



**Tum v Bor & 7 others; County Assembly of Kericho & 3 others (Interested Parties)
(Constitutional Petition 14 of 2023) [2024] KEHC 9293 (KLR) (1 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 9293 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CONSTITUTIONAL PETITION 14 OF 2023**

JK SERGON, J

AUGUST 1, 2024

**IN THE MATTER OF ARTICLES 2(1), 2(2), 3(1),10,19,20(1),22,23,47,48,73(1), 73(2),
75(1), 75(2),75(3),165, 174,179(6),258 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF ALLEGED GROSS MISCONDUCT AND
CONTRAVENTION OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF VIOLATION OF SECTIONS 31(B), 34, 35 (3)
(C),40(2) OF THE COUNTY GOVERNMENTS ACT, NO. 17 OF 2012**

AND

**IN THE MATTER OF SECTIONS 8,10, 11, 35, 36 OF
THE PUBLIC OFFICERS ETHICS ACT, NO. 4 OF 2003**

AND

IN THE MATTER OF THE COUNTY GOVERNMENT OF KERICHO

BETWEEN

VICTOR TUM PETITIONER

AND

WESLEY BOR 1ST RESPONDENT

BRENDA BILL BII 2ND RESPONDENT

LEONARD NGETICH 3RD RESPONDENT

ALPHONCE ROTICH 4TH RESPONDENT

GILBERT BII 5TH RESPONDENT

BETSY CHEBET 6TH RESPONDENT



H.E DR. ERICK KIPKOECH MUTAI 7TH RESPONDENT

THE COUNTY GOVERNMENT OF KERICHO 8TH RESPONDENT

AND

THE COUNTY ASSEMBLY OF KERICHO INTERESTED PARTY

THE CLERK, COUNTY ASSEMBLY OF KERICHO INTERESTED PARTY

THE SPEAKER, COUNTY ASSEMBLY OF KERICHO INTERESTED PARTY

ETHICS AND ANTI-CORRUPTION COMMISSION INTERESTED PARTY

RULING

1. The petitioner herein has moved to court by way of a notice of motion dated 13th September, 2023 seeking the following reliefs;
 - (i) Spent
 - (ii) Spent
 - (iii) That pending the hearing and determination of the petition herein, an order be issued directing the 1st, 2nd, 3rd, 4th, 5th and 6th Respondents to vacate office and/or step aside and cease exercising the functions of the public offices they hold in compliance with the recommendations of the 1st interested party.
 - (iv) That the honorable court be pleased to grant any other order that it deems fit and just in the circumstances.
 - (v) That the costs of this application be provided for.
2. The application is supported by the grounds on the face of it and the annexed affidavit of Victor Tum the petitioner herein.
3. A brief factual background to the petition is as follows; On the eve of 30th June, 2023 there was a tragic road accident occurred in Londiani, Kericho County. The road accident claimed at least 53 lives and left tens of others injured. In the aftermath of the accident, residents, leaders from both the national and county government and Kenyans from all walks of life made generous contributions aimed at cushioning, aiding and ameliorating the suffering of the victims of the tragic road accident. That soon thereafter, a storm brewed up over the theft of the funds collected and an ad hoc committee of The County Assembly of Kericho was set up to investigate the matter. The ad hoc committee rendered its verdict on 11th August, 2023 vide a report tabled before the Assembly with several recommendations therein. Subsequently, the report was served upon the Governor Dr. Eric Mutai, for immediate action and that the Governor was duty bound to act on the recommendations of the ad hoc committee and dismiss the 1st to 6th respondents from service. The Governor (the 7th respondent herein) feigned ignorance and purportedly misled the public that he had no power to act on the report or dismiss the 1st to 6th respondents from office. The petitioner was adamant that the 1st to 6th respondents having been found culpable for the theft of the said funds, should be held to account and/or take responsibility and vacate public office, failure necessitating the instant petition.
4. The 7th and 8th Respondents filed a preliminary objection on a point of law to the petition on the following grounds:



- (i) That this Honourable Court is bereft of jurisdiction to hear and determine the instant petition since in its nature, the petition raises issues warranting the attention of the Employment and Labour Relations Court's jurisdiction as stipulated under article 162 (2) of *the Constitution* of Kenya and section 12 of the *Employment and Labour Relations Court Act*, 2011.
 - (ii) That the Petition as is offends the doctrine of sub judice as espoused under section 6 of the *Civil Procedure Act* since a similar matter with substantively similar respondents and prayers is pending determination by the Employment and Labour Relations Court at Kericho in Kericho ELRC Petition No. E006 of 2023 Wesley Bor & 5 Others v The Kericho County Assembly & 4 Others
 - (iii) That the Petition does not disclose any constitutional question for the determination by this Court neither does it meet the principles on pleadings in constitutional petitions as enunciated in Anarita Karimi Nheru v Republic [1979] 1 KLR 154 and augmented in Mumo Matemu v Trusted Society of Human Rights Alliance [2013] eKLR.
 - (iv) That the suit and application are frivolous, vexatious and abuse of the scarce resources of this Honourable Court and the same ought to be struck out at once.
5. This Court directed the parties to canvas the preliminary objection via written submissions. The parties complied and filed their written submissions which I have duly considered.
 6. The 7th and 8th respondent filed submissions in respect to their preliminary objection they submitted that the application and the petition offend the doctrine of sub judice in section 6 of the *Civil Procedure Act* which provides as follows; "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." and cited the case of Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR in which the court stated as follows; "The sub judice rule like other maxims of law has a salutary purpose. The basic purpose and the underlying object of sub judice is to prevent the courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of same cause of action, same subject matter and the same relief. This is to pin down the parties to one litigation so as to avoid the possibility of contradictory verdicts by two courts in respect of the same relief and is aimed to prevent multiplicity of proceedings."
 7. The 7th and 8th respondent reiterated that there is a similar matter with similar respondents and prayers pending determination in Kericho ELRC Petition No. E006 of 2023 Wesley Bor & 5 Others v Kericho County Assembly & 4 Others
 8. The 7th and 8th respondent submitted that the petitioner/ applicant had not set out with a degree of precision his complaint, constitutional provisions infringed and therefore the petition does not meet the threshold of a constitutional petition. They cited the case of Grays Jepkemoi Kiplagat v Zakayo Chepkoga Cheruiyot [2021] eKLR in which the Learned Judge stated as follows; "I have set out, albeit briefly, the facts giving rise to the petition to contextualize the consideration of the merits or otherwise of the preliminary objection. As to whether or not there is a competent constitutional petition before the Court, it is necessary to consider whether the petition satisfies the threshold of what constitutes a constitutional petition as per the principle established in the case of Anarita Karimi Njeru -vs- The Republic (1979) eKLR which principle was later restated by the Court of Appeal in the case of Mumo Matemo -vs- Trusted Society of Human Rights Alliance & 5 others (2013) eKLR. The principle established in the Anarita Karimi Njeru case (supra) was that a Constitutional petition



should set out with a degree of precision the petitioner’s complaint, the provisions infringed and the manner in which they are alleged to be infringed.”

9. The 7th and 8th respondent submitted that the general rule is that costs follow the event and placed reliance on section 27 (1) of the Civil Procedure Act and the case of Peter Muriuki Nguni v Equity Bank (K) LTD [2018] eKLR where Nzioka J. held that costs always follow the event and are granted at the discretion of the Court. The event, the Judge goes on, is the result of the litigation. They were therefore seeking that the costs of the instant application be borne by the petitioners/ applicants.
10. The 7th and 8th respondent urged this Court to dismiss the instant petition and the application, in its entirety.
11. The 1st and the 2nd interested party filed their submissions with respect to the preliminary objection and submitted that the preliminary objection does not raise clear points fit for consideration as a preliminary objection as set out in the Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696 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 usually 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 interested parties were adamant that the 7th and 8th respondent had not satisfied the test required to oust this Court’s jurisdiction using the sub judice rule. They cited the case of Kenya National Commission of Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) (Advisory Opinion Reference 1 of 2017) [2020] KESC 54 (KLR) (Constitutional and Human Rights) (7 February 2020) (Ruling) whereby the Supreme Court observes as follows; “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.” The interested parties reiterated that sub judice is not a pure point of law as it does require ascertaining of facts or probing of evidence in an earlier suit mentioned in this case Kericho ELRC Petition No. E006 of 2023 Wesley Bor & 5 Others v Kericho County Assembly & 4 Others.

12. The interested parties submitted that the instant petition and application raises serious constitutional issues for consideration by this Court and that this Court is duty bound to arrest the continued violation of the constitution by the respondents.
13. The petitioner and the 1st to 5th respondents did not file any submissions for consideration by this Court.
14. Having considered the preliminary objection and the submissions by the parties, the sole issue for consideration for this Court is whether the preliminary objection is merited.
15. This Court finds that the preliminary objection filed is primarily based on the fact that the petition raises issues warranting the attention of the Employment and Labour Relations Court’s jurisdiction as stipulated under article 162 (2) of the Constitution of Kenya and section 12 of the Employment and Labour Relations Court Act, 2011 and that there is a similar matter with substantively similar respondents and prayers is pending determination by the Employment and Labour Relations Court



at Kericho in Kericho ELRC Petition No. E006 of 2023 Wesley Bor & 5 Others v Kericho County Assembly & 4 Others. A preliminary objection cannot be based on disputed facts. It is not in dispute that there exists another suit between the same parties over the same subject matter in the Labour and Employment Court.

16. In 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 subject of sub judice as follows; “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.”
17. Going by the Supreme Court decision (Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) (supra); the suits are found to be as between the same parties or those claiming under them over the same subject matter and this court finds that the outcome of one suit may affect the outcome of the other suit which may result in the courts to issue conflicting decisions over the same subject matter. This court makes the following findings and determination;
 - (i) This court finds that this instant suit offends the doctrine of sub judice.
 - (ii) The Preliminary Objection is found to be merited and is hereby upheld.
 - (iii) The notice of motion and petition dated 13th September, 2023 is hereby stayed to await the determination of Kericho ELRC Petition No. E006 of 2023 Wesley Bor & 5 Others v Kericho County Assembly & 4 Others.
18. Each party to bear their own costs.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 1ST DAY OF AUGUST, 2024.

.....
J.K. SERGON

JUDGE

In the Presence of*

C/Assistant – Rutoh

Mweni for 7th, 8th Respondent

Simiyu for 1st to 6th Respondent

Kipkorir for 1st & 2nd Interested Party

