



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**PETITION 24 OF 2014**

**HONOURABLE PRISCA AUMA MISACHI.....PETITIONER**

**VERSUS**

**COUNTY ASSEMBLY OF KISUMU.....1ST RESPONDENT**

**ELUID OWEN OJUOK.....2ND RESPONDENT**

**HON. GABRIEL OCHIENG.....3RD RESPONDENT**

**ATTORNEY GENERAL.....4TH RESPONDENT**

**AND**

**ANNE ATIENO ADUL.....1ST INTERESTED PARTY**

**PAMELA APONDI OMINO.....2ND INTERESTED PARTY**

**NELCO MASANYA SAGWE.....3RD INTERESTED PARTY**

**R U L I N G**

1. In her petition dated 3rd November 2014, the petitioner, a member of the County Assembly of Kisumu seeks several orders (as outlined in the petition).
2. The petitioner also filed an application by way of Notice of Motion in which she sought orders restraining the respondents from acting upon or effecting the decision of the County Assembly of Kisumu made on 21st October 2014 on removal from office of the speaker and or holding sessions in contravention of the law and the Constitution and in absence of the duly elected speaker. The basis of the application and the petition is that the respondents had in a meeting held on 21st October 2014 purported to unprocedurally remove from office the speaker of the County Assembly of Kisumu, her deputy and the clerk to the County Assembly. The petitioner contended that such removal was in violation of their right to fair administrative action and their replacement was in contravention of the Constitution.
3. In response to the petition and application for conservatory orders, the respondents filed two affidavits in reply to the petition and the application. The first affidavit was by Eliud Owen Ojuok the Acting Clerk of the Kisumu County Assembly and a second one by Gabriel Ochieng an elected member of the Assembly. On 11th March 2015 the respondents filed an application by way of Notice of Motion seeking to strike out the petition as being *res judicata*. In the said application dated 9th March 2015, the

respondents seek the following orders:

- 1. That the petition filed herein and dated 3rd November 2014 be struck out with costs to the applicants.**
- 2. That costs of this petition be provided for.**
- 4. The respondents' application was based on the following grounds:**
  - 1. That there exist a suit which has been heard on merit and determined being Kisumu Industrial Petition No. 297 of 2014 between Kisumu County Assembly Service Board, Ann Atieno Adul vs. County Executive of Kisumu and 5 others.**
  - 2. That the issues raised herein, the facts and pleadings involved are similar to the previous petition aforementioned and runs foul of provision of section 7 of the Civil Procedure Act.**
  - 3. That the prayers sought in this petition have been determined by the judgment delivered by Honourable Lady Justice Hellen Wasilwa on 12th January 2015.**
  - 4. That to have this petition heard would be an affront to provisions of law which provide for:**
    - a. just expeditious, proportionate and affront resolution of civil dispute.**
    - b. efficient disposal of business before court.**
    - c. Efficient use of the available judicial and administration resources**
    - d. Timely disposal of proceedings at a cost which is affordable.**
  - 1. That to have this petition heard is with respect an academic exercise and will not serve any useful purpose.**
  - 2. That it is clear that this petition is scandalous frivolous and vexatious.**
  - 3. That this petition will greatly prejudice the respondents and embarrass or delay the fair trial of the action before court and is otherwise an abuse of the process of court.**
  - 4. That this application is made in good faith**
  - 5. That this application is deserving in equity.**

This ruling relates to the application to strike out petition.

#### **Case for the Applicants/Respondents**

5. The applicants relied on the affidavit of Eliud Owen Ojuok sworn on 9th March 2015. Mr. Ojuok averred that the petition herein is scandalous, frivolous and an abuse of court process. This is because the issues and allegations raised in her petition were in fact the subject matter of industrial petition proceedings instituted in Kisumu industrial Court Petition No. 297 of 2014 which has since been heard and determined on merit in the petitioners' favour. He further stated that the petitioner would not suffer prejudice as there is a judgment already in their favour. He was of the view that the present petition was a waste of the Honourable court's resource and an unnecessary financial burden to the litigants as the issued ventilated had already been conclusively determined.

6. The applicants asks the Court to consider the pleadings relating to the said industrial petition No. 297 of 2014 and the judgment therein, and to find that the substance of the claim being agitated in the present

petition and the grounds thereof were conclusively determined in the industrial petition proceedings.

### **The Respondent's/Petitioner's Response**

7. The petitioner filed grounds of opposition in response to the application. It is her averment that her right to commence court proceeding under Article 22 and Article 258(1) of the Constitution cannot be taken away by any provisions in the Civil Procedure Act or Rules as the Civil Procedure Act is not applicable to proceedings commenced under the Bill of rights.

