



**Huka & 2 others v County Assembly of Isiolo & another; Kenya Kwanza Coalition & 2 others (Interested Parties) (Constitutional Petition E009 of 2023) [2023] KEHC 18212 (KLR) (5 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18212 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CONSTITUTIONAL PETITION E009 OF 2023**

**EM MURIITHI, J**

**JUNE 5, 2023**

**IN THE MATTER OF THE COUNTY GOVERNMENTS ACT 2012**

**AND**

**IN THE MATTER OF SECTION 16 & 17 OF THE  
COUNTY POWERS & PRIVILEGES ACT 2017**

**AND**

**IN THE MATTER OF THE ISIOLO COUNTY ASSEMBLY STANDING ORDER**

**AND**

**IN THE MATTER OF ILLEGAL SUSPENSION, DE-WHIPPING AND/  
OR REMOVAL OF MEMBERS OF ISIOLO COUNTY ASSEMBLY**

**AND**

**IN THE MATTER OF ARTICLE 1, 2, 3, 10, 23, 38, 47, 48,  
50, 108, 159, 232, 251 & 258 OF THE CONSTITUTION**

**AND**

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

**BETWEEN**

**NURA MOHAMMED HUKA ..... 1<sup>ST</sup> APPLICANT**

**MEJJA ABDULLAHI GOLICHA ..... 2<sup>ND</sup> APPLICANT**

**ABUBAKAR ABDI GODANA ..... 3<sup>RD</sup> APPLICANT**

**AND**

**COUNTY ASSEMBLY OF ISIOLO ..... 1<sup>ST</sup> RESPONDENT**

**SPEAKER COUNTY ASSEMBLY OF ISIOLO ..... 2<sup>ND</sup> RESPONDENT**



**AND**

**KENYA KWANZA COALITION ..... INTERESTED PARTY**  
**ABDINOOR DIMA JILO ..... INTERESTED PARTY**  
**KAMILA WARSAME ..... INTERESTED PARTY**

**RULING**

1. By a Notice of Motion under certificate of urgency dated 8/5/2023 pursuant to Sections 1A, 1B, 3, 3A, 6 of the Civil Procedure Act, Order 51 of the Civil Procedure Rules and all other enabling provisions of the law, the 1<sup>st</sup> Respondent seeks that:
  1. Spent
  2. This Honorable Court be pleased to issue an order of stay staying the proceedings and or any other hearing of the instant petition/application being Meru Constitutional Petition No. E009 OF 2023 pending the hearing and determination of PPDT E001 OF 2023 in Meru; JR E001 OF 2023 in Meru; and Appeal No. E067 OF 2023 in Meru.
  3. This Honorable Court be pleased to issue orders dismissing the Petition dated 3<sup>rd</sup> May 2023 with costs as it amounts to an abuse and misuse of the court process.
  4. Costs of this application be on the course.
2. The application is premised on the grounds on the face of it and supporting affidavit of Salad Guracha, the clerk of the 1<sup>st</sup> Respondent sworn on even date. He accuses the Applicants of filing multiple suits in various courts and tribunals seeking the same or substantially the same orders, on accounts of similar facts and involving the same facts which violates the intent of Section 6 of the Civil Procedure Act. It is in the interest of justice that the hearing in this petition being Meru Constitutional Petition No. E009 OF 2023 be stayed pending the hearing and determination of PPDT E001 OF 2023 in Meru; JR E001 OF 2023 in Meru; and Appeal No. E067 OF 2023 in Meru to avoid the court rendering conflicting decisions and or compromising the jurisdiction of the courts and or tribunals ranking below it.

**Response**

3. The Applicants opposed the application vide the replying affidavit sworn by the 3<sup>rd</sup> Applicant on 18/5/2023. He urges the court to consider their petition in accordance with the provisions of Articles 25(3) and 159(2) of the Constitution, which will not in any prejudice the 2<sup>nd</sup> Respondent. There is no other available forum to address the constitutional breaches occasioned to the Petitioners and as such, this court is the last resort, and in the event the court downs its tools, the Petitioners will remain outside the functions of the county assembly for 3 months, thereby missing out on formulation of public policy documents and representation as mandated by the Constitution. The stay of the proceedings application by the Respondents is bad in law as it seeks to mislead the court of the existence of other active matters similar to the petition herein. He urges the court to allow the petition on its own merit as the same is neither *res judicata*, sub judice, frivolous, malicious or vexatious, and cites Kenya Wildlife Service v James Mutembei (2019) eKLR and Watu Credit v Geoffrey Mokaya Aboki & Karen Chepkurui (2022) eKLR.



