



Ombwayo v Clerk of, and National Assembly & 3 others; Ministry of Devolution & 12 others (Interested Parties) (Constitutional Petition 13 of 2022) [2023] KEHC 21869 (KLR) (22 August 2023) (Ruling)

Neutral citation: [2023] KEHC 21869 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CONSTITUTIONAL PETITION 13 OF 2022
OA SEWE, J
AUGUST 22, 2023**

BETWEEN

ANDREW OMBWAYO PETITIONER

AND

CLERK OF, AND NATIONAL ASSEMBLY 1ST RESPONDENT

CLERK OF, AND THE SENATE 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 4TH RESPONDENT

AND

MINISTRY OF DEVOLUTION INTERESTED PARTY

COUNCIL OF COUNTY GOVERNORS INTERESTED PARTY

COUNTY ASSEMBLIES FORUM INTERESTED PARTY

GIDEON MBUVI KIOKO ALIAS MIKE SONKO INTERESTED PARTY

FERDINAND NDUNGU WAITITU INTERESTED PARTY

ABDULSWAMAD SHARIFF NASSIR INTERESTED PARTY

HASSAN SARAI INTERESTED PARTY

WILLIAM KINGI INTERESTED PARTY

DANIEL MUNGA KITSAO INTERESTED PARTY

HEZRON AWITI INTERESTED PARTY

SAID ABDALLA INTERESTED PARTY



SHAFII MAKAZI INTERESTED PARTY
ANTONY CHITAVI INTERESTED PARTY

RULING

- [1] The petition dated August 16, 2022, as amended on September 8, 2022 seeks the following orders:
- (a) A declaration that section 33 of the County Governments Act, No 17 of 2012 be declared unconstitutional and that all impeachments undertaken in the Republic of Kenya pursuant to that provision and the resolutions of the County Assemblies of Nairobi and Kiambu to impeach the 4th and 5th interested parties, respectively, and the decision of the Senate to impeach the 4th and 5th interested parties and to approve and adopt the resolution of their respective county assemblies as well as the decision of the 4th respondent to refuse to clear the 4th and 5th interested parties to participate in the general elections held on August 29, 2022 are equally unconstitutional, invalid, null and void.
 - (b) An order of prohibition to stop the 4th respondent from refusing to clear the 4th and 5th interested parties to participate in any general or other elections on the basis of the impugned disqualification for having been impeached, and from conducting the general election for the position of the County Governor of Mombasa that was scheduled for August 29, 2022 and gazettment of the 6th interested party as the Mombasa County Governor elect, and or the Judge of the High Court Mombasa from swearing in the 6th interested party as the Mombasa County Governor.
 - (c) An order of *mandamus* to compel the 4th respondent to recall and reconsider the 4th and 5th interested parties' respective nomination applications to participate in the general elections hitherto scheduled for the August 9, 2022 for the positions of county governors and or for any other elective positions in the Republic of Kenya.
 - (d) Costs.
- [2] The petitioner's request for *ex parte* conservatory orders was dismissed by the duty judge; whereupon the petitioner sought leave to amend his notice of motion on the ground that some of his prayers had been overtaken by events. In the meantime, counsel for the 1st respondent, Mr Mwendwa, filed a notice of preliminary objection to the petition dated December 30, 2022 contending that:
- (a) The Petition and the application for conservatory orders are res judicata as the issues raised and the orders sought have already been determined by the Court of Appeal in the case of Martin Nyaga Wambora v County Assembly of Embu [2015] eKLR;
 - (b) In any case the application dated December 7, 2022 is moot having been overtaken by events, given that the process of removal of the County Governor, Meru County has already been undertaken to completion at the County Assembly and hearing has also been concluded at the Senate level;
 - (c) The petition and the application are malicious and an abuse of the court process;
 - (d) The petition and the application herein are incurably defective and bad in law;
 - (e) Based on the foregoing, the petition and the application lack merit, are frivolous and an outright abuse of the court process and ought to be dismissed with costs.



