



**Okoti v Matiangi (Cabinet Secretary Interior) & 20 others (Petition 227 of 2018)
[2024] KEHC 11695 (KLR) (Constitutional and Human Rights) (3 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 11695 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION 227 OF 2018
LN MUGAMBI, J
OCTOBER 3, 2024**

BETWEEN

OKIYA OMTATA OKOITI PETITIONER

AND

FRED MATIANGI (CABINET SECRETARY INTERIOR) 1ST RESPONDENT

**KARANJA KIBICHO (PRINCIPAL SECRETARY, INTERIOR) 2ND
RESPONDENT**

AMOS MARIBA (NAIROBI COUNTY COMMISSIONER) 3RD RESPONDENT

**JOSHUA NKANTHA (NAKURU COUNTY COMMISSIONER) 4TH
RESPONDENT**

**WILFRED NYAGWANGWA (MERU COUNTY COMMISSIONER) 5TH
RESPONDENT**

PAULINE DOLA (KISUMU COUNTY COMMISSIONER) 6TH RESPONDENT

**ABDI ALI MUKTAR (KERICHO COUNTY COMMISSIONER) 7TH
RESPONDENT**

**ONESMUS KYATHA (LAIKIPIA COUNTY COMMISSIONER) 8TH
RESPONDENT**

JAMES KIANDA (BUNGOMA COUNTY COMMISSIONER) 9TH RESPONDENT

**SAMSON IRUNGU (HOMABAY COUNTY COMMISSIONER) 10TH
RESPONDENT**

JOHN CHELIMO (VIHIGA COUNTY COMMISSIONER) ... 11TH RESPONDENT



**WILSON WANYANGA (KIAMBU COUNTY COMMISSIONER) 12TH
RESPONDENT**

FREDRICK SHISIA (NYERI COUNTY COMMISSIONER) . 13TH RESPONDENT

**GEORGE OMONDI (BOMET COUNTY COMMISSIONER) 14TH
RESPONDENT**

**DAVID KIPKEMEI (KAJIADO COUNTY COMMISSIONER) 15TH
RESPONDENT**

**BOAZ CHERUTICH (NYANDARUA COUNTY COMMISSIONER) 16TH
RESPONDENT**

**MOHAMMED BARRE (NANDI COUNTY COMMISSIONER) 17TH
RESPONDENT**

MICHAEL TIALAL (BUSIA COUNTY COMMISSIONER) .. 18TH RESPONDENT

**MOHAMMED MAALIM (MAKUENI COUNTY COMMISSIONER) 19TH
RESPONDENT**

**MATILDA SAKWA (MACHAKOS COUNTY COMMISSIONER) 20TH
RESPONDENT**

**GEORGE NATEMBEA (NAROK COUNTY COMMISSIONER) 21ST
RESPONDENT**

RULING

1. The Petitioner filed a Petition dated 20th June 2018 supported by his affidavit in support of even date. The crux of the matter was the Respondents' crackdown of gaming slot machines used for betting across the Country. Whereas the Petitioner appreciated the goal to protect the vulnerable members of the public, he took issue with the manner in which this exercise was carried out.
2. According to the Petitioner the destruction of the gaming slot machines and crackdown was carried out in a discriminatory manner targeting the small scale business owners as against digital players in the industry. He claimed that digital players were let go scot free despite online and digital betting operations being more destructive in comparison.
3. The Petitioner was also aggrieved that the Respondents continued to harass these small scale business owners despite their being Court Orders that were issued in their favour, against the destruction of their machines and the crackdown. In this regard, the Petitioner accused the Respondents of being in contempt of Court Orders already in force.
4. Additionally, he contended that the Respondents should be personally liable for any claim that arises from the destruction of the small scale business owners' gaming slot machines.
5. Consequently, the Petitioner sought the following reliefs against the Respondents:
 - i. A declaration that the ongoing crackdown on gaming slot machines is discriminatory and therefore, unconstitutional, null and void.



- ii. A declaration that by acting in defiance of Court Orders the Respondents are personally liable for the ongoing confiscation and destruction of gaming slot machines.
- iii. A declaration that public officers who defy court orders act in their private capacity and their actions are not public acts that bind the sovereign people.
- iv. An order compelling the Respondents to pay the costs of this suit.
- v. Any other relief the Court may deem just to grant.

Respondents' Case

6. The Respondents' filed a Preliminary Objection dated 11th March 2022 to the Petition on the following grounds:

- i. The Petition dated 20th June, 2018, is Res Judicata for reasons the matter has already been determined in Constitution Petition 447 of 2016, Samuel Kahi & 373 others -vs- Betting Control and Licence Board and 6 Others, where the High Court held that :

96. In the instant case, I note that there were over 373 petitioners cited in the original petition before the re-amendment. Going by the sheer number of the petitioners in this case and considering the fact that each one of them did not indicate the exact nature of the loss they suffered in the impugned crackdowns on their businesses, I find that only declaratory orders would suffice in this suit and that the petitioners will then be at liberty to pursue separate civil claims for damages, if they so wish, which suits shall be subject to specific proof of such loss as is required by the law.

