

**THE REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. E536 OF 2022**

**BETWEEN**

**KENYA PHARMACEUTICAL DISTRIBUTORS  
ASSOCIATION.....1<sup>ST</sup> PETITIONER**

**DR. ISAAC KAMAMIA WA MURICHI.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**ANTI-COUNTERFEIT AUTHORITY.....1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**CABINET SECRETARY FOR TRADE,  
INVESTMENTS AND INDUSTRY.....3<sup>RD</sup> RESPONDENT**

**AND**

**KENYA INDUSTRIAL PROPERTY INSTITUTE....1<sup>ST</sup> INTERESTED PARTY**

**PHARMACY AND POISONS BOARD.....2<sup>ND</sup> INTERESTED PARTY**

**COMPETITION AUTHORITY OF KENYA.....3<sup>RD</sup> INTERESTED PARTY**

**CABINET SECRETARY FOR THE MINISTRY OF  
HEALTH.....4<sup>TH</sup> INTERESTED PARTY**

**RULING**

**Background of the Case**

1. The Petitioners herein filed a Petition dated 8<sup>th</sup> December 2022. They stated that the 1<sup>st</sup> Petitioner's does the business of import and export of drugs and other health products and technologies.
  
2. The Petitioners averred that by virtue of Section 32 (j) of the Anti-Counterfeit Act, No. 13 of 2008, it is an offence for any person to import into Kenya any good bearing a trademark that has not been recorded by the 1<sup>st</sup> Respondent whereas Section 32(k) makes it an offence to import any item that is not branded. The amendment to

the Act, Section 34B further requires recording of Intellectual Property Rights (IPR) in relation to goods that have been imported into Kenya with the 1<sup>st</sup> Respondent.

3. In keeping with that mandate, the 1<sup>st</sup> Respondent pursuant to Section 34B of the Act, issued a public notice on the 26<sup>th</sup> April 2022 being Public Notice No.1/2022 directing that recording of IPR would commence from 1<sup>st</sup> July 2022. Traders were thus required to declare particulars of the IPR for all goods imported into Kenya from that date.
4. The 1<sup>st</sup> Respondent on 24<sup>th</sup> May 2022 issued another Public Notice No.2/2022. This Notice sought to extend the deadline for commencement of the directive in Public Notice No.1/2022 to 1<sup>st</sup> January 2023.
5. The Petitioners assert that following issuance of the first notice, they sought to engage the 1<sup>st</sup> Respondent so as to register their reservations on commencement of the IPR recording exercise. In their opinion, the 1<sup>st</sup> Respondent's directive was usurping the mandate of other institutions that are already tasked with the role of maintaining standards in their line of work notably, the 2<sup>nd</sup> Interested Party's mandate under the Pharmacy and Poisons Act. Furthermore, the role of the 1<sup>st</sup> Interested Party who is mandated to protect intellectual property rights through their registration.
6. Owing to this, the Petitioners seek the following relief:

*i. A declaration that the actions of the 1<sup>st</sup> Respondent to implement its directive of the*

*recordation exercise as communicated through Legal Notice No. 117 (the Anti-Counterfeit (Amendment) Regulations, 2021 and Legal Notice No. 118 of 2021 (the Anti-counterfeit (Recordation) Rules, 2021) published by the 1<sup>st</sup> Respondent and Public Notices No. 1, 2 and 3 of 2022 amount to a violation of the Petitioners' right to fair administrative action by failing to give the Petitioners an opportunity to be heard, consumer rights and the right to the highest attainable standard of health of the greatest majority of the Kenyan people.*

- ii. A declaration that Sections 2,32(j), (k) and 34B of the Anti-Counterfeit Act, 2010 are unconstitutional to the extent that they make it illegal and criminalize the importation and trade in unbranded medicines and health products technologies and those whose intellectual property rights have been exhausted.*
- iii. A declaration that the provisions of Sections, 2 and 34B of the Anti-Counterfeit Act, 2010, Legal Notice No. 117 (the Anti-Counterfeit (Amendment) Regulations, 2021 and Legal Notice No. 118 of 2021 (the Anti-counterfeit (Recordation) Rules, 2021) are unconstitutional to the extent that the same amount to criminalization of trade in generic medicines, unbranded medicines and other health products and technologies.*
- iv. A declaration that the provisions of Sections, 2 and 34B of the Anti-Counterfeit Act, 2010, Legal Notice No. 117 (the Anti-Counterfeit (Amendment) Regulations, 2021 and Legal Notice No. 118 of 2021 (the Anti-counterfeit (Recordation) Rules, 2021) are unconstitutional to the extent that the same violate various provisions of the Constitution and infringe on the*

