



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

CONSTITUTIONAL PETITION NO. 3 OF 2019

HON. BENJAMIN KOECH.....PETITIONER

=VERSUS=

BARINGO COUNTY GOVERNMENT.....1ST RESPONDENT

THE COUNTY ASSEMBLY OF BARINGO.....2ND RESPONDENT

BARINGO COUNTY ASSEMBLY SERVICE BOARD.....3RD RESPONDENT

AND

JOSEPH C. KOECH.....INTERESTED PARTY

RULING NO. 3

1. This is a ruling on an application of extension of conservatory order previously made in this Petition awaiting the hearing and determination of Petition No. 12 of 2019 before the Employment and Labour Relations Court at Nairobi in the matter of the removal of Clerk of the County Assembly of Baringo.

2. By the Notice of Motion dated 9th October 2019, the Petitioner seeks the following orders of the Court:

“NOTICE OF MOTION

1. THAT this application be certified as urgent and the same be heard ex-parte at the first instance.

2. THAT subsequent to the judgment of Onyango, J in E.L.R.C Petition No. 12 of 2019 at Nairobi (Formerly Mombasa E.L.R.C Petition No. 4 of 2019) Joseph C. Koech v Baringo County Assembly and 2 others delivered on 27th September, 2019; **this Honourable Court extends the conservatory orders granted in paragraph 47 (1) of this Honourable Court’s Ruling of 14th August, 2019.**

3. THAT the Honourable Court be pleased to give directions for the expeditious hearing of the Petition herein.

4. THAT *the costs of this application be in the cause.*”

3. The application was expressed to be based upon grounds set out in the Notice of Motion as follows:

“WHICH APPLICATION is based on the following grounds:

a. THAT the Applicant/Petitioner approached this Court vide a Petition and Application dated 13th June, 2019.

b. THAT the Court subsequently considered the application by the Petitioner on 17th June, 2019 and granted orders inter alia certifying the matter urgent and further maintaining the status quo until further orders of the Court.

c. **THAT** the parties were heard on the Petitioner's application and a ruling delivered on 26th July, 2019 in which the Court invited parties to submit on the Court of Appeal decision of **Attorney General & another v Andrew Kiplimo Sang Muge & 2 Others**, Civil Appeal 247 of 2017.

d. **THAT** in the interim the Court directed that the status quo be maintained meaning that the 2nd and 3rd Respondents would not take a final decision as to appointment or filling of the position of the Clerk of the Baringo County Assembly.

e. **THAT** upon subsequently parties rendering their views on the aforementioned Court of Appeal Judgment, the Honourable Court delivered its Ruling on 14th August, 2019 granting inter alia an order restraining the filling of the vacancy created by the impugned removal of the Interested Party from the Office of the Clerk of Baringo County Assembly until the determination of E.L.R.C Petition No. 12 of 2019 at Nairobi (Formerly Mombasa E.L.R.C Petition No. 4 of 2019 Joseph C. Koech v Baringo County Assembly and 2 Others).

f. **THAT** on 27th September, 2019 the Court at Nairobi pronounced itself on the aforementioned case finding that there was no breach of the Petitioner's Constitutional rights and thus dismissing the Petition therein.

g. **THAT** the Petitioner herein maintains that the aforementioned Petition decided in Nairobi only considered whether the Interested Party herein was lawfully suspended by the 3rd Respondent and whether he should be reinstated.

h. **THAT** the Court at Nairobi holding that no rights of the Petitioner (the Interested Party herein) were violated does not render the passing of the Resolution dated 2nd May, 2019 to remove the Interested Party from office obsolete."

4. The respondents filed a Replying Affidavit in opposition to the Notice of Motion as follows:

"THE 2ND & 3RD RESPONDENTS' REPLYING AFFIDAVIT

I HON. DAVID KIPKORIR KIPLAGAT of P.O Box 159 – 30400 KABARNET, a resident of Baringo County within the Republic of Kenya being Sui Juris and Compos Mentis do hereby make solemn oath and state as follows:

1. **THAT** I am the speaker of the 2nd Respondent and the Chairman of the 3rd Respondent hence competent to make and swear this affidavit.

2. **THAT** I have read and understand the import, purport and purpose of the Certificate of Urgency, Notice of Motion, the affidavit and annexures thereto by one Hon. Benjamin Koech dated filed 9/10/2019 and wish to reply thereto as follows:

3. **THAT** it is clear the Interested Party and the Petitioner are colluding to defeat justice.

4. **THAT** the application is untenable in law and in fact as the same has been rendered nugatory though the judgment of a Court of competent jurisdiction in Mombasa Constitutional Petition No. 12 of 2019, delivered on 27/10/2019 from which no appeal has been filed and or determined.

5. **THAT** the Interested Party has challenged the process systematically as follows and has at every stage lost or surrendered through withdrawal till the Court pronounced itself with finality as doth:

a. **Eldoret High Court Petition No. 5 of 2019 – Joseph Koech -vs- Baringo County Assembly & 2 Others** where the subject matter was the same disciplinary proceedings.

b. **ELDORET ELRC Case No. 3 of 2019** where the subject matter was the proceedings trying to stop the proceeding of 2/5/2019 in vain.

c. Mombasa ELRC Constitutional Petition No. 4 of 2019 (Now Nakuru Constitutional Petition No. 12 of 2019, over the same termination of 2/5/2019 for which judgment was delivered on 27/10/2019 and from which no appeal has been filed and or determined as aforesaid.

d. It is clear that the Applicant herein is doing spanner works for the Interested Party.

6. **THAT** given that the same issues are in this matter, the matter is now Res judicata, and this Court is functus officio after its ruling of 14/8/2019.

7. **THAT** the purported distinction between the dismissal of the Interested Party on 2/5/2019 and the resolution to dismiss him made on 2/5/2019, is a distinction without a difference.

8. **THAT** the proceedings of 2/5/2019 were part of the process that the Court has found to be procedural and valid.

9. **THAT** the Court in Mombasa Constitutional Petition No. 4 of 2019 (Now Nakuru Constitutional Petition No. 12 of 2019, delivered on 27/10/2019 and at page 34 of the record of motion herein, specifically referred to the resolution of County Assembly of

Baringo which resolution, is that, of 2/5/2019 and to which the Court cannot now pronounce itself as that has already been done by the Employment and Labour Relations Court, a Court of equal status to this Court.

