



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

PETITION NO. 343 OF 2018

MARY ARIVIZA MWAMI.....PETITIONER

VERSUS

NAIROBI CITY COUNTY ASSEMBLY SERVICE BOARD.....1ST RESPONDENT

NAIROBI CITY COUNTY ASSEMBLY.....2ND RESPONDENT

CHEGE MWAURA.....3RD RESPONDENT

RULING

1. This ruling addresses two preliminary objections filed by the Nairobi City County Assembly Service Board (the 1st Respondent), the Nairobi City County Assembly (the 2nd Respondent) and Chege Mwaura (the 3rd Respondent).

2. Mary Arivisa Mwami, the Petitioner opposes the two notices of preliminary objection. In the first Preliminary Objection dated 4th March, 2019 the respondents object to the Petitioner's Chamber Summons application dated 28th September, 2018 on the grounds that:-

“(a) the Application and the Petition offend the provisions of Section 6 of the Civil Procedure Act;

(b) the Application and Petition potentially offends the provisions of Section 7 of the Civil Procedure Act;

(c) the Application and the Petition offend the provisions of article 124(3) of the Constitution of Kenya, 2010;

(d) the Application and the Petition offend the provisions of Article 178(2) of the Constitution of Kenya, 2010 as read with Section 9(4) of the County Governments Act, 2012;

(e) the Application and the Petition offend the provisions of article 196(3) of the Constitution of Kenya, 2010 as read with sections 8, 10 and 11 of the County Assembly Powers and Privileges Act, 2017;

(f) the matters raised in the Application and the Petition are inherently unjusticiable for offending the political question doctrine, having been constitutionally entrusted to a political organ of government (see Patrick Ouma Onyango & 12 others v Attorney General & 2 Others [2005] eKLR.)”

3. Through the notice of Preliminary Objection dated 24th June, 2019 the respondents object to the Petitioner's Chamber Summons application dated 17th June, 2019 on the grounds that:-

“(a) The Application offends the provisions of Articles 117(2) and 196(3) of the Constitution as read with Section 10 of the County Assemblies Powers and Privileges Act, 2017.

(b) The substratum of the underlying Petition has been rendered nugatory vide the Employment and Labour Relations Court's (Nairobi) judgment in Petition No. 92 of 2018: Beatrice Elachi v Nairobi City County Assembly Service Board & another.

(c) The Application and underlying Petition do not meet the legal test prescribed in the case of Anarita Karimi Njeru v

(d) The matters raised in the application are inherently non-justiciable.”

4. The Petitioner’s counsel indicated to the Court that the Petitioner relies on her supplementary affidavit sworn on 29th March, 2019 in opposition to the two preliminary objections. In the relevant paragraphs of the said affidavit, the Petitioner avers that the orders sought herein against the 3rd Respondent and one John Nyumu Kamangu are not similar to the orders that were being sought in the Employment and Labour Relations Court case. Further, that the existence of the case before the Employment & Labour Relations Court should not bar her from seeking reliefs from this Court. It is therefore her averment that the provisions of sections 6 and 7 of the Civil Procedure Act are not applicable to her case.

5. On the allegation that the petition interferes with the proceedings of the Nairobi City County Assembly, the Petitioner avers that those proceedings are subject to the rules of the Assembly and the Constitution of Kenya and she is entitled to seek remedy from this Court if the rules and the Constitution are flouted.

6. In the written submissions dated 4th July, 2019 counsel for the respondents condensed the preliminary objections into two limbs, namely that:-

(a) The Court lacks jurisdiction to entertain the application and the underlying petition; and

(b) The proceedings are fatally and incurably defective.

7. On the claim that this Court lacks jurisdiction to entertain the applications and the petition, counsel for the respondents submitted that the substratum of the petition and the applications have been rendered nugatory vide the judgment of the Employment & Labour Relations Court delivered on 7th May, 2019 in **Nairobi ELRC Petition No. 92 of 2018, Beatrice Elachi v the Nairobi City County Assembly Service Board and another**. It is the respondents’ case that among the orders issued in that judgment are:-

(a) an order restraining the 1st Respondent from interfering with the terms of employment of Hon. Beatrice Elachi as the Speaker of the County Assembly;

(b) an order of certiorari quashing the 2nd Respondent’s decision of 6th September, 2018 to impeach Hon. Beatrice Elachi; and

(c) an order of prohibition restraining the 1st and 2nd respondents from carrying out a process to remove Hon. Beatrice Elachi from office without complying with due process.