*various constitutional rights as outlined and explained in this Petition;*

- v. *A declaration that the intended recordation exercises amounts to a usurpation of the mandate of the Pharmacy and Poisons Board, The Ministry of Health and the Kenya Industrial Property Institute by the 1<sup>st</sup> Respondent in contravention of the Constitution and other legislations.*
- vi. *A declaration Legal Notice No. 117 (the Anti-Counterfeit (Amendment) Regulations, 2021 and Legal Notice No. 118 of 2021 (the Anti-counterfeit (Recordation) Rules, 2021) are unconstitutional to the extent that they amount to usurpation of the constitutional and legislative mandate of the Pharmacy and Poisons Board, The Ministry of Health and the Kenya Industrial Property Institute by the 1<sup>st</sup> Respondent;*
- vii. *In the alternative to Prayers (i), (iii), (iv) and (vi) above, a declaration be issued that, members of the 1<sup>st</sup> Petitioner, being distributors of medicines and medicinal substances are not required to comply with the provisions of Sections, 2 and 34B of the Anti-Counterfeit Act, 2010; Legal Notice No. 117 (the Anti-Counterfeit (Amendment) Regulations, 2021 and Legal Notice No. 118 of 2021 (the Anti-counterfeit (Recordation) Rules, 2021).*
- viii. *An order of permanent injunction staying the implementation of the recordation exercise as per Legal Notice No. 117 (the Anti-Counterfeit (Amendment) Regulations, 2021 and Legal Notice No. 118 of 2021 (the Anti-counterfeit (Recordation) Rules, 2021) published by the 1<sup>st</sup> Respondent and the 1<sup>st</sup> Respondent's Public Notices No. 1, 2 and 3 of 2022.*

- ix. *An order of judicial review in the nature of certiorari to bring to this Court and quash the Legal Notice No. 118 of 2021 (the Anti-counterfeit (Recordation) Rules, 2021) published by the 1<sup>st</sup> Respondent's Public Notices No.1, 2 and 3 of 2022.*
- x. *In the alternative to prayers (vi) and (vii) above, that an order be issued exempting medicines and pharmaceutical products from Legal Notice No. 117 (the Anti-Counterfeit (Amendment) Regulations, 2021 and Legal Notice No. 118 of 2021 (the Anti-counterfeit (Recordation) Rules, 2021) published by the 1<sup>st</sup> Respondent and the 1<sup>st</sup> Respondent's Public Notices No. 1, 2 and 3 of 2022.*
- xi. *Costs consequent to this Petition be borne by the 1<sup>st</sup> Respondent.*

### **The Application**

- 7. By a Notice of Motion Application dated 22<sup>nd</sup> December 2022, the 1<sup>st</sup> Respondent seeks orders that:
  - i. *This Petition be struck out as this Court lacks the requisite jurisdiction to entertain, hear and determine the Petition herein.*
  - ii. *Costs to the 1<sup>st</sup> Respondent.*

### **1<sup>st</sup> Respondent's Case**

- 8. The Application is supported by the 1<sup>st</sup> Respondent's affidavit of even date sworn by its Deputy Director, Legal Services, Naylor Mukofu.
- 9. He avers that the Petition inter alia challenges the constitutionality of Section 32(k) and 34D of the Anti-Counterfeit Act. He states that

these provisions were introduced through amendments contained in the Statute Law (Miscellaneous Amendments) Act, No. 18 of 2018 to apply to the Anti-Counterfeit Act, No. 13 of 2008.

