



REPUBLIC OF KENYA



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**Musyoka v Clerk, Machakos County Assembly & 4 others; Sereka & 3 others (Interested Parties)
(Constitutional Petition E024 of 2022) [2023] KEHC 20805 (KLR) (13 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20805 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CONSTITUTIONAL PETITION E024 OF 2022**

MW MUIGAI, J

JULY 13, 2023

BETWEEN

WILFRED MANTHI MUSYOKA PETITIONER

AND

THE CLERK, MACHAKOS COUNTY ASSEMBLY 1ST RESPONDENT

SPEAKER, MACHAKOS COUNTY ASSEMBLY 2ND RESPONDENT

MACHAKOS COUNTY ASSEMBLY 3RD RESPONDENT

**THE GOVERNOR, MACHAKOS COUNTY GOVERNMENT ... 4TH
RESPONDENT**

COUNTY GOVERNMENT MACHAKOS 5TH RESPONDENT

AND

CECILIA MBINYA SEREKA INTERESTED PARTY

STELLAMARRIS NDINDA MUTHOKA INTERESTED PARTY

ONESMUS MUTISYA MUIA INTERESTED PARTY

**COUNTY PUBLIC SERVICE BOARDS NATIONAL CONSULTATIVE
FORUM INTERESTED PARTY**

RULING

Preliminary Objection

Petition Dated 13/12/2022



1. The Petitioner herein is a resident of Machakos County defending the Constitution and ensuring the rule of law is upheld, he wishes to challenge the legality of the removal from office of the 1st, 2nd & 3rd Interested Parties herein by the Respondents herein.
2. The 1st Respondent is the Clerk of the Machakos County Assembly appointed as per the provisions of Section 19 of the County Governments Act, 2012, the 2nd Respondent is the Speaker of the County Assembly of Machakos appointed under Article 178 of the Constitution of Kenya, the 3rd Respondents is the County Assembly of Machakos established under Article 176(1) of the Constitution of Kenya, the 4th Respondent is the Governor of Machakos County established under Article 180 of the Constitution of Kenya and the 5th Respondent is the County Government of Machakos established under Article 176 of the Constitution of Kenya.
3. The 1st Interested Party is the immediate former vice chairperson of the Machakos Public Service Board, the 2nd Interested party is the immediate former member of the Machakos Public Service Board and the 3rd interested party is the immediate former Certified Public Secretary who were all removed from office by a vote cast on 29/11/2022 by members of the 3rd Respondent and a letter authored by the 4th Respondent addressed to them on even date. The 4th Interested party is a forum mandated with the role of overseeing the issues of all County Public Service Boards Countrywide.
4. That the 1st, 2nd & 3rd Interested parties and the three other members of the Public Service Board continued to perform their functions as prescribed by Section 59 of County Government Act.
5. That as at 29th November, 2022 the Board was constituted of the following members:-
 - i. Cecilia Mbinya Sereka
 - ii. Stellamarris Ndinda Muthoka
 - iii. John Kimeu Kumbo
 - iv. Franklin Musila Makola
6. This was after two of the members resigned prior to their impeachment on 29th November, 2022. The two included;
 - i. George Kioko Luka
 - ii. Jane Mutheu Mutune
7. Subsequently, three other members of the Machakos Public Service Board, the 1st, 2nd & 3rd Interested parties herein, were removed from office on 29/11/2022 vide vote cast by members of the 3rd Respondent and prompting the letter of removal by the 4th Respondents and subsequent Gazette Notice of their removal as aforesaid.
8. The Board is no longer properly constituted as per the provisions of Section 58 of the County Government Act, 2012.
9. After the removal from office of the 1st, 2nd & 3rd interested parties, it follows that the 2 members of the Board who are still holding office cannot perform the functions of the Public Service Board for want of quorum.
10. Prior to the chaotic removal of the 1st, 2nd and 3rd interested parties from office on 10/11/2022, the Machakos Public Service Board was conducting interviews for the position of County Chief Officers which exercise was suspended on the 10/11/2022.



