



REPUBLIC OF KENYA



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**Kiamba & another v Attorney General; Ethics and Anti-Corruption
Commission (Interested Party) (Constitutional Petition E025 of 2024)
[2024] KEHC 10917 (KLR) (19 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 10917 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CONSTITUTIONAL PETITION E025 OF 2024**

OA SEWE, J

SEPTEMBER 19, 2024

**IN THE MATTER OF ARTICLES 1, 2, 12, 19, 20, 21, 22, 23,
25, 28, 31, 40, 43, 45, 50, 53, 159 AND 160 OF THE
CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION
ACT, 2015**

AND

**IN THE MATTER OF ENFORCEMENT AND INTERPRETATION
OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF SECTIONS 55(1), 55(2)(B), 55(6), 55(9),
56(1) & 56(2) OF THE ANTI-CORRUPTION & ECONOMIC
CRIMES ACT, NO. 3 OF 2003**

BETWEEN

JIMMY MUTUKU KIAMBA 1ST PETITIONER

TRACY MBINYA MUSAU 2ND PETITIONER

AND

THE ATTORNEY GENERAL RESPONDENT

AND

ETHICS AND ANTI-CORRUPTION COMMISSION INTERESTED PARTY



RULING

1. The petitioners, Jimmy Mutuku Kiamba and Tracy Mbinya Musau, filed the Notice of Motion dated 29th May 2024 under a Certificate of Urgency on the grounds that they were on the verge of losing their properties and being rendered homeless due to the effect of the implementation of the provisions of Sections 55(1), 55(2)(b), 55(6), 55(9), 56(1) and 56(2) of the [Anti-Corruption and Economic Crimes Act](#), No. 3 of 2003. They averred that the interested party had commenced and sustained proceedings against them pursuant to the provisions aforementioned; and that unless the orders sought are granted, their constitutional right to property will be violated.
2. The application was filed under Articles 1, 2, 12, 19, 20, 21, 22, 23, 24, 25, 28, 31, 40, 43, 45, 50, 53, 159 and 160 of [the Constitution](#) and Sections 1, 3A, 3B and 63 of the [Civil Procedure Act](#), and all other enabling provisions of the law. In essence, the petitioners are seeking conservatory orders staying the execution of the judgment and consequential orders issued in Nairobi Civil Appeal No. 464 of 2019, among other prayers.
3. In response to the application, the respondent filed a Notice of Preliminary Objection dated 5th June 2024 contending that:
 - (a) The Court lacks jurisdiction to hear and determine the matter by virtue of the same having been determined by the Court of Appeal in Nairobi Civil Appeal No. 464 of 2019.
 - (b) The issue of the constitutionality of Sections 55 and 56 of the [Anti-Corruption and Economic Crimes Act](#) has been determined in several cases, including Civil Appeal No. 213 of 2011: Ethics and Anti-Corruption Commission v Stanley Mombo Amuti [2015] eKLR.
 - (c) The suit is res judicata as the issues raised herein are the same raised in Anti-Corruption and Economic Crimes [Petition No. 7 of 2017](#) and Civil Appeal No. 187 of 2018: Jimmy Kiamba & 3 others v Ethics and Anti-Corruption Commission & others.
 - (d) The application and Petition are frivolous, vexatious, an abuse of the court's process and a waste of judicial time.
4. In the premises, the respondent prayed for the striking out with costs of not only the application but also the Petition.
5. The interested part also filed Grounds of Opposition dated 5th June 2024, seeking similar orders as the respondent on the following grounds:
 - (a) The application and the Petition are bad in law, incompetent and an abuse of the court process as the petitioners are asking this Court to vary, review and/or stay a Judgment of the Court of Appeal dated 9th February 2024 in Civil Appeal No. 464 of 2019: Jimmy Kiamba & 3 others v Ethics and Anti-Corruption Commission & others.
 - (b) The question of the constitutionality of Sections 55 and 56 of the [Anti-Corruption and Economic Crimes Act](#), 2003 raised in the application and the Petition is res judicata as the same was directly and substantially in issue in ACEC [Petition No. 7 of 2017](#) and the subsequent appeal in Civil Appeal No. 187 of 2018: Jimmy Kiamba & 3 others v Ethics and Anti-Corruption Commission & others.