10. He asserts that the challenge to the constitutionality of the Statute Law (Miscellaneous Amendments) Act was done in **Petition No. 163 of 2019 - Okiya Omtatah Okoiti & 4 Others v. Attorney General & 4 Others** but it failed. Furthermore, that the issue of the constitutionality of Section 32(k) of the Anti-Counterfeit Act in reference to the unbranded goods was also determined in **Mombasa Constitutional Petition No. 101 of 2021 - Amani Technology Limited & Another v. The Attorney General & 3 Others**. This Petition also failed and the Section found to be constitutional.
11. He avers correspondingly that the constitutionality of the Statute Law (Miscellaneous Amendments) Act was once again challenged in **Nairobi Petition No. 284 of 2019 [Consolidated with Petition No. 353 of 2019] - The Senate of the Republic of Kenya & 4 Others v. The Speaker of the National Assembly & Another; The Attorney General & 7 Others (Interested Parties)**. The Court in its Judgment dated 29<sup>th</sup> October 2020 declared the Act unconstitutional.
12. However, this matter was appealed in **Civil Appeal No. E084 of 2021 - Speaker of the National Assembly of the Republic of Kenya & Another v. Senate of the Republic of Kenya & 12 Other**. The Court of Appeal in its Judgment dated 19<sup>th</sup> November

2021 overturned the High Court's decision and found the Act constitutional.

13. On this premise, it is asserted that the Court of Appeal having found the Statute Law (Miscellaneous Amendments) Act to be constitutional and by extension the provisions of the Anti-Counterfeit Act, this matter is res judicata. This is also in addition to the other cited suits that equally challenged the provisions of Section 32(k) and 34B of the Anti-Counterfeit Act.
14. He also argues that the Petition does not raise any constitutional issues. For these reasons, the Petition is considered to be an abuse of the process of the Court and an attempt to prevent the 1<sup>st</sup> Respondent from fighting counterfeit goods within the Kenya.

### **The Preliminary Objection**

15. The 1<sup>st</sup> Respondent had also prior filed a Preliminary Objection dated 15<sup>th</sup> December 2022 to the Petition on the grounds that:
  - i. ***This Court lacks the requisite jurisdiction and is therefore barred, to entertain, hear and determine the Petition herein on account of-***
    - a. ***The doctrine of res judicata.***
    - b. ***The doctrine of issue estoppel.***  
***The Petitioners have not demonstrated any constitutional rights or fundamental freedoms violated or threatened with violation.***
  - ii.

### **Petitioners' Case**

16. In reaction to the 1<sup>st</sup> Respondent's case, the Petitioners' filed grounds of opposition dated 14<sup>th</sup> February 2023 on the premise that:

- i. *The 1<sup>st</sup> Respondent's Notice of Preliminary Objection and Notice of Motion Application are based on complete misunderstanding of the law and the issues arising from the Petition and should, therefore, be dismissed in limine with costs to the Petitioner.*
- ii. *The issues raised in this suit fall squarely within the Jurisdiction of this Court as donated to it under Articles 22, 23 and 165 of the Constitution.*
- iii. *The matters in issue herein are not similar to those which were previously in dispute in Okiya Omtatah Okoiti & 4 Others vs Attorney General & 4 Others; Council of Governors & 4 Others (Interested Parties) [2020] EKLR, Amani Technology Limited & Another V Attorney General & 2 Others; The Director Of Public Prosecutions (Interested Party) (Petition 101 of 2021) [2022L The Senate of the Republic of Kenya & 4 Others vs Speaker of the National Assembly & Another; Attorney General & 7 Others (Interested Parties) [2020] and Speaker of the National Assembly & Another vs Senate & 12 Others (Civil Appeal E084 of 2021)[2021].*
- iv. *The Parties herein are not identical to the parties in Okiya Omtatah Okoiti & 4 Others vs Attorney General & 4 Others; Council of Governors & 4 Others (Interested Parties) [2020] EKLR, Amani Technology Limited & Another V Attorney General & 2 Others; The Director Of Public Prosecutions (Interested Party) (Petition 101 of 2021) [2022], The Senate of the Republic of Kenya & 4 Others vs Speaker of the National Assembly & Another; Attorney General & 7 Others (Interested Parties) [2020] and Speaker of the National Assembly & Another vs Senate & 12 Others (Civil Appeal E084 of 2021) [2021].*