10. THAT further on the basis, of the Supreme Court decision in the Supreme Court in **Karisa Chengo and 2 Others –vs- Republic (2015) eKLR** which held particular page 15 as set out below, this Court lack requisite decisional jurisdiction to handle a matter within the domain of the Employment and Labour Court. The said decision held as doth:

“In this regard Angote J. was specifically appointed a Judge of the Employment & Labour Relations Court and it is in that Court and that Court alone that his jurisdiction lies. Having been so appointed by the President, the Chief Justice or indeed any other entity cannot lawfully move him (sic) to hear matters reserved for the High Court. The converse is gain true, Judges appointed to the High Court and Employment & Labour Relations Court have no Constitutional and Statutory Mandate to deal with Employment & Labour Relations Court matters. Indeed the constitution expressly prohibits the High Court (which can only be constituted by a Judge appointed to that Court) from hearing matters to do with Environment, Land and Employment. The purported appointment of Judges to do that which the Constitution prohibits is therefore inconsistent with the Constitution. Indeed Article 2 (2) of the Constitution is emphatic that:

11. THAT further, there is nothing to conserve as the County Assembly of Baringo has already carried out its mandate and the County Assembly service board has already completed its mandate.

12. THAT the filing of the Petition in Nakuru ELRC No. 12 of 2019 was after the dismissal and as earlier stated, paragraph 3 of the Notice of Motion was based on the allegation that the Respondents had un-procedurally, unfairly and illegally dismissed the Interested Party.

13. THAT the Employment & Labour Relations Court pronounced itself, in the ratio decidendi

“that the disciplinary process in relation to the Petitioner (**who is the Interested Party herein**), indeed met the test of legality, rationality, procedural propriety and observance of rules of natural justice in accordance with articles 41, 47 and 50 of the Constitution and the Fair Administrative Actions Act” (emphasis mine)

14. THAT with that holding, this Court is now being drawn into a wild goose chase game meant to murky waters and obfuscate issues to the detriment of justice and the rule of law.

15. THAT it is against the doctrine of finality of judicial decisions for the applicant to regurgitate the same issues in this Court.

16. THAT the current applications are a well travelled journey and even this Court pronounced itself in its ruling no. 2.

17. THAT the Court further in Nakuru ELRC Constitutional Petition No. 12 of 2019, found as a matter of fact and law that the Interested Party, who is the principal beneficiary of the orders sought, it is guilty of forum shopping.

18. THAT the current application appears to be a belated appeal to the Court of equal jurisdiction of:

a. The decision of this Court given on 14/8/2019 which stayed this suit for duplicity especially as succinctly elucidated in paragraph 44 of the ruling of 14/8/2019.

b. The final decision of the Employment and Labour Relations Court in Nakuru ELRC Constitutional Petition No. 12 of 2019.

19. THAT by 9/5/2019 when the former petition, Nakuru ELRC Petition No. 12 of 2019 was filed, the Interested Party had already been removed vide proceedings of 2/5/2019 which now have had the clothing of judicial pronouncements with finality and as a corollary we cannot reinvent the wheel.

20. THAT there are no orders capable of being stayed or upon which conservatory orders can rest as:

a. The Court stayed this matter, since it was already found sub judice hence the only recourse available is to strike out this petition.

b. The applicant ignored the orbiter dictum from the Court to arrest the judgment and consolidate the petition; the judgment is not out and free, cannot be arrested or impugned in this Court.

c. The applicant herein is forum shopping after failing to present their grievances in the former petition.

d. On the basis of the doctrine of predominant question, all the issues herein are overtaken by events.

e. The preliminary point of law on issues of jurisdiction was allowed in lamine, hence there cannot be other matters to be dealt with after fact.

f. This petition is not life, it is dead as a dodo and only needs to be buried in a sea of costs to the respondent.

g. The doctrine of separation of powers demand that the Court lets the assembly to carry out its business without undue interference with the independence of the legislature.

21. THAT *the only prevailing now, which has not been stayed is the final judgment of the Court in the former petition, Nakuru ELRC Petition No. 12 of 2019.*

22. The Court has pronounced itself on the waste of judicial time in forum shopping and filling of multiplicity of suits and the only forum available to all and sundry is Appeal which has been done.

23. That even if appeal is filed, it is not this Court to issue stay or conservatory orders.

24. This Court has no jurisdiction to stay a decision of the Court in Nakuru ELRC Petition No. 12 of 2019.

25. THAT any order given will be incapable of compliance as there will be directly two contradictory orders of the Courts of equal jurisdiction and this Court will have acted per incuriam on the same subject matter and the parties are bound by the judgment of the Court already delivered a prior.

26. THAT *I wish to state further as follow:*

a. There is nothing to go to trial as the issues have been fully determined.

b. THAT *it is stretching imagination to argue that the former petition has no bearing in this case, when the same Court has already on 14/8/2019 pronounced itself.*

c. THAT *there is a preliminary housekeeping issue, whether the same Court can be asked to depart from its prior pronouncements without an application for review properly grounded.*

d. THAT *the orders of 14/8/2019 were spent and not capable of being extended without violating common sense.*

e. THAT *since the termination of employment of the Interested Party has received judicial sanction, then there is nothing else to be rendered nugatory as even the procedure for filing the vacancy created by termination of the Interested Party has not been impugned in a proper forum.*

27. There is absolutely no basis of reinstating the Interested Party by this Court hence the vacancy must as a matter of procedure and the law be filled.

28. THAT *I swear this affidavit in solemn opposition to the Application dated 9/10/2019."*

5. The Court directed Counsel for the parties to file written submissions on the twin issues it considered affected the outcome of the Notice of Motion as follows:

“Upon hearing counsel for the parties the Court directs that the Notice of Motion dated 9th October 2019 be canvassed by written submissions on two questions, namely:

1. Whether the decision of Maureen Onyango, J. of 27th September 2019 in E & LRC No. 12 of 2019 is a judgment in rem within the meaning of section 44 of the Evidence Act; and

2. Whether the present Petition may be heard independently of the issue of the tenure of Joseph C. Koech in the County Assembly.

3. Hearing on the 29th October 2019 at 10.00am.”

6. Counsel for the parties – filed respective written submissions and at the hearing on 29th October 2019 made oral arguments in highlight thereof as follows:

“Mr Mwathe for the petitioner

Notice Motion 9/10/19. Seeking extension of orders.

The two issues.

Whether judgment of ELRC is judgment in rem.

I adopt submissions of 28/10/19 filed today. We distinguish the cases before ELRC and this Court. The issues in the Petitions are dissimilar section 44 of Evidence Act. Doctrine of finality is established through res judicata principle judgment in rem is the

determinant of res Judicata.

We have sought to prove that the ingredients of res judicata are existent. We have listed the nature of prayers in the two suits.