- [3] Thereafter, another notice of preliminary objection, dated January 24, 2023, was filed on behalf of the 2nd respondent by Mr Libendi, Advocate. He similarly contended that:
- (a) The application is moot as the orders sought had been overtaken by events since the Senate Special Committee on the proposed removal from office of the Governor of Meru already considered the charges in respect of the impeachment in accordance with article 181 of the Constitution and section 33 of the County Governments Act and found that the allegations for impeachment were not substantiated;
 - (b) That the amended petition is moot as the orders sought had been overtaken by events given the gubernatorial elections for Kiambu and Mombasa Counties were conducted in 2022 and the respective Governors-elect have already been sworn into office;
 - (c) That the court lacks jurisdiction on the ground that the constitutionality of section 33 of the County Governments Act and article 181 of the Constitution was conclusively determined by the Court of Appeal in Martin Nyaga Wambora v County Assembly of Embu & 37 others [2015] eKLR;
 - (d) That both the application and the amended petition are incurably defective and bad in law;
 - (e) That the application lacks merit and is an abuse of the process of the court and ought to be dismissed with costs.
- [4] The two notices of preliminary objection were argued jointly by way of written submissions, pursuant to the directions given herein on March 23, 2023. Thus, Mr Mwendwa relied on his written submissions filed on January 9, 2023. He proposed a single issue for determination; namely, whether the court has jurisdiction to hear this matter in view of the doctrine of *res judicata*. He submitted that the petition herein has been conclusively determined by the Court of Appeal in the following cases:
- (a) Martin Nyaga Wambora & 3 others v Speaker of the Senate & 6 others [2014] eKLR; and
 - (b) Martin Nyaga Wambora v County Assembly of Embu & 37 others [2015] eKLR.
- [5] Accordingly, counsel was of the view that the petitioner applied a selective interpretation of article 181(2) of the Constitution and therefore failed to appreciate that legislative authority is vested upon Parliament. On the authority of John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2021] eKLR in which the elements of *res judicata* were extensively discussed, counsel urged the court to find that, in this instance, the 1st respondent has satisfied the four pre-requisites to pave way for the invocation of the doctrine of *res judicata*. He consequently urged the court to be guided by Explanation No 6 in section 7 of the Civil Procedure Act and find that the petition is *res judicata*. He added that the issue of *res judicata* is one that can be decided in limine on the basis of the pleadings filed in so far as it goes to the jurisdiction of the court.
- [6] On behalf of the 2nd respondent, Mr Libendi relied on his written submissions dated January 24, 2023. He relied on Mukisa Biscuits Co Ltd v West End Distributors Ltd [1969] EA 696 as to what amounts to a preliminary objection. Counsel submitted, on the authority of John Mundia Njoroge & 9 others v Cecilia Muthoni Njoroge & Another [2016] eKLR, that lack of jurisdiction is a valid ground for a preliminary objection. Accordingly, he proposed the following two issues for determination:
- (a) Whether the application and the amended petition are moot;
 - (b) Whether the application and amended petition are *res judicata*.



