



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
MISCELLANEOUS CAUSE NO. 155 OF 2015

REPUBLIC.....APPLICANT

VERSUS

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

THE CHIEF MAGISTRATE'S COURT

MILIMANI LAW COURTS.....2ND RESPONDENT

AND

JOHN KARANJA WARUI.....INTERESTED PARTY

EXPARTE

GEORGE JAMES KANGETHE.....1ST APPLICANT

PATRICK KANGETHE NJUGUNA alias NDONGA.....2ND APPLICANT

JUDGEMENT

1. The ex parte applicants, George James Kangethe and Patrick Kangethe Njuguna, are the accused persons in **Criminal Case No. 744 of 2014** filed in Milimani Chief Magistrate's Court. The 1st Respondent on the other hand is the Director of Public Prosecutions mandated under the Constitution of the Republic of Kenya, to undertake criminal prosecutions on behalf of the Republic. The 2nd Respondent is Milimani Chief Magistrate's Court where the criminal proceedings have been filed. The Interested Party, John Karanja Warui is the complainant in the criminal case filed against the applicants.
2. The ex parte applicants being aggrieved by the decision of the Director of Public Prosecutions to charge them, have through the Notice of Motion dated 26th May, 2015, come to this Court seeking the following orders:

“1. THAT this Honourable Court be pleased to issue AN ORDER OF PROHIBITION directed at the Respondents to prohibit, forbid and to act as a restraint to any trial or any further Proceedings as now pending before the Milimani Law Courts Chief Magistrate's Court in Criminal Case Number 744 of 2014, where the Applicants are the 1st and 2nd

Accused persons respectively.

2. THAT this Honourable Court be pleased to grant any other and/or further relief under the terms that it may find fair and just in the circumstances.

3. THAT costs of this Application be provided for.”

3. The application is premised on the grounds on its face thereof, the Chamber Summons application for leave, the Statutory Statement and the Verifying Affidavit of the applicants sworn on the 18th May, 2015.
4. The 1st Ex Parte Applicant is the son of the 2nd Ex Parte Applicant. The 1st Ex Parte Applicant contends that he is the registered owner of the parcel of land known DAGORETI/RIRUTA/2290 which he avers, he lawfully acquired in the year 2008, through a sale agreement dated 30th August, 2008, from one Vincent Mungai Mbugua at a cost of Kshs. 3.5 million.
5. The 1st Ex Parte Applicant avers that prior to acquiring the land, he carried out due diligence through his lawyers and upon being satisfied that the vendor was the registered owner of the land, he proceeded to purchase and register it as his own. He avers that once registered as the owner, he took possession and developed rental flats which he has let out to various tenants and continues to be in lawful occupation.
6. The ex parte applicants contend that the Interested Party who is the alleged administrator of the estate of the late Elizabeth Muthoni and the complainant in the criminal case and who was unknown to them started making allegations of being entitled to the property, which he averred belonged to his late mother Elizabeth Muthoni.
7. It is the ex parte applicants' case that the 1st Ex Parte Applicant bought the property *bona fides* and as such could not entertain the allegations by the Interested Party, who being dissatisfied moved to the High Court at Nairobi and filed **ELC Case No. 415 of 2009**. The 1st Ex Parte Applicant is named as the 2nd defendant, while the vendor Vincent Mungai Mbugua is the 1st defendant in that case.
8. It is the case of the ex parte applicants that when the civil suit was filed, it was accompanied by an application seeking injunctive reliefs, which sought to restrain them from dealing in the land in question. However, the Court dismissed the application on account that the Interested Party's claim to the property was not established, observing that there was no reason of enjoining the 2nd Ex parte Applicant in the suit as he had no role to play nor any interest in the suit property. They assert that the Interested Party is yet to appeal against that decision with the substantive matter still pending full hearing.
9. According to the ex parte applicants, the Interested Party has now chosen a different path in laying his malicious claim to the property through abuse of the criminal justice system by making baseless claims with the police based at Riruta, who without conducting independent investigations charged them vide **Criminal Case No 744 of 2014** disregarding the fact that the 2nd Ex parte Applicant is a stranger to the transaction except that he is the father of the 1st Ex Parte Applicant. They contend that their prosecution was carried out despite the fact that they had shown the police all the documentary evidence including the ruling of the High Court in which the Interested Party was found not to have established a valid claim, but the police were adamant that they must be arraigned in Court to face the various charges leveled against them which were unfounded in law.
10. It is their case that they tried to challenge the intended prosecution in the Criminal Division of the High Court but were unsuccessful. The Court was of the view that they should take the plea in the trial court and clear themselves, which they have. They averred that it is beyond any doubt that the intention of the Interested Party is not to attain the ends of justice but to attain that which he has failed to achieve through the civil process.
11. In support of their case, the ex parte applicants submitted that from the documents and witness statements to be used in their trial, there is no offence disclosed and attributable to them. They do not understand how a legal purchase of property can be turned into alleged conspiracy to commit a felony and forgery. Further, Justice Mbogoli in his ruling delivered in the civil case on 4th March,