The issues in Nairobi suit were more of employment relationship seeking damages for unfair termination. He did not seek the constitutionality of the initial termination and removal. The determination on constitutionality cannot be made by this Court.

It is public interest that is raised in his Petition. As the orders are not sought to benefit anybody and as the petitioner is not a party to the Nairobi suit, the proper forum is this Court. The Court has wider powers of the interpretation of the Constitution.

Whether petition may proceed independently of tenure of the Interested Party.

The application does not seek to save the tenure of the Interested Party. The petition orders that 2nd and 3rd Respondent acted unlawfully. There is no legal backing for process of the removal of the County Clerk. In the circumstances, the removal of the clerk is illegal. The determination of illegality. The reward is by this Court. This was not an issue before the ELRC. It can still be determined even after the judgment in the ELRC. It does not negate the substratum of the petition before the Court.

The Interested Party could only raise the issue before ELRC as a present issue in regard to the reward. We submit that if the Court finds the judgment in Nairobi is judgment in rem it is a violation of the petitioner's right to approach the Court. We pray that the Court finds merit in the two issues. Conservatory orders are orders in the public nature to secure a legal process not to favour a private citizen.

Mr. Njoba for the Interested Party

We adopt submissions of 28/10/19 with regard to the Court's jurisdiction under Article 165. Judgment in rem question, we refer to **Abubakar G Mohammed v. IEBC (2017)** eKLR. Judgment only binds the whole world if it is in rem. We require an analysis of Maureen Onyango's judgment.

Ruling of 14/8/2019, the Court appreciates that Nairobi ELRC considered the two issues as separate. The issues are distinct and the effect of ELRC case were that damages failed. It was a judgment in persona.

Issues of fact determination does not bind other persons unless her derives interest from a party.

ELRC case was an employer-employee case. The petitioner did not have an interest in the Nairobi case. Petitioner is a defender of the constitution of Kenya.

Independence of this suit with regard to Joseph Koech's tenure. Article 22 of the Constitution. It can be brought by any person in public interest. Petitioner came to Court under Article 258 of the Constitution rely to protect the office of the clerk. The Interested Party appreciates that the position of Clerk is not synonymous to his occupation of the office. He supports to Petitioner's case to safeguard petitioner's interest.

We pray that application of 9/10/19 be allowed as prayed.

Mr Magare in response

Judgment in rem

It is not the prayer that make a judgment in rem but the subject matter. If the Court allows the application and the Court has already dismissed the suit, there would be two conflicting decisions on the same subject.

Res judicata

Explanation 6 of section 7 of Civil Procedure Act all persons are bound by the decision.

Paragraph 44 of the ELRC judgment said procedure was lawful and no violation of Constitutional right and found that the procedure is enshrined in section 23 of the County Assembly Services Board Act.

The finding binds everyone. The declaration was not a private right. It is a decision in personam.

Explanation no. 5. should have been raised in the former suit. Given that they were not raised they are deemed to have been redressed. In the 2nd ruling paragraph 4. It is clear that there were similar matters. Respondent and Interested Party did not appeal from the decision. It is a decision in rem and binding on them.

The only question remaining is whether there is any subject matter remaining to be determined by the Court. The Petition questions the process through which the Interested Party was removed. That is the same powers page 16 of Maureen Onyango's decision where she found that disciplinary process went to test of Judicial Review in accordance with Article 41, 47 and 50 the same articles impugned herein. The reverse issue is whether the petition can be determined without the interested party or can the conservatory

order be issued without the Interested Party.

It is not possible to progress the matter without the Interested Party. The Interested Party has already had a determination. The only option is to find that this is an example of matter that was res judicata and there is nothing to be heard.

The Court has had to deal with this matter 4 times. Courts in Nairobi found that Interested Party had abused the Court process.

I pray that the Court makes a final decision so that the matter can rest. All the prayers should have been taken in the Nairobi matter.

We pray that the matter be struck out with costs.

The Preliminary Objection was allowed in the ruling. There was ruling of stay pending the other suits in terms of section 6 of Civil Procedure Act.

The very act of order of stay under section 6 is a reflection that the Court finds the matter to be sub judice as set out in paragraph 44 of the ruling.

The Petitioner ignored the obiter advice.

Mr Mwathe

Ruling no. 2 of the Court paragraph 44. Decision not appealed from or reviewed.

Ruling which is dated 14/8/19 at paragraph 19 thereof the Court made a finding that there was an arguable case.

At paragraph 22 the Court noted that the petition was not filed to secure the Interested Party's occupation of the office. The petition could proceed without the Interested Party. I refer to paragraph 24 of the ruling.

Paragraph 27 of the ruling of 14/8.19. It is yet to established of the legality or otherwise the removal. Issues before Nairobi Court are distinguished by the petitioner.

The petition before the Court - 4th time the Court has addressed the matter.

Matter is distinguishable from the ELRC case.

Prayers are part of the matter. They distinguish the two cases."

7. By its Ruling of 14th August, 2019, this Court, while making the conservatory order in this petition, the Court further directed a stay of the proceedings and directed that proceedings be heard before the Employment and Labour Court as follows:

Orders

47. Accordingly, for the reasons set out above, the Court makes the following orders in the matter:

1. The Petitioner's application for conservatory order by Notice of Motion dated 13th June 2019 is granted only to the extent that the 2nd and 3rd respondents are restrained from filing the vacancy created by the impugned removal of the Interested Party from the office of the Clerk of Baringo County Assembly until the determination of the previously instituted suit namely Nakuru ELRC Petition No. 12 of 2019 (formerly Mombasa ELRC Petition No. 4 of 2019) by Judgment scheduled for 20th September 2019 or such other date as that Court may appoint.
2. For the avoidance of doubt, this order for status quo to be maintained does not authorize the reinstatement of the Interested Party as Clerk to the County Assembly of Baringo, the duties of which office shall continue to be discharged by the person or persons acting in the office.
3. The 2nd and 3rd Respondent's Preliminary Objection by Notice of Motion dated 19th June 2019 is allowed to the extent that the Petition herein shall be **stayed** pending determination of the previously instituted suit, namely Nakuru ELRC Petition No. 12 of 2019 (formerly Mombasa ELRC Petition No. 4 of 2019).
4. On account of the Public and Constitutional nature of the matter, this Court does not make any order as to costs.

Obiter

48. Needless to state, the Interested Party and the Petitioner herein may, as they may be advised by their legal advisors, respectively, appeal from the Judgment of the Employment and Labour Relations Court in the pending suit Nakuru No. 12 of 2019, if unfavourable, and or prior to Judgment pray for joinder as Interested Party or **amicus** as is such seek arrest or review of the said

Judgment, and or consolidation of suits, as appropriate and necessary. This statement is, of course, made **Obiter** and it is not intended to be binding on any Court or Party or otherwise as legal advice to any person. It is merely a lawyer's reflection on the matter.

