



**Okiro v National Assembly & 5 others; Judicial Service Commission (Interested Party)  
(Constitutional Petition E017 of 2023) [2024] KEHC 14865 (KLR) (28 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14865 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CONSTITUTIONAL PETITION E017 OF 2023  
HI ONG'UDI, J  
NOVEMBER 28, 2024**

**BETWEEN**

**PETER OKIRO ..... PETITIONER**

**AND**

**THE NATIONAL ASSEMBLY ..... 1<sup>ST</sup> RESPONDENT**

**THE SPEAKER NATIONAL ASSEMBLY ..... 2<sup>ND</sup> RESPONDENT**

**THE CABINET SECRETARY, NATIONAL TREASURY AND ECONOMIC  
PLANNING ..... 3<sup>RD</sup> RESPONDENT**

**THE HON ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**SALARIES AND REMUNERATION COMMISSION ..... 5<sup>TH</sup> RESPONDENT**

**COMMISSION-GENERAL KENYA REVENUE AUTHORITY .... 6<sup>TH</sup>  
RESPONDENT**

**AND**

**JUDICIAL SERVICE COMMISSION ..... INTERESTED PARTY**

**RULING**

1. This ruling is in respect of the notice motion dated 21<sup>st</sup> August, 2023 and the Preliminary Objection dated 29<sup>th</sup> September, 2023.
2. In the notice of motion, the petitioner prays for the following orders;
  - i. Spent.
  - ii. That this honourable Court be pleased to certify that the Petition raises substantial questions of law and forthwith refer the case to Her Ladyship the Chief Justice for the empanelment of



a bench of an uneven number of judges, being not less than three to hear and determine this Petition, pursuant to Article 165(4) of *the Constitution* of Kenya, 2010.

- iii. That consequent to the grant of the prayers above the honourable Court be pleased to issue such further directions and orders as may be necessary for urgent hearing and determination of this matter.
  - iv. That costs be provided for.
3. The said application is based on the grounds on its face and the affidavit in support of the petition sworn by the petitioner on even date.
  4. In the Preliminary Objection the 1<sup>st</sup> and 2<sup>nd</sup> respondents pray for an order that;
    - i. That the petition and Notice of Motion application offend the doctrine of sub judice under section 6 of the *Civil Procedure Act* as the issues raised therein are directly and substantially in issue in Milimani High Court Constitutional Petition No. E0237 of 2023; Dr. Fredrick Onyango Ogola and 9 others v Cabinet Secretary National Treasury and Planning, the National Assembly and 2 others which matter was filed on 6<sup>th</sup> July 2023 and is pending judgment on 24<sup>th</sup> November 2023.
  5. Both applications were canvassed by way of written submissions but only the petitioner, 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondent complied. The interested party's counsel informed the court that they would not be responding to the application. The 5<sup>th</sup> and 6<sup>th</sup> respondents' submissions are not in the CTS nor in the court file and efforts by the Deputy Registrar to contact them has been futile.

#### **Petitioner's submissions**

6. The said submissions were filed by Gordon Ogola Kipkoech & Company advocates and are dated 10<sup>th</sup> August 2024. Counsel identified two issues for determination and the first is whether the petition raises substantial questions to warrant reference to the Chief Justice for empanelment. He submitted in the affirmative and cited Article 165 (3) (b), (4) and the Supreme Court of Kenya decision in *Hermanus Phillipus Steyn v Giovanni GnechiRuscone* [2013] eKLR where the following governing principles for purposes of certification under Article 163(4)(b) were pronounced:
  - “(i) For a case to be certified as one involving a substantial point of law, the intending applicant must satisfy the Court that the issue to be canvassed is one the determination of which affects the parties and transcends the circumstances of the particular case and has a significant bearing on the public interest;
  - (ii) The applicant, must show that there is a state of uncertainty in the law;
  - (iii) The matter to be certified must fall within the terms of Article 165 (3) (b) or (a) of *the Constitution*: (vi) The applicant has an obligation to identify and concisely set out the specific substantial question or questions of law which he or she attributes to the matter for which the certification is sought.”
7. The second issue is whether the petition and the notice of motion offend the doctrine of sub judice to deny this court jurisdiction. Counsel submitted that the preliminary objection was incompetent and misplaced since it was based on a point of law and largely facts which require the objector to produce pleadings and proceedings of the alleged the Petition No. E237 of 2023.



