REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW (JR) 13 OF 2016

REPUBLIC ……..……. APPLICANT

VERSUS

KENYA REVENUE AUTHORITY …….. RESPONDENT

EX PARTE PAUL MAKOKHA OKOITI

RULING

1. The *ex parte* Applicant moved the High Court under **Misc. Civil Cause JR 300 of 2016** seeking leave to apply for orders of mandamus directed at the Respondent to give particulars of the errors with regard to his salaries, deductions of his salaries. The JR 300 of 2016, the High Court transferred the matter to this Court for hearing and disposal noting it related to employment and labour relations between the parties.

2. Upon the Respondent being served, they filed Notice of Preliminary Objections on 28 September 2016. Noting the issues raised, the Court directed the parties to argue the objections first.

3. The respondent's objections are that;

> *1. The orders sought in the application are untenable because they seek to compel the respond in its public and administrative capacity to perform alleged statutory duty which they have never refused to perform in any event.*
>
> *2. This matter is res judicata in view of a judgement delivered on 10th February 2012 in HC Misc. Applc.351 of 211 between the same parties … and subsequent ruling on 9th May 2014 where the Court dismissed the applicant's application to set aside judgement. The Applicant has already exercised the option of Appeal to the Court of Appeal.*
>
> *3. The matter is also res judicata as it is also pending before the Industrial Court [Employment and Labour Relations Court] in Industrial Misc. No.25 of 2013: Paul Makokha Okoiti vs KRA. The Applicant has refused to prosecute that matter.*
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> *4. The matter is also res judicata as the petitioner filed judicial Review in JR No.340 of 2013 which was heard on the very same issues as proposed to be canvassed in this suit. … Judgement dated 21st May 2014 in the JR and ruling delivered on 11st December 2014 in the matter was given denying the Applicant his application to set aside Judgement.*
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> *5. Mr Okoiti has filed six (6) suits on the same issue before 6 different Judges. The suits are as follows:*

(a) HC Misc. Application No.341 of 2011; Paul Makokha Okoiti vs KR- Heard and determined by Justice Majanja and now pending ruling before Lenaola J. and seeking release of documents.

(b) Industrial Misc. No.25 of 2011; Paul Makokha Okoiti vs KRA – was before lady justice Onyango, has never been prosecuted and was outside limitation period.

(c) JR No.340 of 2013; Paul Makokha Okoiti vs KRA & 5 Others – heard and determined by Justice Korir through both judgment and ruling – application seeking to summon and cross-examine various officers.

(d) JR No.117; Paul Makokha Okoiti vs KRA – heard and determined by justice Odunga, seeking that KRA not be allowed to defend the suit for reasons that they had not availed the charges against the applicant.

(e) JR No.300 of 2016; Paul Makokha Okoiti vs KRA- was before justice Odunga, directed to pursue the matter in the employment court.

(f) ELRC Misc. JR 13 of 2016; Paul Makokha Okoiti vs KRA – current suit

6. The issues raised herein are res judicata and sub judice by virtue of the fact that there are three (3) similar judgements in the suits, and two (2) similar rulings. All of the findings in those decisions are in favour of KRA.

7. The Applicant is a vexatious litigant and is abusing the Court process to the prejudice of the respondent. The present application is a frivolous one and highly prejudicial to the respondents.

4. The objections and grounds thereto are supported by the affidavit of **Mrs Lorraine Malinda** who avers that she is a Deputy Commissioner with the Respondent and has been Head of the human Resources Department within KRA. The Applicant was employed by the Respondent and was taken through disciplinary hearing for gross misconduct and dismissed from service but has continuously alleged that he was not given a fair hearing whereas he was taken through due process. The Applicant has since filed various suits;

(a) HC Misc. Applc No.351 of 2011, *Paul Makokha Okoiti vs KRA;*

(b) Industrial Misc. No.25 of 2013, *Paul Makokha Okoiti vs KRA;*

(c) JR No.340 of 2013; Paul Makokha Okoiti vs KRA;

(d) JR No.117 of 2015; Paul Makokha Okoiti vs KRA; and

(e) JR No.300 of 2016; Paul Makokha Okoiti vs KRA.

5. There has been judgement and rulings in the first 3 suits save for Industrial Misc. No.25 of 2012 that the Applicant has refused to set down for hearing and in which case the Respondent has set out the objections with regard to the suit being time barred.

6. That the Applicant has continued to write numerous letters to the respondent's Human Resource Department directly despite his knowledge that his suits are pending in court. The Applicant is now using the letters in reply to issue threats to Respondent officers and mislead the court.

