REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Mwilu; DCJ & VP, Ibrahim, Wanjala, Njoki & Lenaola, SCJJ)

PETITION NO.17 OF 2015

—BETWEEN—

JOHN FLORENCE MARITIME SERVICES LIMITED...1ST PETITIONER

CONKEN CARGO FORWARDERS LIMITED.....2ND PETITIONER

—AND—

CABINET SECRETARY,
TRANSPORT & INFRASTRUCTURE.....1st RESPONDENT
THE ATTORNEY GENERAL.....2ND RESPONDENT
KENYA MARITIME AUTHORITY.....3RD RESPONDENT
OFFICE DE GESTION DU FREIT
MARITIME (OGEFREM).....4TH RESPONDENT

(Being an appeal from the Judgment and Order of the Court of Appeal at Malindi ***(Makhandia, Ouko & M'inoti, JJ.A)*** *dated the 31st day of July 2015, in Civil Appeal No. 42 of 2014)*

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] The Appellants moved this Court under Article 163(4)(a) of the Constitution, Section 15 of the Supreme Court Act and Rules 9, 33 and 42 of the Supreme Court Rules 2012 vide their Petition of Appeal dated 9th September, 2015 and lodged on

10th September 2015. The Petition is supported by affidavits sworn by Mr. Gilbert Ojwang and Mr. Joseph Gacheru who are Directors of the 1st Petitioner. They seek the following Orders:

a) *An order does issue restraining the 1st, 2nd and 3rd Respondents from levying any fees that are not provided for under the Bilateral Agreement dated 30th May, 2000, thereafter gazetted on 30th August, 2002, and more specifically restraining them from demanding for the payment of any monies, taxes or levies in addition to the collection of the commission specified of only 1.8% of the Gross Freight Charges paid by shipping lines on imported cargo destined for the Democratic Republic of Congo, and then only on the condition that all such payments must and shall be made or effected and receipted only to, and by the Merchant Shipping Office.*

b) *A declaration be made that any provision(s) not having the force of Law in Kenya and which require the payment of anything over and above the sum of 1.8% of the Gross Freight Charges paid by shipping lines on imported cargo destined for the Democratic Republic of Congo are in contravention of the Petitioners' fundamental rights and freedoms under Article 95 of the Constitution and are therefore null and void* ***ab initio****.*

c) *A declaration that the Bilateral Agreement entered into on 30th May, 2000 and known as the "Agreement On Maritime Freight Management" is null and void and that its continued enforcement by any person as part of the Laws of Kenya contravenes the Petitioners' fundamental rights and freedoms under Articles 2, 40, and 95 of the Constitution and are therefore null and void* ***ab initio.***

d) *A declaration be made that any and all provisos not having the force of law in Kenya and that contravene the Petitioners' fundamental rights*

and freedoms under Article 95 of the Constitution be held to be null and void ***ab initio.***

e) *A declaration be made that any provisions of law that contravene the Petitioners' fundamental rights and freedoms under Article 40 of the Constitution be held to be null and void* ***ab initio****.*

f) *A declaration be made that any provisions of the Agreement that (sic) contravenes the terms of Article 2 of the Kenyan Constitution be held to be null and void* ***ab initio.***

g) *Such further and or other orders, directions or writs as the Court may deem fit, just and appropriate to grant.*

h) *Costs of and incidental to the Petition.*

[2] The grounds of the appeal are that the Court of Appeal erred in holding that the doctrine of *res judicata* applied to constitutional litigation just as in other civil litigation as a doctrine of general application albeit with the rider that it should be invoked in constitutional litigation only in the rarest and clearest of cases; that having held as such, the appellate court erred in holding that the doctrine applied to the current case; that the appellate court erred in holding that the matter, High Court Petition No.64 of 2013, was res judicata by virtue of the previous proceedings known as Mombasa High Court Miscellaneous Application No.130 of 2011 (JR).

[3] That the learned Judges of appeal disregarded the provisions of Sections 107, 108, 109, and 112 of the Evidence Act by relieving the Respondents of their duty thereunder and shifting the burden of proof onto the Appellants; and that the Judges erred in not finding that an objection premised on allegations of res judicata, which is a matter of both fact and law, cannot form the basis for a

preliminary objection which is always a matter of pure law; That they also erred in failing to find that Judicial Review was concerned with procedures; issuable orders being those of mandamus, certiorari and prohibition and not merits of the case, whereas their case was a constitutional Petition seeking issuance of specific declarations to remedy fundamental rights and freedoms breaches.

B. BACKGROUND

[4] The Appellants' claim is that they are Kenyan Registered Companies carrying on the business of clearing and forwarding of imported goods within the port of Mombasa. It is their claim that they encountered problems with the 4th Respondent, an agent of the Democratic Republic of Congo (DRC) Government, in respect to all imported cargo destined for DRC.

[5] The basis of the case is a Bilateral Agreement on Maritime Freight Management entered into on 30th May, 2000. The parties to the Agreement were Democratic Republic of Congo (DRC) Government, through the Ministry of Information, Transport and Communication, acting through the 4th Respondent, a body known as Office De Gestion Du Freit Maritime (OGEFREM) on one part and Kenyan Government through the Ministry of Information, Transport and Communication on the other part. Under the Agreement, the Kenyan Government, through the 1st to 3rd Respondents, was tasked with collection of taxes on freight charges of goods imported to and on transit to the DRC through the port of Mombasa.

[6] The Agreement provided for the assessment, levying and collection of a commission to the tune of 1.8% of the gross freight charges on the imports on behalf of OGEFREM. The Agreement was gazetted in the Kenya gazette on the 30th of August 2002 and was to remain in force for a three-year period subject to a one-off renewal for a further period of three years. It is alleged that the said Agreement expired on 29th May 2003 and was renewed on 18th December 2003, which was seven months outside the agreement renewal period.

[7] On 26th October, 2012 the 4th Respondent issued circulars to Shippers, Forwarders and Agents stating that effective 29th October, 2012, all payments for Fiche Electronique de Renseigment Certificate ("FERI") as well as Certificate of Destination ("COD") would be made to its account and that such payments were to be made in US Dollars subject to all documents submitted and validated at its offices. These requirements introduced new charges at a rate of USD 100.00.

[8] The Appellants were aggrieved by these new requirements alleging that they were onerous and in blatant breach of the Bilateral Agreement. According to them, payments could only be collected by the 1st Respondent on behalf of the DRC Government but not by payment to a private individual's bank account in Italy, as the receipts issued did not bear the Coat of Arms of the DRC government or the address of the recipient. They also contended that the Bilateral Agreement should have been subjected to Parliamentary approval and deposited with the Registrar of Treaties so as to form part of the laws of Kenya, which was not the case. They alleged that its enforcement amounted to constitutional violations to their detriment.

(i) Proceedings at the High Court

[9] Being so aggrieved, the Appellants filed *High Court Mombasa, Constitutional Petition No. 64 of 2013* on 5th November, 2013 seeking a number of reliefs. Alongside the Petition, the Appellants also sought conservatory orders through an interlocutory application in the same terms as prayer (a) of the Petition. The prayers sought were as here below:

> *a) A conservatory order does issue restraining the 1st, 2nd and 3rd Respondents from levying any fees that are not provided for under the Bilateral Agreement dated 30th May 2000, thereafter Gazetted on the 30th of August 2002 and more specifically restraining them from demanding for the payment of any monies, taxes or levies in*

addition to the collection of the commission specified of only 1.8% on the Gross Freight Charges paid by shipping lines on imported cargo destined for the Democratic Republic of Congo, and then only on the condition that all such payments must and shall be made or effected and receipted only to and by the Merchant Shipping Office.

b) *A declaration that any provision(s) not having the force of law in Kenya and which require the payment of anything above the sum of 1.8% of the Gross Freight Charges paid by shipping lines on imported cargo destined for the Democratic Republic of Congo are in contravention of the petitioners' fundamental rights and freedoms under Article 95 of the Constitution and are null and void ab initio.*

c) *A declaration that the Bilateral Agreement entered into on the 30th day of May, 2000 and known as the "Agreement On Maritime Freight Management" is null and void and that its continued enforcement by anybody or person as part of the Laws of Kenya contravenes the Petitioners' fundamental rights and freedoms under Articles 2, 40 and 95 of the Constitution and is therefore null and void ab initio.*

d) *A declaration be made that any and all provisos not having the force of law in Kenya and that contravene the petitioners' fundamental rights and freedoms under Article 40 of the Constitution be held to be null and void ab initio.*

e) *A declaration be made that any provisions of the agreement that contravene the terms of Article 2 of the Kenyan Constitution be held to be null and void ab initio.*

f) *General damages*

g) Punitive damages.

[10] The 3rd Respondent herein, Kenya Maritime Authority, filed Grounds of Opposition to the interlocutory application urging that the matter directly in issue in the Petition before the Court was a matter that had been determined by the same Court in ***Mombasa High Court Misc. Application (JR) No. 130 of 2011*** hence the Court lacked jurisdiction to entertain the matter. The 2nd Respondent, the Attorney General, equally filed Grounds of Opposition, raising the same ground, that those issues had been determined already.

[11] In a Ruling delivered on 31st July, 2014 the High Court first determined the question of *res judicata* since, as it observed, *res judicata* was a matter affecting the jurisdiction of the Court. The Court was of the opinion that it was thus prudent that it be determined *in limine* before delving into the merits of the case. The High Court found the Petition to be *res judicata* because of the previous decision of the court in ***Judicial Review Case No. 130 of 2011***. The Court therefore held that the Petition and the Notice of Motion filed there-under were thus barred by Section 7 of the Civil Procedure Act. Citing the case of ***Owners of the Motor Vessel Lilian SS v. Caltex Oil (Kenya) Ltd (1989) KLR 1***, the court found that it had no jurisdiction in the matter. It downed its tools and struck out the Notice of Motion for conservatory orders together with the Petition both dated 5th November 2013 with costs to the Respondents.

[12] The Court also held that since in *JR No. 130 of 2011*, the imposition of "FERI" and "COD" was found to have a legal basis, the Court conferred status upon the two certificates which is protected by the provision of law on estoppel by record by way of a Judgment *in rem* against the whole world, as opposed to Judgment in *personam* or *inter partes* which operates against the parties to the suit. The Court observed that the decision in *JR 130 of 2011* was on appeal in Mombasa Court of Appeal *Civil Appeal No. 254 of 2012* and the Appellants could have participated in the appeal as persons affected by the decision of the High Court.

