



**Onsomu v Kimwomi; County Assembly of Nyamira & 3 others (Interested Parties)
(Petition E006 of 2024) [2025] KEHC 5143 (KLR) (24 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5143 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
PETITION E006 OF 2024**

**WA OKWANY, J
APRIL 24, 2025**

BETWEEN

GILBERT ATEI ONSOMU PETITIONER

AND

AMOS NYARIBO KIMWOMI RESPONDENT

AND

THE COUNTY ASSEMBLY OF NYAMIRA INTERESTED PARTY

**THE ETHICS AND ANTI-CORRUPTION COMMISSION INTERESTED
PARTY**

**THE DIRECTORATE OF CRIMINAL INVESTIGATIONS INTERESTED
PARTY**

THE KENYA NATIONAL EXAMINATIONS COUNCIL .. INTERESTED PARTY

RULING

1. The Petitioner herein filed the Petition dated 19th July 2024 seeking the following reliefs: -
 1. A finding and a declaration that the Respondent had breached Chapter 6 of the *Constitution* of Kenya and the relevant provisions of the *Leadership and Integrity Act*, the Public Officers Ethics Act, the *Public Procurement and Asset Disposal Act*, the *Public Finance Management Act*, the *County Governments Act* by engaging in fraud, illegal and unlawful activities, nepotism, clannism, corruption and hence unsuitable to hold a public office.
 2. An Order directing the 4th Respondent to avail to the Petitioner and the other Interested Parties certified copies of the Respondent's academic and educational certificates and testimonials for the purposes of investigating on the suitability and/or the qualifications of the Respondent in being the Governor of Nyamira County.



3. An Order directing the 1st, 2nd, 3rd and 4th Interested Parties to investigate, to consider, to probe and scrutinize the evidence tendered and/or availed to them by the Petitioner and other residents of Nyamira County to establish if the Respondent had committed any cognizable offence(s) for which he should be prosecuted and/or impeached.
 4. An Order directing the Respondent to refund the Kenya Shillings paid in the sum of Five Million, Six Hundred and Forty Nine Thousand, Seven Hundred and Six Only (Kshs. 5,649,706/=) to the Nyamira County Government which he fraudulently received as salary arrears.
 5. Costs of the Petition.
2. The Respondent opposed the Petition through a Replying Affidavit and Notice of Preliminary Objection (PO) dated 30th September 2024. The PO raises the issue of the jurisdiction of this court to entertain the Petition on the basis that it offends the doctrines Sub Judice, Res Judicata, Exhaustion, Constitutional Avoidance and Non-Justiciability.
 3. When the matter came up for mention on 4th December 2024, parties took directions to dispose of the Preliminary Objection by way of written submissions. I have considered the pleadings filed herein alongside the parties' written submissions and I find that the main issue for my determination is whether the PO is merited.
 4. What constitutes a preliminary Objection was explained in the oft-cited case of Mukhisa Biscuits Manufacturing Ltd vs. West End Distributors (1969) EA 696 thus: -

“----a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.
 5. In the same case Sir Charles Newbold, P. further stated: -

“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 issue, and this improper practice should stop”.
 6. The principle that emerges from the above cited case is that a Preliminary Objection can only be on a pure point of law argued pm the assumption that all the facts pleaded by the other side are correct. This means that the court is not required to delve into the details of disputed facts when dealing with a PO.
 7. The gist of the PO is the Respondent's claim that there are and there have been similar Petitions filed before this Court and the Employment and Labour Relations Court (ELRC) touching on the facts that form the basis of the present Petition.
 8. The point of law raised by the Respondent is over the jurisdiction of this court to entertain these proceedings. According to the Respondent, the instant Petition offends the doctrine of Res Judicata and res Sub Judice.



9. It is trite that the court's authority flows from either the *Constitution* or Statute and that without this authority, a court cannot purport to hear and determine a dispute before it. In *Owners of the Motor Vessel "Lillian S" vs. Caltex Kenya Limited*. [1989] KLR 1 the Court held:

“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of Law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

10. On the sub judice doctrine, the Respondent submitted paragraph 19(3) of the Petition and paragraphs 16, 17, 25 to 47 and 108 of the Petitioner's Supporting Affidavit contain allegations over matters that are subject of adjudication in another Petition being Kisumu ELRC Petition No. E024 of 2024, *Gilbert Atei Onsomu vs. The Governor, County Government of Nyamira and 4 Others*. It was therefore the Respondent's case that multiplicity of suits may result in an embarrassing situation where different courts arrive at different outcomes over the same issue.

11. The Doctrine of Sub Judice is captured under Section 6 of the *Civil Procedure Act* as follows: -

6. Stay of suit

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

12. In *Kenya National Commission on Human Rights vs. Attorney General; IEBC and 16 Others* (2020) KESC 54 KLR the apex court declined to hear a matter on the basis that it was already in issue before the High Court.