- 2010, succinctly held that the 1st Ex Parte Applicant cannot be held liable for any fraudulent activities of the vendor if he was not a party to the said fraudulent activities. In addition, the Interested Party was unable to establish a *prima facie* case so as to be entitled to injunctive orders and the learned Judge found that the balance of convenience tilted in favour of the 1st Ex Parte Applicant. This being the case, they wondered how the Interested Party will prove the ex parte applicants' guilt beyond reasonable doubt in the criminal trial.
12. It is their submission that, had the 1st Respondent addressed himself to the facts at hand namely that the 1st Ex Parte Applicant innocently bought the land and the 2nd Ex Parte Applicant was neither a party to the transaction; he would not have instituted the criminal case. Further, that Justice Mbogoli had determined there was no reason whatsoever to enjoin the 2nd Ex Parte Applicant in the civil suit because he had no interest whatsoever in the property. They argue that none of the witnesses in all the witness statements has mentioned the 2nd Ex Parte Applicant's name and it is interesting how a case against him will be made out. According to them, the 2nd Ex Parte Applicant's alleged involvement in the offences is therefore baffling, if not downright outrageous. In their view, the criminal case against them is a blatant abuse of the criminal justice system, and the same should not proceed any further.
 13. They further submitted that no fair trial is guaranteed if the criminal case is allowed to proceed as it has been instituted based on a clear lack of evidence against them. Any further proceedings would not only heavily prejudice them, but also waste the trial Court's precious time. In their estimation, the result of the criminal case will be an acquittal and even though they will be afforded an opportunity to defend themselves, cross-examine witnesses and adduce evidence in support of their case, this will cause great injury to them, and in particular the 2nd Ex Parte Applicant, who is an old, blind and frail man with no capacity whatsoever to commit the offences he is charged with.
 14. The ex parte applicants also contend that there has been an inordinate delay in the bringing of the criminal charges against them as the offences are alleged to have been committed in 2008 but they were only charged in Court in 2014. There has been no explanation for the delay and six years is a long time to investigate a criminal case. They assert that the delay has occasioned unmitigated prejudice upon them as they may have since lost the evidence in their favor. It is their submission that it is bizarre that the 1st Respondent did not take action immediately the offences were allegedly committed. They submit that the delay had the effect of giving them a legitimate expectation that criminal charges would not be levied against them. Further, the unjustifiable delay in charging them has deprived them of the ability to fairly mount their defence. Their witnesses could have passed on in the intervening period between the commission of the alleged offences and the institution of the criminal charges.
 15. They postulate that the Interested Party resorted to the criminal proceedings after he lost the application for injunctive orders in the civil case. The Interested Party was using the criminal case as a means of achieving his claim to the property, and further as a mechanism for gathering evidence to strengthen his now hopeless civil claim. They submit that the Interested Party's interest in the criminal case, which was initiated by his complaint, is not for the vindication of a criminal offence, but rather for the achievement of collateral purposes, chief among them being to harass them and divert attention from the pending civil case.
 16. In support of their case they relied on the decision of G. V. Odunga, J in **Republic v Chief Magistrate's Court Nairobi & 4 others [2013] eKLR** where he opined that:

"However, it is one thing to investigate crime and another to prosecute the suspects. The office of the Director of Public Prosecutions, is, in my view not a conveyor belt for transmitting persons against whom allegations are made to court for cleansing. The office of the Director of Public Prosecutions owes a duty to the public to ensure that the cases it takes to court have been properly investigated and they are cases which are prosecutable. If the court finds that a case is vexatious, the court will not sit back and rubberstamp a prosecution which is clearly malicious and an abuse of the process of the court."
 17. Also cited in support of the ex parte applicants' case is the statement of the same Judge in **Republic v Chief Magistrate's Court at Kibera Law Courts Nairobi & 2 others ex-parte**

Qian Guo Jun & 2 others [2013] eKLR that:

“It is therefore clear that whereas the discretion given to the 3rd respondent to prosecute criminal offences is not to be lightly interfered with, that discretion must be properly exercised and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence such as with a view to forcing a party to submit to a concession of a civil dispute, the Court will not hesitate to bring such proceedings to a halt.”

