondent's Submissions

41. On 13th July 2021, Oraro and Company Advocates filed submissions for the 1st Respondent and identified the issues for determination as: whether the petition is res judicata, whether the Petition runs afoul of the doctrine of Constitutional Avoidance and whether the damages sought by the Petitioners are exorbitant.

42. On the first issue, Counsel was categorical that the matter is res-judicata on account that the issues raised in this Petition challenge the procedure followed in suspending the Petitioners, which was the main issue JR. MISC.NO. 126 OF 2020. Secondly that, the parties in both suits are the same. Equally that the parties in both suits have been litigating under the same title. Lastly, that the issue was heard and determined with finality by the Judicial Review court in its judgment dated 1st July 2021.

43. He relied on the Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others (2017) eKLR where the Court outlined the elements of res judicata as follows:

> "a) The suit or issue was directly or substantially in issue in the former suit;
>
> b) That former suit was between the same parties or parties under whom they or any of them claim;
>
> c) Those parties were litigating under the same title;
>
> d) The issue was heard and finally determined in the former suit; and
>
> e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

44. Likewise, the case of John Florence Maritime Services Limited & Another (supra) was also cited.

45. Counsel was emphatic that despite the 2nd petitioner not having been a party in the JR proceedings, the Court in Omondi vs National Bank of Kenya Limited & Others [2001] EA 177 emphasized that Parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit. (See also, ET. vs Attorney General & Another (2012) eKLR which counsel cited.

46. Concerning the second issue, Counsel argued that the Petitioner primarily challenges the process by which the 1st Respondent made its findings and proceeded to make the impugned recommendations. According to the 1st Respondent, the reasonableness and/or procedural propriety of a decision are matters that are to be determined vide a judicial review application not a constitutional petition. Counsel as such argued that the instant Petition ought to have been filed before the Judicial Review Division of the High Court and this had already been accomplished and the matter determined. Counsel thus charged the petitioners of forum shopping and a waste of judicial time.

47. To buttress this point Counsel cited the case of Republic vs National Land Commission & Another. ex parte Hellen Kemunto Obaga (2018) eKLR where the Court noted that:

> " Judicial review is concerned with the decision-making process, not with the merits of the decision itself: The Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters."

48. Other cases cited were: New Life Travellers Limited vs County Government of Kiambu & Another (2019) eKLR and Republic vs. Communications Authority of Kenya, Ex parte Information Communication Technology Association of Kenya (CTAK) (2021) eKLR.

49. On avoidance principle, Counsel submitted that it requires a Court not determine a constitutional issue when a matter may properly be decided on another basis as held by the Supreme Court in Communications Commission of Kenya & 5 others v. Royal Media Services Limited & 5 Others (2014) eKLR. Identical reliance on this point was placed in Jorum Kabiru Mwangi & 2 others vs. Co-operative Bank of Kenya, Kawangware Branch (2016)eKLR and Uhuru Muigai Kenyatta v. Nairobi Star Publications Limited (2013) eKLR.

50. On the final issue, Counsel submitted that the Petitioners had not produced any evidence to support and particularize how the Respondent's actions caused them pain, stress and anxiety. Without this demonstration, Counsel argued that the unsubstantiated claim of Ksh.5,000,000/- amounts to extortion. Counsel stated thus that the Court in accessing damages ought to be guided by what is appropriate and just. Reliance was placed in Reuben Njuguna Gachukia & another vs. Inspector General of the National Police Service & 4 Others (2019) eKLR where it was held that:

> " Having regard to the above judicial experience and philosophy, it is clear that the award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law remedies within the discretion of a trial court but that such discretion is limited by what is "appropriate and iust" according to the facts and circumstances of a particular case in view of the fact that the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringement."

51. The case of Kenya Wildlife Service vs. Godfrey Kirimi Mwiti (2018) eKLR was also cited in support.

2nd and 3rd Respondents' Submissions.

52. These parties did not file any submissions.

DIVISION- **Analysis and Determination**

53. It is my considered view that the issues that arise for determination in this matter are as follows:

i. Whether or not the instant petition offends the principle of res judicata.

ii. Whether the doctrine of constitutional avoidance applies in the Instant Petition or is excepted given the circumstances of this case.

iii. Whether the petitioners' rights under Articles 35, 36, 40, 47 and 50 of the Constitution were violated by the 1st respondent.

Whether or not the Petition offends the principle of res- judicata

54. When a matter has been heard conclusively and determined on merits between the parties in a particular case, the issues that are subject of the determination cannot be raised in a subsequent trial.