7. The Respondent is highly prejudiced as the Applicant has been allowed to abuse the Court process and make fresh allegations against KRA and in every instance has been forced to make responses and Court appearances to defend the same issues. The respond has filed several affidavits in reply to the Applicant's numerous Court matter. Every time the Applicant appears before a different judge, he is

given a fresh ear, and hear a matter afresh despite objections and thereafter substantive judgments are written but the Applicant does not take heed to the same. The Respondent is aggrieved as every time the Applicant is in Court he makes personal attacks of its officers and counsel of record and this has put all such officers on personal defence countless times.

8. Counsel for the Respondent Ms Lavuna and Ms Ng'ang'a also submitted that the Respondent and its officers are seeking the protection of the Court so as to stop the multiplicity of suits and the harassment and treats visited upon them by the applicant, the current application should be dismissed and the Applicant be directed to set Industrial Misc. No.25 of 2013 for hearing. The Court ordered parties to proceed with full discovery and since the Applicant filed that suit he has not moved another step and chosen to engage the Respondent in new suits.

9. In response, the Applicant filed his affidavit and submissions.

10. The Applicant avers that the respondents have not explained the source of the deductions made on his salary and there is need for the Respondent to account for 25% of the amount paid kshs.16, 750.00. Such deduction was made in 2008 when the Applicant was still in office and the deductions made should be explained. The deponent of the affidavit, Mukuni Kithonga should give proper account to the payments and deductions made so as to give proper accounts for the 25%. The deponent should give such accounts in Court so as to be cross-examined.

11. That the question with regard to a salary and employment are distinct issues particularly where such relate to past payments that are in dispute. That the accounting persons should give full documentation from Mukuni Kithonga. The issues raised by the deponent for the Respondent cannot be addressed by affidavit.

12. The objections should be dismissed.

13. The Applicant also submit that there can be no objections in a judicial review matter as facts are contested. Leave herein was obtained *ex parte* and that prohibits the Respondent from raising any objections which amount to an appeal against the orders granted *ex parte* as held in Misc. Civil Appl. No.282 of 1982 and that objections can only be raised on matters of law as held in Mukisa Biscuits manufacturing Co. Ltd Versus West End Distributors (1969) EA.

14. The Applicant also submit that *res judicata* does not occur in a case which has never been contested even in the judicial review matter. Where the Court has a problem, both parties can bring an accountant to verify the issue of deductions. As such, the objections lack merit and should be dismissed.

15. The Applicant further submitted that he filed JR No.351 of 2011 and his case was dismissed and has challenged the same by a review. He filed Industrial Misc. No.25 of 2013 and the Court allowed him to get documents and then he filed JR No.340 of 2013 so as to have the Respondent produce the documents before proceed with his case but the matter was dismissed. In JR No.300 of 2016 the Applicant was seeking his pay slips and records to support his deductions and thus in this cases he has been properly before court.

Determination

Is the matter herein *res judicata*?

Is the matter herein *sub judice*?

16. On the question as to whether a matter is *res judicata*, section 7 of the Civil Procedure Act which 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. [Emphasis added].

17. In this regard, a 'suit' has been defined under section 2 of the Civil Procedure Act as;

"Suit" *means all civil proceedings commenced in any manner prescribed.*

18. Therefore, the doctrine of *res judicata is well settled* under the provisions of Civil suits adjudication to serve the dual roles of preventing multiplicity of suits and to ensure litigation comes to an end. 'civil suits' are thus defined under the Civil Procedures Act but Judicial Review applications are regulated under a different regime and statute, section 8 and 9 of the Law Reform Act as the substantive law and Order 53 of the Civil Procedure Rules for the procedural requirements.

20. This question was gone into at length in the case of **Commissioner of Lands vs. Hotel Kunste Ltd Civil Appeal No. 234 of 1995 where the Court held;**

… The High Court shall not, whether in the exercise of its Civil or Criminal jurisdiction, issue any of the prerogative Writs of Mandamus, prohibition or Certiorari. … in this country by reason of ***S.8 (2)*** *of the Law Reform Act, prerogative writs were changed to be known as "Orders", except for the writ of habeas corpus. So S.8 (1) above denies the High Court the power to issue orders of mandamus, prohibition and certiorari while exercising Civil or Criminal jurisdiction. What that then means is that notwithstanding the wording of S.13A, above, which talks of proceedings, in exercising the power to issue or not to issue an order of certiorari the Court is neither exercising Civil nor Criminal jurisdiction. It would be exercising special jurisdiction … [as in] a suit within the meaning of the term "Suit" in* ***S.2 of the Civil Procedure Act*** *is envisaged.*

21. The rationale is that section 7 of the ***Civil Procedure Act*** does not apply to judicial review proceedings. In fact in **Re: National Hospital Insurance Fund Act and Central Organisation of Trade Unions (Kenya) Nairobi HCMA No. 1747 of 2004 [2006] 1 EA 47** it was held that *res judicata* principles do not apply to judicial review.