- v. *No Court of competent jurisdiction has determined with finality or at all, the issues raised in the Petition herein.*
- vi. *In considering all the relevant facts, the Petitioners do not seek to abuse the process of the court, by seeking to raise issues which could have been raised before as there has been no suit on the matters in issue between the parties herein.*
- vii. *The Petitioners do not seek to relitigate any issues or points which have been raised and specifically determined in previous litigation between the parties and it is consequently evident that the 1<sup>st</sup> Respondent's understanding of the doctrine of issue estoppel is misconceived.*
- viii. *The 1<sup>st</sup> Respondent's Notice of Preliminary Objection and Notice of Motion Application filed herein are bad in law, misconceived, incompetent, unwarranted, ill-advised, and frivolous and should therefore be dismissed.*

### **The Other Parties Responses**

- 17. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' and 1<sup>st</sup> Interested Parties responses are not in the Court file or Court Online Platform (CTS).
- 18. On the other hand, the record reflects that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Interested Parties were not opposed to the 1<sup>st</sup> Respondent's application and thus did not file any response or submissions.

### **Parties Submissions**

#### **1<sup>st</sup> Respondent's Submissions**

19. In support of its case, the 1<sup>st</sup> Respondent through its Counsel, J.O. Adera filed two sets of submissions dated 2<sup>nd</sup> March 2023 and 13<sup>th</sup> September 2023.
20. To commence with, the Respondent placed reliance on the Owners of the Motor Vessel "Lillian S' v. Caltex Oil (Kenya) Ltd [1989] KLR 1 and reiterated that jurisdiction is everything and that a court of law must lay down its tools in respect of the matter before it the moment it holds that it is without jurisdiction.
21. Other cases on jurisdiction cited included: Samuel Kamau Macharia & Another Versus Kenya Commercial Bank Limited & 2 Others [2012] eKLR, Benson Makori Makworo Versus Nairobi Metropolitan Services & 2 Others [2022]eKLR and Phoenix of E.A. Assurance Company Limited Versus S. M. Thiga t/a Newspaper Service [2019] eKLR.
22. On the doctrine of res judicata, the Respondent relied on Oyugi Versus Independent Electoral and Boundaries Commission & 8 Others [2022] eKLR where the Court as held that:

*"The doctrine, rightly so, applies to constitutional Petitions. This is what the Court partly stated: -*

*We reaffirm our position as in the Muiri Coffee case that the doctrine of res judicata is based on the principle of finality which is a matter of public policy. The principle of finality is one of the pillars upon which our judicial system is founded and the doctrine of res judicata 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....."*

23. Other cases cited were: Kenya Commercial Bank Limited Versus Muiri Cofee Estate Limited & Another [2016]eKLR, Kakaa Versus Kadhis Court, Nairobi & Another; Saad (Interested Party)[2022]eKLR, Bethwel Omondi Okal Versus Board of Trustee Telposta Pension & 2 Others [2017]eKLR, Okiya Omtatah Okoiti & 2 Others Versus Cabinet Secretary, Ministry of Health & 2 Others; Kenya National Commission on Human Rights (Interested Party) [2020]eKLR, Peter Obungha Wakoyo & 87 Others Versus County Government of Mombasa & Another; Ali Hassan Joho, Governor Mombasa County & Another (Affected Parties) [2020]eKLR, Adam Katana Shahenza (Suing on behalf of 300 Residents of Starehe and Shauri Moyo Estates Nairobi) Versus Cabinet Secretary, National Treasury & 3 Others [2020] e KLR and William Kabogo Gitau Versus Ferdinand Ndung'u Waititu [2016] eKLR.

24. Discussing the doctrine of res judicata, the 1<sup>st</sup> Respondent submitted that the Petitioners challenge the constitutionality of Sections 32(k) and 34B of the Anti-Counterfeit Act which were introduced through the Statute Law (Miscellaneous Amendments) Act. Restating its averments, the 1<sup>st</sup> Respondent insisted that the Courts in their findings affirmed the constitutionality of the impugned legal provisions. It stressed that the issues raised in the instant petition and former petitions are similar and the previous matters were determined conclusively by competent courts.

