



**Odeny (Formerly Victor Onyango Odeny) v Attorney General (Petition E415 of 2022) [2024] KEHC 5627 (KLR) (Constitutional and Human Rights) (23 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5627 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
PETITION E415 OF 2022  
LN MUGAMBI, J  
MAY 23, 2024**

**BETWEEN**

**ONYANGO ODENY (FORMERLY VICTOR ONYANGO ODENY) ..... PETITIONER**

**AND**

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

**RULING**

1. This ruling is a ruling in respect to a Notice of Preliminary Objection dated 7<sup>th</sup> June 2023 against the Petition dated 11<sup>th</sup> August 2022.
2. The petition alleges violation of the Petitioner’s constitutional rights visited upon him as a military officer in the Kenya Defence Forces immediately after the crushing of the Kenya’s 1982 coup d’état.
3. The objection is based on the following grounds:
  - i. This Court lacks jurisdiction to entertain the petition herein since the same offends the principle of res sub-judice owing to the existence of Nairobi ELRC Pet.No.63 of 2015 – *Moses Kemboi Kotut and 3 others vs Attorney General* (Consolidated with ELRC Pet. No.67 of 2017, 42 of 2015 and 93 of 2016).
  - ii. The petition is an abuse of the process of the Court and should be struck out with costs.

**Respondent’s Submissions**

4. Special State Counsel, S.M. Njoka in this matter filed written submissions and a list of authorities dated 17<sup>th</sup> July 2023 on behalf of the Respondent in support of the preliminary objection.



5. It was submitted on behalf of the Respondent that the two suits are grounded on the same facts and subject matter, between the petitioner and the respondent and are pending determination, the earlier one being the one before the ELRC Court. As such, it was argued that the instant Petition offends the sub judice rule. The Respondent asserted:

“...It is not in dispute that the Petitioner herein is a Petitioner in Nairobi ELRC Pet 63 of 2015- *Moses Kemboi Kotut & 3 Others v AG*, consolidated with ELRC 67 of 2017, 42 of 2015 and 93 of 2016 which petition is pending determination before ELRC, involves the same parties, stems from the same facts as well as the subject matter, therefore, offends the res sub judice principle...” (emphasis)

6. The Respondent cited Section 6 of the *Civil Procedure Act* and relied on the Supreme Court case; *Kenya National Commission on Human Rights vs Attorney General; Independent Electoral and Boundaries Commission and 16 others (Interested Parties)* (2020) eKLR where the Court held:

“The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”

7. The Respondent submitted that the petitioner had the opportunity to ventilate all his issues in Nairobi ELRC PET No.63 of 2015 but instead of doing so, he filed this Petition in abuse of Court process. Counsel urged the court to protect its process against such abuse. The Respondent relied on the High Court decision of *Republic vs Paul Kihara Kariuki* (2020) eKLR where the Court expressed itself thus:

“... Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action, is a form of abuse of the Court process.”

8. Accordingly, the Respondent, citing the case of *Remmy Mwanzo Mwandzomari vs Rishard Hela Mkuva and 4 others* (2021) eKLR argued that suits that offend the res sub judice principle ought to be dismissed to prevent the abuse of the Court process.

### **Petitioners’ Submissions**

9. The Preliminary Objection was opposed on behalf of the Petitioner through the written submissions filed by Kibet, Adoli and Magina, Advocates together with a list of authorities dated 18<sup>th</sup> July 2023.
10. The Petitioner called the attention of the Court to the fact that apart from the Petitioner merely stating that the instant petition is sub judice on account of a similar case being Nairobi ELRC PET.No.63 of 2015 – *Moses Kemboi Kotut and 3 others vs Attorney General* (Consolidated with ELRC Pet. No.67



of 2017, 42 of 2015 and 93 of 2016), the Petitioner did not provide evidence of the existence of the cited suit. The Petitioner thus argued:

“...The Respondent has not provided this Honourable Court with the pleadings and/or proceedings in ELRC PET No. 63 of 2015 to enable the Court to appreciate the issues therein and evaluate them as against this particular petition to see if they are directly or substantially the same in line with Section 6 of the Civil Procedure Act. No document pertaining to ELRC PET No. 63 of 2015 has been furnished to the Honourable Court...”

11. In the succeeding paragraphs, the Petitioner categorically stated:

“...The Petitioner has never filed any case elsewhere to address these issues and therefore this Honourable Court has requisite jurisdiction to hear and determine the Petition...”

12. In support of his submission that the Respondent was bound to provide the evidence that another suit exists, the Petitioner relied on the case of Wensley Barasa vs Immaculate Awino Abongo & another (2020)eKLR where faced with a similar situation, the Court held:

“A party pleading *res – judicata* or *sub – judice* is enjoined to place before the Court any evidence of previous litigation involving the same parties and subject matter.”

13. The absence of evidence aside, the Petitioner’s Advocate submitted the firm carried out a search on ELRC PET.No.63 of 2015 which showed that the said matter was determined by a Ruling dated 8<sup>th</sup> July 2022 delivered by Hon. Justice Stella Chemtai Ruto and was closed and thus the matter no longer exists in the Judiciary e-filing system hence is evident that the impugned suit was not heard on merit and cannot thus be a bar the instant Petition. He placed *MWK vs. AMW* (2016) eKLR where it was held that:

“Both the policy rationale as well as our case law lean in the direction that a suit will only be deemed to be barred by *res judicata* when it was heard and determined on the substantive merits of the case as opposed to suits that are dismissed on preliminary technical points. *Res judicata* bars a future suit only when the case is resolved based on the facts and evidence of the case or when the final judgment concerned the actual facts giving rise to the claim. For example, dismissal of a case for lack of subject matter or because the service was improper or even for want of prosecution does not give rise to judgments on the merits and therefore do not trigger the plea of *res judicata*.”

