



REPUBLIC OF KENYA



**Mwaniki v Attorney General & 20 others (Petition E304 of 2020)
[2022] KEHC 11078 (KLR) (Constitutional and Human Rights) (31 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 11078 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E304 OF 2020

HI ONG'UDI, J

MAY 31, 2022

BETWEEN

PETER MAINA MWANIKI PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

J.W.O OLOO, OGW 2ND RESPONDENT

ELIZABETH JUMA KADULI (D.P.O KAJIADO) 3RD RESPONDENT

HENRY N.OMOSA (DHRM) 4TH RESPONDENT

**MINISTRY OF INTERIOR & CO-ORDINATION OF NATIONAL
GOVERNMENT 5TH RESPONDENT**

S.M. MAHG'LE 6TH RESPONDENT

M.W. NDEGWA 7TH RESPONDENT

JOSEPHTA MUKOMBE 8TH RESPONDENT

PUBLIC SERVICE COMMISSION 9TH RESPONDENT

ALICE A. OTWALA (CBS) 10TH RESPONDENT

PHILLIP NTABO 11TH RESPONDENT

PAMELA MASESE 12TH RESPONDENT

AUTHORISED OFFICER 13TH RESPONDENT

**DEPARTMENTAL HUMAN RESOURCE MANAGEMENT ADVISORY
COMMITTEE 14TH RESPONDENT**

IN CHARGE OF SALARIES 15TH RESPONDENT



AMELIA J.CHESYINA	16 TH RESPONDENT
WYCLIFFE ODUKENYA	17 TH RESPONDENT
LORAIE SHITUBI	18 TH RESPONDENT
MBAU, DIRECTOR PROBATION	19 TH RESPONDENT
ZEINAB INTERIOR	20 TH RESPONDENT
W.F.O AMOLO (DHRM)	21 ST RESPONDENT

RULING

1. This brief is in relation to the 1st, 5th, 9th, 16th, 17th and 18th respondents' preliminary objection dated 10th February 2021 to the petition dated 16th September 2020 on the grounds that:
 - i. The petitioner's claim is a non-starter and bad in law as the issues have been litigated and determined on merit by a Court of competent jurisdiction in the ruling delivered on 22nd December 2020 in Employment Cause No.2311 of 2014(also referenced as JR E012 of 2020 Peter Mwaniki v Ministry Interior and Co-ordination of National Government & 8 others.)
 - ii. The 16th, 17th and 18th respondents are state counsels and the cause of action against them arises from their official capacity as subordinates of the Attorney General. They by dint of Section 8 of the Office of the Attorney General Act No.49 of 2012 enjoy personal protection from liability in respect of any proceedings in a court of law or in the course of discharging of the functions of the Attorney General under *the Constitution* and the said Act. On that premise the 16th, 17th and 18th respondents ought to be struck out.
 - iii. Without prejudice by virtue of the provisions of Article 162(2)(a) of *the Constitution* as read together with Section 12 of the *Employment and Labour Relations Court Act* No.20 of 2011,this is a matter that should be entertained by the Employment and Labour Relations Court and not the Constitutional and Human Rights Court. In this instance, this Court lacks jurisdiction.
 - iv. By virtue of the grounds set out, the present proceeding is a classic case of blatant abuse of the court's processes and therefore ought to be dismissed.
2. The petitioner filed his response dated 18th October 2021 to the respondents' preliminary objection. In reply to the first ground, he asserts that the ground raised is false and the respondents' way of misleading the Court contrary to Article 22, 48 and 50 of *the Constitution*. He adds that a reading of the case alluded to ELRC No.2311/2014 discloses that the matter dealt strictly with labour issues while the present petition deals with constitution and human rights issues. Moreover he states that the suit ELRC No.2311/2014 had 9 respondents while the instant petition has 21 respondents an indication that the cases are different.
3. He deposes further that some of the violations of rights addressed in the instant petition were violated during the continuance of the ELRC No.2311/2014 suit. He states that he could not therefore raise the alleged violations as they had not yet been committed. He additionally avers that all the prayers



sought in ELRC No.2311/2014 were granted except aggravated damages. He informs that one of the prayers was his reinstatement which the respondents failed to adhere to.

