IN THE COURT OF APPEAL

AT ELDORET

(CORAM: AZANGALALA, GATEMBU & MURGOR, JJ.A)

CIVIL APPEAL NO. 376 OF 2014

BETWEEN

AFRICA OIL TURKANA LIMITED

(Previously known as Turkana

Drilling Consortium Ltd).....1ST APPELLANT

AFRICA OIL CORPORATION.....2ND APPELLANT

AFRICA OIL KENYA BV

(Previously known Lundin Kenya B.V.....3RD APPELLANT

KEITH HILL.....4TH APPELLANT

VERSUS

PERMANENT SECRETARY,

MINISTRY OF ENERGY.....1ST RESPONDENT

MINISTER OF ENERGY.....2ND RESPONDENT

MINISTER OF PLANNING & DEVELOPMENT.....3RD RESPONDENT

NATIONAL OIL CORPORATION OF KENYA.....4TH RESPONDENT

ENVIRONMENT MANAGEMENT AUTORITY.....5TH RESPONDENT

GEOTHERMAL DEVELOPMENT COMPANY.....6TH RESPONDENT

CENTRIC ENERGY CORPORATION.....7TH RESPONDENT

PLATFORM RESOURCES INC.....8TH RESPONDENT

TULLOW OIL PLC.....9TH RESPONDENT

0903658 B.C. LTD.....10TH RESPONDENT

ALEC EDWARD ROBINSON.....11TH RESPONDENT

ANGUS McCOSS.....12TH RESPONDENT

SUMAYYA ATHMANU (MD NOCK)..... 13TH RESPONDENT

PATRICK MWAURA NYOIKE.....14TH RESPONDENT

CHINA NATIONAL OFFSHORE OIL CORP.....15TH RESPONDENT

INTERSTATE PETROLEUM

COMPANY LTD.....16TH RESPONDENT

MONENA M. KENGARA.....17TH RESPONDENT

EDWARD KINGS ONYANCHA MAINA.....18TH RESPONDENT

CONSOLIDATED WITH

CIVIL APPEAL NO. 18 OF 2015

BETWEEN

TULLOW OIL PLC.....1ST APPELLANT

AFRICA OIL TURKANA LTD.....2ND APPELLANT

AFRICA OIL KENYA LIMITED.....3RD APPELLANT

ANGUS MCCOSS.....4TH APPELLANT

VERSUS

THE PERMANENT SECRETARY,

MINISTRY OF ENERGY,

REPUBLIC OF KENYA.....1ST RESPONDENT

MINISTER OF ENERGY,

REPUBLIC OF KENYA.....2ND RESPONDENT

MINISTRY OF PLANNING &

DEVELOPMENT, REPUBLIC OF KENYA.....3RD RESPONDENT

NATIONAL OIL CORPORATION OF KENYA.....4TH RESPONDENT

ENVIRONMENTAL MANAGEMENT

AUTHORITY.....5TH RESPONDENT

GEOTHERMAL DEVELOPMENT COMPANY.....6TH RESPONDENT

CENTRIC ENERGY CORPORATION.....7TH RESPONDENT

PLATFORM RESOURCES INC.....8TH RESPONDENT

0903658 B.C LTD.....9TH RESPONDENT

ALEC EDWARD ROBINSON.....10TH RESPONDENT

SAMAYA ATHASMNI (MD NOCK).....11TH RESPONDENT

PATRICK MWAURA NYOIKE.....12TH RESPONDENT

CHINA NATIONAL OFFSHORE

OIL CORP.....13TH RESPONDENT

INTESTATE PETROLEUM CO. LTD.....14TH RESPONDENT

MONENA M. KENGARA.....15TH RESPONDENT

EDWARD KINGS ONYANCHA MAINA.....16TH RESPONDENT

CONSOLIDATED WITH

CIVIL APPEAL NO. 45 OF 2015

BETWEEN

0903658 BC LIMITED (Previously known as

Centric Energy Corporation).....APPELLANT

VERSUS

THE PERMANENT SECRETARY, MINISTRY OF ENERGY

REPUBLIC OF KENYA.....1ST RESPONDENT

MINISTER OF ENERGY,

REPUBLIC OF KENYA.....2ND RESPONDENT

MINISTRY OF PLANNING & DEVELOPMENT

REPUBLIC OF KENYA.....3RD RESPONDENT

NATIONAL OIL CORPORATION OF KENYA..... 4TH RESPONDENT

ENVIRONMENT MANAGEMENT AUTHORITY.....5TH RESPONDENT

GEOTHERMAL DEVELOPMENT CO.....6TH RESPONDENT

TURKANA DRILLING CONSORTIUM LTD.....7TH RESPONDENT

AFRICA OIL CORPORATION.....8TH RESPONDENT

LUNDIN KENYA B.V.....9TH RESPONDENT

PLATFORM RESOURCES INC.....10TH RESPONDENT

TULLOW OIL PLC.....11TH RESPONDENT

AFRICA OIL TURKANA LTD.....12TH RESPONDENT

AFRICA OIL KENYA B.V.....13TH RESPONDENT

KEITH HILL.....14TH RESPONDENT

ALEC EDWARD ROBINSON.....15TH RESPONDENT

ANGUS MCCOSS.....16TH RESPONDENT

SUMAYYA ATHMANI (MD NOCK).....17TH RESPONDENT

PATRICK MWAURA NYOIKE.....18TH RESPONDENT

CHINA NATIONAL OFF

SHORE OIL CORPORATION.....19TH RESPONDENT

EX PARTE

INTERSTATE PETROLEUM CO. LTD.....20TH RESPONDENT

MONENA M. KENGARA.....21ST RESPONDENT

EDWARD KINGS ONYANCHA MAINA.....22ND RESPONDENT

(An appeal from the Ruling of the High Court of Kenya

at Kitale, (Hon. J. R. Karanja, J.) dated 5/03/2013

in

JUD. REVIEW NO. 1 OF 2012

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JUDGMENT OF THE COURT