18. Other decisions cited in support of the ex parte applicants' position are **Republic v Director of Public Prosecutions & 2 others ex-parte Nyaboga Mariaria [2013] eKLR** and **Republic v Inspector General, National Police Service & 3 others ex-parte Stephen Somba Kathima [2014] eKLR**. In those cases it was opined that the use of criminal prosecution to settle civil disputes amounts to an abuse of the criminal justice.
19. The ex parte applicants also submitted that it is trite law that before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. In support of this proposition they cited the decision in **R v Attorney General ex parte Kipngeno Arap Ngeny, Nairobi High Court Civil Application No. 406 of 2001** where it was stated that **“[a] prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution, otherwise the prosecution will be malicious and actionable.”**
20. Finally, it is their position that the 1st Respondent's discretion to prosecute criminal offences must be properly exercised but this was not the position in their case as the discretion is being used to harass them and attempt to disentitle an innocent purchaser of his property. Further, that the decision to institute criminal proceedings against them was not with the intention of achieving justice which should be the underlying motive of all criminal prosecutions. In conclusion they submitted that the 1st Respondent did not conduct proper investigations before instituting the criminal case and any further proceedings in the matter should therefore be prohibited.
21. The application was opposed by the respondents through the Replying Affidavit of Laura Spira and the Notice of Preliminary Objection dated 4th June, 2015.
22. The respondents' two point preliminary objection to the application is that the subject matter is *res judicata* having been canvassed in **Miscellaneous Criminal Application No. 298 of 2013** and this matter is therefore an abuse of the process of court.
23. In summary, the respondents' case is that the issues raised by the ex parte applicants herein are the same ones canvassed in **Nairobi High Court Misc. Criminal Application No. 298 of 2013** which had been filed before the Criminal Division by the ex parte applicants herein. Further, that the issues raised in this application are issues of evidence which are better left for the decision of the trial court.
24. It is the respondents' case that the 1st Respondent undertakes prosecutions after a complaint has been made to the police and the police have investigated the matter and only where there is enough evidence to sustain a charge. The respondents assert that the 1st Respondent under Article 157(6) of the Constitution of Kenya exercises the state powers and functions of prosecution including the institution, undertaking, taking over, continuance and or termination of criminal proceedings amongst other functions and duties. In doing so, the 1st Respondent must, under Article 157(11) have regard to public interest, the interests of administration of justice and the need to prevent and avoid abuse of the legal process. The 1st Respondent is also obliged to comply with other relevant constitutional provisions including the Chapter Four on the Bill of Rights and the national values and principles of governance enshrined in Article 10. Further, that the 1st Respondent has the mandate to prosecute criminal cases without undue influence, direction or control by any other authority or any person.
25. On behalf of the respondents, it was submitted that the ex parte applicants' allegation that the case was instituted for ulterior motive and is a blatant abuse of the criminal justice system has no basis as the National Police Service is empowered to investigate any complaint made to them and enforce the law against the persons in contravention. Further, that the complaint herein was investigated and the file was sent to the 1st Respondent who independently reviewed the same and