## Preliminary Objection

4. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents raised a Preliminary Objection dated 8/5/2023 on the grounds that:

“The Application offends the provisions of Section 10 of the [County Assembly Powers and Privileges Act](#), 2017 which inter alia expressly insulates proceedings before the County Assembly from judicial interference; The Application offends the provisions of Section 11 of the [County Assembly Powers and Privileges Act](#), 2017 which inter alia expressly insulates the Speaker, Leader of Majority, Leader of Minority, Chairperson of Committee, Member, Clerk or Member of Staff from civil proceedings for any act done or ordered by them in the discharge of the functions of their office or for an act done or ordered to be done in the discharge of their functions relating to proceedings of a County Assembly or its Committees from judicial interference; The Application is bad in law for seeking to restrain the Assembly from discharging its constitutional mandate; The instant Petition and Application are sub judice on account of the matter in the Political Parties Dispute Tribunal, PPDT No. E001 of 2023; The Application and Petition are res judicata on account of the Court in High Court Judicial Review No. E001 of 2023 – Meru.”

## Submissions

5. The Petitioners urge that the internal memo is not a creation of the law or statute and is not a proceeding on the face of Order 48 of the County Assembly Standing Orders, and cite [Peter Mungai v Joseph Ngaba Kuria and another v Leah Ngari Ndichu](#) (Interested Party) (2022) eKLR and [Speaker of National Assembly v Njenga Karume](#) (1992) eKLR. They urge that the jurisdiction of the Political Parties Tribunal is limited and it cannot wear the hat of the High Court, and issue the orders sought herein. They urge that the petition and the complaint before the Tribunal are distinct in context, substance and component and the parties are not similar. It is trite law that the sub judice rule cannot be used to deny interim orders at the preliminary stage but that it should concern itself with trial of the main suit. They invite the court to lean in favor of the public policy and public interest in the current petition, and cite [Miguna Miguna v Fred Okenjo Matiangi; minister of Interior and KNCHR](#) (2018) eKLR. They urge that they have met the threshold befitting grant of interlocutory orders pending determination of the petition as set out in [Giella v Cassman Brown & Co. Ltd](#) (1973) EA 358, [Gatirau Peter Munya v Dickson Kitbinji](#) (2014) eKLR and [Mrao v First American Bank Ltd](#) (2003) eKLR. They urge that the Respondents are in violation of Standing Orders 108 to 112 of the County Assembly Standing Orders by acting suo moto and failing to invoke the clear and express provisions of the [Constitution](#). Article 165 (3) of the [Constitution](#) donates jurisdiction of this court with the duty and obligation to intervene in actions of other arms of Government and State Organs where it is alleged or demonstrated that the [Constitution](#) has either been violated or threatened with violation.
6. The 1<sup>st</sup> Respondent submits that section 10 of the [County Assembly Powers and Privileges Act](#) absolutely bars court’s intervention in proceedings such as those before the court, and cites Meru HC JR No. E001 of 2023 [Hon. Abubakar & 2 Others v Speaker of Isiolo County Government and others and Ndyanabo v A.G of Tanzania](#) (2001) EA 495. It urges that section 6 (2) of the [County Assembly Powers and Privileges Act](#) ousts the jurisdiction of the court from entertaining the matters raised in the Petition, and cites [Owners of Motor Vessel ‘Lilian S’ v Caltex Oil \(Kenya\) Limited](#) (1989) KLR 1, [Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 Others](#) (2012) eKLR and [Diana Ketbi Kilonzo & Another v Independent Electoral Boundaries Commission & 10 Others](#) (2013) eKLR. It invites the court to find guidance in the judicial lineage established in the above cases and find it prudent to decline jurisdiction in the matter. It urges the court to allow the application of 8/5/2023



by staying the petition pending the hearing and determination of the complaint in Meru PPDT No. E001 of 2023 and Meru H.C Civil Appeal No. E067 of 2023, and cites *Kinatwa Cooperatives Savings & Credit Limited v Kinatwa Prestige Limited* (2021) eKLR.

7. The 2<sup>nd</sup> Respondent urges that the County Assembly enjoys the Constitutional doctrine of separation of powers not to have its matters intruded upon by the judicial arm of government with the exception of entertaining unconstitutionality. It is urged that the 2<sup>nd</sup> Respondent enjoys immunity from civil proceedings so long as they have not conducted unconstitutional actions and acted *ultra vires*, and cites *Hon. Abubakar Abdi Godana & 2 Others v The Speaker, County Assembly of Isiolo & Another and United Democratic Movement & 2 Others* – JR Application No. E001 of 2023 Meru. It is urged that the instant application and petition are sub judice as the issues they raise are before the Political Parties Dispute Tribunal for determination, and cites the *Supreme Court of Kenya case of Kenya National Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 Others (Interested Parties)* (2020) eKLR. It is urged that the application and the petition are res judicata and the court ought not to usurp the jurisdiction of the Tribunal, and cites *Invesco Assurance Company Limited & 2 Others v Auctioneers Licensing Board & another; Kinyanjui Njuguna & Company Advocates & another (Interested Parties)* (2020) eKLR.

### **Analysis and Determination**

8. Having considered the pleadings herein and the submissions on record, the court finds the issues for determination to be whether the Preliminary objection is merited and whether the proceedings herein ought to be stayed on the principles of separation of powers, statutory ouster of jurisdiction, sub judice and res judicata, and constitutional avoidance.