1. The three appeals before us stem from one decision of the High Court of Kenya at Kitale (J. R. Karanja, J.) contained in a ruling delivered on 5th March, 2013 by which that court rejected the appellants' applications to dismiss or strike out a judicial review application by the 16th to 18th respondents. By consent of all the parties, the three appeals were consolidated by an order of the Court given at the commencement of the hearing of the appeals on 26th April, 2016. It was further agreed that the consolidated appeals would be conducted under Civil Appeal No. 376 of 2014 as the lead file.

2. The three appeals raise one common principal question, namely, whether the doctrine of res judicata applies to judicial review proceedings.

Background

3. Interstate Petroleum Company Limited (named as the 16th respondent and as the 1st subject in Civil Appeal No. 376 of 2014; as the 20th respondent in Civil Appeal No. 45 of 2015; and as the 14th respondent in Civil Appeal No. 18 of 2015) (hereafter referred to as "Interstate" or "the 1st ex parte applicant") instituted judicial review proceedings before the High Court at Kitale in Judicial Review Number 30 of 2010 (formerly Eldoret Judicial Review Number 18 of 2010) against the Permanent Secretary Ministry of Energy of the Republic of Kenya (hereafter referred to as "the Permanent Secretary" or "the 1st respondent"). It joined Turkana Drilling Company of Kenya as the 1st interested party. (It has since changed its name to Africa Oil Turkana Corporation and is the 1st appellant herein). Ludin Kenya Limited, (named in the appeal by the name Africa Oil Kenya BV) was named as the 2nd interested party. (We shall hereafter refer to it as the 3rd appellant). Africa Oil Corporation, the 2nd appellant herein was named as the 3rd interested party. Platform Resources Inc., the 8th respondent herein was named as the 4th interested party. Centric Imaging Inc., the 7th respondent herein was named as the 5th interested party. (We will refer to the 5 parties collectively as "the interested parties"). In those proceedings Interstate sought the following orders from the court:

"Certiorari to quash an oil exploration permit granted by the Permanent Secretary to the 1st to 5th interested parties in respect of oil exploration blocks identified as Blocks 10BA, 10BB, 11A, 11B, 12A and 13T;

Mandamus to compel the Permanent Secretary to make full disclosure regarding information given by Interstate relating to samples;

Mandamus to compel the Permanent Secretary to issue an exploration permit to Interstate over Blocks 10BA, 10BB, 11A, 11B, 12A and 13T;

Prohibition to restrain the 1st to 5th interested parties from executing the exploration permit issued to them in respect of oil exploration Blocks 10BA, 10BB, 11A, 11B, 12A and 13T;

Restitution to Interstate the crude oil samples and the chemical analysis report in relation to that sample."

4. The basis on which Interstate sought those reliefs was that in the course of carrying out its drilling programmes in Turkana and West Pokot areas of the Rift Valley to prospect for water for the local communities, it (at the time it was known as Interstate Mining Co. Ltd) had encountered "a black substance smelling like kerosene" which it suspected "to be crude oil"; that it then provided the Permanent Secretary with samples of that substance in December 2005 with a request to carry out chemical analysis; that thereafter, it applied to the Permanent Secretary to be issued with a non exclusive exploration permit with a view to obtaining further crude samples for further chemical analysis and with a view also to undertaking crude reserve quantification feasibility report as a foundation for a production sharing contract with the Ministry of Energy and its overseas strategic investors; that the Minister of Energy robbed it of its "God given find" in that, using Interstate's samples, the Minister "deceitfully and fraudulently" expropriated and misappropriated its secrets and "clandestinely" issued exploration permit in respect of Blocks 10BA, 10BB, 11A, 11B, 12A and 13T to the interested parties.