Leave to appeal

49. Because of the Public importance in the matter relating to the office of Clerk of the County Assembly, leave to appeal, if necessary, is granted to the parties to the Petition.”

8. In its judgment of 27/9/2019 in Petition No. 12 of 2019, the Employment and Labour Court at Nairobi (Maureen Onyango, J.) determined as follows:

“DETERMINATION

The first issue for determination is whether the termination of the petitioner's employment was in breach of the Constitution and Fair Administrative Action Act. The second issue for determination is whether the Petitioner is entitled to the reliefs and orders sought in his Petition.

The Petition has argued that the Respondents had no justifiable cause to terminate his employment, that he was given short notice in terms of the disciplinary hearing. Further, that he was not furnished with documents and evidence relied upon by the Respondents. The Respondents in response have submitted that they complied with due procedure as per Section 23 of the County Assemblies Service Act.

As submitted by the Petitioner, he was issued with a letter sending him on compulsory leave on 15th January 2019. On 22nd March 2019, he received a letter summoning him to appear before a disciplinary committee to answer to the charges that were leveled against him. He responded to the allegations but requested that the date of the disciplinary hearing be moved from 3rd to 5th April 2019 on grounds that his advocate had a matter at Eldoret High Court.

The 2nd respondent agreed to accommodate him as requested by its letter dated 2nd April 2019. On 5th April 2019, the Petitioner, accompanied by his advocate, asked for a further adjournment of the disciplinary hearing to 11th April 2019 to enable them consider documents he had demanded to be supplied with, and which were supplied. The adjournment was granted and marked as the final adjournment.

On the 11th April 2019, the Committee waited for the Petitioner until 5 pm when the Committee received a letter from the Petitioner's Counsel stating he would not attend the hearing. Upon his failure to attend the meeting, the committee which had waited for him from morning, proceeded to hear his case and recommended that a motion be filed in the County Assembly with a view to remove the Petitioner. The Committee further decided to suspend the Petitioner.

While all this was going on, the Petitioner was busy in the Court corridors. He filed Eldoret High Court Constitutional Petition No. 5 of 2019 but the Court declined to grant him ex parte orders to stay the disciplinary proceedings. This was on 19th April 2019. When the orders were declined, he filed another application in Employment and Labour Relations Court, ELRC Petition No. 3 of 2019 seeking to stop the Baringo County Assembly from continuing with proceedings to remove him from office. The present petition, filed on 21st May 2019 was thus the third petition he filed in a bid to stop proceeding for his removal from office. This is a classic case of abuse of Court process.

On 25th April 2019, the Baringo County Assembly formed a Select Committee to conduct investigations into the conduct of the Petitioner. The Select Committee invited him to appear before it on 29th April 2019. The Petitioner failed to attend the meeting of the Select Committee.

From the foregoing, I find that the Petitioner was given every opportunity to attend the disciplinary hearing both before the disciplinary committee of the 3rd respondent and the 2nd respondent but squandered the same.

From the evidence on record, which is not contested, I find that the disciplinary process in relation to the Petitioner indeed met the test for legality, rationality, procedural propriety and observance of rules of natural justice in accordance with **Article 41, 47 and 50 of the Constitution, and the Fair Administrative Action Act**.

As held by the South African Labour Appeal Court in **Nampak Corrugated Wandeville –v- Khoza (JA14/98) [1998] ZALAC 24:**

“A Court should, therefore not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether the Court would have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable.”

Having found no breach of the Petitioner's Constitutional Rights and having found further that the Petitioner is guilty of not only forum shopping but also abuse of Court process, I find that he is underserving of the orders sought.

I accordingly dismiss the petition with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27TH DAY OF SEPTEMBER 2019.”

Determination

9. In granting the conservatory order in this Petition, the Court stayed the Petition awaiting the determination of the Petition before the E&LR Court as follows:

“The 2nd and 3rd Respondent’s Preliminary Objection by Notice of Motion dated 19th June 2019 is allowed to the extent that the Petition herein shall be **stayed** pending determination of the previously instituted suit, namely Nakuru ELRC Petition No. 12 of 2019 (formerly Mombasa ELRC Petition No. 4 of 2019).”

10. The stay was made pursuant to section 6 of the Civil Procedure Act on the ground that the petition was a previously instituted case between the same parties raising similar issues for determination and on the judicial policy against different orders by Court of equal status on the same or similar dispute. In its ruling, this Court rather hoped, as the *obiter* shows, that the petitioner herein would seek to intervene in the proceedings before the labour Court, which it was pointed out in the decision had authority to determine constitutional issues relating to a labour dispute before it.

11. The petitioner did not seek joinder in the petition and merely waited for the decision of the Court to be delivered on the 27th September 2019 and then filed this Notice of Motion for extension of the conservatory order pending hearing of the Petition herein.

Issues for determination

12. The dilemma that immediately arose is that this Court cannot do the same thing it ruled against in the ruling of 14th August 2019: it cannot decide determine the matter which has already been decided by the labour Court as that may result in two conflicting decisions on the same point by Courts of equal status. The other issue that arose was whether the Judgment of the labour Court was a judgment *in rem* so that it left nothing to be considered by any other Court, its determination being binding on the whole world. Hence the invitation to the counsel to make submissions on whether the judgment of the labour Court was a judgment *in rem* and whether the Petition could proceed to hearing without reference to the question of the tenure of the Interested Party as the clerk of the County Assembly of Baringo.

Whether E&LR Court decision judgment in rem

13. The labour Court held that –

“From the evidence on record, which is not contested, I find that the disciplinary process in relation to the Petitioner indeed met the test for legality, rationality, procedural propriety and observance of rules of natural justice in accordance with Article 41, 47 and 50 of the Constitution, and the Fair Administrative Action Act.

Having found no breach of the Petitioner’s Constitutional Rights and having found further that the Petitioner is guilty of not only forum shopping but also abuse of Court process, I find that he is underserving of the orders sought.”

14. Section 44 of the Evidence Act provides that-

“44. Judgments in rem

(1) A final judgment, order or decree of a competent Court which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is admissible when the existence of any such legal character, or the title of any such person to any such thing, is admissible.

(2) Such judgment, order or decree is conclusive proof—

(a) that any legal character which it confers accrued at the time when such judgment, order or decree came into operation;

(b) that any legal character to which it declares any such person to be entitled accrued to that person at the time when such judgment, order or decree declares it to have accrued to that person;

(c) that any legal character which it takes away from any such person ceased at the time from which such judgment, order or decree declared that it had ceased or should cease;

d. that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, order or decree declares that it had been or should be his property.”

