



**Musyoka v Clerk, Machakos County Assembly & 4 others; Sereka & 3 others (Interested Parties)
(Constitutional Petition E024 of 2022) [2023] KEHC 23179 (KLR) (4 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23179 (KLR)

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

MW MUIGAI, J

OCTOBER 4, 2023

IN THE MATTER OF ARTICLES 2, 10, 19, 20, 22 (1), 38, 41, 47, 48, 165, 174, 175, 176, 232, 233, 234, 236, AND 259 OF THE CONSTITUTION OF KENYA, 2010 AND IN THE MATTER OF CONTRAVENTION OF SECTIONS 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 83, 85 AND 86 OF THE COUNTY GOVERNMENT ACT, 2012 AND IN THE MATTER OF IMPEACHMENT/REMOVAL FROM THE OFFICE OF THE CERTIFIED PUBLIC SECRETARY OF THE MACHAKOS PUBLIC SERVICE BOARD ON 29/11/2022 VIDE GAZETTE NOTICE NUMBER 14710

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 OF MACHAKOS 5TH RESPONDENT

AND

CECILIA MBINYA SEREKA INTERESTED PARTY

STELLAMARRIS NDINDA MUTHOKA INTERESTED PARTY

ONESMUS MUTISYA MUIA INTERESTED PARTY

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



RULING

Background

Petition

1. The Petitioner herein *vide* a petition dated December 13, 2022 and filed in court on December 14, 2022, challenges the legality of the removal from office the 1st, 2nd and 3rd Interested parties herein by the Respondents herein.
2. The Petitioner sought the following orders:
 1. 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 first, second and third interested parties from office, the Gazette of the resolution *vide* Gazette Notice Number 14710 and the communication by the 4th Respondent dated 29/11/2022 addressed to the First, Second and Third Interested parties herein.
 2. A declaration that standing order number 46 (1) of the Machakos county assembly standing orders is unconstitutional, null and void.
 3. A declaration that the entire process by the respondents leading to the removal of the First, Second and Third Interested Parties from office on November 29, 2022 was illegal null and void.
 4. Any other order the Court may deem fit and expedient in the circumstances of this case.
 5. Costs of this Petition to be borne by the Respondent.
3. The ground upon which this Petition is premised are on the face of the said Petition.

Supporting Affidavit

4. The Petition herein is supported by an affidavit dated December 13, 2022 sworn by Wilfred Manthi Musyoka, the Petitioner herein, wherein, he deposed inter alia that: he knows by his own knowledge that on March 4, 2020 six other members of the Machakos Public Service Board were gazetted as follows:
 - i. George Kioko Luka
 - ii. Cecilia Mbinya Sereka
 - iii. Stellamarris Ndinda Muthoka
 - iv. John Kimeu Kumbo
 - v. Franklin Musila Makola
 - vi. Jane Mutheu Mutune
5. that the 6 members of the Public Service Board were obligated to perform their functions as prescribed by section 59 of the [County Government Act](#).
6. It was his position that by a Notice of Motion tabled on November 15, 2022 it was sought to remove from office four out of six members of the County Public Service Board namely;