22. That said, filing of judicial review applications so as to avoid the *res judicata* rule application and where there indeed evidence that such judicial review applications have been filed in their big numbers over the same matters and purpose for leave being sought, such has been held as an abuse of Court process. In **Republic v National Transport & Safety Authority & 10 others ex parte James Maina Mugo [2015] eKLR** the High Court held;

This, however, does not mean that the Court is powerless where it is clear that by bringing proceedings a party is clearly abusing the Court process. Whereas res judicata may not be invoked in judicial review the Court retains an inherent jurisdiction to terminate proceedings where the same amount to an abuse of its process. 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 matter 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 a jurisdiction conferred by section 3A of the ***Civil Procedure Act*** *as such but merely reserved thereunder. In* ***Kenya Bus Services Ltd & Others vs. Attorney General and Others [2005] 1 EA 111; [2005] 1 KLR 743*** *it was held:*

'It is trite law that an ex parte order can be set aside by the judge who gave it or by any other judge. The Civil Procedure Rules provide for this. Our Constitution does assume the existence of supportive Civil Procedure regime in so far as the same is not inconsistent with the Constitution. There is nothing inconsistent with the Constitution in the act or principle of setting aside of ex parte orders for good reasons. If an order obtained in a Constitutional application is incompetent or improperly obtained there cannot be any valid reason why the Court would not

have the jurisdiction to set it aside. Setting aside would be properly justified on grounds of doing justice and fair play and good administration of justice and therefore in furtherance of public policy...Where there is no specific provision to set aside the courts power or jurisdiction would spring from the inherent powers of the court. Whereas ordinary jurisdiction stems from the Act of Parliament or statutes, the inherent powers stem from the character or the nature of the Court itself – it is regarded as sufficiently empowered to do justice in all situations. The jurisdiction to exercise these powers was derived, not from statute or rule of law, but from the very nature of the Court as a superior Court of law, and for this reason such jurisdiction has been called "inherent". For the essential character of a superior Court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent the process being obstructed and abused. Such a power is intrinsic in a superior court, its very lifeblood, its very essence, its immanent attribute. Without such a power, the Court would have form but would lack substance. The jurisdiction, which is inherent in a superior Court of law, is that which enables it to fulfil itself as a Court of law. The judicial basis of this jurisdiction is therefore the authority of the Judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner. The need to administer justice in accordance with the Constitution occupies an even higher level due to the supremacy of the Constitution and the need to prevent the abuse of the Constitutional provisions and procedure does occupy the apex of the judicial hierarchy of values. Therefore the Court does have the inherent powers to prevent abuse of its process in declaring, securing and enforcing Constitutional rights and freedoms. It has the same power to set aside ex parte orders, which by their very nature are provisional."

23. Does the Applicant then suffer application of the *res judicata* Rule? Obviously, the Applicant moved Court by way of judicial review and thus has circumvented the application of the same in his case. However, it is apparent that there exists;

JR No.351 of 2011- Paul Makokha Okoiti versus KRA;

JR No.340 of 2013 – Paul Makokha Okoiti versus KRA; and

JR No.117 of 2015 – Paul Makokha Okoiti versus KRA.

24. In JR No.351 of 2011, the Court, upon hearing both parties wrote judgement and attending to all the substantive issues before Court held that;

While the petitioner is seeking for information to enforce specific fundamental rights and freedoms, I am satisfied that the Respondent has sufficiently complied for purposes of this suit with the provisions of Article 35 of the Constitution by furnishing the petitioner with information to launch his intended action. I also find that there has been no breach of the petitioner's right to information. In fact, the Respondent has undertaken to furnish him with information as and when it becomes available.