55. Statutorily, the doctrine of res judicata is provided for in Section 7 of the Civil Procedure Act as follows:

> " 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."

56. The Supreme Court in Kenya Commercial Bank Limited vs. Muiri Coffee Estate Limited & another Motion (2016) eKLR defined this doctrine as follows:

> " (52) Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights..."

57. Similarly, the Supreme Court in John Florence Maritime Services Limited & another (supra) opined as follows:

> " 54. The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively...Res judicata entails more than procedural technicality, and lies on the plane of a substantive legal concept... The principle is rooted to the rationale that issues decided may not be reopened and has little to do with the merit of the decision."

58. The Court went on to observe that:

> " 59. For res judicata to be invoked in a civil matter the following elements must be demonstrated:
>
> a. There is a former Judgment or order which was final;
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> b. The Judgment or order was on merit;
>
> c. The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
>
> d. There must be between the first and the second action identical parties, subject matter and cause of action."

59. The Court of Appeal in Independent Electoral & Boundaries Commission (supra) on the same observed as follows:

> " ...for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;
>
> a. The suit or issue was directly and substantially in issue in the former suit.
>
> b. That former suit was between the same parties or parties under whom they or any of them claim.
>
> c. Those parties were litigating under the same title.
>
> d. The issue was heard and finally determined in the former suit.
>
> e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

60. In the end, the Court concluded:

> " The practical effect of the res judicata doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties –because it is the court itself that is debarred by a jurisdictional injunct, from entertaining such suit."

61. In the instant Petition, the Respondent position is that the Petitioners are simply regurgating the issues which were raised in the judicial review proceedings where they challenged the procedure followed in suspending the Petitioners pending the results of an investigation. It was pointed out that the 1st Applicant within the JR proceeding is the 1st Petitioner in the instant Petition where the issue was heard and determined with finality in a judgment delivered on 1st July, 2021.

62. In a rejoinder, the Petitioner admitted that there was indeed a judicial review matter, JR. Misc. No. 126 of 2020 Rep vs. Royal Nairobi Golf Club, Exparte Richard Cyoi Wafula & Anor. Nevertheless, it was countered on the Petitioner's behalf that the reliefs sought in the instant Petition are declaratory orders and not the prerogative order of certiorari which had been sought in the judicial review proceedings. Further, that the judicial review process was concerned with the decision-making process of the 1st Respondent and not the merits of the decision.

63. This Court needs to re-emphasize some of the core principles underlying res-judicata as can be gleaned from Section 7 of the Civil Procedure Act which sets out the conditions that must exist for a successful plea of res-judicata to be raised. It states:

> " 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."

64. Two explanations provided in the said Section stand out and I find them very relevant to this determination, namely; explanation 4 & 6. They as follows:

Explanation (4)

Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. (6)

Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating...."

65. It is also necessary to pay regard to particular words used in Section 7 which are very key in deciding whether or not res-judicata applies. The section talks of a 'suit or issue', that no court shall try any "suit or issue." This means a res-judicata can arise as a 'cause of action estoppel' or 'issue-based estoppel'.

66. A cause of action estoppel, will bar the filing of an identical suit to be re-litigated between the same parties or their representatives. The issue-based estoppel looks at the issues that formed part of the former suit that was decided and bars them from being reintroduced by a party or the representative of such party in a later claim/suit even though the suit may be different. Such a party or his representative will be prevented from reopening the issue afresh.

67. I have carefully examined the factual basis relied upon by the Petitioners. In particular, the following paragraphs in the Petition dated 18th day of December, 2020.Para 9- "The Respondent did not accord the Petitioners' an opportunity to be heard as provided by the 1st Respondent's bylaws and its Articles of AssociationPara 10- The 1st Respondent ordered forensic audit to be carried out but the findings thereof were never disclosed to the Petitioners.Para 11- The Petitioners are aggrieved by the decision by the 1st Respondent to demand for payment of sums of money which only the 1st Respondent can explain how it was credited to the Petitioners membership cards and/or expended.

68. Having regard to the above, it is difficult to appreciate the distinction that the Petitioners are trying to make by pointing out that the Judicial review proceedings was a challenge on the decision-making process while this Petition is on the merits of the decision itself. It is apparent from the facts set out in this Petition that what the Petitioner is basically questioning is the manner the Respondent went about in reaching the decision that the Petitioners are aggrieved with. From the Petitioners point of view, the decision is either irrational and/or made without evidence. This in itself could be raised as a ground in the previous judicial review proceedings. It needs to be appreciated that res-judicata bar not only applies to the issues that were directly in issue in the previous suit, but also, (per explanation 4),

> " Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

69. In Republic v Chesang (Ms) Resident Magistrate and 2 Others Ex parte Paul Karanja Kamunge t/a Davisco Agencies & 2 Others (2017) eKLR citing Reid vs Secretary of State for Scotland (1999) 2 AC 512, the Court was categorical that in judicial review, the decision can be questioned on the following grounds:

> "...As regards the decision itself, it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, through a failure for any reason to take into account a relevant matter, through taking into account an irrelevant matter, through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While evidence may be explored in order

to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from ordinary appeal, the Court may not set about forming its own preferred view of the evidence..."

