IN THE HIGH COURT OF TANZANIA

(MAIN REGISTRIY)

AT DAR ES SALAAM

MISC. CIVIL CAUSE NO. 36 OF 2019

IN THE MATTER OF THE CONSTRITUTION OF THE UNITED REPUBLIC OF TANZANIA, 1977 [CAP.2 R.E 2002] AS AMENDED FROM TIME TO TIME

AND

IN THE MATTER OF THE BASIC RIGHTS AND DUTIES ENFORCEMENT ACT [CAP.3 R.E. 2002]

AND

IN THE MATTER OF A PETITION TO CHALLENGE THE CONSTITUTIONALITY OF CERTAIN PROVISIONS OF THE CRIMINAL PROCEDURE ACT [CAP. 20. R.E 2002]

BETWEEN

ONESMO OLENGURUMWA.....PETITIONER

AND

HON. ATTORNEY GENERAL.....RESPONDENT

RULING

Date of last Order: *06/10/2020*
Date of Judgement: *21/10/2020*

MLYAMBINA, J.

Before the Court is a petition challenging the constitutionality of *Sections 178, 243, 244, 245, 246, 247, 248, 249, 250, 256, 257,*

258 and 259 of the Criminal Procedure Act.[1] The Petitioner alleged that the impugned provisions, which provide for the requirement to conduct committed proceedings and preliminary inquiries by the subordinate Courts for offences triable by the High Court, are unconstitutional and void for infringing the rights to (i) fair trial (ii) equality before the law, and (iii) non-discrimination, which are guaranteed in *Article 13 (1), (2) and 6 (a) of the Constitution of The United Republic of Tanzania of 1977* as amended from time to time.[2] The Petitioner therefore sought for, *inter alia,* a declaratory order to the effect that the impugned provisions be declared unconstitutional, null and void, and the same be expunged from the statute book.

In response, the Respondent raised a *plea in limine lits* to the effect that:

> *The petition is incompetent and bad in law for being res judicata.*

This ruling will address the above raised objection. For fairness, I will first answer the issue; *whether an objection on res judicata is the legal objection in strict sense.* As conceded by both parties the

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[1] [Cap 20 R.E. 2002].
[2] [Cap 2. R.E. 2019].

phrase "preliminary objection" was defined in the daily cited case of **Mukisa Biscuits Manufacturing Company Limited v. West End Distributors Limited**[3] where Law, J.A at page 700 observed that:

> *In so far as I am 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. Examples are an objection to the jurisdiction of the Court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.*

And at page 701 sir Newbold said:

> *A preliminary objection is in the nature of a demurrer. It is a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has 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 issues. This improper practice should stop.*

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[3] [1969] EA 696.

As properly stated by the Petitioner, the Court of Appeal of Tanzania in the case of **Mount Meru Flowers Tanzania Limited v. Box Board Tanzania Limited,**[4] was inspired by the Judgement in the case of **Karata Ernest v. The Attorney General,**[5] where the Court of Appeal stated:

> *At the outset we showed that it is trite law that a point of preliminary objection cannot be raised if any fact has to be ascertained in course of deciding it. It only consists of a point of law which has been pleaded, or which arise by clear implication out of the pleadings.*

Also, the Court of Appeal in the case of **NIC Bank Tanzania Limited v. Hirji Abdallah Kapiluka,**[6] it was stated at page 10 that:

> *With that principle and examples in mind, can it be said that the point of preliminary objection raised by the Respondents in the notice at hand meets the definition and the requirements above? Certainly, it does not, because there is still a dispute as regards factual matters...*

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[4] Civil Appeal No. 360 of 2018 (unreported).
[5] Civil Revision No. 10 of 2010 (unreported).
[6] Civil Application No. 561/16 of 2018 (unreported).

The Petitioner has pointed out that the supreme Court of India in the case of **Smt v. Rajeshwari v. T.C. Saravanabava,**[7] did state that; the issue of *res judicata* is a matter which requires proof. In that case the Court was dealing with *Section 11 of the Indian Code of Civil Procedure*[8] which is *in pari materia* with *Section 9 of our Civil Procedure Code*[9] while dealing with the same issue, the Court stated:

> *The appeal of res judicata is founded on proof of certain facts and then by applying the law to the facts so found. It is, therefore, necessary that the foundation for the plea must be laid in the pleadings and then an issue must be framed and tried. A plea not properly raised in the pleadings or in issues at the stage of the trial would not be permitted to be raised for the first time at the stage of appeal.*

The supreme Court went on to state:

> *Not only the plea has to be taken, it has to be substantiated by producing the copies of the pleadings, issues and Judgement in the previous case. May be in a given case only copy of Judgement in previous suit is filed in proof of plea of*

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[7] Civil Appeal No. 7653 of 1997 and Civil Appeal No. 7654 of 1997.
[8] [Act No. 5 of 1908].
[9] [Cap 33 R.E.2019].

res judicata and the Judgement contains exhaustive or in requisite details the statement of pleadings and the issues which may be taken as enough proof.

In yet another case of **Vaish Aggarwal Panchayat v. Inder Kumar and Others,**[10] at paragraph 12 the Supreme Court of India summed up the position by referring to the case above and came to the conclusion as held in the case of **Syed Mohd. Salie labbai v. Mohd. Hanifs,**[11] that:

The basic method to decide the question of res judicata is first to determine the case of the parties as put forward in their respective pleadings of their previous suit and then to find out as to what had been decided by the Judgement which operates as res judicata...

