Hamptons Hospital Limited v Chief Justice & President of the Supreme Court of Kenya & 2 others; Sika Kenya Limited & another (Interested Parties) (Petition E515 of 2022) [2025] KEHC 1173 (KLR) (Constitutional and Human Rights) (27 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1173 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E515 OF 2022

LN MUGAMBI, J

FEBRUARY 27, 2025

BETWEEN

HAMPTONS HOSPITAL LIMITED ..... PETITIONER

AND

THE CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT OF KENYA ..... 1ST RESPONDENT

ATTORNEY GENERAL ..... 2ND RESPONDENT

NATIONAL ASSEMBLY ..... 3RD RESPONDENT

AND

SIKA KENYA LIMITED ..... INTERESTED PARTY

LAW SOCIETY OF KENYA ..... INTERESTED PARTY

RULING

Introduction

1. The Petition dated 18th November 2022 challenges the constitutionality of Section 38 (1) and (2) of the *Small Claims Court Act*.

2. The 1st Respondent opposed the Petition by filing a Chamber Summons application dated 4th May 2023 which seeks to be struck out of the Petition on the grounds of misjoinder.

3. The 3rd Respondent filed a Notice of Preliminary Objection dated 2nd May 2023.

4. On 12th February, 2024; this Court gave directions on the disposal of the said preliminary objection and the application to strike the Petition. The parties subsequently complied with the directions as the filing of submissions hence this ruling.

5. I will begin by setting out the 1st Respondent's Application to be

1st Respondent's Chamber Summons Application dated 4th May, 2023

6. The 1st Respondent sought the following orders:

    i. Spent.

    ii. This Court be pleased to strike out the 1st Respondent from the present Petition for misjoinder.

    iii. This Court be pleased to grant any other orders as it may deem fit and proper to further the ends of justice.

    iv. The costs of this application be borne by the Petitioner.

7. The application is supported by the 1st Respondent's Counsel, Muciimi Mbaka's affidavit, sworn on even date and the grounds on the face of the application.

8. Mr. Mbaka asserts that the 1st Respondent has been wrongly joined in the Petition as no orders have been sought against the 1st Respondent hence is an unnecessary party in this suit.

9. Further, Mr. Mbaka depones that the Petition does not disclose any reasonable cause of action against the 1st Respondent hence should be struck out of the Petition.

3rd Respondent's Notice of Preliminary Objection dated 2nd May 2023

10. The 3rd Respondent through its Notice of Preliminary Objection opposed the Petition on the premise that:

    i. The Petition is res judicata since the issues raised herein have been conclusively determined by the High Court of Kenya at Mombasa (Constitutional and Judicial Review Division) in Constitutional Petition No. 10 of 2019 Mombasa Law Society v Attorney General & another [2021] eKLR.

    ii. The issue of constitutionality of Section 38 of the *Small Claims Court Act*, 2016 raised in the Petition was among the issues raised in Mombasa Constitutional Petition No. 10 of 2019.

    iii. 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.

    iv. Further, explanation no. 6 of section 7 of the *Civil Procedure Act* provides as follows:

    > Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

v. The issue of constitutionality of Section 38 of the *Small Claims Court Act* was determined conclusively and with finality by a court of competent jurisdiction in Mombasa Constitutional Petition No. 19 of 2019.

vi. The principle of res judicata is a matter of public policy and is one of the pillars on which a judicial system is founded. Once a Judgment becomes conclusive the matters in issue covered thereby cannot be reopened unless fraud or mistake or lack of jurisdiction is cited to challenge it directly at a later stage.

vii. From the foregoing, it is clear that the Petition herein lacks merit, is frivolous, generally argumentative and an outright abuse of the court process and ought to be dismissed with costs.

Petitioner's case

11. In response to the 1st Respondent's Chamber Summons Application; the Petitioner filed a Replying Affidavit through its Director, Julius Mwale sworn on 12th June 2023.