5. Interstate further contended that despite having procured the requisite permits and authority from the County Council of Turkana and that of Pokot and having procured "serious and competent strategic investor with requisite financial and technical capabilities", the Minister ignored or refused to respond to its letters and applications for exploration permit(s) in respect of Blocks 10BA, 10BB, 11A, 11B, 12A and 13T. According to Interstate, the Minister "fraudulently sold out the secrets and transferred the benefits" accruing to it to the interested parties.

6. The Permanent Secretary and the interested parties opposed the application maintaining that knowledge regarding possible existence of crude oil deposits in the area under consideration predated the alleged "discovery" of crude oil by Interstate; that information in that regard is publicly available; that the reliefs sought were not available; that the Permanent Secretary could not be compelled to exercise its statutory discretion in any particular manner; that the interested parties had entered into production sharing contracts with the Minister that had nothing to do with the samples submitted for analysis by Interstate; that in any case the samples were not submitted by Interstate but by a different entity; that Interstate did not qualify or heed the statutory requirements in seeking exploration permit ; and that to grant the reliefs sought by Interstate would occasion the interested parties untold loss and hardship on account of the investment they had already made towards oil exploration.

7. Dismissing the application by Interstate in Judicial Review Number 30 of 2010, (hereafter referred to as "the previous judicial review application") the court (M. Koome, J. as she then was) in a ruling delivered on 16th December, 2010 held that it could not interfere with the exercise of discretion by the Minister unless it was shown that the discretion was not exercised in accordance with the law and the set regulations; that Interstate had not demonstrated that it had submitted an application for a non exclusive exploration permit and there was no evidence that Interstate met the criteria set out in the Petroleum Act for consideration for the grant of non-exclusive exploration permits; that what the interested parties had were production sharing contracts with the Minister as opposed to permits; that there was no evidence that Interstate had applied for a production sharing contract; that Interstate had "come late to seek an exploration permit when the interested parties had gone ahead and entered into production sharing contracts." The Judge concluded that the previous judicial review application by Interstate was based on its "fanciful desire to enter into petroleum exploration without following the laid down procedure but through a chain of correspondence that were contrived to circumvent the lengthy procedures and regulations set out under the Act." With that, the previous judicial review application was dismissed with costs.

8. Interstate was dissatisfied with that decision. It appealed against it before this Court in Civil Appeal No. 64 of 2011.

9. As that appeal was pending determination before this Court, Interstate, together with Maosa Kengara Monena (the 17th interested party) and Edward Kings Onyancha Maina (the 18th interested party) (hereafter referred to as the "1st to 3rd ex parte applicants") instituted fresh judicial review proceedings in the High Court in Judicial Review Number 1 of 2012 (hereafter referred to as "the subsequent judicial review application") against the Permanent Secretary, Ministry of Energy Republic of Kenya as the 1st respondent, Minister of Energy Republic of Kenya as the 2nd respondent, Ministry of Planning & Development Republic of Kenya as the 3rd respondent, National Oil Corporation of Kenya as the 4th respondent, Environment Management Authority as 5th respondent, and Geothermal Development Company as the 6th respondent. Tullow Oil Plc, Africa Oil Corporation, Centric Energy Corporation, Turkana Drilling Consortium Limited, Lundin Kenya B.V, Platform Resources Inc., Africa Oil Turkana Ltd; Africa Oil Kenya B.V, 0903658 B. C Ltd, Keith Hill, Alec Edward Robinson, Angus McCoss, Sumayya Athmani (MD Nock), Patrick Mwaura Nyoike and China National Offshore Oil Corporation were named as the 1st to 15th interested parties.

10. In those proceedings, the 1st to 3rd ex parte applicants vide an application dated 8th December, 2011 sought and obtained leave of the court on 30th January, 2012 to apply, within 21 days from that date, for orders of mandamus to compel the respondents to vacate and stay out of "disputed acreages for exploration for crude oil and gas within Block 10BA, 10BB, 12A and 13T. Leave was also granted to the 1st to 3rd ex parte applicants to apply for orders of prohibition to restrain the respondents "from undertaking and carrying on with explorations for crude oil and gas within Block 10BA, 10BB, 12A and 13T." The 1st to 3rd ex parte applicants then filed the main application on 6th February, 2012 seeking substantive orders in terms of the leave granted on 30th January, 2012.

11. Without much ado, Tullow Oil Plc, Africa Oil Turkana Ltd; Africa Oil Kenya B.V, Angus McCoss the 6th, 7th, 8th and 12th interested parties respectively made an application dated 20th February, 2012 seeking orders to discharge the ex parte leave granted on 30th January, 2012 and for the dismissal of the application dated 8th December, 2011 on the basis of which that leave was granted. In the alternative, they prayed for an order for the three applicants to deposit Kshs. 5,000,000.00 as security for their costs.