The petitioner contemplates filing an action against the Respondent for wrongful dismissal in the very near future, the Court with jurisdiction to determine the case will have full powers to order full discovery. The Court having powers to order discovery will consider what is relevant and what is not for purposes of the proceedings before it. For me to proceed with this action, in the manner suggested by the petitioner would be to conduct a fishing expedition on his behalf. …

25. Thus settled, I take it, the Applicant filed Industrial Misc. No.25 of 2013.

26. In JR No340 of 2013, the Court, in view of submission made and particularly the issue of *res judicata* that arose, and held that the Applicant should not ***be allowed to go on litigating forever 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.***

Of importance in this regard is the finding of the Court at page 12/14 that;

> *Justice Majanja gave sound advice to the Applicant as to what he should do about his case. …*
>
> *The Applicant initially complied with that sound advice and filed Misc. No.25 of 2013 at the Industrial Court but later changed his mind and filed this matter. The applicant's action is an abuse of the Court process. It therefore follows that the applicant's decision to file these proceedings amounts to an abuse of the Court process. …*

27. Justice Korir went on at page 14/14 of his judgement to make a finding that;

> *… as pointed out by Majanja, J, the Judge who will try his case will apply the CPR when appropriately moved. The remedies that the Applicant seeks in these proceedings [an order of mandamus directed tot eh Kenya Revenue Authority to give the applicant, all the information required by the Applicant concerning his disciplinary proceedings, including those given in his request served upon the Kenya Revenue Authority on 20th September, 2013, which were concealed, and the particular reasons for their concealment, certified by the Kenya Revenue Authority] can as well be given to him in the case before the Industrial Court.*

28. In High Court JR 117 of 2015, the Applicant filed application seeking an ***order of prohibition to restrain the KRA counsels, Ms Janet Livuna, from representing the KRA in cases of alleged dismissal of the Applicant from Kenya Revenue Authority.***

29. The Respondent filed objections to the application filed against them on the grounds that similar issues raised in support of the same had been addressed with a conclusion in three 93) other matters before the same Court, High Court and that another matter was pending before the Industrial Court [Employment and Labour Relations Court] in Industrial Misc.No.25 of 2013.

30. Upon the Court considering all arguments and submission by both parties, Odunga, J, went in-depth into the question and purposes for which judicial review applications should be filed. At paragraphs **16 and 22** of his judgement he held that;

> *16. What comes out clearly from the foregoing is that the grant of leave to commence judicial review proceeding is not a mere formality and that leave is not granted as a matter of course. The Applicant for leave is under an obligation to show to the Court that he has a prima facie arguable case for grant of leave. Whereas he is not required at that stage to go into the depth of the application, he has to show that there exist grounds upon which the Court may find that the judicial review orders would be justified. Therefore where it is clear to the Court that even if the applicant's case as pleaded would otherwise succeed but the grounds do not bring the matter within the purview of judicial review the Court would still not grant the leave sought.*
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> *22. I have also considered the nature of the orders sought. It is clear that the Applicant's basis for seeking the orders sought herein is to compel the Respondent to furnish him with the charges against him. That relief cannot be obtained by prohibiting the Respondent from defending suits filed against it by the Applicant. If properly advised the Applicant can obtain what he seeks without necessarily applying for the orders he intends to seek herein. In fact in Miscellaneous Application No. 351 of 2011 between the same parties, **Majanja, J** offered the Applicant a gratuitous opinion on the manner in which he could obtain the relief he seeks herein but the Applicant did not heed the same. Instead in these proceedings the Applicant is contending that **"attempt to get the charges have been avoided by both judges and the counsel in Misc. JR 351 of 2011"**. In my view the commencement of these proceedings is a gross abuse of the Court process. **Leave to commence judicial review application, however cannot be granted where to do so would amount to the Court abetting abuse of its own process since the decision whether or not to grant leave is an exercise of judicial discretion**. [Emphasis added].*

31. Despite the Judgement of Odunga, J, on 1st of July 2015 which dismissed the applicant's application

with costs to the respondent, on 14th July 2016, the Applicant filed High Court JR No.300 of 2016 and which was transferred herein under ELRC, JR No.13 of 2013. The Applicant is seeking for ***Orders of mandamus directed at the respondent, Kenya Revenue Authority to give particulars complained about by the Applicant and full response of them (complaints satisfactorily).***

32. Noting all of the above, the different matters now before the court, I find the applicants has totally avoided to address ELRC, Misc. No.25 of 2013. I have taken the liberty to look at this file and noted the proceedings and last orders issued to the applicant. The Applicant has not complied. He cannot keep the various courts engaged on a matter(s) that can very well be addressed by the Court in ELRC, Misc.No.25 of 2013 as it is admitted the relationship that existed between the Applicant and the Respondent is that of employer and employee. The subject of all the matters now filed by the Applicant go back to the cause of action, the termination of employment on 3rd February 2009.