25. The 1<sup>st</sup> Respondent additionally argued that there was commonality of the parties by virtue of the fact that the parties that had instituted all the suits had done so in public as opposed to a private interest. In the light of the reasons advance, the 1<sup>st</sup> Respondent maintained that the Court lacks jurisdiction to entertain this matter.
26. Turning to the doctrine of issue estoppel, 1<sup>st</sup> Respondent relied on **Oyugi Versus Independent Electoral and Boundaries Commission & 8 Others [2022] e KLR** where it was held that:

*"We find that the petition at the High Court had sought to relitigate an issue already determined by the Public Procurement Administrative Review Tribunal. Instead of contesting the Tribunal's decision through the prescribed route of judicial review at the High Court, the 1st, 2nd and 3rd respondents instituted fresh proceedings, two years later, to challenge a decision on facts and issues finally determined. This strategy, we would observe, constitutes the very mischief that the common law doctrine of "issue estoppel" is meant to forestall. Issue estoppel "prevents a party from using an institutional detour to attack the validity of an order by seeking a different result from a different forum, rather than through the designated appellate or judicial review route."*
27. Like dependence was placed in **Peter Obungha Wakoyo & 87 Others Versus County Government of Mombasa & Another; Ali Hassan Joho, Governor Mombasa County & Another (Affected Parties) [2020] eKLR** and **Eric Omari Wanyamah Versus Independent Electoral & Boundaries Commission (IEBC) [2022] eKLR.**
28. The 1<sup>st</sup> Respondent accordingly submitted that the Petitioners were estopped from raising similar issues that had already been

determined. Besides, it was noted that the onus to demonstrate the existing special circumstances to displace this doctrine had not been discharged by the Petitioner. In closing, the 1<sup>st</sup> Respondent argued that the Petitioners had not demonstrated any violation of the cited constitutional rights. On this premise, the 1<sup>st</sup> Respondent urged this Court to allow their application.

### **Petitioners' Submissions**

29. On 19<sup>th</sup> June 2023, the Petitioners through Ngeri, Omiti and Bush Advocates LLP filed submissions where the issue for determination was highlighted as whether the issues raised in the Petition are *res judicata*.
30. The Petitioners delved into an analysis of the principles of the doctrine of *res judicata*. They highlighted key principles as enunciated by the Supreme Court in **Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR** as follows:
  - "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.*"

31. Similarly, they cited Uhuru Highway Development Limited v Central Bank of Kenya & 2 Others [1996] eKLR and E.T. v Attorney General & Another [2012] eKLR.
32. On whether the instant Petition is res judicata, the Petitioners did a comparative review of the cited cases and the instant Petition. To begin with, Counsel submitted that in Nairobi Constitutional and Human Rights Petition No. 163 of 2019 (Okiya Omtatah Okoiti & 4 Others z, Attorney General & 4 Others) the contention revolved around the adherence to the constitutional and legislative procedures before the enactment of the Statute Law (Miscellaneous Amendment) Act. This is said to be distinct from the issue before this Court and that the parties in the two suits are dissimilar.
33. Turning to Mombasa Constitutional Petition No. 101 of 2021 (Amani Technology Limited & Another v the Attorney General & 3 Others) they pointed out that although Section 32(k) of the Anti-Counterfeit Act was challenged, the contention was premised on other reasons other than those raised in the instant Petition. Equally that the parties in the two suits are not the same.
34. Discussing Nairobi High Court Petition No. 284 Of 2019 (Consolidated with Petition No. 353 Of 2019) (The Senate of The Republic of Kenya & 4 Others v the Speaker of The National Assembly & Another; The Attorney General & 7 Others (Interested Parties), they submitted that the Statute Law (Miscellaneous Amendment) Act among others, was challenged on

the basis that it was presented to the President for assent without the participation of the Senate. On appeal in **Nairobi Civil Appeal No. E084 of 2021 (Speaker of the National Assembly of The Republic of Kenya & Another V Senate of The Republic of Kenya & 12 Others)** its constitutionality was declared.

35. In like manner, Counsel contended that this is not the issue before this Court. Owing to the comparison made above, it was submitted that the 1<sup>st</sup> Respondent's argument on res judicata lacked merit.
36. Counsel added that the constitutionality or otherwise of a provision is arrived at by weighing that particular provision against a specific provision of the Constitution as seen in **Robert Alai v The Hon Attorney General & another [2017] eKLR**. Like dependence was placed in **Council of County Governors v Attorney General & another [2017] eKLR**.
37. Counsel in addition submitted that where the constitutionality of a legislation or provision thereof is challenged and the Court finds that the same is constitutional, it is still possible to raise a question of unconstitutionality of the same legislation and/ or provision of a statute on the basis that it violates a different provision of the Constitution or that it infringes on a constitutional right not considered in the initial Petition as rights keep evolving.
38. To buttress this point reliance was placed in **John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015)**