70. In respect to the 1st Petitioner, he was the 1st Applicant in the Judicial Review and further, the present Respondent was equally in that matter. The Court that heard the Judicial review matter was competent. The attempt by the 1st Petitioner to run away from the fact that the issues in the previous judicial review and the current Petition are identical must therefore fail.

71. For the 2nd Petitioner, I am fully guided by the following dicta by the Court in Henry Wanyama Khaemba Vs Standard Chartered Bank of Kenya Ltd, Civil Case No. 560 of 2006 to hold that he is too barred under the res-judicata principle although he was not a party in the already concluded judicial review matter touching on the same issues that have been raised herein. The Court reasoning, which I fully subscribe to was as follows:

> "...I accept the submissions by counsel for the defendants that the doctrine of res judicata would apply not only to situations where a specific matter between the same persons litigating in the same capacity has previously been determined by a court of competent jurisdiction but also to situations where either matters which could have been brought in were not brought in or parties who could have been enjoined were not enjoined. Parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit. They are bound to bring all their case at once. They are forbidden from litigating in installments..."

72. At this juncture, I can stop here and strike out the Petition but I am of the view that I should consider the other issues as well.

Whether or not the doctrine of Constitutional avoidance applies or is excepted

73. The principle of constitutional avoidance requires the Court to desist from deciding the matter as a constitutional question if it may be decided on any other ground apart from the Constitution. The doctrine was expounded on by the Supreme Court in Communications Commission of Kenya (Supra) as follows:

> "
>
> "(256) The appellants in this case are seeking to invoke the "principle of avoidance", also known as "constitutional avoidance". The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in S v. Mhlungu, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:
> "I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue,that is the course which should be followed."
>
> (257) Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936))."

74. Equally, in C O D & another vs Nairobi City Water & Sewerage Co. Ltd (2015) eKLR the Court noted as follows:

> "
>
> " 11. Similarly, in Papinder Kaur Atwal -vs- Manjit Singh Amrit Nairobi Petition No. 236 of 2011where after considering several authorities on the issue, Justice Lenaola remarked as follows:
>
> "All the authorities above would point to the fact that the constitution is a solemn document, and should not be a substitute for remedying emotional personal questions or mere control of excesses within administrative processes..... I must add the following; Our Bill of Rights is robust. It has been hailed as one of the best in any Constitution in the World. Our Courts must interpret it [with] all the liberalism they can marshall. However, not every pain can be addressed through the Bill of Rights and alleged violation thereof." (Emphasis added)
>
> 12. The Supreme Court of India has also held that ordinary remedies available under common law and statutes must be pursued in the ordinary manner or as provided under statute. For instance, in Re Application by Bahadur [1986] LRC (Const) the Court expressed itself as follows at page 307;
>
> "The Courts have said time and again that where infringements of rights are alleged which can be founded in a claim under substantive law, the proper course is to bring the claim under such law and not under the Constitution. This case highlights the unwisdom of ignoring that advice.... The Constitution sets out to declare in general terms the fundamental concepts of justice and right that should guide and inform the law and the actions of men. While an infringement of the Constitution might in certain cases give rise to the redress provided for at section 14, yet, as has been proclaimed by the highest Court in the land, it is not, "a general substitute for the normal procedures for invoking judicial control of administrative action." (See Harrikissoon v A-G [1979] 3 WLR 62).
>
> 13. It was further observed in the case of Minister of Home Affairs vs Bickle & Others (1985) LRC Const (per (Georges C.J);
>
> "Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a Court will usually decline to determine whether there has been in addition a breach of the Declaration of Rights."

75. The Court then went on to state as follows:

> " 14. The law above is crystal clear that where there exist sufficient and adequate mechanisms or forums to deal with a specific issue or dispute by other designated constitutional organs or under a statute, the jurisdiction of the High Court under Article 165(3) (b) of the Constitution should not be invoked until such mechanisms have been exhausted. To my mind therefore, not every litigant ought to come to court by way of a constitutional petition even where there are no constitutional issue arising and where there are adequate remedies provided in other laws to determine such situations.