- [7] In support of his submission that both the application and the petition are moot, Mr Libendi submitted that, since the Senate Special Committee on the proposed removal of the Governor of Meru had already found the impeachment allegations unsubstantiated, the application had been overtaken by events. Similarly, Mr Libendi pointed out that, since the gubernatorial elections for Kiambu and Mombasa Counties have already been conducted and the governors-elect sworn into office, the amended petition is not justiciable. He relied on *Daniel Kaminja & 3 others (suing as Westland Environmental Caretaker Group) v County Government of Nairobi* [2019] eKLR, *Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others* [2020] eKLR to buttress his submissions.
- [8] On *res judicata*, counsel quoted section 7 of the *Civil Procedure Act* to underscore his submission that the issue raised herein has been heard and finally decided by a court of competent jurisdiction. He likewise made reference to *John Florence Maritime Services Limited v Cabinet Secretary Transport and Infrastructure* (supra), *Eric Omari Wanyamah v Independent Electoral & Boundaries Commission (IEBC)* [2022] eKLR as well as *Martin Nyaga Wambora v County Assembly of Embu & 37 others* [2015] eKLR to buttress his submissions. Hence, Mr Libendi urged the court to uphold the 2nd respondent's preliminary objection and dismiss the petitioner's application and the amended petition with costs.
- [9] Mr Makuto, counsel for the 3rd respondent and the 1st interested party, supported the position taken by counsel for the 2nd respondent and accordingly adopted Mr Libendi's written submissions. Similarly, Mr Mutugi, counsel for the 4th respondent, supported the preliminary objections filed by the 1st and 2nd respondents and was in agreement with the written submissions filed in that regard.
- [10] The petitioner relied on his written submissions dated May 8, 2023 and urged the court to overrule the preliminary objections. In his submission, the court has jurisdiction to entertain the petition in so far as it is founded upon the premise that the entire architecture of impeachment, domiciled in section 33 of the *County Governments Act*, is ultra vires article 181(2) of the *Constitution*. He then proceeded to point out the ways in which this petition is distinguishable from the Wambora Case and urged the court to find that this petition raises totally different issues. He further submitted that, whereas the Wambora Case challenged the power of the Senate to entertain impeachment proceedings, in the instant matter, he has challenged the substantive law that gives the Senate the power to handle impeachment proceedings; and therefore that the petition raises germane issues for the court's determination.
- [11] Additionally, the petitioner submitted that the role of the Senate is to foster devolution and nothing more. In his oral submissions, the petitioner took the posturing that the question of *res judicata* does not apply to either judicial review or constitutional petitions; and therefore that the preliminary objections raised by the 1st and 2nd respondents are misconceived. He pointed out that, in any event, ground 2 of the 2nd respondent's notice of preliminary objection has been overtaken by events with the abandonment of the application for conservatory orders.
- [12] On behalf of the 4th and 5th interested parties, written submissions were filed herein on February 1, 2023 by Mr Odhiambo. He opposed the 1st respondent's preliminary objection and proposed the following issues for determination:
- (a) Whether the preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings;
 - (b) If the answer to [a] above is yes, whether the point if argued as a preliminary point may dispose of the suit.



- [13] Mr Odhiambo relied on *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696 and submitted that the 1st and 2nd respondents failed to demonstrate whether the parties to this petition were parties in the Wambora case; and in particular whether the 4th and 5th interested parties, were parties to the Wambora case. He submitted that this case has its own peculiarities which ought to be interrogated by the court and a determination made in accordance with its own facts. Thus, counsel relied on *National Bank of Kenya Limited v Peter Kipkoech & another* [2005] eKLR and *Mchuba Ghelaan Kelil & others v Abdulkadir Shariff Abdirhim & others* [2015] eKLR where the court dismissed a preliminary objection on conflict of interest because the same called for factual probing.
- [14] Mr Odhiambo also relied on *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others* (supra) and *Okiya Omtatah Okoiti & Another v Attorney General & 6 others* (supra) for the submission that the principle of *res judicata* ought to be sparingly invoked in constitutional matters. He accordingly prayed that the 1st respondent's preliminary objection dated December 30, 2022 be dismissed with costs.
- [15] When the matter came up for directions on March 23, 2023 in respect of the petitioner's application dated September 8, 2022, counsel for the petitioner indicated that his application had been overtaken by events. He accordingly prayed for leave of the court to have that application withdrawn. The application for withdrawal was accordingly granted and the said application for conservatory orders marked as withdrawn. Directions were thereafter given for the filing of written submissions in respect of the preliminary objections in so far as they related to the amended petition itself. Accordingly, my ruling is limited to the aspects of the 1st and 2nd respondent's preliminary objections that are pertinent to the amended petition itself.
- [16] It is now trite law that a preliminary objection should consist only of pure points of law which, if argued as such, may dispose of the suit. Accordingly, in *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors* (supra) it was held that a preliminary objection consists of:
- ...a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection 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...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion..."
- [17] It is therefore well settled that a preliminary objection that is dependent on factual details cannot stand. In this regard, it suffices to reiterate the expressions of Hon Ojwang, J (as he then was) in *Oraro v Mbaja* [2005] 1 KLR 141 that:
- ...The principle is abundantly clear. A "preliminary objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed...Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed



facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence..."

