



REPUBLIC OF KENYA



**KENYA LAW**

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**Oichoe v Attorney General (Petition E403 of 2023) [2025] KEHC 2497 (KLR)  
(Constitutional and Human Rights) (20 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2497 (KLR)

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

**PETITION E403 OF 2023**

**LN MUGAMBI, J**

**FEBRUARY 20, 2025**

**BETWEEN**

**HANS OICHOE ..... PETITIONER**

**AND**

**ATTORNEY GENERAL ..... RESPONDENT**

**RULING**

**Introduction**

1. The Petition dated 12<sup>th</sup> October 2023 challenges the constitutionality of Section 82 of the *Proceeds of Crime and Anti-money Laundering Act*.
2. The Petition prays for:
  - a) A declaration that Section 82 of the *Proceeds of Crime and Anti-Money Laundering Act* is unconstitutional and contravenes the provisions of Articles 10, 25 (c) and 50 (1) to the extent that it does not permit a respondent to be heard on whether the grounds in an application under Section 82 meets the standard of reasonableness and limits the rights to a fair trial
  - b) A declaration that Section 82 of the *Proceeds of Crime and Anti-Money Laundering Act* is unconstitutional and contravenes the provisions of Article 160 of the *Constitution* of Kenya 2010 to the extent that it does not grant the Court an opportunity to carry the test of reasonableness of the grounds by considering facts as presented by the Assets Recovery Agency and a Respondent in an application under Section 82 of the Act in order that the Court might independently discharge its constitutional duty of determining disputes between parties on the weight of evidence



- c) A declaration that Section 82 of the *Proceeds of Crime and Anti-Money Laundering Act* is unconstitutional and contravenes the provisions of Article 160 of the *Constitution* of Kenya 2010 to the extent that it does not provide for inter-partes hearing of an application under Section 82 of the *Proceeds of Crime and Anti-Money Laundering Act*, 2009
  - d) Costs be provided for
  - e) Any other and further orders the Court may deem fit and just to award.
3. In response, the Respondent filed a Notice of Preliminary Objection dated 28<sup>th</sup> March 2024, which is the subject of this ruling.

### **The Preliminary Objection**

4. The Respondent raised a preliminary objection is against the Petition on grounds that:
- i. The legality of Section 82 and Part VIII of the *Proceeds of Crime and Anti-money laundering Act* has already been determined by a Court of competent Jurisdiction in Petition No 2 of 2022 formerly petition No E327 OF 2021 Desmond Irungu Kinuthia & Another v The Hon. Attorney General & 2 Others, High Court of Kenya & another Interested Parties as well as in Petition No 4 of 2019 Stephen V. Mangira & Another v The Senior Principal Magistrate, Shanzu & 9 Others.
  - ii. Therefore, the matter is res judicata.

### **Parties' Submissions**

#### **Respondent's Submissions**

5. The Respondent through Principal State Counsel, Rodgers Sekwe filed submissions dated 28<sup>th</sup> March 2024 in support of the contention that the subject matter of the Petition, being the constitutionality of section 82 of *Proceeds of crime and Anti-Money Laundering Act* is res judicata. It was thus the Respondent's position that this Court is bound by the principle of finality as enunciated in *Federal Airports Authority of Nigeria v AIC Ltd* [2022] UKSC 16 and thus has no jurisdiction and must down its tools as was held in *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR.
6. It was the Respondent's submission that the legality of Part VIII of the *Proceeds of Crime and Anti-Money Laundering Act* (POCAMLA) has already been dealt with by the Anti-Corruption and Economic Crimes Division of the High Court in Petition No. 2 of 2022 formerly Petition No. 327 of 2021 Desmond Irungu Kinuthia & Anor v The Hon Attorney General & 2 Others, High Court of Kenya & Interested Parties where the Court held thus:
- “...the *Constitution* has guaranteed citizens the rights set out in Chapter four of the *Constitution*. It has given the Court the jurisdiction to intervene where violations of those rights have been demonstrated. However, the same Constitution has given Constitutional bodies certain mandates among them the power to carry out investigations and institute civil proceedings and it is in public interest that the said bodies be allowed to carry out their mandates without interference. There must be very cogent grounds for the Court to interfere with the exercise of those powers...”
7. Further, reference was also made to Petition No. 4 of 2019; Stephen V Mangira & Anor v the Senior Principal Magistrate, Shanzu & 9 Others.