8. It is the petitioner's ground that the issues raised in the industrial petition and the current petition are substantially different. According to her, the current petition seeks to have the court determine the question whether the County Assembly can legally function without:

- a. **the speaker elected pursuant to Article 178(1) of the Constitution;**
- b. **the deputy speaker elected pursuant to Article 178(2) of the Constitution.**
- c. **The clerk appointed as contemplated under section 13(1) of the County Governments Act and the legality of the process.**

9. The petitioner was of the view that where similar prayers are sought on terms similar to those previously sought and granted then judgment can be entered in favour of the petitioner on terms as previously sought and determined but that such should not be a ground to strike out the petition.

### **Case for the 1st Interested Party**

10 The 1st interested party also filed grounds of opposition reiterating the grounds of opposition raised by the petitioner. She was of the further view that prayers sought and granted by the industrial court were substantially different from the prayers sought in the current petition and the same were being sought by different parties. She was of the view that the application herein is offends the "Mutunga Rules" and is an after-thought calculated to delay the speedy disposal and hearing of the petition herein.

### **Parties submissions**

#### **Applicants'/Respondents' submissions**

11. In his written submissions, the 2nd respondent first dealt with the issue raised by the petitioner that the application was brought under the civil procedure rules which are inapplicable in constitutional matters. The 2nd respondent was of a different view. He argued that **Section 1(2)** of the Civil Procedure Act provides that it shall apply to all proceedings in the High Court and it was therefore applicable in this matter. He argued further that the "Mutunga Rules" are subsidiary legislation and cannot override the Civil Procedure Act.

12. Secondly, the 2nd respondent dealt with the issue of res judicata. He argued that the issues herein had already been dealt with conclusively. He submitted further that though the petitioner was not a party to the industrial petition, she was well represented as the office of the speaker is one institution formed under Article 178 of the Constitution read together with Section 7(1)(b) of the County Governments Act. The 2nd respondent was of the view that the petitioner might be a different person from the petition in the industrial petition but the right claimed is claimed in common for themselves and all other persons interested in such rights. The 2nd respondent quoted the 6th explanation to Section 7 of the Civil Procedure Rules which states as follows:

**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.**

13. It was submitted further that the facts giving rise to the suits are similar and this was also admitted in the petitioner's grounds of opposition. He urged the court to strike the petition out as prayed.

### **Petitioner's Submissions**

14. The petitioner also filed written submissions. In her submissions, the petitioner majorly dealt with the issue of merits of the petition herein. She argued that the issues in the petition herein were substantially different from those cited in the Industrial Petition and so were the prayers sought. It was submitted that the petition is not about impeachment of the speaker, removal of the clerk or suspension of the County Assembly Service Board as these were the issues in the industrial petition rather the petition herein seeks to ask the court to determine the constitutionality and legality of the County Assembly of Kisumu conducting all its business, affairs and proceedings without the speaker, Deputy Speaker and the Clerk.

### **Analysis and Determination**

15. The two main issues for consideration and determination in this application are:

1. **whether the provisions of the Civil Procedure and more specifically the principle of *res judicata* is applicable in Constitutional matters**
2. **whether the issues raised in the petition are *res judicata* having been addressed in Industrial Petition No. 297 of 2014.**

If the two questions are answered in the affirmative, then the court should strike out the petition.

### **Applicability of the Principle of Res Judicata**

16. The petitioner in her grounds of opposition stated that the civil procedure rules are not applicable to proceedings commenced or geared towards protecting rights under the Bill of Rights and or enforcing the Constitution and that as such the principle of *res judicata* is not applicable.

17. I reject the petitioner's submission that the provisions of the Civil Procedure are not applicable. I put reliance on the case of **Vallerie Namtilu Wafula & another v Kenya National Union of Teachers (KNUT) & 2 others [2012]eklr** where it was held as follows:

*...."the foregoing provision as read together with the provisions of Article 159(2) (d) is clear that technicalities of procedure, more particularly in application brought for the enforcement of the Bill of Rights, should not be entertained. Even prior to the promulgation of the current Constitution the relevance of the Civil Procedure Rules was considered in Meme Vs. Republic [2014] 1 EA 124: [2004] 1KKR 637, in which Rawal J (as she then was), Njagi J & Ojwang' AJ (as he then was held that at a very basic level the Court is empowered to draw from the Civil Procedure rules in its exercise of powers under the Constitution of Kenya (Protection of Fundamental Right and Freedoms of the Individual) Practise and Procedure Rules and by virtue of Order 1 Rule 10(2). This decision should put the second Respondent's position on the applicability of Civil Procedure rules to *Constitutional petitions to rest.*"*

18. 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 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 any Constitutional litigation that may be preferred for that purpose.