15. I think it indubitable that the judgment of the E& LRC of 27th September 2019 took away the legal character of the Interested Party as the Clerk of the County Assembly of Baringo, and in accordance with the provision of section 44 (1) (c) of the Evidence Act such “legal character which it takes away from any such person ceased at the time from which such judgment, order or decree declared that it had ceased or should cease”.

16. It follows that the Interested Party loss of his position as the clerk of the County Assembly of Baringo was ratified by the labour Court's determination by its judgment of 27th September 2019 that he had been properly removed from office. **This Court cannot extend the conservatory order against his replacement after a Court of competent jurisdiction has decreed him properly removed. Only an appeal process can reverse that finding.**

17. I have noted the decisions cited by Counsel for the parties on the question whether the judgment of the labour Court is a judgment *in rem*, namely, *R v. Attorney General & 2 Ors. ex p. APM Terminals B.V.* [2015] eKLR; *Kamunyu and Others v. Attorney General* (2007) EA 116; and *Japheth Nzila Muangi v. Kenya Safari Lodges and Hotels Ltd.* [2008] eKLR.

18. I respectfully consider that had the determination of the Labour Court been that the Interested Party was wrongly removed in breach of his constitutional rights and statutory rights to, among others, fair administrative action and was, therefore, entitled to an order reinstating him, those orders would have been good against County Assembly Board which purported to remove him and against the whole world, including any person who may in the meantime been appointed in acting or full capacity to the position of clerk of the County Assembly of Baringo. The reverse finding and determination by the Labour Court must also be, *in rem* against the whole world.

Whether Petition may proceed to hearing

19. But can the petition proceed to hearing and determination without the concern of the removal of the Interested Party which has already been settled by the Labour Court? That is the subject of the second issue in this application.

20. The direct consequence of the E&LRC judgment being held to be a judgment *in rem* is that this and any other Court shall not reopen the question whether the applicant was removed from office in breach of his constitutional rights as held in the judgment. I should respectfully agree with the Ugandan High Court decision cited by Odunga, J. in Constitutional Petition No. 255 of 2017, **Abukar G Mohamed v Independent Electoral and Boundaries Commission**, [2017] eKLR as follows:

“8. Therefore the mere fact that the applicant was neither a party to the petition nor a party on whose behalf the petition was instituted does not deprive it of the benefit of the said order as long as the same was a decision *in rem*. I further associate myself with the decision in **George William Kateregga vs. Commissioner for Land Registration & Others Kampala High Court Misc. Appl. No. 347 of 2013** in which the Court while citing the South African case of **Nicholas Francois Marteenms & Others vs. South African National Parks, Case No. 0117**, expressed itself as follows:

“Therefore, in the instant case even if the parties other than the Applicant crafted a consent judgement over the suit land which was sanctioned by the Court, it necessarily became a judgement of the Court. The effect was that the Applicant would be bound by it notwithstanding that he was not privy to the consent agreement or suit; which renders the judgement in that case a judgement in rem. A judgement in rem invariably denotes the status or condition of the property and operates directly on the property itself. It is judgement that affects not only the thing but all persons interested in the thing; as opposed to judgement in personam which only imposes personal liability on the defendant.”

9. Similarly in **Japheth Nzila Muangi vs. Kenya Safari Lodges & Hotels Ltd [2008] eKLR** it was held:

“It is trite law that ordinarily a judgement binds only the parties to it. This is known as Judgement in personam. A judgement may also be conclusive not only against the parties to it but also against all the world. This is known as a judgement in rem. This is a judgement which declares, defines or otherwise determines the status of a person or of a thing i.e. the jural relation of the person or thing to the world generally.”

21. Related to the issue of judgment *in rem*, however, is the question whether the matters raised in the Petition are barred by the principle of *res judicata*. The principle of *res judicata* is provided for in section 7 of the Civil Procedure Act as follows:

“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.

Explanation. —(1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. —(2) For the purposes of this section, the competence of a Court shall be determined irrespective of any provision as to right of appeal from the decision of that Court.

Explanation. —(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

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. —(5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

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.

[L.N. 22/1984.]”

22. The principle clearly covers by its explanation IV any issue which could or ought to have been raised or made grounds of attack or defence in the previous suit. That is the principle of *constructive res judicata*. The Court of Appeal has in Nairobi Civil Appeal No. 107 of 2010, *Kenya Commercial Bank Limited v. Benjoh Amalgamated Limited* [2017] eKLR accepted the principle of *constructive res judicata* as follows:

“Therefore, there are instances where the public interest is given prominence over parties’ interests in a suit. Such an instance, in our view, would be like in the instant suit where great burden of litigation has been placed upon a party necessitating such a party to seek protection from Court. The Supreme Court of India in the case of *State of UP v Nawab Hussain, AIR 1977 SC 1680, considered the doctrine of constructive res judicata and delivered itself thus,*

“This doctrine is based on two theories: (i) the finality and conclusiveness of judicial decisions for the final termination of disputes in the general interest of the community as a matter of public policy, and (ii) the interest of the individual that he should be protected from multiplication of litigation. It therefore serves not only a public but also a private purpose by obstructing the reopening of matters which have once been adjudicated upon.”

Further that,

But it may be that the same set of facts may give rise to two or more causes of action. If in such a case a person is allowed to choose and sue upon one cause of action at one time and to reserve the other for subsequent litigation, that would aggravate the burden of litigation. Courts have therefore treated such a course of action as an abuse of its process and it would be accurate to say that *res judicata* for this purpose is not confined to the issues which the Court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could; have been raised that it would be an abuse of the process of the Court to allow a new proceeding to be started in respect of them. This is therefore another and an equally necessary and efficacious aspect of the same principle, for it helps in raising the bar of *res judicata*, by suitably construing the general principle of subduing a cantankerous litigant. That is why this other rule has sometimes been referred to as constructive *res judicata* which, in reality, is an aspect or amplification of the general principle.”

To our mind, there is no better case in which the Court ought to invoke the doctrine of constructive *res judicata* than in the present appeals. Constructive *res judicata* is broader and encompasses all the issues in a dispute which, a party employing due diligence ought to have raised for consideration. To allow Benjoh to relitigate, re-agitate and re-cavass any issues, no matter how crafted or the legal ingenuity and sophistry employed and in spite of the plethora of cases already conclusively determined by competent Courts on the question of accounts, would be tantamount to throwing mud on the doctrine of *res judicata* and allow a travesty of justice to be committed to a party. The specific issue the respondent raises of rendering true and proper accounts to a customer’s accounts, has been or could have been raised before the High Court in the previous suits.