- i. Cecilia Mbinya Sereka
 - ii. Stellamarris Ndinda Muthoka
 - iii. John Kimeu Kumbo
 - iv. Franklin Musila Makola
7. Deposing that on 29/11/2022 the board was constituted by the aforementioned persons and that he was informed after two of the Board members resigned prior to their impeachment on November 29, 2022. The two included;
 - i. George Kioko Luka
 - ii. Jane Mutheu Mutune
8. According to the Deponent 3 other members of the Machakos Public Service Board, the interested parties herein, were removed from office on 29/11/2022 *vide* a vote cast by members of the third Respondent and a letter authored by the 4th Respondent and addressed to the interested parties herein on even dates. Further that after the removal from office the First, Second and Third interested parties, the Board was left with only two members, being John Kimeu Kumbo and Franklin Musila Makola.
9. It was deposed that the board is longer properly constituted as the provisions of section 58 of the [County Government Act, 2012](#). Further that he is advised by counsel on record that quorum for any sitting of the Board is a minimum of three members, and that the two members who still holding the office cannot purport to perform the functions of the Public Service Board for want of quorum.
10. As per the deponent, prior to the chaotic removal of the First, Second and Third 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 10/11/2022 (annexed and marked copy of the re-advertisement for the vacancies and interview scheduled for County Chief Officers)
11. Deposing that he is well aware that interviews for the position of Chief Officers are still ongoing to date despite the absence of a functional and well constituted Public Service Board.
12. The Petitioner lamented that numerous allegations were made to the First, Second and Third Interested parties for irregular approval of extraneous allowances for some officers; approval of the employment of nine officers under delegated authority by the office of the Deputy Governor without advertisement or following due process; corruption, abuse of office, irregular changes of terms of service of some officers from contractual to permanent and pensionable without completion of the appropriate probation time; conflict of interest by some board members where beneficiaries of the recruitment process are relatives and were appointed to higher job groups than they deserve or qualify and sexual harassment of two officers namely Caroline Nzioka and Hellen Musau.
13. After the said allegations made against the First, Second and Third interested parties, the Labour, Public Service and ICT Committee was constituted to investigate the Conduct of the First, Second and Third Interested parties in relation to the allegations and it tabled its recommendations before the 3rd Respondent herein sometimes in May,2022 exonerating the First, Second and Third interested parties from the allegations made against them (annexed and marked copy of the recommendations by the Labour, Public Service and ICT Committee sometime in May 2022).
14. The Petitioner contended that the Respondents are in contravention of both the [Constitution](#) and the [County Government Act, 2012](#) as follows:



- i. The First, Second and Third interested parties had been investigated over the same allegation and acquitted by the Labour, Public Service and ICT Committee by the 2nd Assembly by the report and recommendations of May 2022. Hence it is against the rule of natural justice and the double jeopardy rules to subject them to trial over the same allegations.
 - ii. The 3rd Respondent relied on the Standing Order number 46 (1) which allows the said Respondent to charge the First, Second and Third interested parties with same offences upon expiry of six months without limit thus opening it to abuse.
 - iii. The said Standing Order is unconstitutional because it allows the Petitioner to be charged countless times over the same allegations until the mover of the motion achieves the desired result, which is a conviction.
15. He deposed that on or about 10/11/2022 armed county inspectorate officials and hired goons under the direction, supervision and instructions of the 4th and 5th Respondents at around 3:45pm illegally stormed the county public service board offices, terrorized, threatened and ordered all staff of the board to stand up and leave the offices immediately. Further that the armed county inspectorate officials and hired goons remained in the offices to the exclusion of any staff and it is unknown what they did with the documents and other items left behind but definitely they had ulterior motives before locking the same and confiscated all keys for the offices.
 16. The Board then reported the incident to the police and under OB/No/57/10/11/2022 and the issue is under investigation.
 17. It was deposed that the 4th and 5th Respondent has violated the First, Second and Third interested parties' right to fair hearing enshrined in article 50 of the Constitution as they were not issued with a show cause letters. Further they were not heard before being dismissed and kicked out of office neither were they given a chance to respond to the allegations leveled against them and no disciplinary hearing was ever conducted.

Notice Of Motion

18. The Petitioner filed together with the Petition herein a notice of motion application dated December 13, 2022 supported by an affidavit sworn by the Wilfred Manthi, the Petitioner herein. In the said application, the Petitioner sought orders that:
 1. Spent
 2. Pending the hearing and determination of this application, conservatory orders be granted staying the resolutions of the 3rd Respondent passed on 29/11/2022 and/or published on 30/11/2022 communicating the resolution and/or removal of the 1st, 2nd and 3rd Interested parties from the office of the Machakos County Public Service Board.
 3. Pending the hearing and determination of the Petition conservatory orders be granted staying the resolutions of the 3rd Respondent passed on 29/11/2022 and/or published on 30/11/2022 communicating the resolution and/or removal of the 1st, 2nd and 3rd Interested parties from the office of the Machakos County Public Service Board.
 4. 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 hearing and determination of this application.



5. 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.
6. This court grant any orders as it may deem appropriate in the circumstances.
7. The costs of this application be provided for.

