REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW

MISCELLANEOUS APPLICATION NO. 331 OF 2016

IN THE MATER OF AN APPLICATION BY RAMESHCHANDRA GOVIND GORASIA FOR LEAVE TO APPLY FOR ORDERS OF PROHIBITION

AND

IN THE MATTER OF THE CHIEF MAGISTRATE'S COURT AT MILIMANI LAW COURTS IN CRIMINAL CASE NO. 1043 OF 2016

AND

IN THE MATTER OF THE PENAL CODE & CRIMINAL PROCEDURE CODE

AND

IN THE MATTER OF ARTICLES 29(a), 39, 48 & 50 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

REPUBLIC ……..…….....APPLICANT

VERSUS

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

DIRECTORATE OF CRIMINAL INVESTIGATIONS……...2ND RESPONDENT

RAMESH CHANDRA GOVIND GORASIA.....EXPARTE APPLICANT

RULING

1. On 28th July 2016, the exparte applicant, RAMESH CHANDRA GOVIND GORASIA vide chamber summons dated 28th July 2016 and supported by statement of facts and verifying affidavit sworn by the applicant **Ramesh Chandra Govind Gorasia** and annextures thereto sought from this court leave to apply to apply for Judicial Review orders of prohibition prohibiting the respondents from prosecuting the applicant and from proceeding any further or taking any other step in any manner

whatsoever with criminal case No. 1043 of 2016 filed in the Chief Magistrate's Court, Milimani Law Courts, Nairobi against the applicant as the accused person; costs be provided for; and that the grant of leave herein do operate as a stay of the criminal proceedings filed against the applicant at the Chief Magistrate's Court, Milimani Law Courts being criminal case No. 1043 of 2016 pending the hearing and determination of the Judicial Review application. The application was supported by 8 grounds on the face of the chamber summons.

2. The matter was placed before me on 29th July 2016 when I certified the same as urgent and directed the applicant's counsel to serve the respondents for interpartes mention on 10th August 2016. I granted an interim stay until then.

3. On 10th August 2016 the respondents did not appear. only the applicant's counsel did appear and the court fixed he matter for interpartes hearing on 20th September 2016, while extending the interim stay orders. I also ordered service to be effected upon the respondents.

4. On 20th September 2016 all parties appeared. Timelines were given for the respondents to file their replying affidavit and the court also ordered for service of the pleadings upon other interested parties who are Respondents in Criminal Application No. 11/2016 private prosecution proceedings. I also extended the interim orders of stay until 5th October 2016.

5. On 5th October 2016, Mr Mungai counsel for the applicant had filed another notice of motion seeking to enjoin the Principal Secretary, Ministry of Lands as a party. The respondent's counsel raised the issue of res judicata in that there was HC Miscellaneous Application No. 304/2016 which had been heard and determined by Honourable Justice Odunga. The court directed parties to urge that preliminary objection first before any other matter could be heard on this file.

6. On 3rd October 2016 all the parties' advocates appeared and urged the said preliminary objection, with Mr Ochwo counsel for the interested parties submitting that annexture JP5 annexed to the replying affidavit sworn by **Jayesh Patel** in paragraphs 12 and 15 of the replying affidavit is the ruling by Honourable Odunga J in **HC Miscellaneous Application No. 304 of 2016** wherein the applicant herein **Ramesh Chandra Govind Gorasia** sought leave of court to apply for Judicial Review orders of prohibition to prohibit the respondents in this matter, the Director of Public Prosecutions and the Director of Criminal Investigations from prosecuting and proceeding any further or taking any further steps in any whatsoever with criminal case No. 1043 of 2016 filed at the Chief Magistrate's Court, Milimani Law Courts, Nairobi; Costs and that the leave granted do operate as stay of the said criminal proceedings pending hearing and determination of the Judicial Review proceedings.

7. That the learned judge after hearing the said application, and citing several authorities dismissed the said application for leave to apply and that the said application having been found to be constituting a defence in the pending criminal case and the court observing that there was not even copy of the charge sheet annexed, the application was determined on merits and not on technicalities.

8. Further, it was submitted that the applicant is guilty of non disclosure of the fact that there was the ruling by Honourable Odunga J.

9. The interested party's counsel further submitted that the applicant, after losing out in JR 304/2016 should have filed an appeal and not a fresh application for leave which is an abuse of the court process and Resjudicata.

10. The above submissions by the interested party's counsel were adopted in their entirety by the respondent's counsel Mr Ondimu.

11. In opposing the preliminary objection, the applicant's counsel, Mr Mungai submitted that the

matter herein is not Resjudicata because the ruling of Honourable Odunga J was based on the facts before him.