8. In support of his argument he cited the decision in *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* [1964] EA 696 which was cited with approval in the case of *Attorney General of the Republic of Kenya vs Independent Medical Legal Unit, Appeal No 1 of 2011*, where the Court emphasized that the proper form which ought to have been used was a motion and not a preliminary objection. Sir Charles Newbold, P. pointed out that:

“ A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the 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...”
9. He further submitted that the preliminary objection was not merited since it invoked the sub judge doctrine. The court’s attention was drawn to the decisions in *Kenya National Commission on Human Rights v Attorney General Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* [2020] eKLR and *National Assembly & Another v Okoiti & 55 others* [2024] eKLR.
10. In conclusion, he submitted that matters that touch on the independence of the judiciary such as remuneration of judges raised very substantial issues of the law that cannot be wished away and such deserved a hearing before a panel of judges.

#### **1<sup>st</sup> and 2<sup>nd</sup> Respondents’ submissions**

11. The said submissions were filed by Mr. Joshua Kiilu advocate and are dated 16<sup>th</sup> October 2024. Counsel identified two issues for determination.
12. The first issue is whether the petition has been rendered moot. He submitted that the Petition dated 21<sup>st</sup> August 2023, and the notice of motion dated the same day had been overtaken by events and rendered moot by the Court of Appeal’s decision.
13. He placed reliance on several cases among them being the decision in *Attorney General g 3 others v David Ndii & 73 others: Prof Rosalind Dixon & 7 others (amicus curiae)* (SC Petition 12, 11 & 13 of 2021 (Consolidated) [2022] KESCA 8 (KLR) (Constitutional and Human Rights) (31 March 2022) (Judgment) (with dissent), quoted with approval the decision of the High Court of South Africa in *Afriform NPC & others v Eskom Holdings SOC Limited & others* 3 All SA 663 (GP) where it was held:

“ 1710. The mootness barrier therefore usually arises from events arising or occurring after an adverse decision has been taken or a lawsuit has got underway, usually involving a change in the facts or the law, which allegedly deprive the litigant of the necessary stake in the pursued outcome or relief. The doctrine requires that an actual controversy must be extant at all stages of review and not merely at the time the impugned decision is taken or the review application is made.”
14. The second issue is whether the petition is res judicata. Counsel submitted in the affirmative and urged the court to dismiss both the petition and the application herein. He placed reliance on two decisions one of them being the case of *Independent Electoral & Boundaries Commission v Maina Kiai, Khelef Khalifa, Tirop Kitur, Attorney General, Katiba Institute & Coalition for Reforms & Democracy (Civil*



[Appeal 105 of 2017](#) [2017] KECA (KLR) (Civ) (23 June 2017) (Judgment) where the Court of Appeal addressed the doctrine of res judicata as follows;

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

15. In conclusion, he urged the court to dismiss both the petition and application on the grounds of mootness and res judicata.

### **3<sup>rd</sup> and 4<sup>th</sup> Respondents’ submissions**

16. The said submissions were filed by Gilbert Rotich a State counsel and are dated 14<sup>th</sup> September 2024. Counsel identified two issues for determination.
17. The first issue is whether the petition and application dated 21<sup>st</sup> August 2023 offend the doctrine of sub judice. Counsel submitted in the affirmative and cited section 6 of the [Civil Procedure Act](#) and the decision in *Haji & 4 others: (Suing for and on behalf of one hundred and sixty residents of Plot Number 232/XVII) v SBS Properties (2016) Limited & 3 others: National Land Commission & another (interested Parties)* (Constitutional Petition 03 of 2022) [2023] KEELC as follows:
  - a. “There must exist two or more suits filed consecutively;
  - b. The matter in issue in the suits or proceedings must be directly and substantially the same.
  - c. The parties in the suits or proceedings must be the same or must be parties ‘ under whom they or any of them claim and they must be litigating under the same title.
  - d. The suits must be pending in the same or any other court having Jurisdiction in Kenya to grant the relief claimed.”
18. Lastly, on whether the present petition raises substantial questions of law to warrant reference to the Chief Justice for the empanelment of a bench of uneven number of judges. Counsel submitted in the negative and added that this court had the jurisdiction to handle the petition.