### **Jurisdiction of the Court**

9. In the locus classicus of *Owner of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Limited* (1989) KLR 1, Nyarangi JA sitting in the Court of Appeal held as follows: -

“...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 continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter the moment it holds the opinion that it is without jurisdiction....”

10. The 1<sup>st</sup> Respondent’s Counsel Mr. Lesaigor urged that the jurisdiction of the Court to determine this matter is ousted by the provisions of sections 10 and 11 of the *County Assemblies Powers and Privileges Act*. Those sections provide that,

“10. No proceedings or decision of a county assembly or the Committee of Powers and Privileges acting in accordance with this Act shall be questioned in any court. 11. (1) No civil or criminal proceedings shall be instituted against any Member for words spoken before, or written in a report to a county assembly or a Committee, or by reason of any matter or thing brought by him or her therein by a report, petition, Bill, resolution, motion or other document written to a county assembly. (2) No civil suit shall be commenced against the Speaker, the leader of the majority party, the leader of the minority party, a chairperson of a committees or any member for any act done or ordered by them in the discharge of the functions of their office. (3) The Clerk or other members of staff shall not be liable to be sued in a civil court or joined in any



civil proceedings for an act done or ordered to be done in the discharge of their functions relating to proceedings of a county assembly or its committees.”

11. It is trite law that the High Court draws its jurisdiction from Article 165 (3) of the Constitution, which provides as follows:

- “(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.”

12. This Court has jurisdictional competence to consider in addition to questions of violation of the Bill of Rights, any “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.” The Court is asked to interrogate the constitutionality of the acts and/or omissions of the Respondents, and it will not shy away from doing so.

### **Application for stay of proceedings, Res judicata and Sub-judice**

13. The 1<sup>st</sup> Respondent seeks to stay the proceedings herein pending the hearing and determination of PPDT E001/2023; JR E001/2023; and Appeal No. E067/2023, on the reasoning that there may be conflicting decisions from those suits. As shown below, this court already heard, determined and issued orders in JR No. E001/2023 and an application for stay of execution in Civil Appeal No. E067/2023, and besides those proceedings are distinct from the issue in the proceedings herein.



## Sub Judice

14. It is said that there is pending proceedings before the Political Parties Dispute Tribunal rendering this matter as sub judice. That is not the case because while the dispute herein relates to an internal memo suspending the Applicants from house sittings for 21 days, the dispute before the Tribunal relates to the removal from house committees.

15. The Court agrees with the Petitioners that the suit in this petition relates to the events of 28<sup>th</sup> March 2023 rather than 27/3/2023 as evidenced by the reliefs sought in the Petition as follows:

- “ 1. This petition be allowed.
2. This court be pleased to issue an order of certiorari to bring into this court and quash the internal memo dated 28<sup>th</sup> March 2023.
3. A perpetual order do issue directing the petitioners to resume their roles and functions as members of county assembly of Isiolo with the privileges accruing thereto ante 27<sup>th</sup> of March 2023.
4. Costs of this suit.

Dated at Nairobi this 3<sup>rd</sup> day of May 2023”

16. By a Notice of Motion dated 3/5/2023, the Petitioners sought in similar terms interlocutory relief principally as follows:

- “ 3. That pending the hearing and determination of this suit, leave be granted to the Applicants to seek an order of certiorari to bring to this court the "internal memo" dated 28<sup>th</sup> of March 2023 for purposes of quashing for being in breach of the standing orders 42, 108, 109, 110, 111, 112, 158 and 160 of the County assembly standing orders and Articles 47, 48 and 50 of the Constitution of Kenya.”

17. The challenge in this case is clearly on the Memo dated 28<sup>th</sup> March 2023 made by the 2<sup>nd</sup> respondent in purported exercise of powers set out in the Memo. The determination of the question whether the provisions of law relied on by the Speaker 2<sup>nd</sup> Respondent contravene the Constitution as urged by the Petitioners is a matter squarely falling within the constitutional jurisdiction of the High Court under Article 165 (3) (d) (ii) of the Constitution .

18. The scope of the dispute resolution under section 40 of the Political Parties Act is political disputes involving members of political parties or political parties or coalitions; between members or independent candidates with political parties; and appeals from the Registrar as follows:

- “ 40. Jurisdiction of Tribunal
  1. The Tribunal shall determine—
    - a. disputes between the members of a political party;
    - b. disputes between a member of a political party and the political party;
    - c. disputes between political parties;



- d. disputes between an independent candidate and a political party;
  - e. disputes between coalition partners;
  - f. appeals from decisions of the Registrar under this Act; and
  - (fa) disputes arising out of party nominations.
2. Notwithstanding subsection (1), the Tribunal shall not hear or determine a dispute under paragraphs (a), (b), (c), (e) or (fa) unless a party to the dispute adduces evidence of an attempt to subject the dispute to the internal political party dispute resolution mechanisms.
  3. A coalition agreement shall provide for internal dispute resolution mechanisms.

[Act No. 21 of 2016, s. 19, Act No. 2 of 2022, s. 27.]”