8. Furthermore, the Respondent argued that it is incumbent upon the Petitioner to prove how the impugned Act has violated its constitutional rights as alleged. Reliance was placed in *Rheir Shipping Co. SA v Edmunds* [1955] IWL 948 at 955 where it was held that:

“No judge likes to decide a case on the burden of proof if he can legitimately avoid having to do so. There are cases, however in which owing to the unsatisfactory state. of the evidence or otherwise, deciding on the burden of proof is the only just cause to take.”

9. Like dependence was placed in *Hellen Wangari Wangechi v Carumera Muthini Gathua* (2005) eKLR. Consequently, Counsel asserted that the Petition lacks merit as the matter is res judicata. As a result, Counsel urged that the matter should be dismissed with costs to the Petitioner.

### **Petitioner’s Submissions**

10. In reaction to the preliminary objection, the petitioner through Rene and Hans LLP filed submissions dated 26<sup>th</sup> April 2024.

11. The Petitioner argued that the Respondent had failed to file a substantive response to the Petition and instead elected to file an objection hence the averments in the Petitioner’s supporting affidavit should be deemed admitted. Reliance was placed in *Peter O. Nyakundi & 68 Others v Principal Secretary, State Department of Planning, Ministry of Devolution and Planning & Another* (2016) eKLR where it was held that:

“As stated earlier, the Respondents did not file a replying affidavit to challenge and/or controvert the sworn averments by the Petitioners that they were victims of the post-election violence. Grounds of opposition which were filed are only deemed to address issues of law. They are general averments and cannot amount to a proper or valid denial of allegations made on oath. (see *Mereka & Co. Advocates Vs Unesco Co. Ltd* 2015 Eklr, *Prof Olaka Onyango & 10 Others Vs Hon Attorney General Constitutional Petition No. 8 Of 2014 And Eliud Nyauma Omwoyo & 2 Others Vs Kenyatta University*). The Respondents have failed to refute specifically the allegations in the Petitioner’s sworn affidavit in support. Failure to file a Replying Affidavit can only mean that those facts are admitted. Therefore, in the absence of any evidence to the contrary I find that the petitioners are indeed victims of the 2007/20078 post-election violence.”

12. Like dependence was placed in *Daniel Kibet Mutai & 9 Others Versus the Attorney General* (2019) eKLR.

13. Turning to the objection, it was argued that in *Petition No. 4 of 2019 Stephen V. Mangira & Another v The Senior Principal Magistrate, Shanzu & 9 Others*, Section 82 of the *Proceeds of Crime and Anti-money Laundering Act* was challenged on a different ground of negating of the constitutional presumption of innocence and the right to remain silent. On the other hand, *Petition No. 2 of 2022 formerly petition No. E327 of 2021 Desmond Irungu Kinuthia & Another v The Attorney General & 2 Others*, High Court of Kenya & Another Interested Party was a preliminary objection on the Court’s jurisdiction.

14. Contrasting the two with the matter herein, Counsel submitted that this Petition is premised on the role of Courts to carry out their constitutional function of conducting a test of reasonableness of the grounds advanced by the Assets Recovery Agency prior to confirmation of the preservation order after the initial ex-parte grant of the preservation orders. Counsel argued thus that it was evident that the issues in the instant Petition are distinct from the issues raised in the cited Petitions.



## Analysis and Determination

15. The is only one issue for determination, which is:

### Whether the present petition is barred by the doctrine of res judicata

16. This doctrine is provided at Section 7 of the [Civil Procedure Act](#), CAP 21 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.

17. The Supreme Court in *Kenya Commercial Bank Limited vs. Muiri Coffee Estate Limited & another* (2016) eKLR underscored the universality of the doctrine of res judicata in all types of cases including constitutional petitions 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...”

18. Further, in *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others* [2024] KEHC 6648 (KLR) the Supreme Court stated:

“54. The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine 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.

55. It emerges that, contrary to the respondent’s argument that this principle is not to stand as a technicality limiting the scope for substantial justice, the relevance of res judicata is not affected by the substantial-justice principle of Article 159 of the [Constitution](#), intended to override technicalities of procedure. Res judicata entails more than procedural technicality, and lies on the plane of a substantive legal concept.

56. The learned authors of Mulla, Code of Civil Procedure, 18th Ed 2012 have observed that the principle of res judicata, as a judicial device on the finality of court decisions, is subject only to the special scenarios of fraud, mistake or lack of jurisdiction (p 293):

The principle of finality or res judicata is a matter of public policy and is one of the pillars on which a judicial system is founded. Once a Judgment becomes conclusive, the matters in issue covered



thereby cannot be reopened unless fraud or mistake or lack of jurisdiction is cited to challenge it directly at a later stage. The principle is rooted to the rationale that issues decided may not be reopened and has little to do with the merit of the decision.”

