REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.493 OF 2014

BETWEEN

TOM LUUSA MUNYASYA……1ST PETITIONER

JOHN KENNEDY MUTETI……2ND PETITIONER

AND

GOVERNOR MAKUENI COUNTY……....1ST RESPONDENT

COUNTY GOVERNMENT OF MAKUENI……..……2ND RESPONDENT

RULING ON A PRELIMINARY OBJECTION

1. The objection by the Respondents to the hearing of the Petition dated 30th September 2014 is premised on the singular argument that it is barred by the doctrine of *res judicata* in view of the fact that the present dispute was also the subject of **Industrial Cause No.103/2014** which was struck out by Rika, J on 17th September 2014. The fact of striking out of that Cause is undenied and in addressing the objection, I must begin by addressing the issues raised in it and later juxtaposing those issues with the ones raised in the present Petition.

2. The matters in contest in the Industrial Court Cause, in a nutshell, were whether the termination of the 1st Petitioner's services by the 1st Respondent was lawful and whether the latter should be compelled to rescind the termination aforesaid and lastly, whether the Petitioner should be paid what was termed, **"service pay",** and damages for unlawful termination plus costs thereof.

3. It is agreed that no hearing was conducted to resolve the above issues on their merits by Rika, J because his Ruling of 17th September 2014 was limited to the issue whether the Industrial Court (now the Employment and Labour Relations Court) *inter-alia* had the jurisdiction to determine them. In his Ruling, Rika J stated that the specific issues he was required to determine in the context of the Preliminary Objection raised by the Respondents in that matter were the following (set out verbatim);

> ***"(a) Do County Governors have the prerogative to hire and fire members of the County Executive Committee, in the same way the President at the National level has the prerogative to hire and fire Cabinet Secretaries and Principal Secretaries?***

(b) Is the Employment Act, 2007 applicable in determining the terms and conditions of Employment of Members of the County Executive Committee?

(c) Is the County Government Act, 2012 on the firing of Members of the County Executive Committee inconsistent with the Presidential System?

(d) Does the Industrial Court have jurisdiction to hear and determine this dispute?"

4. The learned judge in a very detailed and well considered Ruling, then held *inter-alia* as follows;

"The jurisdiction of the Industrial Court in interpreting the Law and the Constitution in all matters touching on employment was reaffirmed in the High Court Case of United States International University [USIU] vs the Attorney General [2013] eKLR and the Court of Appeal at Nairobi Appeal No.6 of 2012 Prof. Daniel Mugendi vs Kenyatta University and 3 Others. There is no doubt in the mind of the Court that it has jurisdiction in ruling on the constitutional consistency of the provisions of the County Governments Act 2012, relating to the removal of the County Executive Committee Members. The Industrial Court is created under the Industrial Court Act 2011, pursuant to Article 162[2] of the Constitution, and has the status of the High Court. Jurisdiction flows from this constitutional fountain, and from Section 12 of the Industrial Court Act, as well as Section 87[2] of the Employment Act, 2007. The Court has the full power to adjudicate on constitutionality of legislation which touches on labour and employment disputes."

He went to state that;

"The second question is whether there would be anything left for trial, if the Court finds the Governor is not limited by the Employment Act 2007, and exercised his prerogative appropriately, in removing the two Members of his Cabinet. The Court is satisfied the Claimants were removed from Office in accordance with the Law and the Constitution, which creates a pure Presidential System. The Employment Act, 2007 which grants Employees notice, notice pay, service pay, reinstatement or compensation such as are sought by the Claimants, a month other employment rights, has no application to the Claimants. By reason of politics and public policy, the President and County Governor should not be, and are not bound to employ Members of their Cabinets, otherwise than at pleasure. Although these Employees are not 'status' Employees, there is a strong reason to view them as working under special contracts, contracts which carry in them an implied term, that the Officers are dismissible at any time, at the will of the Crown. The President and the Governor exercise their roles as popularly elected CEOs. They exercise a sovereign power which belongs to the People under Article 1 of the Constitution, as submitted by the Claimants…."

He then contextualized his findings in the following terms;

"Whether looked at from the standpoint of the law, or the contract, the relationship between the Claimants and their Governor, Professor Kivutha Kibwana, was terminable through the prerogative of the Governor, without assigning reason, and without recourse for the Claimants to the Employment Act, 2007. The records indicates the Governor did not in fact, act capriciously, if due process required he does not, having investigated allegations against the Claimants, and given specific grounds for termination. This process of investigation and justification of the decision, were not legally necessary in light of the prerogative intended to be enjoyed by the Governor. The Court agrees that the President and the Governor could wake up in the morning and announce dismissal of their entire Members of the Cabinet without exposure to

claims of unfair removal from Office. If they are erratic and irrational in deciding so, they answer to the People, not to the Court. The pure Presidential System does not distinguish between the prerogative of the President and that of the Governor."

