



**Njagi & 4 others v Governor Embu County & 4 others; Njagi & 3 others (Interested Parties)  
(Constitutional Petition E006 of 2022) [2023] KEHC 20255 (KLR) (19 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20255 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CONSTITUTIONAL PETITION E006 OF 2022**

**LM NJUGUNA, J**

**JULY 19, 2023**

**IN THE MATTER ARTICLES 2(1), 3(1), 10, 19, 20, 21, 22, 23, 25, 27, 28, 33(1), 35(3), 43,  
46, 47, 48, 55, 159(1), 165(D)(I), 232 AND 259 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 10,  
20, 21, 27(1), 35, 43, 46, 47, 232 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF THE WATER ACT 2016, AND COMPANIES  
ACT 2015 AND THE CORPORATE GOVERNANCE GUIDELINES**

**FOR THE WATER SERVICES SECTOR 2018**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT (NO. 4 OF 2015)**

**BETWEEN**

**JOY MUKAMI NJAGI ..... 1<sup>ST</sup> PETITIONER  
NYAGA KAROGO ..... 2<sup>ND</sup> PETITIONER  
JOHN NJIRU ..... 3<sup>RD</sup> PETITIONER  
MAURICE NJUE ..... 4<sup>TH</sup> PETITIONER  
MOSES SALIM ..... 5<sup>TH</sup> PETITIONER**

**AND**

**THE GOVERNOR EMBU COUNTY ..... 1<sup>ST</sup> RESPONDENT  
WATER IRRIGATION, ENVIRONMENT AND NATURAL RESOURCES EMBU  
COUNTY ..... 2<sup>ND</sup> RESPONDENT  
COUNTY SECRETARY EMBU COUNTY ..... 3<sup>RD</sup> RESPONDENT**



EMBU WATER AND SANITATION COMPANY ..... 4<sup>TH</sup> RESPONDENT  
WATER SERVICES AND REGULATORY BOARD ..... 5<sup>TH</sup> RESPONDENT

AND

MERCY MURINGO NJAGI ..... INTERESTED PARTY  
RT. REV. DR. SAMUEL NGINYI ..... INTERESTED PARTY  
VIMAL SHAH ..... INTERESTED PARTY  
DICKSON NJIRU ..... INTERESTED PARTY

## RULING

1. The interested parties herein filed a notice of preliminary objection dated August 8, 2022 for the application dated July 27, 2022 and the petition herein, on the following grounds:
  - a. This Honourable Court lacks jurisdiction to hear and determine the Application and Petition for reasons; the matters and issues therein are Res Judicata and the rules and grounds upon which the Application and Petition are pegged are unconstitutional, having been stayed in the High Court in Murang'a Constitutional Petition 3 of 2021 and determined in Embu High Court Constitutional petition no 6 of 2021;
  - b. The application is frivolous, vexatious, a waste of the Honourable court's time and the petition be dismissed; and
  - c. The application and petition are premature, ill-conceived, bad in law and an abuse of the court process and should be dismissed with costs to the Respondents.
2. The objection was argued by way of written submissions. The 4<sup>th</sup> Respondent and the Petitioners filed their respective written submissions. The interested parties associated themselves with the submissions filed by the Counsel for the 4<sup>th</sup> Respondent.
3. In their submissions, the respondents and interested parties urged the court to determine whether the preliminary objection is merited and who should bear the costs of the petition. On their argument that the preliminary objection and the petition were res judicata, the petitioners relied on the case of *Aviation and Allied Workers Union Vs Kenya Airways Limited & 3 others [2015] eKLR* and *ET VS Attorney General and Another (2012) eKLR*. They argued that the preliminary objection was indeed meritorious and urged the court to also find as much and on this they relied on the cases of *Kitty Njiru Vs Nature & Style Fun Day Events & Another; Rebecca Muriuki t/a Kabaari (proposed third party) (2020) eKLR* as with authority in the case of *Vincent Mwatsuma Nguma & 5 others Vs Kilifi Mariakani water & sewerage Co Ltd (KIMAWASCO) (2021)*.
4. Further they relied on *Independent Electoral & Boundaries Commission Vs Maina Kiai & 5 Others [2017] eKLR* and section 7 of the *Civil Procedure Act* CAP 21 to submit that the Application and Petition are not only Res Judicata but are also an abuse of the Court process.
5. On their case that the application in question and the petition are scandalous, vexatious, and frivolous as to their nature, the Respondents and Interested Parties invoked the decision of the court in *County Council of Nandi Vs Ezekiel Kibet Rutto & 6 others(2013) eKLR*. They prayed that their objection be sustained and the Application and petition be dismissed with costs to the Respondents.