8. It is the respondents’ case that the reliefs sought by the Petitioner herein revolve around the twin issues of whether Hon. Beatrice Elachi was procedurally removed from the office of the Speaker of Nairobi City County Assembly and whether she is the validly elected Speaker of Nairobi City County Assembly. The respondents submit that these issues have been determined in the judgment of the Employment & Labour Relations Court in favour of Hon. Beatrice Elachi rendering the petition and the applications *res judicata* and ripe for striking out with costs. The respondents have disclosed that they have already preferred an appeal against the said judgment at the Court of Appeal.

9. Counsel for the respondents submit that the Petitioner should have instituted fresh proceedings to ventilate the grievances contained in the applications instead of clutching at a dead petition.

10. On their assertion that the issues raised in the petition and the applications are non-justiciable, counsel for the respondents contend that the election and removal of speakers of legislative assemblies, suspension from legislative assemblies, and re-assignment of members of legislative assemblies to select committees are essentially political acts and processes whose adjudication or determination falls outside the scope of this Court’s jurisdiction.

11. It is counsel’s position that the judicial arm of government lacks the wherewithal to adjudicate political intrigues such as those before the Court. Further, that it is well established that processes of a political nature are inherently non-justiciable under the political doctrine question.

12. Reliance is placed on the decision of the Supreme Court in the case of **Justus Kariuki Mate & another v Martin Nyaga Wambora & another, Supreme Court Petition No. 32 of 2014** and the decision of this Court in **R v National Assembly Committee of Privileges & 2 others ex-parte Ababu Namwamba [2016] eKLR** in urging this Court not to interfere with the internal workings of other arms of government.

13. Still on the jurisdictional challenge, the respondents submit that the applications and the petition are a challenge to the powers, privileges and immunities attaching to the 2nd Respondent and its members. The respondents point out that entertaining the instant proceedings will offend the clear provisions of sections 10 and 11 of the County Assemblies Powers & Privileges Act, 2017 which precludes the Court from questioning the proceedings or decision of a county assembly and confers immunity to words spoken or resolutions made by members in a county assembly.

14. Finally, counsel submitted that the proceedings herein are fatally incompetent and incurably defective having been filed by a person who has no appreciable interest in the matters in controversy. It is the respondents’ case that the Petitioner has not demonstrated how the election of the 3rd Respondent as the Acting Speaker of the 2nd Respondent has contravened or threatened to contravene the cited constitutional

provisions as alleged in the petition.

15. Through the Petitioner's submissions dated 29th June, 2019 counsel urged the Court to dismiss the preliminary objections. The position taken by the Petitioner is that the reliefs sought in the petition are different from those prayed for and issued in the Employment and Labour Relations Court case. The Petitioner submits that the fact that Hon Beatrice Elachi has been reinstated as the Speaker of the 2nd Respondent does not in any way determine the issues raised in her petition which are more concerned with the procedures of the 2nd Respondent.

16. The Petitioner stresses that this Court has jurisdiction to safeguard her constitutional rights whenever the same are threatened and the reliefs she seeks are meant to enforce and protect her rights.

17. Upon consideration of the respondents' notices of preliminary objection, I form the opinion that the two issues for the determination of this Court are:-

(a) Whether the issues raised in the Petitioner's petition and the applications are non-justiciable hence denying this Court jurisdiction; and

(b) Whether the matters raised in the petition are *res judicata* in light of the judgment delivered in Nairobi Employment & Labour Relations Court, Petition No. 92 of 2018, Beatrice Kedeversia Elachi v Nairobi City County Board & another.

18. Discussing the issue of jurisdiction in the case of **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR; Supreme Court Application No 2 of 2012**, the Supreme Court stated that:-

“(68) 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 counsel 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. This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011*. 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.”

19. A perusal of the objections raised by the respondents will show that the issues raised regarding the jurisdiction of this Court can only be determined after full hearing. The respondents cannot be allowed to stop this Court on its tracks on the strength of sections 10 and 11 of the County Assemblies Powers and Privileges Act, 2017 in light of the jurisdiction given to this Court by Article 165(3)(d)(ii) to hear and determine a question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with or in contravention of the Constitution. It is only after a full hearing that the Court can decide whether the issues raised were better left to be decided by the 2nd Respondent. I do not therefore find any merit in the claim by the respondents that this Court does not have jurisdiction.