14. The Petitioner questioned the preliminary objection for delving into disputed factual matters instead of pure points of law. He relied on *Engineer E.M. Kithimba T/A Kithimba Associates Consulting Engineers vs Attorney General & another* (2014) eKLR where the Court explained:

“A “preliminary objection” correctly understood is now well identified as, and declared to be the point which must not be blurred with factual details liable to be contested and in any event, to be through the processes of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle a true preliminary objection which the court should allow to proceed. I am in agreement ... that ‘where a court needs to investigate facts, a matter cannot be raised as a preliminary point.’”



15. It was Petitioner position that the preliminary objection lacks merit and ought to be dismissed with costs.

### **Analysis & determination**

16. Flowing from the above submissions by the Parties, it is the considered view of this Court only two issues arise for determination, namely:

- i. Whether the preliminary objection dated 7<sup>th</sup> June 2023 meets the legal threshold.
- ii. Whether the preliminary objection is merited.

17. A preliminary objection is raised to point to the Court an important issue of law that the Court is required to consider before delving into the merits of the case before it. The Supreme Court in *Hassan Ali Joho and another vs Suleiman Said Shabbal and 2 others* (2014) eKLR explained the fundamental features of a Preliminary Objection as follows:

“(31) To restate the relevant principle from the precedent-setting case, *Mukisa Biscuit Manufacturing Co Ltd –vs. - West End Distributors* (1969) EA 696:

“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....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”.

18. Discussing its nature in *Dismas Wambola v Cabinet Secretary, Treasury & 5 others* (2017) eKLR, the Court noted as follows:

“A preliminary objection must first, raise a point of law based on ascertained facts and not on evidence. Secondly, if the objection is sustained, that should dispose of the matter. A preliminary objection is in the nature of a legal objection not based on the merits or facts of the case, but must be on pure points of law.

It may be noted that preliminary objections are narrow in scope and cannot raise substantive issues raised in the pleadings that may have to be determined by the court after perusal of evidence....”

19. Furthermore, the observation in the *Oraro vs. Mbaja* [2005] 1 KLR offers significant insight. The Court stated as follows:

“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..... 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 facts pleaded by the opposite side are correct. It cannot be raised if any fact is 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 nothing but unnecessarily increase costs and, on occasion confuse issues and this improper practice should stop... The principle is abundantly clear. A “preliminary objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.....”

20. From the reading of the above authorities, the essential characteristics of a preliminary objection can be succinctly stated as follows:
- i. It must be on a pure point of law, not factual matters.
  - ii. It is argued on assumption that all facts pleaded by the party against whom that objection is targeted are correct.
  - iii. If any fact has to be ascertained or if what is sought in the objection is an exercise of judicial discretion, it cannot be raised.
  - iv. If successful, it must be capable of disposing the suit without the need of proceeding to full trial.
21. The Respondent based his preliminary objection on the principle of sub judice by asserting there is a similar matter by the Petitioner pending before another Court being Nairobi ELRC PET.No.63 of 2015.
22. The principle of res subjudice is encapsulated in Section 6 of the [Civil Procedure Act](#) which declares thus:
- “No Court shall proceed with the trial of any suit or proceeding on 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 or proceedings is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed.”
23. The Supreme Court of Kenya in [Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others \(Interested Parties\)](#) (2020) eKLR pronounced itself on the principle of sub judice as follows:

“(67) The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This



means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”

24. Despite the Respondent stating that the issue as to the existence of another suit by the petitioner is not in dispute, the Petitioner categorically denied that assertion. The Respondent only stopped at mentioning the case number, it did not provide any evidence of that other case it alleged the Petitioner had filed for the examination by the Court.
25. Two clear observations emerge. First is that the Respondent relied on a contested factual matter to raise the instant Preliminary objection. For this Court to decide on the instant Preliminary Objection, it would first have to inquire into the existence of the alleged suit by the Petitioner as this is not admitted by the Petitioner and cannot be confirmed from the Petitioner’s pleadings. The claim was made by the Respondent for the first time in the Notice of Preliminary Objection. The fact that the Court has to ascertain a fact that the Respondent relies on to raise the Preliminary Objection means that the Preliminary Objection does not meet the legal threshold required of a preliminary objection as a preliminary objection cannot be based on a disputed factual matter.
26. The second conclusion is that without availing the evidence of the previous suit, a factual issue that the Petitioner categorically denied, this Court was denied the opportunity of examining the two pleadings in order to determine if they are identical or substantially similar. In the absence of the evidence, the Court has nothing to assess in order to determine if Section 6 of The Civil Procedure Act was contravened so as to reach a finding on whether or not there is sub-judice.
27. The inescapable conclusion is that this Preliminary Objection lacks merit and must therefore inevitably fail. Accordingly, the Respondent’s Preliminary Objection dated 7<sup>th</sup> June 2023 is hereby dismissed with costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY MAY, 2024.**

.....

**L N MUGAMBI**

**JUDGE**

