



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO. 267 OF 2017

JARED ODUOR OSODO.....1ST APPLICANT

JESSEE MBURU GITAU.....2ND APPLICANT

CHRISPUS MUNENE.....3RD APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

CHIEF MAGISTRATE, KIBERA LAW COURTS.....4TH RESPONDENT

HABIB OMAR KONGO.....5TH RESPONDENT

RULING

Applicants, Jared Oduor Osodo, Jessee Mburu Gitau and Chrispus Munene have been charged before the **Kibera Chief Magistrate's Court in Criminal Case No.2055 of 2015**. The Applicants are facing a raft of charges arising out of the registration of a certificate of lease in respect of a parcel of land known as Nairobi/Block 83/893. The charges range from **forgery of a document of title to land** contrary to **Section 350(1)** of the **Penal Code** to **procuring execution of a document by false pretences** contrary to **Section 355** as read with **Section 349** of the **Penal Code**. In total, the Applicants are facing eight (8) counts in relation to the said transaction. The Applicants filed an application before this court seeking orders of prohibition, to prohibit their prosecution in the said case because they were of the view, *inter alia*, that their prosecution was actuated by malice with a view to intimidating them from pursuing a civil claim over the suit parcel of land. In particular, the Applicants complained that the criminal proceedings were instituted against them without proper investigations being done; was instigated at the behest of the 5th Respondent; was preferred in bad faith and connected with unrelated criminal proceedings; was calculated to give the 5th Respondent an upper hand in the civil claim; that the entire prosecution was executed with the ulterior purpose of aiding the 5th Respondent in claiming the suit parcel of land. The Applicants claimed that their fundamental rights as captured under **Articles 20(1), 25(c), 27, 28,29(f), 31(a) and (b), 36(1), 40(1), 47(1), 48, 49 & 50(1) and (4)** of the **Constitution** had been infringed. They craved for orders of the court to have the said rights be vindicated.

Upon being served, the Respondents filed grounds in opposition to the application. Of importance, is the notice of preliminary objection which was filed by the Respondents to the effect that the issues that the Applicants were seeking to canvass before this court were issues which had already been considered by this court, specifically by Odunga J in **Nairobi HC Miscellaneous Civil Case No.1089 of 2007 Republic –vs- The Attorney General & 3 Others and Aviton Enterprises Ltd as the Interested Party Ex-parte John Wachira Macharia, Julius Ndiritu Miriti & Jared Oduor Osodo**. In that case, the Applicants had sought judicial review orders of prohibition, certiorari and mandamus to prohibit and restrain their prosecution in the then pending criminal charges in **Kibera Chief Magistrate's Court Criminal Case No.2168 of 2006**. That case also related to alleged forgery of title documents of the said parcel of land known as Nairobi/Block 83/893. After considering the Applicants' application, Odunga J dismissed the same with costs.

It is instructive that the Applicants herein did not mention the existence of that decision when they first made the application before this court. For completeness of record, **Kibera Chief Magistrate's Court Case No.2168 of 2006** which related to charges against the Applicants was withdrawn under **Section 87(a)** of the **Criminal Procedure Code**. New charges were laid against the Applicants in **Kibera Chief Magistrate's Court Criminal Case No. 2055 of 2015**. The charges laid against the Applicants are substantially the same charges as the

charges in the withdrawn case. It is the subsequent charges that the Applicants seek the intervention of this court to have the same quashed.

During the hearing of the preliminary objection, this court heard oral rival submission made by Ms. Akunja for the State, Ms. Robi for the 2nd, 3rd and 4th Respondents, Mr. Thuita for the Interested Party and also for the 5th Respondent and Mr. Rutto for the Applicants. The Respondents and the Interested Party all submitted that the Applicants' application had been filed in abuse of the due process of the court on account of the fact that the same issues which are sought to be canvassed in the application had been determined by the court. In essence, the Respondents and the Interested Party were saying that the issues that the Applicants seek to canvass in the present application were *res judicata*. They emphasized that it did not matter that some of the issues that the Applicants seek to canvass in the present application had not been argued in the former application. They were of the view that the issues raised in the present application were substantially the same issues that the Applicants had raised in the previous applications. In the premises therefore, the Respondents and the Interested Party urged the court to uphold the preliminary objection and dismiss the Applicants' application.

The Applicants opposed the application. The Applicants denied the assertion by the Respondents and the Interested Party that the issues raised in the present application were similar to the issues raised in the former application. They pointed out that the former suit related to different criminal charges that were laid against them and not the present charges. The Applicants reiterated that the grounds upon which they sought to quash the proceedings did not accrue until they were charged in the subsequent suit. They insisted that it was upon the filing of the fresh suit that it became clear that their fundamental rights cited in the application had been infringed. They insisted that the issues raised in the present application were different from the issues raised in the former application. For added measure, they pointed out that the parties in the former application were not the same as the parties in the present application. In the premises therefore, the Applicants urged the court to disallow the Respondents' and the Interested Party's preliminary objection and hear the application on its merit. The Applicants reiterated that the court should bear in mind that it had the duty to uphold the broader principle of justice that will result in the upholding of the fundamental rights of the Applicant.