13. The Respondent submitted that the averments contained in paragraphs 19(4), (5) & (10) of this Petition and Paragraphs 53, 54, 55, 56, 58, 59, 66, 67, 68, 69, 70, 71, 72 and 76 of the Petitioner's Supporting Affidavit were similar to the issues that were in dispute and conclusively decided in two different cases being Kisumu ELRC Petition No. E012 of 2024 *Gilbert Atei Onsomu vs. The County Government of Nyamira & 4 Others* (hereinafter “the “Onsomu Petition”) and Kisumu ELRC Petition No. 3 of 2023 *Vincent Mariita Omaso vs. County Government of Nyamira & 4 Others*. (hereinafter the ‘Omaso Petition’). The Respondent informed this court that in a Judgement delivered on 7th December 2023 the Omaso Petition was dismissed for failure to meet the threshold set for proof in Constitutional Petitions while the Onsomu Petition was struck out on 19th December 2024 for being Res Judicata.

14. The Respondent cited the decision in *Independent Electoral and Boundaries Commission vs. Maina Kiai and 5 Others* (2017) eKLR where the Court of Appeal explained that Res Judicata aims at bringing litigation to finality and the case of *State of UP vs. Nawab Hussain* AIR 1977 SC, 1680 where the Supreme Court of India explained that Res Judicata was meant to avoid a multiplication of litigation against one individual and ensure finality and conclusiveness of litigation.

15. The Petitioner, on his part, submitted that the issues of Sub Judice and Res Judicata fall outside the precincts of a Preliminary Objection because they require the Court to go outside the pleadings in the Petition to interrogate the other suits that have been mentioned. Reference was made to the decision in *John Florence Maritime Services Limited and Another vs. Cabinet Secretary for Transport and*



Infrastructure & 3 Others (2021) eKLR where the court outlined the parameters for determining whether a matter is Res Judicata or not.

16. I have considered the decision in case of Republic vs. Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR where Mativo J. (as he then was) outlined the following principles on the doctrine of Sub Judice: -

“For the doctrine of Sub Judice to apply the following principles ought to be present:-

- (a) There must exist two or more suits filed consecutively;
- (b) The matter in issue in the suits or proceedings must be directly and substantially the same, the parties in the suits or proceedings must be the same or must be parties under whom they or any of them claim and they must be litigating under the same title, the suits must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed....”

17. The purpose behind the doctrine of Sub Judice was explained by the High Court of Uganda in Nyanza Garage vs. Attorney General HCCS No. 450 of 1993 as follows: -

“In the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided. It is in the interest of the parties because the parties are kept at a minimum both in terms of time and money spent on a matter that could be resolved in one suit. Secondly, a multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating and or adding to the backlog of cases courts have to deal with. Parties would be well advised to avoid a multiplicity of suits.”

18. It was not disputed that the Petitioner herein filed two other petitions before the ELRC. A perusal of the said petitions reveals that the Petitioner herein sought orders before the said court as follows: -

- i. Kisumu ELRC Petition No. E012 OF 2024: Gilbert Atei Onsomu vs. County Government of Nyamira –(hereinafter “the 1st Petition”).
 - a. A Declaration that the recruitment based on the advertisement by the 4th Respondent dated 9th March 2023, October 2023 and 14th December 2023 contravenes the Public Finance Management Act, County Government Act and the Constitution and therefore are unconstitutional and unprocedural and illegal.
 - b. A Declaration that the recruitment of personnel without provision in the budget and without approval of the County Assembly by the Respondents violates the Constitution and the law.
 - c. A Declaration that the Respondents have violated Articles 27 (1), (2), (4), (5), 28, 41, 47 (1), (2), 50 (1), 201, 212, 227, 232, 236(b) of the Constitution.
 - d. A Declaration that the recruitment of persons who were not shortlisted, relatives of the Respondents and members of the Respondents, removal of certain employees from the payroll and recruitment to positions not vacant but occupied by other employees is illegal, discriminatory and violates the Constitution and laws relating to employment.



- e. A conservatory order staying any further recruitment of personnel to the Respondent by the 4th Respondent pursuant to the advertisement by the 4th Respondent dated 9th March 2023, October 2023, and 14th December 2023.
 - f. A conservatory order stopping any payment of wages and salaries together with the accompanying allowances and any payments already paid be refunded to the government for having been paid illegally and unlawfully contrary to the Public Finance Management Act and the Constitution.
 - g. A Declaration that the 2nd Respondent has violated the Constitution and hence unfit to hold public office by presiding over actions that violate the Constitution.
 - h. The costs of the Petition be borne by the Respondents.
- ii. Kisumu ELRC Petition No. E024 of 2024: Gilbert Atei Onsomu vs. County Government of Nyamira, Governor Nyamira County, County Public Service Board, County Secretary and Head of Public Service County Chief Officer Public Service Management – (hereinafter “the 2nd Petition”)
- a. A conservatory order issued against the Respondents prohibiting them, their agents and/or representatives from effecting the unilateral alterations of the terms and conditions of service of the effected staff of the 1st Respondent.
 - b. A Declaration that the Respondents’ actions are contrary to the provisions of the Constitution, Articles 27, 41, 43 (1) (d) and (e), 47, 50, 232 and 236 and infringes on the rights of the affected staff of the 1st Respondent.
 - c. A Declaration that the actions of the Respondents by unilaterally alteration (sic) of the affected staff of the 1st Respondent is an infringement of their rights to fair labour practices and therefore unconstitutional.
 - d. A Declaration that the letter dated 3rd June 2024 referenced NCPSB/001-24/06/CH/jg by the County Public Service Board is a nullity in its entirety.
 - e. A mandatory order directed at the Respondents to restore the terms and conditions of service of the affected staff before the letter dated 3rd May 2024, 22nd May 2024 and 3rd June 2024.
 - f. That costs of the Petition be borne by the Respondents.
19. As I have already noted in this ruling, while the 1st Petition was stuck out on the basis that the case was res judicata, the 2nd Petition is still pending determination before the ELRC. My finding is that since the issue of the existence of the earlier suits was a matter that was not disputed by the Petitioner, the doctrines of Res Sub Judice and Res Judicata fall under pure points of law.
20. It is also instructive to note that the Petitioner herein made the following averments at paragraph 24 of the instant Petition, which averments turn out to be false owing to the uncontested fact of the existence of the earlier petitions: -
- “24. The Petitioner is not aware of any litigation touching on the subject matter herein and that there are no pending judicial proceedings, neither have there



been any previous litigation between the Petitioner and the Respondent over the subject matter herein.”

21. I have considered the totality of the averments and prayers made in this Petition and compared them to the averments made in the 2nd Petition. I find that this Petition is anchored on similar facts as those raised in the 2nd Petition. The facts in both cases challenge the Respondent’s conduct and relate to the allegation that he handled public finances and county staff contrary to the tenets of the Constitution, the Leadership and Integrity Act, the Public Officers Ethics Act, the Public Finance Management Act, the County Governments Act amongst other statutes.
22. I find that since the issues raised herein and in the related suits relate mainly to alleged violation of constitutional and statutory provisions, the correct approach should have been for the Petitioner to consolidate all the issues that he may have against the Respondent in a single suit for the court’s determination as opposed to filing a multiplicity of suits in different courts.
23. I find that, owing to the existence of the 2nd Petition, the instant Petition offends the Sub Judice rule having been filed a few days after the filing of the 2nd Petition.
24. Turning to the doctrine of Res Judicata Section 7 of the Civil Procedure Act provides thus: -
 7. Res Judicata

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.
25. The Black’s Law Dictionary 10th Edition defines Res Judicata as: -

“Latin ‘a thing adjudicated’. An issue that has been definitively settled by judicial decision. An affirmative defence barring the same parties from litigating a second law suit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been – but was not – raised in the first suit. The three essential elements are:-

 - (1) an earlier decision on the issue
 - (2) a final judgment on the merits, and
 - (3) the involvement of the same parties, or parties in privity with the original parties.”
26. In Independent Electoral & Boundaries Commission vs. Maina Kiai & 5 others [2017] eKLR the Court of Appeal explained the doctrine 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 common-sensical 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 and calumny. The foundations of Res Judicata thus rest in the public interest for swift, sure and certain justice.”

27. I have considered the judgment delivered in ELRC Petition No. 3 of 2023 which, I also note, was initiated before this court before it was transferred to the ELRC in Kisumu and finally determined on 7th December 2023. I have also noted that the ELRC dismissed the Petition for failing to meet the threshold set in constitutional Petitions. I further note that the Petitioner in the said Petition cited instances of violation of constitutional principles during the advertisement and recruitment of employees. A perusal of the instant petition reveals that the same facts have been pleaded as the Petitioner raises issues integrity, nepotism, clannism against the Respondent. I further note that the 1st Petition was also anchored on similar facts as the facts raised in the present Petition with the only twist being the issue of the Respondent’s academic and professional qualifications.
28. My finding is that even though the issue of the Respondent’s academic qualifications was not raised in the earlier petitions, the crux of all the Petitions still remains the issue of the Respondent’s fitness and competence to hold office and the validity of his decisions as the County Chief Executive. I find that the present Petition meets the parameters of Res Judicata which finding is further buttressed by the fact that the parties herein are the same parties in the 1st Petition.
29. In conclusion I find that the PO is merited and I therefore uphold it by finding that this Petition offends both the Sub Judice and Res Judicata doctrines. Consequently, I strike out the Petition with orders that each party shall bear his/its own costs.
30. It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA VIA MICROSOFT TEAMS THIS 24TH DAY OF APRIL 2025.

W. A. OKWANY

JUDGE