19. The Tribunal will not determine the question of suspension of a member of the House by the Speaker. The proceedings before the Political Parties Dispute Tribunal (PPDT) relate to the removal of the petitioners from their House roles, and that is a matter different from the question of the authority of the 2<sup>nd</sup> Respondent Speaker raised in this Petition. The Proceedings in this suit are not therefore sub judice by virtue of the proceedings before the PPDT, which is interrogating a different, if connected, matter. A decision by the Tribunal that the petitioners were or were not properly removed from their specific roles of House leadership does not determine the question whether the 2<sup>nd</sup> Respondent Speaker has authority to suspend the petitioners from the House. Sub judice rule does not arise in the circumstances.
20. The Applicants in their application dated 3/5/2023 principally seek the quashing of the internal memo dated 28/3/2023 for being in breach of standing orders 42, 108, 109, 110, 111, 112, 158 and 160 of the County Assembly of Isiolo Standing Orders and Articles 47, 48 and 50 of the Constitution . The Internal Memo in question was in the following terms:

“Republic of Kenya

County Assembly of Isiolo

The Speaker, County Assembly

28/3/2023

Internal Memo

The Clerk

County Assembly of Isiolo

Re: Suspension Of Members For Grave Disorderly Conduct

During the Tuesday 28<sup>th</sup> March 2023 afternoon sitting some members attacked the persona of the Speaker violating the Provisions of Standing Order 112 1 (a, c) a conduct deemed gravely disorderly: if the concerned member,



- a. Uses violence against a Member or other person in the Chamber or Committee-
- c. Handles, dismember, breaks, attempts to snatch and or removes the Mace from its place in the Chamber:

Pursuant to Standing Order 112 2 (a) the following members were suspended for a period of twenty-one sitting days., including the day of suspension the for (sic) gravely disorderly conduct during the above mentioned House proceeding.

Those Members include:

1. Hon. Abubakar Abdi Godana
2. Hon. Meja Abdullahi Golicha
3. Hon. Nura Mohamed Huka.

Thank you.

[signed]

Hon. Mohamed Roba Koto, OGW

Speaker to the County Assembly

Cc. Hon. Abubakar Abdi Godana

Hon. Meja Abdullahi Golicha

Hon. Nura Mohamed Huka”

21. The relevant part of the Standing Orders of Isiolo County Assembly provides as follows:

“Grave disorderly conduct

112.

- (1) Conduct is gravely disorderly if the Member concerned
  - (a) Uses violence against a Member or other person in the Chamber or Committee -
  - (b) Attempts to or disrupts the Speaker's Procession;
  - (c) Handles, dismember, breaks, attempts to snatch or snatches and or removes the Mace from its place in the Chamber:
- (2) The Speaker or the Chairperson of Committees shall call a Member whose conduct is gravely disorderly to order. and shall order the Member to withdraw immediately from the precincts of the Assembly -
  - (a) On the first occasion, during the same Session, for a minimum of fifteen sitting days and a maximum



of twenty-one sitting days, including the day of suspension:

- (b) on the second occasion. and any subsequent occasion during the same Session. for a minimum of twenty-two sitting days and a maximum of a period equivalent to a Session. including the day of suspension.
  - (3) In the event of grave disorder arising in the Assembly. the Speaker may adjourn the Assembly forthwith or suspend any sitting for a period to be determined by him or her.
  - (4) In the event of grave disorder arising in the Committee of the whole Assembly, the Speaker shall resume the Chair forthwith.”
22. It is clear that section 40 of the *Political Parties Act* deals with a different subject of relation between a members and political parties/coalitions and the challenge before the court here is a question of the suspension from the House not by a political party but by Speaker and County Assembly.

### **Res Judicata**

23. Section 7 of the *Civil Procedure Act* provides as follows:

“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.”

24. Whereas the proceedings before Meru H.C JR No. E001 of 2023 Hon. Abubakar Abdi Godana & 2 Others v The Speaker County Assembly of Isiolo & Ano questioned the legality of the acts of the 2<sup>nd</sup> Respondent herein, Speaker of the County Assembly of Isiolo, the judicial review nature of proceedings meant that, unlike in constitutional litigation such as the present, the court does not delve into the merits of the case. See *Commissioner of Lands v Kunste Hotel Limited* [1997] eKLR that “judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision-making process [and its] purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected”, citing *R v. Secretary of State for Education and Science ex parte Avon County Council* [1991] 1 ALL ER.282, at p. 285 and *Chief Constable of the North Wales Police v. Evans* [1982] 1 WLR 1155.
25. Res judicata would only arise if the Judicial Review application Meru HC JR No. E001 of 2023 had dealt with any merits of the case. Apart from the limited scope of judicial; review proceedings by which the court does not delve into the merit of a decision, the particular proceedings herein were terminated by the refusal of leave to commence judicial review proceedings, and the court had no occasion to consider the merit of the decision by the 2<sup>nd</sup> respondent being under challenge here.