12. He swore that the presence of the 1st Respondent is necessary as the office is created under Article 161(2)(a) of *the Constitution* as the head of the Judiciary. Further that the 1st Respondent issues practice directions from time to time through Gazette Notices.

13. Consequently, he stated that the 1st Respondent was joined in this matter as it was responsible for operationalizing the Small Claims Court in Kenya vide Gazette Notice No.3791 dated 23rd April 2021.

14. Equally that once a decision is made in this matter, it is the 1st Respondent who will be required to issue practice directions relating to the operations of the Small Claims Court.

2nd Respondent's and Interested Parties Case

15. These parties' responses and submissions to the 1st and 3rd Respondent's case are not in the Court file or Court Online Platform (CTS).

Parties' Submissions

1st Respondent's Submissions to its Application

16. The 1st Respondent through Muma and Kanjama Advocates filed submissions dated 31st May 2024 and highlighted the single issue for discussion as whether the 1st Respondent should be struck out of the instant Petition.

17. Counsel argued that the Petitioner had failed to establish a reasonable cause of action against the 1st Respondent. Reliance was placed in Karl Wehner Claasen v Commissioner of Lands & 4 others [2019]eKLR where the Court of Appeal opined that:

> "A cause of action denotes a combination of facts which entitles a person to obtain a remedy in court from another Person and includes a right of a person violated or threatened violation of such right by another person."

18. Comparable reliance was placed in Investments and Mortgages Bank limited v Nancy Thumari & 3 others [2015] eKLR.

19. Counsel submitted that the Petition relates to the constitutionality of the impugned provision which is a legislative function outside the 1st Respondent's mandate. It was argued that the 1st Respondent's

function in this matter as provided under Section 4 of the *Judicial Service Act* is limited to technical, infrastructural and administrative competence while ensuring that the requirements of the judicial processes are fulfilled.

20. In support of this argument Counsel relied in Order 1 Rule 10(2) of the Civil Procedure Rules on striking out of parties. It was underscored that no remedy had been sought against the 1st Respondent by the Petitioner citing the case of Josphat Langat & 2 others (Suing as the officials of 343 Members of Koita Welfare Self Help Group) v Kericho County Government & 4 others [2021]eKLR where it was held that:

> " It can be deduced from the above holding that a party whose presence in a suit cannot help the court determine the subject matter of the suit is an unnecessary party and should be struck out of the proceedings. It is therefore that the court may on its own motion or on application of any party to the proceedings order the striking out a party whose presence in a suit will not enable the court to effectually and completely adjudicate upon and settle all questions involved in the matter."

21. Other judicial authorities relied on includes: Boniface Omondi. v Mathare Youth Sports Association & another [2021] eKLR, Kizito M. Lubano v KEMRI Board of Management & 8 Others [2015] eKLR, Pizza Harvest Limited v Felix Midigo [2013] eKLR, Pravin Bowry v John Ward & Another [2015] eKLR and Gladys Nduku Nthuki v Letshego Kenya Limited; Mueni Charles Maingi (Intended plaintiff) [2022]eKLR.

22. It was argued that the improper joinder of the 1st Respondent was aimed at embarrassing and prejudicing the 1st Respondent. To support this point reliance was placed in Mercy Nduta Mwangi t/Mwangi Keng'ara & Co. Advocates v Invesco Assurance Company Limited [2019] eKLR where it was held that:

> " Pleading tend to prejudice, embarrass or delay fair trial when
>
> i. it is evasive; or
>
> (ii) obscuring or concealing the real question in issue between the parties in the case.
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> It is embarrassing if
>
> i. It is ambiguous and unintelligible; or
>
> (ii) it raises immaterial matter thereby enlarging issues, creating more trouble, delay and expense; or
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> (iii) it is a pleading the party is not entitled to make use of; or
>
> (iv) where the defendant does not say how much of the claim he admits and how much he denies. See Strokes Vs. Grant (1878) AC 345; Hardnbord vs. Monk (1876) 1 Ex. D. 367; Preston vs. Lamont (1876).
>
> A pleading which tends to embarrass or delay fair trial is described as a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses, trouble and delay and that which contains unnecessary or irrelevant allegations which will prejudice the fair trial of the action and lastly a pleading which is abuse of the process of the court really means in brief a pleading which is a misuse of the Court machinery

or process. See Trust Bank Limited vs. Hemanshu Siryakat Amin & Company Limited & Another Nairobi HCCC No. 984 of 1999."

