



**Okoth v Ethics and Anti-Corruption Commission & another
(Constitutional Petition E065 of 2023) [2025] KEHC 2890 (KLR)
(Constitutional and Human Rights) (13 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 2890 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E065 OF 2023**

**LN MUGAMBI, J
MARCH 13, 2025**

BETWEEN

ERICK OTIENO OKOTH PETITIONER

AND

ETHICS AND ANTI-CORRUPTION COMMISSION 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

JUDGMENT

Introduction

1. The petition dated 8th March 2023 is supported by the petitioner's supporting affidavit and his further affidavits one of which is sworn on 14th April 2023 while others are undated.
2. The petition assails the manner in which the 1st respondent terminated the petitioner's employment which the petitioner alleges violated his constitutional rights and thus prays for the following reliefs:
 - a. An order for exemplary and punitive damages be issued against the 1st respondents on account of their gross violation of the petitioner's fundamental freedoms and rights as enumerated in the Petition Article 19, 20(1)&(2), 21(1)&(3) and 27 of the *Constitution*.
 - b. An order for exemplary and punitive damages be issued against the 1st respondent on account of their gross all violation of the *Constitution* and impact on the petitioner as enumerated in the petition.
 - c. This Court declare that the 1st respondent bear the costs of this petition.



- d. A declaration be issued that 1st respondent unfit to work on account of their violations of the Constitution and the petitioner's rights so tribunal to formed to investigate its operation.
- e. This Court be pleased to grant such further Order or Orders as may be just and appropriate.
- f. A declaration be issued that calling the petitioner, offering the job and then dismissing without justification in Constitution is a grave violation of human right as quoted in various Article 43 (1)a, b, c, d, e, f hence full compensation that equate to damage of economic and social rights.
- g. A declaration be hereby issued that detaining the petitioner without justification and without informing him of the reasons of detention, holding him incommunicado, holding him in deplorable and inhumane conditions, threatening him with death and physical harm, was a violation of the petitioner's rights protected in Article 29 of the Constitution on freedom and security of the person.
- h. A declaration be issued that the action of the 1st respondent effectively infringes on the petitioner's rights to dignity and security (Art. 27,28 and 29); rights of a detained person, arrested and persons held in custody (Art.47, Art 48 and Art.51) of the Constitution.
- i. An order for compensation of petitioner for career disruption without justification and reason in the termination letter.
- j. An order for compensation of petitioner for abrupt career destruction and without due constitutional process.
- k. Declaration that the termination letter of the petitioner is null, void, invalid and unconstitutional and does not meet threshold of an undertaking of a trusted constitutional body and compensated.
- l. The Court confirm that the termination reason was not indicated in the letter and evidence of malice and thus unconstitutional and damages be awarded.
- m. The Court to confirm that the termination letter was a summary dismissal done in bad faith which is unconstitutional and award damages.
- n. The Court to award 23 years to retirement age of 60 years from 2017 when the petitioner was 37 years, compensation of career destruction and annual gross salary of Kshs.1,000,000 then.
- o. The Court to award of Kshs.5,000,000.00 for each Article violation of the Constitution and constitutional Rights of the petitioner.
- p. The Court to pronounce itself on the protection against physical or psychological harm of the petitioner during judicial process.
- q. The Court to pronounce itself on patriotism and to which extent it should be protected as fundamental rights.
- r. The Court to affirm supremacy and validity or legality of Kenyan Constitution and the references here is not subject to challenge by or before any court or other State organ [Article 2].

Petitioner's Case

3. The Petitioner deponed that prior to this appointment by the 1st Respondent he was permanent and pensionable employee with Safaricom working as a customer experience executive with a variety of benefits and gross annual salary of Ksh.1,000,000/-.