The history of this matter shows a vexatious litigant who in spite of having lost all the fourteen cases and despite the costs involved is still willing to further subject KCB and Bidii to ceaseless litigation. Justice demands that a successful party in litigation be allowed to enjoy the fruits of its litigation. It is time the respondent accepted the inevitable despite the consequences such a possibility portends to it and stops further litigation on this long running dispute which has all been about KCB’s exercise of its statutory power of sale and accounts. To open up any further litigation would complicate matters as they stand and goes against the pursuit of finality in this dispute.

Probably recognizing the tenacity of the human spirit in pursuit of a goal, the Supreme Court of India in the *Nawab Hussein case* (supra) stated that the spirit of contentiousness may give rise to conflicting judgments of equal authority, lead to multiplicity of actions and bring the administration of justice into disrepute. To guard against such and in ensuring certainty of the law, this Court ought to and does affirm what the various Courts have stated, that the issues in this dispute are for as long as they revolve around KCB’s exercise of statutory power of sale and accounts are *res judicata* and Benjoh ought to accept that fact. Accordingly, the learned Judge erred in not allowing the applications by KCB and Bidii to strike out the suit on that account.”

23. On the direct application of the principle of *res judicata*, there is a lot of learning on the principle of *res judicata* since the decision of the Court of Appeal (Wambuzi & Law JJA., Madan dissenting) holding that-

“A second application [or setting aside judgment in default of defence] was *res judicata* since the facts on which it was based were known to he appellant at the time when he made the first application.”

24. In his dissenting judgment Madan JA thought that as the appellant’s defence had not been disclosed, the Court never considered it and therefore never pronounced a judgment upon or relating to it and the first application for setting aside was rejected because no defence was disclosed, the principle of *res judicata* did not apply, and in any event, the defence raised provisions of law which made it a special case

outside *res judicata*, citing *Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd.* (1975) AC 581 per Wigram, V-C at 590 and held as follows:

“I am not aware of any bar generally to presenting more than one application until the conscience of the Court comes to rest at ease that justice has been done. I would not go so far as to say that the Court must act whether or not there is a right of appeal, review or application. It would depend on the circumstances in each case. Moreover, the liberty to present more than one application is always subject to the Court’s power to prevent abuse of its process, including mulcting the offending party in costs. It is also of course subject to the rule of *res judicata* including what is laid down in explanation (4) to section 7, unless a special circumstance is present in which event I would be content to follow the following dictum of Wigram V-C, in *Henderson v Henderson* (1843) 67 ER 313, 319, which the Privy Council described as the *locus classicus* of this aspect of *res judicata*, in *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] A C 581, 590:

...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 the 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.

As I see it, first, there was no *res judicata* here. The appellant’s defence was not disclosed in the first application. Chanan Singh J never considered it, he never pronounced a judgment upon or relating to it. In fact he rejected the first application because no defence was disclosed. With respect, the judge erred in thinking that the second application was *res judicata*. **Untenable definitely though it is, suppose it was *res judicata*, then secondly, the appellant by drawing our attention to the provisions of sections 126 and 143 of the Registered Land Act has raised a special circumstances to make it a special case outside *res judicata*.**”

25. The majority of the Court in *Mburu Kinyua* therefore decide the matter on what has come to be called constructive *res judicata* dealt with above.

Exceptional circumstances may remove the bar of *res judicata*

26. I think that properly understood, Madan’s dictum in *Mburu Kinyua v. Gichini Tuti*, supra, is that a situation which may give rise to *res judicata* may, for exceptional circumstances, have its application of removed. This was the same stance taken by the Court, of which I was a member, in Joho’s degree case, *Silas Make Otuke v. Attorney General & 3 Ors.*, Mombasa HC Pet. No. 44 of 2013, [2014] eKLR, where the Court found the allegation of fraud and illegality in a decision to be exceptional circumstances removing the application of the principle of *res judicata* as follows:

“In a leading case on *res judicata* *Arnold v. Westminster Bank* (1991) AC 93 H.L., the House of Lords held that cause of action estoppel **“is an absolute bar in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment.”** In the same decision, the Court agreed that the same considerations apply for reopening of the cause of action in the previous suit as with particular issues in the action which are the subject of issue estoppel. In acknowledging similarity of the principles applicable to both cause of action estoppel and issue estoppel, Lord Keith stated that:

“Issue estoppel 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 reopen that issue.” *Ibid* at at p.105 parag. D-E”

And that:

“It thus appears that, although *Henderson v Henderson* (1843) 3 Hare 100, [1843-60] All ER Rep 378 was a case of cause of action estoppel, the statement there by Wigram V-C has been held to be applicable also to issue estoppel. That statement includes the observation that there may be special circumstances where estoppel does not operate.” *Ibid* at at p.107 parag. C

Lord Keith, with whom the other Law Lords concurred concluded that –

“In my opinion your Lordships should affirm it to be the law that there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. One of the purposes of estoppel being to work justice between the parties, it is open to Courts to recognise that in special circumstances inflexible application of it may have the opposite result, as was observed by Lord Upjohn in the passage which I have quoted above from his speech in the *Carl-Zeiss* case [1966] 2 All ER 536 at 573, [1967] 1 AC 853 at 947.” - *ibid* at p.109 parag. A-B.”

Similarly, the learned authors of *Mulla, Code of Civil Procedure*, 18th Ed. 2012 at p. 293 have observed that the principle of *res judicata* as a judicial device for finality of Court decisions is subject to the special circumstances of fraud, mistake or lack of jurisdiction –

“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.”

Accordingly, we find that a determination on a particular point giving rise to issue estoppel is similarly open to challenge on the basis of fraud which vitiates the previous Court’s finding on the point notwithstanding that the said Court’s determination on the point is in the nature of a judgment in rem.

We think that in the present case, the Petitioner would be entitled to bring evidence, such as that which the Court in the *Mbete* lamented was not availed, to demonstrate that the 1st Interested Party’s degree certificate was fraudulently obtained. Such evidence must, however, be of such nature as to convince the Court that there was actual fraud as pleaded, vitiating the judgment in the previous decision. As we understand it, this is the effect of the decision of the Court in *Lazarus Estates Limited v. Beasley* (1956) 1 ALL ER 340 where in declining a submission that a defence of fraud was time barred, the Court held that –

“No Court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a Court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The Court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved it vitiates judgments, contracts and all transactions whatsoever.”

See also *Mistry Amar Singh v Serwano Wofunira Kulubya* (1963) EA 408.