Chamber Summons

19. The Petitioner further filed a Chamber Summons dated 20th December, 2022 and supporting Affidavit, seeking the Orders that:
 1. (Spent)
 2. (Spent)
 3. (Spent)
 4. Despite the 5th Respondent being aware there is a pending petition and an application for conservatory orders barring any recruitment until the said application and petition are heard and determined.
 5. If the recruitment proceeds as advertised it will render the application and the petition nugatory and/or superfluous.
 6. This is an urgent deserving case for the court to intervene during the current vacation to meet ends of justice.

The Preliminary Objection

20. The 4th and 5th Respondent herein filed their Preliminary Objection dated and filed in court on 9th February, 2023 on the grounds that:
 1. 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*.
 2. 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.
 3. It is in the interest of justice that the application and the entire proceedings be dismissed and struck out.
21. The Preliminary Objection was canvassed *vide* written submissions, in which only the Respondents filed their written submissions in support of the Preliminary Objection. The Petitioner did not file His submissions on the said Preliminary objection.

Court Ruling

22. *Vide* a Court ruling dated July 13, 2023, the Court found that parties did not confirm that the alleged matters filed in ELRC had commenced, proceeded or determined. Secondly in the absence of other parties' responses it was not confirmed whether, the matters in ELRC and in this Court are the same parties and 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 was not proved. The



Court further found and held that the notice of Preliminary objection was not merited and the same was dismissed entirely with no orders as to cost.

Notice Of Motion Dated 24th July, 2023

23. *Vide* a notice of motion under a certificate of urgency dated July 24, 2023, brought under sections 1A, 1B, 3A and 7 of the *Civil Procedure Act* and rules 3 and 19 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*.
24. The Applicant seeks orders that:
 1. Spent
 2. The Honorable Court strike out and or dismiss the Petition herein for being *res judicata* Petitions 3, 4 and 5 of 2022 before the employment and Labour Relations Court at Machakos.
 3. Costs be awarded to the Respondents
 4. Any further orders that this court may deem fit.
25. The grounds upon which this Application is premised are on the face of the said application.

Supporting Affidavit

26. The Application is supported by an Affidavit filed in court on July 25, 2023 sworn by Dr. Victor Muya Ndambuki, County Secretary of the 5th Respondent and authorized by the 4th Respondent to represent her, wherein he deposed inter alia that: The Petitioner in this case has indicated that the Petition was brought on behalf of, for the benefit of and to protect the fundamental rights and freedoms of others being the 1st, 2nd, and 3rd interested parties herein.
27. Deposing that the 1st, 2nd, and 3rd interested parties had filed their own Petitions before the Employment and Labour Relations Court Being Petitions 3, 4, and 5 of 2022 wherein they were challenging the constitutionality of their impeachment and removal from Office as Members of the Machakos County Public Service Board by the County Assembly of Machakos.
28. According to the deponent, the main issue for consideration in the present proceedings and petition is a challenge to the impeachment and removal of the 1st, 2nd, and 3rd interested parties as members of Machakos County Public Service Board, which was similarly the main issue for consideration in the proceedings before the Employment and Labour Relations Court in Petitions 3,4 and 5 of 2022.
29. He lamented that the Employment and Labour Relations Court has since considered the issue and constitutionality of the removal of the 1st, 2nd, and 3rd interested parties as members of Machakos County Public Service Board; and that the said court found that the removal of the said interested parties as members of Machakos County Public Service Board was legal and constitutional and that there was no violation of any legal rights and freedoms of the parties in their removal as members of the said board.
30. That ELRC being a Court of equal stature and standing as the high court of Kenya, the decision of that court stands and the honorable court has no option but to dismiss the Petition.
31. He is advised by his Counsel on record that in light of sections 7 of the *Civil Procedure Act*, the High Court cannot proceed with a consideration of the same issues as was considered and determined by the Employment and Labour Relations Court; further that he is equally aware that all the Respondents and interested parties on whose behalf the proceedings herein have been instituted were parties in the proceedings before the ELRC in Petitions 3, 4, and 5 of 2022.