12. Turkana Drilling Consortium Limited, Africa Oil Corporation, Lundin Kenya B. V and Keith Hill (the 1st, 2nd, 4th and 10th respondents) followed suit with a similar application dated 18th April, 2012 praying that the judicial review application by Interstate and the entire proceedings therein be struck out as an abuse of the process of the court. In the alternative, they prayed for the setting aside of the leave granted on 30th January, 2012 and for security of costs.

13. The 6th respondent, Geothermal Development Company also made an application dated 20th April, 2012 seeking an order that the ex parte leave granted to Interstate on 30th January, 2012 be set aside or discharged or alternatively that the 6th respondent be struck off as a party to the Judicial Review proceedings.

14. The Environment Management Authority, the 5th respondent, was not left behind. By an application dated 8th May 2012, it sought an order that the entire proceedings by Interstate be struck out.

15. Those four applications were based on similar grounds namely, that the issues raised by 1st to 3rd ex parte applicants in subsequent judicial review application were in substance identical or the same issues as the issues raised in the previous judicial review application and that the matters raised in subsequent

judicial review application were therefore res judicata; that the institution of subsequent judicial review application was a duplication of the previous proceedings and unwarranted multiplicity of claims; that the same matters were directly and substantially in issue in the Court of Appeal in Civil Appeal No. 64 of 2011; that the prayers the 1st to 3rd ex parte applicants were seeking were not available; and that Interstate had failed to pay taxed costs in relation to the previous judicial review application.

16. In its application dated 20th April, 2012, the 6th respondent, a state corporation established under Geothermal Resources Act, 1982 Chapter 314 of the Laws of Kenya with the mandate of development of geothermal energy contended that it was wrongly made a party in the proceedings in that the 1st to 3rd ex parte applicants had not demonstrated that it was a material party as it is not involved in exploration of crude oil and gas.

17. Environment Management Authority, the 5th respondent, on its part based its application dated 8th May, 2012 on the grounds that it had not been served with process; that 1st to 3rd ex parte applicants had an alternative remedy; and that no reasonable cause of action had been disclosed.

18. All four applications were strenuously opposed by the 1st to 3rd ex parte applicants who asserted that their claim was effectively admitted by those parties who had not entered appearance or filed defences and the court should therefore summarily grant the reliefs sought; that the court did not have jurisdiction to set aside the leave already granted as to do so would be tantamount to sitting on appeal over its own decision; that all the applications were incompetent on the basis of breach of the Advocates Act and the Constitution of Kenya; that the issues raised in the subsequent judicial review application as well as the reliefs sought therein were different from those raised in the previous judicial review application; that the plea of res judicata was misconceived; and that in any case the interested parties did not have the locus standi to present the applications.

19. Having considered the applications, affidavits and submissions made before him, the learned Judge (J. R. Karanja, J) delivered the impugned ruling on 5th March, 2013 in which he framed the central question common to the applications as being whether “the subject matter or matters and indeed the issues” in the subsequent judicial review application had “previously been dealt with and finalized by the court” in the previous judicial review application. Dismissing the applications dated 20th February, 2012, 18th April, 2012 and the application dated 8th May, 2012 the learned Judge had this to say:

“***Judicial review proceedings, being sui-generis, do not fall under the Civil Procedure Act and Rules save order 53 of the Civil Procedure Rules. The main ground in the applications to set aside leave is founded on the doctrine of “res-judicata" which 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.”

The doctrine is based on the maxims that no man should be vexed twice over the same cause, that it is in the interest of the state that there should be an end to litigation and that a judicial decision must be accepted as correct. However, the doctrine is applicable under the Civil Procedure Act which does not apply to judicial review proceedings (see, Republic vs. Judicial Service Commission ex parte Pareno (2004) KLR 203, Republic vs Communication Comm. Of Kenya (2001) 1 EA 1999 and Welamondi vs The Electoral Commission of Kenya (2002) KLR 486).

It may as well follow that "res-judicata" does not apply in judicial review proceedings. Therefore, the application dated 20th February, 2012 and the two applications dated 18th April, 2012 would be devoid of merit in so far as they relate to the setting aside of the leave granted on 30th January, 2012."

20. The court however allowed the application dated 20th April, 2012 and struck off the 6th respondent from the proceedings.

21. Aggrieved by the order dismissing their respective applications, the appellants lodged the present appeals.

The appeals and submissions by counsel

22. During the hearing of the appeal, Ms. F. M. Macharia, learned counsel for Africa Oil Turkana Limited (previously Turkana Drilling Consortium Ltd), Africa Oil Corporation and Africa Oil Kenya BV (previously Lundin Kenya B.V), the appellants in Civil Appeal No. 376 of 2014 began by setting out the background to the appeal. She submitted that the dispute is over oil exploration rights over Blocks 10BA, 10BB, 11A, 11B, 12A and 13T; that the subject matter of the dispute, the prayers and the issues in the previous and in the subsequent judicial review applications are the same; that the previous judicial review application having been heard and determined, it is an abuse of the process of the court to try to re-litigate the same issues.

