

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL PETITION NO.159 OF 2018

CONSOLIDATED WITH

CONSTITUTIONAL PETITION NO. 201 OF 2019

1. WILLIAM ODHIAMBO RAMOGI
2. ASHA MASHAKA OMAR
3. GERALD LEWA KITI
4. KENYA TRANSPORTERS ASSOCIATION.....PETITIONERS

VERSUS

1. THE ATTORNEY GENERAL
2. CABINET SECRETARY, MINISTRY OF
3. TRANSPORT & INFRASTRUCTURE
4. KENYA PORTS AUTHORITY
5. KENYA RAILWAYS CORPORATION
- COMPETITION AUTHORITY OF KENYA.....RESPONDENTS

AND

1. MUSLIMS FOR HUMAN RIGHTS
2. MAINA KIAI
3. COUNTY GOVERNMENT OF MOMBASA.....INTERESTED PARTIES

RULING

1. The Notice of Motion application before the Court dated 10/5/2021 is filed by the 3rd Respondent. The motion prays for the following orders: 3rd Respondent and its dated 10/5/ 2021. The application seeks the following orders:

a) Spent

b) Spent

c) There be a stay of execution of order no. (c) & (d) in the judgement delivered 6th November 2020 pending the inter-parties hearing and determination of his application.

d) The honourable court be pleased to extend the time fixed by its order of 6th May 2021 to until such time as *Court of Appeal Civil Appeal (Application) No.E012 of 2021* is fixed for hearing by the court of appeal.

e) In the alternative to prayer (4) above, there be an extension of the time stated in order no.(d) in the judgement delivered on 6th November,2020 ,by a further ninety (90) days from the date of ruling or for such other period as the court may deem fit.

f) The costs of this application be in the appeal.

2. The application is premised on the grounds set out therein and the supporting affidavit of **TURASHA J. KINYANJUI** sworn on the same date together with its annextures.

The Response

3. The 3rd Interested Party filed grounds of opposition dated 19/5/2021 in response to the application and termed the application as an abuse of court process and one that offends Section 7 of The Civil Procedure Act on the doctrine of *res judicata*.
4. The 4th Petitioner also filed grounds of opposition 18/5/2021 and stated that the issue of stay of execution of judgement dated 6/11/2020 is pending in the Court of Appeal and it would therefore be wrong for this Court to entertain a similar application. That the court does not have jurisdiction to extend any further period in favour of any of the Respondents.
5. The other parties did not respond to the application despite being given enough time to do the same.

Determination

6. I have considered the motion, the responses and rival submissions and the issues for determination are:
 - a) **Whether this application is an abuse of the court process.**
 - b) **Whether this application is res judicata.**
 - c) **Whether the court is functus officio.**
7. On whether this application is an abuse of court process am guided by the by decision in **Satya Bhama Gandhi v Director of Public**

Prosecutions & 3 others [2018] eKLR where the court stated that,

“... It is trite law that the Court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused. The black law dictionary defines abuse as “Everything which is contrary to good order established by usage that is a complete departure from reasonable use "An abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use".”

The concept of abuse of court/judicial process is imprecise. It involves circumstances and situation of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents.

The situation that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations: -

- (a) *Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.*
- (b) *Instituting different actions between the same parties simultaneously in different court even though on different grounds.*

- (c) *Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and respondent notice.*
- (d) *Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.*
- (e) *Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.[13]*
- (f) *Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.*
- (g) *Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.*
- (h) *Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent.*

8. The orders of the court in its judgement of 6/11/2020 were:

“(c) The claim that directives by the 3rd respondent dated 15th March,2019 and 3rd August,2019 were in violation of articles 10 and 47 of the constitution for want of public participation and for non-compliance with fair administrative procedures succeeded the court declares the impugned directives constitutionally infirm. The impugned directives are hereby quashed.

(d) Given the potential of order (c) above to disrupt the orderly operations of the port and the operationalization of the national transport policy, the effect of that order is hereby suspended for one hundred and eighty (180) days to afford the respondents an opportunity to regularize the situation.”

9. The 3rd Respondent made an application dated 30/11/2020 before this court seeking stay of execution of the above orders pending lodging, hearing and determination of an intended appeal to the Court of Appeal.

