



REPUBLIC OF KENYA



**Kamau & 10 others v Speaker of the County Assembly Nakuru & 2 others
(Petition E004 of 2021) [2023] KEHC 568 (KLR) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 568 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
PETITION E004 OF 2021
HK CHEMITEI, J
FEBRUARY 9, 2023**

BETWEEN

**CATHERINE KAMAU 1ST PETITIONER
SUSAN NJUGUNA 2ND PETITIONER
JOYCE ANYISO 3RD PETITIONER
ROSE KARUGI 4TH PETITIONER
CAROLINE KILISHIA 5TH PETITIONER
BUISIENEI BENAZIR 6TH PETITIONER
ALICE KERING 7TH PETITIONER
ELIZABETH GICHUKI 8TH PETITIONER
ROSE GATHONI 9TH PETITIONER
DOREEN KORIR 10TH PETITIONER
ZAITUNA IBRAHIM 11TH PETITIONER**

AND

**SPEAKER OF THE COUNTY ASSEMBLY NAKURU 1ST RESPONDENT
CLERK NAKURU COUNTY ASSEMBLY 2ND RESPONDENT
COUNTY ASSEMBLY NAKURU 3RD RESPONDENT**



RULING

1. This ruling is in respect to a preliminary objection filed by the respondents herein dated November 17, 2021 against the petitioners' suit filed *vide* a petition and application both dated February 10, 2021 on the grounds that;
 - a. That the application together with the petition are fatally and incurably defective, vexatious and an abuse of the court process.
 - b. That the application together with the petition offend section 7 of the *Civil Procedure Act*.
 - c. That issues raised in the pleadings herein are *res judicata* and were substantively determined by Justice M. Mbaru in ELRC petition No El of 2020
 - d. That the applicants ought to have appealed the above decision by Hon Justice M. Mbaru.
 - e. That further to the above, the only remedy (if any) available to the petitioners can only be advanced by the Salaries and Remuneration Commission which is not a party to these proceedings.
 - f. That the application lacks merit and legal legs and such ought to be dismissed with costs the respondents.
 - g. That the application is an abuse of the process of the court.
2. Parties agreed to dispose the preliminary objection by way of written submissions.

Respondents'/Applicants' Submission

3. The respondents in their submissions identified three issues for determination by this court namely; the principles of *res judicata*, whether this court was bound by the decision of a court of concurrent jurisdiction and whether the petitioners had the capacity to seek the prayers sought.
4. On the first issue on principles of *res judicata*, the respondents submitted that the present petition was similar to the issue handled by Justice Lenaola in the case of *Tom Luusa Munyasa & another v Governor Makeni County & another* [2015] eKLR, and urged the court to be guided by the *ratio decidendi* as was applied by the honourable judge in dealing with the present matter.
5. On the second issue, whether this court was bound by the decision of a court of concurrent jurisdiction the respondents submitted that this court cannot sit as an appellate court to overturn the decision by Justice Mbaru regarding the unconstitutionality of the petitioners' petition with respect to ward funds. They placed reliance on the case of *Thika Coffee Mills v Gakuyu* civil appeal 281 of 2019.
6. On the last issue, whether the petitioners had the capacity to seek the prayers sought they submitted that the present petition had been overtaken by events since most of the members were not nominated members of the county assembly post the recently held elections.
7. In conclusion, the respondents submitted that the preliminary objection had merit and should therefore be allowed as prayed.



