REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 227 OF 2019 (J.R)

IN THE MATTER OF AN APPLICATION BY JOIN VEN INVESTMENTS LIMITED FOR LEAVE TO APPLY FOR JUDICIAL REVIEW UNDER SECTION 8 AND 9 OF THE LAW REFORM ACT CHAPTER 26 OF THE LAWS OF KENYA AND ORDER 53 OF THE CIVIL PROCEDURE RULES 2010, LAWS OF KENYA

-AND-

IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

-AND-

IN THE MATTER OF THE NATIONAL ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION ACT, CHAPTER 387 LAWS OF KENYA

-AND-

IN THE MATTER OF THE OCCUPATION OF THE UNITS ERECTED ON ALL THAT PROPERTY KNOWN AS LAND REFERENCE NUMBER 12715/290

-AND-

IN THE MATTER OF CRIMINAL CHARGES PREFERRED AND THREATENED TO BE PREFERRED AS AGAINST THE DIRECTORS AND EMPLOYEES INCLUDING KIBERA CRIMINAL CASE NUMBER 4174 OF 2016 (R-VS- TAHERALI HASSANALI & ANOTHER)

-BETWEEN-

REPUBLIC OF KENYA.....APPLICANT

-VERSUS-

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....1ST RESPONDENT

CHIEF MAGISTRATE'S COURT, KIBERA LAW COURTS.....2ND RESPONDENT

EX PARTE.....JOIN VEN INVESTMENTS LIMITED

AND

360 DEGREES APARTMENTS RESIDENTS ASSOCIATION.....INTERESTED PARTY

RULING

1. By a Motion on Notice dated 2nd April, 2019, the ex parte applicant herein, **Join Ven Investments Limited**, seeks the following orders:

> **a. CERTIORARI to remove into the High Court for purposes of quashing the decision by the National Environment Management Authority to institute and undertake criminal proceedings against JOIN VEN INVESTMENTS LIMITED, its**

directors, servants and/or employees at the Chief Magistrate Court, Kibera Law Courts in Criminal Case Number 4174 of 2016 (*R-vs- Taherali Hassanali & Another* or such other Court within the jurisdiction of this Honorable Court for a charges relating to the user of the development on ALL THAT PROPERTY KNOWN AS Plot Number 12715/290 as contained in the Charge Sheet;

b. CERTIORARI to remove into the High Court for purposes of quashing the entire proceedings in Kibera Law Courts in Criminal Case Number 4174 of 2016.

c. PROHIBITION directed at the NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY, the 1st Respondent, its agents, servants and/or employees and the 2nd Respondent or such other Court restraining them from continuing, sustaining or proceedings with proceedings including but not limited to Kibera Law Courts in Criminal Case Number 4174 of 2016 as against JOIN VEN INVESTMENTS LIMITED, its directors, servants and/or employees with respect to any dealing related to ALL THAT PROPERTY KNOWN AS LAND REFERENCE NUMBER 12715/290;

d. A MANDAMUS do issue directing the 1st Respondent to impartially conduct inquiries in terms of the observation made during an inspection carried out within ALL THAT PROPERTY Known as Plot Number 12715/290 and allow such party as it shall in law find culpable a reasonable opportunity to undertake any improvement activities that it shall deem just and fit in the circumstances.

2. According to the ex parte applicant, at all material times relevant to these proceedings a company known the applicant was the registered owner of ALL THAT PROPERTY KNOWN AS 1215/290, Syokimau (hereinafter referred to as **"the suit property"**) wherein residential apartments known as Three Degrees Sixty Apartments were erected. The said units were then sold to third parties in 2011 and what remains is for the reversionary interest to be registered in favour of the Interested Party.

3. According to the ex parte applicant, the Interested Party receives service charge from the Purchasers and manages the complex including the play grounds, street lighting and sewer plants upon the issuance of Certificates of Occupation. In fact, the management of the affairs of the units vests in a management company which has third party Purchasers constituted as shareholders and the Applicant does not sit on the management of Interested Party.