19. The Court went on to observe that:

“ 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

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

20. The res judicata applies not only identical suits which it precludes from being re-litigated between the same parties or their representatives but also extends to what is described as issue-based estoppel by blocking any issue decided in a former suit from being introduced again by a party or representative of such party in a subsequent suit even if that suit is different. Such party or its representative are estopped from reviving the issue.

21. Justice Lenaola invoked issue-based estoppel in *Okiya Omutatah Vs Communication Authority of Kenya* (2015) eKLR when he held as follows:

“In my view, he sued the officials of the 1st Respondent so as to disguise the proper parties who were in the first Petition and that attempt cannot affect my conclusions above and help him evade the doctrine of res judicata on the main issue of digital migration which is the common thread running through all the Petitions as can be seen above. I shall repeat for emphasis that the said issue cannot be re-opened merely by re-introducing the rights of viewers to migrate and re-packaging it differently as a violation of the provisions of the Constitution and that of the Bill of Rights so as to prevaricate the principle of res judicata.”

22. The Court in *Mumira v Attorney General* [2022] KEHC 271 (KLR) articulated the essence of issue-based estoppel as contradistinguished with cause of action estoppel as follows:

“ 18. In the United Kingdom, res judicata is known as cause of action estoppel or issue estoppel... (A distinction is made between “cause of action estoppel” and “issue estoppel”. In the first case— “the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter.” (Arnold v National Westminster Bank [1991] 2 AC 93 (HL) at 104.) In the second case— “a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue.” (Arnold at 105.)



23. An issue concerning the constitutionality or otherwise of a statutory provision made by a competent Court is a decision in rem and cannot thus be said to be confined to the parties in that particular litigation only.
24. If therefore, the Constitutionality of Section 82 of POCAMLA has already been the subject of previous litigation and a pronouncement has been made about the same, the same issue cannot be the subject of another examination by this Court.
25. This therefore leads me to the question of whether the High Court has addressed the constitutionality of this provision before as alleged by the Respondent.
26. In Petition No. 4 of 2019 Stephen V. Mangira & Another v The Senior Principal Magistrate, Shanzu & 9 Other (2020) eKLR the Petitioner assailed various of the *Proceeds of Crime and Anti-Money Laundering Act* (POCAML A) on the basis that they were unconstitutional. In effect, the Petitioner in this case brought into question several Sections of the *Proceeds of Crime and Anti-Money Laundering Act* which included 56, 64, 65, 68, 69, 70, 71, 81, 82, 88, 90, 92, 94, 100, 104, 131 for derogating from enshrined rights and freedoms. In its determination, the Court held inter alia held:

“...In my view having read the impugned provisions, all part VII of the Act does is to clothe the court with power not only to issue confiscation and restraint orders but also to tinker with them on case-by-case basis and dependent upon materials placed before it and if set thresholds be met. There appears to me to be no room for whim or arbitrariness by the court. The duty to act judiciously is not sidestepped or circumvented.

80. It is thus of note that even though sections 68 and 82 of the Act sanctions that the applications for a restraint and preservation orders be made ex-parte by the Agency Director, the discretion of the court to grant the order and thereafter revisit and tinker with the order once made, including variation and rescission and the right of appeal, is robustly retained and upheld. Those provisions to this court are clear to all to see and it should not take an imagined all importance of a constitutional court to establish if there exist sufficient material to justify the grant any orders under the act. I find that the court before which the two applications were filed would have the capacity to determine the matters on the merits. This is the position of law I learn from various decisions of the superior court that a constitutional court is not the only court to determine all disputes to the exclusion of all other courts...”

27. Clearly therefore, the contention that issue that Section 82 does not allow or permit the Court the opportunity to carry out the objective test of reasonableness is something that the High Court differently constituted had had opportunity to address and poured scorn on that notion.
28. In the light of the foregoing reasons, I am persuaded that the High Court in Stephen V. Mangira & Another v The Senior Principal Magistrate, Shanzu & 9 Other (2020) eKLR conclusively and authoritatively determined the constitutionality of Section 82 of the *Proceeds of Crime and Anti-money Laundering Act* by sustaining its constitutionality.
29. This being cannot thus be invited to revisit the same issue by camouflaging the issue in a different Petition. It is my finding that the instant Petition offends the res judicata principle. The preliminary objection is upheld and the Petition accordingly struck out.
30. Each Party shall bear its own costs.



DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20<sup>TH</sup> DAY OF FEBRUARY, 2025.

.....

L N MUGAMBI

JUDGE