- (c) The petitioners further appealed the judgment of the Court of Appeal to the Supreme Court in Supreme Court Application [No. E006 of 2024](#): Jimmy Kiamba & 3 others v Ethics and Anti-Corruption Commission & others where the Supreme Court dismissed the application for stay of execution and struck out the appeal for want of jurisdiction.
 - (d) The Petition is also res judicata Civil Appeal No. 213 of 2011: Ethics and Anti-Corruption Commission (The Legal Successor of Kenya Anti-Corruption Commission) v Stanley Mombo Amuti [2015] eKLR on the provisions of Section 55 of the Ethics and Anti-Corruption Commission in relation to the fundamental principle of fair trial under Article 50 of [the Constitution](#).
 - (e) The petitioners have introduced a new party, the Attorney General, in a mischievous attempt to evade the doctrine of res judicata whereas the issues in the Petition have been the subject of adjudication and determination by courts of competent jurisdiction as well as the appellate courts.
 - (f) The Court lacks the requisite jurisdiction to hear and determine the application and the Petition as the Court is being asked to exclude from forfeiture that which the Court of Appeal found to be an unexplained asset.
 - (g) Without prejudice to the foregoing, the proper forum to determine any issue relating to corruption and economic crimes, including the constitutionality of any provision of the [Anti-Corruption and Economic Crimes Act](#), 2003, is the Anti-Corruption and Economic Crimes Division.
 - (h) The application and the Petition are frivolous, vexatious, an abuse of the court process and a waste of judicial time and ought to be dismissed with costs.
6. The preliminary objections were canvassed by way of written submissions, pursuant to the directions given herein on 6th June 2024. The petitioners relied on their written submissions dated 19th June 2024 in which they proposed one issue for determination, namely, whether this Court has the jurisdiction to hear and determine the application and the Petition. They relied on Section 7 of the [Civil Procedure Act](#), and posited that the issues raised herein are different from the issues raised in the Nairobi suit.
7. On the authority of *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & others* [2021] eKLR the petitioners submitted that the considerations in judicial review and constitutional petitions are different and therefore that the court in each case would be playing different roles. They also asked the Court to note the distinction made by the Supreme Court as exceptions to the doctrine of res judicata, namely: where there is potential for substantial injustice if the court does not hear a constitutional matter or issue on its merit, and where a litigant demonstrates special circumstances warranting the court to make an exception. Therefore, the petitioners urged for the dismissal of the Preliminary Objections.
8. The respondent filed written submissions dated 13th June 2024 and proposed the following issues for determination:
- (a) Whether the application raises issues which are res judicata.
 - (b) Whether the orders sought by the petitioners are subject to a judgment in rem.
 - (c) Whether the Court has jurisdiction to hear and determine the present application.



9. The respondent submitted that the application is res judicata for the reason that the issues raised therein have been determined by a court of competent jurisdiction and were the subject of an appeal in Civil Appeal No. 464 of 2019. Reliance was placed on Section 7 of the Civil Procedure Rules as well as the cases of Independent Electoral and Boundaries Commission v Maina Kiai & 5 others [2017] eKLR, Republic v Attorney General and another, Ex Parte James Alfred Koroso, E T V v Attorney General & another [2012] eKLR, *Kiamba & 3 others v Ethics and Anti-Corruption Commission; Equity Bank Limited (Interested Party) (Civil Appeal 464 of 2019)* [2024] KECA 74 (KLR) (9 February 2024) (Judgment).
10. It was further the submission of the respondent that the petitioners are subject to the judgment in rem as to the constitutionality of Sections 55 and 56 of the *Anti-Corruption and Economic Crimes Act*. In this regard the respondent referred to Stanley Mombo Amuti v Kenya Anti-Corruption Commission [2019] eKLR and Ethics and Anti-Corruption Commission v Fastlane Freight Forwarders Limited & 8 others [2017] eKLR and urged the Court to make findings accordingly.
11. On the jurisdiction of the Court, the respondent relied on Owners of Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1 for the submission that without jurisdiction the Court has no power to proceed with this matter further. Thus, the respondent urged for the striking out of the suit with costs.
12. What constitutes a preliminary objection was discussed in the case of Mukisa Biscuits Manufacturing Ltd v West End Distributors [1969] EA 696. The court held:

“...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”.
13. Sir Charles Newbold, P. added:

“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”.
14. The Supreme Court added its voice in *Independent Electoral & Boundaries Commission v Cheperenger & 2 others (Civil Application 36 of 2014)* [2015] KESC 2 (KLR) (15 December 2015) (Ruling), and stated:

“...The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits...”



15. In respect of the Preliminary Objection by the interested party, it is pertinent to note that in Rule 1 of the Mutunga Rules an “interested party” is defined as follows:

“interested party” means a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation.”

16. My considered view, therefore, is that an interested party, whose role is merely peripheral, cannot be heard to seek the striking out of a suit. Indeed, the Supreme Court pointed out in *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others* [2014] 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 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.”

17. Nevertheless, since the Preliminary Objections touched on jurisdiction of the Court, the Court is obliged, even suo motu, to take a decision thereon, for jurisdiction is a threshold issue. In *The Owners of 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.”

18. Moreover, in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, the Supreme Court pointed out that:

“(68) A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011*. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law...”



19. The jurisdiction of the High Court is provided for in Article 165(3) of *the Constitution* thus:
- (3) Subject to clause (5), the High Court shall have—
 - (a) unlimited original jurisdiction in criminal and civil matters;
 - (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
 - (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
 - (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
 - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - (iv) a question relating to conflict of laws under Article 191; and
 - (e) any other jurisdiction, original or appellate, conferred on it by legislation.
20. In the premises, there can be no doubt that the Court has the requisite jurisdiction to hear and determine the issues raised in the Petition dated as well as the Notice of Motion dated 29th May 2024 in so far as they allege violations of *the Constitution*.
21. The foregoing notwithstanding, the respondent contended that the suit is res judicata, in view of the following factors:
- (a) The issues raised herein are the same issues that were raised and were finally determined in Anti-Corruption and Economic Crimes Petition *No. 7 of 2017* and Civil Appeal No. 187 of 2018: *Jimmy Kiamba & 3 others v Ethics and Anti-Corruption Commission & others*.
 - (b) The same issues were reconsidered and determined by the Court of Appeal in Nairobi Civil Appeal No. 464 of 2019.
 - (c) The issue of the constitutionality of Sections 55 and 56 of the *Anti-Corruption and Economic Crimes Act* has been determined in several cases, including Civil Appeal No. 213 of 2011: *Ethics and Anti-Corruption Commission v Stanley Mombo Amuti* [2015] eKLR.
22. There is no gainsaying that res judicata is a plea that goes to the jurisdiction of the Court which, if successfully raised, has the potential of disposing of the entire suit; for Section 7 of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya, provides that:

“No Court shall try any suit or issue in which the matter 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...and has been heard and finally decided by such Court.”

23. It is noteworthy however that, it is not in every case that the issue of res judicata can be appropriately taken up by way of a preliminary objection. In this case, for instance, for the Court to make a determination either way, it would have to embark on an examination of the factual basis of the previous suits, including an examination of the pleadings, proceedings and judgment in those cases, to ascertain whether:
- (a) The subject matter is identical in both suits.
 - (b) The parties in the suits are substantially the same.
 - (c) The subject matter is the same; and,
 - (d) Whether there is a final determination on the recurring issues.
- (see Bernard Mugo Ndegwa v James Nderitu Githae and 2 Others [2010] eKLR)
24. It is therefore my finding that the issue of res judicata was wrongly taken herein by way of preliminary objections. In this regard, I adopt the words of Hon. Ojwang, J. (as he then was) in *Oraro v Mbaja* [2005] 1 KLR 141 that:
- “...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...”
25. Other than the issue of res judicata, the respondent and the interested party also objected to the jurisdiction of the Court on the ground that the petition ought to have been filed before the Anti-Corruption Division in Nairobi. Indeed, Rule 8 of the Mutunga Rules, provides that:
- (1) Every case shall be instituted in the High Court within whose jurisdiction the alleged violation took place.”
26. The Petition shows that the matrimonial house the subject of the suit, known as Land Reference No. 7785/605 (Original No. 7785/10/430) I R 56556, is situated in Runda Water Estate in Nairobi City County. Hence, there is considerable merit in the respondent’s submission that the matter ought to have been filed in Nairobi. Indeed, it was the respondent’s prayer that the Petition be transferred to the Anti-Corruption and Economic Crimes Division of the High Court in Nairobi.
27. Counsel for the petitioners opposed that prayer contending that a formal application for transfer ought to have been filed for the Court’s consideration. That argument is flimsy because Subrule (2) of Rule 8 above envisages that a transfer may be ordered by the Court suo motu; and therefore it is not mandatory that an order for transfer be preceded by a formal application as posited by counsel. It states:
- (2) Despite sub-rule (1), the High Court may order that a petition be transferred to another court of competent jurisdiction either on its own motion or on the application of a party.



28. It is not apparent from the pleadings why the Petition was not filed at the Anti-Corruption and Economic Crimes Division, Nairobi. Accordingly, it is my considered view, guided by Rule 8 of the Mutunga Rules, that sufficient justification has been made by the respondent for the transfer of the Petition to the Anti-Corruption and Economic Crimes Division, Nairobi for hearing and determination.
29. In view of the above, it is hereby ordered that:
- (a) The Preliminary Objections raised by the respondent and the interested party be and are hereby dismissed.
 - (b) Pursuant to Rule 8 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, this Petition be and is hereby transferred to the Anti-Corruption and Economic Crimes Division, Milimani High Court, Nairobi, for hearing and determination.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 19TH DAY OF SEPTEMBER 2024.

OLGA SEWE

JUDGE