We agree that the finality of a decision is destroyed by an appeal. In our view, however, a Notice of Appeal is deemed an appeal for purposes only of applications for stay of execution or injunction pending appeal not for purposes of *res judicata*. We did not hear serious submissions as to whether a decision is *res judicata* when it is under review by the Court that made the decision. However, on the principle that the decision may be altered on review the matter cannot properly be said to have finally determined. In the present proceedings, however, nothing turns on the status of the decision as the Petitioner in this case though pursuing the same reliefs as the Petitioner in the *Mbete* is a different person and it has not been shown that the two are parties litigating under the same title or that one is a proxy of the other.”

27. No such fraud, mistake or lack of jurisdiction in the proceedings and judgment of E& LR Court is alleged here. Are there any special circumstances to remove operation of the doctrine of *res judicata*?

28. It is not accurate that the by virtue of the Constitutional provisions of Article 258, the doctrine of *res judicata* and issue of judgment *in rem* under section 44 of the Evidence act do not apply to constitutional litigation. The three-judge bench in *Silas Make Otuke*, supra, dismissed such a contention as follows:

“In determining the matter of *res judicata*, the Court was therefore invited by the parties to consider whether the plea of *res judicata* is available under the Constitutional litigation procedure for enforcement of Constitutional provisions; whether the bar of *res judicata* may be removed by allegations of fraud, appeal from earlier judgment or review; and whether, in the circumstances of this case, the Petitioner had properly invoked fraud as a justification for the invocation of the exception to applicability of *res judicata*.

The principle of *res judicata* is entrenched in section 7 of the Civil Procedure Act 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.”

The principle of finality of Court decisions is emphasized by the fact that the conclusive evidential character of decisions determining any legal character or entitlement of a person is statutorily underpinned under Section 44 of the Evidence Act, which provides as follows:

“44. Judgments in rem

(1) A final judgment, order or decree of a competent Court which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is admissible when the existence of any such legal character, or the title of any such person to any such thing, is admissible.

(2) Such judgment, order or decree is conclusive proof—

(a) that any legal character which it confers accrued at the time when such judgment, order or decree came into operation;

(b) that any legal character to which it declares any such person to be entitled accrued to that person at the time when such judgment, order or decree declares it to have accrued to that person;

(c) that any legal character which it takes away from any such person ceased at the time from which such judgment, order or decree declared that it had ceased or should cease;

d. that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, order or decree declares that it had been or should be his property.”

In our view, however, the provisions of section 44 of the Evidence Act create a rule of evidence as to admissibility and proof existence of a judgment in rem giving effect to the conclusive character of such a judgment on the legal character or entitlement of a person as at the time of the judgment. It does not preclude such a judgment from being set aside on appeal or review under the applicable rules of the Court.

Although the Constitutional principles for fair hearing under Article 50 (1), access to justice under Article 48, promotion and protection of the Bill of Rights under Articles 22, and enforcement of the Constitution under Article 258 would generally call for full inquiry into disputes that may be resolved by operation of law consistently with the rule of law, the principle of res judicata as a cardinal principle for the finality of litigation and for the prevention of abuse of the Court process must be in-built in the any Constitutional litigation that may be preferred for that purpose.

We agree with the Privy Council decision in *Thomas v. The AG of Trinidad and Tobago* (1991) LRC (Const) 1001, cited in *E.T. v. Attorney General & Anor.* [2012] eKLR, where the Board was “satisfied that the existence of a Constitutional remedy as that upon which the appellant relies does not affect the application of the principle of res judicata” and referred to a decision of the Supreme Court of India; *Daryao and others v The State of UP and Others* (1961) 1 SCR 574, 582-3 where Gajendragkar J held that the principle of res judicata was applicable in cases under Article 32 of the Constitution of India -

‘But, is the rule of res judicata merely a technical rule or is it based on high public policy? If the rule of res judicata itself embodies a principle of public policy which in turn is an essential part of the rule of law then the objection that the rule cannot be invoked where fundamental rights are in question may lose much of its validity. Now, the rule of res judicata as indicated in s. 11 of the Code of Civil Procedure has no doubt some technical aspects, for instance the rule of constructive res judicata may be said to be technical; but the basis on which the said rule rests is founded on considerations of public policy. **It is in the interest of the public at large that a finality should attach to be binding decisions pronounced by Courts of competent jurisdiction, and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation. If these two principles form the foundation of the general rule of res judicata they cannot be treated as irrelevant or inadmissible even in dealing with fundamental rights in Petitions filed under Art. 32’.**

See also *Charo Kazungu Matsere & 273 Ors. v Kencent Holdings Limited & Anor.* Mombasa H.C Constitutional Petition 136 OF 2011, [2012] eKLR and *Booth Irrigation v. Mombasa Water Products Ltd. (Booth Irrigation No. 1)* Nairobi HC Misc. Appl. NO. 1052 of 2004.

Accordingly, we unhesitatingly find that the principle of res judicata is applicable to Constitutional litigation and its relevance is not affected by the substantial justice principle of Article 159 of the Constitution which overrides technicalities of procedure.”

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] E.A. 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 Wittshire 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 4th respondent through the 3rd 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 3rd 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 4th 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 Mwanvua**. 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 (4th 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.”

The special circumstances rule in Henderson v. Henderson.

30. The effect of special circumstances to justify removal of the bar of *res judicata* was also considered by Onguto, J. in **Edward Akongo Oyugi & 2 Ors. v. Attorney General** (2016) eKLR citing **Henderson v. Herderson** as follows:

“14. A plea of res judicata will also intercept and include not only matters which the Court was called upon to adjudicate but every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward in the previous suit: see **Henderson –v- Henderson [1843-60] All E R 378**. A claimant is not allowed to split claims. He will be estopped. As was stated by the Court in **Henderson -v- Henderson (supra)**

“...The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the 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”(emphasis mine)

15. The Henderson -v- Henderson estoppel , it is clear, will not apply, if there are special reasons to justify or explain the claims having been split.

16. In the instant case there was no claim or allegations of torture. It can be understood why. The Petitioners had apparently been prevented from communicating with anyone. The previous suit was actually filed on their behalf. There is no indication they even participated in the proceedings. There was no way of knowing they were being kept in the alleged treacherous conditions. Besides there is also the possibility that some or all of the alleged acts of torture chanced after the Court had actually validated the Petitioners’ detention.

17. I view it that it would not be appropriate in the circumstances of the case if taken in totality to invoke and apply the doctrine of res judicata wholly.”