(ii) Proceedings at the Court of Appeal

[13] Dissatisfied with the decision of the High Court, the Appellants moved to the Court of Appeal vide *Civil Appeal No. 42 of 2014*. They preferred seven grounds to wit that, the High Court erred:

a) *In considering and ruling on matters in respect of which no application was filed and prosecuted before it;*
b) *In arriving at a decision regarding res judicata without any evidence having been tendered before it;*
c) *In failing to avail the appellants the opportunity to respond and produce evidence in opposition to the allegations that the matter was res judicata;*
d) *In failing to consider the application before him and matters that were relevant which he was seized of and instead considered matters that were irrelevant thereby arriving at a decision without any basis or evidence being laid;*
e) *In holding that the matters raised in the Petition were res judicata, whilst the Appellants and the Respondents were different with the exception of 3rd Respondent;*
f) *In holding that the matters raised in the Petition were res judicata, whilst the reliefs sought in the Judicial Review and Petition were different; and,*
g) *In holding that the Petition and the Notice of Motion filed by the Appellants were barred by Section 7 of the Civil Procedure Act whilst the parties in the Petition were not the same parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit nor did they authorize anyone to litigate on their behalf in JR nor were they making a claim on behalf of the other people.*

[14] In a Judgment dated 31st July, 2015, the Court of Appeal upheld *inter alia*, that the doctrine of *res judicata* was applicable to constitutional litigation just as in other civil litigation, as it is a doctrine of general application. The Court however cautioned that the doctrine should be invoked in constitutional litigation in the rarest and in the clearest of cases. It also found that the Appellants were granted an opportunity to be heard and that the High Court was justified in holding the suit before it to be *res judicata*. The appeal was therefore dismissed with costs. Aggrieved by that Court of Appeal decision, the Appellants have now preferred the appeal before this Court.

(iii) Proceedings before the Supreme Court

[15] The Respondents' application to strike out the appeal was unsuccessful. The Supreme Court affirmed its jurisdiction vide a Ruling delivered on 25th October 2019. This Court however framed the issue for determination as follows; ***Did the High Court procedurally consider the plea of*** *res judicata* ***or did it infringe on the Appellant's right to fair hearing in the*** *res judicata* ***proceedings hence condemning them unheard?*** The parties were directed to file submissions on the said issue.

[16] The 1st and 2nd Appellants, 3rd and 4th Respondents filed their written submissions. The 1st and 2nd Respondents did not file their written submissions. When the matter came up for hearing, parties sought to highlight their written submissions. The Appellants were represented by Mr. Taib Ali Taib, the 1st and 2nd Respondents were represented by Ms. Anne Mwangi, Mr. Brian Ondego appeared for the 3rd Respondent, while Ms. Jacqueline Waihenya appeared for the 4th Respondent.

C. PARTIES' SUBMISSIONS

(a) Appellants' Submissions

[17] The Appellants filed lengthy written submissions on 5th June 2020. At the hearing they argued two points; *Res judicata* and how it led to denial of the right to be heard as directed by the Court. They argue that there was no issue of *res judicata* at all. There was no evidence adduced to justify the allegation of *res judicata* as *res judicata* is a matter of fact first before it becomes a matter of law. Their response to the question framed by the Supreme Court was in the negative.

[18] They submit that that the High Court did not procedurally consider their plea of *res judicata*. As a result, it infringed on their right to fair hearing as provided for under Article 51 of the Constitution by condemning them unheard. They oppose the manner in which *res judicata* was brought up then argued and how it was later used to shut them out of the proceedings depriving them the right to a fair hearing under the public hearing requirement. This contention, they allege, is supported by their pleadings and written submissions.

[19] They also argue that *res judicata* cannot be raised as a preliminary objection within the jurisprudence of ***Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors*** (1969) EA 696 as was done by the High Court. A preliminary objection must be a matter of pure law. It cannot be a matter of fact. They urge that it is a matter of fact before it becomes a matter of law. That the law demands that applications of that nature be made by way of a Notice of Motion under Order 51 of the Civil Procedure Rules 2010. They further submit that evidence must be placed before the Court before determination and not determined by way of a preliminary objection.

[20] Further, the Appellants submit that a party relying on *res judicata* must not only plead, frame and argue the issue of *res judicata* but they must also discharge

the burden of proof to establish *res judicata* to the standard required by law. They contend that while the Court of Appeal held that *res judicata* is applicable in the rarest of constitutional matters, there was no evidence led to qualify their case to the category where exceptions would apply.

[21] The Appellants submit, based on other jurisdictions, that the doctrine of *res judicata* does not apply to constitutional litigation and specifically under the following petitions: habeas corpus petitions, matters affecting bill of rights, constitutional matters, in matters dismissed *in limine*, taxation matters, judicial review matters and matters collaterally incidental. They urge this Court to find that *res judicata* was not applicable in constitutional matters the way other jurisdictions have found, so that pre-2010 restrictions are not placed, by providing few exceptions only to be enlarged with time.

[22] The Appellants assert that they never participated in any other suit before any court relating to the same parties in respect of the same subject matter and their case is factually incapable of being classified as *res judicata*. They submit that they had no opportunity to respond to any application or any opportunity to be heard. According to them, *res judicata* was used to extinguish their hope of ever being heard when it was not properly raised in a way they could respond to. They assert that being present in court did not amount to fair hearing. They maintain that this opportunity to be heard was the only surest way of achieving justice for the parties, without which there is no granting of right to fair trial under Article 50 of the Constitution. They urge that the appeal be granted as prayed.

(b) Respondents' Submissions

[23] Despite the 1st and 2nd Respondents not filing their submissions, their counsel, Ms. Anne Mwangi, from the office of the Attorney General, at the hearing indicated that they were in total agreement with the submissions of the 3rd and 4th Respondents.

(c) 3rd Respondent's Submissions

[24] The 3rd Respondent opposed the appeal through their submissions filed on 14th July 2020. Its position is that the High Court procedurally considered the plea of *res judicata* and found it did not infringe on the Appellants' right to fair hearing. It contends that the issue of *res judicata* was raised formally and not as contended by counsel for the Appellants. That it was pleaded in their Defence and in the affidavit of Odira Omingo in *Misc. Application No. 130 of 2011,* with all material for *res judicata* placed before the court. Furthermore, parties who appeared in the High Court were all granted an opportunity to be heard on the issue of *res judicata* before a ruling was delivered. That the Appellants had ample time to refute the claims of *res judicata*.

[25] It is the 3rd Respondent's view that the Appellants never at any time pleaded that they were ambushed by the plea of *res judicata* that was being advanced by the Respondents. That they had ample opportunity to file any further affidavits or to bring any further evidence to refute *res judicata* yet they never did. That the issue of whether they were denied opportunity to be heard was never raised in the High Court but was raised in the Court of Appeal. That the Court of Appeal inquired on the same and found out that the Appellants were accorded an opportunity to be heard in the High Court.

[26] The Respondent submits that the superior courts agreed with the Appellants' counsel that the doctrine of *res judicata* applies in the rarest of constitutional cases. That, however, the superior courts below inquired about the facts and did a very thorough analysis referring to the facts, before arriving at a finding that *res judicata* applied in this case as evidenced by the conclusions in their Judgments.

[27] As regards the contention that the plea of *res judicata* can only be raised by way of formal application, counsel for the 3rd Respondent urges the Court to find that this is not the correct position of the law. That the Court of Appeal was very clear that there is no legal provision that required that the plea of *res judicata* be

raised by way of an application. All that is needed is for the facts to be placed before the Court for the Court to inquire from the facts of that particular case; whether the doctrine of *res judicata* applies; whether the parties are the same; whether the issues are the same and the prayers sought. That this was done when the Respondents filed their affidavits, placing on records all the facts and the Judgment in *JR 130 of 2011*. With this, Counsel urges this Court to dismiss this Petition and award costs to the Respondents.

(d) 4th Respondent's Submissions

[28] The 4th Respondent filed grounds of opposition, a replying affidavit sworn by Michel Kaninda Mukuna, its representative of the Director in Mombasa and submissions on 23rd June 2020. It argues that the Appellants had ample notice of the plea of *res judicata*. That Order 51 specifically Rule 14(1) entitles a respondent to oppose an application by filing a notice of preliminary objection, a replying affidavit or grounds of opposition. That the Respondents chose to oppose by filing grounds of opposition and replying affidavit. It is contended that the Appellants in this case participated in those proceedings, they were heard and gave oral submissions. That the question of not having a fair hearing did not arise as the Appellants were procedurally and substantially heard within the ambit of *res judicata*.

[29] They submit that the proceedings in the Judicial Review and the subsequent High Court case reveals that they are in *pari material* consisting of the same parties and specifically Mr. Paluku Lusenge and Mr. Paluku Riabana, and the same subject matter thus properly falling within the doctrine of *res judicata* articulated in Section 7 of the Civil Procedure Act. That both proceedings sought to nullify the Bilateral Agreement entered between the two states herein so as to prevent the collection and/or imposition of the requirement for the FERI Certificate and COD and that the taxes imposed thereunder as unconstitutional. Orders of mandamus

were sought on both cases. The case of ***Kenya Commercial Bank Limited v. Muiri Coffee Estate Limited & another*** Motion No. 42 OF 2014 [2016] eKLR was cited in support of these arguments.

[30] It is urged that the finding of the Court of Appeal be deemed as proper that *res judicata* is applicable in the rarest of cases. It is also submitted that the doctrine of *res judicata* is applicable in constitutional matters as per the Supreme Court of India decision in ***Daryao & others v. State of Uttar Pradesh*** that the plea of *res judicata* does apply to constitutional references because the considerations are substantially the same. This decision it was submitted to have relied on the English case of ***Re: Hasting No.2* (1958) 3All ER QBD 625** on *habeas corpus*.

[31] The Respondent argues that the intention of the doctrine, is to curb the mischief of Appellants who move from one Court of concurrent jurisdiction to the other seeking the same orders in alternative decisions which amounts to forum shopping. They urge this Court to consider the doctrine of *res judicata* as a sober one as provided for in our laws. They contend that it is applicable to all matters including constitutional matters. In conclusion, the submit that the appropriate remedy for the Appellants was the linear extension of the original law suit on appeal which they chose not to pursue for undisclosed reasons. Further, they maintain that the Petition cannot stand and should be dismissed with costs.

[32] On costs it is submitted that the 4th Respondent has suffered unduly because of conservatory orders issued on 11th December, 2015 and as a result the cargo that has been going through the port of Mombasa destined to the Republic of Congo, has not attracted the revenue that it should have under the Agreement. According to them, there is also a loss of USD.248,900/- arising out of *HC Misc.Applic.No.130 of 2011* in which the 4th Respondent was compelled to suspend collection of levies and taxes for 10 months. It is urged that this Court exercises discretion to award costs in its favour for loss of earnings in addition to legal costs.

D. ISSUES FOR DETERMINATION

[33] From the pleadings and submissions of the parties, and as guided by the issue set for the parties to address the Court on during certification, the following questions for determination arise:

a) Did the High Court procedurally consider the plea of *res judicata?*

b) Did the finding by the High Court on *res judicata* ***infringe on the Petitioner's right to fair hearing condemning them unheard?***

c) Were the learned Judges of the Court of Appeal justified in holding that the doctrine of *res judicata* ***applied to the current case; was the Paluku case the same as the Appellants' herein?***

d) Is this doctrine of *res judicata* ***applicable to constitutional litigation and interpretation, just as in other criminal and civil litigation?***

e) If the doctrine of *res judicata* ***is applicable to constitutional matters with the rider that it should be invoked in constitutional litigation only in the rarest and clearest of cases, on whom lies the burden of proving such rarest and clearest of cases?***

f) What constitutes such "rarest and clearest" of cases?

g) Who bears the costs of the suit.

E. ANALYSIS

(a) Did the High Court procedurally consider the plea of *res judicata?*

[34] On the first issue of whether the High Court procedurally considered the plea of *res judicata*, we look at the definition of procedure according to Black's Law Dictionary, 9th Edition which provides as follows:

1. *A specific method or cause of action.*
2. *The judicial rule or manner for carrying on a civil lawsuit or criminal prosecution also termed rules of procedure.*

[35] The procedure on how the Court should determine an application is governed by Order 51 of the Civil Procedure Rules, 2010. It provides as follows:

"1. Procedure [Order 51, Rule 1.]

All applications to the court shall be by motion and shall be heard in open court unless the court directs the hearing to be conducted in chambers or unless the rules expressly provide."

[36] The Appellants have relied on Article 51. Article 51 is on the rights of persons detained, held in custody or imprisoned. The precise provision on right to fair hearing is Article 50 which at Sub-Article 1 provides as follows:

"Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."

[37] The right to fair trial is a fundamental non-derogable under Article 25 of the Constitution which provides as follows:

"Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited –

(a) freedom from torture and cruel, inhuman or degrading treatment or punishment;

(b) freedom from slavery or servitude;

(c) the right to a fair trial;

(d) the right to an order of habeas corpus."

[38] The African Commission on Human and People's Rights established general principles to all legal proceedings applicable by Member States, of which Kenya is one. Therefore, the principles are binding under Article 2(5) and (6) of the Constitution, and include the following:

"GENERAL PRINCIPLES APPLICABLE TO ALL LEGAL PROCEEDINGS:

1. Fair and Public Hearing

In the determination of any criminal charge against a person, or of a person's rights and obligations, everyone shall be entitled to a fair and public hearing by a legally constituted competent, independent and impartial judicial body.

2. Fair Hearing

The essential elements of a fair hearing include:

...

(e) adequate opportunity to prepare a case, present arguments and evidence and to challenge or respond to opposing arguments or evidence;

(f) an entitlement to consult and be represented by a legal representative or other qualified persons chosen by the party at all stages of the proceedings;

...

(i) an entitlement to a determination of their rights and obligations without undue delay and with adequate notice of and reasons for the decisions; and

(j) an entitlement to an appeal to a higher judicial body."

[39] In a concurring opinion, *Njoki Ndungu, SCJ* in the decision of ***Evans Odhiambo Kidero & 4 others v. Ferdinand Ndungu Waititu & 4 others*** Petition no. 18 OF 2014 as consolidated with Petition no. 20 of 2014 [2014] eKLR elaborated on the right to fair hearing as follows:

> ***"[257]*** *Fair hearing, in principle incorporates the rules of natural justice, which includes the concept of* audi alteram partem*(hear the other side or no one is to be condemned unheard) and* nemo judex in causa sua *(no man shall judge his own case) otherwise referred to as the rule against bias.* Peter Kaluma, Judicial Review: Law, Procedure and Practice *2nd Edition (Nairobi: 2009) at page 195, notes that the rules of natural justice generally refer to procedural fairness in decision making. Further he analyses the two mentioned concepts of the rules of natural justice and states [at pages 176 and 177] that it is the duty of the courts, when dealing with individual cases, to determine whether indeed the rules of natural justice have been violated and noting that* "although the necessity of hearing is well established, its scope and contents remain unsettled."
>
> ***[258]*** *What then are the* norms or components of a fair hearing*? The Supreme Court of India, in* ***Indru Ramchand Bharvani & Others v. Union of India & Others****, 1988 SCR Supl. (1) 544, 555 found that a fair hearing has two justiciable elements: (i) an opportunity of hearing must be given; and (ii) that opportunity must be reasonable (citing* ***Bal Kissen Kejriwal v. Collector of Customs, Calcutta & Others****, AIR 1962 Cal. 460).*

[259] *That Court in* ***Union of India v. J.N. Sinha & Another****, 1971 SCR (1) 791 and* ***C.B. Boarding & Lodging v. State of Mysore****, 1970 SCR (2) 600 held that with regards to fair hearing, each case has to be decided on its own merits. In* ***Mineral Development Ltd. v. State of Bihar****, 1960 AIR 468, 160 SCR (2) 909 the Court further observed that the concept of fair hearing is an elastic one and* **"is not susceptible of easy and precise definition."**

[260] *The Court of Appeal at Kampala in Uganda in* ***Obiga v. Electoral Commission & Anor****., Election Petition Appeal No. 4 of 2011 [2012] UGCA 29* ***(Obiga)*** *held that in order to determine whether a party received a fair hearing, the Court has to look to the statutes, case laws, and regulations that govern the decisions that the Court made.*

[261] *It is important to restate that a literal reading of the provisions of the Constitution show that the right to a fair hearing is broad and* includes the concept of the right to a fair trial *as it deals with any dispute whether they arise in a judicial or an administrative context. Comparative experience shows that the European Court has elaborated on the question regarding the scope of the right to fair trial applying the right in both civil and in criminal matters. The European Court of Human Rights (European Court) has severally explained that:* **"it is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court."** *(*See ***Steel and Morris v. United Kingdom****, [2005] ECHR 103, paragraph 59).*

[40] This Court in its decision in ***Mohamed Abdi Mahamud v. Ahmed Abdullahi Mohamad & 3 others*** Petition 7 of 2018 consolidated with Petition 9 of 2018 [2018] eKLR determined what constitutes a right to fair hearing. We held as follows:

*"**[86]** We are also minded that the interests of justice dictate that this Court ensures that all parties to a dispute are accorded a fair hearing so as to resolve the dispute judiciously. This is particularly so because what is at stake is the Appellant's right to a fair election as well as the right of the voters to non-interference with their already cast votes, the will of the people, so to speak. It is on this breath that we must consider whether the Appellant's right to a fair hearing and trial will be infringed upon by the denial of admission of new evidence.*

[87]** In the circumstances, was there a reasonable opportunity of hearing given to the Appellant? In this regard, what then are the norms or components of a fair hearing? In the matter of* ***Indru Ramchand Bharvani & Others v. Union of India & Others, 1988 SCR Supl. (1) 544, 555, *the Supreme Court of India, found that a fair hearing has two justiciable elements:* ***(i) an opportunity of hearing must be given****; and* ***(ii) that opportunity must be reasonable*** *(citing Bal Kissen Kejriwal v. Collector of Customs, Calcutta & Others, AIR 1962 Cal. 460). It is important to restate that a literal reading of the provisions of the Constitution of Kenya show that the right to a fair hearing is broad and includes the concept of the right to a fair trial as it deals with any dispute whether they arise in a judicial or an administrative context. Comparative experience shows that the European Court has elaborated on the question regarding the scope of the right to fair trial applying the right in both civil and in criminal matters. The European Court of Human Rights (European Court) has severally explained that: "****it is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court****." (See Steel and Morris v. United Kingdom, [2005] ECHR 103, paragraph 59)."*

[41] In considering whether the High Court procedurally considered the plea of res judicata, we are asked to determine whether the court accorded the Appellants *an opportunity of hearing; and whether that opportunity was be reasonable.* In

order to do that we must look at the court record of the proceedings before the High Court.

[42] On 5th November 2013, the Appellants filed, alongside the main Petition, an application under certificate of urgency seeking *inter alia* conservatory orders to restrain the Respondents from levying the disputed fees.

[43] The application dated and filed 5th November 2013 was placed before the duty Court (*Odero J.)* on the same day and counsel for the Appellant was given an opportunity to address the court on the same. The Court certified the matter as urgent and directed that counsel for the Appellant serve the application on the Respondents for hearing on 14th November 2013.

[44] Order 51 Rule 14 of the Civil Procedure Rules, 2010 makes provision on how a matter who wishes to oppose an application may respond. It provides as follows;

> ***"14. Grounds of opposition to application in High Court [Order 51, rule 14.]***
>
> *(1) Any respondent who wishes to oppose any application may file t any one or a combination of the following documents —*
>
> *(a) a notice preliminary objection: and/or;*
>
> *(b) replying affidavit; and/or*
>
> *(c) a statement of grounds of opposition;*
>
> *(2) the said documents in subrule (1) and a list of authorities, if any shall be filed and served on the applicant not less than three clear days before the date of hearing.*
>
> *(3) Any applicant upon whom a replying affidavit or statement of grounds of opposition has been served under sub-rule (1) may, with the leave of the court, file a supplementary affidavit.*
>
> *(4) If a respondent fails to file to comply with sub-rule (1) and (2), the application may be heard ex parte.*

[45] Upon service, the Respondents entered various responses. The 3rd Respondent entered appearance on 11th November 2013 and on even date filed Grounds of Opposition dated 11th October 2013 to oppose the Appellant's application raising the plea of *res judicata* due to the Judgment in JR No. 130 of 2011 by the High Court. On 14th November 2013, the 3rd Respondent filed a Replying Affidavit sworn by John Dira Omingo, the 3rd Respondent's Head of Commercial Shipping, on 13th November 2013. The 3rd Respondent annexed a copy of the Judgment in ***Mombasa HC Misc. Application No. 130 of 2011***.

[46] The Attorney General on 18th November 2013 also filed Grounds of Opposition dated 14th November 2013 raising the same objection. While the 4th Respondent, on 3rd December 2013 filed a Replying Affidavit sworn by Berthe Morisho Mwamvua, the 4th Respondent's appointed representative in Kenya, on 2nd December 2013 opposing both the Petition and the Application. The 1st Respondent on 21st February 2014 filed a Replying Affidavit sworn by Nduva Muli, the Principal Secretary in opposition to the Petition.

[47] All the parties appeared before Court (*Kasango, J.*) on 14th November 2013 where counsel for the 1st and 2nd Respondents sought an adjournment on account of not properly on record consequently not ready to proceed. Counsel for the 4th Respondent also sought for more time on account of not having been properly instructed. Counsel for the Appellants vehemently opposed the application for adjournment. The Court however allowed the adjournment and directed that the same proceed for hearing on 4th December 2013.

[48] It is important to note that at this point, the Appellants were aware of the defences and opposition raised against their application and Petition including the plea of *res judicata*. They were also aware of the Judgment in JR 130 of 2011 as it one of the annexures in the Affidavit sworn by John Dira Omingo, the 3rd Respondent's Head of Commercial Shipping, on 13th November 2013.

[49] On 4th December 2013 all parties appeared before Court (*Muriithi, J.)* where they were each granted opportunity to address the court on the merits and

demerits of the application by the Appellants. It was at this point that if the Appellants had felt that the time to reply to the plea of res judicata was too short that they should have raised the same before the court. Parties were unable to conclude their oral submissions and the matter was stood over to 21st January 2014 where parties were able to finalise their oral submissions. Counsel for the Appellants was granted opportunity for a rebuttal to counter the submissions by the Respondents.

[50] The Court then rendered its Ruling on 31st July 2014 where it found the Petition to be *res judicata*.

[51] It is evident that the plea of *res judicata* was raised and not as a preliminary objection as argued by the Appellants. The definition of a preliminary objection was well set out in the case of ***Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors ltd*** (1969) EA 696 as follows:

> *"So far as I'm aware, a 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 of the suit."*

[52] This was followed up by the Judgment of Sir Charles Newbold in the same case:

> *"The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. A Preliminary Objection is in the nature of what used to be a demurrer. 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 had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way*

of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop"

[53] Instead, and contrary to the Appellants submissions, the plea of *res judicata* was raised through both grounds of opposition and replying affidavits in response to the Appellants application. It is also evident that through the Replying Affidavits of the 3rd and 4th Respondents, evidence by way of the Judgment of *JR No. 130 of 2011* was introduced through an affidavit to bolster the plea of *res judicata*.

[54] It is further evident that the Appellants were not condemned unheard or shut out from the proceedings. The proceedings demonstrate that the Court accorded the Appellants the two justiciable elements of fair hearing: *(i) an opportunity of hearing must be given; and (ii) that opportunity must be reasonable.*

[55] This ground of appeal must therefore fail.

Is this doctrine of res judicata applicable to constitutional litigation and interpretation, just as in other criminal and civil litigation?

[56] The doctrine of *"res judicata"* is provided for under Section 7 of the Civil Procedure Act in 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 issue in which such issue has been subsequently raised, and has been heard and finally decided by such court."

[57] The Civil Procedure Act has also provided explanations with respect to the application of the res judicata rule. Explanation 1-6 are in the following terms:

Explanation (1) —The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation (2) —For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation (3) —The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation (4) — Any matter which might and ought to have been made 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.

Explanation (5) — Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation (6) — 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.

[58] This Court in the case of ***Kenya Commercial Bank Limited v. Muiri Coffee Estate Limited & another*** Motion No. 42 of 2014 [2016] eKLR ***(Muiri Coffee case)*** held as follows regarding the doctrine of *res judicata:*

"[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. Such a perception has a basis in comparative jurisprudence; in the Ugandan case of* ***Hon. Norbert Mao v. Attorney-General,*** *Constitutional Petition No. 9 of 2002; [2003] UGCC3, the petitioner brought an action on behalf of 21 persons from his constituency, for declarations under Article 137 of the Uganda*

Constitution, and for redress under Article 50 of that Constitution. The matter arose from an incident in which officers of the Uganda Peoples Defence Forces attacked a prison, and abducted 20 prisoners, killing one of them. Unknown to the petitioner, another action had already been filed under Article 50, seeking similar relief; and Judgment had been given in ***Hon. Ronald Reagan Okumu v. Attorney-General,*** *Misc. Application No.0063 of 2002, High Court HCT 02 CV MA 063 of 2002. The Constitutional Court dismissed the petition, on a plea of res judicata, declining the petitioner's pleas that certain important constitutional declarations now sought, had not been accommodated in the earlier Judgment.*

[53] *In* ***Silas Make Otuke v. Attorney-General & 3 Others,*** *[2014] eKLR, the High Court of Kenya* ***agreed with the Privy Council decision in Thomas v. The AG of Trinidad and Tobago (1991) LRC (Const.) 1001****, in which the Board was "satisfied that the existence of a constitutional remedy as that upon which the appellant relies does not affect the application of the principle of* ***res judicata".***

[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****, 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."*

[57] *The essence of the res judicata doctrine is further explicated by Wigram, V-C in* ***Henderson v. Henderson*** *(1843) 67 E.R. 313, as follows:*

> *" ... where a given matter becomes the subject of litigation in, and adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of* ***res judicata*** *applies, except in special cases, 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 of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time" *[emphasis supplied].*

[58] *Hence, whenever the question of res judicata is raised, a Court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case¾to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The Court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a Court of competent jurisdiction. This test is summarized in* ***Bernard Mugo Ndegwa v. James Nderitu Githae & 2 Others,*** *(2010) eKLR,* *under five distinct heads: (i) the matter in issue is identical in both suits; (ii) the parties in the suit are the same; (iii) sameness of the title/claim; (iv) concurrence of jurisdiction; and (v) finality of the previous decision.*

[59] *That Courts have to be vigilant against the drafting of pleadings in such manner as to obviate the res judicata principle was judicially remarked in* ***E.T v. Attorney-General & Another,*** *(2012) eKLR, thus:*

> ***"The Courts must always be vigilant to guard litigants evading the doctrine of*** *res judicata* ***by introducing new causes of action so as to seek the same remedy before the Court.*** *The test is whether the plaintiff in the second suit is trying to bring before the Court in another way and in a form of a new cause of action which has been resolved by a Court of competent jurisdiction. In the case of* ***Omondi v. National Bank of Kenya Limited and Others,*** *(2001) EA 177 the Court held that, 'parties cannot evade the doctrine of* ***res judicata*** *by merely adding other parties or causes of action in a subsequent suit.' In that case the Court quoted* ***Kuloba J.****, in the case of* ***Njangu v. Wambugu and Another*** *Nairobi HCCC*

No.2340 of 1991 (unreported) where he stated, 'If parties were 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, then I do not see the use of the doctrine of ***res judicata****....."*

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

a) There is a former Judgment or order which was final;

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.

(See ***Uhuru Highway Developers Limited v. Central Bank of Kenya & Others*** [1999] eKLR and See the decision of the Court of Appeal in ***Nicholas Njeru v. Attorney General & 8 Others*** Civil Appeal 110 of 2011 (2013) eKLR)

[60] However, the courts have differed on whether the doctrine of res judicata is applicable to constitutional matters. Some of the decisions include In ***Okiya Omtatah Okoiti & Another v. The Attorney General and Another*** Petition No. 593 of 2013 [2014] eKLR where *Lenaola J***.** (as he then was) held as follows:

"For ***res judicata*** *to be invoked in a civil matter therefore, the issue in a current suit must have been decided by a competent court. Secondly, 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. Thirdly, 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. (See the case of ***Karia and Another v. the Attorney General and Others (2005) 1EA 83).*** *It therefore follows that the essence of the doctrine of* ***res judicata*** *is to bring an end to litigation and a party should not be vexed twice over the same cause. This was what was held with approval in* ***Omondi v. National Bank of Kenya Ltd and Others (2001) EA 177.***

Whereas these principles have generally been applied liberally in civil suits, the same cannot be said of their application in constitutional matters. ***I say so because, in my view, the principle of res judicata can and should only be invoked in constitutional matters in the clearest of cases and where a party is relitigating the same matter before the Constitutional Court and where the Court is called upon to redetermine an issue between the same parties and on the same subject matter. While therefore the principle is a principle of law of wide application, therefore it must be sparingly invoked in rights-based litigation and the reason is obvious****." [Emphasis added]*

[61] In ***Wycliffe Gisebe Nyakina v. Attorney General & another*** [2014] eKLR, *Gikonyo, J.* held as follows:

"I reiterate the sentiments above and I must also state that while the Courts in constitutional litigation must apply the principle of res judicata sparingly, they must also be vigilant to guard against litigants who are clearly evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the same Court. That being my finding and looking at the Petition before me, I do not think that it is res judicata and I will say why shortly."

[62] In ***William Kabogo Gitau v. Ferdinand Ndung'u Waititu*** [2016] eKLR *Onguto, J.* held as follows:

"59. In the cases of ***Aggrey Chiteri v. Republic*** *[2016] eKLR and* ***Edward Okongo Oyugi & 2 Others v. The Attorney General*** [2016] eKLR***,*** *this Court held that the doctrine of* ***res judicata*** *applied with even force to constitutional litigation though it was important that caution is exercised lest a person whose rights were being violated a fresh was unjustly locked out from the wheels and seat of justice. So said the court in* ***Edward Okongo Oyugi & 2 Others v. The Attorney General [supra]****:*

"[11] The application of the principle of ***res judicata*** *has the potential of locking out a person from the doors of justice or even reaching the out-stretched arms of justice if the claim is disposed off without venturing into the merits. Consequently, the factors and circumstances ought always be nit-picked and caution exercised. The court ought to be in no doubt that the principle is applicable to the facts and circumstances of each case."*

[63] *Chitembwe J.* in ***Mercy Munee Kingoo & another v Safaricom Limited & another*** [2016] eKLR held as follows:

In the case of ***Zurich Insurance Company PLC v. Colin Richard*** [2011] EWCA CIV 641, *the court explained the principal of* ***res judicata*** *in the following terms:*

> ***"Estoppel by*** *res judicata****, or estoppel by record, is a manifestation of the principle that judicial decisions once made must be accepted as final and are not open to challenge. Ultimately, it rests on a rule of policy that it is in the public interest for there to be finality in litigation, but it also sustains an important principle that decisions of competent tribunals must be accepted as providing a stable basis for future conduct. The Latin word*** *"res judicata"* ***mean simply "a thing judicially determined." They may apply to***

the claim as a whole (usually referred to as "cause of action estoppel"), or may refer to one or more specific issues which the court was required to decide in the course of reaching its decision on the matter before it (what is generally referred to as "issue estoppel"…. The fact that an order is made by consent does not in my view prevent it from giving rise to an estoppel by record, provided that the nature of the order is such that it would otherwise have that effect."