12. Further, that this application annexes a copy of the charge sheet with which the applicant was charged in the lower court, and which charges the applicants seek to prohibit hence there is no Resjudicata.

13. In addition, Mr Mungai submitted that the observations by the learned judge on the issue of the charge sheet came in the last paragraph of his ruling which means it never formed the core of his decision to dismiss the application for leave.

14. In a brief rejoinder, Mr Ochwo submitted that the learned judge in JR 304/2016 dismissed the applicant's application on merit. That he did not strike out the application. Further, that the dismissal of JR 304 of 2016 has not been set aside hence this court's hands are tied and that the court cannot sit on appeal of the decision of Odunga J.

Determination

15. I have carefully considered the preliminary objection raised by the interested party as supported by the respondents and opposed by the exparte applicant through their respective counsel's on record.

16. In deciding whether to uphold the preliminary objection, the court is guided by the often cited case **of Mukisa Biscuits Manufacturing Company Ltd Vs West End Distributors Ltd [1969] EA 696** where the Court of Appeal for Eastern Africa held that a preliminary objection consists of a point of law which has been pleaded, or which arise by clear implication out of the pleadings, and which, if argued as a preliminary objection may dispose of the suit. The court further held that a preliminary objection would normally be argued on the assumption that all facts pleaded by the other side are correct and cannot be raised if any facts have to be ascertained or if what is sought is judicial discretion.

17. In the instant case, the basic facts are that this Judicial Review application is the same in all material particulars as JR 304/2016 between the same parties and that in the latter matter, the court declined to grant the orders sought vide the ruling of the court delivered on 20th July 2016 after which , the applicant herein, instead of filing an appeal thereof, chose to file another fresh application and it so happens that the new application is now before me, a different judge from the judge who heard and dismissed JR 304/2016.

18. It is therefore alleged that this application is Res judicata JR 304/2016 which was heard and determined on merits and not on a technicality.

19. The applicant did not deny that the prayers and the parties in the former JR 304/2016 application are the same as the prayers and parties in these proceedings. The only contention is that in JR 304/2016, the learned judge found that no charge sheet in the criminal case was annexed and that the applicant had in this application annexed a copy of the charge sheet showing the offences that he is charged with before the subordinate criminal court.

20. The issue of whether the plea of Resjudicata can be raised as a preliminary objection was considered in **Omondi Vs National Bank of Kenya Ltd & Others [2001] KLR 579: [2001] 1 EA 177** where it was stated that:

> ***" The objection as to the legal competence of the plaintiff to sue in their capacity as directors and shareholders of the company under receivership and the plea of Resjudicata are pure points of law which if determined in favour of the respondent, 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 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 preliminary objection because to stay or not to stay a suit for such reason is not done ex debito justiciae (as of right) but as a matter of judicial discretion."

21. In the instant case, I find that the doctrine of Resjudicata was properly taken as a preliminary objection on a point of law. I must then revisit the legal principles guiding the applicability of the doctrine of Resjudicata.

22. In **Lotta V Tanaki [2003] 2 EA 556** the court held:

" 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 judgment between the same parties or their privies in 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 subsequence suit. The conditions are

i. The matter 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 he subsequent suit; and the matter in issue must have been heard and finally decided in the former suit."

23. In **Gurbachan Singh Kaisi V Yowani Ekori CA 62/1958**, the former East African Court of Appeal held, citing **Yat Tung Investments Company Ltd V Dao Heng Bank Ltd [1975] AC 581,590:**

" 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 Resjudicata 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 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. 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 judgment 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."

24. Waki JA in **Apondi V Canuald Metal Packaging [2005] 1 EA** 12 held:

" 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 installments."

25. Odunga J in **Republic Vs City Council of Nairobi & 2 Others [2014] e KLR** stated thus:

" ***However, I must say here that the mere addition of parties in a subsequent suit does not necessarily render the doctrine of Resjudicata inapplicable since a party cannot escape the said doctrine by simply undertaking a cosmetic surgery in 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."***

26. In **Pop –in (Kenya) Ltd CA 80/88** (Unreported) relying on **Yat Tung Investment Ltd** (supra) the Court of Appeal held that:

" ***parties must bring before the court, exercising reasonable diligence, all points that they could take and that points not taken then cannot be taken again as the same would amount to an abuse of the process of court."***

27. In **Lali Swaleh Lali & Others Vs Stephen Mathenge Wachira & Others Civil Application No. 257 1994 Nairobi** (unreported), the Court of Appeal in upholding the decision of Shah J in the trial court held:

" on the issue of Resjudicata, it would, in our view, require, the skills of a spin doctor to say that the judge was wrong." The learned judge in the trial court had held that an application for interlocutory injunction having been decided on the principles laid down in the Giella V Cassman Brown, a similar application cannot be brought once again even in a subsequent suit when a former suit, in which the application was dismissed, stood struck out on account of the proceedings therein being incontestably bad."