33. To allow the Applicant proceed on the path he has chosen, filing a judicial review application for every matter that he feels aggrieved against the respondent, such being done with the knowledge that he has ongoing case against the Respondent in ELCR, Misc.No.25 of 2013 and that there is judgement in HC Misc. Appl.No.351 of 2011; JR No.340 of 2013; JR No.117 of 2015; and the current JR Appl. 300 of 2016 transferred to this Court under JR No.13 of 2016; these suits I find to be in gross abuse of the Court process. Whatever motive the Applicant is engaged in in moving different courts and judges to this extent, this should stop forthwith. To file multiple applications is not only time consuming for the Court but a serious aggression upon the respondent. Setting out different motions with the aim of attacking individual employees and officers of the Respondent is simply unacceptable.

34. The latitude the Applicant has enjoyed so far before different judges has been abused and has ended up putting the Respondent into great expense in terms of personnel attendance to his various matters in Court and valuable judicial time. The advice given to the Applicant particularly in JR No.351 of 2011, though partially complied with and he filed Misc. No.25 of 2013 before this court, similar advice was reinstated in JR No.340 of 2013 and JR No.117 of 2015 but the Applicant has not taken heed. This is engaging the Court in circles and amounts to being frivolous.

35. Parties admit that there is an Appeal to the Court of Appeal arising out of judgement and ruling of the High Court in JR No.351 of 2011. The Applicant has not moved the process therein. As this Court has no jurisdiction to go into the matter before the Court of Appeal, the knowledge of the Applicant with regard to his matter now pending before that Court yet he continues to engage the courts over the same only adds to the finding for his abuse of Court process.

36. For being an abuse of Court process and being frivolous, the application herein should be dismissed. Costs should also be paid to the respondent.

37. The above noted, the question of the matter being *sub judice* was raised by the Respondent in objection to the application herein.

38. The general rule is that to file similar applications over the same subject matter seeking similar reliefs is an abuse of the Court process. Where an Applicant files two applications, where the earlier one is not concluded, a similar subsequent application is ***sub judice*** by virtue of section 6 of the Civil Procedure Act. However, even where the *sub judice* rule apply to suits filed in accordance with the Civil Procedure Act and the Rules thereto, where Order 53 of the Civil Procedure Rules specifically address the filing of judicial Review applications as regulated under the Law Reform Act, for an Applicant to file different judicial applications arising from the same cause of action while the Court with jurisdiction is already seized of the matter is an abuse of Court process.

39. In The speaker of the National Assembly versus The Hon James Njenga Karume Civil Application No NAI 92 of **1992**, quoted in **Charles Kagai Mwihia & another v Ndolo Ayah & another,** it was held that**;**

In our view there is considerable merit in the submission that where there is a clear procedure for

the redress of any particular grievance prescribed by the Constitution or an Act of parliament that procedure should be strictly followed. We observe without expressing a concluded view that Order 53 of the Civil procedure Rules cannot oust clear Constitutional and statutory provisions

40. The Applicant has filed ELCR, Misc.25 of 2013 and to file the current application, whether under HC JR No.300 of 2016 or before any other forum, is to fail to comply with procedures that should strictly followed for judicial review applications. The Employment and Labour Relations Court (Procedure) Rules, especially Rule 7 allow any party to move the Court with an application as appropriate, whether the same relates to a constitutional violation or requires judicial review or a memorandum of claim.

41. For the Applicant to continue to file different applications seeking documents on his employment with the respondent; seeking the attendance of non-attendance of individual employees of the Respondent or for the respondent; production of documents with regard to his salaries and deduction thereto; such being made outside ELCR, Misc.25 of 2013, I find this to be an abuse of Court process. In my view, in the exercise of judicial discretion the Court cannot legitimately look at a matter on one assumption alone favouring one party and ignoring the other party. The Respondent must also be protected by the Court where there is apparent frivolousness of an Applicant such as in this case. in arriving at this finding, I am persuaded by the ruling in **In The Matter of Global Tours and Travels Limited Nairobi High Court Winding Cause Number 43 of 2000 that;**

… judicial discretion to be exercised in the interest of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion it should be exercised rationally and not capriciously or whimsically

In conclusion therefore, the objections by the Respondent are allowed to the extent that the application herein and subsequent orders made are vacated as the same have been obtained through abuse of Court process. The Applicant is also hereby directed to cease writing, communicating and or addressing the Respondent and its officers directly on matters relating to his former employment that ceased on 3rd February 2009 unless the same relates to motions of the Court out of ELRC, Misc.25 of 2013.

Application and proceedings herein filed by the Applicant are hereby dismissed. Costs awarded to the respondent. A copy of the ruling shall be served upon the Registrar, High Court of Kenya for appropriate action with regard to any other matter filed by the Applicant over the same cause of action and outside ELRC, Misc.25 of 2013.

Orders accordingly.

Delivered in open court at Nairobi this 24th day of October 2016.

M. MBARU

JUDGE

In the presence of:

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