REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 441 OF 2015

EDWARD AKONGO OYUGI…..……...……..1ST PETITIONER

KAMOJI WACHIRA……..2ND PETITIONER

JOSEPH OTIENO MALO……..……..3RD PETITIONER

VERSUS

ATTORNEY GENERAL…...……...RESPONDENT

RULING

1. The three Petitioners lodged the instant Petition on 22nd October 2015. They each swore an affidavit in support of the Petition. They alleged that they had been detained without trial and tortured in the aftermath of the 1982 failed coup d'état. The Petitioners sought a declaration that their fundamental rights and freedoms were contravened and grossly violated by the officers of the Government. They sought a declaration that they were entitled to general, exemplary and punitive damages. They sought compensation. They also sought costs.
2. On the 20th November 2015, the Respondent filed an objection to the Petition. The Respondent sought to have the objection argued *in limine*. The objection was to the effect that the Petitioners claim had previously been adjudged. That it was res judicata. The Respondent effectively, through his objection, sought to prevent the Petitioners from having another day in court on the basis that a similar or substantially similar claim had been concluded by a court of competent jurisdiction. The Respondent referred to High Court Misc. Civil case No. 60 of 1984 (hereafter "the previous case"). A copy of the judgment delivered by Simpson C.J in the said case on 24th April 1984 was annexed by the Petitioners to their respective affidavits.
3. Ms. Ann Mwangi, urging the objection on behalf of the Respondent, was clear that the Petitioners' claim had been decided and that the judgment rendered in 1984 was conclusive upon the parties in any subsequent litigation involving the same matter. The result was that Simpson C.J gave the detention now being question by the Petitioners a seal of approval after interrogating the circumstances that led to the detention and the relevant law then obtaining alongside the retired Constitution. Ms. Mwangi urged the court to ensure that litigation was brought to an end, insisting that the current cause of action was similar to the previous one.
4. Counsel relied on the cases of **Michael Mutinda Mutemi v The Attorney General HCCP No 28 of 2015** as well as **Gordon v Gordon [1952] 59 So 2d 40** both for the proposition that a final decree or judgment of a court of competent jurisdiction once it becomes absolute, puts to rest and

entombs in eternal quiescence every adjudicated as well as justiciable issue between two parties to a dispute.