11. The appointment of County employees is a function reserved to the Public Service Board unless the said Board collectively chooses to delegate this function as per the provisions of Section 86 of the County Government Act.
12. The Board as from 29/11/2022 is dysfunctional for want of quorum as afore-mentioned thus it can neither appoint any employees nor delegate its functions.
13. The Petitioner is well aware that interview for the position of Chief Officers is still ongoing to date despite the absence of a functional and well constituted Public Service Board.
14. The Petitioner is apprehensive that names of individuals who have been illegally and irregularly interviewed will be forwarded to the 3rd Respondent herein for vetting and subsequent approval in utter contravention of the law.
15. In addition to the ongoing interviews being illegal and unprocedural the same are also a complete waste for the public funds in contravention of Article 201 of the Constitution of Kenya, 2010.
16. Sections 59, 30 & 31 of the County Governments Act 2012 outlines the duties and functions of the County Public Service Board.
17. Article 73 of the Constitution provides for the authority assigned to a State Officer.
18. Section 4(1) of the Fair Administrative Action Act outlines the process and outcome of Fair Administrative Action.
19. The Petitioner states that the forceful eviction and locking of the County Public Service Board offices is thus without any legal basis, it is abuse of the power by the Respondents and should be stopped by this Court.
20. The 5th Respondent has violated the Petitioner's rights to protection of the law under Articles 27 and 47 of the Constitution by arbitrary dismissing and evicting them from office.
21. The 4th and 5th Respondents have violated the 1st, 2nd and 3rd interested parties rights to fair hearing enshrined in Article 50 of the Constitution.
22. The Petitioners sought for the following prayers:-
 - a. An order of certiorari to remove to this Court and to quash the resolution of the 3rd Respondent dated 29/11/2022 which had the effect of removing the 1st, 2nd and 3rd interested parties from office, the gazette of the resolution vide gazette Notice No.14710 & the communication by the 4th Respondent dated 29/11/2022 addressed to the 1st, 2nd and 3rd interested parties.
 - b. A declaration that standing order number 46(1) of the Machakos County Assembly standing orders is unconditional, null and void.
 - c. A declaration that the entire process by the Respondents leading to the removal of the 1st, 2nd and 3rd interested parties from office on 29th November, 2022 was illegal, null and void.
 - d. Any other order Court may deem fit and expedients in the circumstances of this case.
 - e. Costs of this petition to be borne by the Respondents.

Notice Of Motion Dated 13/12/2022

23. The petitioner filed an application together with the petition and sought the following prayers;



1. Spent
2. That pending the hearing and determination of this application, conservatory orders be granted staying the resolutions of the 3rd Respondent passed on the 29/11/2022 and/or published on 30/11/2022 communication the resolution and/or removal of the 1st, 2nd & 3rd interested parties from the office of the Machakos County Public Service Board.
3. That pending the hearing and determination of the petition conservatory orders be granted staying the resolutions of the 3rd Respondent passed on the 29/11/2022 and/or published on 30/11/2022 communication the resolution and/or removal of the 1st, 2nd & 3rd interested parties from the office of the Machakos County Public Service Board.
4. That a conservatory order of injunction be granted restraining the Respondents from undertaking any exercise towards recruitment of County Chief officers for the county government of Machakos pending the hearing and determination of this application .
5. That conservatory order of injunction be granted restraining the Respondents from undertaking any exercise towards recruitment of County Chief officers for the County Government of Machakos pending the hearing and determination of this petition.
6. That this Court grant any orders as it may deem appropriate in the circumstances.
7. That costs of this application be provided for.

Chamber Summons Dated 20/12/2022

24. The Petitioner filed a chamber summons dated 20th December, 2022 based on the following:-
 - a. That there is a pending application for conservatory orders dated 13/12/2022 seeking among other orders an order barring the recruitment of the vacant positions of the Machakos County Public Service Board.
 - b. The 5th Respondent has on 20/12/2022 placed an advert in the daily nation calling for applications for the recruitment of the chairperson and three (3) members of the Machakos County Public Service Board.
 - c. That this is despite the 5th Respondent being aware there is pending petition and an application for conservatory orders barring any recruitment until the said application and petition are heard and determined.
 - d. That if the recruitment proceeds as advertised it will render the application and the petition nugatory and/or superfluous.
 - e. This is an urgent deserving case for the Court to intervene during the current vacation to meet the ends of justice.