97. Having regard to my findings in this judgment, I find that the instant petition succeeds, albeit partly, and I make the following orders:

A declaration that the actions of the 1st, 2nd, and 3rd Respondents violated the Petitioners' rights and freedoms were under Articles 40, 47 and 50 of *the Constitution*.

There shall be no orders as to costs.”

- ii. The Petition has been overtaken by events and the orders sought cannot be effected by the Court.
- iii. The Petition on this premise is an abuse of the process of the Court and the same should be dismissed with costs to Respondents.

Petitioner's Case

7. The Petitioner's response and submissions to the Respondents' preliminary objection was not in the Court file or the Court online platform (CTS).The same was also not availed by the petitioner when called upon to do so.



Parties Submissions

Respondents' Submissions

8. In support of their objection, the Respondents through Ms. Ruth Wamuyu filed submissions dated 5th May 2022. The Respondents submitted that the matter herein raises similar issues as was Constitution Petition 447 of 2016, Samuel Kahi & 373 others -vs- Betting Control and License Board and 6 others.
9. The previous Petition just like the instant one, the Petitioners raised issue with the Respondents' directive on the gaming industry (Petitioners in Petition 447 of 2016) that occasioned massive crackdown that saw their gaming slot machines get destroyed which directive had been challenged as malicious, unreasonable, abuse of power and without lawful cause or justification.
10. In the instant Petition just like in the former petition, the Petitioner sought the intervention of the Court to issue orders suspending the crackdown and confiscation of the gaming slot machines yet in Petition 447 of 2016 the Court had found that the Petitioners' rights had been violated by the Respondents acts of confiscating and destroying their gaming slot machines.
11. On this premise Respondents contended that the instant Petition and Petition 447 of 2016 are founded on the fact of alleged crackdown and confiscation of the gaming slot machines arising from the Respondents' directive hence the present petition is barred by the doctrine of res judicata. Moreover it was noted that the 1st Respondent herein was the 2nd Respondent in Petition 447 of 2016.
12. Counsel further highlighted that the Petitioner herein had alluded to Petition 447 of 2016 in his Petition with a view to have this Court issue similar conservatory orders against the Respondents.
13. Counsel stressed therefore that this matter which was sub judice at the time was now res judicata. This is because it had been conclusively determined. Accordingly Counsel argued that this bars this Court from proceeding and making any other orders.
14. In support of this argument Counsel relied in *Okiya Omtatah Okioti V Communications Authority of Kenya & 14 Others*, Petition No.59 OF 2015 where it was held that:

“(17) For res judicata to be invoked in a civil matter therefore, the issue in a current suit must have been previously decided by a competent Court. Secondly, the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in a subsequent suit where the doctrine is pleaded as a bar. Thirdly, the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title. (See the case of *Karia and Another vs the Attorney General and Others* (2005) 1EA 83).”

15. Equal dependence was placed In *E.T. V Attorney General & Another* [2012] eKLR and *Suleiman Said Shabhal Vs Independent Electoral & Boundaries Commission & 3 Others* [2014] eKLR.

Analysis and Determination

16. Flowing from the foregoing submissions, this Court considers the key issues that arise for determination in this ruling to be as follows:
 - i. Whether the Respondents' Notice of Preliminary Objection meets the threshold for a preliminary objection.



- ii. Whether the Preliminary Objection raised is merited.

Whether the threshold of the Preliminary Objection has been met threshold

17. The essential characteristics of a preliminary objection were set out in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 69 and later emphasized by the Supreme Court in *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others*(2014) eKLR as follows:

- (31) To restate the relevant principle from the precedent-setting case, *Mukisa Biscuit Manufacturing Co Ltd –vs. - West End Distributors* (1969) EA 696:

“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 the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

18. Correspondingly in *Independent Electoral & Boundaries Commission v Cheperenger & 2 others (Civil Application 36 of 2014)* [2015] KESC 2 (KLR) (15 December 2015) (Ruling) the Supreme Court held as follows:

“...Thus a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”

16. It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law. (see *Hassan Nyanje Charo v. Khatib Mwashetani & 3 Others, Civil Application No. 14 of 2014*, [2014] eKLR).”

19. The Court concluded as follows:

- “21. The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement...”

20. Res-judicata is a principle of law provided for under Section 7 of the *Civil Procedure Act*, CAP 21 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.

21. The Supreme Court, in *Kenya Commercial Bank Limited v. Muiri Coffee Estate Limited & another* Motion [2016] eKLR explained the doctrine of res judicata as follows:

“(52) Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights...”

22. Similarly, the Supreme Court in *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015)* [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment) held as follows:

“54. The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.

55. It emerges that, contrary to the respondent’s argument that this principle is not to stand as a technicality limiting the scope for substantial justice, the relevance of res judicata is not affected by the substantial-justice principle of Article 159 of *the Constitution*, intended to override technicalities of procedure. Res judicata entails more than procedural technicality, and lies on the plane of a substantive legal concept.