My view on the issue of estoppel is that where the dispute involves interpretation of a statutory provision which is alleged to be in contravention of the Constitution, similar cases can be brought to court but based on a different dimension. A petitioner can say that a certain provision of a statute is unconstitutional as it violates a certain Article of the Constitution. That dispute can be determined but another party is not barred from asking the same court to declare the same statutory provisions as unconstitutional as it was passed without public participation or that it violates another Article of the Constitution. In other words, res judicata cannot be applied generally in relation to interpretation of the Constitution or a statute. There is also the simple fact that one Judge can declare a certain statutory provision as unconstitutional while another Judge declares the same provision as constitutional. In such a case, res judicata cannot apply. A good example is the issue relating to section 40 (3) of the County Governments Act, 2012. In the case Of ***Stephen Nendela v. Count Assembly Of Bungoma & 4 Others*** [2014] eKLR ***Justice Mabeya*** declared that section as unconstitutional. *Justice Byram Ongoya* dealt with the same issue in two case namely ***George Maina Kamau v. County Assembly of Muranga & 2 Others*** [2016] eKLR and ***Richard Bwogo Birir v. Narok County Government & 2 Others*** [2014] eKLR. The Judge did

not declare Section 40 (3) of the County Governments Act as unconstitutional. I also dealt with the same issue in the case of ***Amina Rashid Masoud v. The Governor, Laumu County & Others Malindi*** Constitution Petition No. 10 of 2016 and I held that Section 40 (3) was not unconstitutional. All these cases were based on similar facts and involved the constitutionality of Section 40 (3) of the County Governments Act. The ***Richard Bwogo Birir Case*** ended in the Court of Appeal (Nyeri Civil Appeal No. 74 of 2014)."

[64] The Court of Appeal, its impugned decision herein (Civil Appeal 42 of 2014), sought to settle the issue and made a determination as follows:

> ***"Res judicata*** *is a subject which is not at all novel. It is a discourse on which a lot of judicial ink has been spilt and is now sufficiently settled. We therefore do not intend to re-invent any new wheel. We can however do no better than reproduce the re-indention of the doctrine many centuries ago as captured in the case of* ***Henderson v. Henderson*** *[1843] 67 ER 313:*
>
> > *".....where a given matter becomes the subject of litigation in and adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by parties to form an opinion and pronounce a Judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time....."*

[65] See also ***Kamunye & others v. Pioneer General Assurance Society Ltd*** [1971] E.A. 263. Simply put *res judicata* is essentially a bar to subsequent proceedings involving same issue as had been finally and conclusively decided by a competent Court in a prior suit between the same parties or their representatives.

> *The rationale behind **res judicata** is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of Court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of Judgments by reducing the possibility of inconsistency in Judgments of concurrent Courts. It promotes confidence in the Courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably. In a nutshell, res judicata being a fundamental principle of law may be raised as a valid defence. It is a doctrine of general application and it matters not whether the proceedings in which it is raised are constitutional in nature. The general consensus therefore remains that res judicata being a fundamental principle of law that relates to the jurisdiction of the Court, may be raised as a valid defence to a constitutional claim even on the basis of the Court's inherent power to prevent abuse of process under **Rule 3(8)** of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. On the whole, it is recognized that its scope may permeate broad aspects of civil law and practice. **We accordingly do not accept the proposition that Constitution-based litigation cannot be subjected to the doctrine of res judicata. However we must hasten to add that it should only be invoked in constitutional litigation in the clearest of the cases. It must be sparingly invoked and the reasons are obvious***

as rights keep on evolving, mutating, and assuming multifaceted dimensions.

We also resist the invitation by the appellants to hold that all constitutional petitions must be heard and disposed of on merit and that parties should not be barred from the citadel of justice on the basis of technicalities and rules of procedure which have no place in the new constitutional dispensation. The doctrine is not a technicality. It goes to the root of the jurisdiction of the Court to entertain a dispute. If it is successfully ventilated, the doctrine will deny the Court entertaining the dispute jurisdiction to take any further steps in the matter with the consequence that the suit will be struck out for being res judicata. That will close the chapter on the dispute. If the doctrine has such end result, how can it be said that it is a mere technicality? If a constitutional petition is bad in law from the onset, nothing stops the Court from dealing with it peremptorily and having it immediately disposed of. There is no legal requirement that such litigation must be heard and determined on merit.

[66] The Court of Appeal went on to make the following findings:

i) *The doctrine of res judicata is applicable to constitutional litigation just as in other civil litigation as it is a doctrine of general application with a rider, however, that it should be invoked in constitutional litigation in rarest and in the clearest of cases.*

ii) *There is no legal requirement or factual basis for the submission that the doctrine must only be invoked and or ventilated through a formal application. It can be raised through pleadings as well as by way of preliminary objection.*

iii) *The ingredients of res judicata must be given a wider interpretation; the issue in dispute in the two cases must be the same or substantially the same as in the previous case, parties to the two suits should be the same or parties under whom they or any of them is claiming or*

litigating under the same title and lastly, the earlier claim must have been determined by a competent court.

[67] The Court of Appeal reiterated its findings in its later decision in, ***Accredo AG & 3 others v. Steffano Ucceli & another*** Civil Appeal 43 of 2018 [2019] eKLR.

[68] The Court of Appeal however did not attempt to define what *'rarest and clearest'* cases were. The Court only stated as follows as justification:

> *"On the whole, it is recognized that its scope may permeate broad aspects of civil law and practice. We accordingly do not accept the proposition that Constitution-based litigation cannot be subjected to the doctrine of res judicata. However, we must hasten to add that it should only be invoked in constitutional litigation in the clearest of the cases. It must be sparingly invoked and the reasons are obvious as rights keep on evolving, mutating, and assuming multifaceted dimensions."*

[69] We may draw from the comparative lesson. From the Law of England and Wales, **Halsbury's Laws of England, Volume 12A, 5th Edition, 2015** provides as follows:

> ***"(2) RES JUDICATA***
>
> ***(i) The Doctrine of Res Judicata***
>
> *1603. Basis for doctrine of res judicata*
>
> *The doctrine of res judicata provides that, where a decision is pronounced by a judicial or other tribunal with jurisdiction over a particular matter, that same matter cannot reopened by parties bound by the decision, save on appeal. It is most closely associated with the legal principle of 'cause of action estoppel', which operates to prevent a cause of actions being raised or challenged by either party in subsequent proceedings where 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 privies), and having involved the same subject matter. However, res judicata also embraces 'issue estoppel', a term that is used to describe a defence which may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided, but, in subsequent proceedings between the same parties involving different cause of action to which the same issue is relevant, one of the parties seeks to reopen that issue. For this reason, res judicata has been described as a portmanteau term which is used to describe a number of different legal principles with different juridical origins upon which the courts have endeavoured to impose some coherent scheme only in relatively recent times.

...

The purpose of the principle of res judicata is to support the good administration of justice in the interests of the public and the parties by preventing abuse and duplicative litigation and its twin principles are often expressed as being the public interest that the courts courts should not be clogged by re-determinations of the same disputes; and the private interest that it is unjust for a man to be vexed twice with litigation on the same subject matter.

....

1626. Extent to which issue estoppel applies in public law proceedings.

Issue estoppel is a doctrine appropriate to proceedings in private law. While in certain circumstances it would be an abuse of process to permit a public authority which had acted in disregard of a declaration or order made in judicial review proceedings to seek to re-open debate about whether its actions were justified, in judicial review there is always a third party who is present: the wider public or private interest. ***The wider public or private interest should not be prejudiced by the***

failure of a public authority to place all the relevant material and arguments before the court on the first occasion, or if that authority reconsiders in the light of the previous decision but arrives at conclusions which do not in every respect mirror the court's conclusions on the first occasion*. The extent to which the doctrine of issue estoppel is applicable in judicial review proceedings is therefore doubtful. It has however been held that issue estoppel may apply in habeas corpus proceedings. In planning appeals, although the doctrines of cause of action estoppel and issue estoppel do not apply to decisions of inspectors, a previous inspector's decision on a matter is material consideration which an inspector is obliged to take into account. It has also been said that courts should not be used as a means to attempting to reargue points that have already been fully considered at a planning inquiry.*

Issue estoppel does not apply in child care cases, because it is outweighed by public policy considerations relating to the protections of children."

[70] In the well-known decision of Wigram V.C. in ***Henderson v. Henderson (1843) 3 Hare 100*** at page 115, he held as follows:

"...where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. ***The plea of res judicata applies, <u>except in special cases,</u> not only to points upon 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 of litigation, and which the parties, exercising reasonable, diligence, might have brought forward at the time. [Emphasis added]

[71] *Hon. Mr. Justice Vivian Lavan* in the case of ***Foley v. Smith [2004] IEHC 299*** (16 July 2004) discussed a party's constitutional right to access court *vis-à-vis* the doctrine of *res judicata* as follows:

"The doctrine of res judicata is based upon the principle that a party should not be allowed to re-litigate a matter that he has already had an opportunity to litigate. It is based on the principle of public interest that requires finality in litigation and the private right of an individual to be protected from a vexatious multiplication of suits.