19. I am guided by the decision of the court in **Silas Make Otuke v Attorney General & 3 others [2014] eKLR** where it stated as follows:

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.*

20. Accordingly, I 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

#### ***Is the Petition Res judicata?***

21 To determine this question, the court needs to address itself to the meaning and implications of the principle of *res judicata*. The principle of *res judicata* is set out in the Civil Procedure Act, Cap 21 at section 7 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 can 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.”***

22. The Civil Procedure Act has also provided explanations with respect to the application of the *res judicata* rule. Explanation 1-3 are in the following terms:

***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.***

23. The *res judicata* rule has also been considered in different jurisdictions, and there is unanimity on what the rule means and implies. In *Nicholas Njeru -vs- Attorney General & 8 Others* (2013)e KLR, the Court of Appeal expressed itself as follows:

***“This doctrine has been applied in a number of cases including; Reference No. 1 of 2007 EACJ, James Katabazi & 21 Others -vs- The Attorney Of The Republic Of Uganda where the court stated that for the doctrine to apply;***

*-The matter must be directly and substantially in issue in the two suits.*

*-The parties must be the same or parties under when any of their claim, litigating under the same title; and*

*-The matter must have been finally decided in the previous suit (see **Uhuru Highway Development Limited -vs- Central Bank & 2 Others – Civil Appeal No. 3 of 1996.**)”*

24 Also in the English case of **Henderson -vs- Henderson (1843-60) ALL E.R.378**, the Court expressed the following view:

*“...where a given matter becomes the subject of litigation in, and of 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 a 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 case, 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.”*

25 Even so courts of competent jurisdiction have been quick to add that the principle of res judicata can and should be invoked in Constitutional matters in the clearest of cases. While therefore the principle is a principle of law of wide application, it must be sparingly invoked in rights- based litigation. (see. **Okiya Omtatah Okoiti & Anor vs.- The Attorney General & Anor Petition No. 593 of 2013.**) The courts must however be vigilant to guard against litigants who are clearly evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the same courts. (see. ***Wycliffe Gisebe Nyakina vs. Attorney General & Anor Petition No. 403 of 2014***)

26. Going back to the petition before this court, as is evident from the prayers sought, the averments of Prisca Auma in the affidavit in support of the petition and the application for conservatory orders, it is obvious that the petitioner is aggrieved by the respondents' decision to oust the 1st interested party (the speaker) from office. The petitioner is also aggrieved by the fact that the 1st respondent has been proceeding with its activities as usual in their absence.

27. In her affidavit, the petitioner gives a history of the dispute. The facts as in the Industrial Petition heard and determined by Hellen Wasilwa J. as well as the present petition relate to the office of the speaker of the County Assembly of Kisumu. The Claim in both petitions is that the speaker of the Assembly was on 21st October 2014 unlawfully and unprocedurally ousted from office and the County Assembly is thus operating its business without a legally elected speaker in contravention of Article 178 of the Constitution. That despite the fact that the petitioner was not impeached from office, she was not allowed to preside over the impeachment proceedings.

28. That during her removal from office the speaker was not allowed a chance to be heard and neither was the correct procedure as provided under Section 11 of the County Governments Act and standing order No. 58 followed. The petitioner is also of the view that Section 11 of CGA and Standing Order No. 58 are inconsistent with the constitution.

29. The petitioner concedes that some of the prayers sought are similar to those sought in the Industrial Petition but insists that the present petition concerns the legality of the proceedings of the County Assembly undertaken in the absence of the office of the county speaker.

30. The applicant/respondent argues that all these matters which have been raised in the petition had been canvassed and determined by Hellen Wasilwa J. The applicant further argues that though the petitioner was not a party in the industrial petition, the prayers sought were group rights which included her rights

as a deputy speaker and as such the petition is still res judicata by virtue of explanation No. 6 to section 7 of the Civil Procedure Act earlier quoted.

31. In the considered judgment of Hellen Wasilwa, the court set out the prayers sought by the petitioner therein and also set out the respective cases of the parties. The court then proceeded to address its mind to the questions raised. On the issue of the conduct of business in the absence of the speaker the Honourable Court stated as follows:

***“On 16th October 2014 when the house sat, there was no mention of the speaker nor her deputy(the petitioner herein) or why someone else had to be the speaker nor how the new person Samuel Ombogo was elected to be the speaker under Article 178(1) of the Constitution.”***

32. The court went on to observe that :

***“There is need for a hearing or due process envisaged under section 11 of the CGA before the impeachment process. The 1st real encounter of the 2nd petitioner with the motion was on 21st October 2014 through email....under the law, the notice should be given at least 48 hours before impeachment. This right was not accorded to the petitioner.”***

33. In the present petition the petitioner who was not impeached seems to be aggrieved by the speaker's impeachment which is an issue that was comprehensively dealt with in the industrial petition. I reject petitioner's argument in her grounds of opposition that the petition herein concerns the conduct of business after the impeachment of the speaker. Throughout the petition, replying affidavit and the Notice of Motion application, all the petitioner seems to be ventilating is the unlawful impeachment of the speaker. All the issues raised in the petition herein were eloquently raised and canvassed by the speaker herself in the industrial petition. The court addressed itself to the respective cases of the parties before it on merit, and found in favour of the petitioner therein (the speaker). What more could the petitioner herein want?

34. I think that I have stated enough to show that this application ought to be allowed which I do. The petition herein is equally dismissed with costs.

**Dated, signed and delivered this 5th day of October 2015.**

**H. K. CHEMITEI**

**J U D G E**