The Petitioner, therefore, stated without fear of contradiction that the plea of *res judicata* does not fall within the parameters set forth in the case of **Mukisa Biscuits** (*supra*) as the plea of res judicata would require prof facts to prove such a *plea*.

The Respondent on its part had different view. According to the Respondent, the doctrine of *res judicata* is a point of law which

[10] Civil Appeal No. 2089 of 2015.
[11] 1976 AIR 1569.

affects the competence of a suit including a constitutional petition such as the present matter. To back up the position, the Respondent cited the case of **Tanzania Women Lawyers Association v. The Attorney General,**[12] where it was observed by her Ladyship Masabo, J. that:

> *In my settled view, the issue of res judicata perfect suits under the purview of the preliminary objection and corresponds with the rationale behind preliminary objection.*

The Court went on to state at page 13 that:

> *...it has to be noted that, the issue to the relevance and applicability of the doctrine of res judicata is not an alien subject in our jurisdiction. It has been canvassed in many cases by this Court and the position has consistently been that the doctrine of res judicata is applicable in constitutional and public interest litigation. In* **Fikiri Liganga & Another v. Attorney General** *(supra) having employed this doctrine of res judicata, the Court struck out the petition for being res judicata to* **Zephrine Nyarungenda Galeba v. Honorable Attorney General and Another** *(supra) the principle of res*

[12]Miscellaneous Civil Cause No. 22 of 2019, High Court of Tanzania, Main Registry at Dar es Salaam (unreported).

judicata was also recently applied by this Court in **Machibya Selemani and 2 Others v. The Attorney General**[13] *and* **Boniface Vicent Muhoro and 4 Others v. The Attorney General,**[14] *both of which were challenging the constitutionality of Section 36 (2) of The Economic and Organized Crimes Control Act*[15] *which had been conclusively determined in Godfrey Wasonga's case (supra). Guided by these authorities which I find to be highly persuasive, I find no reason for departure. (Emphasis supplied).*

In view of the above authority, it was the Respondent's submission that the doctrine of *res judicata* is point of law which goes to the root of the jurisdiction of the Court to entertain a dispute and thus as a point of law can as well be raised at any time. The Respondent reiterated that the doctrine of *res judicata*, as applies in normal civil cases, has the same effect in public interest litigation cases such as the present matter.

I have considered both sides submissions. It is undisputable valid that the doctrine of *res judicata* entails the identity of parties (or

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[13] Miscellaneous Civil Cause No. 24 of 2018 High Court of Tanzania, Main Registry at Dar es Salaam (unreported).
[14] Miscellaneous Civil Cause No. 3 of 2019 High Court of Tanzania, Main Registry at Dar es Salaam.
[15] [Cap 200 R.E. 2019].

their proxies); subject matter; and cause of action between two cases, one of which has been conclusively and finally determined prior to the suit in question, before a Court of competent jurisdiction.

In other words, *Section 9 of the Civil Procedure Code*[16] gives six mandatory prohibition to the Court if: ***One,*** the matter was directly and substantially in issue in the former suit. ***Two,*** the issues are between the same parties or between parties under whom or any of them claim litigating. ***Three,*** the parties have litigated under the same title. ***Four,*** the former suit was determined by the court with competent jurisdiction. ***Five,*** there are two suits, the former suit and subsequent suit. ***Six,*** the issue has been determined conclusively. The position is supported by Sarkar, who in his book **Sarkar's the Law of Civil Procedure**,[17] states:

> *The doctrine of res judicata was recognized much earlier...rests on the principle that one should not be vexed twice for the same cause and there should be finality of litigation.*

The principle embodied in *Section 9 of Civil Procedure Code* and in the **Sarkar's Book** prohibit the plaintiff to relinquish and re-

[16] [Cap 33, R. E. 2019].
[17] 8th Edition Vol. 1 at page 53.

institute another case in which the subject matter was directly and substantially in issue in the subsequent suit and have been heard and finally decided in the former suit.

In case of **Lotta v. Tanaki and Others**[18] the Court of Appeal in illustrating the test of *res judicata* in connection to *Section 9 of Civil Procedure Code* stated that:

> *The object of the principle of res judicata is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final Judgement between the same parties or their privies on the same issue by the Court of competent jurisdiction in the subject matter of the suit.*

In the Indian case of **Atyadhyan Ghosal v. Deorjin Debi**[19] the object or *res judicata* was stated that:

> *When a matter, whether on a question of fact or law, has been decided between two parties in one suit and the decision if final, either because no appeal was taken to the higher Court, or no appeal lies in such case, neither party will be allowed in the future suit between the same parties to canvass the matter again.*

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[18] [2003] 2 EA 556 at page 557.
[19] [AIR 1960 SC 941].

As properly submitted by the Respondent, the doctrine of *res judicata* is based on three maxims.

a) *nemo debet bis vexari pro una et eadem causa*. (No man should be punished twice for the same cause).
b) *interest reipublicae ut sit finis litium* (It is in the interest of the state that there should be an end to a litigation).
c) *res judicata pro veritate occipitur* (A judicial decision must be accepted as correct).