He concluded as follows;

"There is nothing left for the Court to adjudicate, and the Court must respectfully down its tools and decline further jurisdiction in this dispute, the Court orders;

(a) The preliminary objection is sustained, to the extent stated in this ruling.

(b) The Employment Act, 2007 has no application in the removal of County Executive Committee members.

(c) The County Governments Act, 2012 is not in material departure from the pure Presidential System.

(d) The Claim is hereby struck out with no order on the costs(sic)."

5. The above background is important because in his submissions, Mr. Kitonga for the Respondents stated that the pleadings before the Industrial Court are the same as those before this Court and therefore, Rika J having struck out the matter before him, the Petitioners were now barred from further action by fact of the doctrine of *res judicata*.

6. Mr. Nyamu also appearing for the Respondents supported Mr. Kitonga's position and added that Rika, J. addressed **Articles 47** and **236** of the **Constitution** as well as **Section 76** of the **County Governments Act** and categorically held that the 1st Petitioner could not invoke **Article 236** in support of his claims. Further, that since Rika J had also categorically found that the Governor of Makueni could hire and fire County Executives at his pleasure, no other Court, including this one, could re-open that issue at all.

7. The Respondents now seek that based on the doctrine of *res judicata*, the Petition before me should be struck out with costs to them, a position not shared by the Petitioners and in submissions, Miss Githogori stated firstly, that the Cause before the Industrial Court was struck out as opposed to it being dismissed meaning that its merits were never considered.

8. Secondly, that in **Francis Kariuki Kinya vs Pheroze Construction Company Ltd, HCCC No.198/2013**, the Court differentiated between **"striking out"** and **"dismissal"** and its conclusion was that striking out was a technical matter as opposed to dismissal which is made on the merits of a case. Further, that since the present Petition was premised on **Articles 22, 41, 47, 73** and **129** of the **Constitution**, all issues raised therein were never addressed by Rika J and his reference to **Article 236** of the **Constitution** was limited to the question of due process and had nothing to do with the merits or otherwise of the 1st Petitioner's claim in general.

9. Lastly, that looking at **Section 7** of the **Civil Procedure Act** where the principle of *res judicata* is explained, it is obvious that since the Industrial Court had no jurisdiction to determine the dispute placed before it, then it could not have been **"the Court of competent jurisdiction"** contemplated by the said section.

10. Mr. Nyandieka also appearing for the Petitioners added that once Rika, J. determined that he had no jurisdiction to address the matters placed before him, then following the decision in **Re: Owners of Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd (1989) KLR 1,** he could not at the same time proceed and determine any of those matters on their merits. In any event, that since the causes of action in both matters are different, then the principle of *res judicata* cannot apply at all. His argument in this

regard was that in the present Petition, the issues raised relate to alleged violations of fundamental rights which issues were never determined by Rika J.

11. On my part, I have elsewhere above reproduced firstly, the issues that Rika J had set out to determine in his Ruling of 17th September 2014. Secondly, I have also reproduced, verbatim, some of his findings but of importance is the fact that he dismissed the cause before him on account of lack of jurisdiction. If that be so, could any material and substantive question be properly addressed by the same Court and even if the learned Judge had done that, is it open for this Court to re-open those issues and/or dismiss the findings made as irrelevant to the matter before me?

12. The answers to those question lie in the very simple fact that the Industrial Court has the same status as this Court by dint of **Article 162(2)** of the **Constitution** which provides as follows

"(1) …

> ***(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."***

13. In addressing the issue of jurisdiction of the Industrial Court to address constitutional questions, in the case of **USIU vs AG [2012]eKLR**, Majanja J. stated thus;

> ***"… I find and hold that the Industrial Court as constituted under the Industrial Court Act, 2011 is a Court with the status of the High Court (and) is competent to interpret the Constitution and enforce matters relating to breach of fundamental rights and freedoms in matters arising from disputes falling within the provisions of Section 12 of the Industrial Court Act, 2011."***

