



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION**  
**PETITION NO. 14 OF 2017**

**IN THE MATTER OF ARTICLES 3, 10, 73, 75, 76, 227 AND 232 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF LEADERSHIP AND INTEGRITY ACT NUMBER 19 OF 2012**

**AND**

**IN THE MATTER OF THE PUBLIC SERVICE (VALUES AND PRINCIPLES) ACT, 2015**

**BETWEEN**

**MARGARET WANJIRU KIIRU.....PETITIONER**

**VERSUS**

**SUSAN WAKARURA KIIHIKA.....1<sup>ST</sup> RESPONDENT**

**JOSEPH MALINDA.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The petition before me seeks orders that:-

- (a) A declaration that the conduct of the 1<sup>st</sup> respondent in allowing debate and passing of a motion contravened section 25 of the County Government Act, is contrary to the Leadership and Integrity Act and Articles 10 and 73 of the Constitution.
- (b) A declaration that the conduct of the 1<sup>st</sup> respondent in allowing debate leading to the appropriation of a sum of Kshs.370,000,000/- as car loan funds and the mortgage funds contravenes the County Government Act, Leadership and Integrity Act and Articles 10 and 73 of the Constitution.
- (c) A declaration that the conduct of the 1<sup>st</sup> and 2<sup>nd</sup> respondent being members of the Nakuru County Assembly Service Board in single sourcing of Family Bank to administer and disburse the car loan and the mortgage fund contravenes the County Government Act, Leadership and Integrity Act and Articles 10,73 and 227 of the Constitution.
- (d) A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> respondents should take personal responsibility for the unlawful and unconstitutional disbursement of the car loan fund and the mortgage fund as provided for under the Leadership and Integrity Act and the Public Service Values and Principles Act.
- (e) A declaration that the respondents are unfit to hold public office either permanently or for a specific period as the court may deem just.

2. At the time of filing the petition, the petitioner was a member of the County Assembly of Nakuru representing the youth. The 1<sup>st</sup> respondent was the speaker while the 2<sup>nd</sup> respondent was the Clerk to the County Assembly.

3. The petition is supported by the affidavit of the petitioner sworn on 17<sup>th</sup> April 2017. The factual basis of the Constitution according to the petitioner is that in the period leading to March 2014, the 1<sup>st</sup> respondent received a Bill, Nakuru County Assembly Car Loan Members Scheme Fund Regulations 2014 and Nakuru County Assembly Mortgage Members Scheme Fund Regulations 2014 which two bills she passed on to the County Assembly for debate. It is the petitioner's case that the 1<sup>st</sup> respondent's action of permitting the debate and passing of the regulations whose object was to benefit the current assembly and the subsequent implementation of the regulations was contrary to the Constitution and the County Government Act. It is also the petitioner's case that the 2<sup>nd</sup> respondent being the accounting officer of the County Assembly acted in complicity with the 1<sup>st</sup> respondent and single sourced the services of Family Bank to administer and disburse the Car Loan Fund and the mortgage fund.

4. According to the petitioner, the 1<sup>st</sup> and 2<sup>nd</sup> respondents' actions were in violation of Article 73 of the Constitution, the County Government Act, the Public Procurement and Disposal Act and Sections 9 and 10 of the Leadership and Integrity Act. Further the petitioner contends that the actions and omissions of the 1<sup>st</sup> and 2<sup>nd</sup> respondent's occasioned loss of public funds in excess of 370,000,000/-. It is his contention that the functions of both offices are to be exercised in strict compliance with the Constitution, the County Government Act and the Standing orders.

5. The respondents filed a notice of preliminary objection dated 10<sup>th</sup> May 2017. The objection was based on 3 grounds namely that the petition was *res judicata* Nakuru HC Petition No. 27 of 2015; the petition did not set out with a reasonable degree of precision the provisions of the Constitution alleged to have been violated; and; Article 185(1) of the Constitution vests the legislative authority in the County Assembly hence no basis for suing the respondents in their personal capacity.

6. The respondents also filed a replying affidavit sworn by **Joseph M. Malinda** the 2<sup>nd</sup> respondent herein on 10<sup>th</sup> November 2017. The gist of the respondent's averments is that the present petition was *res judicata* as the issues raised in were the subject of **Nakuru HC Petition No. 27 of 2015** already adjudicated upon by the court. Further, the respondents have deposed that the actions attributed to them were actions undertaken by the County Assembly. It is the respondents' case that the Nakuru County Assembly passed regulations known as the County Assembly of Nakuru Car Loan (Members) Scheme Fund and the County Assembly of Nakuru Mortgage (Members) Scheme Fund Regulations 2014, following communication of the remuneration and benefits for members by the Salaries and Remuneration Commission. They have annexed circulars dated 15<sup>th</sup> November 2013 referenced SRC/TS/C GOVT/3/16 and SRC /TC/WB/3/14. The respondents further deposed that following the operationalization of the two schemes, funds were disbursed to the members including the petitioner. It is the respondent's case that no public funds were lost.

