Waitere v Advocates Disciplinary Tribunal; Zambetakis (Interested Party) (Judicial Review E009 of 2022) [2023] KEHC 3835 (KLR) (3 May 2023) (Ruling)

Neutral citation: [2023] KEHC 3835 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

JUDICIAL REVIEW E009 OF 2022

HM NYAGA, J

MAY 3, 2023

BETWEEN

PERPETUAL WANGECHI WAITERE ..... APPLICANT

AND

THE ADVOCATES DISCIPLINARY TRIBUNAL ..... RESPONDENT

AND

AGNES WAITWIKA ZAMBETAKIS ..... INTERESTED PARTY

RULING

1. Before Court is the ex parte chamber summons Application dated 23rd August,2022 brought by the Applicant, Perpetual Wangechi Waitere under order 53 rule 1 of the *Civil Procedure Rules*, 2010 seeking the following principal reliefs: -

   I. That leave be granted to the Exparte applicant to apply for an order of certiorari to call to this Court and to quash the decision of the Respondent in respect of Taxation of costs rendered on 28th March,2022 dismissing the Exparte's Applicant's Application for review of the Ruling on Taxation rendered on 16th November, 2020.

   II. That pending the hearing and determination of the Judicial Review Application leave be granted to the Applicant to apply for orders of prohibition to prohibit the Respondent and the interested party from implementing the decision dated 28th March,2022 in respect of the Advocate depositing the balance from Ksh. 30,000,000/= held on behalf of the interested party with the Law Society of Kenya within ninety (90) days together with interest at 12% from 2017.

   III. That the said leave do operate as stay of the Implementation of the decision and directions of the Respondent dated 20th March, 2022.

   IV. That costs of the Application be provided for.

2. The application was supported by the statement of facts and verifying affidavit of the applicant, Perpetual Wangechi Waitere both dated 23rd August,2022.

3. The application was placed before Ngugi J (as he then was) and he certified the matter as urgent and directed the Applicant to serve the same on the Respondent and the interested party then appear for directions/hearing inter partes on 28th September,2022.

4. The Application was duly served upon the respondent and the interested party, and the Interested party responded to the same through Notice of Preliminary Objection (P.O) dated 9th September, 2022 on the following grounds: -

    a. That the Court having considered and allowed a similar application for leave previously leading to the institution of Nakuru HCJRE007 of 2022: Republic v The Advocates Disciplinary Tribunal & Another ex parte Perpetual Wangechi Waitere, it lacks jurisdiction to grant the instant Application which is res judicata and an abuse of the court process.

    b. That Nakuru HCJRE007 of 2022: Republic v The Advocates Disciplinary Tribunal & Another ex parte Perpetual Wangechi Waitere is still alive and the instant application is subjudice and an abuse of the Court Process.

5. On 20th February, 2023 this Court directed that the P.O be canvassed first through Written Submissions.

6. The Counsel for the Applicant and the Interested Party duly filed their respective submissions.

The Interested Party's Submissions

7. The Interested party filed her submissions on 22nd February, 2023. She abandoned the 2nd limb of the P.O on grounds that the court endorsed the Applicant's notice of withdrawal of suit in Nakuru HCJRE007 of 2022: Republic v The Advocates Disciplinary Tribunal & Another ex parte Perpetual Wangechi Waitere on 10th November, 2022.

8. In regards to whether the Application for leave herein is res judicata, the Counsel for the interested party submitted in the Affirmative. He submitted that on 8th June, 2022, Hon. Judge Chemitei granted leave to the Applicant to apply for orders of certiorari and Prohibition in Nakuru HCJRE007 of 2022: Republic V. The Advocates Disciplinary Tribunal & Another ex parte Perpetual Wangechi Waitere on 10th November 2022.

9. It was the Interested party further submissions that the instant application is similar to the aforesaid previous application in every aspect. That the parties are the same, it is founded on the same facts and evidence and the prayers sought are similar. The counsel argued therefore that this court having considered a previous similar application is barred by the doctrine of *res judicata* from entertaining the instant Application.

10. To bolster the interested party submissions, the counsel relied on the following cases: -

    a. *Africa Oil Turkana Limited (previously known as Turkana Drilling Consortium Ltd) & 3 Others –vs- Permanent Secretary Ministry of Energy & 17 Others* [2016] eKLR where the Court of Appeal cited with approval its own authority in *John Florence Maritime Services Ltd v Cabinet Secretary for Transport & Infrastructure & 3 Others* [2015] eKLR where it was stated that the rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation

over the same matter. Res judicata ensures the economic use of court's limited resources and timely termination of cases.

b. In *Re The Globe Tour* [1998] eKLR where the court held interalia stated that it would be an abuse of the court process to consider a similar or same application which is brought before court as a fresh matter.

c. *Republic v Chief Magistrate Kitui Law Courts Ex parte Benjo Travellers (K) Ltd; James Kameya Mwasya (Suing as the legal representative of the estate of the estate of Kivelenge Kameja (Deceased) (Interested Party)* [2022] eKLR where the court held that it was estopped by law from entertaining parties over an issue that has been litigated upon and a decision rendered on it on the merit.