**[2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment)**

where it was held that;

*"Just as the Court of Appeal in its impugned decision noted that rights keep on evolving, mutating, and assuming multifaceted dimensions it may be difficult to specify what is rarest and clearest. We however propose to set some parameters that a party seeking to have a court give an exemption to the application of the doctrine of res judicata. The first is where there is potential for substantial injustice if a court does not hear a constitutional matter or issue on its merits, it is our considered opinion that before a court can arrive at such a conclusion, it must examine the entirety of the circumstances as well address the factors for and against exercise of such discretionary power."*

**Analysis and Determination**

39. It is my considered view that the key issue that arises for determination at this juncture is:

***i. Whether or not this Petition should be disallowed on account of res-judicata principle***

40. Res judicata is a jurisdictional issue in that it bars the Court from hearing a matter that has been conclusively heard and determined on merits by another Court of competent jurisdiction.

41. This doctrine is provided for 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.*

42. The Supreme Court in Kenya Commercial Bank Limited v. Muiri Coffee Estate Limited (supra) explained the doctrine of res judicata as follows:

**"[52] Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights..."**

43. Likewise, the Supreme Court in John Florence Maritime Services Limited & another (supra) opined as follows:

**"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.**

**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.*

56. *The learned authors of Mulla, Code of Civil Procedure, 18<sup>th</sup> 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.”*

44. The Court went on to observe that:

***"59. For res judicata to be invoked in a civil matter the following elements must be demonstrated:***

- 1. There is a former Judgment or order which was final;***
- 2. The Judgment or order was on merit;***
- 3. The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and***
- 4. There must be between the first and the second action identical parties, subject matter and cause of action."***

45. Equally, the Court of Appeal in **Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR** on this doctrine observed as follows:

***“...for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all 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.”***

46. The Court proceeded to note that:

***“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”***

47. In effect the Court concluded that:

***"The practical effect of the res judicata doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties –because it is the court itself that is debarred by a jurisdictional injunct, from entertaining such suit."***

48. While at it, it is important to mention that res-judicata embodies two principles, that cause of action estoppel and issue-based estoppel. On the first concept, it bars relitigation of claims based on the same facts when they have conclusively been heard and determined on merits by a competent Court. The issue-based estoppel on the other hand prohibits relitigating issues that have been determined having formed part of the former case against a party even though the cause of action may not be exactly similar. In expounding on doctrine of issue based estoppel, the Court in **Anne Delorie v Aga Khan Health Service Limited [2009] eKLR** stated as follows citing the Court of Appeal decision of ***Trade Bank Limited –vs- L-Z Engineering Construction Limited [2000] IEA 266:***

***"... At page 861 of Halsbury's Laws of England there is some further comment on the issue of estoppel as follows: -***

***"An estoppel which has come to be known as 'issue Estoppel' may arise where a plea of res judicata could not be established because the causes of action are not the same. A party is precluded from contending the contrary of any precise point which having once been distinctly put in issue, has been solemnly and with certainty determined against him. Even if the objects of the first and second actions are different, the finding on a matter which came directly (not collaterally or incidentally) in issue in the first action, provided it is embodied in a judicial decision is final, is conclusive in a second action between the same parties and their privies. This principle applies whether the point***

*involved in the earlier decision, and as to which the parties are estopped, is one of fact or one of law, of one mixed fact and law.”*

**8. In the local celebrated case of *Mburu Kinyua –vs-Gachini Tuti* [1978] KLR 69, Madan J (as he then was) said the following on the plea of res judicata: -**

*“The plea of res judicata applies --- not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject and which the parties, exercising reasonable diligence, might have brought forward at the time”.*

49. In the case of Mumira v Attorney General [2022] KEHC 271 (KLR) the Court explained:

*“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.)*

50. The Supreme Court embraced the latter position in the case of Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] KESC 53 (KLR) when it opined 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.**

**[318] This concept is incorporated in Section 7 of the Civil Procedure Act (Cap. 21, Laws of Kenya) which prohibits a Court from trying any issue which has been substantially in issue in an earlier suit. It thus provides:**

**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..."**

51. Turning to the present case, I must say that I scrutinized the case of **Nairobi Constitutional and Human Rights Petition No. 163 of 2019 (Okiya Omtatah Okoiti & 4 Others z, Attorney General & 4 Others** which was one of the cases the 1<sup>st</sup> Respondent relied on while challenging the competence of this Petition on grounds of res-judicata. To be precise, that Petition challenged the constitutionality of the amendments made to various

statutes through the Statute Law (Miscellaneous Amendments) Act, 2018. The main ground of contention was that the Act had introduced substantive amendments which should have been brought through stand-alone Bills. That further public participation was not done.