It follows, therefore, that the doctrine of *res judicata* is the combined result of the public policy reflected in maxims *interest reipublicae ut sit finis litium* and *res judicata pro veritate occipitur* and private justice expressed in the maxim *nemo debet bis vexari pro una et eadem causa* and they apply to all judicial proceedings including public litigation proceedings.

Being guided with the afore analogy, it is the interest of justice the *res judicata* objection be raised at preliminary stage of the case and be decided. More reasons. ***One,*** determination of the *res judicata* objection is based on facts mostly pleadings and judicial notices. ***Two,*** *Section 9 of the Civil Procedure Code* which is *in pari materia* to *Section 11 of Indian Civil Procedure Code* gives a mandatory prohibition of trying a suit involving the same parties

over the same subject matter by the competent Court. That means, objection on *res judicata* has to be determined prior trial of the case. In the case of **Pukhraj D. Jain v. G. Gopalakr Ishna**[20] the Court was of view that:

> *If it is satisfied that subsequent suit can be decided purely on the legal point, it is open to the Court to decide that point.*

In the light of the afore observation and relying on the position of this Court in the case of **Tanzania Women Lawyers Association** (*supra*), the Court is of equal view with the Respondent that an objection on *res judicata* as it applies on *res subjudice* falls within the parameters of preliminary objection by all legal purposes and intent. *Res judicata* precludes the reception of evidence to disturb the earlier reached finding on the same subject matter involving the same parties and their proxies or privies.

Again, as submitted by the Respondent, finality of Judgement is advantageous to both the parties to a given case and to the public at large. ***One,*** from the public's perspective, finality reduces the risk of inconsistent judicial decisions which, would undermine the public's faith in the Courts. ***Two,*** it reduces the risk of redundant litigation, which is wasteful not only of the parties' resources, but

[20] [(2004) 7 SCC 251].

also the judiciaries from the party's perspective. ***Three,*** finality creates a sense of repose an assurance that, after a matter has been litigated, the parties can consider it settled and adjust their Real-World dealings accordingly. ***Four,*** it makes it more difficult for either party to intentionally vex the other with repetitive litigation.

Justice requires that every cause should be once fairly tried, and public tranquility demands that having been tried once, all litigation about that should be concluded forever between those parties. If there had been no such rule there would have been no end of litigation; the rights of the contesting parties would have been involved in an endless confusing. As observed by the US Supreme Court in **Jeter v. Hewitt**,[21] the maintenance of Public Order, the repose of society, and the quiet of families require that what has been definitely determined by competent tribunals shall be accepted as irrefragable legal truth. I will now turn to consider the raised objection.

The Respondent was of submission, from the outset, that the instant matter is *res judicata* in that the constitutionality of the impugned provisions had already been previously determined by this Court in **Zephrine Galeba v. Honorable The Attorney**

[21] 63 US 22 How 352 352 (1859).

General[22] in that case, the Petitioner challenged the provisions of *Sections 244 and 245 (1), (2) and (3) of the Civil Procedure Act* for being unconstitutional. In that case, which was heard on merits and the Judgement delivered on 2nd June, 2016, this Court was called upon to determine the following issue: *Whether Committal Proceedings in subordinate Court in matters triable in High Court are inconsistent with the provisions of the constitution [at page 14 of the typed Judgement].* Determining the issue, this Court held (at page 31) that:

> *...at this juncture, we are clear in our minds that the issue we posed earlier as to whether Committal Proceedings in subordinate Courts in matters triable in the High Court are inconsistent with the provisions of the constitution is answered in the negative since, as aforesaid, the proceedings conducted under Sections 244 and 245 (1), 20 and (3) of the Criminal Procedure Act (supra) in the subordinate Courts are not intended to amount to denial of the right to be heard as per Article 13 (6) (a) of the Constitution. (Emphasis added).*

[22] Miscellaneous Civil Application No. 21 of 2013, High Court of Tanzania at Dar es Salaam, (unreported).

According to the Respondent, the Petitioner is challenging the constitutionality of the similar provisions of the Criminal Procedure Act (i.e *Sections 244 and 245 (1), 20 and (3) together with Sections 178,243, 246, 247, 248, 249,250, 256, 257, 258 and 259*. The Respondent called upon the Court to note that all these provisions relate to the procedure for the conduct of Committal Proceedings in subordinate Courts in relation to matters triable by the High Court. This means that, although in **Galeba v. Honorable The Attorney General** only *Section 244 and 245 (1), (2) and (3) of the Criminal Procedure Act* were subject of this Court's consideration, the gross effect of the holding in that case covers all the provisions impugned in the present petition. As such, it was the Respondent submission that this Court's decision in **Galeba's case** regarding the constitutionality of the provisions of *Section 244 and 245 (1), (2) and (3) of the Criminal Procedure Act* are applicable to all the impugned provisions in the instant matter since they all provide in common for Committal Proceedings and its related matters.