7. Parties consented to prosecute both the preliminary objection and petition together and by way of written submissions which they highlighted. I have considered the petition, responses, submissions and supporting authorities as filed by the parties. Two issues emerge for my determination. The first issue is whether the present petition was *re judicata* **Nakuru HC Petition No. 27 of 2015, Margaret Wanjiru Kiiru Vs. The Attorney General, the Nakuru County Assembly Service Board, the County Government of Nakuru and Family Bank Limited** (hereinafter 1<sup>st</sup> petition). The second issue is whether the orders sought are merited.

#### Whether the petition is *res judicata*

8. The respondents' position is that the petition was *res judicata*. They submit that by filing the petition the petitioner was seeking to obtain orders which were not sought or if sought were not granted in Petition No. 27 of 2015. They urge the court not to allow litigation in installments and further argue that litigation must come to an end. They cite **ET V. Attorney General [2012] eKLR; Njangu V. Wambugu & Another Nairobi HCC No. 2340/1991 [UR] and Booth Irrigation Vs. Mombasa Water Products Limited (Booth Irrigation No. 1) Nairobi HC Misc. Application No. 1052 of 2004**. They also cite **Africa Oil Turkana Limited (previously known as Turkana Drilling Consortium Ltd) & 3 others Vs. Permanent Secretary, Ministry of Energy & 17 others** to support the proposition that parties cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action in a subsequent suit.

9. The petitioner disputes that the petition was *res judicata*. Her argument is that the general principles do not apply to Constitutional applications and should only apply 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. They rely on **Tassia Plot Owners Association Vs. Managing Trustee of the National Social Security Fund & Another [2015] eKLR**.

10. The doctrine of *res judicata* is provided for under **Section 7 of the Civil Procedure Act**. It states that:

**“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim litigating under the same title in a court competent to try such subsequent suit or issue in which such issue has been subsequently raised or has been heard and finally decided by such court”**

11. In **Africa Oil Turkana Ltd (Supra)**, the Court of appeal citing its earlier decision in **John Florence Maritime Services Ltd. & Another Vs. Cabinet Secretary for Transport and Infrastructure & 3 others**, stated with respect with applicability of the doctrine of *res judicata* in constitutional claims thus:-

**“The rationale behind *res judicata* is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. *Res judicata* ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without *res judicata*, the very essence of the rule of law would be in danger of unraveling uncontrollably. In a nutshell, *res judicata* being a fundamental principle of law**

**may be raised as a valid defence. It is a doctrine of general application and it matters not whether the proceedings in which it is raised are constitutional in nature. The general consensus therefore remains that res judicata being a fundamental principle of law that relates to the jurisdiction of the court, may be raised as a valid defence to a constitutional claim even on the basis of the court's inherent power to prevent abuse of process...** (Emphasis mine)

12. It is clear from the above exposition by the court of appeal that the doctrine of *res judicata* is applicable to constitutional petitions; the only caution being that it must be applied only in the clearest of cases.

13. The parties to the 1<sup>st</sup> petition (No. 27/2015) were **Margaret Wanjiru Kiiru Vs. The Attorney General, Nakuru County Assembly Service Board**. The County Government of Nakuru and Family bank Limited. The orders sought in that petition were *inter alia* an order of mandamus to compel the clerk (who is now 2<sup>nd</sup> respondent) to prioritize the presentation and debate against the Speaker (who is now 1<sup>st</sup> respondent); An order to impugn the administration of the car loan and mortgage schemes by Family Bank as illegal, contrary to the regulations and in contravention of national values of good governance, integrity, accountability and transparency; and, an injunction to restrain Family Bank from administering the car loan and mortgage schemes.

14. In a reasoned ruling dated 21<sup>st</sup> March, 2017, the court (**Odero J.**) denied the prayer for an order of mandamus to compel the clerk to present the motion for impeachment of the speaker within such time as the court may deem just. The court however found the process of appointment of Family Bank to administer the schemes to be contrary to regulation 7 of the Public Procurement and Disposal (County Governments) Regulations 2013 and consequently issued an injunction restraining the 5<sup>th</sup> respondent from administering the Fund.

15. The parties in the present petition are Margaret Wanjiru Kiiru (petitioner) and Susan Wakarura Kihika (1s respondent) and Joseph Malinda (2<sup>nd</sup> respondent). The orders sought are as stated at paragraph 1 of this Ruling. In summary they are a declaration that the respondents who were members of the Nakuru County Assembly Service Board contravened the County Government Act, Leadership and Integrity Act and Articles 10, 73 and 227 of the Constitution in single sourcing Family Bank. A declaration that they were not fit to hold public office and a further declaration that they should take personal responsibility for the unlawful disbursement of the Funds.