32. That in the circumstances of this and taking into account the provisions of the law, it is the deponent averment that this Honorable court cannot proceed with the hearing of this petition, the issues having already been determined by a court of equal stature and standing as the High Court. (annexed and marked copies of documents in support of the Averments herein).
33. The matter was disposed by written submissions, wherein the only the 4th and 5th Respondents filed their submissions. The 1st, 2nd and 3rd Respondents and the Petitioner herein did not file their written submissions at the time of writing this Ruling.

Submissions

4TH and 5th Respondent Submissions

34. The 4th and 5th Respondent in their written submissions dated and filed in court on July 31, 2023, wherein Counsel for the 4th and 5th Respondent submitted that prayers in the Petition herein are replicated word by word as those sought in Petitions 3,4 and 5 of 2022 before the ELRC. Opining that the proceedings before the Employment and Labour Relations Court addressed the same questions that this Honorable is being invited to address in the present petition.
35. Counsel contended that these questions were considered on merit by the ELRC in Petitions 3, 4, and 5 of 2022 vide a judgment issued on July 14, 2023. Averring that in light of that determination and judgment by the ELRC, the issues are *res-judicata* and this Honorable court should at this point reject the invitation to reconsider the same issues, as the issues are essentially the same in those proceedings and in the present proceedings. To buttress his position *res judicata* counsel placed credence in case of *Christopher Kenyariri v Salama Beach* (2017) eKLR, an urged the court to find that the present proceedings are *res judicata* as the ELRC was competently convened to determine the question.
36. Similarly, counsel for the 4th and 5th Respondent placed his reliance on the case of *E.T v Attorney General & another* (2012) eKLR and *Mwangi Stephen Muriithi v Daniel T. Arap Moi & another* [2017] eKLR, to further cement his position on *res judicata*.
37. Counsel urged the court to adopt the above decisions and find that indeed the present proceedings are *res judicata* and offends the Provisions of sections 7 of the *Civil Procedure Act*, and in the premises, the present suit should be struck out and dismissed.

Court Proceedings

38. On 27/9/2023 the matter came up for mention as the Court did not sit on 25/9/2023 and Counsel for 4th & 5th Respondents Mr. Otieno informed the Court that Judgment was delivered on 14/7/2023 by Hon. PJ Bryam Ongaya and a copy of the judgment was annexed to the instant Application filed on 24/7/2023 under Certificate of Urgency which sought that this Court strike out and/or dismiss the Petition 3,4 and 5 of 2022, herein for being *res judicata* as the Petitions challenge the legality and constitutionality of impeachment and removal from office of 1st 2nd & 3rd interested parties as members of the Machakos County Public Service Board by County Assembly of Machakos.
39. The Application lists other grounds that is the main issue in contestation in the present proceedings relate to legality and constitutionality of the removal of interested parties as members of Machakos County Public service board.
40. In light of the decision of ELRC determining the question and finding it to be legal, it is imperative that the present proceedings be dismissed to allow the County fully constitute its Public service board.



41. Ms Kombo holding brief for Mr. Muthusi for 1st & 3rd Respondents supported the Application and waived the right to respond to the Application.
42. The Court adjourned the matter to allow the Petitioner and/or Advocate to appear/Attend Court and respond to the Application.
43. On 28/9/2023, Mr. Munyao for the Petitioner informed the Court it is true there is Judgment by ELRC Court and relates to Petitioners 3,4,& 5 of 2022, but the Petitioner herein was not Petitioner in the just concluded matter in ELRC. He objected to the application of res judicata as the record is clear as the Petitioners in ELRC are not Petitioner in this matter before this Court. Secondly, the judgment delivered by ELRC is subject of Appeal in Court of Appeal. Thirdly, the last time this matter was in this Court was on delivery of Ruling on Preliminary Objection on 13/7/2023 and when the instant Application was filed the Petitioner was not heard on the matter and were not served with directions of 25/7/2023 and therefore did not file Response to the Application.
44. Counsel for Respondents reiterated earlier submissions made the previous day. Counsel for 2nd & 3rd Respondents concurred with 4th & 5th Respondent's Counsel's Application and submissions.
45. Counsel for 4th & 5th Respondents confirmed. Counsel indicated that Pg 12 of the Petition & Pg 51 of the Application. Pg 62 & Pg 73 of the application are similar. The prayers sought in the instant Petition and the Petitions in ELRC are similar save for the Advocates who signed the same. They are 5 prayers similar in both matters in ELRC and in this Court. The ELRC Court rendered itself on the Petitions and no one has challenged the same.
46. As for the Application of 25/7/2023 was filed and served to the Respondents, no response; affidavit/pleadings were filed and remains unopposed.