The situation in the present case is such that the High Court proceedings were in being prior to the initiation of the proceedings, on the part of the defendant, in the District Court. Furthermore, it is clear that the plaintiff had the intention of defending the District Court proceedings, but due to an omission on the part of his insurers, was unable to do so. The dicta of Hardiman J. in Ahmed v. The Medical Council [2004] 1 ILRM 372 at p.386 is of assistance:

> *"Rules or principles so described cannot, in their nature, be applied in an automatic or unconsidered fashion. Indeed, it appears to me that sympathetic consideration must be given to the position of a plaintiff or applicant who on the face of it is exercising his right of access to the Courts for the determination of his civil rights or liabilities."*

The operation of the principle of res judicata requires the court to look at the competing interests of the parties, namely the constitutional right of the plaintiff to access the courts and the opposing right of the defendant to be protected from a

multiplicity of suits from an opponent. *This is the principle as set down by Keane J. in McCauley v. McDermott [1997] 2 ILRM 486 at p.498:*

"In cases of this nature, the courts are concerned with achieving a balance between two principles. A party should not be deprived of his or her constitutional right of access to the courts by the doctrine of res judicata where injustice might result, as by treating a party as bound by a determination against his or her interests in proceedings over which he or she had no control*. Res judicata must be applied in all its severity, however, where to do otherwise would be to permit a party bound by an earlier Judgement to seek to escape from it, in defiance of the principles that there should ultimately be an end to all litigation and that the citizen must not be troubled gain by a law suit which has already been decided."* [Emphasis added]

[72] The Courts in India have had occasion to grapple with the question. The Supreme Court of India in the case of ***Daryao And Others vs The State Of U. P. And Others 1962 SCR (1)*** *574* rejected a submission that the principle of res judicata could not apply to a petition for redress in respect of an infringement of fundamental right under the Constitution. The Court held as follows:

"That is why we must proceed to deal with the question of res judicata on the basis that a fundamental right has been guaranteed to the citizen to move this Court by an original petition wherever his grievance is that his fundamental rights have been illegally contravened. There can be no doubt that the fundamental right guaranteed by Art. 32(1) is a very important safeguard for the protection of the fundamental rights of the citizen, and as a result of the said guarantee this Court has been entrusted with the solemn task of upholding the fundamental rights of the citizens of this country. The fundamental rights are intended not only to protect individual's rights but they are based on high public policy. Liberty of the individual and the

protection of his fundamental rights are the very essence of the democratic way of life adopted by the Constitution, and it is the privilege and the duty of this Court to uphold those rights. This Court would naturally refuse to circumscribe them or to curtail them except as provided by the Constitution itself. It is because of this aspect of the matter that in Romesh Thappar v. The State of Madras (1), in the very first year after the Constitution came into force, this Court rejected a preliminary objection raised against the competence of a petition filed under Art. 32 on the ground that as a matter of orderly procedure the petitioner should first have resorted to the High Court under Art. 226, and observed that "this Court in thus constituted the protector and guarantor of the fundamental rights, and it cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringements of Ruch rights". Thus the right given to the citizen to move this Court by a petition under Art. 32 and claim an appropriate writ against the unconstitutional infringement of his fundamental rights itself is a matter of fundamental right, and in dealing with the objection based on the application of the rule of res judicata this aspect of the matter had no doubt to be borne in mind.

But, is the rule of res judicata merely a technical rule or is it based on high public policy? ***If the rule of res judicata itself embodies a principle of public policy which in turn is an essential part of the rule of law then the objection that the rule cannot be invoked where fundamental rights are in question may lose much of its validity****. Now, the rule of res judicata as indicated in s. 11 of the Code of Civil Procedure has no doubt, some technical aspects, for instance the rule of constructive res judicata may be said to be technical; but the basis on which the said rule rests is founded on considerations of public policy. It is in the interest of the public at large that a finality should attach to the binding decisions pronounced by Courts' of competent jurisdiction, and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation. If*

these two principles form the foundation of the general rule of res judicata they cannot be treated as irrelevant or inadmissible even in dealing with fundamental rights in petitions filed under Art. 32.

.....

Therefore, the argument that res judicata is a technical rule and as such is irrelevant in dealing with petitions under Art. 32 cannot be accepted.

.....

In our opinion therefore, the plea that the general rule of res judicata should not be allowed to be invoked cannot be sustained."

[73] Supreme Court of India in the case of ***State of Haryana & Ors Vs. M.P. Mohla*** (2007) 1 SCC 457 held as follows:

"The dispute between the parties has to be decided in accordance with law. What, however, cannot be denied or disputed that a dispute between the parties once adjudicated must reach its logical conclusion. If a specific question which was not raised and which had not been decided by the High Court the same would not debar a party to agitate the same at an appropriate stage, subject, of course, to the applicability of principles of res judicata or constructive res judicata.

It is also trite that if a subsequent cause of action had arisen in the matter of implementation of a Judgment a fresh writ petition may be filed, as a fresh cause of action has arisen."

[74] The Court of Appeal in Trinidad and Tobago in the case of ***Endell Thomas v. The Attorney General*** Privy Council Appeal No. 20 of 1989 ***1990 (UKPC) 49*** agreed with the reasoning and conclusion with the decision from India in ***Daryao And Others v. The State Of U. P. (supra).*** The Court held as follows:

"Their Lordships are satisfied that the existence of a constitutional remedy such as that upon which the appellant relies does not affect the application of the principle of ***res judicata."***

[75] The Court however made an exception to the application of the principle of res judicata to where the applicant can demonstrate special circumstances warranting exemption. They held as follows:

> *"The classic statement on the subject is contained in the following passage from the Judgment of Wigram V.C. in Henderson v. Henderson (1843) 3 Hare 100 at page 115:*
>
> *.....where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not* ***(except under special circumstances****) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon 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 of litigation, and which the parties, exercising reasonable, diligence, might have brought forward at the time.*
>
> *The principles enunciated in that dictum have been restated on numerous occasions.*
>
> *.....*
>
> ***It is clear from these authorities that when a plaintiff seeks to litigate the same issue a second time relying on fresh***

propositions in law he can only do so if he can demonstrate that special circumstances exist for displacing the normal rules."

[76] The Supreme Court of Canada in ***Angle v Canada (Minister of National Revenue–M.N.R.), 1974 CanLII 168 (SCC), [1975] 2 SCR 248*** establishes the following three-part test for the application of issue estoppel:

a. The same question has been decided;

b. The decision said to create the estoppel was final;

c. The parties to the previous decision or their privies are the same as the parties to the proceeding in which the estoppel is raised.

[77] The *Honourable Mr. Justice Russell* in the Federal Court of Canada in the case ***Sami v. Canada (Citizenship and Immigration), 2012 FC 539 (CanLII)*** held as follows:

"[65] The preconditions for res judicata, as set out by the Supreme Court of Canada in Angle, above, are as follows:

a. The same question was decided in earlier proceedings;

b. The judicial decision which is said to create the estoppel was final; and

c. The parties to the judicial decision were the same persons as the parties to the proceedings in which the estoppel was raised.

[66] In the present case, the IAD determined that these preconditions were all met. The question to be determined, the genuineness of the Applicant's marriage, and the parties to the decision were the same as those in the previous IAD decision. The IAD is a court of competent jurisdiction with the authority to dispose of sponsorship appeals. Therefore, the previous decision was final, and the IAD was correct in finding that the preconditions for res judicata were met.

[67] The case law has established that, where the preconditions are met, issue estoppel must apply ***unless special circumstances exist which would warrant hearing the case on its merits****.* ***The Supreme Court of Canada has determined that an evaluation of the special circumstances requires the decision-maker to ask whether, taking into account all of the circumstances, the application of issue estoppel would result in an injustice.*** *See Danyluk, above, at paragraphs 64 to 67."*

[78] The Supreme Court of Canada in the case of ***Danyluk v. Ainsworth Technologies Inc., 2001 SCC 44 (CanLII), [2001] 2 SCR 460*** elaborated the special circumstances which may permit a court to make an exception to the doctrine of res judicata as follows:

"64. Courts elsewhere in the Commonwealth apply similar principles. In ***Arnold v. National Westminster Bank plc,*** *[1991] 3 All E.R. 41, the House of Lords exercised its discretion against the application of issue estoppel arising out of an earlier arbitration, per Lord Keith of Kinkel, at p. 50:*

> ***"One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result . . . ."***

65. In the present case Rosenberg J.A. noted in passing at pp. 248-49 the possible existence of a potential discretion but, with respect, he gave it short shrift. There was no discussion or analysis of the merits of its exercise. He simply concluded, at p. 256:

> *" In summary, Ms. Burke did not accord this appellant natural justice. The appellant's recourse was to seek review of Ms. Burke's decision. She failed to do so. That decision is binding upon her and her employer."*

66. In my view it was an error of principle not to address the factors for and against the exercise of the discretion which the court clearly possessed. This is not a situation where this Court is being asked by an appellant to substitute its opinion for that of the motions Judge or the Court of Appeal. The appellant is entitled at some stage to appropriate consideration of the discretionary factors and to date this has not happened.

67. The list of factors is open. They include many of the same factors listed in Maybrun in connection with the rule against collateral attack. A similarly helpful list was proposed by Laskin J.A. in Minott, supra. The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice in the particular case. Seven factors, discussed below, are relevant in this case."

[79] The Court listed the seven factors to include the following;

(a) *The Wording of the Statute from which the Power to Issue the Administrative Order Derives*

(b) *The Purpose of the Legislation*

(c) *The Availability of an Appeal*

(d) *The Safeguards Available to the Parties in the Administrative Procedure*

(e) *The Expertise of the Administrative Decision Maker*

(f) *The Circumstances Giving Rise to the Prior Administrative Proceedings*

(g) *The potential Injustice*

[80] Of particular interest the Supreme Court of Canada in the ***Danyluk case***, on the factor of potential injustice, stated as follows:

(g) The Potential Injustice

80. As a final and most important factor, the Court should stand back and, taking into account the entirety of the circumstances, consider whether application of issue estoppel in the particular case would work an injustice. Rosenberg J.A. concluded that the appellant had received neither notice of the respondent's allegation nor an opportunity to respond. He was thus confronted with the problem identified by Jackson J.A., dissenting, in Iron v. Saskatchewan (Minister of the Environment & Public Safety), 1993 CanLII 6744 (SK CA), [1993] 6 W.W.R. 1 (Sask. C.A.), at p. 21:

> *"The doctrine of res judicata, being a means of doing justice between the parties in the context of the adversarial system, carries within its tenets the seeds of injustice, particularly in relation to issues of allowing parties to be heard."*

[81] 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. To further bolster our position we borrow from the decision from India in ***Karam Chand Another vs Union Of India and others on 24 April, 2014*** where it was restated the principles upon which the doctrine of *res judicata* is founded as follows:

> *"29…it is clear that the rule of res judicata is mandatory in its application and should be invoked in the interest of public policy and finality. The matter which have actually been decided would also apply to the matters which have been impliedly and constructively decided by the Court. These principles are to be applied to preserve the doctrine of finality rather than frustrate the*

same. The doctrine of res judicata is the combined result of public policy so as to prevent repeated taxing of a person to litigation. ***It is primarily founded on the following three maxims:***

(1) *nemo debet bis vexari pro una et eadem causa:* ***no man should be vexed twice for the same cause.***

(2) *interest republicae ut sit finis litium****: it is in the interest of the State that there should be an end to a litigation; and***

(3) *res judicata pro veritate occipitur:* ***a judicial decision must be accepted as correct.***

...The doctrine of ***res judicata*** *is conceived not only in the larger public interest which requires that all litigation must sooner than later come to an end but is also founded on equity, justice and good conscience."*

[82] If we were to find that the doctrine does not apply to constitutional litigation, the doctrine may very well lose much of its legitimacy and validity. We say this in light of the fact that constitutional tenets permeate all litigation starting with the application of Article 159 of the Constitution in both civil and criminal litigation, and its application now embedded in all procedural statutes. Further Article 50 on right to fair hearing and Article 48 on access to justice are fundamental rights which every litigant is entitled to. Such a holding may very well lead to parties, that whenever they need to circumscribe the doctrine of res judicata, they only need to invoke some constitutional provision or other.