20. Are the issues raised in the petition and the applications *res judicata*? In the case of **FS v EZ [2019] eKLR; Malindi HCCC No. 22 of 2017**, I discussed the doctrine of *res judicata* as follows:-

“21. The ingredients of the *res judicata* doctrine were stated by the Court of Appeal in the case of the Independent Electoral and Boundaries Commission v Maina Kiai & 5 others [2017] eKLR; Nairobi CA Civil No. 105 of 2017 thus:

“Thus, for the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must 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.”

22. The Court of Appeal proceeded to explain the purpose of 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.”

23. The extensive nature of the doctrine of *res judicata* was discussed by the Court of Appeal of Eastern Africa in Gurbacham v Yowani Ekori [1958] EA 450 wherein a passage from the Judgement of the Vice-Chancellor in *Henderson v Henderson* (1), 67 E.R. 313 is reproduced as follows:

“In trying this question I believe I state the rule of the court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time.”

24. The law as gleaned from the cited cases is that a party who has had his day against an opponent before a court of competent jurisdiction in respect of a certain dispute should not be allowed to reopen the contest. The *res judicata* principle is meant to ensure that only matters that have not been addressed by the courts should be entertained.”

21. In her petition dated 28th September, 2018 the Petitioner prays for orders as follows:-

“(A) A declaration be made that procedure followed by the 2nd Respondent, Nairobi City County Assembly sitting as a whole house committee and purporting to appoint Chege Mwaura to the position of Acting Speaker on 25th September 2018 constituted a breach of the Petitioner’s constitutional rights.

(B) A declaration that the Respondents decision made on 25th September 2018 electing Chege Mwaura to the position of Acting Speaker is unconstitutional and therefore Null and Void.

(C) A declaration that the Honourable John Nyumu Kamangu had no authority to preside over the meeting of Nairobi City County Assembly on 25th September 2018.

(E) The order of Certiorari to call up into the High Court and quash the proceedings and decision therein made by the Respondents leading to the appointment of Chege Mwaura to the position of Acting Speaker of Nairobi City County Assembly.

(F) There be an order of prohibition directed to Chege Mwaura and or his nominated representative barring him from assuming the functions of the Speaker of Nairobi City County Assembly.

(G) Any further order or writ as this Honourable Court deems fit, just and appropriate to grant.

(H) Costs of this suit.”

22. One of the several orders sought before the Employment and Labour Relations Court in **Petition No. 92 of 2018** was an order prohibiting the appointment of an Acting Speaker in place of Hon. Beatrice Kedevesia Elachi or a declaration that such an appointment was unconstitutional null and void. Another prayer was for an order of Certiorari to bring into the Court and quash the decision of the Nairobi County Assembly impeaching the Speaker. Whereas the orders sought in the Employment and Labour Relations Court petition were related to the events that took place on 6th September, 2018 and whereas this petition concern events that took place on 25th September, 2018, the main subject of all those events is the impeachment of Hon. Beatrice Kadeveresia Elachi, the Speaker of the Nairobi City County Assembly. The moment the Employment and Labour Relations Court allowed her petition and quashed her impeachment, all the events, including the election of an Acting Speaker, that occurred as a consequence of the impeachment were quashed by that judgment.

23. All the prayers the Petitioner seeks in this petition were granted by the Employment and Labour Relations Court. There is therefore nothing more to litigate in this petition. As correctly pointed out by counsel for the respondents, any orders sought by the Petitioner in her applications which are not in consonance with the prayers in the petition cannot be granted through this petition.

24. This matter therefore meets the conditions of *res judicata* in that the issues raised herein were directly and substantially in issue in **ELRC Petition No. 92 of 2018** and the issues were heard and finally determined in the said petition by a Court of competent jurisdiction.

25. There is the fact that the Petitioner herein was not named as a party in the ELRC petition. It is however noted that in her pleadings she clearly identified herself as a nominated member of Nairobi City County Assembly representing Gender Equality. That being so, she is a member of the 2nd Respondent in **ELRC Petition No. 92 of 2018**. She was by virtue of that membership a party to that case and if she wanted to present her individual opinion she ought to have applied to join those proceedings as an interested party. I therefore find that the Petitioner herein was a party to **ELRC Petition No. 92 of 2018** and so were the respondents herein.

26. In the circumstances, this petition meets all the ingredients of the doctrine of *res judicata*. From what I have stated above, it follows that

the respondents' preliminary objections succeed on the ground that the Petitioner's petition and applications are *res judicata*. The petition, pleadings and all the proceedings in the petition are therefore struck out for being *res judicata* with costs to the respondents. Those are the orders of the Court.

Dated, signed and delivered this 25th day of July, 2019

W. Korir

Judge of the High Court