23. Citing the decision of this Court in **Jetlink Express Limited vs. East African Safari Air Express Ltd [2015] eKLR,** Ms. Macharia submitted that institution of multiplicity of actions on the same subject matter against the same opponent on the same issues or subject matter or institution of different actions between the same parties in different courts is an abuse of the process of the court. According to her, the High Court should have invoked its inherent powers to stem the manifest abuse of the process of the court. In that regard counsel referred us to the decision of **Equity Bank Limited v West Link Mbo Limited [2013] eKLR**.

24. Counsel further argued that the Judge was clearly wrong in taking the view that the doctrine of res judicata does not apply to judicial review proceedings. Basing her argument on **John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR** and **John Njue Nyaga vs. Attorney General & 6 others [2016] eKLR,** counsel submitted that res judicata is a doctrine of general application and that the court was therefore wrong to exclude its application to judicial review proceedings.

25. Mr. Emmanuel Wetangula, learned counsel for the appellants in Civil Appeal No. 18 of 2015 associated himself with the submissions by Ms. Macharia. He added that the High Court undoubtedly had inherent jurisdiction, which the appellants invoked in the High Court, to stem abuse of the process of the court. He went on to say that the doctrine of res judicata is based on public policy that litigation must come to an end; that had the Judge considered the issues he was called upon to adjudicate in the subsequent judicial review application against those that arose for determination in the previous judicial review application, he would no doubt have concluded that the issues were the same; that he would accordingly have allowed the appellants' applications by striking out the subsequent judicial review application in exercise of the court's inherent power to prevent abuse of the court process. In that regard counsel referred us to the High Court decision in **Republic vs. City Council of Nairobi & 2 others [2014] eKLR** and the English decision in **R vs. Secretary of State for Environment, ex parte Hackney London Borough Council and another [1983] 3All E R 358**.

26. Learned counsel, Mr. Mbarak A. Ahmed, for the appellants in Civil Appeal No. 45 of 2015 also associated himself with the submissions by Ms. Macharia and by Mr. Wetangula. He drew our attention to the decision in **Republic v National Transport & Safety Authority & 10 others exparte James Maina Mugo [2015] eKLR,** where the High Court expressed the view that although Section 7 of the Civil Procedure Act that deals with res judicata does not apply to judicial review proceedings, it does not mean that the court is powerless where it is clear that by bringing proceedings a party is clearly abusing the court process. In his view, considering that the matters in controversy in this matter were determined by the High Court in the previous judicial review application and the appeal therefrom to this Court struck out, the matters were finally determined. Referring to the overriding principles under Sections 3A and 3B of the Appellate Jurisdiction Act, counsel urged that a party should not be vexed twice over a matter that is already determined.

27. Regarding the cross appeal by Edward Kings Onyancha Maina, counsel submitted that there is no merit in the same. He urged that the cross appeal is based on a faulty premise that there was a substitution of a party when in fact there was merely a change of name in the appellant. As to the complaint that the appeal was filed out of time, counsel drew our attention to the certificate of delay in the record of appeal. He also disagreed that the order extracted is at variance with ruling and argued that the order appealed from is properly sealed by High Court.

28. Appearing for the 1st, 2nd 3rd and 14th respondents, learned counsel, Ms. Wambui Nganga, associated herself with the submissions by counsel for the appellants and urged us to allow the appeals saying that had the learned Judge of the High Court properly directed himself on the matter, he should have found that the subsequent application for judicial review was an abuse of the process of the court. She submitted that a change of name or substitution of a party in the subsequent judicial review application does not affect the application of the doctrine res judicata.

29. Opposing the appeals, learned counsel for Interstate, Mr. P. N. Kiarie submitted that the learned Judge duly considered the applications before him and was alive to the previous judicial review application; that the order of stay of proceedings that the Judge made was amongst one of the alternative reliefs the appellants had sought; that when considering an application for leave to apply for judicial review, the court is required to satisfy itself that a prima facie case is made out; that although such leave may be challenged by an application to set aside or by appeal, the power to set aside should be exercised sparingly and only in the clearest of cases. In support of that argument, counsel referred to a decision of this Court in **Aga Khan Education Service Kenya v Republic and others [2004] 1 EA 1**.

30. Regarding the contention that subsequent judicial review is res judicata, Mr. Kiarie submitted that the issues arising in subsequent judicial review application are fundamentally different from those the court was dealing with in the previous judicial review application; that in the previous judicial review application what was being sought was an order to quash exploration permits while no such relief was sought in the subsequent judicial review application; that in any case, it was premature to deal with the issue of res judicata as the main application as well as the question whether the leave granted would operate as a stay were yet to be heard by the High Court.