4. It was averred that the 1st Respondent issued an Improvement Notice dated 20th November 2018 to the Interested Party and the Applicant stating as follows;

"based upon the findings within your facility you are required to improve the following IMMEDIATELY

Report to NEMA Police Unit on Thursday 22nd November 2018 at 10.00 am failure to which legal action will be taken without any further reference to you"

5. It was averred that this compliance with the law was as result of a protest made by the Applicant through its directors of the overreach by the 1st Respondent in not issuing mandatory Notices to parties and which informed proceedings in Machakos JR Number 85 of 2017. According to the deponent of the supporting affidavit, he attended NEMA Police Unit together with the Applicant's Advocate in compliance with the Improvement Notice. However, there was no representation from the Interested Party in spite the fact that the Notice had initially been directed to it and actually served upon its representative one **Samuel Omondi**.

6. At the said NEMA Police Unit, the ex parte applicant explained that it does not own the units erected on the suit property; that neither the Applicant nor its directors reside on the suit property; that the Applicant does not manage the suit property; that the Applicant does not collect service charge from the owners of the units erected on the suit property;that the Sewer Plant on the suit property was managed and installed by the Interested Party; and that the Applicant was being used by the Interested Party to avoid its obligations to the regulator.

7. Given that no decision would have been made in absence of the Interested Party, the meeting was adjourned with an undertaking that the 1st Respondent would secure a meeting on site with the Interested Party. After the applicant followed up with the 1st Respondent and after several remainders, a meeting was convened at the suit property at the offices of the Interested Party chaired by **Sophie Mutemi**, a NEMA Inspector at which the Interested Party admitted that the sewer plant on the property was a new plant that was installed by them and it was them who were managing the same. However, the 1st Respondent wanted to be addressed on the "capacity" of the sewer plant that was installed by the Interested Party and that of the one installed by the Applicant when it handed over the project and it was the Applicant position that if the sewer plant installed and approved at the commissioning of the project had the capacity to sustain the complex, then it could not be asked to repair the same since the issues management were within the scope of the Interested Party's duties; that if it turned out that the sewer approved by NEMA at the commissioning of the project was not able to now handle the capacity of the complex, it, the Applicant would work with NEMA to conduct urgent remedial works and thereafter handover management to the Interested Party; that if the Sewer plant had been mismanaged by the Interested Party, then it should work with the 1st Interested Party to remedy the breach; and that the Interested Party had to produce the Effluence Discharge Licence. The said meeting, it was averred was adjourned with undertaking that both the Applicant and the Interested Party would submit brochure detailing the specifications of the Sewers on the suit property to enable the 1st Respondent undertake further inspection and technical analysis.

8. According to the Applicant, it has in compliance with the directions by the 1st Respondent submitted the documents required and the prosecutor of the 1st Respondent is aware of the matters respecting the suit property as one of the letters from the Interested Party was sent to him and the Applicant continue to await the communication from the 1st Respondent to enable it deal further herein.

9. It was the applicant's position that the 1st Respondent cannot sustain and/or seek to prosecute the Applicant on matters that are the subject

of the Improvement Notice which is being addressed by its Inspectors. However, in spite failing to comply with the Notice, the Interested Party was not charged with any offence. The applicant's position is that the conduct of the 1st Respondent through its prosecutor to selectively pursue the Applicant and/or its Officers who are neither involved in the matters respecting the suit property is both discriminatory, unfair and in pursuit of an ulterior motive because the Applicant has and continues to abide by all the directions of the Regulators including the regulation of its approved drawings. The 2nd Respondent however insists on arraigning in court the elderly sickly officers of the Applicant for non-environmental reasons.

10. The Applicant contended that the summons issued and the intended criminal proceedings are fraught with impropriety for the reasons that the Applicant/its directors are not the proper accused persons insofar as they do not own nor occupy the units on the suit property; that the entirety of the 1st Respondent decision to institute criminal proceedings against the Applicant's directors is, on the whole, irrational, unreasonable and will lead to an absurd result; and that the 1st Respondent has wrongfully exercised its discretion by electing to prosecute the Applicant for the achievement of a collateral purpose which is to insulate the real manager of the units erected on the suit property from discharging its duties to the residents from whom they collect service charge.