26. As observed by this court in KBT Petition No. 3 Of 2019, *Hon. Benjamin Koech V. Baringo County Government & 2 ORS.*, it has long been held that the principle of *Res Judicata* is applicable in constitutional litigation but only in the clearest of cases:

“29. The Court of Appeal (Makhandia, JA; Ouko JA (as he then was) and M’Inoti, JA.) in Malindi Civil Appeal No. 42 of 2014, *John Florence Maritime Services Limited & another v. Cabinet Secretary for Transport and Infrastructure & 3 others* [2015] eKLR (an appeal from the decision of this court sitting in Mombasa) put paid any question that the doctrine of *res judicata* applied even to constitutional litigation as follows:

“As we see it, the issues for determination from the memorandum as well as the submissions of the parties are:-

- i) Whether *res judicata* is applicable in Constitutional cases;
- ii) Whether a plea of *res judicata* must be raised through a formal application;
- iii) What must be proved in order to establish that a suit is *res Judicata*;
- iv) Whether in this case the appellants were accorded a fair hearing and an opportunity to be heard or defend themselves against the claim of *res judicata*; and,
- v) Whether the High Court was justified in holding that the matter was *res judicata*.

The doctrine of *res judicata* in Kenyan law is embodied or anchored on Section 7 of the *Civil Procedure Act*. It is in these terms:-

“7. *Res judicata*

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.”

From the above, the ingredients of *res judicata* are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title and lastly that the court or tribunal before which the former suit was litigated was competent and determined the suit finally (see *Karia & Another v the Attorney General and Others* [2005] 1 EA 83.



*Res judicata* is a subject which is not at all novel. It is a discourse on which a lot of judicial ink has been spilt and is now sufficiently settled. We therefore do not intend to re-invent any new wheel. We can however do no better than reproduce the re-indention of the doctrine many centuries ago as captured in the case of *Henderson v Henderson* [1843] 67 ER 313:-

“.....where a given matter becomes the subject of litigation in and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.....”

See also *Kamunye & others v Pioneer General Assurance Society Ltd* [1971] EA 263. Simply put *res judicata* is essentially a bar to subsequent proceedings involving same issue as had been finally and conclusively decided by a competent court in a prior suit between the same parties or their representatives.

The rationale behind *res judicata* is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. *Res judicata* ensures the economic use of court’s limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without *res judicata*, the very essence of the rule of law would be in danger of unraveling uncontrollably. In a nutshell, *res judicata* being a fundamental principle of law may be raised as a valid defence. It is a doctrine of general application and it matters not whether the proceedings in which it is raised are constitutional in nature. The general consensus therefore remains that *res judicata* being a fundamental principle of law that relates to the jurisdiction of the



court, may be raised as a valid defence to a constitutional claim even on the basis of the court's inherent power to prevent abuse of process under Rule 3(8) of the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules, 2013](#). On the whole, it is recognized that its scope may permeate broad aspects of civil law and practice. We accordingly do not accept the proposition that Constitution-based litigation cannot be subjected to the doctrine of *res judicata*. However we must hasten to add that it should only be invoked in constitutional litigation in the clearest of the cases. It must be sparingly invoked and the reasons are obvious as rights keep on evolving, mutating, and assuming multifaceted dimensions.

We also resist the invitation by the appellants to hold that all constitutional petitions must be heard and disposed of on merit and that parties should not be barred from the citadel of justice on the basis of technicalities and rules of procedure which have no place in the new constitutional dispensation. The doctrine is not a technicality. It goes to the root of the jurisdiction of the court to entertain a dispute. If it is successfully ventilated, the doctrine will deny the court entertaining the dispute jurisdiction to take any further steps in the matter with the consequence that the suit will be struck out for being *res judicata*. That will close the chapter on the dispute. If the doctrine has such end result, how can it be said that it is a mere technicality? If a constitutional petition is bad in law from the onset, nothing stops the court from dealing with it peremptorily and having it immediately disposed of. There is no legal requirement that such litigation must be heard and determined on merit.

The respondents filed grounds of opposition and affidavits raising the defence of *res judicata*. The appellants had ample time and opportunity to advance evidence and submissions to refute this claim. Indeed from the record of the proceedings, there were extensive submissions on the issue by all the parties. We do not think that the appellants are therefore being candid when they claim that they were denied the right to be heard and or that the court ruled on the issue suo moto. This is a false accusation. The court in deciding to rule on the issue in limine is not the same thing as acting suo moto. It did so after hearing the parties on the issue. We are also not aware of any legal edict that an objection to a suit taken on the basis of *res judicata* must be so taken on a formal application. The appellants did not cite to us any such authority. In any event, the respondents had in their various pleadings raised the issue and this was long before the hearing of the application and the appellants were therefore put on notice in good time. In any event, why did they not take up the issue in the High Court? They have not even alleged that they were ambushed by the plea. The doctrine of *Res inter alios acta alteri nocere non debet* which holds that: "things done between strangers must not cause an injury to people who are



not parties to such acts” is relevant in the circumstances of this case. Essentially, it means that a contract cannot adversely affect the rights of one who is not a party to it. This doctrine was applied in the case of *Powel v Wittsbire and Others* [2004] 3 All ER 235 where the Court held that estoppel per rem judicatam could not bind a person who claimed under the person against whom a judgment had been obtained unless he had obtained his interest from that person after judgment had been given. In that case however, the court quoted with approval Lord Denning in the case *Nana Ofori Atta II v Nana Abu Bosra II* (1957) 3 All ER 559 at 243 in which he stated that:-