[18] Likewise, in *Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 others* [2015] eKLR the Supreme Court held:

(15) Thus a preliminary objection may only be raised on a “pure question of law”. To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are *prima facie* presented in the pleadings on record...”

[19] From the 1st respondent’s notice of preliminary objection, only one point stands out, namely, that the petition is *res judicata* since the issues raised and the orders sought have already been determined by the Court of Appeal in the case of *Martin Nyaga Wambora v County Assembly of Embu* [2015] eKLR. As for the 2nd respondent’s notice of preliminary objection, the two issues that can be gleaned therefrom are, firstly, that the amended petition is moot as the orders sought have been overtaken by events since the gubernatorial elections for Kiambu and Mombasa Counties were conducted in 2022 and the respective Governors-elect have already been sworn into office; and, secondly, that the court lacks jurisdiction as the constitutionality of section 33 of the *County Governments Act* and article 181 of the *Constitution* was conclusively determined by the Court of Appeal in *Martin Nyaga Wambora v County Assembly of Embu & 37 others* [2015] eKLR.

[20] From the foregoing points the following issues emerge for determination:

- (a) Whether the amended petition is *res judicata*.
- (b) Whether the issues raised in the amended petition are moot.

[21] I am convinced that these are issues that can be easily determined on the basis of the parties’ pleadings and decided authorities and therefore do not entail an examination of disputed facts; and therefore fit for canvassing by way of preliminary objection. Accordingly, I take the following view of the two issues:

A. On Res Judicata:

[22] The doctrine of *res judicata* is anchored on section 7 of the *Civil Procedure Act*, which provides 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 between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

[23] Hence, in *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others* (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment), the Supreme Court held:

59. For *res judicata* to be invoked in a civil matter the following elements must be demonstrated:
- a) There is a former judgment or order which was final;
 - b) The judgment or order was on merit;
 - c) The judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and



- d) There must be between the first and the second action identical parties, subject matter and cause of action.

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

- [24] Accordingly, it was the submission of counsel for the petitioner as well as counsel for the 4th and 5th interested parties that, for the court to determine whether or not the issues raised in the petition have been fully determined in the Wambora case, the court must engage in a probing of the facts; and therefore that the issue of *res judicata* was improperly taken. However, as pointed out herein above, it is my considered view that, in appropriate cases, such as this, the issue of *res judicata* is tenable as a preliminary point if confined to the pleadings, agreed facts and the law. In this instance, the Wambora case is a concluded matter which form part of the law reports of the country and can be accessed by the court as part of the authorities relied on by the parties. I consequently find no merit in the argument that the issue of *res judicata* cannot be raised by way of a preliminary objection.
- [25] In addition, Mr Ombwayo submitted that section 7 of the *Civil Procedure Act* does not apply to judicial review or constitutional petitions, and on this account urged for the dismissal of the respondents’ preliminary objections. Mr Odhiambo, on his part, urged for caution, contending that the plea of *res judicata* in constitutional petitions should be raised “...only in the plainest of plain cases...” He relied on the following excerpt from *Okiya Omtatah Okiiti & another v Attorney General & 6 others* [2014] eKLR, in which Hon Lenaola, J (as he then was) held:

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

- [26] However, the Supreme Court has since pronounced itself on the matter and provided guidance in the case of *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others* (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment) thus:

81. We reaffirm our position as in the Muiiri Coffee case that the doctrine of *res judicata* is based on the principle of finality which is a matter of public policy. The principle of finality is one of the pillars upon which our judicial system is founded and the doctrine of *res judicata* prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively. To further bolster our position we borrow from the decision from India in *Karam Chand another v Union Of India and others* on 24 April, 2014 where it was restated the principles upon which the doctrine of *res judicata* is founded as follows:

29.it is clear that the rule of *res judicata* is mandatory in its application and should be invoked in the interest of public policy and finality. The matters which have actually been decided would also apply to the matters which have been impliedly and



constructively decided by the court. These principles are to be applied to preserve the doctrine of finality rather than frustrate the same. The doctrine of *res judicata* is the combined result of public policy so as to prevent repeated taxing of a person to litigation. It is primarily founded on the following three maxims:

- (1) *nemo debet bis vexari pro una et eadem causa*: no man should be vexed twice for the same cause.
- (2) *interest reipublicae ut sit finis litium*: it is in the interest of the State that there should be an end to a litigation; and
- (3) *res judicata pro veritate occipitur*: a judicial decision must be accepted as correct.