- directed that the ex parte applicants be charged.
26. According to the respondents the ex parte applicants' assertion that there was a civil case over the same land matter was examined by this Court (L. A. Achode, J) in **Nairobi High Court Miscellaneous Criminal Application No. 298 of 2013**. The learned judge addressed the issue at paragraph 16 of her ruling delivered on 14th May, 2014 thus making the issue *res judicata*. It is the respondents' case that the ex parte applicants cannot be allowed to again raise the same issue in these proceedings.
27. On the question of *res judicata*, the respondents, without providing the citation, relied on the case of **Lotta v Tanaki** where it was 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 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”.**
28. It was the respondents' submission that judicial review deals with the issue of the fairness of the procedure leading to the making of a decision and in this particular matter all the rules of natural justice and procedure were observed during investigations. The ex parte applicants were given a chance to record statements which they did. They further submitted that the mere fact that the land in question was the subject of a High Court civil case could not stop the police from investigating an allegation of fraud since Section 193A of the Criminal Procedure Code provides that the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.
29. They submitted that the ex parte applicants' claim that the criminal case lacks evidential material amounts to tendering their defence through the judicial review application by delving into matters of evidence. On this argument the respondents relied on **Nairobi High Court Misc application No. 68 of 2011, Michael Monari & another v The Commissioner of Police and another**, where it was observed that it is not the duty of the judicial review court to go into the merits and demerits of any intended charges to be preferred against any party as this onus belongs to the trial court. Also cited to strengthen this position is the decision of the Court of Appeal in **Meixner & another v Attorney General [2005] 2 KLR 189**.
30. The respondents' position is that the application lacks merit as the ex parte applicants have failed to show that the process was flawed and that the respondents acted *ultra vires* and maliciously.
31. The respondents revealed that the issues raised herein were raised in **Nairobi High Court Miscellaneous Criminal Application No. 298 of 2013**. After their application was dismissed in that matter, they filed **Judicial Review Application No. 180 of 2014** and on realizing that they had no case, they withdrew the same and opted to file an appeal against the decision of L. A. Achode, J being **Court of Appeal Civil Application No. 190 of 2014**. That, on the date the Court of Appeal application was to be heard; they again withdrew the same and filed these judicial review proceedings.
32. It is the respondents' conclusion that the application is misconceived, intended to obstruct the rightful course of justice, an abuse of the court process and the same ought to be dismissed with costs to the respondents.
33. The Interested Party opposed the application through his replying affidavit sworn on the 19th June, 2015. His case is that he is the complainant in the criminal proceedings which the ex parte applicants seek to quash through this matter. It is his case that the application as drawn and filed is incompetent and an abuse of the Court process. Further, that the allegations therein do not disclose breach of any decision making process by the respondents so as to entitle the ex parte

- applicants to invoke the Court's judicial review jurisdiction.
34. The Interested Party's position is that the averment by the ex parte applicants that the criminal charges are an abuse of the court process is a complete misconception of the law as the existence of a civil matter is no bar to institution of criminal proceedings. In his opinion, the ex parte applicants, by filing this cause, displayed lack of good faith as their sole aim was to scuttle the hearing of the civil matter which was scheduled for 29th June, 2015. He asserted that the issues between himself and the ex parte applicants are both civil and criminal in nature and Section 193A of the Criminal Procedure Code permits simultaneous and concurrent civil and criminal proceedings. Further, that the 1st Respondent is by law allowed to institute criminal charges against any person notwithstanding the existence of a civil suit between that person and the complainant over the same set of facts.
35. The Interested Party averred that the issues being raised by the ex parte applicants in this application can be raised in the criminal trial and the court should not entertain applications which are only meant to obstruct the respondents from carrying out their constitutional and statutory duties. His final take is that the ex parte applicants have not made a case for grant of judicial review orders.
36. The starting point is to consider the respondents' Preliminary Objection with a view to finding out whether this matter is indeed *res judicata*.
37. H. W. R. Wade & C. F. Forsyth in the 10th Edition of their book, **Administrative Law** at page 204, discusses the doctrine of *res judicata* as follows:

“One special variety of estoppel is res judicata. This results from the rule which prevents the parties to a judicial determination from litigating the same question over again, even though the determination is demonstrably wrong. Except in proceedings by way of appeal, the parties bound by the judgement are estopped from questioning it. As between one another, they may neither pursue the same cause of action again, nor may they again litigate any issue which was an essential element in the decision.”

38. At pages 209 to 210 the authors suggest that a plea of *res judicata* is restricted in public law. They state that:

“It is probable that the doctrine of res judicata is inherently inapplicable to proceedings for habeas corpus, certiorari and the other prerogative remedies. Formerly there were grounds for holding that the court's rulings in such cases were not technically judgments capable of producing res judicata. A more persuasive reason is that in these procedures the court 'is not finally determining the validity of the tribunal's order as between parties themselves' but 'is merely deciding whether there has been a plain excess of jurisdiction or not'. They are a special class of remedies designed to maintain due order in the legal system, nominally at the suit of the Crown, and may well fall outside the ambit of the ordinary doctrine of res judicata. But the court may refuse to entertain questions which were or could have been litigated in earlier proceedings, when this would be an abuse of the legal process, and in the case of habeas corpus there is a statutory bar against repeated applications made on the same grounds.”