4. He stated that in October 2016, the 1st respondent offered him employment vide appointment letter Ref. EACC/2 for the position of Ethics Officer II and deployed him to Garissa Station from 1st November 2016.
5. He states that while at work on 26th January 2017, he received a call from the 1st respondent's, Deputy Director Human Resources, Madam Petronilla directing him to report to the headquarters at Nairobi.
6. On arrival at the Nairobi Office, he was instructed to record a statement and explain how he got recruited to work for the 1st respondent after which he was told to return the following day.
7. He claims that, Madam Petronilla demanded that he should amend his previous statement or write another one but he rejected the suggestion. He then requested that a third party should be present but that request was not granted.
8. Madam Petronillah left the office and came back with a man in civilian clothing and then directed the petitioner to return to her office once she was done with the man. He discovered later that the said man was an inspector of police.
9. The man introduced himself as one Mr. Mwangi and the OCS in charge of the 1st respondent's police station. The petitioner alleges that he was forced and intimidated to write a statement regarding how he was recruited at the 1st respondent. The petitioner avers that he was then directed to hand over his appointment letter. He was released on the same day and asked to wait for a call that would guide on the way forward.
10. On 2nd February 2017, the petitioner was called and directed to visit the 1st respondent's Human Resources office. It is there that the petitioner was issued with a letter of termination of his employment dated 30th January 2017.
11. The petitioner alleges that the 1st respondent violated his constitutional rights by arresting him arbitrarily, forcing him to record his statement and issuing the termination letter without giving reasons for his termination. Further, that the 1st respondent failed to account for 11 days being the weekends and also, that the 1st respondent backdated the termination letter.

1st Respondents' Case

12. The 1st respondent in response to the petition filed a Notice of Preliminary Objection dated 11th April 2023 and a replying affidavit by its Senior Human Resource Manager, Douglas Olang Oliech sworn on even date.
13. The 1st respondent opposes the petition on the basis that:
 - i. This Court lacks jurisdiction under the law to entertain, interrogate and determine the issues raised in the Petition as the same are res judicata having been directly and substantially in issue in ELRC Cause NO. 464 of 2017 Erick Otieno Okoth vs the Ethics and Anti-Corruption Commission and determined vide a judgment delivered on 9th February 2021.
 - ii. The petition herein is bad in law, vexatious and amounts to an abuse of Court process.
14. Echoing this position, he depones that the petitioner filed the cited suit on 8th March 2017. The matter was heard and determined and the petitioner awarded Kshs.174,243/- as compensation for one month, Kshs.33,884.45 being payment for accrued leave due for the period served and 50% costs of the suit. He informs that upon taxation of the Bill of costs in the matter, the 1st respondent on 21st February 2022 issued the petitioner with Kshs.336,162.45 via an RTGS payment thus satisfying the Court orders.



15. Considering this, he asserts that the petitioner cannot make a further claim against the 1st respondent on the basis of his wrongful termination. He notes that the petitioner did not appeal the matter in ELRC Cause No.464 of 2017. As such, he avers that the petitioner’s grievance was fully addressed by a court of competent jurisdiction. He contends that this suit is an attempt to re-litigate the issues which were heard and determined thus matter is res judicata.
16. He denies the allegation that the petitioner was coerced into recording his statement noting that the process was lawfully carried out. He adds that during this period the petitioner was not arrested nor detained at the Integrity Centre Police Station and no evidence had been adduced to that effect.

2nd Respondent’s Case

17. In rejoinder to the petition, the 2nd respondent filed a Notice of Preliminary objection dated 18th April 2023 on the premise that:
 - i. This Court lacks jurisdiction to hear and determine the petition herein since it is a dispute relating to the disputes relating to or arising out of employment between the petitioner (employee) and the 1st respondent (employer). By virtue of the provisions of Article 165 (5) of the Constitution which provides that ‘the High Court shall not have jurisdiction in respect of matters- (b) falling within the jurisdiction of the courts contemplated in Article 162 (2).
 - ii. Section 12 of the Employment and Labour Relations Act provides that the Employment and Labour Relations Court shall have original and appellate jurisdiction to hear and determine all dispute in accordance with Article 162 (2) (a) of the Constitution and shall have powers to hear and determine disputes relating to or arising out of employment between an employer and an employee.
 - iii. Section 12 (3) of the Employment and Labour Relations Act provides that the Employment and Labour Relations can issue prerogative orders, which provision if read together with the provisions of Article 162 (2) of the Constitution ousts the jurisdiction of this Court to hear and determine this case.
 - iv. In *Ali Jarso Wako & another vs. Ministry of Interior & Coordination of National Government & 5 others; Public Service Commission & 5 Others (Interested Parties)* [2020] eKLR, Chitembwe J held that:

The issue of jurisdiction is quite crucial in that it avoids the hearing and determination of cases by superior courts haphazardly. Issue relating to recruitment and employment of public servants or any employee belong to the Labour court. Any Constitutional issue revolving around employment or recruitment of an employee has to be dealt by the Labour Court. We cannot have Constitutional issue relating to employment or recruitment dealt by the High court and thereafter refer the other issues in the same dispute to the Labour Court.”
 - v. In *Abdikadir Suleiman –Versus-County Government of Isiolo and Another* [2015] eKLR thus:

As stated by the court earlier in this judgment, the original and unlimited jurisdiction to make a finding on legitimacy or lawfulness of decisions in disputes between employers and employees rests with this court as vested with the appropriate jurisdiction under Articles 159(1), 162 (2) (a) as read with Article 165(5) and (6) of the Constitution; Articles 22(1) and 258(1) of the Constitution, and



the provisions of the Employment and *Labour Relations Act*, 2011. The court holds that the jurisdiction spreads to all issues in the employment relationship and related matters including the enforcement of the fundamental rights and freedoms under Article 22 of the *Constitution* and enforcement of the *Constitution* under Article 258 as far as the issues in dispute are, evolve, revolve or relate to employment and labour relations. The court holds that the compass or golden test for the court’s jurisdiction is the subject matter in the dispute namely disputes relating to employment and labour relations as provided for Article 162 (a) of the *Constitution* and as amplified in the Employment and *Labour Relations Act*, 2011 and not the remedies sought or the procedure of moving the court or the situ of the applicable law or any other extraneous considerations as may be advanced by or for a litigant.”

Petitioner’s Submissions

18. The petitioner filed submissions in support of his case dated 6th June 2024 and 25th November 2024.
19. The petitioner submitted that the 1st respondent had violated the preamble of the *Constitution* and further the guarantee of a speedy and accurate justice dispensation under Article 48 of the *Constitution*. It is noted that inter alia the 1st respondent had not appeared in Court on 2nd May 2023 and 30th April 2024.
20. Turning to the substantive matter, the petitioner asserted that the 1st respondent had failed to issue him with the requested information thus violated Article 35 of the *Constitution*. This is with reference to the correspondence on his labour matter, his certified copies and the termination letter.
21. The petitioner further submitted that the 1st respondent had violated his right under Article 28 of the *Constitution* by purporting that he was a liar and also his right to fair labour practices under Article 41 of the *Constitution*. He moreover alleged that the 1st respondent had consulted his labour relations advocate in the matter hence violating his right to privacy under Article 31 of the *Constitution*.
22. The petitioner in addition submitted that he 1st respondent had violated numerous constitutional provisions being Article 1, 2, 3, 7, 10, 19, 20, 21, 29, 30, 47, 50, 51, 73, 79, 156, 238, 239, 244 and 253 of the *Constitution*.

1st Respondent’s submissions

23. In support of their case, the 1st respondent through their counsel Mwongela Mbiti filed submissions dated 23rd February 2024.
24. Reiterating the averments in the 1st respondent’s replying affidavit, Counsel submitted that this petition is res judicata. This is because the issues raised herein were directly and substantially in issue in the labour relations suit, the parties are the same, and the issues herein were tried and determined by a competent court.
25. Furthermore, the cause of action in ELRC Cause No. 464 of 2017; Erick Okoth Otieno Vs Ethics and AntiCorruption Commission was the petitioner’s termination of employment by the 1st respondent and so is the present petition. As such, Counsel urged that the petition ought to be dismissed.
26. Reliance was placed in *Accredo AG & 3 others v Stefano Uccelli & another* [2019]eKLR where the elements of res judicata were recapped as:

“ 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."
27. Like dependence was placed in Michael Mutinda Mutemi v Attorney General [2015]eKLR, Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others [2017]eKLR, Musankishay Kalala Paulin v. Director Criminal Investigations & 4 others [2022] eKLR and Okiya Omtatah Okoiti & Another v. Attorney General & 6 Others [2014] eKLR.
28. It was further submitted on behalf of the 1st Respondent that the issue of violation of rights ought to have been raised in the former suit. Counsel stressed that the petitioner in this matter seeks to re-litigate the issues by labelling it a constitutional petition cannot succeed. Reliance was placed in Kennedy Mokua Ongiri v John Nyasende Mosioma & Florence Nyamoita Nyasende [2022] eKLR where it was held that:

“If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.”