15. The Constitution cannot be used as a general substitute for the normal procedures. The mere allegation that a human right has been contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the High Court under Article 165 of the Constitution: See Harrikissoon v A-G [1979] 3 WLR 62. Where it is possible to decide any case or dispute, civil or criminal, without reading a constitutional issue then that is the course that should be followed. The court sitting as a constitutional court must through the doctrine of avoidance steer clear of determining such disputes as if there were constitutional questions being raised: see S v Mhlungu[1995] 3 SA 867 (CC) and also Ashwander v Tennessee 297 US 288."

76. Correspondingly, in Council of County Governors vs Attorney General & 12 others (2018) eKLR the Court expressed itself as follows:

" 59. The doctrine of avoidance is primarily viewed by courts from the position that although a court could take up a matter and hear it, it would still decline to do so if there is another mechanism through which the dispute could be resolved. In that regard, the Supreme Court stated in Communication Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 others (supra) (at para 256) that the principle of avoidance means that a Court will not determine a constitutional issue when a matter may properly be decided on another basis.

60. In the South African case of S v Mhlungu, [1995] (3) SA 867 (CC), Kentridge AJ, stated in the dissenting opinion respecting the principle of avoidance (at paragraph 59), that he would lay down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed. And in Ashwander v Tennessee Valley Authority, 297 U.S. 288, 347 (1936)), the U.S. Supreme Court held that it would not decide a constitutional question which was properly before it if there was also some other basis upon which the case could have been disposed of."

77. The Respondent submitted that what the Petitioners are seeking could have been very well remedied in the judicial review. The Petitioner on the other hand submitted on the inadequacy of the judicial review forum claiming that one cannot get damages under judicial review or declaratory orders. The Petitioners submitted under paragraph 5 and 11 of their supplementary submissions thus:

Para 5- "...The reliefs sought are declaratory orders as opposed to prerogative order sought in JR. MISC NO. 126 of 2020-REP vs ROYAL NAIROBI GOLF CLUB, EX PARTE RICHARD CYOI WAFULA & ANOR..."

Para 11- "...We also submit that judicial review does not grant an order for damages as prayed in this Petition. The Petitioners herein are well within their right to invoke this Court's jurisdiction to determine whether they are entitled to damages..."

78. With due respect, I find the above submissions fundamentally flawed and not flowing with the current legal developments in this country in regard to orders that the Court may grant in a judicial review matter. The discretion of the Court has been expanded and is not limited to the traditional three

prerogative orders that were associated with judicial review remedies as is manifest from the reading of the Fair Administrative Review Act no. 4 of 2015. Section 11 of the Act provides as follows:

11. Orders in proceedings for judicial review

(1) In proceedings for judicial review under section 8 (1), the court may grant any order that is just and equitable, including an order–

a. declaring the rights of the parties in respect of any matter to which the administrative action relates;

b. restraining the administrator from acting or continuing to act in breach of duty imposed upon the administrator under any written law or from acting or continuing to act in any manner that is prejudicial to the legal rights of an applicant;

c. directing the administrator to give reasons for the administrative action or decision taken by the administrator;

d. prohibiting the administrator from acting in a particular manner;

e. setting aside the administrative action or decision and remitting the matter for reconsideration by the administrator, with or without directions;

(f) compelling the performance by an administrator of a public duty owed in law and in respect of which the applicant has a legally enforceable right;

(g) prohibiting the administrator from acting in a particular manner;

(h) setting aside the administrative action and remitting the matter for reconsideration by the administrator, with or without directions;

i. granting a temporary interdict or other temporary relief; or 9 No. 4 of 2015 Fair Administrative Action

i. for the award of costs or other pecuniary compensation in appropriate cases.

(2) In proceedings for judicial review relating to failure to take an administrative action, the court may grant any order that is just and equitable, including an order-

(a) directing the taking of the decision;

(b) declaring the rights of the parties in relation to the taking of the decision;

(c) directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court or tribunal considers necessary to do justice between the parties; or

(d) as to costs and other monetary compensation.

79. The finding of this Court is that the previous judicial review proceedings could still get the Petitioners the remedies that they are now seeking in this Petition. I find no reason of delving into any other issue in this matter.

80. Filing a fresh petition was just but a sly way of forcing a second chance at reviving a lost cause which I find unacceptable. The Petition is totally misconceived and an abuse of this court's process.

81. I dismiss the Petition with costs to the Respondents.

Dated, signed and delivered in Nairobi this 3rd day of May, 2024

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L N MUGAMBI

JUDGE

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