39. Therefore, in judicial review proceedings the Court has to be very keen when a plea of *res judicata* is raised least a deserving applicant is denied a public law remedy.
40. The principles applicable to the doctrine of *res judicata* in our jurisdiction are now well established. In **Gurbachan v Yowani Ekoru [1958] E.A. 450**, the Court of Appeal for Eastern Africa, while considering the doctrine of *res judicata*, at page 453 cited a passage from the Judgement of the Vice-Chancellor in **Henderson v Henderson (1), 67 E.R. 313** at page 319 where it was stated that:

“In trying this question I believe I state the rule of the court correctly when I say that, 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 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.”

41. In **Willie v Muchuki & 2 others [2004] 2 KLR 357**, Kimaru, J cited the decision of Bosire, J (as he then was) in the case of **Caltex Oil (Kenya) Ltd v Mohamed Yusuf and others, Nairobi HCCC No. 1322 of 1993** where the principles underpinning a successful invocation of *res judicata* were enunciated as follows:

“The third and the last issue is one of *res judicata*. The doctrine is provided for under section 7 of the Civil Procedure Act. For the doctrine to apply three basic conditions must be satisfied. The party relying on it must firstly, show that there was a former suit or proceeding in which the same parties as in the subsequent suit litigated. Secondly, the matter in issue in the latter suit must have been directly and substantially in issue in the former suit. Thirdly, that a court competent to try it had heard and finally decided the matter(s) in controversy between the parties in that former suit.”

42. The respondents’ argument is that the issues being raised by the ex parte applicants herein were fully addressed by the Criminal Division of this Court in **Nairobi H. C. Miscellaneous Criminal Application No. 298 of 2013, George James Kang’ethe & Patrick Kang’ethe Njuguna alias Ndonga v The Inspector General of Police & Director of Public Prosecutions**. In that case John Karanja Warui was an Interested Party.

43. Counsel for the ex parte applicants in oral submissions made during the hearing of the matter argued as follows:

“The Interested Party filed a suit claiming ownership of the land before the ELC. He also filed an application for injunction in ELC No. 415/2009 which was dismissed. The case is pending. Vincent Mungai is the 1st defendant and the 1st and 2nd Applicants herein are the 2nd and 3rd defendants respectively in that matter. When the Interested Party lost the application, he started using the police and we say this was an abuse of the criminal justice system. That was the basis of our constitutional application before the Criminal Division of the High Court. Justice Achode in dismissing the application found that the police had the right to do their work. This application is different from the constitutional application. In this case, the applicants seek to review the decision of the Director of Public Prosecutions to have them charged.”

44. I have carefully gone through the ruling delivered on 14th May, 2014 by my sister, L. A. Achode, J in **Miscellaneous Criminal Application No. 298 of 2013**. She identified the issue for determination as follows:

“The crux of the matter before this court and upon which the court must decide is that the Petitioners charge that their intended prosecution is a nullity, an illegality a gross breach of their fundamental rights and a violation of the Constitution. They aver that it is an abuse of the criminal justice system meant to harass, intimidate and embarrass them for the satisfaction of the Interested Party since the matter is already proceeding in a civil court. For that reason they have asked this court to stay the process of prosecution, in all its stages.”

45. After identifying the issue for determination, the learned Judge analysed the cases of the parties and then proceeded to make her determination as follows:

“In **Petition No. 251 of 2012, Beatrice Ngonyo Kamau & 2 others vs Commissioner of Police and others** the court held that it behoves a petitioner to show by tangible evidence that the

Director of Public Prosecution, in exercising his wide prosecutorial powers had acted against the public interest and against the interest of the administration of justice. The applicants have not in any way demonstrated the manner in which the decision of the Inspector General of Police to investigate or that the Director of Public Prosecution to prosecute are an abuse of the criminal justice system nor that the predominant purpose of the prosecution is to further cause ulterior motive.

There is no evidence that the Respondents have acted arbitrarily or unconstitutionally in the performance of neither their duties, nor the Interested Party is actuated by the desire to punish or oppress the Petitioners by brandishing the rod of punishment under the criminal law. A court can only interfere with and interrogate the acts of other constitutional bodies if there is sufficient evidence that they acted in contravention of the Constitution. In addition, the court cannot prevent the police or the Director of Public Prosecutions from carrying out investigations on reasonable suspicion that an offence has been committed, since they are executing their constitutional duty and obligation. See - Petition No. 518 of 2012, Paul Ng'ang'a Nyaga & 2 others vs The Hon. A.G. & others.