### **Analysis and determination**

19. I have considered the application, the preliminary objection together with the supporting affidavit and the submissions by the respective parties. I opine that the issue for determination by this court is whether both or either of them is merited.
20. I will first deal with the preliminary objection since it raises the issue of sub judice.
21. It is trite law that for a preliminary objection to be valid; firstly, it must raise a pure point of law. Secondly, the objection is argued on the assumption that all the facts pleaded by the party against whom it is raised are correct. Lastly, an objection cannot be raised if any fact has to be ascertained or if what



is sought is the exercise of judicial discretion. In *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (Supra)*, Law JA stated as follows:

“So far as I’m aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. 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.”

22. The Court will also consider that a preliminary objection must stem from the pleadings and raise a pure point of law, and should not deal with disputed facts nor should it derive its foundation from factual information. See the case of *Oraro v Mbaja* [2005] 1KLR 141, where it was held that: “Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”.

23. The 1<sup>st</sup> and 2<sup>nd</sup> respondents contend that the application dated 21<sup>st</sup> August 2023 offends the doctrine of sub judice, but the petitioner has disputed the said facts. I find that in order to determine whether the rule of sub judice has been offended, this court has to delve into material facts of the case and the application, call for pleadings, examine and/or interrogate them to help it determine if the facts in issue are similar. This necessarily puts the matter outside the ambit of a preliminary objection.

24. In this respect, I agree with the decision in *Henry Wanyama Khaemba v Standard Chartered Bank LTD & Another* (2014) eKLR, where the court pronounced itself as follows: -

“The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1st Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of jurisdiction on Preliminary Objections.”

25. Further, in *Odeny (Formerly Victor Onyango Odeny) v Attorney General (Petition E415 of 2022) [2024] KEHC 5627 (KLR) (Constitutional and Human Rights)* (23 May 2024) (Ruling) LN Mugambi, J observed as follows;

“26. The second conclusion is that without availing the evidence of the previous suit, a factual issue that the Petitioner categorically denied, this Court was denied the opportunity of examining the two pleadings in order to determine if they are identical or substantially similar. In the absence of the evidence, the Court has nothing to assess in order to determine if Section 6 of The *Civil Procedure Act* was contravened so as to reach a finding on whether or not there is sub-judice.

27. The inescapable conclusion is that this Preliminary Objection lacks merit and must therefore inevitably fail. Accordingly, the Respondent’s Preliminary Objection dated 7<sup>th</sup> June 2023 is hereby dismissed with costs.”

26. In view of the issues pointed out at paragraph 23 of this ruling and the cited decisions it is clear that the Preliminary Objection dated 26<sup>th</sup> September 2023 is not merited and the same is dismissed.

27. I now move to consider the notice of motion which seeks to have this petition referred to Her Ladyship the Chief Justice for the empanelment of a bench of an uneven number of judges, being not less than



three to hear and determine this Petition, pursuant to Article 165(4) of *the Constitution* of Kenya, 2010. The said Article states as follows:

“Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.”

28. It is evident from the above cited provision of *the Constitution* that for a matter to be considered for empanelment, it must raise a substantial question of law under clause (3) (b) or (d) of article 165 of *the Constitution*.

29. Clause (3) Subject to clause (5), the High Court shall have-“a.....

- b. Jurisdiction to determine the question whether a right of fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
- c. ....
- d. Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of-
  - i. the question whether any law is inconsistent with or in contravention of this Constitution;
  - ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with or in contravention of this Constitution.
  - iii. any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
  - iv. any question relating to conflict of laws under article 191;
- e. ....”