11. The applicant therefore contended that there is no just cause to charge a person who has complied with the Improvement Notice.

12. The Applicant averred that the circumstances herein are distinct from the proceedings in Machakos JR Number 85 of 2017 in so far as the Improvement Notice was issued after the commencement thereof and that after the issuance of the Improvement Notice dated 20th November 2018, the 1st Respondent has, in its regulatory role, chaired meetings involving the Applicant and the Interested Party.

13. It was disclosed that further that the Applicant and the Interested Party have filed respective documents in an Arbitration respecting the management of the apartments developed on the suit property and that the Arbitration which is part heard before **Willy Mutubwa** has had the following admissions made by the Interested Party;

i. That they are the ones who have been managing the suit property from December 2012;

ii. That they collect service charge from home owners at the suit property;

iii. That they installed a Sewer Plant through a company known as AIDI Kenya Limited;

iv. That before December 2012, there was no Improvement Notice issued by the 1st Respondent to the Applicant; and

v. That the Interested Party has never retained an expert to run the sewer plant on the suit property;

14. It was averred that the Interested Party in the filing before the Arbitrator exhibited a letter dated from its advocates by which it, unconstitutionally and illegally directed the 1st Respondent to institute the criminal proceedings as against the Applicant and that it was in fact confirmed in correspondence between the 1st Respondent and the Interested Party, which the Applicant was not privy to, that the 1st Respondent solely acted on directions issued by the Interested Party. In the Applicant's belief, had the 1st Respondent conducted itself legally and without being directed, it would have not have reached the decision it reached as it did not undertake any investigations as to the management of the sewer plant; it did not liaise with the County Government on rectification of plans issued; it did not isolate issues caused by non-maintenance of the sewer plant by the Interested Party and rectification of plans which are totally distinguishable; it did not consider the Applicant role as a home owner in the suit property was limited to paying service charge to the Interested Party; it did not appreciate that the Applicant was not resident neither was it managing the property; and it did not consider rights passed to Lessee in a conveyance and how such affect regulation.

15. The Applicant's view was that this matter is not res judicata as the acts of the 1st Respondent relate to the same property and same event and the issues complained off are in respect of its continued failure to address itself to the real issues of the matter over the suit property and a motivation by the prosecution on ulterior motives and considerations which are subject of an inquiry elsewhere. To him, as late as 23rd April 2019, the Interested Party was rightly engaging parties on matters the subject of the prosecution. In its belief, the regulator cannot engage in acts geared towards addressing issues in an Improvement Notice while holding an unlawful prosecution on the Applicant's aging directors who have never managed the sewer plant under consideration.

16. It was averred by the applicant that it is also been brought to its attention that the 1st Respondent has all along suppressed the fact that it has previously taken out criminal prosecutions against the Interested Party over the same charge, hence the Court ought to interrogate the motivation and basis of pursuing criminal proceedings as against the Applicant.

17. In its response, the 1st Respondent took up preliminary objections based on the following grounds:

i. THAT this application is res judicata the same having been filed, heard and determined vide Machakos HC Judicial review 85 of 2017. The same is a gross abuse of court process.

ii. THAT the substratum of the present application being environmental issues/an environmental prosecution (as evident from the charge sheet sought to be prohibited), this application ought to be filed before the Environment and Land Court which has jurisdiction under section 13 of Act 19 of 2011 to hear and determine the sought Orders.

iii. THAT the High Court is prohibited by Article 165(5) of the Constitution from hearing matters otherwise reserved for the Environment and Land Court and thus has no jurisdiction to hear this application.

18. The 1st Respondent however abandoned grounds (ii) and (iii). This ruling is therefore in respect of the objection set out in ground (i) that this application is res judicata the same having been filed, heard and determined vide Machakos HC Judicial review 85 of 2017.

Determination

19. I have considered the facts of this case as well as the submissions made on behalf of the parties herein. The issue for determination is whether these proceedings are *res judicata* and whether that doctrine may be invoked in these proceedings in the manner the 1st Respondent has done.

