



REPUBLIC OF KENYA



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Mwangi & 32 others v Baringo County Public Service Board (Civil Appeal 124 of 2019) [2023] KECA 1380 (KLR) (24 November 2023) (Judgment)

Neutral citation: [2023] KECA 1380 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL 124 OF 2019
FA OCHIENG, LA ACHODE & WK KORIR, JJA
NOVEMBER 24, 2023**

BETWEEN

ZIPPORAH MWANGI & 32 OTHERS APPELLANT

AND

BARINGO COUNTY PUBLIC SERVICE BOARD RESPONDENT

(Being an Appeal from the Ruling of the Employment & Labour Relations Court at Nakuru (Mbaru. J) delivered on 8th November 2018 in JR Cause No. 1 of 2018)

JUDGMENT

1. This is the first appeal of Zipporah Mwangi & 32 others (the appellants) against the Ruling of Mbaru J delivered on 8th November 2018 at the Employment & Labour Relations Court (ELRC) at Nakuru. Baringo County Public Service Board is the respondent.
2. This appeal was born out of an application dated 9th April 2018 that the appellants filed in the ELRC, for orders of mandamus to compel the respondent to pay the appellants Kenya Shillings Two Million, Five Hundred and Ninety-Two Thousand, Nine Hundred and Seventy (Kshs. 2, 592,970) through M/S Julius Juma & Co. Advocates.
3. The application was supported by an affidavit of even date sworn by Zipporah Mwangi. The application was premised on the grounds that the appellants filed Petition No. 10 of 2015 seeking to be employed by the respondent on permanent and pensionable basis with effect from 1st July 2015. Consequently, the Court granted their prayers and ordered the respondent to pay costs. It was averred that the Deputy Registrar assessed the costs at Kshs. 2,592,970 and issued a Certificate of Costs confirming the assessment of costs and a Certificate of order dated 20th October 2016 against the government as required under section 21 of the *Government Proceedings Act*. The respondent acknowledged receipt of both documents, but it did not comply with the court order.



4. In response, Mr Mark Suge the chairperson of the respondent filed a replying affidavit sworn on 21st May 2018 on its behalf, deposing that the persons on whose behalf the application was filed had not authorized the filing thereof in writing. Further, that the application was *res judicata* and bad in law in view of the existence of a decree in Nakuru JR No. 4 of 2017 in which the prayers sought herein were declined. The said decree had not been challenged or appealed by the *ex parte* applicants. It was also averred that the said application contravened section 103 of the *Public Finance Management Act* No. 18 of 2012 which vests statutory power of payments on other statutory bodies and not the respondent herein.
5. Upon considering the facts before her, the learned judge found that the application was *res judicata* and dismissed it with costs.
6. Dissatisfied and aggrieved by the above decision the appellants filed the present appeal. They allege that the learned trial judge erred in fact and in law on the following grounds:
 - a) In finding that the matter before her was *res judicata* despite a clear demonstration that the previous matter was never determined on merit.
 - b) In finding that the matter before her was *res judicata* despite a clear demonstration that no determination was made in the previous matter as to the appellant's entitlement to costs for which orders of Mandamus were sought.
 - c) In dismissing the notice of motion for being *res judicata*, despite the fact that costs which were taxed in ELRC Petition No. 10 of 2015 and which were the subject of the application before her, remain unpaid to date.
 - d) In reaching an unfair determination of the matter, without considering the appellants' submissions and judicial Authorities filed therewith."
7. The matter was disposed of by way of written submissions. The firm of M/S Julius Juma & Co. Advocates filed written submissions dated 11th February 2023 on behalf of the appellants. They submitted that the bar to filing subsequent suits where a similar suit has been determined previously between the same parties only applies to civil actions. That Judicial Review proceedings are neither civil nor criminal and accordingly, doctrines that are founded in civil law cannot apply. To buttress this position, they relied on the case of *Republic v City Council of Nairobi & 2 others* (2014) eKLR, where Odunga J (as he then was), cited this Court's decision in *Commissioner of Lands v Kunste Hotels Ltd* (1995 - 1998) 1 EA 1. That therefore, the respondent cannot invoke the doctrine of *res judicata*.
8. The appellants contended that this suit was not *res judicata*, citing the five conditions that must be satisfied to raise the defence of *res judicata* as was stated in the case of *Lotta v Tanaki* (2003) 2 EA 556. The admitted facts were that the issue in contention in the previous application as well as the one appealed from was the payment of taxed costs; that the parties were the same; that the parties were litigating under the same title and that the former court had jurisdiction. However, an element that was not satisfied was that the issue was not heard or finally determined in the former suit.
9. In opposition, the firm of M/S Limo R.K & Company filed written submissions dated 6th March 2023 on behalf of the respondent. They relied on this Court's decision in Eldoret Civil Appeal No. 376 of 2014; *Africa Oil Turkana Limited (previously known as Turkana Drilling Consortium Ltd) & 3 others v Permanent Secretary, Ministry of Energy & 17 others* (2016) eKLR to urge that the doctrine of *res judicata* is a principle of general application and applies to Judicial Review.