4. Moving on to the second ground, the petitioner avers that the stated position is not true. This is since the very Section relied on by State Counsel for immunity from personal liability, informs that this is so as long as the officer acted in good faith while carrying out the functions, powers and duties. He states that the State Counsel's action is geared toward shielding her clients' from legal action which is a criminal offence. It is his argument as such that the State Counsel has not approached the Court with clean hands.
5. On the ground of lack of jurisdiction, the petitioner deposes that this Court has jurisdiction to hear matters relating to constitution and human rights as enshrined in Articles 22 and 23 of *the Constitution*. In view of this, he contends that the respondent's 4th ground is insensitive to the Bill of rights. He says so because the respondents' action of stopping his salary was contrary to Article 2 of *the Constitution*. In doing so he says that they allocated themselves authority not sanctioned by *the Constitution*.
6. In conclusion, he deposes that the respondents have never put forth any reason as to why his rights under Articles 27, 28, 41, 43, 47, 48 and 50 of *the Constitution* were violated. He notes that Articles 232, 234 and 236 protect civil servants from being abused for their seniors. In view of the foregoing the petitioner urges this Court to dismiss the preliminary objection with costs.

The Petitioner's submissions

7. The petitioner did not file any substantive written submissions however relied on his response dated 18th October 2021 to the respondents' preliminary objection.

The 1st, 5th, 9th, 16th, 17th and 18th Respondents' submissions

8. State Counsel Betty Mwasao on behalf of the 1st, 5th, 9th, 16th, 17th and 18th respondents' filed written submissions dated 7th December 2021 in support of their preliminary objection. Counsel submits that the issues for determination are:
 - i. Whether the petition is res judicata; and
 - ii. Whether this Honourable Court has jurisdiction to hear the petition.
9. Counsel on the first issue submits that according to Section 7 of the *Civil Procedure Act*, once a court in exercise of its jurisdiction delivers a judgement which is final and conclusive, the cause of action and issues decided as a result become res judicata. In this regard Counsel submits that the petitioner in paragraph 19 of his petition avers that following the stoppage of his salary and dismissal from work, he filed cause ELRC No.2311/2014. This matter was heard and judgement delivered on 30th September 2019. Among the reliefs sought, Counsel informs was compensation for salary and loss and reinstatement. She submits that the petitioner in the suit was awarded statutory compensation award of sum total Ksh.902, 440.
10. In view of that, she submits that it is clear that the instant petition's facts and prayers arise from the same cause of action that was already determined by a court of competent jurisdiction in the cause ELRC No.2311/2014. It is on this premise she states that the petition is res judicata and as such should be dismissed.
11. Counsel submits furthermore that the petitioner went on to file a judicial review case under the Employment Court referenced JR E012 of 2020 Peter Mwaniki v Ministry Interior and Co-ordination of National Government & 8 others seeking similar prayers as those in the instant petition. Counsel



states that this matter was dismissed by the Court owing to the Court of Appeal decision in *Gerald Kitbu Mchanje v Catherine Muthomi Ngare & another* (2020)eKLR that litigation must come to an end. Additional reliance was placed on the case of *Satya Bhama Gandhi v Director of Public Prosecutions & 3 others* (2018) eKLR. Counsel argues that the instant petition is an abuse of the Court process and ought to be dismissed with costs to the respondents.

12. Moving on to the second issue, Counsel submits that the prayers sought in the instant petition are employment in nature. Considering this that matter ought to be determined by the Employment and Labour Relations Court in line with Article 162(2)(b) of *the Constitution* and the *Employment and Labour Relations Court Act*, No.20 of 2011.
13. In light of this, Counsel submits that the Employment and Labour Relations Court being of equal status with the High Court, has jurisdiction to determine the question concerning the violation of *the Constitution*. In support Counsel cited the Court of Appeal case of *Daniel N. Mugendi v Kenyatta University & 3 others* (2013) eKLR where it was held that the Industrial Court can determine industrial and labour relations matters alongside claims of fundamental rights ancillary and incident to those matters.
14. Owing to this, Counsel submits that since jurisdiction flows from *the Constitution* or a Statute, a Court cannot arrogate itself jurisdiction exceeding what is conferred by law. As such she contends that this Court lacks jurisdiction and should down its tools.

Analysis And Determination

15. Having considered the pleadings and submissions of the parties herein, the issue that arises for determination is:

Whether the preliminary objection dated 10th February 2021 is merited.

16. The threshold of a preliminary objection was set out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 as follows:

“...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.”

17. The Court went further to note that:-

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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.

18. Likewise, the Court in the case *Oraro vs. Mbaja* [2005] 1 KLR on the nature of preliminary objections observed that:-

“A preliminary objection is now well identified 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 process of evidence. Any assertion which claims to be a preliminary objection and 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 objection 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.”

