



**Ominde v Attorney General & 3 others; Laptrust & 2 others (Interested Parties)  
(Petition E016 of 2022) [2024] KEHC 3687 (KLR) (2 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3687 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
PETITION E016 OF 2022  
SM MOHOCHI, J  
APRIL 2, 2024**

**BETWEEN**

**DANIEL OMINDE ..... PETITIONER**

**AND**

**THE ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**THE SPEAKER OF THE NATIONAL ASSEMBLY ..... 2<sup>ND</sup> RESPONDENT**

**THE SPEAKER OF THE SENATE ..... 3<sup>RD</sup> RESPONDENT**

**RETIREMENT BENEFITS AUTHORITY ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**LAPTRUST ..... INTERESTED PARTY**

**CPF ..... INTERESTED PARTY**

**LAPTRUST ..... INTERESTED PARTY**

**RULING**

1. The matter for determination is the Notice of Preliminary Objection dated 7<sup>th</sup> March 2023 Under Section 1A,1B, 3A & 7 of the *Civil Procedure Act*, brought by the 3<sup>rd</sup> Interested Party during pendency of the Petitioner's Application dated 1<sup>st</sup> August 2022, on the grounds that:
  - i. This Honorable court lacks jurisdiction to hear and determine the petition and application filed by the Petitioner on grounds of res judicata.
  - ii. The subject matter of the Petitioners' petition and application is centered on the protection of LAPFUND and LAPTRUST scheme members and the constitutionality and implementation the County Governments Retirement



Scheme Act, 2019, issues that were substantially and directly raised in following petitions:

- a. Nairobi Employment & Labor Relations Court Petition No. 213 of 2019: *Okiya Omtatab Okoiti v The County Government's Retirement Scheme & 152 Others.*
  - b. Nairobi Employment & Labor Relations Court Petition No. 222 of 2019: *Kenya County Government Workers Union & 7 Others v The Board of Trustees of Local Authorities Provident Fund & 54 Others.*
  - c. Nairobi Employment & Labor Relations Court Petition No. 230 of 2019: *Local Authorities Pensions Trust Board of Trustees & Another v The Attorney General & 3 Others.*
  - d. Kisumu Employment and Labor Relations Court Petition No.6 of 2020: *Christine Songa v County Executive Committee Member Finance, County Government of Kakamega & 2 others; Local Authorities Provident Fund (LAPFUND) & another (Interested Parties).*
  - e. The aforementioned petitions were consolidated, heard and determined and a judgement delivered on the 20th December 2022 issued and delivered at the Nairobi Employment and Labour Relations court settling the matters conclusively.
2. On 16<sup>th</sup> February 2023, the Court directed that the Preliminary Objection be canvassed by way of written submissions and in compliance with the said directive, the Petitioner complied on the 28<sup>th</sup> June 2023, the 2<sup>nd</sup> Respondent Complied on the 19<sup>th</sup> June 2023, the 3<sup>rd</sup> Respondent complied on the 24<sup>th</sup> August 2023, the 1<sup>st</sup> Interested Party complied on the 19<sup>th</sup> of June 2023, the 3<sup>rd</sup> Interested Party complied on the 12<sup>th</sup> of June 2023.
  3. The Court has carefully read and considered the Preliminary Objections together with the rival written submissions and finds that the issue for determination is whether the Notice of Preliminary Objection is merited.
  4. The 3<sup>rd</sup> Interested Party has raised a Preliminary Objection on the ground that the Petition is Res Judicata. Before the Court can determine whether the Objection is merited, it must first determine whether what has been raised amounts to a Preliminary Objection.
  5. The Notice of Preliminary Objection is supported by the 3<sup>rd</sup> Respondent, and opposed by the Petitioner, the 3<sup>rd</sup> Respondent and the 1<sup>st</sup> Interested party.
  6. The Petitioner, the 3<sup>rd</sup> Respondent and the 1<sup>st</sup> Interested party were of the view that the matter had not finally been determined and was a subject of two Appeals
  7. A Preliminary Objection was described in the *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd (1969)* E.A 696 to mean: -

“So far as I am aware, 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 the contract giving rise to the suit to refer the dispute to arbitration”.

Further Sir Charles Nebbold, JA stated 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 had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.

8. From a cursory look, it is not in doubt that the Preliminary Objection raises pure point of law, which if argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts have to be ascertained from elsewhere or if the court is called upon to exercise judicial discretion. The Court will also take into account that the Preliminary Objection must stem from the pleadings and raises pure point of law, and should not deal with disputed facts nor should it derive its foundation from factual information. See the case of *Oraro v Mbaja*(2005) 1KLR 141, where it was held that:-

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”.

9. The 3<sup>rd</sup> Interested Party has contended that the suit is Res Judicata, whereas the Petitioner, the 3<sup>rd</sup> Respondent and the 1<sup>st</sup> Interested Party have disputed the same, arguing that whereas it is true that, judgment was entered and delivered on the 20<sup>th</sup> December 2022 in the Employment & Labour Relations Court Petition No. 230 of 2019 (as Consolidated with Petitions 213 and 222 of 2019: Local Authorities Pensions Trust Board of Trustees & Another v The Attorney General & Others. (“the ELRC Judgment”) the very same 3<sup>rd</sup> Interested Party instituted an Appeal before the Court of Appeal and is thus being economical with the truth.

10. Section 7 of the *Civil Procedure Act* provide that:

*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.

Explanation. — (1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. — (2) 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.

Explanation. — (3) 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.