3rd Respondent's Submissions to its Notice of Preliminary Objection

23. The 3rd Respondent's Counsel, Henry Abwanzo filed submissions dated 8th April 2024.

24. It was the 3rd Respondents contention that the suit is barred by the doctrine of res judicata the subject matter of the Petition was conclusively determined by the High Court in Mombasa (Constitutional and Judicial Review Division) in Constitutional Petition No. 10 of 2019 Mombasa Law Society v Attorney General & another [2021] eKLR.

25. To augment this position, the 3rd Respondent relied on the case of Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] KESC 53 (KLR) where the Supreme Court held as follows:

> "(317) The concept of res judicata operates to prevent causes of action, or issues from being relitigated once they have been determined on the merits. It encompasses limits upon both issues and claims, and the issues that may be raised in subsequent proceedings. In this case, the High Court relied on "issue estoppel", to bar the 1st, 2nd and 3rd respondents' claims. Issue estoppel prevents a party who previously litigated a claim (and lost), from taking a second bite at the cherry. This is a long-standing common law doctrine for bringing finality to the process of litigation; for avoiding multiplicities of proceedings; and for the protection of the integrity of the administration of justice all in the cause of fairness in the settlement of disputes... There are conditions to the application of the doctrine of res judicata:
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> i. the issue in the first suit must have been decided by a competent Court;
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> (ii) the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar; and
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> (iii) the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title Karia and Another v. The Attorney General and Others, [2005] 1 EA 83, 89."

26. Comparable dependence was placed in John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2024] KEHC 6648 (KLR) and Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another [2016]eKLR.

Petitioner's Submissions

27. The Petitioner through Javier Georgiadis and Sylvester Law LLP filed submissions dated 12th May 2024 in answer to the 1st Respondent's application and also, submissions dated 15th February 2024 to the 3rd Respondent's Preliminary Objection.

28. In regard to the 1st Respondent's application, the Petitioner's counsel reiterated the contents of the Petitioner's affidavit and submitted that the 1st Respondent is a necessary party in this suit.

Acknowledging the Court's power to strike out a party as empowered under Order 1 Rule 9 of the Civil Procedure Rules, Counsel submitted that this power should nonetheless be exercised with caution.

29. Counsel urged the Court to recognize that the Petitioner seeks a declaration on the constitutionality of the impugned section as legislated by Parliament and it's only the Court, as headed by the 1st Respondent that is vested with the power to interpret *the Constitution*.

30. Turning to the 3rd Respondent's Preliminary Objection, Counsel submitted that the principles of making such a determination are anchored in Mukhisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] E.A. 696 where it was held that:

> " Preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose the suit... A preliminary objection is in the nature of what used to be a demure. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or of what is sought is the exercise of judicial discretion."

31. Counsel further submitted that the doctrine of res judicata implies that for a matter to be res judicata, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merits by a court of competent jurisdiction. Reliance was also placed in John Florence Maritime Services Limited and another (supra).

32. Additional reliance to support this issue was placed in Henderson v Henderson (1843-60) All ER 378, Siri Ram Kaura v M.J.E. Morgan, *CA 71/1960* [1961] EA 462 and Njangu vs Wambugu and another Nairobi HCCC No.2340 of 1991 (unreported).

33. According to Counsel, the two petitions, contrary to the 3rd Respondent's assertions are different. This is because the parties and issues in the two petitions are not similar. Counsel stressed that for the doctrine of res judicata to apply, the three essential ingredients must be satisfied which had not in this case.