Analysis

47. I have considered the instant application, the petition as filed, the Replying Affidavits to various applications herein, the annexures, submissions and the authorities cited by the counsel on behalf of the clients.
48. Before delving into the issue I wish to note that the petitioner herein did not file his response to this application, neither did he file his written submissions to this application. In a nutshell he did not controvert the application despite being served as evidenced by Affidavit of Service filed on 22/9/2023.

Issue

49. The issue that commends itself to me for determination is whether the Petition and proceedings herein are *res judicata* Petition Nos. 3, 4 and 5 of 2022 *vide* Judgment delivered by ELRC Court on 14/7/2023.
50. The substantive law on *res judicata* is found in section 7 of the [Civil Procedure Act](#) cap 21 which provides thus:

“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”



51. Further, *Black's law Dictionary* 10th Edition defines “*res judicata*” as;
- “An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties...”
52. The import of the aforementioned provision is that no court is to try a matter that had been heard and determined by a court of competent jurisdiction that involved the same parties and that matter was substantial and was directly in issue in the former suit. This then means that suits must always come to an end so that litigants do not file multiple suits in court when those matters have been heard and determined by a court of competent jurisdiction.
53. The only exception to *res judicata* is where a litigant having been heard by a Court of competent jurisdiction and is dissatisfied by the said decision, may appeal that decision to a superior court or approach the superior court to revise that decision.
54. Further, in the case of *Kennedy Mokuu Ongiri v John Nyasende Mosioma & Florence Nyamoita Nyasende* [2022] eKLR, Kamau J expressed himself as follows:
- “To this end, it is helpful to refer back to the reasons for the principle of finality including that decisions of the court, unless set aside or quashed, must be accepted as incontrovertibly correct. The principle is quite clear, and quite strict. The Court reaches this conclusion on an orthodox application of the principle. In the plea of *res judicata* only the actual record, that the issue has been decided upon, is relevant. Not what material was before the Court. Even if the reasoning given in the earlier Decision was wrong, the matter cannot be re-opened by way of a similar Application. There are only 2 other Avenues which I will address later. The binding force of such Orders depends upon the general principles of law. If it were not binding, there would be no end to litigation.”. The principle of *res judicata* applies to a matter decided in an earlier suit and upon its general principles it applies to proceedings in the same suit as well.”
55. In the present case, the 4th and 5th Respondents have raised a pertinent issue of *res judicata*. They aver that the applications, petition and proceedings herein are *res-judicata* petition Nos. 3, 4 and 5 of 2022. Further they aver that the interested parties herein had filed their own Petitions before the Employment and Labor Relations Court wherein they were challenging the constitutionality of their impeachment/removal from office as members of the Machakos County Public Service Board by the county Assembly. The 4th and 5th Respondents contend that the prayers sought in the present petition are similar prayers that were sought in petitions 3, 4 and 5 of 2022 before Employment and Labour Relations Court.
56. The Court of Appeal in the case of The *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, [2017] eKLR), that:
- “The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and



brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”

57. In this case, I have noted that the prayers in the Petitions filed in the ELRC consolidated of Petitioners Cecilia Mbinya Sereka, Stellamarris Ndinda & Onesmus Mutisya Mutinda Muia all immediate former members of Machakos Public Service Board among others contested unlawful and unconstitutional removal from office by Respondents from serving in the Public Service Board of Machakos County. The grounds of unlawful removal were/are similar to those brought in the present petition in this matter where the Petitioner is William Manthi Musyoka. They include; Failure to give proper notice to Petitioner & The Public, Biaseness and partiality of the Select committee; Abuse of process by 3rd Respondent; the unconstitutionality of Standing order 46 (1) of County Assembly of Machakos County Standing Orders; Impeachment of the Petitioners and Acts of threat and intimidation by 4th & 5th Respondents and abuse of Process by 4th & 5th Respondents.
58. The Relief/Prayers sought in the 3 Petitions consolidated in ELRC and in the instant Petition are identical; Seeking order of Certiorari remove and quash resolution, declare standing order 46(1) unconstitutional null and void and declaration that the entire process was illegal null and void and reinstate the Petitioners to offices Public Service Board Machakos and any order the Court may grant.
59. This Court notes the interested parties herein were petitioners in the ELRC and that what was in issue in the ELRC was the impeachment/ removal from office as members of the Machakos County Public Service Board by the County Assembly which is also in issue in the present petition. The only difference in the instant Petition is that the Petitioner herein was not a party in the Petition before ELRC.
60. Further, it is on record that the Employment and Labour Relations Court vide its judgment dated July 14, 2023 found that the County Public Service Board is independent to the extent as pleaded for the petitioner, that independence of the Board does not defeat the impeachment and removal from office of the Petitioners in the consolidated petitions in ELRC.
61. Employment and Labour Relations Court each of the issues raised and determined each of them and in conclusion found that the Petition Nos. E03, E04 and E05 all of 2022 at Machakos were dismissed.
62. The ELRC is a Court of competent, equal, similar jurisdiction to this Court; High Court. Secondly, ELRC has unique and specific jurisdiction to employment and labour matters with regard to reinstatement of petitioners to employment/office and/or compensation, which the High Court lacks. Thirdly, the Petitioners in the consolidated Petitions and the Petitioner herein were removed from office in similar circumstances and same process by the same Respondents. All relate to circumstances that culminated to unlawful or illegal removal from office; same subject-matter.
63. Therefore, the present petition is substantially and directly in issue, since the substantial issue herein had been heard and determined by a Court of competent jurisdiction and with equal status as the High Court. To hear the instant petition would amount to taking another bite at the cherry; rehearing the Petitions already heard and determined only difference is a different Petitioner who was interested party to ELRC matters.
64. Article 159 (2) (b) of the Constitution mandates that justice ought not to be delayed.
The Supreme Court decision in Petition 14, 14A, 14B & 14C of 2014 (Consolidated) Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR, where it delimited the operation of the doctrine of *res-judicata* in the following terms;
(317) The concept of res judicata operates to prevent causes of action, or issues from being re-litigated once they have been determined on the merits. It encompasses limits upon both issues and



claims, and the issues that may be raised in subsequent proceedings. In this case, the High Court relied on “issue estoppel”, to bar the 1st, 2nd and 3rd respondents’ claims. Issue estoppel prevents a party who previously litigated a claim (and lost), from taking a second bite at the cherry. This is a long-standing common law doctrine for bringing finality to the process of litigation; for avoiding multiplicities of proceedings; and for the protection of the integrity of the administration of justice? all in the cause of fairness in the settlement of disputes.

(318) This concept is incorporated in section 7 of the *Civil Procedure Act* (Cap. 21, Laws of Kenya) which prohibits a Court from trying any issue which has been substantially in issue in an earlier suit.

65. Having perused the Court record and having regard to section 7 *Civil Procedure Act* and guided by the authorities herein, I find that this Court lacks jurisdiction to entertain the Petition herein the same having been heard and determined by the Employment and Labour Relations Court which court is in the same status as the High Court.

Disposition

1. The Court finds and holds that the applications, petition and proceedings herein are dismissed for being *res-judicata* Petitions 3, 4, and 5 of 2022 before the Employment and Labour Relations Court at Machakos by judgment delivered on 14/7/2023.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 4TH DAY OF OCTOBER 2023 (PHYSICAL/VIRTUAL CONFERENCE).

M.W. MUIGAI

JUDGE

In The Presence of

Mr. Mutava H/B for Mr. Munyao - For the Petitioner

Ms Kombo H/B Mr. Muthusi for the 1st, 2nd & 3rd Respondents

Mr. Otieno for the 4th & 5th Respondents

No Appearance - for the Interested Parties

Geoffrey/Patrick - Court Assistant(s)