“.....Those instances do not, however, cover this case which is not one of active participation in the previous proceedings or actual benefit from them, but of standing by and watching them fight out or at most giving evidence in support of one side or the other. In order to determine this question, the West African Court of Appeal quoted from a principle stated by Lord Penzance in *Wytcherley v Andrews* [1871] LR 2 P& D 327 at 328). The full passage is in these words:-

‘...there is a practice in this Court, by which any person having an interest may make himself a party to the suit by intervening; and it was because of the existence of that practice that the Judges of the Prerogative Court held that if a person, knowing what was passing, was content to stand by and see his battle fought by somebody else in the same interest, he should be bound by the result, and not be allowed to re-open the case.’

The doctrine of *res judicata* has two main dimensions: cause of action *res judicata* and issue *res judicata*. *Res judicata* based on a cause of action, arises where the cause of action in the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. Cause of action *res judicata* extends to a point which might have been made but was not raised and decided in the earlier proceedings. In such a case, the bar is absolute unless fraud or collusion is alleged. Issue *res judicata* may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant and one of the parties seeks to re-open that issue.

The cause of action in the JR as well as in the Petition was substantially the same, being the imposition of certification levies by the 4<sup>th</sup> respondent through the 3<sup>rd</sup> respondent. The genesis of these levies was traced to the bilateral agreement between Kenya and DRC. The issue in both suits is whether the levies were valid



although the grounds of validity were anchored in the decision making process with regard to JR and violation of rights and fundamental freedoms of the Constitution of Kenya in the Petition. However, the main respondent against whom orders were sought and would have been executed is the 3<sup>rd</sup> respondent. Would it not be vexed twice over the same issue? The interested party in the JR was referred to as Office De Gestion Du Freit Multimodal. In the Petition, the 4<sup>th</sup> respondent is referred to as Office De Gestion Du Freit Maritime (OGEFREM). The appellants argue that the two are different parties altogether. Not much evidence was placed on record in this regard, although it is noteworthy that both institutions were represented in the respective suits by one, Bertha Morisho Mwamvua. The two names appear to have been used interchangeably in various documents on record, and they played the same function in both instances. Further, the applicants in the JR came to court as representing those who, just as the appellants, plied the business of clearing and forwarding. Therein lies the nexus of the two suits and the issue of *res judicata*. The appellants were aware of the JR proceedings but were content to just stand by and see the battle waged by their colleagues in the trade without intervention much as they were entitled to. They must suffer the consequences. They cannot be allowed to reopen the same case now on constitutional grounds. The appellants' claims of violations of their rights and freedoms would and could have been raised within JR and determined therein.

The JR was tried before a competent court and judgment thereon delivered. Halsbury's Laws (4<sup>th</sup> Edition, Volume 16 para 1527-1529) states that: in deciding what questions of law and fact were determined in the earlier judgment the court is entitled to look at the Judge's reasons for his decision, and his notes of the evidence and is not restricted to the record. As correctly submitted by counsels for the respondents, nothing would therefore prevent a court from accessing its own records in the previous proceedings. It should be noted that the Judge in the Petition had occasion to hear an interlocutory application for leave so as to operate as stay in JR, which he granted. Accordingly, the Judge cannot be said to have been a stranger to the facts and issues of both cases.

From our expose of the doctrine above, we are now able to formally answer the issues isolated for determination in this appeal earlier as follows:-

- i) The doctrine of *res judicata* is applicable to constitutional litigation just as in other civil litigation as it is a doctrine of general application with a rider, however, that it should be invoked in constitutional litigation in rarest and in the clearest of cases.



- ii) There is no legal requirement or factual basis for the submission that the doctrine must only be invoked and or ventilated through a formal application. It can be raised through pleadings as well as by way of preliminary objection.
- iii) The ingredients of *res judicata* must be given a wider interpretation; the issue in dispute in the two cases must be the same or substantially the same as in the previous case, parties to the two suits should be the same or parties under whom they or any of them is claiming or litigating under the same title and lastly, the earlier claim must have been determined by a competent court.
- iv) The appellants were accorded an opportunity to be heard against the claim of *res judicata* and finally,
- v) We entertain no doubts at all that the High Court was justified in holding the subsequent suit to be *res judicata*.

This being our view of the appeal, it must fail and is accordingly dismissed with costs to the respondents.”

27. I do not agree that circumstances exist for the application of *res judicata* in this case, and the plea is rejected. In any event, the judicial review application was not heard on the merit as leave was declined and was, therefore, not “heard and finally decided” by the judicial review court, and the issue of *res judicata* does not arise.