Explanation. — (4) Any matter which might and ought to have been made 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.



Explanation. — (5) 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.

Explanation. — (6) 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.

11. The doctrine of *res judicata* was expounded by the Supreme court in the case of *John Florence Maritime Services Limited & Another –v- Cabinet Secretary Transport and Infrastructure & 3 others* [2021] e KLR

In paragraph 86, the court restated the elements that must be proved before a court may arrive at the conclusion that a matter is *res judicata*. The court stated:

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

- a. There is a former judgement or order which was final.
- b. The judgement or order was rendered by a court having jurisdiction over the subject matter and the parties, and
- c. There must be between the first and second action identical parties, subject matter and cause of action.”

12. One of the key requirements in establishing *res judicata* is the element that, Judicial body in question has jurisdiction and where there is none, then *Res Judicata* does not arise *R. (on the application of Coke-Wallis) v Institute of Chartered Accountants in England and Wales*, [2011] 2 A.C. 146, [34] (Lord Clarke JSC) (UKSC.)

13. This Court notes that, the Petitioner is not alleged to have been a party in the matters giving rise to the judgment dated 20<sup>th</sup> December 2022 in the Employment & Labour Relations Court Petition No. 230 of 2019 (as Consolidated with Petitions 213 and 222 of 2019: *Local Authorities Pensions Trust Board of Trustees & Another v The Attorney General & Others*. It therefore follows that the Parties to this Petition are not strictly identical to the parties in the case.

14. In this Particular instance the 3<sup>rd</sup> Interested party raising a notice of preliminary objection is an Appellant challenging jurisdiction of the superior court that rendered the judgment on the 20<sup>th</sup> December 2022. The 3<sup>rd</sup> Interested Party cannot weaponize litigation to this extent, and such overtures must be resisted. The 3<sup>rd</sup> Interested Party cannot be heard to be “speaking from both sides of her mouth”. It is ingenious for one to claim that the Nairobi Employment and Labour Relations Court conclusively settled the matter when it entered judgment while at the same time Appealing the same judgment on grounds of want of jurisdiction. The Paradox here is that *res judicata* is inapplicable if Employment and Labour Relations court rendered judgment without jurisdiction, I need not say more.

15. This being a constitutional petition, illuminates and shines to the parties the reality to be alive to the constitutional standards and norms that bind the court, the parties, constitutional offices, public bodies, independent commissions. A higher duty is placed on state offices, public bodies, state officers, in promoting, practicing and protecting constitutionalism.

16. ‘Weaponization of litigation’ is on its death-bed and it is most unfortunate as has been deployed in this constitutional petition that has a far-reaching effect on thousands of retiring and retired senior citizens, persons that worked hard in nation-building and contributing to Kenya’s economic growth,



to qualify and earn their pensions. This issue is best adjudicated in hearing than be stifled in procedural technicalities.

17. Article 165 (d) is a special jurisdiction that cannot be stifled by *res judicata* in other words *res judicata* cannot apply so long as the impugned statute or section subsists, without the interpretation of the constitution, to determine if the same is law is inconsistent with, or in contravention of this Constitution. The process of aligning All our laws to the constitutional framework shall and must continue, to identify out of over 3,000 statutes, all such statutes and or provisions and declare them unconstitutional or alternatively affirm their constitutionality.
18. With regard to the scope of participation of an interested party, and to forewarn the interested parties herein, as they may attract adverse cost orders. I stand guided by the Supreme court in Samuel Kamau Macharia & Anor v DPP & Eleven (11) Ors Petition No. 9 (E011) of 2022 that an interested party cannot have an overriding interest above and beyond the primary parties as follows;
  - (13) Restating the words in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others, Civil Appeal No. 290 of 2012; [2013] eKLR that: “A suit in Court is a ‘solemn’ process, ‘owned’ solely by the parties. This is the reason why there are laws and Rules, under the Civil Procedure Code, regarding Parties to suits, and on who can be a party to a suit. A suit can be 7 Petition No. 9 (E011) of 2022 struck out if a wrong party is enjoined in it. Consequently, where a person not initially a party to a suit is enjoined as an interested party, this new party cannot be heard to seek to strike out the suit, on the grounds of defective pleadings.”
  - (14) Ultimately, we respectfully agree that the petitioners, though interested parties before the superior courts below, cannot, at this juncture, have overriding interests above and beyond the primary parties or mutate from having a peripheral stake into central core parties complete with freshly and new formulated constitutional grounds that were not the issues determined by the court appealed from. Just like we stated in Methodist Church in Kenya v Mohamed Fugicha & 3 others, SC Petition 16 of 2016; [2019] eKLR, this appeal is not properly before us.
19. Consequently, this Court is unable to find in favor of the 3<sup>rd</sup> Interested Party’s Notice of Preliminary Objection and issues the following orders;
  - a. The Notice of Preliminary Objection dated 7<sup>th</sup> March 2023, is hereby dismissed.;
  - b. Petitioner’s Application dated 10<sup>th</sup> March 2023, shall be heard on its merits.
  - c. Respondents to file Response to the Application dated 1<sup>st</sup> August 2022 within the next twenty-one (21) days.
  - d. The Interested Parties may file written submissions maximum three (3) pages limited to their interests and how the Application prejudices them or not.
  - e. There shall be no costs, this being a public interest matter.

It is so Ordered.

**SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 2<sup>ND</sup> DAY OF APRIL 2024**



**MOHOCHI S. M.**  
**JUDGE**