31. Referring to the case of **R v Secretary of State** (supra) and **Republic v Nairobi City Council ex parte Senco Limited W. H. E. Edgley's Trust Trustees Registered**, (supra) counsel submitted that the learned Judge was right in holding the doctrine of res judicata does not apply to judicial review proceedings that are concerned with process rather than with the merits of a case.

32. Whilst agreeing that a court may in appropriate cases invoke inherent jurisdiction to prevent abuse of the process of the court, Mr. Kiarie submitted that in this case there was no finding that there was any

abuse of the process of the court; that the Judge safeguarded against any abuse of process by ordering, under its inherent powers, stay of proceedings pending hearing and determination of the appeal that was at the time pending. With that, counsel urged us to dismiss the appeals.

33. On his part, Edward Kings Onyancha Maina, the 18th respondent, urged us to dismiss the appeals and to allow his cross appeals and to order payment of costs by the advocates. In his view there is no competent appeal before the Court as the same was filed out of time; that based on a letter dated 17th October, 2014 addressed to Ms. Anjarwalla & Khanna advocates by the Deputy Registrar, High Court, Kitale, the typed proceedings were ready for collection by that date; that there is no reason the same were not collected until 30th October, 2014 as indicated in the certificate of delay; that the certificate of delay is therefore irregular and that the appeal was therefore filed outside the time prescribed under Rule 82 of the Rules of the Court and should be dismissed.

34. According to Mr. Maina, the record of appeal is also incomplete as an order given on 9th October, 2014 requiring the appellant to deposit security is not part of the record; that appellants are in contempt of that order and should not have been granted audience; that the present appeals are a result of collusion, given that the notices of appeal in all the appeals are the same.

35. Mr. Maina went on to say that in the absence of proof of fraud, there is no basis for interfering with the leave granted to apply for judicial review; that a party aggrieved by the leave should have appealed instead of seeking to set aside the leave; that the Judge did not have the mandate to set aside leave as to do so would have been tantamount to sitting on appeal over his own decision.

36. He went on to say that he is seeking leave to appeal to the Supreme Court from the decision of this Court striking out Civil Appeal No. 64 of 2011 and the matters therein could not therefore be a basis of a plea of res judicata as there is no final determination yet.

37. Mr. Z. Mokua, learned counsel for Monena M. Kengara, the 17th respondent, associated himself with the submissions by Mr. Kiarie urging that the two judicial review proceedings are different; that the parties and the reliefs sought are different; that although the court has inherent powers to intervene where abuse of process is proved, that is not the case here; that in the spirit of Article 159 of the Constitution the main application in the subsequent judicial review application should have been heard on merits. With that, he urged us to dismiss the appeals.

38. In her brief reply, Ms Macharia maintained that the two judicial review applications were substantially the same; that the mere addition of other parties in the second application for judicial review does not alter that position; that the court should have invoked inherent jurisdiction to stop abuse; that the complaints on competence or incompetence of appeal cannot be taken at this late stage in light of Rule 84 of the Rules of the Court; that any party considering that the records of appeal are incomplete was at liberty to file a supplementary record of appeal; that in any event the order of 9th October, 2014 said to have been omitted from the record though complied with, is not relevant and the appeals should be allowed and the cross appeal should be dismissed.

39. On his part, Mr. Wetangula reiterated that the court has power to set aside leave and that this is a clear case where that power should have been exercised.

40. On his part, Mr. Mbarak in reply urged that absent grounds affirming the decision of the court, Mr. Kiarie was not at liberty to support the decision of the High Court on grounds other than those relied upon by the judge; that a party should not be at liberty to litigate in installments and that on the strength of the case of **Omondi v National Bank of Kenya Ltd and others [2001] 1 EA175,** the addition of other

parties in the subsequent proceedings does not negate the application of the doctrine of res judicata.

Analysis and determination

41. We have considered the records of appeal in the three consolidated appeals and the submissions by learned counsel. The central question for determination is whether the learned Judge of the High Court was right in taking the view that the doctrine of res judicata was not applicable to judicial review proceedings.

42. The Judge identified the main ground in the applications that were before him was founded on the "doctrine of res judicata which is provided for under section 7 of the Civil Procedure Act…" Basing his determination on three past decisions, the Judge went on to hold that "the doctrine is applicable under the Civil Procedure Act which does not apply to judicial review proceedings." He then expressed the view that "it may as well follow that "res judicata" does not apply in judicial review proceedings" and for that reason held that the applications were "devoid of merit"

43. That notwithstanding, the Judge also found, (a finding that has not been challenged in any of these appeals) that:

"…**the subject matter herein is also the subject of other matters pending before the Court of Appeal arising from a previous judicial review matter involving the same subject matter and some of the parties herein**…"

44. It was on the basis of that finding that the Judge went on to order that:

"**So that the process and stature of this court is not put into disrepute due to several conflicting decisions from the various court on the same subject matter, and also taking into consideration that courts do not act in vain by making futile orders and being the policy of the law to avoid multiplicity of suits, all further proceedings in this case are hereby stayed pending the hearing and determination of all the proceedings currently pending before the Court of Appeal and in particular Civil Appeal No. 64 of 2011 and the applications made thereunder**."