### **Separation of Powers, judicial restraint and Constitutional avoidance**

28. Counsel for the 1<sup>st</sup> respondent Mr. Aluku cited *Aswander v Tennessee Valley Authority*, 297 U.S. 288 and invited this Court to exercise judicial restraint urging that the said US Supreme Court decision as authority for the proposition that where there are alternative means of resolution the court should exercise judicial avoidance in constitutional cases. The Supreme Court of Kenya in *Communications Commission of Kenya & 5 Others v Royal Media Services & 5 Others*, Petition No. 14, 14 A, B & C of 2014, (2014) eKLR relied on the *Aswander* case in upholding the principle of constitutional avoidance as observed by this court in MERU HC Const. Pet. No. 15 of 2020 *Gacheri David Mukindia V. Harles Murugu Mukindia & 11 ORS.*, as follows:

- “ 14. In the case of *Royal Media Services v Attorney General*, Civil Appeal No. 45 of 2012 (2018) eKLR, the Court of Appeal comprising P. N. Waki JA, R. N. Nambuye JA and A. Makhandia JA, while determining an appeal where the Appellant had filed a Petition in the High Court seeking to recover debt ensuing from a contract held as follows: -

“In our view the judge cannot be faulted for holding that a constitutional petition procedure adopted by the appellant in ventilating its claim was ill suited for the kind of claim it had laid before the trial court namely debt collection. We had occasion in the



past to bemoan the current trend of filing constitutional petitions and references on matters or claims that have no iota or scintilla of any constitutional bearing. This trend of constitutionalizing virtually everything, which is actually, in our view an abuse of the court process, needs to nibbed in the bud and frowned upon. We stated thus in the case of *Gabriel Mutava & 2 Others v Managing Director Kenya Prots Authority & Another* (2016) eKLR:

“Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such a party ought to seek redress under such other legal regime rather than trivialize constitutional litigation.....”

15. The above finding surmises the principle of constitutional avoidance which holds that where it is possible to decide a case without reaching a constitutional issue, that should be done. In the above case of *Royal Media Services v Attorney General*, Civil Appeal No. 45 of 2012 (2018) eKLR, the quote cited with the approval the decision of the Supreme Court in the case of *Communications Commission of Kenya & 5 Others v Royal Media Services & 5 Others*, Petition No. 14, 14A, B & C of 2014 where it was held as follows: -

(256) The appellants in this case are seeking to invoke the “principle of avoidance”, also known as “constitutional avoidance”. The principle entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S V Mhulungu* 1995 (3) SA 867 (CC) the Constitutional Court, Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows (at paragraph 59):

“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”

(257) Similarly, the U.S Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (*Aswander v Tennesse Valley Authority*, 297 U.S 288, 347 (1936)).”

What do the Isiolo County Assembly Standing Orders provide for a member suspended for misconduct?

29. The Petitioners did not attach the full text of the second Edition of the County Assembly of Isiolo Standing Orders but only page 44 thereof setting out Standing Orders Nos.111 and 112. The Court has, however, no reasons to expect that there is an internal mechanism for redress under the 2<sup>nd</sup> edition



above the position set out in the Standing Orders under 2015 edition which is available on the Isiolo County Assembly Website.

### **No appeal provision from suspension in Standing Orders**

30. This court would in deference to the constitutional doctrine of separation of powers gladly restrain itself had there been procedure equivalent to situation in the National Assembly for the appeal from a decision on suspension because in that case the avoidance principle would be grounded on there existing an alternative procedure for redressing the alleged grievance. See the *Speaker of the National Assembly v Karume* (Civil Application 92 of 1992) [1992] KECA 42 (KLR) (29 May 1992) (Ruling), where the Court of Appeal (Kwach, Cockar (as he then was) and Muli JJA) held:

“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that order 53 of the *Civil Procedure Rules* cannot oust clear constitutional and statutory provisions.”

31. Under Standing Orders 110A and 110B of the *National Assembly Standing Orders*, the effect of suspension and a right of appeal is set out as follows:

“110A. Effect of suspension

- (1) A Member who is ordered to withdraw from the precincts of Assembly under Standing Order 108 (Member may be suspended after being named) and Standing Order 111 (Action to be taken on refusal to withdraw) shall during the period of such withdrawal or suspension forfeit—
  - (a) the right of access to the precincts of the Assembly; and
  - (b) his or her salary and all allowances payable during the period.
- (2) Suspension from the service of the House shall not exempt the Member so suspended from appearing before a Committee of the House for the consideration of a Bill sponsored by the Member.

110B. Appeal against suspension

- (1) Except as provided in this Standing Order, the suspension of a Member or the application of this Standing Order shall not be subject to debate.
- (2) A Member suspended from the House under this Part may appeal in writing to the Committee of Privileges within three days of the suspension.
- (3) Despite paragraph (2), the Committee may, with leave of the House, admit an appeal received after three days.