11. The counsel urged this court to uphold the P.O and to strike out the application with costs to the interested party.

Applicant's Submissions

12. The Applicant filed her submissions on 18th March, 2023.

13. She referred this court to the leading case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Limited* [1969] EA. 696 on the definition of Preliminary Objection and submitted that grounds of res judicata and sub judice are not grounds for raising a preliminary objection.

14. The applicant submitted that Nakuru HCJR E007 of 2022 was formally withdrawn on 10th November,2022 before it was heard.

15. He argued that the withdrawal notice was under Order 25 of the *Civil Procedure Rules*.

16. The counsel referred this court to the case of *Priscilla Nyambura Njue v Geovhem Middle East Ltd; Kenya Bureau of Standards (Interested Party)* [2021] eKLR which the court cited with approval the Supreme Court case of *Nicholas Kiptoo arap Korir Salat v IEBC & 7 Others*[19] where it was held that a party's right to withdraw a matter before the court cannot be taken way. A court cannot bar a party from withdrawing his matter.

17. The Applicant argued that pursuant to provisions of Order 53 Rule 1 of the *Civil Procedure Rules*, leave is Mandatory before one can apply for Judicial Review.

18. She contended that the interested party has not shown that there is a suit before court where a matter in issue was substantially in issue in HCJR E007 of 2022 which was withdrawn on 4th August,2022.

19. She submitted that in terms of Order 25 Rule 1 of the *Civil Procedure Rules*, she has the right to re-litigate subject to compliance with Order 53 Rule 1 of the *Civil Procedure Rules*.

20. She vehemently opposed the contention by the interested party that she is guilty of an abuse of the court process and averred that the interested party had invited this court to embark on an exercise of ascertainment of facts which is precluded by the holding in the Mukisa Biscuit's case.

21. The Applicant argued that Order 53 Rule 3 of the *Civil Procedure Rules* is couched in mandatory terms with no provisions for extension of time. To support this reliance was placed on the case of *Peter Orengo Migiro (suing on behalf of the Late Christopher Orenge Makori) v Samwel Omagwa James & 2 others* [2022] eKLR

22. She submitted she opted to apply for leave afresh within 6 months' statutory period due to uncertainty as to whether the court can enlarge time under order 53 of the *Civil Procedure Rules*. In addition,

she submitted that when the formal order of withdrawal was recorded no objection was raised by the interested party and thus prayed that the P.O. be dismissed with costs.

Issues For Determination

23. The following are the issues for determination: -

    a. Whether the Notice of Preliminary Objection raises any valid preliminary objection warranting a determination at this point.

    b. If the answer to the above is in the affirmative, what is this court's determination on the preliminary objection.

Analysis

24. It is important to first outline what constitutes preliminary objection and res judicata in law.

25. The Court of Appeal case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd*. [1969] EA 696 at page 700 defined a preliminary objection as follows:

> " A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration".

26. On his part, Justice Newbold P in the same case gave the following essential features of a preliminary objection:

> " A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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."

27. With respect to Res judicata, the same is enshrined in Section 7 of the *Civil Procedure Act* which provides as follows: -

> " 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"

28. The Court of Appeal gave a rendition of the doctrine of *res judicata* in *John Florence Maritime Services Limited & Anor. v Cabinet Secretary for Transport and Infrastructure & 3 Others* [2015] eKLR in which it cited verbatim the following paragraph in *Henderson v Henderso*n [1843] 67 ER 313.

> " .....where a given matter becomes the subject of litigation in any adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought

forward, as part of the subject in contest, but which was not brought, 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 parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time....."

29. There are courts which have taken the view that doctrine of res judicata cannot be raised by way of preliminary objection while others are of the view that Res judicata is a pure point of law that can dispose of a matter.

30. In the case of *George Kamau Kimani & 4 Others v County Government of Trans Nzoia & Another* [2014], eKLR, the Court held that: -

> " I have considered the points raised by the 1st Defendant. All those points can be argued in the normal manner. They do not qualify to be raised as Preliminary Points. One cannot raise a ground of res judicata by way of Preliminary Objection. The best way to raise a ground of res judicata is by way of Notice of Motion where pleadings are annexed to enable the court to determine whether the current suit is res judicata. Professor Sifuna did not raise the issue of res judicata by way of Notice of Motion. Professor Sifuna only annexed a ruling in respect of a case which was struck out. This is not a proper way of issues which require ascertainment of facts by way of evidence. They cannot be brought by way of Preliminary Objection".