52. The Court then found the impugned Act was constitutional except for the amendments to Section 6 of the Kenya Information and Communication Act 1998, Section 24 of the Public Finance Management Act and Section 5(1)(g) and 5(1) (ha) of the Registration of Persons Act.
53. Looking at the present petition vis-à-vis *Petition No.163 of 2019*, *Petition No.284 of 2019* (as consolidated with *Petition No.353 of 2019*) and *Civil Appeal No. E084 of 2021* I do think that the claim or the issues raised are in anyway identical with what is contained in the instant Petition. The former suit challenged the constitutionality of the Statute Law (Miscellaneous Amendments) Act, 2018 which had amended various statutes among them the provisions of the Anti-Counterfeit Act where the primary concern was the legislative process with no specific reference to the provisions of the Anti-Counterfeit Act. I would therefore not consider Petition No. 163 of 2019 to be a bar to the instant Petition on account of the doctrine of *res judicata*.
54. That position may not however hold when you compare the present Petition with the **Mombasa Constitutional Petition No. 101 of**

**2021 (Amani Technology Limited & Another v The Attorney General & 3 Others).**

The Mombasa Petition inter alia challenged the constitutionality of Section 32(k) of the Anti-Counterfeit Act claiming that this provision was vague, overboard and contrary to Article 40 of the Constitution. The Court found the section to be constitutional. The 1<sup>st</sup> Respondent contends that the Petitioner cannot thus bring a second challenge against Sections 32 (k) and 34B of the Anti-Counterfeit Act as unconstitutional as that is barred by res judicata having been determined conclusively by a competent Court.

55. Admittedly, the parties in the instant and former suits are on the face of it not same.
56. Nonetheless, it is a fact that the former petitions were instituted in public interest hence determination of the legality of the impugned legal provisions transcended the parties' interests in that dispute.

**Explanation 6 which is contained in Section 7** of the Civil Procedure Act states:

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

57. The Court having conclusively determined the constitutionality of Section 32 (k) of the Anti-Counterfeit Act in *Petition No.101 of 2021* which is also substantially in issue in this matter, that issue cannot be raised again for determination in the present case as the decision

reached is a decision in *in rem* hence such an issue will be barred by the doctrine of *res judicata*.

58. As already observed, *res judicata* not only bars identical suits from being re-litigated between the same parties or their representatives but equally extends to issue-based estoppel that precludes an issue in a former suit that was decided from being reintroduced by a party or the representative of such party in a later claim/suit even though the suit may be different but the issue in the former suit is recurring. Such is the case here with Section 32 (k) of the Anti-Counterfeit Act which forms the substratum of the present petition. The former suits having been filed in public interest and the constitutionality of this section having been conclusively dealt with in the former suit, it cannot be raised again.
59. This is so even if that the particular dimension upon which the previous challenge was mounted against Section 32 (k) of the Anti-Counterfeit Act is different from course taken in assailing the said section in the instant case given the provisions of explanation **number 4 under Section 7 of the Civil Procedure Act** which provides:

***"Any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."***

In view of this aspect, this would include Section 34B of the Anti-Counterfeit Act which is intertwined with Section 32. This is because

Section 32 (j) & (k) criminalizes the failure to comply with Section 34B. The two sections are thus interconnected and a challenge on one naturally impacts on the other. By parity of reasoning, a failed attempt to have Section 32 declared unconstitutional left it intact and this extends to Section 34B of the Act as well.

60. The upshot of the foregoing is that the plea of *res judicata* is upheld with the consequence that the instant Petition is struck out with costs to the Respondents.

***Dated, signed and delivered virtually at Nairobi this 7<sup>th</sup> day of November, 2024.***

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**L N MUGAMBI**

**JUDGE**