28. Again in **Mburu Kinyua V Gachiani Tuti [1978] KLR 69 [1976-80] 1 KLR 790** the Court of Appeal further held that:

" However caution must be taken to distinguish between discovery of new acts 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."

29. In the case of **Siri Ram Kaura V MJE Morgan Civil Application No Nairobi 71/60 [1961] EA 462** the then **EACA** 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 resjudicata.

The law with regard to Resjudicata 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 reopen 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."

30. In the instant case, having examined he ruling in JR 304/2016 and the present application for leave and what it seeks to achieve, I have no doubt in my mind that the parties are the same, and the subject matter is the same in all material particulars.

31. The cosmetic panel beating that the applicant seeks to introduce in this matter is to add another party who is the Principal Secretary, Ministry of Lands, and Urban Housing; and the annexing of a charge sheet which Honourable Odunga J in JR 304/2016 in dismissing that application for leave, observed, had not been annexed to the affidavit by the same applicant.

32. In my humble view, what the applicant is s telling this court is that " ***I was badly advised in the other matter that is why I did not annex the charge sheet and or enjoin the Principal Secretary, Ministry of Lands and Urban Housing hence that application was prematurely filed."***

33. The applicant is not telling this court that what he has since discovered is 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.

34. In dismissing the application for leave to apply for Judicial Review in JR 304/2016, Honourable Odunga J was clear in paragraphs 13,14,15, 16 & 17 of the Ruling dated 15th July 2016 that the applicant had not proved that he had a prima facie arguable case for grant of leave, based on the facts as averred by the applicant in the verifying affidavit; and that it was not sufficient to just throw grounds for the grant of Judicial Review and contend that a prima facie case has been made out.

35. From the said concluding paragraphs of the learned judge's ruling, it is clear in my mind that the learned judge determined that application on its merits by applying himself to the relevant principles in granting leave to apply for Judicial Review orders.

36. The learned judge did not strike out the application on a technicality. He dismissed the application upon satisfying himself that the applicant had not adduced sufficient evidence to prove that he deserved the orders sought.

37. Even if the learned judge observed at the end that the charge sheet was not annexed, that was a merit issue that a charge sheet was the most crucial document to show what offences the applicant had been charged with, and which charges the applicant was seeking to prohibit, by that application yet, strangely, the applicant had not annexed the said charge sheet document.

38. The applicant cannot, therefore, at this stage claim that this application is now complete with all the required but more importantly, with the crucial document which is a charge sheet which he failed to annex to the first application.

39. The applicant has not given any explanation why he did not annex the charge sheet in the earlier application which was dismissed, and which failure was not the only or sole reason why the learned judge dismissed his application for leave to apply for Judicial Review orders.

40. If the applicant considers, which he has not, that the omission to annex the charge sheet was inadvertent or that the charge sheet came in late , he should have tried applying for review of the ruling of Honourable Odunga J or even appeal against that ruling, and not to seek to relitigate the matter by way of a fresh application, which in essence, is seeking to have a second bite at the cherry.

41. In my humble view, the applicant is abusing the court process. furthermore, even after being forewarned of this preliminary objection that this matter is Resjudicata Judicial Review No. 304/2016, his counsel casually prepared for the response to the preliminary objection which is a clear point of law and which, if successful, would determine the whole matter without going into its merits.

42. The applicant also mischievously failed to disclose to this court, when he filed the subject exparte chamber summons for leave under certificate of urgency, that he had filed an earlier application with the same facts and same parties which had been dismissed by Odunga J, and explaining why he considered that this court, nonetheless, had some residual powers to hear and determine this matter on its merits.

43. Failure to disclose previous similar proceedings affecting the same parties over the same subject matter is being mischievous, frivolous, vexatious and an abuse of the court process.

44. It also matters not that the applicant now intends to enjoin the Permanent Secretary Ministry of Lands and Urban Housing as a party to these proceedings. The court can as well on its own motion, order that any person who is likely to be affected by the Judicial Review orders be served and or be enjoined to these proceedings, should it be satisfied that they are necessary parties.

45. An attempt to enjoin the Permanent Secretary Ministry of Lands to these proceedings would not in any way cure the problem of the plea of Resjudicata. The Court of Appeal in **CA 36/1996 UHDL vs CBK & Others** warned and I echo that warning to the applicant's counsel herein that:

> ***"Before we depart from this appeal, we must sound a stern warning. If advocates insist on filing and arguing applications similar to the ones dismissed, in future, we will call upon advocates to show cause why they should not be made personally liable for costs, as litigation to them is a luxury. This appeal lasted nearly two months. Many others appeals were not listed for hearing because of this. Those litigants have suffered. Justice is for all and all must have equal access to courts as well as equal priorities in being heard."***

46. I add that litigating over the same subject matter between the same parties is a total waste of precious judicial time and resources and denies the many very deserving litigants of this nation an opportunity to be heard expeditiously.