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

[27] The Supreme Court further stated thus in respect of the applicability of *res judicata* to constitutional petitions:

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

[28] It is plain then that Mr Ombwayo’s contention that the doctrine of *res judicata* as envisaged by section 7 of the [Civil Procedure Act](#) is inapplicable to constitutional matters is misconceived. It is equally plain that, depending on the facts and circumstances of each case, *res judicata* can be raised as a preliminary point not only in respect of matters which have actually been decided, but also in respect of matters which have been impliedly and constructively decided by the court. Thus, the Supreme Court further held that:

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

85. In the alternative a litigant must demonstrate special circumstances warranting the court to make an exception...”



[29] In the premises, it is manifest from the amended petition that the petitioner is not, here, pleading any personal interest in the issues raised therein but to champion public interest and the interest of the 4th and 5th interested parties. Indeed, at paragraph 10 thereof, he averred that:

The petitioner is an Advocate of the High Court of Kenya, a registered voter in Nairobi city county, a legal practitioner in constitutional law obligated to contribute to legal jurisprudence under article 259(1)(c) Constitution, to respect, uphold and defend the Constitution of Kenya 2010 under article 3(1) thereof and entitled under article 258(1) and (2) thereof to petition this court for redress against the contravention of the Constitution, or a threat to its contravention...”

[30] Then at paragraphs 11 to 16, the petitioner adverted to the manner in which, in his view, section 33 of the County Government Act impinges article 181 of the Constitution. He thus stated that, instead of abiding by its mandate under article 181(2) of the Constitution, Parliament overreached itself by conferring the impeachment mandate upon the 47 County Assemblies and the Senate. At paragraphs 18 to 44 of the amended petition, the petitioner reiterated his averments to underscore his assertion that section 33 of the County Government Act is unconstitutional.

[31] As to the nature of injury suffered, the petitioner made general averments at paragraphs 45 to 54 of the amended petition about the usurpation by Parliament of the sovereignty of the people of Nairobi and Kiambu Counties the public and the 4th and 5th interested parties in enacting section 33 of the County Governments Act. Thus, in conclusion, the petitioner posited, at paragraph 57 that:

“All in all therefore, S. 33 County Government Act 2012 the provision on impeachment of county governors, the impeachment of the 4th and 5th interested parties, the 4th respondent’s decision to bar them from participating as contenders for the positions of county governors of Kiambu and Mombasa in the general election of August 9, 2022 and the postponed Mombasa Gubernatorial Elections of the August 29, 2022 on the bases of those impugned impeachments, those elections and the consequential declaration, gazettelement, swearing in and or intended swearing in of the Governor(s) Elect and or Governors, are unconstitutional, invalid, null and void.”

[32] Consequently, the petitioner prayed for, *inter alia*, a declaration that section 33 of the County Governments Act is unconstitutional and that all impeachments undertaken in the Republic of Kenya pursuant to that provision and the resolutions of the County Assemblies of Nairobi and Kiambu to impeach the 4th and 5th interested parties, respectively, are null and void. He further sought that the decision of the Senate to impeach the 4th and 5th interested parties and to approve and adopt the resolution of their respective county assemblies as well as the decision of the 4th respondent to refuse to clear the 4th and 5th interested parties to participate in the general elections held on August 29, 2022 to be declared unconstitutional, invalid, null and void; yet the Court of Appeal has pronounced itself on the above provisions in the Wambora Case and held:

...the above is a clear exposition of the law in regard to the application of article 181 and section 33 of the County Government Act in the removal of a County Governor. The process of removal lies entirely with the County Assembly wherein it is initiated, and the Senate wherein it is concluded. The court may only come in where necessary to confirm that the process has been properly followed as laid down in the Constitution and the statute. By implication the learned judges found section 33 of the County Government Act to be in harmony with article 181 of the Constitution that provides for the removal of a County



Governor on specified grounds such as gross violation of the Constitution, abuse of office or gross misconduct.”