56. The learned authors of Mulla, Code of Civil Procedure, 18th Ed 2012 have observed that the principle of res judicata, as a judicial device on the finality of court decisions, is subject only to the special scenarios of fraud, mistake or lack of jurisdiction (p 293):

The principle of finality or res judicata is a matter of public policy and is one of the pillars on which a judicial system is founded. Once a Judgment becomes conclusive, the matters in issue covered thereby cannot be reopened unless fraud or mistake or lack of jurisdiction is cited to challenge it directly at a later stage. The principle is rooted to the rationale that issues decided may not be reopened and has little to do with the merit of the decision.”

23. The Court went on to observe that:

“59. For res judicata to be invoked in a civil matter the following elements must be demonstrated:

- a. There is a former Judgment or order which was final;
- b. The Judgment or order was on merit;



- c. The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
 - d. There must be between the first and the second action identical parties, subject matter and cause of action.”
24. Equally, the Court of Appeal in *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR on this doctrine observed as follows:

“...for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all 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.”
25. The Court proceeded to note 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 common-sensical 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 and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”
26. In effect the Court concluded that:

“The practical effect of the res judicata doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties –because it is the court itself that is debarred by a jurisdictional injunction, from entertaining such suit.”
27. A perusal of the Judgment in *Petition 447 of 2016* clearly reveals that that matter was tried by a competent court, the High Court just like in the instant case. The Court issued final/conclusive orders on the substantive issue that was presented by granting declaratory orders. There is some slight variation pertaining to the parties in the dispute as they are not an exact replica even though the substratum of the two cases is indeed identical.
28. For res judicata to be invoked, the Parties must be the same or litigating under the same title. This requirement must however be carefully examined particularly in cases filed in public interest or for the



benefit of the public at large or where orders granted are in rem. For instance, a declaratory relief may not be confined to the individual parties in a dispute.

29. The Respondents' assertion that the subject matter is similar to that in Petition 447 of 2016 is not disputed.
30. The only issue, as observed is that the parties in the instant suit are not exactly the same as those in Petition 447 of 2016 except for the 1st Respondent who was 2nd Respondent in the former suit. However, the substance/ substratum of the two cases is similar. Would dissimilarity of the parties in the circumstances of this case defeat the plea of res judicata? I am of the humble view the variation of the parties in this case does defeat the plea of res judicata for the reasons advanced below.
31. Section 7 of the [Civil Procedure Act](#) that sets out the principle of res judicata proceeds to give explanations that clarify the application of this principle. Of great relevance to the present matter is explanation 4 & 6 which state as follows:
- Explanation (4)
- Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.
- Explanation. (6)
- Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating....”
32. It is important to underscore that res judicata not only bars an identical suit from being re-litigated between the same parties or their representatives but also deals with issue-based estoppel thereby preventing any issue in a former suit that had been decided in that former suit from being reintroduced by a party or the representative of such party in a later claim/suit even though the suit may be different where the issue in the former suit recurs. Such a party or his representative will be prevented from reopening the issue afresh.
33. Justice Lenaola in *Okiya Omutatah Vs Communication Authority of Kenya* (2015) eKLR applied issue-based estoppel when he expressed himself as follows-
- “In my view, he sued the officials of the 1st Respondent so as to disguise the proper parties who were in the first Petition and that attempt cannot affect my conclusions above and help him evade the doctrine of res judicata on the main issue of digital migration which is the common thread running through all the Petitions as can be seen above. I shall repeat for emphasis that the said issue cannot be re-opened merely by re-introducing the rights of viewers to migrate and re-packaging it differently as a violation of the provisions of [the Constitution](#) and that of the Bill of Rights so as to prevaricate the principle of res judicata.”
34. Further to the above, explanation (6) of the [Civil Procedure Act](#) makes it clear that Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating....”
35. In the previous suit Petition No. 447 of 2016 an order of declaration was issued in relation to the subject matter which was a declaration against seizure and destruction of gaming slot machines. A declaration by its nature is an order in rem. Even persons who were not parties in that suit could avail themselves



the benefit of a declaratory relief. The instant petition is brought in public interest and relates to the same subject matter as the former petition. This is therefore a perfect res-judicata barred case.

36. It is my considered view that the instant Petition has satisfied the preconditions set out under Section 7 of *Civil Procedure Act* as offending res judicata principle as the substratum of the Petition is the same and the nature of the relief issued in the previous suit is declaratory relief meaning it was to benefit the public at large. The Petitioner cannot thus file similar Petition in public interest. The Preliminary Objection which is premised on the principle of res judicata is upheld. The preliminary objection succeeds.
37. The upshot is that this Petition is struck out. I make no orders as to costs since the petition was instituted in public interest.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 3RD DAY OF OCTOBER, 2024.

.....

L N MUGAMBI

JUDGE