- (4) Upon receipt of the Member’s appeal, the Committee shall within seven days—
  - (a) notify the Member, in writing, of the day appointed for the hearing of the appeal;
  - (b) notify the Speaker, who shall thereafter admit the Member to the precincts of Parliament on the day(s) appointed for the hearing of the appeal; and
  - (c) consider the appeal and after according the Member the right to be heard, submit a report to the House either—
    - (i) upholding the suspension; or
    - (ii) reducing the period of suspension; or
    - (iii) readmitting the Member to the House.
- (5) The decision of the Committee regarding the suspension shall be final.
- (6) The Member who presided in the House or Committee of the whole House during suspension of an appealing Member shall not participate in the proceedings of the Committee during the appeal, except to give evidence when so required.
- (7) A Member designated by the Committee shall inform the House of the decision of the Committee regarding the suspension and the Speaker shall thereupon effect the decision.
- (8) The House may, in exceptional circumstances permitted by the Speaker, debate the report of the Committee without amendment or resolution.”

32. I have not seen similar provisions for appeal from suspension of a member of the Isiolo County Assembly in its Standing Orders and the County Assembly having already promulgated own Standing Orders, it cannot rely on the saving provisions of section 14(7) of the [County Governments Act](#) to fall back on the Standing Orders of the National Assembly in terms that –

“14.

- (7) Until a county assembly makes its standing orders under subsection (1), the standing orders of the National Assembly shall, with the necessary modifications, apply to that county assembly.”

33. The court is, consequently, unable to agree with Counsel for the 2<sup>nd</sup> Respondent Ms. Kiunga’s submission that “the petitioners/applicants seek to quash communication by the Speaker [and as] the Internal Memo is an internal administrative communication on the decision of the House and it should not be discussed in court. Section 40 of the [Political Parties Act](#), the dispute before the court is subject to section 40. It is the Political Party that took away the election of the applicants.”



34. The respondents have not demonstrated that there exists alternative internal mechanism for redressing the petitioners' grievance. In the absence of a provision in the Standing Orders of the County Assembly of Isiolo on a right of appeal such as that under the National Assembly Standing Orders, the Constitutional Court must step up and take up its jurisdiction under Article 165(3) (b) (d) (ii) of the Constitution to enquire into the question whether the Standing Orders are consistent with the Constitution , and hear the dispute on its merit as to whether the exercise of the powers therein have infringed on the petitioners' rights.

### Conclusion

35. The principles of sub judice and res judicata raised by the 1<sup>st</sup> Respondent's application for stay of proceedings dated 8/5/2023 do not apply in the circumstances of this case because the jurisdiction of, and the matter before, the Political Parties Tribunal is different from the issue of suspension of the Petitioners from the County Assembly raised in this suit; and the prior judicial review proceedings filed by the Petitioners in Meru HC JR E001 of 2023 could not, and did not, deal with the merits of any decision, and at any rate did not finally hear and determine, any issue raised in the present suit.
36. The statutory provisions of section 10 and 11 of the County Assembly Powers & Privileges Act, urged in the Preliminary Objection raised by the 2<sup>nd</sup> respondent herein, cannot trump the Court constitutional jurisdiction under Article 165(3) (b) (d) (ii) of the Constitution , as relevant. The High Court as Constitutional Court is empowered to deal with the matters of unconstitutionality of the 2<sup>nd</sup> respondent's actions raised in this petition. The principle of constitutional avoidance is, in the circumstances of this case, exempt by the reason of want of alternative statutory relief procedure, and the High Court must take up its constitutional mandate.

### Orders

37. Accordingly for the reasons set out above, the Court makes the following Orders:
1. The Preliminary Objection on jurisdiction taken by the Respondents and dated 8/5/2023 is declined.
  2. The 1<sup>st</sup> Respondent's Application for stay of the suit dated 8/5/23 is declined.
  3. The Court directs that the Petition and the Notice of Motion thereunder shall proceed to hearing and determination by this Court sitting as the Constitutional Court under Article 165 (3) (b) and (d) (ii) of the Constitution .
  4. Pursuant to Rule 20 of the the Constitution of Kenya (protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, Legal Notice No. 117 of 28<sup>th</sup> June, 2013, (Mutunga Rules), the Court directs that the Petitioners' application dated 3/5/2023 shall heard, on the basis of the urgency shown and certified, and the court being away on official duty this week, by way of written submissions to be filed by the Petitioners on the one hand, and the Respondents and Interested Party on the other hand, starting with the Petitioners, each taking three (3) days, time being of essence.
  5. The Court shall deliver its ruling on the Petitioner's application dated 3/5/2023 on the Wednesday, 14<sup>th</sup> June 2023.
38. Costs in the Cause.  
Order accordingly.



**DATED AND DELIVERED THIS 5<sup>TH</sup> DAY OF JUNE, 2023.**

**EDWARD M. MURIITHI**

**JUDGE**

**APPEARANCES:**

Mr. Mwendani F Advocate for the Petitioners.

Mr. Aluku with Mr. Lesaigor, Advocates for 1<sup>st</sup> Respondent.

Mr. E. Theuri with Ms. Kiunga, Advocates for the 2<sup>nd</sup> Respondent.

N/A for the Interested Parties.