31. Is this the ordinary situation where litigants as said in *William Koross v. Hezekiah Kiptoo Komen & 4 Ors.* [2015] eKLR keep trying something new until something gives, or, as said in *Edwin Thuo v. Attorney General petition no. 212 of 2013*, a plaintiff in a second suit is trying to bring before the Court in another way and in a form a new cause of action which has been resolved by a Court of competent jurisdiction, or is there special circumstance, as held by *Silas Make Otuke*, supra; *Edward Akongo Oyugi & 2 Ors. v. Attorney General*, supra; or Madan, JA. in *Mburu Kinyua* justifying non-application of the doctrine?

32. There is my view an exceptional circumstance that the question of the existence of a legal procedure for the removal of a clerk of the County assembly is raised by a person other than the Interested Party who is the person affected by the removal. It is a matter of general public importance outside the private interest of the Interested Party and the Court finds it appropriate, on that account, to restrict the applicability of the principle of *res judicata*.

33. However, *in rem* or *in personam*, the Judgment of the Labour Court has the effect of removing from the table the question, consideration and determination as to whether the Interested Party was properly removed from the office of Clerk of the County Assembly of Baringo. If *in rem*, the whole world including the petitioner, this or any other Court is bound by the decision of the Labour Court; if *in personam*, the judgment shall operate to bind the parties to the suit before the Labour Court meaning that the Interested Party’s status as against the 2nd and 3rd respondents herein would have been settled as between those parties and there can be no basis for restraining the said respondents from filling the vacant office of the Clerk of the County Assembly.

34. Either way, the question remains - should the Petition herein regarding the existence of a procedure for the removal of a clerk of the County Assembly be considered for hearing on its merits **without effect on the Interested Party’s claim to Office of the Clerk of County Assembly, which has already been determined?**

Whether Petition may be heard without consideration of the Interested Party’s tenure

35. Having found that the Petition herein on the question of existence of standing orders for the removal of the Clerk of the County Assembly of Baringo is not *res judicata* by virtue of the Judgment of the E & LR Court in Petition No. 12 of 2019; but having found that the question of the validity of the removal of the Clerk of the County Assembly was a judgment *in rem* binding on the Petitioner and the whole world, **this Court finds that while the Petition may proceed to hearing on account the exceptional circumstances of the alleged want of standing orders for the procedure for the removal of a Clerk of the County Assembly, the question of the removal of the Interested party from the office of the Clerk of the County Assembly is beyond reach of the Court for reason of the judgment in rem thereon by the E&LR Court.**

36. Although shy of fully conceding the point, the written submissions of the Petitioner and the Interested Party point to an admission that the question for determination is bigger than, and may be determined outside, the private interest of the Interested Party as follows:

For the petitioner –

28. “We reiterate that the Applicant herein has not instituted this Application and/or Petition to secure the office of Clerk of the County Assembly for the Interested Party to occupy until the expiry of his term of office. On the contrary the Applicant avers in his Petition that the 2nd and 3rd Respondents have acted unlawfully and that there is a lacuna in the law that permitted the 2nd and 3rd Respondents to pass the impugned resolution in an arbitrary manner. These are serious matters that Article 165 (3) of the Constitution enjoin this Court to interrogate and make a definite finding on.

29. We find support to the above in the holding of the Court of Appeal in **Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & Another (2011) eKLR** as quoted with approval in **Silas Make Otuke v Attorney General (supra)** thus;

“If the process of appointment is unconstitutional, wrong, unprocedural or illegal, it cannot lie for the Respondents to say that the process is complete and this Court has no jurisdiction to address the grievances raised by the Petitioners. In our own view, even if the five appointees were sworn in, this Court has the jurisdiction to entertain and deal with the matter. The jurisdiction of this Court is dependent on the process and constitutionality of appointment.”

30. It is our argument that the finding above applies to removal from office as much as it applies to appointment to an office. The constitutionality and the process thereof is voided and/or vitiated by any impugned illegality thereof. If the removal of the Interested

Party is subsequently shown to be tainted with illegality, it will be no answer or defence to say that this Court has no jurisdiction and that it is too late to raise a challenge.”

For the Interested Party –

“We submit that the Petition before this Court is keen on protecting the Office of Clerk of not only Baringo County Assembly but all other County Assemblies in our Republic from unlawful interference by any-body including the County Assemblies.

The Interested Party appreciates that the position of Clerk of Baringo County Assembly is not synonymous with his occupation or not of that office. In this regard the Interested Party might have been a victim of the consequences of an arbitrary process by the County Assembly of Baringo, however his interest in this petition is anchored under Article 258 of the Constitution. The Interested Party thus aims to safeguard and buttress the position taken by the Petitioner herein with the aim of safeguarding the Constitution and the Officer of Clerk in all the 47 Counties.”

37. The substratum of the request for extension of the conservatory order fails because, the Court cannot delve into the question of tenure and subsequent removal from office of the particular person herein enjoined as the Interested Party whose removal has been validated by the E&LR Court by its Petition No. 12 of 2019. The Court may only determine the question, generally, as to the removal of a clerk – an unnamed clerk from the office of the Clerk of a County Assembly.

38. In deference to the Court of Appeal decision in *John Florence*, supra, the Court would apply *res judicata* only in clearest cases. Not so in this case. In this case, the Court further agrees that **the question of procedure for removal of clerk of the County Assembly** is of general public importance to all the 47 county assemblies of the Republic of Kenya and, consequently, there exists **special circumstances** to justify leaving the issue for hearing and determination by the **Constitutional Court** in accordance with Articles 165 (3) and 258 of the Constitution.

39. As this Court observed in Ruling No. 2 herein, the prospects of multiple judicial pronouncements on the same question by Courts of equal status, in this case the High Court and the Employment and Labour Relations Court on the issue of removal of the Interested Party as a individual holder of the office of the County Assembly of Baringo must be avoided.

Orders

40. Accordingly, for the reasons set out above, the Petitioner’s Notice of Motion dated 9th October 2019 is only partly successful, in that the order for extension, pending hearing and determination of the Petition herein, of the conservatory order which had previously been made to await the determination of the Nairobi Employment and Labour Relations Court Petition No. 12 of 2019, now decided by the Judgment of that Court of 27th September 2019, is declined; but the order for the hearing of the petition is granted as prayed in Prayer 3 of the Notice of Motion.

41. Costs in the Cause.

Order accordingly.

DATED AND DELIVERED THIS 6TH DAY OF DECEMBER 2019.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Kinoti & Kibe & Co. Advocates for the Petitioner.

N/A for the 1st Respondent.

M/S Magare & Co. Advocates for the 2nd and 3rd Respondents.

M/S Nderi & Mwangi & Co. Advocates for the Interested Party.