5. Mr. Suyianka Lempaa, in his usual self, was brusque in response. Counsel stated that the Petitioners had been forthright and indeed disclosed the existence of the 1984 case. Counsel added that the 1984 case simply concerned an application for habeas corpus. All the applicants in the 1984 case had sought on behalf of the Petitioners was an order for the production of the Petitioners and their ultimate release. This was declined but that did not mean the Petitioners could never challenge their detention or the torture fetched on them by state agents whilst in detention. For completeness, Mr. Lempaa stated that the issues raised by the current Petition are certainly different from what was raised before Simpson CJ in 1984.
6. Counsel relied on the case of **Bernard Mugo Ndegwa v james Nderitu Githae & 2 Others HCCC No 101 of 2006** for the proposition that when a plea of res judicata is raised, the court must always cautiously interrogate the two cases and determine whether the issues determined in the first suit are similar to those in the second suit and, if not, try and ascertain why they were not previously raised.
7. For starters, I would state that the first tenet of the res judicata doctrine is that there must exist two suits between the same parties or parties litigating on their behalf. It is clear that the 3rd Petitioner herein was not in the mix of 1984. The ex parte applicant in the previous case was the 2nd Petitioner herein. The application had been filed on his behalf as well as on behalf of the 1st Petitioner herein, one George Moseti Anyona and a Mr. Koigi wa Wamwere. All had been detained without trial.
8. The objection raised by the Respondent would therefore not apply to the 3rd Petitioner Joseph Otieno Malo. His claim herein must subsist for determination on merit or otherwise.
9. I must also point out that I have no doubt that the principle of res judicata applies to all court proceedings for the simple reason that it is intended in the main to propagate the public policy that parties to a judicial decision should not be allowed to re-litigate the same question subsequently before the same forum: see the case of **Aggrey Chiteri -v- Republic HCCP No. 260 of 2015 [2016]eKLR** where the court cited the case of **Crown Estate Commissioners -v- Dorset County Council [1990] 1 ALL ER 1923.** The application of the principle to constitutional litigation where the Petitioner alleges violation of his fundamental freedom or rights must however be with abundant caution: see **Aggrey Chiteri –v- Republic *(Supra)*.**
10. The law is also now relatively clear that for a plea of res judicata to succeed, the Respondent must establish four critical factors. First, that the parties must be the same or parties under whom they claim or litigate. Secondly, the matter must be directly and substantially in issue in both suits. Thirdly, the matter must have been conclusively decided in the previous suit. Finally, there must be shown a concurrence of jurisdiction: see **Nicholas Njeru –v- Attorney General & 8 Others [2013]eKLR** and also **DSV Silo –v- The Owners of Sennar [1985] 2 ALL ER 104.**
11. The application of the principle of res judicata has the potential of locking out a person from the doors of justice or even reaching the outstretched arms of justice or the claim is disposed off without venturing into the merits. Consequently, the factors and the circumstances ought always be nit-picked and caution exercised. The court ought to be in no doubt that the principle is applicable to the facts and circumstances of each case.
12. Juxtaposing the above factors with the present circumstances, it is firstly apparent that the parties were essentially the same in the previous suit and in the instant petition, save the 3rd Petitioner. The ex parte applicant in the previous case was stated as the 2nd Petitioner herein. The proceedings were also commenced on behalf of the 1st Petitioner amongst others.
13. I have read the entire judgment by Simpson C.J in the previous case. It is to be noted that the aim of the previous case was for the production of the 1st and 2nd Petitioners with two others for the court to interrogate and investigate the restraint of their personal and physical liberties. The contest also concerned the (in)validity of their detention. Simpson C.J held that their detention was beyond rebuke. Nowhere in the judgment was there an issue as to the alleged physical and or psychological torture of the Petitioners. However that is one of the main issues before this court.
14. A plea of res judicata will also intercept and include not only matters which the court was called upon to adjudicate but every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward in the previous suit: see

Henderson –v- Henderson [1843-60] All E R 378. A claimant is not allowed to split claims. He will be estopped. As was stated by the court in **Henderson -v- Henderson (*supra*)**

> ***"…The plea of res judicata applies, <u>except in special cases</u>, not only to points upon which the court was actually required by the 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"***(emphasis mine)

15. The *Henderson -v- Henderson* estoppel **,** it is clear**,** will not apply, if there are special reasons to justify or explain the claims having been split.
16. In the instant case there was no claim or allegations of torture. It can be understood why. The Petitioners had apparently been prevented from communicating with anyone. The previous suit was actually filed on their behalf. There is no indication they even participated in the proceedings. There was no way of knowing they were being kept in the alleged treacherous conditions. Besides there is also the possibility that some or all of the alleged acts of torture chanced after the court had actually validated the Petitioners' detention.
17. I view it that it would not be appropriate in the circumstances of the case if taken in totality to invoke and apply the doctrine of res judicata wholly.
18. In conclusion, Mr. Lempaa was right in being so dismissive of the Preliminary objection as well as in his submission that the preliminary objection was not well founded. Ms. Mwangi was somehow also right in pointing out that the issue of the Petitioners' detention had been adjudicated upon by a court of concurrent jurisdiction. In filing the instant suit the Petitioners, in my view were not resurrecting an old and resolved claim.
19. The entire Petition ought to subsist and be urged on its merits or opposed on any other grounds including specific collateral estoppel (issue preclusion) other than res judicata (claim preclusion).
20. I consequently, for all the above reasons, dismiss the Preliminary objections but make no order on costs.

Dated, signed and delivered at Nairobi this 5th day April, 2016

J.L.ONGUTO

<u>JUDGE</u>