In support of the above contention, the Respondent referred to this Court's discussion and reasoning on the constitutionality of *Sections 245, 246 and 178 of the Criminal Procedure Act* in

Galeba's case in which it was observed at page 19 of the typed Judgement to the effect that:

> *...yet, we are clear in our mind that Section 245 (4), (5), (6) and (7) of Criminal Procedure Act warrants the Director of Public Prosecutions to present well investigated Criminal Case file capable of allowing him and the committing Magistrate, where an information is filed, to conduct Committal Proceedings and have the accused to be committed for trial by eh High Court under Section 246 (1) of the Criminal Procedure Act. While that seems to be position, we find evidence to the contrary in the same act Section 178 of Criminal Procedure Act.*

Furthermore, at page 20 of the typed Judgement, this Court went on to reason that:

> *In our considered view, the use of the words (The High Court) may inquire into and try an offence subject to its jurisdiction in any place where it has power to hold sittings; and except as provided under Section 93. No Criminal Case shall be brought under cognizance of the High Court unless it has been previously investigated by a subordinate Court and the accused person has been committed for trial before the High*

Court) in Section 178 of the Civil Procedure Act was not merely perfunctory but meant to retain the functionality of the committal proceedings.

Furthermore, the wording of the impugned provisions, indicate that the legislature has categorized as the entire provisions (with the exception of *Section 178* as "relating to committal of accused persons for trial to the High Court". In addition, although *Section 178 of the Criminal Procedure Act* does not fall under the foregoing part of the *Criminal Procedure Act* concerns similar maters as those falling under this part. At large, *Section 178 of the Criminal Procedure Code* provides for powers of the High Court to try Criminal Offences only after they have been investigated by a subordinate Court and the accused person has been committed for trial before the High Court. As such, on basis of this wording as constructed by legislature, it was the Respondent 's submission that the additional impugned provisions of the *Criminal Procedure Act* in the present petition also fall within the ambit of Committal Proceedings and related matters.

Therefore, all the impugned provisions in the present petition fall under the purview of committal proceedings, which were the subject matter of determination by this Court in **Galeba's case**;

and thus, they are similar to the subject matter of the present petition.

In light of the foregoing reasoning of this Court, it was the Respondents' submission that the decision in **Galeba's case** covered the whole part of Committal Proceedings in subordinate Courts and its related matters. For the matter, the present petition is repetitive of **Gableba's case** in all respects. Hence, it is *res judicata*; and thus, this Court should not entertain it.

The Respondent re-emphasized the three rationale behind the doctrine of res judicata (i) to ensure that there is no endless litigation over the same matter concerning same parties, (ii) to protect a person from a multiplicity of litigation over the same matter pitting same parties. And (iii) to ensure certainty in the administration of justice. The Respondent cited the decision in **East Africa Development Bank v. Blueline Enterprises Ltd** [23] **Umoja Garage v. National Bank of Commerce Holding Corporation**[24] **and Penile Lotta v. Gabriel Tanaki and Others.**[25]

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[23] Court of Appeal of Tanzania at Dar es Salaam, Civil Appeal No. 110 of 2009 (unreported) page 33-34.
[24] [2003] TLR 339.
[25] [2003] TLR 314.

It was worth noted by the Respondent that, the doctrine of res judicata, as applied in normal Civil Cases, has the same effect in public interest litigation case such as the instant petition. This was categorically stated in the case of **Boniface Muhoro and 4 Others v. The Attorney General.**[26] In this case the Petitioner challenged the constitutionality of ***Section 36 (2) Of the Economic and Organized Crimes Control Act Cap. 200, (R.E 2002).*** The Court held at page 13 and 14 of the ruling that:

> In the instant matter, both parties do not dispute all that the constitutionality of *Section 362 of the Economic and Organized Crimes Control Act* was conclusively determined by the same Court in the case of **Fikiri Liganga and Another v. The Attorney General and Another.**[27] Since the Petitioners are litigating on public interests' basis, they are privies on the same. As such, the principles of *res-judicata* as applies in normal Civil Cases have the same effect in public interest litigation...the intent of public at large over *Section 36 (2) (supra)* was considered conclusively by this Court in **Fikiri Liganga's case** in absence of the factors the same Court

[26] Miscellaneous Civil Cause No. 3 of 2019, High Court of Tanzania, at Dar es Salaam (unreported).
[27] Miscellaneous Civil Cause No. 5 of 2017 High Court of Tanzania, at Dar es Salaam, (unreported).

cannot re-consider the same public interest brought by privies of the former case.

The Respondent re-cited the **Fikiri Liganga's case** in which it was observed (at page 14 and 15 of the ruling) that, there are four essential elements for the doctrine of *res-judicata* to apply:

1. The matter which is directly and substantially in issue in the present case must also have been directly and substantially in issue in a former case.
2. The previous suit must have been finally and conclusively determined.
3. The former suit and the latter suit must be shown to be between the same parties claiming under the same title.
4. The previous suit was tried by a Court of competent jurisdiction.

In light of the foregoing authority, it is was the Respondent's submission that, the instant matter is barred by the doctrine of *res judicata* as the preliquisites of the same have been met as explained below:

One, with respect to the first element, the Respondent argued that the subject matter in the present case is identical to the one in **Galeba's case** as they all relate to a constitutional challenge of

the validity of Committal Proceedings in the subordinate Courts for matters tribal by the High Court.