31. In the case of *Henry Wanyama KhaembaStandard Chartered Bank Ltd & Another* (2014) EKLR, the Court held that:

> " That re-statement of the limited scope of a Preliminary Objection brings me to the point where I hold that the Preliminary Objection by the 1st Defendant is not a true Preliminary Objection in the sense of the law. The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1st Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of the jurisdiction on preliminary objection. Courts of law have always had a well-founded quarrel with parties who resort to raising preliminary objections improperly".

32. The court in *National Rainbow Coalition (NARK Kenya) v Independent Electoral and Boundaries Commission (I.E.B.C.) & 3 others* [2017] eKLR cited the case of Omondi vs National Bank of Kenya Ltd & Others where it was held that the plea of res judicata are pure points of law which if determined in the favour of the Respondents would conclude the litigation.

33. In *Drill International Limited v Sidian Bank Limited* [2021] eKLR the court stated:

> " In the present case, the PO is premised on the main ground that the instant suit is res judicata. Regard is had to Section 7 of the *Civil Procedure Act* that sets out the threshold for holding that a suit is re judicata. This argument no doubt is a point of law and is advanced on the assumption that facts as pleaded by the Plaintiff are correct."

34. In *Re Estate of Pauline Muthoni Nyaga (Deceased)* [2019] eKLR- the court observed that Res judicata is a point law as where it is urged successfully it would have the force of determining the dispute. The doctrine applies in disputes of civil nature where the circumstances of the case would allow a party to raise it.

35. I associate myself with the latter position and hold that Res judicata raises a point of law and if proved can dispose of the matter herein. It is my view that *res judicata* is a point of law as it rips the Court of Jurisdiction to hear and determine the suit once its elements are proved. The court does not need to go further than look at the pleadings in issue, and which are not contested, well within the arm bit of the circumstances set out in Mukisa's case.

36. I will now address myself to the next issue as framed above.

37. The interested party contends that the orders sought by the applicant herein were the same as those sought in Nakuru Judicial Review No.7 of 2022. I have perused the Application dated 30th May, 2022 and I do note that the same involved the same parties, orders sought are the same and the court, on 8th June 2022, granted leave to the Applicant to apply for orders of certiorari and prohibition. However, the matter was not substantially determined on merit as the Applicant indisputably withdrew the same. The notice of withdrawal was subsequently endorsed as an order of the court.

38. The *Black's law Dictionary* 10th Edition defines "res judicata" as;

> " An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties..."

39. Order 53 Rule 1 of the *Civil Procedure Rules* mandates a party to first seek leave to institute Judicial Review proceedings. Rule 3 thereof then provides that;

Application to be by notice of motion [Order 53, rule 1.]

> "(1) When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion to the High Court, and there shall, unless the judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein for the hearing."

40. It is not in dispute that on 8th June 2022, the applicant was granted leave to file a substantive motion for judicial review within 21 days. It is also not in dispute that the applicant failed to file the substantive application within the time set by the court. The same was filed out of time and when an objection was raised by the interested party, the applicant proceeded to withdraw the said application.

41. The question to be answered then is what was the effect of the withdrawal of the substantive application? In my view once the application for leave was granted, it became spent. The applicant then had 21 days to file the substantive application, which she did not do. The one filed out of time was subsequently withdrawn, meaning that there was no longer any matter pending.

42. The other question is, should the applicant have sought leave to extend time to file the substantive application or was she justified in filing a fresh application for leave?

43. There is ample case law on the issue whether the court has powers to order an extension of time for filing a substantive application for judicial review. I will cite a few of them.

In *Republic v Clerk of the National Assembly & another Ex parte Bernard Njiinu Njiraini*, [2021] eKLR the court held as follows;

I have considered the arguments made by the parties on the issues of extension of time to file the substantive Notice of Motion, and It is notable that there is currently no settled position as to whether

the period of 21 days stipulated in Order 53 Rule 3 of the *Civil Procedure Rules*, 2010, can be enlarged by application of Order 50 Rule 6 of the *Civil Procedure Rules*, which provides for enlargement of time. Some courts have applied strict interpretation regarding extension of time within which the substantive motion should be filed, and held that the requirements in Order 53 Rule 3 are mandatory.

The learned judge then went ahead and extended time to file the substantive application.

In *Republic v Kenya Revenue Authority Ex-Parte Stanley Mombo Amuti* [2018] eKLR the court held as follows as regards extension of time;

Judicial Review is no longer a common law prerogative, but is now a constitutional principle to safeguard the constitutional principles, values and purposes. The Judicial Review powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the *Constitution*.

It is therefore my conclusion that in an application for extension of time such as the one before me, all that an applicant is required to do is to demonstrate that he has a good reason for failing to file the application within the time allowed by the court or sufficiently account for the delay. It will also be a consideration that the impugned decision seeking to be challenged violates or threatens to violate the Bill of Rights or violation of the *Constitutio*n. Provisions limiting access to courts must be read in a manner that conforms with constitution the constitution. No matter how noble and worthy of admiration the common law principles are, if they are simply irreconcilable with constitutional parameters, then the Constitution must prevail. Suffice to say that the ex parte applicants have in the recitals in the heading to their application invoked Articles 21 (1), 23 (3) (f), 25 (c), 27 (1), 47 (1), 49 (1) (d) & 50 (2) of the *Constitution*.

44. The court then also went ahead to extend time for the filing of the substantive application.

45. It is important to look at what the rules provide. Order 50 Rule 6 of the *Civil Procedure Rules* provides as follows;

> " Power to enlarge time [Order 50, rule 6.]
>
> Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed: Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise."

46. From the foregoing authorities, which I agree with, the courts appear to give a wide interpretation of Order 50 Rule 6 of the *Civil Procedure Rules* when it comes to applications to extend time as set out in the Rules or by an order of the court.

47. It is my considered view that the court had powers to extend time within which the applicant was to file the substantive application. Instead of pursuing that avenue, the applicant withdrew the application 'filed' on 27th June 2022, upon the realisation that it had been discovered that the application had actually been filed on 13th July 2022, way out of the time set by the court, or the law. The applicant has now filed a fresh application for leave. It is word for word like the one dated 30th May 2022, and which was allowed by the court.

48. I am in agreement with the interested party that this issue was spent when the application for leave was heard and determined. The applicant cannot now ignore the earlier orders and seek fresh leave. She must account for the lack of compliance with the orders of the court on the filing of the substantive application. In the fresh application the applicant does not mention the earlier orders of the court, painting a picture that this is a matter that has not been previously handled by the court.

49. The applicant has pointed out to the uncertainty in whether the court has jurisdiction to extend time for the filing of an application for extension of time. It is argued that the applicant realised that Order 53 Rule 3 of the *Civil Procedure Rules* are couched in mandatory terms with no provisions for extension of time. Counsel cited *Peter Orengo Migiro (suing on behalf of the Late Christopher Orenge Makori) v Samwel Omagwa James & 2 others* (*supra*).

50. With all due respect to counsel, and if I read the authority correctly, the issue at hand was that of extension of time to file an application for leave vis-- a vis the time of the act or decision that was sought to be quashed. This is in line with the provisions of Section 9 (2) of the *Law Reform Act* which provides that;

> " Subject to the provisions of subsection (3), rules made under subsection (1) may prescribe that applications for an order of mandamus, prohibition or certiorari shall, in specified proceedings, be made within six months, or such shorter period as may be prescribed, after the act or omission to which the application for leave relates."

51. On that issue, I think that the law seems to be settled that the court has no jurisdiction to extend such time, though I must add that there is also no conformity in the decisions of the superior court on that as well, in view of the Constitutional provisions cited above.

52. In the present case, the extension I am referring to is in regard to the time of filing the substantive application, after the period set by the court, or the rules, lapsed. These are two different issues.

53. In *Re Globe Tour*[1998] eKLR, the court held that;

> " In the matter before me leave was obtained in Misc. Civil Application No.39/98. and on the face of it, properly so obtained. But it lapsed before another mandatory provision of the law was complied with. It is now contended that the lapse or dissipation of such leave was of no consequence and only meant that fresh leave was required before the Applicant can proceed to the next stage in the Judicial Review process. I am urged to ignore the first grant of leave and confirm the leave granted de novo by my brother Hayanga, J. Should I do so? I think not.
>
> As stated above, the matter of leave has been enacted by Parliament itself as the very foundation of proceedings for Judicial Review, It made provisions for time limits also. As such, it would make no sense, and I would not be persuaded to make such interpretation, for a court to hold that the grant of leave was of no consequence and that as many applications-for leave as an Applicant desires may be made, if for some reason the previous leave becomes inoperative. The parallel drawn by Mr. Kinyua where a Plaintiff is allowed to file a fresh suit where one is dismissed on technical grounds is not available to the Applicant."

54. After considering the objection, I am inclined to agree with the interested party that the same was fully determined by the court that granted the leave and the applicant cannot come back to seek fresh leave. The option left for the applicant is to seek an extension of time as set out above, and explain why she did not comply with the orders of the court on the time for filing the substantive application.

55. It is thus my finding that the Preliminary Objection herein has merits and the same is allowed.

56. The application dated 23rd August 2022 is hereby struck out for being res judicata, with costs to the interested party.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 3RD DAY OF MAY, 2023.

H. M. NYAGA

JUDGE

In the presence of;

C/A Jeniffer

Mr. Ratemo for interested party

Ms Nelly for Wamwayi for applicant