Petitioners' Submissions

8. The petitioners in their submission identified five issues for determination by this court namely; whether the applicants had established a prima facie case, whether the petition was *res judicata*, whether petitioners could only find relief through the Salaries and Remuneration Commission, whether the petition and application were fatally and incurably defective, vexatious and an abuse of the court process and who was to bear the costs of the application.
9. On the first issue, the petitioners submitted that the respondents raised several grounds whereby only one establishes a point of law in that the matter was *res judicata* in accordance with section 7 of the [Civil Procedure Act](#). They urged the court to strike out the rest of the grounds in the preliminary objection as they did not raise a point of law.
10. On the second issue, the petitioners submitted that honourable Justice Mbaru gave a ruling following an application in ELRC Petition No E1 of 2020 where she found that the Employment and Labour Relations Court had no jurisdiction to determine the petition. That therefore the honourable judge did not dispose of the matter with finality as she did not focus on the substantial issues conversed in the petition.
11. The petitioners placed reliance in the case of [Landmark Freight Services Limited v Kenya Bureau of Standards](#) [2021] eKLR where court opined that *res judicata* applied to a decision given by a judge or tribunal with jurisdiction over the cause of action and the parties, which disposes it with finality, a matter so decided cannot be re-litigated by those bound by the judgement except on appeal or review.
12. On the third issue, the petitioners submitted that the [Constitution](#) sufficiently provided for jurisdiction of the High Court and under article 165 whereby it had powers to interpret and enforce the bill of rights. That also there were various remedies that could be issued by it in performance of its duty to enforce rights in the bill of rights as provided for under article 23 of the [Constitution](#) and one of them was declaration of rights among others.
13. On the fourth issue, the petitioners submitted that the applicants could not deny them their rights to claim constitutional rights under articles 22, and 23 of the [Constitution](#). That they could not limit rights which could only be limited by law as provided for under article 24 of the [Constitution](#).
14. Lastly, the petitioners urged the court to find that the preliminary objection raised by the respondents lacked merit and raised no valid point of law to warrant dismissal of the petition. They also prayed for costs of the application.

Analysis and Determination

15. I have considered the preliminary objection and the submissions by both parties. In my view, the issue for determination is; whether the preliminary objection herein is merited.
16. It is trite law that for a preliminary objection to be valid; firstly, it must raise a pure point of law. Secondly, the objection is argued on the assumption that all the facts pleaded by the party against whom it is raised are correct. Lastly, an objection cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.
17. In *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696, Law JA stated as follows:

“So far as I’m 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.”

18. The above being the description of a preliminary objection, it is not in doubt that a preliminary objection raises pure points of law, which is 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.

19. In the case of *Quick Enterprises Ltd v Kenya Railways Corporation*, Kisumu HCCC No 22 of 1999, the court held that: -

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

20. Therefore, before this court embarks on determining the merit of the notice of preliminary objection herein, it will first determine whether what have been raised by the parties herein satisfy the ingredients of a preliminary objection. In this determination, the court will be persuaded by the findings in 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”.

21. In the present case the respondents have in their preliminary objection averred that the suit herein is *res judicata* as it relates to ELRC Petition No E1 of 2020, which was struck out *vide* a ruling of the court on January 27, 2021. The petitioners in their submissions have disputed that fact that the suit herein is *res judicata*.

22. In the case of *Henry Wanyama Khaemba v Standard Chartered Bank Ltd & another* (2014) eKLR, the court held that:

“That re-statement of the limited scope of a preliminary objection brings me to the point where I hold that the preliminary objection by the 1st defendant is not a true preliminary objection in the sense of the law. The issues of *res judicata*, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1st defendant. They are incapable of being handled as preliminary objections because of the limited scope of the jurisdiction on preliminary objection. Court of laws have always had a well-founded quarrel with parties who resort to raising preliminary objections in improperly”.

23. Further in the case of *George Kamau Kimani & 4 others v County Government of Trans Nzoia & another* (2014), eKLR, the court held that: -

“I have considered the points raised by the 1st defendant. All those points can be argued in the normal manner. They do not qualify to be raised as preliminary points. One cannot raise a ground of *res judicata* by way of preliminary objection. The best way to raise a ground of *res judicata* is by way of notice of motion where pleadings are annexed to enable the court to determine whether the current suit is *res judicata*. Professor Sifuna did not raise the issue of *res judicata* by way of notice of motion. Professor Sifuna only annexed a ruling in respect of



a case which was struck out. This is not a proper way of issues which require ascertainment of facts by way of evidence. They cannot be brought by way of preliminary objection”.

24. In view of the above cited authorities this court finds and hold that for it to determine whether the issues herein were directly and substantially in issue with the other suit that is ELRC Petition No E1 of 2020, it will have to ascertain facts and probing of evidence. These issues need to be determined through a notice of motion application or at the main trial
25. In the premises, what has been raised by the respondents’ application does not amount to a preliminary objection as one will need to search for more factual matters or evidence,
26. The preliminary objection is therefore dismissed. Costs shall await the outcome of the petition.

DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 9TH DAY OF FEBRUARY 2023.

H. K. CHEMITEI

JUDGE