Two, as regards the second and fourth elements, it is undeniable that **Galeba's case** was heard on merits by the Court and the Judgement was delivered on 2nd June, 2016. The Court was competent to try the matter as per the provision of *Article 30 (3) of the Constitution and Section 4 of the Basic Right and Duties Enforcement Act Cap. 3 (R. E. 2019).*

Three, in respect of the third element, it was the Respondent's argument that, although there is lack of similarities between the parties in the instant matter and that of **Galeba's case** there is an exception to the requirement of similarities of parties between the former suit and the later suit when it comes to constitutional petitions. In public interest litigation such as the present petition, the matter is deemed res judicata regardless of the fact that parties are not the same as in the previous matter as long as other ingredients for res judicata are fulfilled.

According to the Respondent, the rationale for the above-mentioned exception is such that, in public interest litigation, the Petitioner claims for vindication of his individual rights as well as those rights concerning the public at large. The principle of which

was laid down by this Court in **Fikiri Liganga's case**. In that case, the Court quoted the holding of the case of the **State of Karnataka and Another v. All Indian Manufactures Organization and Others,**[28] that:

> *As a matter of fact, in public interest litigation, the Petitioner is not agitating his individual rights but represents the public at large. As long as the litigation is bona fide, a Judgement in a previous public litigation would be a Judgement in rem. It binds the public at large and bars any member of the public from coming forward before the Court and raising any connected issue or an issue, which had been raised/should have been raised on earlier occasion by way of a public interest litigation...(Emphasis added).*

Of interest akin to *res judicata*, the Respondent came up with the doctrine issue of *estoppel*, which precludes reception and determination of a matter already determined on the same fact or subject matter. The Court of Appeal of Tanzania discussed this doctrine in the case of **Issa Athuman Tojo v. Republic,**[29] where their lordships (at page 205) stated that:

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[28] AIR 2006 SC 186.
[29] 2003 TLR 199.

The principle is that where an issue has been tried by a competent Court on a former occasion and a finding has been reached, such a finding would constitute an estoppel or res judicata against further prosecution precluding the reception of evidence to disturb that finding.

The Respondent enlightened further that the discussion in **Tojo v. Republic** was on the applicability of the doctrine of issue estoppel in criminal matters, the concept was drawn from civil practice, which is derived from *Section 9 of the Civil Procedure Code.* The justification and well-reasoned argument on the application of the doctrine is reflected in the same Judgement (at page 208) where their lordships, quoting from decision of the House of Lords in **Director of Public Prosecutions v. Humphrys,**[30] stated that the doctrine of issue estoppel performs a useful function-that is it brings finality to litigation.

In response, the Petitioners submitted *inter alia* that in **Galeba's case**, the Court did not consider and make any conclusive finding and deliberate on the constitutionality of *Sections 178, 243, 246, 247 248, 249,250, 256, 257, 258 and 259 of Criminal Procedure Act* for the simple reason that the petition before him did not

[30] [1977] AC 1.

challenge the said provisions of law and the this Court was not asked to decide on and did not deal with their constitutional validity.

According to the Petitioners, the wording and provisions of *Sections 178, 243, 246, 247 2448, 249, 250, 256, 257, 258, and 259 of the Criminal Procedure Act* (challenged in the present petition) are not similar and/or repetitive of and are not in way identical in meaning with *Sections 244 and 245 (1) (2) and (3) of the Criminal Procedure Act* which were the subject of **Galeba's case.** Pursuant to *Section 6 (d)* of *the Basic Rights and Duties Enforcement Act;*[31] the Petitioner set out and showed how each and every impugned provision did contravene the provision of the constitution as such this Court will be required to consider and decide on the constitution validity of each of the impugned provisions of the *Criminal Procedure Act.*

In view of the Petitioner what makes the matter *res judicata* is not the gross effect of the omnibus holding which was made in **Galeba's case** but the determination of constitutional validity of each of the provisions impugned in the present case. The Petitioners brought to the attention of the Court that jurisprudence

[31] Cap 3 R.E. 2019.

has demanded that the application of the principle of *res judicata* in constitutional cases has to be applied with great caution and with limits, particularly in situation like the one in the present case where the specific provisions of Act of Parliament are condemned or are alleged to contravene the specific provisions of the constitution. The Petitioners pointed out four points.

First and foremost, constitutional Cases for the contravention of the provisions of the constitution by a provision of Act of Parliament. Reading and taking into account Articles 30 (3) and (5) and 64 (5) of the constitution, and *Sections 4, 6 (d) and 13 (1) and (2) of the Basic Rights and Duties Enforcement Act,* the law requires the Petitioner to show that a particular provision of the legislation contravene a specific provisions of the constitution and the Court is enjoined to determine only those provisions challenged in a particular petition. Only those provisions as determined may, and not necessarily, be a ground of *res judicata*. So, in constitutional Cases, according to the Petitioner, a Court's declaration that specific provisions of legislation are unconstitutional or constitutionally valid, such declaration applies only to those provision challenged and cannot extend by inference or otherwise to other provisions which were not challenged even if the said provisions are in the same chapter or part, or section in

the legislation. Thus, there is no such thing as subject matter and gross effect of the holding of the Court.

Second, the constitutional Cases are not adversarial system of litigation and principle of *res judicata* may not be applicable. The principle of *res judicata* finds statutory recognition vide our *Civil Procedure Code Cap 33 (R. E. 2002) in section 9*.

The relevant kind of cases which this case falls under are cases of public interest Litigation in which our code has also found a need to legislate and this was done vide *Explanation VI to Section 9 of the Civil Procedure Code*, the said explanation is couched in the following words:

> *Explanation VI: 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.*

The Petitioner cited a Kenyan Constitutional case on public Interest litigation, the Supreme Court of Kenya in the case of **William Odhiambo Ramogi and 2 others v Attorney General & 6 others** [2018] eKLR at paragraph 44 held that:

This being a constitutional Petition, the principle of res judicata can only be applied in the clearest of circumstances.

And in the case of **John Florence Maritime Services Limited and Another v. Cabinet Secretary for Transport and Infrastructure and 3 Others**[32] the Court of Appeal of Kenya said:

> 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

[32] [2015] Eklr.

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.* (Emphasis added).

It was submitted by the Petitioner that the position in so far as constitution cases and the doctrine of *res judicata* are concerned, was well elaborated in the case of **V. Purushotham Rao v. Union of India & Others,**[33] where the Supreme Court of India held as follows:

Then, the principles of Section 11 as well as Order II Rule 2, undoubtedly contemplate an adversarial system of litigation, where the Court adjudicates the rights of the parties and determines the issues arising in a given case. The Public Interest Litigation or a petition filed for public interest cannot be held to be an adversarial system of adjudication and the Petitioner in such case, merely brings it to the notice of the Court, as to how and in what manner

[33] Civil Appeal No. 3100 of 2000.

the public interest is being jeopardized by arbitrary and capricious action of the authorities.

The Supreme Court went on to state that:

> We may not be taken to have said that for public interest litigations, procedural laws do not apply. At the same time, it has to be remembered that every technicality in the procedural law is not available as a defence when a matter of grave public importance is for consideration before the Court. *Even if it is said that there was a final order, in a dispute of this type it would be difficult to entertain the plea of res judicata. As we have already pointed out when the order of 12th March, 1985, was made, no reference to the Forest (Conservation) Act of 1980 had been done. We are of the view that leaving the question open for examination in future would lead to unnecessary multiplicity of proceedings and would be against the interests of society. It is mete and proper as also in the interest of the parties that the entire question is taken into account at this stage. (Emphasis added).*

The Supreme Court of India while discussing the provisions of *Section 11 of the Indian Code of Civil Procedure* which is *in pari*

materia with our *Section 9 of Civil Procedure Code* stated that, constitutional Cases in their nature are not sort of adversarial system of litigation and as such the principle of *res judicata* may not be applicable. In the case of **V. Purushotham Rao v. Union of India & Others,**[34] the Supreme Court of India said:

> The principles of *Section 11* as well as *Order II Rule 2,* undoubtedly contemplate an adversarial system of litigation, where the Court adjudicates the rights of the parties and determines the issues arising in a given case. The Public Interest Litigation or a petition filed for public interest cannot be held to be an adversarial system of adjudication and the Petitioner in such case, merely brings it to the notice of the Court, as to how and in what manner the public interest is being jeopardised by arbitrary and capricious action of the authorities.
>
> We may not be taken to have said that for public interest litigations, procedural laws do not apply. At the same time, it has to be remembered that every technicality in the procedural law is not available as a defence when a matter of grave public importance is for consideration

[34] Civil Appeal No. 3100 of 2000.

before the Court. Even if it is said that there was a final order, in a dispute of this type it would be difficult to entertain the plea of res judicata.

In our considered opinion, therefore, the principle of constructive res judicata cannot be made applicable in each and every public interest litigation, irrespective of the nature of litigation itself and its impact on the society and the larger public interest which is being served. There cannot be any dispute that in competing rights between the public interest and individual interest, the public interest would over-ride. (Emphasis supplied).

Thirdly, while dealing with the said provision of law in matters relating to Public Interest Litigation the Supreme Court of India held that the major and overriding condition or requirement for the effective application of the principle of *res judicata* in public interest litigation is that the person relying the principle must *show and prove that the previous litigation was bona fide and the persons in previous case were litigating bona fide.* (Emphasis added).

This requirement is the one provided by *Explanation VI of Section 9 of the Civil Procedure Code Cap 33 (R.E. 2002)*. The previous litigation which was commenced as result of personal discontent,

enmity or grudge cannot be classified as a bona fide litigation. In the case of **T. Sekaran v. The State of Tamil Nadu, W.P.(MD)**[35] stated at paragraph 28 that:

> It is only when the conditions of *Explanation VI* are satisfied that a decision in the litigation will bind all persons interested in the right litigated *and the onus of proving the want of bona fides in respect of the previous litigation is on the party seeking to avoid the decision.* (Emphasis added).

In a similar manner it was held by the Supreme Court of India in the case of in the case of **Forward Construction Co. & Others v. Prabhat Mandal (Regd.) Andheri & Others,**[36] that:

> The principle underlying Explanation IV is that where the parties have had an opportunity of controverting a matter that should be taken to be the same thing as if the matter had been actually controverted and decided. *It is true that where a matter has been constructively in issue, it cannot be said to have been actually heard and decided. It could only be deemed to have been heard and decided.*

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[35] No.4412 of 2008 And W.P.M.P.(MD) Nos.1 and 2 of 2008 the High Court of Madras in India.
[36] 1986 AIR 391.