30. It is now settled that an order for empanelment of a multiple bench is one to be given with circumspection. Thus, I am in full agreement with the position taken in *Martin Nyaga & Others v Speaker County Assembly of Embu & 4 Others & Amicus Curiae* [2014] eKLR that:

“The decision whether or not to empanel a bench of more than one judge ought to be made only where it is absolutely necessary and in strict compliance with the relevant constitutional and statutory provisions. In this country we still do not have the luxury of granting such orders at the whims of parties. Judicial resources in terms of judicial officers in this country are very scarce. Empaneling such a bench usually has the consequences of delaying the cases which are already in the queue hence worsening the problem of backlogs in this country.”

31. Similarly, in In the case of *Evangelical Mission for Africa & another v Kimani Gachibi & another* [2014]eKLR, Mwongo J held as follows:

“...empanelment of a bench under Article 165(4) arises when circumstances are special and jurisdiction to be exercised is not ordinary”.



32. The Court of Appeal case of *Okiya Omtatab Okoiti & another v Anne Waiguru - Cabinet Secretary, Devolution and Planning & 3 others* [2017] eKLR set out the principles for certification as follows;
- “(i) For a case to be certified as one involving a substantial point of law, the intending applicant must satisfy the court that the issue to be canvassed is one the determination of which affects the parties and transcends the circumstances of the particular case and has a significant bearing on the public interest;
  - (ii) The applicant must show that there is a state of uncertainty in the law;
  - (iii) The matter to be certified must fall within the terms of article 165 (3)(b) or (d) of *the Constitution*;
  - (vi) The applicant has an obligation to identify and concisely set out the specific substantial question or questions of law which he or she attributes to the matter for which the certification is sought.”
33. The petitioner’s case is that sections 26 and 84 of the Finance Act in so far as they affect the remuneration and benefits of judges are unconstitutional as they violate 2(4) and 160(4) of *the Constitution*. The issues raised by the petitioners’ touch on interpretation of various provisions of the Finance Act and *the Constitution*.
34. In *Bidco Oil Refineries Limited v Attorney General & 3 Others* [2013] eKLR, where Majanja J held as follows:
- “In my view although the issues raised by the applicants are weighty, I do not think that they raise any novel issues of law or matters of law that require the court to tread new ground to the extent that I would consider that this matter raises substantial questions of law.”
35. I embrace the principle that a “substantial question of law” is a question to be determined in the circumstances of the case and does not necessarily mean any issue of law that is weighty or any that raises a novel issue of law or even any that is complex. In the instant petition, the mere fact that the said sections of the Finance Act affect the remuneration and benefits of judges does not make it a novel question to be determined by a bench of an uneven number of Judges.
36. The issue being raised in respect of the Finance Act being unconstitutional, as was also noted by the 1<sup>st</sup> and 2<sup>nd</sup> respondents together with the interested party, has been decided on by the Supreme Court in Cabinet Secretary for the *National Treasury and Planning & 4 others v Okoiti & 52 others; Bhatia (Amicus Curiae)* (Petition E031, E032 & E033 of 2024 (consolidated) [2014] KESC 63 (KLR) (29 October 2024) (Judgment), where it held that the Finance Bill was a money Bill contemplated under Article 114 of *the Constitution*. It went ahead to set aside the Court of Appeal’s finding in Civil Appeal No. E003 of 2024 as consolidated with Civil Appeal Nos. E106, E021, E049, E064, & E080 of 2024) declaring the entire Finance Act, 2023 unconstitutional. The Finance Act was therefore found to be constitutional by the Supreme Court of Kenya.
37. In my humble opinion the decision by the Supreme Court renders both the application and the petition herein moot. This court is bound by the said decision and cannot depart from it.
38. The upshot is that the Petition and the Application both dated 21<sup>st</sup> August 2023 stand dismissed.
39. Each Party to bear its own costs.



40. Orders accordingly.

**DELIVERED, DATED AND SIGNED THIS 28<sup>TH</sup> DAY OF NOVEMBER, 2024 IN OPEN COURT  
AT NAKURU.**

**H. I. ONG'UDI**

**JUDGE**