14. I agree with the learned Judge and therefore where the Industrial Court has pronounced itself on any constitutional question in a matter before it, this Court cannot purport to interrogate those findings as if it were sitting on appeal over a matter properly determined by a Court of the same status as itself. In that regard, Rika, J elsewhere above addressed the jurisdiction of the Industrial Court in the context of the matter before him and concluded that the **"Governor could wake up in the morning and announce the dismissal of their entire members of the Cabinet (sic)**, **without exposure to claims of unfair removal from office. If they are erratic and irrational in deciding so, they answer to the people not to the Court".**

15. In a nutshell, the learned Judge addressed one fundamental issue; that the said Court has no jurisdiction to determine whether the 1st Petitioner's services had been unlawfully terminated by the Governor of Makueni and concluded that the Court had no jurisdiction to determine the matter because the 1st Petitioner was neither an employee of the Governor nor of the County Government and his dismissal from office can never be the subject of judicial challenge. That finding binds the Parties and also binds this Court to the extent that it was made by a Court of equal status.

16. In that context and juxtaposing the above issues with those in the present Petition, the Petitioners have sought the following prayers in their Petition;

> ***"(1) A declaration be issued to declare that the Petitioners' removal from office by the 1st Respondent vide a letter dated 28th January, 2014 is in breach of their fundamental rights as encapsulated in Articles 41, 47, 50, 27(1), 27(4) and 236 of the Constitution of Kenya.***
>
> ***(2) A declaration be issued to declare that the removal of the Petitioners from***

the positions of Executive member for I.C.T. and Special programmes and the County Secretary for Makueni County Government is illegal and devoid of legal effect.

(3) A conservatory order does issue prohibiting the Respondents whether by themselves, their agents or servants from undertaking an advertisement, recruiting or making any appointment to fill the positions of the Executive member for I.C.T. and Special Programmes and the County Secretary for Makueni County Government pending determination of this Petition.

(4) An order of Certiorari does issue to remove into the High Court to quash and void the decisions of the 1st Respondent as contained in the 1st Respondent's letter dated 28th January, 2014 removing the County Executive Committee member for ICT and Special Programmes from office.

(5) An order of Certiorari to remove into the High Court to quash and void the decisions of the 1st Respondent as contained in the 1st Respondent's letter dated 28th January, 2014 removing the County Secretary from office.

(6) An order does issue directing the reinstatement of the Petitioners' services both as County Executive committee Member ICT & Special Programmes and County Secretary for Makueni County Government as gazetted in Gazette Notice No.6463 and 6464.

(7) An order does issue for payment of accrued benefits during the Petitioners' illegal stay from office from the date of removal to date of resuming of office.

(8) Further but without prejudice to prayers 3, 4, 5 and 6 above, an order to issue for compensation in damages.

(9) Any further orders, writs, directions as this Honourable Court may consider appropriate.

(10) Costs of the Petition.

(11) Interest on 7 and 8 above."

17. It is obvious that the single thread running through all the above prayers is the fact that the Petitioners are challenging their removal as officers in the County Government of Makueni on Constitutional grounds but clearly their intent is to rescind their termination of employment with the ultimate outcome being their reinstatement to their former positions. In that regard, in the Amended Statement of Claim in the Industrial Court Cause, the Prayers made were as follows;

"(a) An order compelling the 1st Respondent to rescind the said termination.

(b) Service pay.

(c) Damages for unlawful termination.

(d) Costs of the claim"

18. The said prayers therefore revolved around the termination of the present 1st Petitioner's Services as County Secretary and the consequences of any order to rescind the said termination including whether damages are payable to him.

19. In the above regard and taking all the above matters into perspective, when then does *res judicata* apply? In Civil Law, **Section 7** of the **Civil Procedure Act** provides 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 or are 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.***
>
> ***<u>Explanation.(1)</u> – The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.***
>
> ***<u>Explanation.(2)</u> – For the purposes of this Section, the competence of a Court shall be determined irrespective of any provision as to right of appeal from the decision of that Court.***
>
> ***<u>Explanation.(3)</u> – The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.***
>
> ***<u>Explanation.(4)</u> – Any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.***
>
> ***<u>Explanation.(5)</u> – Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this Section, be deemed to have been refused.***
>
> ***<u>Explanation.(6)</u> – 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."***

20. In **<u>Mulla, the Code of Civil procedure, Sixteenth Edition, at page 173</u>**, the essentials of *res judicata* in civil proceedings were summarized as follows;

> ***"(i) The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue either actually (Explanation iii) or constructively (Explanation iv) in the former suit.***
>
> ***(ii) The former suit must have been a suit between the same parties or between parties under whom they or any of them claim. Explanation (vi) is to be read with his condition.***
>
> ***(iii) The parties as aforesaid must have litigated under the same title in the former suit.***
>
> ***(iv) The Court which decided the former suit must have been a Court competent to try the subsequent suit or the suit in which such issue has been subsequently raised. Explanation (ii) is to be read with this condition.***
>
> ***(v) The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the Court in the first suit. Explanation (v) is to be read with this condition."***

21. As can be seen, the same essentials are also in our civil law but what is before me is not a Civil

Petition but a Constitutional Petition. How should invocation of *res judicata* be treated in such Petitions?