10. They also urged that this matter was heard and determined, and judgment delivered on 8th of December 2017 where the said prayer was declined. They asserted that the court conclusively determined the competence of the prayer for mandamus compelling payment of costs without joinder of the relevant accounting officer, and correctly held that the said prayer was unsustainable and incompetent for want of joinder of the accounting officer who is the proper party by law to pay.
11. Counsel urged that the respondent is not a proper party in these proceedings since it is not an accounting officer within the meaning of section 21 (3) of the Government Proceedings Act as read with section 103 (2) (a) and (3) and section 148 (2) and (3) of the Public Finance Management Act, No.8 of 2012. As such, the order of mandamus cannot be issued against the respondent.
12. We have considered the record of appeal, the submissions of the parties and the law. This being a first appeal, our duty is as stated in this Court in Abok James Odera T/A A. J. Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, that: -

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re- evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of *Kenya Ports Authority v Kusthon (Kenya) Limited* (2000) 2EA 212 wherein the Court of Appeal held, *inter alia*, that:-

“On a first appeal from the High court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

13. We begin by stating that indeed, *res judicata* is a doctrine of general application and is therefore applicable to Judicial Review. In this regard the Court stated in the case of Africa Oil Turkana Limited (previously known as Turkana Drilling Consortium Ltd) & 3 others v Permanent Secretary, Ministry of Energy & 17 others [2016] eKLR relied on by the respondent thus:

“In the recent case of *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others, (supra)* this Court when pronouncing itself on the applicability of the doctrine of *res judicata* in constitutional claims, and whilst cautioning that the doctrine should be sparingly invoked in the clearest of cases, had this to say:

“The rationale behind *res judicata* is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. *Res judicata* ensures the economic use of the court’s limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without *res judicata*, the very essence of the rule of law would be in danger of unraveling uncontrollably. In a nutshell, *res judicata* being a fundamental principle of law



may be raised as a valid defence. It is a doctrine of general application, and it matters not whether the proceedings in which it is raised are constitutional in nature. The general consensus therefore remains that res judicata being a fundamental principle of law that relates to the jurisdiction of the court, may be raised as a valid defence to a constitutional claim even on the basis of the court's inherent power to prevent abuse of process... [Emphasis]

Those views apply equally, in our view, to judicial review litigation.”

14. Having stated that, the issue that remains for our consideration is whether the application subject of this appeal is *res judicata*. Section 7 of the *Civil Procedure Act*, Cap. 21 of the Laws of Kenya provides that: -

“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.”

15. Also, this Court in the *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others* [2017] eKLR, had the following to say regarding what constitutes *res judicata*:

“For the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms:

- a) The suit or issue was directly and substantially in issue in the former suit.
- b) That former suit was between the same parties or parties under whom they or any of them claim.
- c) Those parties were litigating under the same title.
- d) The issue was heard and finally determined in the former suit.
- e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

16. According to the judgment dated 8th of December 2017, the *ex parte* applicants filed a Judicial Review application dated 31st of March 2017 seeking orders for:

- (i) Certiorari to bring this court for purposes of being quashed the letters of appointment dated 24th October 2016 issued by the respondent in contravention of the judgment delivered on 22nd July 2016.
- (ii) Mandamus compelling the respondent to issue to the applicants fresh letters of appointment on permanent and pensionable terms effective 1st July 2015 as directed by the court in its judgment above referred to.
- (iii) Mandamus compelling the respondent to pay to the applicants costs as assessed by the Deputy Registrar in the ELR Petition No. 10 of 2015 and certificates issued on 20th October 2016.”



17. The learned judge allowed prayers (i) and (ii) and in disallowing prayer (iii) he held as follows:

- “ 13. The *ex parte* applicants have not demonstrated that they had made any attempts to the respondent to pay the costs as taxed.
14. There is also no evidence that the certificates of costs were served upon the respondent.
15. In the view of the court, an order compelling the respondent to pay the taxed costs should only issue after a demonstration that the respondent has refused, failed or neglected to pay the costs.
16. It would not be prudent to issue an order compelling the performance of a duty or obligation without evidence that the party or obligation has failed to act.
17. Before concluding, a few observations on issues which may appear to be legal technicalities.
18. The *ex parte* applicants purported to file a supporting affidavit to the motion, which was not filed at stage of seeking leave.
19. My understanding of order 53 rule 4 of the *Civil Procedure Rules* is that no further affidavits (save for those filed at the leave stage) are allowed unless leave of court is sought and granted.
20. Instead of turning this judgment into a prose on the practice and procedure of judicial review, the court would draw the attention of the *ex parte* applicants to *Republic v Chief Magistrates Court Thika & Ar ex parte Joseph Kamunya Kinuthia* (2016) eKLR.
21. It is also not clear whether it was competent for the *ex parte* applicants to combine an order for payment of costs together with the other 2 orders sought.”

18. Having considered the record, we note that the learned judge’s dismissal of the prayers seeking to compel the respondent to pay costs, was on the grounds that the application was brought prematurely. We find that the suit was not determined on merit and hence, it is not *res judicata*. Ultimately, the appeal is allowed with orders that:

- i. The matter be and is hereby referred back to the Superior Court to be determined on merit, before any other judge of the ELRC, other than lady justice M. Mbaru.
- ii. Costs shall abide the outcome of the trial.

It is so ordered.

DATED AND DELIVERED IN NAKURU THIS 24TH DAY OF NOVEMBER 2023.

F. OCHIENG

.....

JUDGE OF APPEAL

L. ACHODE



.....
JUDGE OF APPEAL

W. KORIR

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original.

signed

DEPUTY REGISTRAR