This court has evaluated the facts in support of the application and the applicable law. For the Respondents and the Interested Party to succeed in their objection to have the suit dismissed on account that the same was *res judicata*, they must fulfill the conditions set by **Section 7 of the Civil Procedure Code** which provides that:

“No court shall try any suit or issue in which the matter directly or substantially in issue has been directly or substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has substantially been raised, and has been heard and finally decided by such court.”

The court in **Okiya Omtatah Okoiti v Communication Authority of Kenya & 14 Others [2015] eKLR** held thus:

“17. For res judicata to be invoked in a civil matter therefore, the issue in a current suit must have been previously decided by a competent court. Secondly, the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in a subsequent suit where the doctrine is pleaded as a bar. Thirdly, the parties in the former suit should be the same parties or parties under whom they or any of them claim, litigating under the same title. (See the case of Karia and Another vs Attorney General and Others [2005] 1EA 83.

18. The rationale behind the provisions of Section 7[of the Civil Procedure Act] entrenching the doctrine of res judicata is that if the controversy in issue is finally settled, determined or decided by a competent court, it cannot be reopened. The doctrine is therefore based on two principles; that there must be an end to litigation and that a party should not be vexed twice over the same cause. This is what was held with approval in Omondi vs National Bank of Kenya Ltd and Others [2001] EA 177.

The Court of Appeal in **Pop-In (Kenya) Ltd & 3 Others v Habib Bank AG Zurich [1990] KLR 609 at Page 612** held thus:

“On the application of res judicata, appellant's main and final position is well within the decision in Yat Tung Investment Co Ltd vs Dao Heng Bank Ltd and Another [1975] AC 581 as is clear from the following passage which repays quotation:

“But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. The locus classicus of that aspect of res judicata is the judgment of Wingram VC in Henderson v Henderson (1843) Hare 100, 115, where the Judge says:

“Where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment, but 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.”

Taking into consideration the above applicable principles in light of the facts of this application, the following are the facts that this court was able to glean to be common in the previous suit which was determined by Odunga J and the present application:

I. In the former suit and the present suit, the Applicants seek to stop their criminal prosecution over charges laid against them in

respect of an alleged forged certificate of lease of a parcel of land Nairobi/Block 83/893.

II. In the previous suit and the present suit the Respondents are the same save that more respondents have been added in the present suit.

III. The orders that the Applicants craved for in the previous application are substantially the same as the orders they are seeking in the present application.

IV. The grounds in support of the previous application are substantially the same as the grounds in support of the present application. The Applicants are essentially saying that their prosecution was maliciously instigated at the behest of the 5th Respondent who desires to have an advantage in a civil suit regarding the ownership of the suit parcel of land.

V. The court in the previous suit substantially determined the issues that the Applicants seeks to re-canvass in the present suit.

If there is any doubt that Odunga J considered the issues that the Applicants seek to re-litigate in the present suit, this court will go no further than to quote what the Learned Judge said in Paragraph 24 in the previous case *i.e.* **Nairobi HC Miscellaneous Civil Case No.1089 of 2007 Republic vs Attorney General & 3 Others and Aviton Enterprises Ltd (Interested Party) Exparte John Wachira Macharia & 2 Others:**

“In this case the exparte applicants’ case is that the respondent is using the criminal process to circumvent the civil case. However, the mere fact that criminal proceedings are being undertaken at the same time as the civil proceedings does not ipso facto amount to an abuse of the court process. The applicant ought to go further and show that the dominant motive for the institution of the criminal proceedings is to scuttle the civil process or force the applicant into abandoning his civil claim or force the applicant into submitting into the civil claim....In this case the criminal process has already commenced and it is not contended that in the course of the said proceedings an event took place which manifested an intention to secure some other purpose than the need to vindicate the committal of the offences charged. It must be remembered that justice must be done to both the complainant and the accused and where there is evidence upon which the prosecution can reasonably mount a prosecution, it is not for the High Court in a judicial review proceeding to inquire into the sufficiency or otherwise of such evidence since the High Court ought not to usurp the role of the trial court in determining the merits of the criminal case.”

In the premises therefore, it was clear to this court that the Applicants want to re-litigate issues which have already been determined by a court of competent jurisdiction. Some of the issues raised by the Applicants may be new but they do not change the core of the Applicants’ application which is substantially or wholly similar to the suit that was determined by Odunga J. It can be said that the issues raised by the Applicants in the present application is new wine in an old wine skin. The wine skin is still the same notwithstanding the new wine in it. Those were the issues which the Applicants ought to have raised in the previous suit. To raise them in the present suit makes the said new issues cosmetic. This court therefore holds that the present application is *res judicata* and ought to be dismissed.

The preliminary objection raised by the Respondents and the Interested Party has merit. This suit being *res judicata* is hereby dismissed. It is so ordered.

DATED AT NAIROBI THIS 23RD DAY OF JULY 2019

L. KIMARU

JUDGE