19. The preliminary objection in this matter is founded on the notion that the instant petition violates the doctrine of res judicata and also within the special courts’ jurisdiction. These two grounds do not bear factual aspects calling for proof by the parties. Considering this it is apparent that the two grounds are on the law and so have met the threshold of a pure point of law. In effect, the preliminary objection if successful is capable of disposing of the whole matter. The question that evidently follows this conclusion is whether the petition invokes the two legal principles with regard to this Court’s jurisdiction to entertain the matter.

20. The Supreme Court addressing its mind on the issue of jurisdiction in the case of Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & others (2012) eKLR opined as follows:-

“ A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

21. To begin with, the 1st, 5th, 9th, 16th, 17th and 18th respondents’ argue that the nature of the petition before this Court falls within the jurisdiction of the special courts under Article 162 of the Constitution which have the status of the High Court to hear and determine matters. This Article provides as follows:-

- (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).
- (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
 - (a) employment and labour relations; and
 - (b) the environment and the use and occupation of, and title to, land.
- (3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).



22. To give effect to this Article, the Parliament under the Employment and *Labour Relations Act* under Section 12 defines the jurisdiction of the Court as:-

- (1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of *the Constitution* and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—
 - (a) disputes relating to or arising out of employment between an employer and an employee;
 - (b) disputes between an employer and a trade union;
 - (c) disputes between an employers' organisation and a trade union's organisation;
 - (d) disputes between trade unions;
 - (e) disputes between employer organisations;
 - (f) disputes between an employers' organisation and a trade union;
 - (g) disputes between a trade union and a member thereof;
 - (h) disputes between an employer's organisation or a federation and a member thereof;
 - (i) disputes concerning the registration and election of trade union officials; and
 - (j) disputes relating to the registration and enforcement of collective agreements.

23. It is clear that the High Court has wide jurisdiction to entertain matters including questions with relating to *the Constitution* and the Bill of Rights under Article 165(3) (d) of *the Constitution*. However it is also evident that this Article limits the High Court jurisdiction under Article 165(5) as follows:

The High Court shall not have jurisdiction in respect of matters-

- (a) Reserved for the exclusive jurisdiction of the Supreme Court Under this Constitution; or
- (b) Falling within the jurisdiction of the Courts contemplated in Article 162(2)

24. The Court of Appeal in the case of *Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 others* [2017] eKLR while interpreting Article 162 of *the Constitution* opined as follows:

“70. Contrast the expression “reserved for the exclusive jurisdiction” with the expression “falling within the jurisdiction”. It is a pointer, in our view, that it was never intended that disputes relating to employment and labour relations and the environment and the use and occupation of, and title to, land would be “reserved for the exclusive jurisdiction” of the specialized courts under Article 162(2). It is also noteworthy that *In Re The Matter of the Interim Independent Electoral Commission* [2011] eKLR, the Supreme Court of Kenya



in construing Article 165(3) of *the Constitution* that confers jurisdiction on the High Court to hear any question respecting the interpretation of *the Constitution* noted that although the High Court was entrusted, under that Article, with the mandate to interpret *the Constitution*, that

“empowerment by itself, however, does not confer upon the High Court an exclusive jurisdiction.”

71. By parity of reasoning, although under Article 162 (2) of *the Constitution* Parliament is mandated to establish courts with the status of the High Court to hear and determine disputes relating to employment and labour relations and environment and the use and occupation of, and title, to land, that in itself does not confer an exclusive jurisdiction to those specialized courts to hear and determine the specified types of cases. However, as already stated, Article 165 (5) is clear that the High Court has no jurisdiction in respect of matters falling within the jurisdiction of the specialized courts. Whereas Parliament is empowered to enact legislation to confer jurisdiction to the Magistrate’s courts to hear and determine disputes stipulated under Article 162 (2) of *the Constitution*, it cannot establish a Superior Court or confer upon a Superior Court jurisdiction to hear employment and labour relations cases and environment and land cases.”

25. Similarly, the Court in the case of *United States International University (Usiu) v Attorney General* [2012] eKLR observed as follows:-

“ 41. Labour and employment rights are part of the Bill of Rights and are protected under Article 41 which is within the province of the Industrial Court. To exclude the jurisdiction of the Industrial Court from dealing with any other rights and fundamental freedoms howsoever arising from the relationships defined in section 12 of the Industrial Court Act, 2011 or to interpret *the Constitution* would lead to a situation where there is parallel jurisdiction between the High Court and the Industrial Court. This would give rise to forum shopping thereby undermining a stable and consistent application of employment and labour law. Litigants and ingenious lawyers would contrive causes of action designed to remove them from the scope of the Industrial Court. Such a situation would lead to diminishing the status of the Industrial Court and recurrence of the situation obtaining before the establishment of the current Industrial Court.