[83] However, though the doctrine of res judicata lends itself to promote the orderly administration of justice, it should not be at the cost of real injustice. In the ***Danyluk Case*** from Canada the court cited the dissenting opinion of Jackson J.A., in *Iron v. Saskatchewan (Minister of the Environment & Public Safety), 1993 CanLII 6744 (SK CA), [1993] 6 W.W.R. 1 (Sask. C.A.),* at p. 21 where he stated:

"The doctrine of ***res judicata****, being a means of doing justice between the parties in the context of the adversarial system, carries within its tenets the*

seeds of injustice, particularly in relation to issues of allowing parties to be heard."

[84] 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.

[85] In the alternative a litigant must demonstrate special circumstances warranting the Court to make an exception.

Were the learned Judges of the Court of Appeal justified in holding that the doctrine of *res judicata* ***applied to the current case; was Paluku the same as the Appellants herein?***

[86] We restate the elements that must be proven before a court may arrive at the conclusion that a matter is res judicata. For res judicata to be invoked in a civil matter the following elements must be demonstrated:

a) There is a former Judgment or order which was final;

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

[87] The first hurdle to resolve is that of parties. The Ex-Parte Applicants in ***JR No. 130 of 2011*** were twenty three in number and included Rosmik Trading Co. Limited, Athanase Kiro M. Muhavirwa, Kambale Valeveka Kdephonse, Abdullatif

Ibrahim, Kataliko Kaniki, Kasereka Mbayahi, Paluku Jean-Bosco, A. Bagha, Kambale Kazingufu, Claude Mahengera, Kahindi Nzoka, Kambale Mahama, Paluku Maliyabwana, Katembo Mahembe, Kamate Maranzi, Lwanzo Mutumishi, Kakule Vikwirahangi, Kalume Kabunga Francois, Muhindo Kyavere Roger, Kasereka Vahwere Izron, Paluku Lusenge, Kambale Charles and Kambale Katsongo. The Respondent in that matter was the Kenya Maritime Authority and the Office De Gestion Du Fret Multimodal (OGEFREM) was named as the Interested party.

[88] The Applicants in ***JR No. 130 of 2011*** are clearly not the same as in the present suit. The only common denominator are the Kenya Maritime Authority and the Office De Gestion Du Fret Multimodal (OGEFREM) named as 3rd and 4th Respondents herein respectively.

[89] The High Court did however note that the Appellants herein and the Applicants in JR no. 130 of 2011 were similar in character and in the nature of the business engaged in. The Court noted as follows:

> *"The Petitioners in the present petition are described at Paragraph 1 of the petition as "limited liability companies duly registered with the Companies Registry under the Companies Act, chapter 486 of the laws of Kenya and carry on the business of importers, exporters, agency, clearing and forwarding of goods within the region with offices at Mombasa in the Republic of Kenya…"*
>
> *The ex parte applicants in the Judicial Review Application No. 130 of 2011 were described in the ruling and Judgment of the court, respectively, as "a company, a firm and individuals engaged in the business of clearing and forwarding of goods for various importers of goods destined to the Democratic Republic of Congo" and "[Many of the imports into Democratic republic of Congo pass through the Port of Mombasa.] The applicants are involved in the clearing and forwarding some of those transit goods at that Port."*

[90] Does the similarity qualify to determine that the Appellants herein and the Applicants in JR 130 of were litigating under the same title?

[91] The Court of Appeal in their determination of the matters in question herein noted as follows:

> *"The appellants argue that the two are different parties altogether. Not much evidence was placed on record in this regard, although it is noteworthy that both institutions were represented in the respective suits by one, Bertha Morisho Mwamvua. The two names appear to have been used inter-changeably in various documents on record, and they played the same function in both instances. Further, the applicants in the JR came to court as representing those who, just as the appellants, plied the business of clearing and forwarding. Therein lies the nexus of the two suits and the issue of res judicata. The appellants were aware of the JR proceedings but were content to just stand by and see the battle waged by their colleagues in the trade without intervention much as they were entitled to. They must suffer the consequences. They cannot be allowed to reopen the same case now on constitutional grounds."*

[92] The answer may be found in Explanation no. 6 of Section 7 of the Civil Procedure Act which provides as follows:

> *Explanation (6)— Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, <u>all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating</u>*

[93] The commonality is that the Appellants herein and the Applicants in Jr 130 of 2011 were persons, juridical and natural, engaged in the business of clearing and forwarding of goods for various importers of goods destined to the Democratic Republic of Congo. They have the same interests and therefore the raise the complaints regarding the two certificates, FERI & COD. The answer is in the

affirmative and we find we cannot fault the High Court or the Court of Appeal for concluding as such.

[94] On whether the issues were directly and substantially in issue in the two suits, we compare the issues raised. In JR 130 of 2011 and in the present suit the courts noted that the parties were challenging the validity, scope and legality of the agreement which was the basis for the requirement of the two certificates (FERI & COD), as well as the authority of the Respondents to continue levying freight charges.

[95] The High Court in the present suit made two findings that since in JR No. 130 of 2011 the imposition of "FERI" and "COD" was found to have a legal basis, the Court conferred status upon the two certificates which is protected by the provision of law on estoppel by record by way of a Judgment in rem against the whole world, as opposed to Judgment *in personam* or *inter partes* which operates against the parties to the suit. The Court observed that the decision in ***JR 130 of 2011*** was on appeal in ***Mombasa Court of Appeal Civil Appeal No. 254 of 2012*** and the Appellants could have participated in the appeal as persons affected by the decision of the High Court.

[96] The Court in JR 130 of 2011, summarized the grounds upon which the Judicial Review application was predicated on as follows:

> *"The Interested Party has no valid or lawful role to play in the process of importation of goods through Kenya.*
>
> *The Respondents' insistence on the Certificate of Destination and FERI Certificate is therefore unlawful and discriminatory. The Respondents' actions aforesaid are unfair, irregular, unprocedural, unlawful and unjust.*
>
> *The Ex-parte Applicants have not been given any valid legal basis or grounds entitling the Respondents to carry out the aforesaid acts.*

The Ex-parte Applicants have neither been heard nor given an opportunity to be heard prior to the said acts.

The Respondents' said acts are ultra vires the powers and statutory functions of the Respondents.

The Respondents' acts complained are an abuse of power, unfair and perverse within the Wednesbury principle.

The Respondents' acts complained of are unreasonable, irrational and a breach of the rules of natural justice."

[97] From the face of it, it would appear that the issues in the present suit and JR 130 of 2011 are directly and substantially the same. However the Appellants herein predicated their petition on *inter alia* grounds that the bilateral agreement should have been approved by Parliament in order to form party of Kenyan law and in failing to do so, the Respondents contravened Article 2. They further alleged that the Respondents herein purported to usurp to the role of Parliament and in doing so contravened Articles 94(5) and (6) of the Constitution. They further alleged that the FERI and COD certificates threatened to infringe their right to property under Articles 40(1)(a) and (2)(a) when the Respondents threatened to arbitrarily deprive them of their property. The Court sitting in determination of a judicial review application did not have jurisdiction to render itself on these issues. We therefore find that the principle of *res judicata* was wrongly invoked on this ground.

[98] The next issue to address is regarding whether the issues in a current suit must have been decided by a competent court. Whether the issue in a current suit has been decided by a competent court and whether the matter in dispute in the former suit between the parties was directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar are closely related. There is a Judgment rendered in JR 130 of 2011 delivered on 27th September 2012 by a competent Court (*Tuiyott, J.* (as he then was)). However, the court was resolving an application for Judicial Review order seeking:

"(a) PROHIBITION restraining the Respondents from demanding from the ex-parte applicants or any other persons FERI Certificate or Certificate of Destination issued by the Interested Party prior to release of any goods imported through the port of Mombasa or through any other Kenyan Port.

(b) MANDAMUS compelling the Respondents to release all goods that have complied with all lawful customs procedures other than the requirement for the aforesaid FERI Certificate and Certificate of Destination."

[99] What is in issue here is Constitutional Petition where the Appellants were seeking the following orders from the High Court:

(a) A conservatory order does issue restraining the 1st, 2nd and 3rd respondents from levying any fees that are not provided for under the Bilateral Agreement dated 30th May 2000, thereafter Gazetted on the 30th of August 2002 and more specifically restraining them from demanding for the payment of any monies, taxes or levies in addition to the collection of the commission specified of only 1.8% on the Gross Freight Charges paid by shipping lines on imported cargo destined for the Democratic Republic of Congo, and then only on the condition that all such payments must and shall be made or effected and receipted only to and by the Merchant Shipping Office.

(b) A declaration that any provision(s) not having the force of law in Kenya and which require the payment of anything above the sum of 1.8% of the Gross Freight Charges paid by shipping lines on imported cargo destined for the Democratic Republic of Congo are in contravention of the petitioners' fundamental rights and freedoms under Article 95 of the Constitution and are null and void ab initio.

(c) A declaration that the Bilateral Agreement entered into on the 30thday of May, 2000 and known as the "Agreement On Maritime Freight Management" is null and void and that its continued enforcement by anybody or person as part of the Laws of Kenya contravenes the

Petitioners' fundamental rights and freedoms under Articles 2, 40 and 95 of the Constitution and is therefore null and void ab initio.

(d) A declaration be made that any and all provisos not having the force of law in Kenya and that contravene the petitioners' fundamental rights and freedoms under Article 40 of the Constitution be held to be null and void ab initio.