2nd Respondent’s Submissions

29. State Counsel, Betty Mwasao for the 1st respondent filed submissions dated 1st October 2024 and outlined the single issue for discussion as: whether this Court has jurisdiction to hear and determine the petition.
30. The 2nd Respondent submitted that the Court can only exercise jurisdiction conferred upon it by the Constitution and the law as guided by the Supreme Court in Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, and thus in absence of jurisdiction, it must down its tools.
31. It was submitted that the dispute was evidently an employment dispute which should be determined by the Employment and Labour Relations Court under Article 162(2)(a) of the Constitution and Section 12 of the Employment and Labour Relations Court Act.
32. Reliance was placed in United States International University V the Attorney General & 2 others [2012] eKLR where it was held that:

“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.”

33. The case of Daniel N Mugendi v Kenyatta University & 3 others [2013] eKLR was also cited in support.

Analysis and Determination

34. The following issues arise for determination:

- i. Whether the Petition is res-judicata.
- ii. Whether the petitioner’s constitutional rights were violated.
- iii. Whether the petitioner is entitled to the reliefs sought.

35. The Court of Appeal in Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696 laid down the essential characteristics of a preliminary objection by stating thus:

“...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.”

36. 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.”

Whether the Petition is res judicata

37. The issue of whether or not the matter is res-judicata impacts on jurisdiction as although the Court, the matter may fall within the scope of disputes that the court can hear and determine, it is nevertheless precluded from entertaining the suit if another competent Court has already heard the matter and determined it on merit.

38. This doctrine is provided for under 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.

39. The Supreme Court in Kenya Commercial Bank Limited & another v Muiri Cofee Estate Limited & 3 others [2016] KESC 6 (KLR) regarding this 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...”

40. Likewise, the Supreme Court in *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others* [2021] KESC 39 (KLR) (Civ) opined as follows:

“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.”

41. The Court went on to observe that:

“59. For res judicata to be invoked in a civil matter the following elements must be demonstrated:

1. There is a former Judgment or order which was final;
2. The Judgment or order was on merit;
3. The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
4. There must be between the first and the second action identical parties, subject matter and cause of action.”



42. On the significance of the res judicata principle, the Court of Appeal in *Nicholas Njeru v Attorney General & 8 others* [2013] KECA 217 (KLR) observed as follows:

“(26)The doctrine of res judicata is founded on public policy and is aimed at achieving two objectives namely, that there must be finality to litigation and that the individual should not be harassed twice with the same account of litigation (See Mulla, the Code of Civil Procedure, 16th Ed. Vol. 1 – pg 161). Section 7 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya Provides 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 the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.”

43. It was the 1st respondent’s position that the petitioner through this petition is attempting to relitigate matter which was heard and conclusively resolved on merits in ELRC Cause No. 464 of 2017.

44. The 1st Respondent provided the petitioner’s statement before the ELRC Court, marked ‘DO1’ in which the petitioner had asserted that he had been unfairly and unlawfully terminated by the 1st respondent. The Employment and Labour Relations Court heard the matter and delivered the Judgment on 9th February 2021(‘DO2’) in which the petitioner was successful and the 1st respondent was found liable for failing to abide by the due process in termination of his employment. The petitioner was consequently compensated to the tune of Kshs.336,162.45 per annexure DO3a and b.

45. The res judicata principle applies not only to identical suits which it precludes from being re-litigated between the same parties or their representatives but also extends to what is now known as issue-based estoppel by blocking any issue that was decided in a former suit from being re-introduced by a party or representative of such party in a subsequent suit even if the suits are different. In fact, under explanation 4 of Section 7 of the *Civil Procedure Act*; that bar applies even on any matter which might and ought to have been a matter directly and substantially in issue in a former suit. The party or its representative is estopped from reviving or raising the issue in a subsequent suit.

46. In *Okiya Omutatah Vs Communication Authority of Kenya* (2015) eKLR the Court applied the issue based estoppel when it held thus:

“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.”

47. A careful scrutiny of the petitioner’s case confirms that he is basically camouflaging the case by revisiting matters that have been settled or which ought to have been raised in the matter in which he challenged his dismissal at the Employment and Labour Relations Court. This attempt must flop.



48. In the light of this finding, I need not consider any other issue as this finding is sufficient to dispose this suit.
49. The instant Petition is barred by the doctrine of res judicata and the inevitable end is that it is struck out.
50. I make no orders as to costs.
51. Consequently, it is my humble view that the 1st respondents' notices of preliminary objection is merited and as such this Court must now to down its tool. The petition is struck out.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 13TH DAY OF MARCH, 2025.

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L N MUGAMBI

JUDGE