42. Article 19 provides that the Bill of Rights is an integral part of the framework of Kenya’s democratic state and is the framework for social, economic and cultural policies. The necessity of having the Industrial Court deal with matters of fundamental rights and freedoms as part of the jurisdiction to resolve labour disputes is to infuse into employment and labour relations the values and essence of the Bill of Rights. The fact that the content of labour rights protected under Article 41 is reiterated in the *Employment Act*, 2007 and *Labour Relations Act*, 2007 does not create a separate wall of jurisdiction for the High Court and the Industrial Court as contended by Mr Obura. The reiteration of these rights is merely a consequence of Article 19 and recognition



of their universality and indivisibility in application is all spheres of labour and employment law.”

26. Turning over to the issue on the doctrine of res judicata, the principle is provided for under Section 7 of the [Civil Procedure Act](#) which states as follows:-

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 the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

27. The Supreme Court in the case of [Kenya Commercial Bank Limited v. Muiri Coffee Estate Limited & another Motion](#) [2016] eKLR regards the doctrine held as follows:

“(52) Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights...”

28. The Court of Appeal in the case of [Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others](#) [2017] eKLR on the doctrine of res judicata observed as follows:

“...for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

- (a) The suit or issue was directly and substantially in issue in the former suit.
- (b) That former suit was between the same parties or parties under whom they or any of them claim.
- (c) Those parties were litigating under the same title.
- (d) The issue was heard and finally determined in the former suit.
- (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

29. The Court proceeded to note that:-

“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 common-sensical 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 and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”



30. In effect the Court concluded that:-

“The practical effect of the res judicata doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties –because it is the court itself that is debarred by a jurisdictional injunction, from entertaining such suit. That much was stated by this Court in *Ngugi v. Kinyanjui & 3 Others* [1989] KLR 146 when it held (at p147) that;

“3. Section 7 was a mandatory bar from (sic) any fresh trial of a concluded issue and a Judge cannot competently get round that bar by obtaining the consent of the parties to an arbitration of a concluded issue.”

31. Turning over to the facts of this case, it is apparent that the petitioner’s contention with reference to his constitutional rights stems from his employment that commenced on 29th December 2009 and terminated five years later. The constitutional violations in the cited Articles are premised on the respondents’ act of stopping his salary and allowance payments, alleged violation of labour laws by the respondents, the averment that the 3rd respondent fabricated offenses against him and a job transfer which the petitioner says was illegal. Furthermore, the petitioner makes known that in a similar matter, ELRC 2311/2014 judgment was rendered in his favour.

32. A look at the prayers sought in this petition other than a declaration that his constitutional rights were violated divulges that the petitioner seeks reliefs concerning his dismissal from employment, compensation for stopping his salary, compensation for being sent to a hardship area and for the respondents’ to be held accountable for their actions.

33. In this regard, a look at suit ELRC 2311 of 2014 informs that the matters raised herein save for the alleged constitutional violations were the premise of that suit. Likewise, the parties in the former suit are the same as the instant petition save for the added parties.

34. From the evidence placed before this Court the undeniable deduction I come to is that the issues touching on this petition bear their legal implication under the jurisdiction of the Employment and Labour Relations Court under Article 162 of *the Constitution*. I say so because the issues though presented as constitutional issues, find their root in the employment relationship between the petitioner and respondents. Secondly it is similarly irrefutable that the issues raised in the instant petition were also raised in the ELRC 2311 of 2014 as between the same parties and finally determined.

35. The existence of these elements in essence bars this Court from entertaining the instant petition. This is because the Employment and Labour Relations Court is vested with the requisite jurisdiction to entertain all matters including violations of the Bill of Rights with reference to labour relations. Owing to this, this Court is barred from exercising jurisdiction over matters reserved for the special courts. What’s more, the issues as raised violate the doctrine of res judicata which is a complete estoppel against maintenance of this suit in this Court.

36. It is my humble finding in light of the established case on the doctrine of res judicata and the dictates of Article 165(5)(b) of *the Constitution* that this Court does not have the jurisdiction to entertain the instant petition.

37. On this premise the preliminary objection dated 10th February 2021 is merited and should accordingly be allowed and I hereby allow it. The result is that the petition is hereby struck out with costs to the respondents.

Orders accordingly.



DELIVERED VIRTUALLY, SIGNED AND DATED THIS 31ST DAY OF MAY, 2022 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT

