



Mukuru v Speaker, Taita Taveta County Assembly; The Wiper Democratic Movement (Interested Party) (Constitutional Petition E009 of 2024) [2024] KEHC 12780 (KLR) (23 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12780 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CONSTITUTIONAL PETITION E009 OF 2024
GMA DULU, J
OCTOBER 23, 2024
IN THE MATTER OF: ALLEGED CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS
UNDER ARTICLES 19, 20, 21, 22, 23, 24,
27(1) & (2), 28, 29 (D), 38 (3)(C), 40 (3),
41(1), 47, 48, 177, 193 AND 194 OF THE
CONSTITUTION OF KENYA, 2010
AS READ TOGETHER WITH SECTION 4(1) OF THE FAIR
ADMINISTRATIVE ACTIONS ACT
IN THE MATTER OF SWEARING INTO OFFICE OF MS. ANN
WAMBUI MUKURU AS NOMINATED MEMBER COUNTY
ASSEMBLY, TAITA TAVETA COUNTY**

BETWEEN

ANN WAMBUI MUKURU PETITIONER

AND

THE SPEAKER, TAITA TAVETA COUNTY ASSEMBLY RESPONDENT

AND

THE WIPER DEMOCRATIC MOVEMENT INTERESTED PARTY



RULING

1. This matter, which was commenced by way of a Constitutional Petition, filed together with a Notice of Motion was filed after this court had already determined a request for swearing in of the same Ann Wambui Mukuru in Voi High Court Constitutional Petition E003 of 2024 as nominated Member of County Assembly (MCA), in the Taita Taveta County Assembly. After the commencement of these present proceedings, a written consent was filed for adoption as an order of this court, which prompted me to ask counsel to address the court on two issues; first, whether this court has jurisdiction to entertain the present matter based on the doctrine of resjudicata, and secondly, on the format and validity of the purported written consent dated 24th September 2024.
2. Mr. Chebii for the petitioner then submitted that this court has jurisdiction to hear and determine the matter and adopt the consent as the principle or doctrine of res-judicata does not apply herein in that, Petition No E003 of 2024 which had already been determined by this court involved different parties, with only the petitioner herein being a common party in the two petitions. Counsel emphasized that in the present petition, the Speaker of the County Assembly of Taita Taveta is a specific party unlike the previous petition. In addition, the main prayer in the previous petition was for the Independent Electoral and Boundaries Commission (IEBC) to gazette the petitioner before being sworn in as nominated MCA, while in the present petition the main prayer is to compel the Speaker of the County Assembly to swear in the petitioner as nominated MCA.
3. On the format and validity of the consent, counsel submitted that the first signatory to the written consent was the petitioner, while the second signatory was the person who currently holds the office of the Speaker, Counsel did not however disclose to the court the name or title of the said signatory, which did not appear on the written consent.
4. With regard to the signatory for the Interested Party Wiper Democratic Movement, counsel for the petitioner submitted that the consent was signed by the Secretary General of the party, even though the name of that Secretary General does not appear on the written consent.
5. Counsel for the petitioner submitted lastly, that though he was the advocate for the petitioner, the parties had elected to sign the consent in person, and thus he did not sign the consent and was obliged to file the consent in court, as is.
6. Mr. Mwabili for the respondent, the Speaker of the County Assembly of Taita Taveta, on his part, fully adopted the submissions of counsel for the petitioner to the extent that this court has requisite jurisdiction to entertain this matter as, though petition No E003 of 2024 was similar to the present petition, the parties herein are different.
7. Counsel for the respondent also submitted that the written consent having been signed by the principals themselves, same was validly filed in court by counsel for adoption.
8. No counsel appeared in court for the interested party Wiper Democratic Movement, nor did any official of the party attend court.
9. Having considered the matter and submissions, I am of the view that this court has neither jurisdiction to entertain and hear this matter, nor to adopt the written consent filed herein, as the matter is res-judicata and the purported consent is a sham and an attempt to abuse the court process. On both scores this court cannot proceed to try or hear and determine this matter.



10. In this regard, the doctrine or principle of res judicata is codified under Section 7 of the Civil Procedure Act (Cap.21) in the following terms:-

“7. 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.”

11. From the above provisions of the statute, it is clear to me that the present petition is res-judicata. The first reason being that both the petitioner Ann Wambui Mukuru and the Interested Party Wiper Democratic Movement were parties in the previous suit, which has already been determined, though counsel for the petitioner seems to suggest that the only petitioner is a party in both suits.

12. With regard to the respondent, Speaker Taita Taveta County Assembly, in my view, this party is not a different or new party, as the Taita Taveta County Assembly was the 2nd Interested Party in the previous petition, whose Chief Executive Member is the same Speaker. Thus all the parties in this petition were parties in the previous Petition No E003 of 2024.

13. In addition to the parties being the same, the prayers in the previous petition include prayers for the same Speaker to be compelled to swear the same petitioner herein as a nominated MCA. In this regard, I reproduce prayers C and E of the previous petition No E003 of 2024 as follows:-

“C. A declaration that the statutory timelines provided by the Elections Act having lapsed the petitioner be deemed as duly nominated and the Speaker of the 2nd Interested Party the County Assembly of Taita Taveta do swear in the petitioner as a Member of County Assembly.

E. Failure of the IEBC to comply with (C) above an order be issued compelling the Speaker of Taita Taveta County Assembly to swear the petitioner as the duly nominated Member of County Assembly.

14. It is of note also, that the fact of the determination of the above previous petition, was only disclosed to this court in a further affidavit sworn on 2nd October 2024 by Vincent Chebii Advocate on the prompting of this court, while the law would require that the petitioner should have filed an affidavit with the petition to indicate whether or not there were previous related proceedings filed in court, which was not done.

15. For the avoidance of doubt, the prayers in the present petition dated 26th August 2024 are as follows:-

a. An order is hereby issued directing the respondent within seven (7) days from the time of service of the order or ruling proceed (sic) to swear the petitioner into office as a duly nominated Member of the County Assembly of Taita Taveta County, under the Gender Top Up list representing Wiper Democratic Movement.

b. Failing to comply with order (a) above within the stipulated time, the petitioner be deemed as having been elected and she be at liberty to take her position as a Member of Taita Taveta County assembly representing Wiper Democratic Movement under Gender Top Up category.



- c. A declaration that the Constitutional Right of the Petitioner as set out under Article 27(1) & (2), 28, 29 (d), 38(c), 40(3), 41(1), and 47(1) of the Constitution as read with Section 4(1) of the Fair Administrative Actions Act has been violated by the respondent.
 - d. General damages for violation of the petitioner's rights under Articles 27(1) & (2), 28, 29(d), 38(3)(c), 40(3) and 47(1) of the Constitution as read together with Section 4(1) of the Fair Administrative Actions Act.
 - e. Costs of the petition and interest thereon.
16. The respondent herein is the Speaker of the County Assembly. In my view, this court having delivered a substantive judgment in Voi High Court Constitutional Petition No E003 of 2024 on 15th April 2024 declining to issue any of the prayers sought in that petition, the prayers sought in the present petition are resjudicata, and this court has no jurisdiction to proceed to hear and determine those prayers.
17. With regard to the purported consent also, this court cannot adopt the said written consent as an order of this court, as the intended consent is on matters that are res-judicata in the same above previous proceedings in which a substantive determination was made, and the only option for an aggrieved party, including the petitioner herein, is to appeal therefrom.
18. For the avoidance of doubt, the purported written consent is in the following terms:-
- Consent
- By consent of the Petitioner and the Respondent, the parties have agreed to compromise the Petition in the following terms:-
- a. That the Respondent has no objection or interest in the Petition as the Petitioner has been duly nominated by her party the Interested Party and as such, the Petition should be allowed by consent of the Respondent and the Petitioner in the terms below:
 - b. That an order be and is hereby issued directing the Respondent the Speaker/Acting Speaker within seven (7) from (sic) the time of the service of the order proceed to swear the Petitioner into office as a duly nominated Member of the County assembly of Taita Taveta County, under the Gender Top Up list representing Wiper Democratic Movement;
 - c. That failure to comply with order (b) above within the stipulated time, the Petitioner be deemed as having been elected and be at liberty to take her position as a Member of Taita Taveta County Assembly representing Wiper Democratic Movement under the Gender Top Up Category;
 - d. That each party bear their own costs of the Petition and Application;
 - e. That the matter be marked as closed.
19. It is obvious from the contents of the above written consent that it is an attempt to make this court issue a different order from the earlier order in which the court rejected the same request. The signatures of the consent are also in doubt as the identity of two signatories cannot be verified. The request is thus both res-judicata and an attempt to abuse the court process. I thus have no jurisdiction to adopt the consent.
20. If it were not for the principles set out by the Court of Appeal in the case of "The Owners of Motor Vessel 'Lillian S' v Caltex Oil (K) Ltd [1989] eKLR, that a court has to down tools once it finds that it has no jurisdiction, I would have ordered the CID to conduct forensic investigations on the identity of the actual signatories of the purported written consent, with a view to determining whether any criminality



has been committed, and taking appropriate action thereon. However, because I am commanded by the doctrine of stare-decisis to down my tools after finding that this court has no jurisdiction, I will say no more on that issue.

21. To conclude, I find that this court has no jurisdiction to hear and determine the Petition and Notice of Motion herein, nor to adopt the purported written consent herein, as this matter is *res-judicata* in view of the previous judgment delivered by this same court on 15th July 2024 dismissing Voi High Court Constitutional Petition No E003 of 2024.
22. I thus strike out the Petition, Notice of Motion and purported written consent. I make no orders as to costs.

DATED, SIGNED AND DELIVERED THIS 23RD DAY OF OCTOBER 2024 IN OPEN COURT AT VOI VIRTUALLY.

GEORGE DULU

JUDGE

In the presence of:-

Maina/Trizah – Court Assistants

Mr. Chebii for Petitioner

Mr. Mwabili for the Respondent

No appearance for the Interested Party