Analysis and Determination

34. It is my considered view that the issues that arise for determination are:

    i. Whether the 1st Respondent should be struck out from the Petition.

    ii. Whether the Petition is res judicata

Whether the 1st Respondent should be struck out from the Petition

35. The 1st Respondent assailed the Petition on two major grounds; one, misjoinder of the 1st Respondent as unnecessary party and two, there is no identifiable cause of action against the 1st Respondent.

36. The law on joinder of parties and striking out of improperly joined parties is found in *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 under Rule 5 which states as follows:

> " The following procedure shall apply with respect to addition, joinder, substitution and striking out of parties—
>
> a. Where the petitioner is in doubt as to the persons from whom redress should be sought, the petitioner may join two or more respondents in order that the

question as to which of the respondent is liable, and to what extent, may be determined as between all parties.

b. A petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every proceeding deal with the matter in dispute.

c. Where proceedings have been instituted in the name of the wrong person as petitioner, or where it is doubtful whether it has been instituted in the name of the right petitioner, the Court may at any stage of the proceedings, if satisfied that the proceedings have been instituted through a mistake made in good faith, and that it is necessary for the determination of the matter in dispute, order any other person to be substituted or added as petitioner upon such terms as it thinks fit.

d. The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just—

i. order that the name of any party improperly joined, be struck out; and

ii. that the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be added.

(e) Where a respondent is added or substituted, the petition shall unless the court otherwise directs, be amended in such a manner as may be necessary, and amended copies of the petition shall be served on the new respondent and, if the court thinks, fit on the original respondents."

37. The principle that misjoinder cannot ruin a cause of action that is properly before the Court was underscored by the Supreme Court in Ndii & others v Attorney General & others (Petition E282, 397, E400, E401, E416 & E426 of 2020 & 2 of 2021 (Consolidated)) [2021] KEHC 9746 (KLR) (Constitutional and Human Rights) (13 May 2021) (Judgment) where it was held as follows:

> " 537. Be that as it may, order 1 rule 9 of the Civil Procedure Rules is clear that a suit cannot be defeated for misjoinder or non-joinder and that what the court should be bothered with is the determination of the rights of the parties; that rule reads as follows: No suit shall be defeated by reason of the misjoinder or non- joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.
>
> 538. To the extent that this rule is applicable to the petitions such as the one before court, we can confidently say that regardless of whether the 1st respondent has been properly joined to this suit, this court is in good stead and ideally placed to 'deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."

38. That notwithstanding, the Court in Youth Limited v Kihiko & another; Kenya Railways Corporation (Intended Defendant) [2024] KEELC 1413 (KLR) observed thus:

> " 20. Courts have held that a party is necessary to a suit where it is shown that the legal reliefs sought would directly affect the person sought to be joined, to avoid a multiplicity of suits or where it is shown that the Defendant cannot effectually set a defence unless that person is joined in it. This position was set out in the Ugandan case of Departed Asians Property Custodian Board v Jaffer Brothers Ltd [1999] 1 EA 55 quoted with approval by the Court of Appeal in Civicon Limited v Kivuwatt Limited & 2 others [2015] eKLR as follows:
>
> "A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the Court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involve in the suit. A party may be joined in a suit, not because there is a cause of action against it, but because that party's presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involve in the cause or matter...For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders, which the plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such a person joined so that he is bound by the decision of the Court in that suit. Alternatively, a person qualifies, (on an application of a Defendant) to be joined as a co-defendant, where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person."
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> 21. The Court of Appeal also quoted its earlier decision in Meme v Republic (2004) KLR637 wherein it held that joinder will be permissible:
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> i. Where the presence of the party will result in the complete settlement of all the question involved in the proceedings;
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> ii. Where the joinder will provide protection for the rights of a party who would otherwise be adversely affected in law: and
>
> iii. Where the joinder will prevent a likely course of proliferated litigation."

39. As to the meaning of cause of action, this phrase simply describes the existence of facts that would give rise to a claim that is properly founded in law. In Isaiah Ondiba Bitange v & 3 others v Institute of Engineers of Kenya another [2017]eKLR the Court explained thus:

> " A cause of action was defined by Obi Okoye — Essays on Civil Proceedings,[1] thus — "By a cause of action is meant any facts or series of facts which are complete in themselves to found a claim or relief." In the case of Drummond Jackson v. British Medical Associations & Ors., Lord Pearson stated as follows:-

> "..... the expression "reasonable cause of action" ....No exact paraphrase can be given, but I think "reasonable cause of action" means a cause of action with some chance of success when..... only the allegations in the pleading are considered, if it is found that the alleged cause of action is to fail, the statement of claim should be struck out."
>
> The Supreme Court of Nigeria in the case of Oshoboja v. Amuda & Ors; held that a reasonable cause of action means a cause of action with some chances of success, when only the allegations in the Statement of Claim are considered. Our law is the law of the practitioner rather than the law of the philosopher. Decisions have to draw their inspiration and their strength from the very facts which framed the issues for decisions."

40. The Court went further to state as follows:

> " ... The pith and marrow of it is that where on a consideration of only the allegations in the pleading the court concludes that a cause of action with some chance of success is shown then that pleading discloses a reasonable cause of action. Person, J in Drummond Jackson v British Medical Association, the definition of a cause of action was determined as an act on the part of the Defendant which gives the Plaintiff his cause of complaint..."

41. In the same way, the Court in Njunge v Ministry of Interior & Coordination of National Government & 3 others [2024] KEHC 4676 citing a number of authorities with approval noted as follows:

> " That the application discloses no reasonable cause of action or defence in law. In DT Dobie & Co. (Kenya) Limited v Muchina & Another [1982] KLR, the Court of Appeal defined reasonable cause of action to mean "an action with some chance of success when allegations in the plaint only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claim prayer..."

42. The Petitioners have not demonstrated with exactitude why the 1st Respondent is Party in these proceedings. When confronted with the Application to strike the 1st Respondent from this suit, the Petitioner filed a replying affidavit claiming that the 1st Respondent is head of the Judiciary and is required to oversee the implementation and administration of the Small Claims Court and issues Practice Directions from time to time.

43. However, this Petition does not challenge the constitutionality of any specific directions that the 1st Respondent has issued in exercise of the statutory powers donated under the Act or the said section under which such directions are issued. I thus find that the Petitioner has not substantiated or demonstrated that the 1st Respondent is a necessary party or indeed there is any reasonable cause of action against it in view of the facts of this case. In any event, the Petitioner does not seek any relief against the 1st Respondent.

Whether the Petition is res judicata

44. Res judicata refers to the judicial principle against re-litigation of disputes that have been conclusively determined on merits. That doctrine is codified under Section 7 of the *Civil Procedure Act*, CAP 21 as follows:

> 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.

45. The Supreme Court in John Florence Maritime Services Limited (supra) underscoring the significance of res-judicata stated as follows:

> "
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> " 54. The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.
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> 55. It emerges that, contrary to the respondent's argument that this principle is not to stand as a technicality limiting the scope for substantial justice, the relevance of res judicata is not affected by the substantial-justice principle of Article 159 of *the Constitution*, intended to override technicalities of procedure. Res judicata entails more than procedural technicality, and lies on the plane of a substantive legal concept.
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> 56. The learned authors of Mulla, Code of Civil Procedure, 18th Ed 2012 have observed that the principle of res judicata, as a judicial device on the finality of court decisions, is subject only to the special scenarios of fraud, mistake or lack of jurisdiction (p 293):
>
> The principle of finality or res judicata is a matter of public policy and is one of the pillars on which a judicial system is founded. Once a Judgment becomes conclusive, the matters in issue covered thereby cannot be reopened unless fraud or mistake or lack of jurisdiction is cited to challenge it directly at a later stage. The principle is rooted to the rationale that issues decided may not be reopened and has little to do with the merit of the decision."

46. The Court went on to observe that:

> " 59. For res judicata to be invoked in a civil matter the following elements must be demonstrated:
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> a. There is a former Judgment or order which was final;
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> b. The Judgment or order was on merit;
>
> c. The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
>
> d. There must be between the first and the second action identical parties, subject matter and cause of action."

47. The principle of res judicata does not only apply in barring similar or identical suits that have been fully litigated and concluded between the parties or their representative but also precludes from being re-litigated between the same parties or their representatives but also precludes similar issues that have been judicially considered and determined on the merits from featuring for re-litigation in what has

now come to be known as issue-based estoppel where party in a former suit or representative of such party cannot re-introduce the matter in a subsequent suit even if that suit be different. The principle of res-judicata can thus be summed up as incorporating two concepts of claim exclusion and issue preclusion.

48. Articulating the significance of issue-based estoppel as distinguishable from cause of action estoppel, the Court of in Mumira v Attorney General [2022] KEHC 271 (KLR) held as follows:

> " 18. In the United Kingdom, res judicata is known as cause of action estoppel or issue estoppel... (A distinction is made between "cause of action estoppel" and "issue estoppel". In the first case— "the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter." (Arnold v National Westminster Bank [1991] 2 AC 93 (HL) at 104.) In the second case— "a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue." (Arnold at 105.)

49. In Okiya Omutatah v Communication Authority of Kenya [2015] eKLR Lenaola J invoked issue-based estoppel when he held as follows:

> " In my view, he sued the officials of the 1st Respondent so as to disguise the proper parties who were in the first Petition and that attempt cannot affect my conclusions above and help him evade the doctrine of res judicata on the main issue of digital migration which is the common thread running through all the Petitions as can be seen above. I shall repeat for emphasis that the said issue cannot be re-opened merely by re-introducing the rights of viewers to migrate and re-packaging it differently as a violation of the provisions of *the Constitution* and that of the Bill of Rights so as to prevaricate the principle of res judicata."

50. The 3rd Respondent impugns the present Petition on the basis that the subject matter of the Petition was settled conclusively by the Court in Constitutional Petition No. 10 of 2019 (Mombasa Law Society v Attorney General & another [2021] eKLR).

51. In that Petition the constitutionality of Sections 20(2) and 38 of the *Small Claims Court Act* was in issue. The Petitioner in that dispute assailed Section 38 for contravening Article 48 on the right of access to justice and Article 50(1) on the right to fair hearing. The Petitioner attacked the constitutionality of Section 38 for stating that an appeal can only be lodged in the High Court and that the decision of the High Court was to be a contravention of Article 48 on access to justice and also Article 164 (3) for barring escalation an appeal from High Court to the Court of Appeal. Further that by limiting the High Court on appeal to matters of law, that it was a contravention of the right to fair hearing under Article 50 (1) of *the Constitution*.

52. In its Judgment of 29th April 2021, the Court held among others that Section 38 of the Small Claims Act is not unconstitutional. The Court held as follows:

> " 31. ... Article 164(3) of *the Constitution* does not provide a right of appeal to the appellant; it merely confers jurisdiction on the Court of Appeal to hear appeals from the High Court; indeed, there is no right of appeal save for that which

is conferred by statute; hence there is no right of appeal subsumed in Article 164(3) of the 2010 Constitution.

32. From the foregoing, it is my view that Section 38 of the Small Claims Act is not unconstitutional."

53. A pronouncement by a competent court on the constitutionality of a statutory provision made is a decision in rem and as its implication is not confined to the interest of the parties in that particular litigation only.

54. This Court thus declines the invitation to revisit the same issue masked as a different issue just because it is a different Petition with different parties. Such a route will bring uncertainty and confusion in the application of the law. The Petitioner opposed this Preliminary Objection despite being made aware through this Preliminary Objection of the existence of the Mombasa decision hence has to be condemned to pay costs.

55. This Court is satisfied that the instant Petition runs afoul the doctrine of res judicata principle. The preliminary objection is upheld and the instant Petition is struck out its entirety with costs to the Respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF FEBRUARY, 2025.

.....

L N MUGAMBI

JUDGE