Preliminary Objection Dated 9.2.2023

25. The 4th and 5th Respondents raised a preliminary objection to the Notice of Motion Application and the Petition on the grounds that;
 - a. The Court does not have the requisite jurisdiction to hear and try this matter in light of the provisions of Section 6 and 7 of the [Civil Procedure Act](#)



- b. The Notice of Motion application, the Petition and indeed the entire proceedings herein are sub judice and res judicata Petitions No 3,4,5 of 2022 all before the Employment and Labour Relations Court at Machakos
 - c. It is in the interest of justice that the Application and proceedings be dismissed and struck out.
26. The Respondents filed submissions. The Petitioner and the Interested Parties Submissions were not on record at the time of writing this Ruling.

1ST, 2ND & 3RD Respondents' Submissions

27. Filed on 12.05.2023, it was submitted that Section 6 of the *Civil Procedure Act* instructs courts to strike out any suits or proceedings that bring rise to matters that have previously been brought on the floor of the court and are yet to be decided on, which include the same subject matter and parties litigating under the same title as those of the previous pending suit.
28. While relying on the case of Miano vs Wanjiru ELC Cause no 246 of 2021, Kenya National Commission on Human Rights vs Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested parties) advisory opinion ref 1 of 2017, Barclays Bank of Kenya Limited vs Elizabeth Agidza & 2 others [2012] e KLR, it was submitted that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await determination to be made in the earlier suit. Further, that for the interest of justice, it would be prejudicial to commence a suit of the same nature that might lead to insufficient or unsatisfactory judgments to parties as a result of conflicting decisions and thus a mockery of the oxygen principle.
29. Constitutional Petitions 3, 4 and 5 of 2022 are based on the removal of office of the Petitioners and interested parties that work for various Respondents in the petition herein and some of the petitioners are also interested parties in the present petition, for example Onesmus Mutisya Muiya is a Petitioner in petition 2 of 2022 and an interested party herein.
30. It was submitted that the advocate for the Petitioner filed the previous petitions before the ELRC and subsequently knowingly filed the petition herein without considering that it would amount to an abuse of the court's process. Reliance was placed on the case of Daniel Kipkemoi Bett & Another vs Joseph Rono [2020] e KLR and Kinatwa Co-operative Savings & Credit Society Limited vs Kinatwa Prestige Limited [2021] e KLR.

4TH & 5TH Respondents' Submissions

31. Filed on 24.04.2023 in support of the Preliminary objection, it was submitted that it is not in dispute that there are pending cases before the Employment and Labour Relations Court at Machakos being Petitions No 3, 4, 5 of 2022 challenging the removal of the interested parties from their positions and therefore the subject matter is the same as that in the present Petition. It was opined that the Counsel appearing for the Petitioners in the said petitions is also the one appearing in the Petition herein.
32. The ELRC Petitions were filed before the present petition and therefore he was aware of these proceedings. It was contended that this was an abuse of the court process to undermine the administration of justice by filing a multiplicity of suits on the same subject matter involving the same parties with an aim to manipulate the judicial system to obtain interim orders in one of the several cases filed.



33. On sub judice, it was submitted that Section 6 of the *Civil Procedure Act* prohibits a court from proceeding with any matter where issues are substantially the same in another case by the same parties. Reliance was placed on the case of *Nguruman vs Jan Bonde Nielsen & Another* [2017] e KLR, *Mwangi Stephen Muriithi vs Daniel T. Arap Moi & Another* [2017] e KLR, *Jesse Njoroge Gitau vs Kibuthu Macharia & Another* [2019] e KLR and *Republic vs Kenya Revenue Authority ex parte Paul Mahokha Okoiti* [2016] e KLR.