In view of the Petitioner, the above case laid down the principle of Constructive *Res judicata*, of which the practice required that in such situation then it is upon the person so desirous to use this as a defence to prove to the Court as shown in the cases above.

Fourthly, the determination of the principle of *res judicata* requires the person relying as a defence to bring pleadings and decisions of the previous litigation into the latter litigation for comparison. The *bona fide* litigation or bona fide of person litigated in previous can be determined by looking at the pleadings and Judgement together. Likewise, the elements of the *res judicata* can effectively be determined by looking at the pleadings and the decision. Determination of plea of *res judicata* involves comparison of pleadings and decisions of previous and later cases, so pleadings of previous case must be attached so that the parties and the Court can look at the claims, cause of action, reliefs and issues.

I have considered the parties debate with great humility. At the outset, the Court is of firm view that filing this petition is inconsistent with the underlying interest that there should be finality in litigation and that a party should not be vexed twice in the same matter. Indeed, the petition is inconsistent with the economic need and efficiency in litigation conduct for both the Petitioner, the Respondent, the Court and the Public at large.

The Petitioner's primary contention is that *Sections 178, 243, 246, 247 2448, 249, 250, 256, 257, 258, and 259 of the Criminal Procedure Act* are unconstitutional and void. However, both parties are not disputing on three important facts. ***One,*** all the impugned provisions provides for requirement to conduct Committal Proceedings and Preliminary Inquiries by the subordinate Courts for offences triable by the High Court, ***Two*** in **Galeba's case** the provisions of *Sections 244 and 245 (1), (2) and 3 of Criminal Procedure Act* (*supra*) were litigated conclusively by the parties before the competent Court. ***Three,*** this Court in **Boniface Muhoro and 4 Others case** has held that Petitioners who are litigating on public interest basis are privies on the same. Therefore, principles of res judicata in Civil and Criminal cases have the same effect in public litigation cases. ***Four,*** the decision of this Court in **Boniface Muhoro's case** has never been turned down by the Court of Appeal of Tanzania. ***Five,*** **Galeba's case** did not deal with the constitutionality of *Sections 178, 243, 246, 247 2448, 249, 250, 256, 257, 258, and 259.* However, the Court in **Galeba's case** determined an issue; *whether Committal Proceedings in subordinate Courts in matters triable by the High Court are inconsistent with the provisions of the constitution.* In my view, such issue covered all the provisions governing Committal

Proceedings in the *Criminal Procedure Act* (*supra*). The question of generality or specificity of the framed issue in **Galeba's case** cannot be a centre of discussion in this case. It is a question to be determined by the Court of Appeal upon appeal being preferred by Zephrine and or his Co- Petitioners. In other words, the question whether the decision in **Galeba's case** was omnibus or not cannot be challenged in this case. It is the domain of the Court of Appeal of Tanzania on appeal.

Needless the above observation, it will be superfluous to look unto the wording of each impugned provision while all govern the same purpose similar to the provisions of *Sections 244 and 245 (1), (2) and (3) of Criminal Procedure Act.*

As properly rejoined by the Respondent, in the case of **Tanzania Women Lawyers Association** (*supra*), the case was struck out for being *res-judicata* to the case of **Attorney General v. Rebecca Z. Gyumi,**[37] although the two petitions challenged provisions of different laws for being un constitutional. In the former case, the Petitioner challenged *Section 130 (2) (e) of the Penal Code Cap 16 (R. E. 2002)* and while in the latter, the

[37] Civil Appeal No. 204 of 2017, Court of Appeal of Tanzania at Dar es Salaam(unreported).

Respondent challenged the provision of *Sections 13 and 17 of the Law of Marriage Act, Cap 29 (R.E. 2002).*

While I agree with the Petitioners first point that the law requires the Petitioner to show that a particular provision of the legislation contravene a specific provision of the constitution, however, it should not be forgotten that, the Court is mandatorily required not to proceed with public matters which have already been determined by the competent Court. The public point in this petition are the provisions governing conduct of Committal Proceedings and Preliminary Inquiries by Subordinate Courts. These are relevant provisions in construing whether the petition is *res-judicata.*

As it was observed by this Court in **Boniphace Muhoro's Case**, the principles of *res-judicata* have the same effect in Civil, Criminal and Public litigation Cases. Even in Kenyan case of **John Florence Maritime Services Limited and Another** (*supra*), the Court did not accept the argument that Constitution-based litigation cannot be subjected to the doctrine of res judicata. Lord Diplock had the same position in the case of **Thrasy Voulou v. Secretary of**

State for The Environment, Oliver v. Secretary of State for The Environment[38] in which he observed:

> *The doctrine of res-judicata rests on the twin principles which cannot be better expressed than in terms of the two latin maxims "interest reipublicae ut sit finis litium and nemo debet bis vexari pro una et eadem causa. These two principles are of such fundamental important that they cannot be confined in their application to litigation in the private law field. They certainly have their place in the criminal law. In principle they must apply equally to adjudications in the field of public law. In relation to adjudications subject to a comprehensive self-contained statutory code, the presumption, in my opinion, must be that, where the statute has created a specific jurisdiction for the determination of any issue which establishes the existence of a legal right, the principle of res judicata applies to give finality to that determination unless an intention to exclude that principle can properly be inferred as a matter of construction of the relevant statutory provisions.*

[38] (1990) 1 All ER 65 at 70-71, 1990] 2 AC 273 at 289.