Having considered all the material placed before me, it is my decision that it is not appropriate for this court to intervene on behalf of the Petitioners. This court cannot weigh whether there is evidence that is sufficient to sustain criminal prosecution or charges. There is also no bar to the exercise of concurrent criminal and civil jurisdictions. The evidence available seems to disclose criminal acts and omissions which must be investigated, prosecuted and determined by a court of competent jurisdiction.

Consequently, the application dated 18th September 2013 is dismissed with costs to the Respondents and Interested Parties.”

46. Looking at the decision of the learned Judge, it is quite clear that the parties before her were the same parties before this Court. The question that had been placed before her by the petitioners, who are the ex parte applicants herein, was alleged abuse of investigatory and prosecutorial powers by the respondents. At the beginning of this judgement, I have reproduced the ex parte applicants' arguments before this Court. These are the same submissions made before my sister Judge.

47. I beg to reproduce, at length, the arguments that the petitioners made before her. She summarised those arguments as follows:

“In the supporting affidavit sworn by the first Petitioner and on which learned counsel Mr. Gachie relied, the first Petitioner averred that he was the registered proprietor of a parcel of land known as L.R. Dagoretti/Riruta/2290 having acquired it for valuable consideration in the year 2008, while the second Petitioner was his father and had no interest in the land. That vide a sale agreement dated 30th August 2008 he purchased the said piece of land from the then registered owner, one Vincent Mungai Mbugua (vendor), for a consideration of Kshs.3,500,000/= (three million five hundred thousand) only.

The first Petitioner further asserted that prior to the acquisition he conducted due diligence over the said piece of land and ascertained that the vendor was indeed the registered proprietor and thereafter he followed all the legal steps necessary for the acquisition thereof. That it was after he had taken possession of the property, developed flats thereon and rented them out that the interested party who was completely unknown to him emerged to allege that the property belonged to the estate of his late mother, Elizabeth Muthoni.

The first Appellant also contended that the Interested Party has since moved the High Court vide Environmental and land Division civil case No. 415 of 2009, wherein he sued the two Petitioners herein together with the Vendor. Together with the civil suit the Interested Party filed an urgent application seeking injunctive orders to restrain the Petitioners herein from dealing with the subject land in any manner howsoever pending the hearing of the civil suit,

alleging a beneficiary's interest.

That in the ruling dated 4th March 2010 the court found that the Interested Party's claim to the suit was not established and declined to grant the injunctive orders sought. The Interested Party did not appeal against the said decision and the suit is yet to be heard in full. Instead he made a report to the Riruta Police who are said to have moved to lay charges against the two petitioners without conducting any independent investigations. Pursuant thereto the police have summoned the petitioners to the police station severally and finally on 16th September 2013 bonded them to appear in court on 20th September 2013 for arraignment.

As far as the Petitioners are concerned, the charges are completely unfounded in law, baseless and unjustifiable in an open and democratic society, and it is the Respondents' intent to infringe the Petitioners' rights by settling a civil dispute through the criminal justice system hence this application."

48. What then is new about the ex parte applicants' case? I say nothing is novel in the application before me. Although it is not clear from the judgment of Justice Achode whether the criminal case had been filed before the Magistrate's Court, it is clear as day is clear from night that the ex parte applicants were in that Petition fighting to stop the Director of Public Prosecutions from prosecuting them. This is what they are also doing through these proceedings. I therefore agree with the respondents that this matter is not only *res judicata* but is also an abuse of the court process.

49. This Court has no jurisdiction to entertain a matter that is *res judicata*. Where there is no jurisdiction, the only remedy is for the Court to down its tools-see the decision of the Supreme Court in **Samuel Kamau Macharia v Kenya Commercial Bank Limited & 2 others [2012] eKLR**.

50. The obvious outcome is that the respondents' Preliminary Objection succeeds and the ex parte applicants' judicial review application is dismissed. Having found that the matter was commenced in abuse of the court process, I find that the respondents and the Interested Party are deserving of costs. The ex parte applicants will therefore pay the respondents and the Interested Party the costs of these proceedings.

Dated, signed and delivered at Nairobi this 10th day of July, 2015

W. KORIR,

JUDGE OF THE HIGH COURT