47. In this case, the applicant, when he filed Judicial Review No. 304/206 he was expected to have brought forward his whole case for adjudication since he was before a court of competent jurisdiction. He did not and there are no special circumstances disclosed herein, that this court could consider to permit him to open up the subject of litigation in respect of the same subject matter between the same parties. Section 7 of the Civil Procedure Act expressly bars the court from re litigating over the same matter and it states with a clear prohibition to the court:

> ***"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, or has been heard and finally decided by such court."***

48. In this case, the grounds upon which the previous application as dismissed by Odunga J were predicated are the same as the grounds upon which this application is premised.

49. What I view is that the applicant having hit a cul-de-sac in the earlier Judicial Review application

opted to open a fresh attack in the expectation that this court may overlook to critically evaluate the previous application and in the process fail to discern that indeed this application is Resjudicata and thereby give him a second bite at the cherry.

50. The applicant herein may also have hoped against all odds that the previous application is never brought to the attention of this court or that this court would luckily grant him exparte orders for leave and stay, that is why he did not disclose to this court that there was a previous application which has the same names of parties and subject matter and that it was dismissed on merits.

51. Majanja J in **E.T.S V Attorney General & Another [2012] e KLR** urged courts to be hawk eyed to avoid suits that are otherwise Resjudicata from being instituted by employing devious means. The learned judge stated thus:

> ***" The courts must always be vigilant to guard litigants, evading the doctrine of Resjudicata 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***.

52. In the case of **Omondi Vs National Bank of Kenya & Others** (supra) the court held that:

> ***" parties cannot evade the doctrine of Resjudicata by merely adding other parties or causes of action in a subsequent suit."***

53. In that case, the court quoted Kuloba J in the case of **Janja Vs Wambugu & Another Nairobi HCCC 2340/91** (unreported) where he stated:

> ***" If parties were allowed to go on litigating for ever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court , then I do not see the use of the doctrine of Resjudicata …."***

54. Accordingly, albeit the pleadings in the Judicial Review 304/2016 were not annexed to the Preliminary Objection herein, I have no doubt that the detailed ruling by Honourable Odunga J which also sets out meticulously the prayers sought in that matter and the arguments therein, the issues are in parimateria the same as what is contained in the present application for leave to apply for Judicial Review orders of prohibition; and that this matter is 100% Resjudicata JR 304/2016 and therefore to sustain the same would be to encourage, aid and abet abuse of the court process.

55. In **Karuri & Others Vs Dawa Pharmaceuticals Company Ltd & Others [2007] 2 EA 235** the court held that nothing can take away the court's inherent power to prevent the abuse of its process by striking out pleadings or striking out a frivolous and vexatious application and that baptizing such matters *constitutional* cannot make them so if they are in fact plainly an abuse of the court process.

56. This court is not left powerless even in Judicial Review proceedings where there is no specific provision under the Law Reform Act or order 53 of the Civil Procedure Rules to hold Judicial Review proceedings Resjudicata; for it has inherent jurisdiction to terminate proceedings where the same amount to abuse of the court process**(see Republic Vs City Council of Nairobi(supra)** where Honourable Odunga J restated that:

> ***" 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 mater 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 the jurisdiction conferred by Section 3A of the Civil Procedure Act as such but merely reserved***

there under(see Kenya Bus Services Ltd & Others Vs Attorney General & Others [2005] 1EA 111[2005] 1 KLR 743……"

57. Accordingly, I am of the most considered view that there is sufficient material to find the chamber summons dated 28th July 2016 Resjudicata JR 304/2016 and to allow this matter to proceed to hearing on merit is to encourage abuse of court process, even if Resjudicata doctrine were inapplicable.

58. In the end, I come to an inescapable conclusion that the preliminary objection as taken by the interested party and supported by the respondents was well taken.

59. I therefore allow and uphold the preliminary objection and strike out and dismiss the chamber summons dated 28th July 2016 as an abuse of court process. All other consequential proceedings and orders made pursuant to that chamber summons automatically fall by the way side.

60. I however order each party to bear their own costs of the chamber summons and of the preliminary objection.

Dated, signed and delivered at Nairobi this 1st day of November, 2016.

R.E. ABURILI

JUDGE

In the presence of:

Mr Ochwo for the interested party

N/A for the Applicant

Mr Ondimu for the DPP

Ca: Adline