6. The Petitioners are of the converse position and they submit that the objection is not a proper one in law and therefore cites the case of *Mukisa Biscuits Manufacturing Co Limited Vs West End Distributors Limited (1969) EA 696* and submits that the objection is, therefore, not grounded in law but on the 4<sup>th</sup> Respondent and Interested Parties' own misinterpretation of the facts of the Petition.
7. Further reliance was placed on the case of *JN & 5 others Vs Board of Management, St G School Nairobi & another [2017] eKLR* wherein the court gave a clear definition of a Preliminary objection and what in that case constitutes a preliminary objection in relation to the court decision of Mukisa Biscuit Manufacturers Ltd Vs Westend Distributors Ltd. The Petitioner posits that the preliminary objection can only be raised on a point of law and that the objection is not merited and that the same should be dismissed. On the issue of Res Judicata, the Petitioner relied on the court of Appeal decision of *Nancy Mwangi T/A Worthlin Marketers Vs Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd) & 2 others [2014] eKLR*.
8. The petitioners further submitted that for Res Judicata to be applied as a defense, there must be a suit having the same parties litigating over the same title in a court of competent jurisdiction. That the suit in Murang'a cannot be used in reference to this suit by invoking Res Judicata as the parties are not the same, the petitioners argued using the court decision in the case of *John Florence Maritime Services Limited & another Vs Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR*. They also submitted that when determining a constitutional petition, the court is empowered to look beyond the process, examine and delve into merits of a matter or a decision. In the end, the Petitioners prayed that the objection be dismissed with costs.
9. The nature of preliminary objections was discussed in Mukisa Biscuits Manufacturing Company Limited -Vs- West End Distributors (supra) and the court had the following to say on preliminary objections: -
 

' Far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.'
10. Section 7 of the *Civil Procedure Act* stipulates 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.'
11. A point of law, is a question that must be answered by applying relevant legal principles to the interpretation of the law. Such a question is distinct from a question of fact, which must be answered by reference to facts and evidence as well as inferences arising from those facts.
12. In the case of *Henry Wanyama Khaemba Vs Standard Chartered Bank (K) Ltd & Another [2014] eKLR* in which the High Court cited with approval an earlier decision of Ojwang J (as he then was) in *Oraro Vs Mbajja [2005] eKLR* held thus;

' 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. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion. The principle is abundantly clear. A 'preliminary objection' correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point. Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.'

13. Its trite law, that if a court of competent jurisdiction in the exercise of its jurisdiction delivers a judgment or a ruling which is in its nature final and conclusive, any subsequent proceedings (unless they are of an appellate nature) in the same or any other judicial tribunal, any fact or right which was determined by the earlier judgment is called into question, the defence of res judicata can be raised.
14. A litigant will not be allowed to litigate a matter all over again once a final determination has been made. Generally, a party will be estopped from raising issues that have been finally determined in previous litigation. The purpose is obviously to prevent the repetition of lawsuits between the same parties, the harassment of a defendant by a multiplicity of actions, and the possibility of conflicting decisions by the different courts on the same issue. This was the position taken by the court in the case of *Lotta Vs Tanaki & others (2003) 2 EA 556 (CAT)*.
15. The requirements for res judicata are that the same cause of action, for the same relief and involving the same parties, was determined by a court previously. In assessing whether the matter raises the same cause of action, the question is whether the previous suit involved the determination of questions that are necessary for the determination of the present case and substantially determine the outcome of this case. In the case of *The Independent Electoral and Boundaries Commission Vs Maina Kiai & 5 others, [2017] eKLR*, it was held that:

' For the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

- a. The suit or issue was directly and substantially in issue in the former suit.
- b. That former suit was between the same parties or parties under whom they or any of them claim.
- c. Those parties were litigating under the same title.
- d. The issue was heard and finally determined in the former suit.
- e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.'



1. This position is resounded in the Court of Appeal case of *Siri Ram Kaura – Vs – MJE Morgan*, CA 71/1960 (1961) EA 462 the then EACA stated that:-

' The general principle is that a party cannot in subsequent proceedings raise a ground of claim or defence which has been decided on which, upon the pleadings or the form of issue, was open to him in a former proceeding between the same parties.'

17. Upon further perusal of the pleadings relating to the application and the petition itself, as well as Murang'a Constitutional Petition 3 of 2021 and Embu High Court Constitutional petition no 6 of 2021, I find that the High Court at Murang'a has not conclusively determined the petition before it while Embu High Court Constitutional petition no 6 of 2021 was withdrawn by consent of the parties.
18. In Embu High Court Constitutional petition no 6 of 2021 the issues were substantially similar to the ones in the instant suit. The 8<sup>th</sup>, 9<sup>th</sup>, and 11<sup>th</sup> respondents in the former suit are now interested parties in the present petition. The 1<sup>st</sup> to 5<sup>th</sup> respondents in the former suit are the 1<sup>st</sup> to 5<sup>th</sup> respondents in the present suit. This court had and still has jurisdiction to hear and determine both petitions. The parties are litigating under the same title in both cases but the former suit was disposed of through consent by the parties to withdraw the suit, such consent being adopted by the court as an order.
19. That being the case, it is true that the issues in the Embu petition were not determined as the court did not get a chance to apply its mind on them. It is therefore difficult to say that the issues were fully determined in the former matter, much as they are distinctly similar to the ones in the present matter. I am informed by Order 25 Rule 1 of the [Civil Procedure Rules 2010](#) which states:

' At any time before the setting down of the suit for hearing the plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action.'

20. This Court is, hence, satisfied that the Petition primarily seeks to enforce fundamental rights and freedoms and I am not persuaded that the plea of *res judicata* raised in this case can succeed.
21. I have carefully considered the material presented before Court by the parties including the submissions and precedence. In applying the principles laid down in the law and the above authorities, the conclusion becomes irresistible that the preliminary objection raised in this case does not succeed and the same is dismissed with no order as to costs.
22. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 19<sup>TH</sup> DAY OF JULY, 2023.**

**L. NJUGUNA**

**JUDGE**

.....**Petitioners**

.....**Respondents**

.....**Interested parties**