16. From the above, it is clear that **Margaret Wanjiru Kiiru** is the petitioner in both petitions. The 1<sup>st</sup> respondent in the present petition was a member of the 2<sup>nd</sup> respondent and 3<sup>rd</sup> respondent by virtue of her position was the Speaker of the Nakuru County Assembly. The 2<sup>nd</sup> respondent in the present petition was the 4<sup>th</sup> respondent in the 1<sup>st</sup> petition.

17. The subject matter in the 1<sup>st</sup> petition was impeachment of the Speaker (now 1<sup>st</sup> respondent) the order sought was one of mandamus to compel the clerk (then 4<sup>th</sup> respondent and now 2<sup>nd</sup> respondent) to prioritize and present a motion for her impeachment. In the present petition, the subject matter is the conduct of the 1<sup>st</sup> and 2<sup>nd</sup> respondents whom the petitioner alleges have fallen short of Articles 10,73, and 227 of the Constitution and the Leadership and Integrity Act. It is the prayer of the petitioner that the two be declared unfit to hold public office and be so barred permanently or for a specified period.

18. It is clear from the above that the parties in the two petitions though not identical have the common denominator of the 1<sup>st</sup> and 2<sup>nd</sup> respondents in the 2<sup>nd</sup> petition. The only difference being that in the present petition they are sued in their individual capacities. On the orders sought, it is clear that the order in respect of an impeachment motion was aimed at removing the 1<sup>st</sup> respondent from office while the order sought in 2<sup>nd</sup> petition is to ensure that she does not hold public office. To my mind, though the orders are coached differently they deal with the same subject matter which is either removal from public office or being barred from assuming public office. The prayer in the 2<sup>nd</sup> petition is in my view an off shoot of the prayer in the first petition. It is also a prayer that arises from the order granted by the court in the 1<sup>st</sup> petition to wit that the single sourcing of Family Bank was contrary to the law.

19. From the above, the question I must ask is: could the petitioner have foreseen the need to include a prayer for declaration that the respondents be declared unfit to hold public office in the event that the court impugned the procurement process? From the facts in the petition it appears that they could have done so but did not. I say so because the central issue behind both petitions was the administration of the car loan and mortgage schemes which the court (**Odero J**) sitting as a court of competent and concurrent jurisdiction exhaustively dealt with in the 1<sup>st</sup> petition and made a decision.

20. It is clear from the pleadings that the petitioner had knowledge of all the facts surrounding the impugned actions of the 1<sup>st</sup> and 2<sup>nd</sup> respondents at the time of the 1<sup>st</sup> petition and ought to have sought all the relevant prayers. I am fortified in this by the holding in **Theresa Costabir Vs. Alka Roshanal Harbanslal Sharma & Another [2015] eKLR** where the court stated that:

**“Res judicata envisions not just issues that were directly before the court previously but also covers facts or issues which as aptly stated by Severell L.J. in Greenhalgh Vs. Mallard [1947] 2 ALL ER 255 are: “so clearly part of the subject matter in the litigation and so clearly could have been raised that it would be an abuse of the process of court to allow a new proceedings to be started in respect of them.”**

21. I agree with the holding in **Omondi Vs. National Bank of Kenya Limited and others [2001] I EA, 177** cited with approval by the court of appeal in **Africa Oil Turkana Ltd (supra)** that “res judicata would apply not only to situations, where a specific matter between the same persons litigating in the same capacity as previously been determined by a court of competent jurisdiction but also to situations where either matters which could have been brought in were not brought in or parties who could have been enjoined were not enjoined. Parties cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action in a subsequent suit. They are bound to bring all their cases at once. They are forbidden from litigating in installments” (emphasis is mine)

22. The analysis above has shown that both the parties and the subject matter in the 1<sup>st</sup> and present petitions have clear overlaps. The

petitioner is the same in both petitions. The respondents were sued in their official capacities in the 1<sup>st</sup> petition but are sued in their private capacities in the 2<sup>nd</sup> petition. The subject matter though differently couched was an offshoot of the 1<sup>st</sup> petition. It is my finding that the parties ought to have sought a review in the 1<sup>st</sup> petition or proceeded on appeal. It follows that I find that the present petition is *res judicata* Petition No. 27 of 2015 adjudicated upon by a court of competent and concurrent jurisdiction. Having so found, I must down my tools and refrain from any further consideration of the present petition.

23. The present petition is thus dismissed. This being public interest litigation, I decline to award costs.

Orders accordingly.

Judgment signed this ..... day of July, 2018.

**R. LAGAT-KORIR**

**JUDGE**

**Judgment dated, delivered and signed at Nakuru this 26<sup>th</sup> Day of September, 2018.**

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**JANET MULWA**

**JUDGE**

**In the presence of:**

..... Court clerk

..... For the Applicant

..... For the Respondent