20. *Res Judicata*, strictly speaking is provided under section 7 of the ***Civil Procedure Act*** which in the preamble to the Act is "An Act of Parliament to make provision for procedure in civil courts". However, it is now well settled that judicial review applications are neither criminal nor civil in nature. See **Commissioner of Lands vs. Kunste Hotels Ltd (1995-1998) 1 EA 1.**

21. In **Commissioner of Lands vs. Hotel Kunste Ltd** (supra) and **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354** it was held that Judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal and the ***Civil Procedure Act*** does not apply since it is governed by sections 8 and 9 of the ***Law Reform Act*** being the substantive law and Order 53 of the ***Civil Procedure Rules*** being the procedural law. Therefore, strictly speaking section 7 of the ***Civil Procedure Act*** does not apply to judicial review proceedings. In fact, in **Republic vs. Judicial Service Commission *ex parte* Pareno [2004] 1 KLR 203-209** it was held that *res judicata* does not apply to judicial review. See also **Re: National Hospital Insurance Fund Act and Central Organisation of Trade Unions (Kenya) Nairobi HCMA No. 1747 of 2004 [2006] 1 EA 47.**

22. This, however, does not mean that the Court is powerless where it is clear that by bringing proceedings a party is abusing the court process. Whereas *res judicata* may not be invoked in judicial review proceedings, the Court retains an inherent jurisdiction to terminate proceedings where the same amounts to an abuse of its process. One of cardinal principles of law is that litigation must come to an end and where a court of competent jurisdiction has pronounced a final decision on a matter to bring fresh proceedings whether as judicial review proceedings or otherwise would amount to an abuse of the process of the court and would therefore not be entertained. The Court in terminating the same would be invoking its inherent jurisdiction which is not a jurisdiction conferred by section 3A of the ***Civil Procedure Act*** as such but merely reserved thereunder. In **Kenya Bus Services Ltd & Others vs. Attorney General and Others [2005] 1 EA 111; [2005] 1 KLR 743** it was held:

> **"It is trite law that an *ex parte* order can be set aside by the judge who gave it or by any other judge. The Civil Procedure Rules provide for this. Our Constitution does assume the existence of supportive Civil Procedure regime in so far as the same is not inconsistent with the Constitution. There is nothing inconsistent with the Constitution in the act or principle of setting aside of *ex parte* orders for good reasons. If an order obtained in a Constitutional application is incompetent or improperly obtained there cannot be any valid reason why the court would not have the jurisdiction to set it aside. Setting aside would be properly justified on grounds of doing justice and fair play and good administration of justice and therefore in furtherance of public policy...Where there is no specific provision to set aside the courts power or jurisdiction would spring from the inherent powers of the court. Whereas ordinary jurisdiction stems from the Act of Parliament or statutes, the inherent powers stem from the character or the nature of the court itself – it is regarded as sufficiently empowered to do justice in all situations. The jurisdiction to exercise these powers was derived, not from statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason such jurisdiction has been called "inherent". For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent the process being obstructed and abused. Such a power is intrinsic in a superior court, its very lifeblood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction, which is inherent in a superior court of law, is that which enables it to fulfil itself as a court of law. The judicial basis of this jurisdiction is therefore the authority of the Judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner. The need to administer justice in accordance with the Constitution occupies an even higher level due to the supremacy of the constitution and the need to prevent the abuse of the Constitutional provisions and procedure does occupy the apex of the judicial hierarchy of values. Therefore the Court does have the inherent powers to prevent abuse of its process in declaring, securing and enforcing Constitutional rights and freedoms. It has the same power to set aside *ex parte* orders, which by their very nature are provisional." See *The Reform of Civil Procedure Law and Other Essays in Civil Procedure (1982) By Sir Isaac J H Jacob*** and **WEA Records Limited vs. Visions Channel 4 Limited & Others (1983) 2 All ER 589; R vs. Land Registrar Kajiado & 2 Others Ex Parte John Kigunda HCMA No. 1183 of 2004.**

23. As was stated by **Kimaru, J** in **Stephen Somek Takwenyi & Another vs. David Mbuthia Githare & 2 Others Nairobi (Milimani) HCCC No. 363 of 2009**:

> **"This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilised legal process it is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract *res judicata* rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it".**

24. I associate myself with the holding in **Karuri & Others vs. Dawa Pharmaceuticals Company Limited and Others [2007] 2 EA 235** that nothing can take away the courts inherent power to prevent the abuse of its process by striking out pleadings or striking out a frivolous and vexatious application and that baptising such matters constitutional cannot make them so if they are in fact plainly an abuse of the court process.

25. Accordingly, the Court may in proper cases invoke its inherent jurisdiction to make such orders as may be necessary for the ends of justice or to prevent abuse of its process and this may be done where the principles of *res judicata* would be applicable.

26. In **Omondi vs. National Bank of Kenya Ltd & Others [2001] KLR 579; [2001] 1 EA 177** it was held that:

> **"The objection as to the legal competence of the Plaintiffs to sue (in their capacity as directors and shareholders of the company under receivership) and the plea of *res judicata* are pure points of law which if determined in the favour of the Respondents would conclude the litigation and they were accordingly well taken as preliminary objections…In determining both points the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters…What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done *ex debito justitiae* (as of right) but as a matter of judicial discretion."**

27. I therefore hold that the doctrine of *res judicata* was properly taken in these proceedings. However, it can only be successfully raised where the pleadings and the decision in the former suit are part of the record. It is therefore important to revisit the legal principles guiding the applicability of the doctrine of *res judicata*.

28. Section 7 of the ***Civil Procedure Act, 2010*** provides as hereunder:

> **"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."**

29. As regards the rationale of the doctrine of *res judicata*, reliance was placed on the decision of the Court of Appeal in **Independent Electoral & Boundaries Commission –vs- Maina Kiai & 5 Others (2017) eKLR.**

> **"The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice."**

30. In the **Maina Kiai** case (supra), the Court quoted with approval the Indian Supreme Court in the case of **Lal Chand vs. Radha Kishan, AIR 1977 SC 789** where it was stated;

> **"The principle of res judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue. 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."**

31. In **Lotta vs. Tanaki [2003] 2 EA 556** it was held as follows:

> **"The doctrine of *res judicata* is provided for in Order 9 of the Civil Procedure Code of 1966 and its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgement between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. The scheme of section 9 therefore contemplates five conditions which, when co-existent, will bar a subsequent suit. The Conditions are: (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; (ii) the former suit must have been between the same parties or privies claiming under them; (iii) the parties must have litigated under the same title in the former suit; (iv) the court which decided the former suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit."**

32. In **Gurbachan Singh Kalsi vs. Yowani Ekori Civil Appeal No. 62 of 1958** the former East African Court of Appeal stated as follows:

> **"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 a 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 a judgement, 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…No more actions than one can be brought for the same cause of action and the principle is that where there is but one cause of action, damages must be assessed once and for all…A cause of action is every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

33. In **Apondi vs. Canuald Metal Packaging [2005] 1 EA 12 Waki, JA** stated as follows:

"A party is at liberty to choose a forum which has the jurisdiction to adjudicate his claim, or choose to forego part of his claim and he cannot be heard to complain about that choice after the event and it would be otherwise oppressive and prejudicial to other parties and an abuse of the Court process to allow litigation by instalments."

34. However, it is trite that the mere addition of parties in a subsequent suit does not necessarily render the doctrine of *res judicata* inapplicable since a party cannot escape the said doctrine by simply undertaking a cosmetic surgery to his pleadings. If the added parties peg their claim under the same title as the parties in the earlier suit, the doctrine will still be invoked since the addition of the party would in that case be for the sole purpose of decoration and dressing and nothing else. Under explanation 6 to section 7 of the ***Civil Procedure Act***, where persons litigate *bona fide* in respect of a public right claimed in common by themselves and others, all persons interested in such right shall, for the purposes of the section, be deemed to claim under the persons so litigating.

35. In the cases of **Mburu Kinyua vs. Gachini Tuti [1978] KLR 69; [1976-80] 1 KLR 790** and **Churanji Lal & Co vs. Bhaijee (1932) 14 KLR 28** it was held that:

"However, caution must be taken to distinguish between discovery of new facts and fresh happenings. The former may not necessarily escape the application of the doctrine since parties cannot by face-lifting the pleadings evade the said doctrine. In the case of Siri Ram Kaura vs. M J E Morgan Civil Application No. 71 of 1960 [1961] EA 462 the then East African Court of Appeal stated as follows:

"The general principle is that a party cannot in a subsequent proceeding raise a ground of claim or defence which has been decided or which, upon the pleadings or the form of issue, was open to him in a former proceeding between the same parties. The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of res judicata...The law with regard to *res judicata* is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in a litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show you that this is a fact which entirely changes the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have been ascertained by me before...The point is not whether the respondent was badly advised in bringing the first application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when he made his first application."

36. In **Nancy Mwangi T/A Worthlin Marketers vs. Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd) & 2 others [2014] eKLR** the Court quoted the case of **E.T vs. Attorney General & Another (2012) eKLR** wherein the court noted thus:

"The courts must always be vigilant to guard 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 in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi Vs 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 Vs 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 fact lift on every occasion he comes to curt, then I do not see the use of the doctrine of res judicata….."

38. It is therefore clear that parties are not to evade the application of *res judicata* by simply conjuring up parties or issues with a view to giving the case a different complexion from the one that was given to the former suit.

38. In **Republic vs. NEMA & Another ex parte Taherali Hassan Ali & Another [2018] eKLR,** the ex parte applicants were **Taherali Hassan Ali** and **Zoeb Ezzi**. It is however clear that they brought the said proceedings in their capacity as agents of the ex parte applicant herein, **Join Ven Investments Limited**. In that case the applicants sought the following orders:

a. Certiorari to remove into the High Court for purposes of quashing the decision by the National Environment Management

Authority to institute and undertake criminal proceedings against Taherali Hassanali and Zoeb Ezzi, purportedly as directors of Join Zein Investments Limited, at the Chief Magistrate Court, Kibera Law Court in Criminal Case No. 4174 of 2016 (R vs. Taherali Hassanali & Another) for charges, inter alia disclosed as "on diverse dates between 17th March and 10th August 2016 at around 10.00am in Syokimau area Mavoko sub County Machakos in the Republic of Kenya and being directors/employees of Join Ven Investments Limited were found discharging effluent into the environment without discharge licence thus contravening the said regulations" and other charges particulars of which relate to the devilment on ALL THAT PROERTY KNOWN AS Plot Number 12715/290 as contained in the charge sheet;

b. Certiorari to remove into the High Court for purposes of quashing the entire proceedings in Kibera Law Courts Criminal Case Number 4174 of 2016 (R vs. Taherali Hassanali & Another);

c. Prohibition directed at the National Environment Management Authority, the 1st Respondent, its agents and/or employees and the 2nd Respondent or such other Court restraining them from continuing, sustaining or proceeding with proceedings including but not limited to Kibera Law Courts in Criminal Case Number 4174 of 206 (R vs. Taherali Hassanali & Another) as against the Applicants herein with respect to any dealing related to ALL THAT PROERTY KNOWN AS Plot Number 12715/290;

39. It is clear that apart from the addition of an order of mandamus, the orders sought in the previous proceedings are substantially the same as those sought in these proceedings. The parties in both cases are substantially the same since the ex parte applicant in the current suit is the entity under which the ex parte applicants in the former suit claimed. The case that is sought to be quashed is the same and as I have said the prayers are substantially the same.

40. In the previous suit, this court pronounced itself as hereunder:

"In this case the applicant's case is that they ought not to be charged with the offences in question since the property from where the effluent is alleged to be discharged known as Three Sixty Degrees Apartments were erected and sold to third parties upon the issuance of Certificates of Occupation. Accordingly, the management of the affairs of the units vests in a management company which has third party Purchasers constituted as shareholders and that neither of the Applicants reside in the said units nor are they directors of the management company. In other words the ex parte applicants' case is that if any crime has been committed, it is not them who ought to be charged but the people under whom the management of the said units fall. The 1st Respondent's case on the other hand is that the obligation to set up a sewerage treatment plant was the responsibility of the ex parte applicants and not the 3rd parties. This obligation, it was contended the ex parte applicants set out to discharge by applying for an Effluent Discharge Licence but which could not issue due to irregularities and for which the ex parte applicants have been charged. It was therefore the 1st Respondent's case that the responsibility to set up a functioning sewerage treatment plant lies with the ex parte applicants squarely. It is clear that the parties herein have adopted diametrically opposed positions as regards who between the ex parte applicants and the 3rd parties had the responsibility of setting up an Effluent Treatment Plant. Obviously if it was the obligation of the 3rd parties, the ex parte applicants ought not to be liable. On the other hand if the duty to do so lies with the ex parte applicants then they cannot escape liability merely because they have parted with possession of the units in question. The long arm of the law would still follow them wherever they may go. However the determination as to who between the ex parte applicant and the 3rd parties are liable must be left for determination by the trial Court since to make such a determination in these proceedings would amount to this Court determining the guilt or innocence of the ex parte applicants. That is not the mandate of this Court exercising its judicial review jurisdiction."

41. One does not need to be a rocket scientist to see that the cause of action in the present case is substantially similar to the cause of action in the previous proceedings. In my view the grant of the orders sought herein would have the effect of overturning the decision made in the previous suit through the backdoor. That is one mischief which the twin doctrines of res judicata and abuse of the court process are meant to cure.

42. The ex parte applicant contends that since leave has been granted this Court has no option but to hear the substantive motion since to allow this objection would have the effect of setting aside leave already granted. What then should the Court do when at *inter partes* hearing it turns out that the applicant did not disclose material facts? It is trite that where a party, at the *ex parte* stage of an application fails to disclose relevant material to court and thus obtains an order from the court by disguise or camouflage the court will set aside the ex parte orders so obtained. This was the position adopted in **Hussein Ali & 4 Others vs. Commissioner of Lands, Lands Registrar & 7 Others (2013) eKLR** where it was held that:

"It is well settled that a person who makes an ex-parte Application to court, that is to say in the absence of the person who will be affected by that which the court is asked to do is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage by him. That is perfectly plain and requires no authority to justify it."

43. In this case, it is clear that at the time this Court granted leave to the applicants, the applicants knew very well that this Court had declined to grant the same orders it sought leave to seek in these proceedings. It however did not disclose the existence of the said proceedings. This Court is therefore perfectly entitled to take steps that would prevent abuse of its process as soon as that abuse is brought to its attention. As was held by the Court of Appeal in **Hunker Trading Company Limited vs. Elf Oil Kenya Limited Civil Application No. Nai. 6 of 2010**:

"The "O2 principle" poses a great challenge to the courts in both the exercise of powers conferred on them by the two Acts

and rules and in interpreting them in a manner that best promotes good management practices in all the processes of the delivery of justice. In the court's view this challenge may involve the use of an appropriate summary procedure where it was not previously provided for in the rules but the circumstances of the case call for it so that the ends of justice are met. It may also entail redesigning approaches to the management of court processes so that finality and justice are attained and decisions that ought to be made today are not postponed to another day."

44. Similarly, the same Court in **Safaricom Limited vs. Ocean View Beach Hotel Limited & 2 Others Civil Application No. 327 of 2009** expressed itself thus:

"The overriding objective is so called because depending on the facts of each case, and the circumstances, it overrides provisions and rules which might hinder its operation and therefore prevent the court from acting justly now and not tomorrow."

45. Having considered the issues raised in the preliminary objection, I find that these proceedings are caught up by the doctrine of res judicata and are therefore an abuse of the court process and are incompetent.

46. Accordingly, these proceedings are struck out with costs to the 1st Respondent.

47. It is so ordered.

Read, signed and delivered in open Court at Machakos this 22nd day of January, 2020

G V ODUNGA

JUDGE

Delivered the presence of:

Miss Lwila for Mr Luseno for the ex parte applicant

Miss Nzioka for Mr Gitonga for the 1st Respondent

CA Geoffrey