Determination

34. This Court considered the Preliminary Objection, the Court record and the submissions of the parties on record and find that the issue for determination is whether this matter is sub judice and/or resjudicata consequently whether this court has jurisdiction to handle this matter or not.
35. This Court notes that the Petitioner has not challenged the Notice of Preliminary Objection and therefore the allegations remain uncontroverted.
36. Jurisdiction is everything. This was stated in the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd.* (1989):
- “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 its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”
37. Section 5 of the *Civil Procedure Act* provides that;
- “Any court shall, subject to the provisions herein contained, have jurisdiction to try all suits of a civil nature except IN suits of which its cognizance is either expressly or impliedly barred.”
38. The Respondents contend that the matter is sub judice. Section 6 of the *Civil Procedure Act* provides as follows;
- “No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”
39. The Supreme Court in *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)*, stated therein as follows: -
- “(67) The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in



order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”

40. This principle was also discussed in the case of Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR where Mativo, J stated as follows:-

“...there exists the concept of sub judice which in Latin means “under Judgement.” It denotes that a matter is being considered by a court or judge. The concept of sub judice that where an issue is pending in a court of law for adjudication between the same parties, any other court is barred from trying that issue so long as the first suit goes on. In such a situation, order is passed by the subsequent court to stay the proceeding and such order can be made at any stage.”

41. In Kenya Bankers Association versus Kenya Revenue Authority, 2019 eKLR the Court stated as follows;

“in addition, it is clear that the matters in issue in the suits or proceedings are directly and substantially the same. The parties in the suits or proceedings are the same. The ex parte applicant herein, is litigating on behalf of its 47 members, some of whom are parties in the existing suits. The suits are pending in the High Court which has jurisdiction to grant the relief claimed.

A cursory look at the prayers sought in this case show that they relate to the same subject matter. However, the principle of sub judice does not talk about the “prayers sought” but rather “the matter in issue” I find that the matters in issue in the suits are substantially the same. In Re the matter of the Interim Independent Electoral Commission, the Supreme Court cited with approval the Australian decision where it was held: -

“... we do not think that the word “matter” ...means a legal proceeding, but rather the subject matter for determination in a legal proceeding. In our opinion there can be no matter...unless there is some right, duty or liability to be established by the determination of the Court...”

42. As per the Supreme Court decision, the party claiming sub judice must prove;

- a. there is more than one suit over the same subject matter;
- b. that one suit was instituted before the other;
- c. that both suits are pending before courts of competent jurisdiction
- d. that the suits are between the same parties or their representatives.”

43. In the case of Margaret Wachu Karuri Vs John Waweru Ribiro (2021) e KLR, the Court was faced with a similar question whether sub-judice can be raised as a preliminary point and held as follows;

“For the Court to determine whether the issues herein were directly and substantially in issue with the other suit, it is this court’s considered view that it will have to ascertain facts and probe evidence by ascertaining whether the issues raised in the instant suit are the same as the ones in the Appeal aforesaid and further interrogate the prayers sought whether they are



the same and relate to the same issues. On whether or not the same is sub-judice, facts have to be ascertained and a preliminary objection cannot be raised on disputed facts. Therefore, this court holds and finds what has been raised by defendant/objector does not amount to a preliminary objection, and thus the preliminary objection is not merited.”

44. The Respondents herein have stated that there are Petitions pending before the Employment and Labour Relations Court being Petition 3,4 and 5 of 2022, however none of the parties have disclosed who the parties in those matters are and/or attached the pleadings before this Court for perusal or consideration.
45. It has only been alleged that the 1st interested party in this matter is the Petitioner in ELRC Petition 2 of 2022. Despite being served with the Notice of Preliminary objection as evidenced by the affidavit of service filed on 20.02.2023, neither the Petitioner nor the interested parties have responded to the allegations raised herein.
46. The parties have not confirmed that the alleged matters filed in ELRC have commenced, proceeded or are determined. Secondly, in the absence of other parties’ responses, it is not confirmed whether, the matters in ELRC and this Court are same parties, same subject-matter. In the absence of such evidence to enable this Court arrive at an informed decision, the allegation that the Petition before this court is sub judice has not been proved.

Disposition

47. Consequently, the Court finds and holds that the notice of preliminary objection dated 9th February 2023 by the 3rd and 4th Respondent is not merited and the same is dismissed entirely with no orders as to costs.

**RULING DELIVERED DATED & SIGNED IN OPEN COURT IN MACHAKOS ON 13/7/2023.
(VIRTUAL/PHYSICAL CONFERENCE**

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

Mr. Munyao - For The Petitioner

Mr. Mutua - For The Respondents

NO/APPEARANCE - FOR THE I/PARTIES

PATRICK/GEOFFREY - COURT ASSISTANT(S)