45. There can be no doubt therefore that the only reason the learned Judge shied away from dismissing or striking out the subsequent application for judicial review action was the doubt he entertained regarding whether the doctrine of res judicata is applicable to judicial review matters. Therefore, the question we are called upon to determine in these appeals is whether the judge was right in taking the view that the doctrine of res judicata was not applicable to judicial review proceedings. In other words did the learned Judge of the High Court err in refusing to strike out or dismiss the subsequent judicial review application on grounds that the matters raised therein were res judicata or alternatively on the grounds that the same was an abuse of the process of the court.

46. We begin with an examination of the general principles. The doctrine of res judicata has a long history and is founded on principles[1]. One of the underlying principles is that a judgment of a court of concurrent jurisdiction directly upon the point is, as a plea, a bar, or as evidence conclusive, as between the same parties upon the same matter, directly in question in another court. There is also the principle that the judgment of a court of exclusive jurisdiction, directly on the point, is in like manner, conclusive upon the same matter, between different parties coming incidentally in question in another court, for a different purpose.[2]

47. The Supreme Court of England in **Virgin Atlantic Airways Limited v Zodiac Seats UK Limited**

[2014] 1AC 160; [2013] 4 All E R 715 referred to res judicata as "a portmanteau term…used to describe a number of different legal principles with different juridical origin". The court in that case identified at least five different legal principles underlying the doctrine of res judicata. It is necessary to quote from that judgment at some length:

"**The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is "cause of action estoppel". It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings. Secondly, there is the principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages: see *Conquer v Boot* [1928] 2 KB 336. Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given upon it, and the claimant's sole right as being a right upon the judgment. Although this produces the same effect as the second principle, it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as "of a higher nature" and therefore as superseding the underlying cause of action…**

…Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties…

…Finally there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger." [Emphasis]

48. We identify with the views expressed in that passage. The principles underlying the doctrine of res judicata undoubtedly transcend Section 7 of the Civil Procedure Act.

49. In the recent case of **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others**, (supra) this Court when pronouncing itself on the applicability of the doctrine of res judicata in constitutional claims, and whilst cautioning that the doctrine should be sparingly invoked in the clearest of cases, had this to say:

"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…" [Emphasis]

50. Those views apply equally, in our view, to judicial review litigation.

51. Again in **William Koross (Legal personal representative of Elijah C. A. Koross) v Hezekiah Kiptoo Komen & 4 others [2015] eKLR** this Court cited with approval from a decision of the Supreme Court of India in **Lal Chand v Radha Kishan, AIR 1977 SC789** and underscored that the philosophy underlying the doctrine of res judicata is that there has to be "finality" to litigation and that the doctrine of res judicata is aimed at providing "rest and closure" to what would otherwise be endless litigation.

52. Applying those general principles to this case, we have set out above in considerable relevant detail the background to this matter and the context in which the appellants contended before the High Court and before this Court that the matters arising in the subsequent judicial review application are res judicata.

53. In the previous judicial review application that culminated in the decision by Koome, J given on 16th December 2010, the case by Interstate, as already mentioned, was that in the process of drilling for water it came across a substance that it believed to by oil; that it submitted samples for analysis and thereafter applied for an exploration permit and for a production sharing contract; that the Minister deceitfully and fraudulently used the applicants' secrets derived from the samples submitted and issued exploration permit to the respondents in that case and refused to issue exploration permit to Interstate. Interstate therefore contended that the exploration permit issued by the Minister to the parties named as interested parties in respect of Blocks 10BA, 10BB, 11A, 11B, 12A and 13T should be quashed by an order of certiorari and that the Minister should be compelled by an order of mandamus to make full disclosures of Interstate's secrets and to issue Interstate with exploration permit in respect of those blocks. In the same vein, Interstate prayed that the interested parties should be prohibited from executing the exploration permit allegedly issued to them in respect of those Blocks. Interstate also applied for its samples and the chemical analysis thereon to be restored to it.

54. The subsequent judicial review application had an expanded number of applicants that included Monena M. Kengara and Edward Kings Onyancha Maina. The number of respondents was expanded to 6 as opposed to the one respondent in the previous action. The interested parties joined in the action were expanded to 15 from the initial 5. The Blocks in respect to which the applicants were making claim was reduced from 6 in the previous action to 4, namely Blocks 10BA, 10BB, 12A and 13T. In the subsequent judicial review application the applicants were therefore not making claim to Blocks 11A, 11B.