- [33] Thus, since the constitutionality of section 33 of the County Governments Act has already been affirmed by the Court of Appeal in the Wambora case, it is my considered view that the issue as raised in this petition is *res judicata*, irrespective of the parties involved. Indeed, Explanation No 6 to section 7 of the Civil Procedure Act is explicit that:

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.”

- [34] Hence, in North West Water Ltd v Binnie & Partners [1990] 3 ALL E.R 547 at 556, a decision that has been followed in our jurisdiction, Lord Drake, J. held;

Where an issue had been decided in a court of competent jurisdiction, the court would not allow that issue to be raised in a separate proceeding between the different parties arising out of identical facts and dependent on the same evidence since, not only was the party seeking to re-litigate the issue prevented from doing so, by virtue of issue estoppel but it would also be an abuse of process to all, the issue to be re-litigated.”

B. On Mootness:

- [35] According to Black's Law Dictionary, Tenth Edition, at page 1161, a “moot case” is defined as “A matter in which a controversy no longer exists; a case that presents only an abstract question that does not arise from existing facts or rights.” Thus, in Daniel Kaminja & 3 others (supra) in which Hon Mativo, J. (as he then was) addressed the issue of mootness in detail, it was held:

23. A matter is moot if further legal proceedings with regard to it can have no effect, or events have placed it beyond the reach of the law. Thereby the matter has been deprived of practical significance or rendered purely academic. Mootness arises when there is no longer an actual controversy between the parties to a court case, and any ruling by the court would have no actual, practical impact. 24. It is trite that as a general principle, the rights and liabilities of parties to any judicial proceedings pending before court are determined in accordance with the law as it was at the time when the suit was instituted and by applying the facts to the law and circumstances. Time and again, it has been expressed that a court should not act in vain.[15]
25. No court of law will knowingly act in vain. The general attitude of courts of law is that they are loathe in making pronouncements on academic or hypothetical issues as it does not serve any useful purpose. A suit is academic where it is merely theoretical, makes empty sound and of no practical utilitarian value to the plaintiff even if judgment is given in his favour. A suit is academic if it is not related to practical situations of human nature and humanity.[16]
26. A case or issue is considered moot and academic when it ceases to present a justiciable controversy by virtue of supervening events, so that an adjudication of the case or a declaration on the issue would be of no practical value or use. In such instance, there is no actual substantial relief which a petitioner or applicant would be entitled to, and which would be negated by the dismissal of the case. Courts generally decline jurisdiction over such cases or dismiss them on grounds of mootness, save when, among others, a compelling constitutional issue raised requires the formulation of controlling principles to guide the bench, the bar and the public; or when the case is capable of repetition yet evading judicial review.



[36] As pointed out hereinabove, I have found that the issue of constitutionality of section 33 of the County Government is *res judicata*. The other two prayers are:

- (a) An order of Prohibition to stop the 4th respondent from refusing to clear the 4th and 5th interested parties to participate in any general or other elections on the basis of the impugned disqualification for having been impeached, and from conducting the general election for the position of the County Governor of Mombasa that was scheduled for August 29, 2022 and gazettelement of the 6th interested party as the Mombasa County Governor elect, and or the Judge of the High Court Mombasa from swearing in the 6th interested party as the Mombasa County Governor.
- (b) An order of *mandamus* to compel the 4th respondent to recall and reconsider the 4th and 5th interested parties' respective nomination applications to participate in the general elections hitherto scheduled for the August 9, 2022 for the positions of county governors and or for any other elective positions in the Republic of Kenya.

[37] Both prayers have long been overtaken by events; and this was essentially why the petitioner sought leave to have his application for conservatory orders withdrawn. Looked at from that standpoint, it becomes apparent that none of the prayers set out at paragraph 58 of the amended petition is tenable.

[38] Accordingly, the preliminary objections raised by the respondents dated December 30, 2022 and January 24, 2023 are hereby upheld with the result that the petition is hereby struck out with no order as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 22ND DAY OF AUGUST 2023

OLGA SEWE

JUDGE