Taking into consideration that the impugned sections caters for Committal Proceedings and Preliminary Inquiries by Subordinate Courts, the Petitioners are precluded from contention that *Sections 178, 243, 246, 247 2448, 249, 250, 256, 257, 258, and 259 of Criminal Procedure Act* have never been determined. The decision in **Galeba's case** makes all such provision *res judicata*, estoppel and abuse of the Court process.

The principles underlying these kinds of estoppel and also abuse of Court process extend beyond those who were formal parties to previous proceedings. They also extend to what are called "privies" or proxies. The question who is a privy of another is also to be answered in a broad way. In **Johson's Case** lord Bingham cited with approval a statement by Megarry V-C in **Gleeson v. J. Wippell and Co Ltd:**[39]

> *Second, it seems to me that the substratum of the doctrine is that a man ought not to be allowed to litigate a second time what has already been decided between himself and the other party to the litigation. This is in the interest both of the successful party and of the public. But I cannot see that this provides any basis for a successful defendant to say that the*

[39] [1977] 3 all ER 54 at 60, 1 WLR 510 at 515.

successful party and of the public. But I cannot see that this provides any basis for a successful defendant to say that the successful defence is a bar to the plaintiff suing some third party, or for that third party to say that the successful defence prevents the plaintiff from suing him, unless there is a sufficient degree of identity between the successful defendant and the third party. I do not say that one must be the alter ego of the other: but it does seem to me that, having due regard to the subject-matter of the dispute, there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party, it is in that sense that I would regard the phrase "Privity of Interest".

The privity of interest between **Galeba's case** and the Petitioner here is the constitutionality of the provisions governing conduct of Committal Proceedings and Preliminary Inquiries by the Subordinate Courts. As such, the instant petition cannot escape the web of *res-judicata*, estoppel or abuse of the Court process.

The proposition laid down by the Indian Supreme Court in **V. Purushotham Rao case** (*supra*) that The Public Interest Litigation or a petition filed for public interest cannot be held to be an adversarial system of adjudication and the Petitioner in such

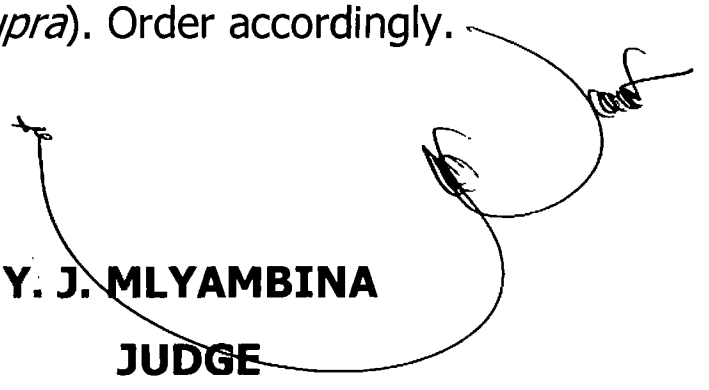
case, merely brings it to the notice of the Court, as to how and in what manner the public interest is being jeopardized by arbitrary and capricious action of the authorities, was not a general rule, to be observed in every public litigation, and no principle could be extracted from it affecting other cases involving public litigation where the circumstances were different and meant to serve the very public from endless litigation involving similar issues, same parties or their proxies, already concluded by the competent Court. A person preferring public litigation cases must be able to pull up beyond the limits of *res judicata.*

It is the finding of this Court that the Petitioner's suggested principle that petition filed for public interest cannot be held to be an adversarial system of adjudication may rest peacefully in the grave in future and not be resurrected with the idea that there is still some spark of life in it. In fact, I do agree with the submission of the Respondent that a Judgement in a previous public litigation would be a Judgement in rem and add that the same principle applies whether it is in adversarial or inquisitorial system of adjudication.

Further, **in V. Purushotham Rao case** (*supra*), the Supreme Court of India was *of the view that leaving the question open for examination in future would lead to unnecessary multiplicity of*

proceedings and would be against the interests of society. The proper test, now adopted by this Court as guiding all future occasions and, if my brethren take the same view in future, is that, such cases had to be determined on their own particular facts. If the provisions challenged are governing different scenarios, it will not lead to invoking *res judicata*. In circumstances of this case, all the impugned provisions are governing conduct of Committal Proceedings and Preliminary Inquiries by the Subordinate Courts. The same issue was determined conclusively by this Court in **Galeba's case.**

In conclusion, therefore, in agreement with what my noble and learned friend representing the Respondent has submitted and taking a broad view of the merits, I am in no doubt that this petition is an abuse of the Court process for being *res-judicata.* I thus sustain the objection as raised and proceed to dismiss this petition with costs for being *res-judicata* with the decision of this Court in the **Galeba's case** (*supra*). Order accordingly.



Y. J. MLYAMBINA

JUDGE

21/10/2020

Ruling delivered and dated 21st October, 2020 in the presence of Counsel Loveness Dennis for the Petitioner and Learned State Attorney Vivian Method for the Respondents. Right of Appeal Explained.

Y. J. MLYAMBINA

JUDGE

21/10/2020