55. The relief the applicants were seeking in the subsequent judicial review application however was for an order of mandamus "compelling the respondents enjoined with the interested parties to vacate remove themselves and stay out from the disputed acreages within Blocks 10BA, 10BB, 12A and 13T". The applicants also sought an order of prohibition to restrain the "respondents enjoined with the interested parties from entering into trespassing unto and/carrying on with exploration and/or petroleum operations howsoever…from the disputed acreages within Blocks 10BA, 10BB, 12A and 13T."

56. The subsequent judicial review application was based on the grounds, inter alia, that the respondents and the interested parties had "through deceitful and fraudulent misrepresentations and concealment" procured the ruling delivered on 16th December 2010; that the respondents and interested parties had "defrauded and expropriated the secrets and benefits" of the applicants contained in the chemical analysis and the crude oil samples supplied by the applicants; that the respondents and interested parties had conspired to render the applicants' appeal from the ruling of 16th December, 2010 nugatory and "perpetrate (sic) defrauding the secrets and benefits contained in the chemical analysis…upon the crude oil samples supplied by and obtained by the" applicants within the disputed

acreages within Blocks 10BA, 10BB, 12A and 13T"; that the commencement of the exploration by the interested parties for gas and/or petroleum" within those blocks was in breach of the law; that the respondents and interested parties had transferred 50% of the interest in the disputed acreages within those blocks to Tullow Oil Plc which exhibits unjust enrichment.

57. It becomes immediately clear from the foregoing that the basis upon which Interstate instituted the previous judicial review application is essentially the same basis upon which the subsequent judicial review application was based. Other than for the complaint that the ruling of 16th December, 2010 in the previous judicial review application was obtained by concealment of facts, which in our view was not a justifiable basis for initiating a fresh action, the issues in controversy are substantially the same The learned Judge of the High Court was, no doubt, of the same view when he stated in the impugned ruling that, "…**the subject matter herein is also the subject of other matters pending before the Court of Appeal arising from a previous judicial review matter involving the same subject matter and some of the parties herein**…"

58. In our judgment the subsequent judicial review application was not only barred by the doctrine of res judicata, but was also an abuse of the process of the court. The inclusion of additional parties in the subsequent judicial review application does not alter this position. We are in agreement with the views expressed by the High court in **Omondi v National Bank of Kenya Ltd and others [2001] 1 EA 177 at page 183** where that court stated:

"**res judicata would apply not only to situations where a specific matter between the same persons litigating in the same capacity has previously been determined by a court of competent jurisdiction but also to situations where either matters which could have been brought in were not brought in or parties who could have been enjoined were not enjoined. Parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit. They are bound to bring all their cases at once. They are forbidden from litigating in instalments**."

59. In our judgment therefore, the learned Judge erred in declining the appellants' applications on the basis that the doctrine of res judicata does not apply to judicial review proceedings. We are therefore satisfied that there is merit in the appeals.

60. There is one other matter. Edward Kings Onyancha Maina, the 18th respondent lodged in all three appeals what he referred to as a notice of cross appeal under Rule 94 of the Rules of the Court. In those notices, he contends that the decision of the High Court appealed from should be confirmed on grounds other than those the court relied upon. The grounds set out in the notice however are not grounds supporting the decision of the High Court but rather are grounds attacking the competence of the appeals. The 8th respondent complains that the memorandum of appeal is defective; that there is no competent, legal or proper or regular record of appeal before us; that by lodging the appeals, the appellants are inviting this Court to breach the Constitution and other statutory provisions; that the appeals are aimed at perpetuating corruption; that appellants are using Kenyan courts for improper purposes; that notices of appointment or notices of change of advocates are defective; and that the appeal was filed out of time and that the certificate of delay is irregular. While we appreciate that the 8th respondent is acting in person, we are not at this stage dealing with an application to strike out the appeal under Rule 84 of the Rules of the Court. The matters the 8th respondent has complained of in the notices of cross appeal may well be matters on the basis of which he may have challenged the competence of the appeal and it is late, in light of Rule 104(b) of the Rules of the Court, to do so at this stage.

61. In conclusion therefore, we allow the appellants' appeals. The ruling of the High Court delivered on 5th March, 2013 is hereby set aside. The ex parte leave granted to the 16th to 18th respondents to apply for judicial review orders of mandamus and prohibition is hereby discharged. The application for judicial review by the 16th to 18th respondents in Judicial Review Number 1 of 2012 is hereby dismissed in its entirety. The appellants shall have the costs of the appeals. The cross appeals fail and are dismissed with no orders as to costs.

Dated and delivered at Eldoret this 29th day of July, 2016.

F. AZANGALALA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original**.**

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DEPUTY REGISTRAR

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[1] See The Duchess of Kingston's Case; 1st Apr 1776 [1776] Eng. R 16; (1776) 168ER175; (1776) 2 Smith's LC, 13th ed 644

[2] See Mulla on the Code of Civil Procedure, 14th edition by J. M. Shelat, Vol. 1 (Bombay, N.M. Tripathi Private Limited(1981-Reprinted 1986) at page 75