22. This Court has in previous decisions stated that *res judicata* is common place in civil suits but Courts should be hesitant to invoke it in constitutional matters more so where allegations of violations of the Bill of Rights are alleged – See **Okiya Omtatah Okoiti & Anor vs The Attorney General & 6 Others [2014] eKLR.**

23. In addition to the above, in **The Law of Fundamental Rights, 4th Edition by Chaudhari and Chaturvedi at** pages 900 to 901, the Authors state that where a constitutional petition has been dismissed on the merits, even if *in limine*, then a subsequent Petition would be barred by *res judicata* but not so where a Petition has been dismissed not on merits but on some preliminary ground nor when the question has been left open. That general statement similarly applies whether or not it is a constitutional petition that is the subject of the plea of *res judicata*.

24. I adopt the above reasoning and would only add that as stated in **Mulla (supra)** at page 175, **"*res judicata* is a rule of procedure and cannot change the law applicable to parties."** Further, that **"a mere expression of opinion on a question not in issue cannot operate as *res judicata*. Rather, a decision on a question involving facts as well as the application of the law to the facts, would be *res judicata*. One cannot dissociate the decision on law from the decision of facts".**

25. I uphold the above principles as general principles applicable in all matters where a party is relitigating a matter that has been finally decided by a Court of competent jurisdiction. Was the Industrial Court such a Court? Rika J. addressed the issue of the jurisdiction of the Industrial Court and concluded that it had no jurisdiction to address the 1st Petitioner's complaints because the issue of termination of the services of a county executive is not one for judicial intervention. That issue, to my mind, is settled and this Court cannot reopen it.

26. Having said so therefore and looking at the four essentials for *res judicata* to apply, a number of facts are apparent viz;

(i) In the Industrial Court Cause, the claimant was only the 1st Petitioner while the present Respondents were also the Respondents. The 2nd Petitioner was not a party to that Cause.

(ii) The Cause of action is the same because the orders sought are grounded largely on the Bill of Rights in the Petition before me, and employment laws, in the Industrial Cause. However, even then, the issues are not different at all and the Prayers in practical terms, as can be seen above, are the same.

(iii) Rika, J. determined that the issues raised by the 1st Petitioner were of both a constitutional and statutory nature and decided that in both instances, the Industrial Court cannot address them for want of jurisdiction.

27. As was held in the **USIU Case (supra)** , the Industrial Court can address constitutional questions within its jurisdiction under **Article 162(2)** of the **Constitution** and elsewhere above, i reproduced Rika J's findings on the constitutionality of the 1st Petitioner's claims. He dismissed them on account of jurisdiction based both on the **Constitution** and the **Employment Act**. This Court is now being asked to assume jurisdiction and determine the constitutionality of the 1st Respondent's actions but this Court cannot reopen those issues since the same have already been determined by a Court of equal status. If the Industrial Court had no jurisdiction, a fresh claim to this Court cannot confer jurisdiction.

28. Lastly therefore, looking at all the Prayers in this Petition, it is obvious to me that all of them were addressed and settled by Rika J and the addition of the 2nd Petitioner as a party to the fresh litigation does not change that fact. The present Petition seeks similar orders in different words and the doctrine of *res judicata* frowns upon such an action. Only an appeal against the orders of Rika J seems a

viable option to the Petitioners.

29. It is obvious that for the above reasons, this matter would not require a determination on its merits as submitted by the Petitioners and the Preliminary Objection is upheld with the consequence that the Petition herein is struck out with no orders as to costs.

30. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 20TH DAY OF FEBRUARY, 2015

ISAAC LENAOLA

JUDGE

In the presence of:

Kariuki – Court clerk

Mr. Musyoka and Mr. Nyandieka for Petitioner

No appearance for Respondents

Order

Ruling duly delivered.

ISAAC LENAOLA

JUDGE