10. The court pronounced itself on the 5/2/2021 and stated:

“in our view, the orders we granted herein were deliberate and advertent to cater for the circumstances contemplated in order 42, rule 6. The order of suspension acknowledged and catered for the circumstances provided in order 42, rule 6 for all the parties. It took into account the peculiar circumstances of the applicant as a statutory body, order no.(d) of our judgement aforesaid was very deliberate .It acknowledged the difficult conditions and circumstances that the applicant will face in order to make the desired changes mandated in our aforesaid judgement.in our view the stay of 180 days which was granted was adequate to enable the applicant ,if it wished to comply with the said orders to do so .However, the applicant has a constitutional right of appeal ,and it has indeed filed a Notice of Appeal in the Court of Appeal. The applicant has not placed anything before this court about what it has already done with the 90 days which have since lapsed. There are no mitigating circumstances brought to the attention of this court militating against the applicant in the employment of the 90 days already gone. However, there is still 90 days

remaining. That is adequate time for the applicant to either appeal against the judgement of this court, or to move the court of appeal for stay of execution.

Having granted a functional stay of execution for 180 days, the applicant should obtain any further extension of the stay or its variation at the court of appeal which is better placed to determine its own docket and its timelines for the completion of the filed appeal. The court of appeal may also be better placed, if so minded, to condition any stay granted on the applicant meeting certain deadlines.”

11. The 3rd Respondent further made an application dated 26/4/2021 seeking stay of execution of order no.(c) and (d) in the interim and extension of the time stated in order no.(d) of the judgement delivered on 6/11/2020 by a further ninety (90) days or for such other period as the court may deem fit. The court on the 6/5/2021 gave the following order:

“there shall be stay of execution of order no.(c) and (d) of the judgement delivered on 6th November 2020 pending the appearance of the parties herein in the Court of Appeal on 10/5/2020 when the applicant in the motion herein may urge further conservatory orders beyond 10/5/2021 before the said Court of Appeal.”

12. On 26/5/2021, Mr. Kongere, learned counsel for 3rd Respondent applied for limited orders of stay so as not to be seen to be in contempt of court. The application was opposed by the other parties on record except 1st and 2nd Respondents. The court issued interim relief in terms of prayer 3 of the subject application herein and stated that, **“the interim orders aforesaid shall stand**

terminated on 22/6/2021.” The said orders were extended on the 22/6/2021.

13. Accordingly, it's our finding that this application amounts to an abuse of court process.

14. On the second issue the court in **Satya Bhamu Gandhi v Director of Public Prosecutions & 3 others** (supra) stated:

“The requirements for *res judicata* are that the same cause of action, for the same relief and involving the same parties, was determined by a court previously. In assessing whether the matter raises the same cause of action, the question is whether the previous judgment involved the ‘determination of questions that are necessary for the determination of the present case and substantially determine the outcome of the case.

Res Judicata is one of the factors limiting the jurisdiction of a court. This doctrine requires that there should be an end to litigation or conclusiveness of judgment where a court has decided and issued judgment then parties should not be allowed to litigate over the same issues again. This doctrine requires that one suit one decision is enough and there should not be many decisions in regard of the same suit. It is based on the need to give finality to judicial decisions. *Res Judicata* can apply in both a question of fact and a question of law. Where the court has decided based on facts it is final and should not be opened by same parties in subsequent litigation.”

15. The 3rd Respondent has sought similar orders before this Court and this court has pronounced itself on the same. Therefore, this application amounts to *res judicata*.

16. In regard to the third issue the Supreme Court of Kenya expounding on the doctrine of *functus officio* in *Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others* [2013] eKLR cited an excerpt from an article by Daniel Malan Pretorius, in “The Origins of the *functus officio* Doctrine, with Specific Reference to its Application in Administrative Law,” (2005) 122 SALJ 832:

“The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”

17. The court also relied on the holding in the case of *Jersey Evening Post Limited vs Al Thani* [2002] JLR 542 at 550 to the effect that:

“A court is *functus* when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court *functus*, when its judgment or order has been perfected. The purpose of the doctrine is to

provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available.”

18. As indicated earlier the Court of Appeal is better placed to determine its own docket and timelines for completion of matter filed in that court. That is also the remaining forum from which the Applicant herein can now seek further redress.

19. In the upshot, we find and hold that the Notice of Motion application herein dated 10/5/2021 lacks merit. However, we note that the issues raised in the application are serious public issues, and therefore we extend the interim conservatory orders herein to 10/11/2021 when they shall automatically lapse.

The same is dismissed with no orders on costs.

Dated, signed and delivered at Mombasa this 30th day of September, 2021.

HON. L. ACHODE
JUDGE

HON. J. NGUGI
JUDGE

HON. P. NYAMWEYA
JUDGE


HON. E. OGOLA
JUDGE

HON. A. MRIMA
JUDGE

Ruling delivered via MS Teams in the presence of:

Mr. Kongere for 3rd Respondent

Ms. Nyambura for 1st, 2nd and 3rd Respondents

Ms. Murage for 4th Petitioner

Ms. Opio for Hon. Attorney General

Mr. Kongere holding brief for 4th Respondent

Ms. Peris Court Assistant