(e) A declaration be made that any provisions of the agreement that contravene the terms of Article 2 of the Kenyan Constitution be held to be null and void ab initio.

(f) General damages

(g) Punitive damages

[100] The considerations for judicial review were aptly captured by *G.V. Odunga, J.* in the case of ***Republic v. Chesang (Ms) Resident Magistrate & 2 others Ex parte Paul Karanja Kamunge t/a Davisco Agencies & 2 others*** [2017] eKLR where he held as follows:

"25. However, it is important to remember that Judicial Review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits. The question is not whether the Judge disagrees with what the public body has done, but whether there is some recognisable public law wrong that has been committed. Whereas private law proceedings involve the claimant asserting rights, judicial review represents the claimant invoking supervisory jurisdiction of the Court through proceedings brought nominally by the Republic. See ***R vs. Traffic Commissioner for North Western Traffic Area ex parte Brake [1996] COD 248.***

*26. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal and procedural validity of the decision****. It***

does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. *It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through taking into account an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. See* ***Reid vs. Secretary of State for Scotland [1999] 2 AC 512."***

[101] Article 47 of the Constitution of Kenya, 2010 and subsequent enactment of the Fair Administrative Actions Act No. 4 of 2015 have sought to allow the courts to consider certain aspects of merit when considering an application for judicial review. The Court of Appeal in the case of ***Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others [2016] KLR*** attempted to reconcile this expanded context as follows:

"54. The law on judicial review of administrative action is now to be found not exclusively in common law but in the principles of ***Article 47*** *of* ***Constitution*** *as read with the* ***Fair Administrative Action Act of 2015****. The Act establishes statutory judicial review with jurisdictional error in* ***Section 2 (a)*** *as the centre piece of statutory review. The Act provides a constitutionally underpinned irreducible minimum standard of judicial*

review; the Act is built on the values of expeditious, efficient, lawful, reasonable, impartial, transparent and accountable decision making process in ***Articles 47*** *and* ***10 (2) (c)*** *of the* ***Constitution****. The extent to which the common law principles remain relevant to administrative review will have to be developed on a case-by-case basis as the courts interpret and apply the provisions of the* ***Fair Administrative Action Act*** *and the Constitution. As correctly stated by the High Court in* ***Martin Nyaga Wambora v. Speaker of the Senate*** [2014] eKLR *it is clear that they -* ***Articles 47*** *and* ***50(1) -*** *have elevated the rules of natural justice and the duty to act fairly when making administrative, judicial or quasi judicial decisions into constitutional rights capable of enforcement by an aggrieved party in appropriate cases.*

An issue that was strenuously urged by the respondents is that the appellant's appeal is bad in law to the extent that it seeks to review the merits of the Minister's decision while judicial review is not concerned with merits but propriety of the process and procedure in arriving at the decision. Traditionally, judicial review is not concerned with the merits of the case. However, ***Section 7 (2) (l)*** *of the* ***Fair Administrative Action Act*** *provides proportionality as a ground for statutory judicial review. Proportionality was first adopted in England as an independent ground of judicial review in* ***R v. Home Secretary; Ex parte Daly [2001] 2 AC 532****. The test of proportionality leads to a "greater intensity of review" than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision play a much greater role. Proportionality invites the court to evaluate the merits of the decision; first, proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions; secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations;*

thirdly, the intensity of the review is guaranteed by the twin requirements in ***Article 24 (1) (b)*** *and* ***(e)*** *of the Constitution to wit that the limitation of the right is necessary in an open and democratic society, in the sense of meeting a pressing social need and whether interference vide administrative action is proportionate to the legitimate aim being pursued. In our view, consideration of proportionality is an indication of the shift towards merit consideration in statutory judicial review applications.*

Analysis of ***Article 47*** *of the Constitution as read with the* ***Fair Administrative Action Act*** *reveals the implicit shift of judicial review to include aspects of merit review of administrative action.* ***Section 7 (2) (f)*** *of the Act identifies one of the grounds for review to be a determination if relevant considerations were not taken into account in making the administrative decision;* ***Section 7 (2) (j)*** *identifies abuse of discretion as a ground for review while* ***Section 7 (2) (k)*** *stipulates that an administrative action can be reviewed if the impugned decision is unreasonable.* ***Section 7 (2) (k)*** *subsumes the dicta and principles in the case of* ***Associated Provincial Picture Houses Ltd v. Wednesbury Corp. [1948] 1 KB 223*** *on reasonableness as a ground for judicial review.* ***Section 7 (2) (i) (i)*** *and* ***(iv)*** *deals with rationality of the decision as a ground for review. In our view, whether relevant considerations were taken into account in making the impugned decision invites aspects of merit review. The grounds for review in* ***Section 7 (2) (i)*** *that require consideration if the administrative action was authorized by the empowering provision or not connected with the purpose for which it was take and the evaluation of the reasons given for the decision implicitly require assessment of facts and to that extent merits of the decision. It must be noted that the even if the merits of the decision is undertaken pursuant to the grounds in* ***Section 7 (2)*** *of the Act, the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act. On a case by case basis,*

future judicial decisions shall delineate the extent of merit review under the provisions of the Fair Administrative Action Act.

In ***Mbogo & another -v- Shah*** *(1968) EA 93 at 96, this Court stated that an appellate court will not interfere with the exercise of discretion by a trial court unless the discretion was exercised in a manner that is clearly wrong because the Judge misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. The dictum in* ***Mbogo -v- Shah*** ***(supra)*** *and the principles of rationality, proportionality and requirement to give reasons for decision are pointers towards the implicit shift to merit review of administrative decisions in judicial review.*

The essence of merit review is the power to substitute a decision. Under the ***Fair Administrative Actions Act****, there is no power for the reviewing court to substitute the decision of the administrator with its own decision. This imposes a limit to merit review under the Act.* ***Section 11 (1) (e)*** *and* ***(h)*** *of the* ***Fair Administrative Action Act*** *permits the court in a judicial review petition to set aside the administrative action or decision and or to declare the rights of parties and remit the matter for reconsideration by the administrator. The power to remit means that decision making on merits is the preserve of the administrator and not the courts."*

[102] Despite the shift from common law to codification in the Constitution and the Fair Administrative Actions Act, the purpose of the remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision–making process itself. This finding is further reinforced by the fact that though the court in determining a judicial review application may look at certain aspects of merit and even set aside a decision, it may not substitute its own decision on merit but must remit the same to the body or office with the power to make that decision. In this regard we cite

the decision of Lord Hailsham L.C. in **Chief Constable of North Wales Police v. Evans (1982) 3 ALL E.R. at pg. 141** said of the remedy of judicial review as follows:

> *"It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual Judges for that of the authority constituted by law to decide the matters in question. The court will not, however, on a judicial review application act as a "Court of Appeal" from the body concerned, nor will the court interfere in any way with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which is not within the body's jurisdiction, or the decision is Wednesbury unreasonable. The function of the court is to see that lawful authority is not abused by unfair treatment. If the court were to attempt itself the task entrusted to that authority by the law the court would, under the guise of preventing the abuse of power be guilty itself of usurping power."* [Emphasis added]

[103] The High Court in exercising its mandate to hear Constitutional petitions, it does so pursuant to Articles 22, 23 and 165 of the Constitution. Article 22(1) provides as follows:

> *"Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened."*

[104] Article 23(1) provides as follows:

> *"23. (1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights".*

[105] Article 23(3) provides the remedies that the Court may grant and in addition to judicial review orders they include a declaration of rights; an injunction; a conservatory order; a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24; and an order for compensation.

[106] Article 165 (3) provides as follows regarding the High Court's jurisdiction:

"(3) Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

[107] The Court when determining a constitutional petition is empowered to look beyond the process and not only examine but delve into the merits of a matter or a decision. The essence of merit review is the power to substitute a decision which the Court can do when determining a constitutional petition. Further the Court is further empowered to grant not just judicial review orders but any other relief is deems fit to remedy any denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. This Court in its decision in ***Mitu-Bell Welfare Society v. Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa*** *(Amicus Curiae)* [2021] eKLR went ahead to reaffirm use of structural interdicts and supervisory orders to redress the violation of a fundamental right in order to allow the development of Court-sanctioned enforcement of human rights as envisaged in the Bill of Rights.

[108] We arrive at the inescapable conclusion that the High Court in determining a judicial review application, exercises only a fraction the jurisdiction it has to determine a constitutional petition. It therefore follows that a determination of a judicial review application cannot be termed as final determination of issues under a constitutional petition. The considerations are different, the orders the court may grant are more expanded under a constitutional petition and therefore the outcomes are different.

[109] The Court in hearing a constitutional petition may very well arrive at the same conclusion as the Court hearing a judicial review application. However, the considerations right from the outset are different, the procedures are different, the reliefs that the court may grant are different, the Court will be playing fairly different roles.

[110] We consequently arrive at the conclusion that the Court of Appeal erred in holding that the doctrine of res judicata applied to the current case. The Court of

Appeal should have at that point found that the High Court was wrong in its conclusion.

F. COSTS

[111] As to the questions of costs in this matter, this Court has previously settled the law on award of costs: that costs follow the event, and that the Court has the discretion in awarding costs. This was our decision in the case of ***Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*** SC. Petition No. 4 of 2012: [2014] eKLR. Considering our findings above, that the High Court that erred in its findings on the matter before it and further that the Court of Appeal's findings were in part correct and partly erroneous, and further that we are sending the matter back to the High Court for determination on its merits, we find that there should be no order as to costs.

G. ORDERS

[112] The Petition of Appeal dated 9th September 2015 and filed on 10th September 2015 date is allowed in the following specific terms:

(i) The Judgment and Order of the Court of Appeal dated 31st July 2015 be and is hereby quashed and set aside.

(ii) The Ruling and Order of the High Court dated 31st July 2014 be and is hereby quashed and set aside.

(iii) For the avoidance of doubt, the Ruling of the High Court is null and void.

(iv) The matter is remitted to the High Court for determination on its merits.

(v) Each party is to bear its own costs.

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this **6th Day** of **August, 2021.**

.....	.....
P. M. MWILU **DEPUTY CHIEF JUSTICE &** **VICE-PRESIDENT** **OF THE SUPREME COURT**	**M. K. IBRAHIM** **JUSTICE OF THE SUPREME COURT**
.....	.....
S. C. WANJALA **JUSTICE OF THE SUPREME COURT**	**NJOKI NDUNGU** **JUSTICE OF THE SUPREME COURT**

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR
SUPREME COURT OF KENYA