

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAIROBI
ELRC PETITION NO. E084 OF 2024

AFRICAN INSTITUTE FOR PEACE & HUMAN RIGHTS...1ST
PETITIONER

CHARLES MAINA KARIUKI.....2ND
PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL.....1ST
RESPONDENT

BRIGADIER ALICE MATE MURINGO.....2ND RESPONDENT

JUDGMENT

By a petition dated 31st May 2025, the Petitioners moved the court seeking the following orders: -

- (a) A declaration that the actions of the 1st Respondent amount to violations of constitutional principles as enshrined under Articles 2, 3, 10(1), 10(2), 35(1), 73(1)(a)(iv), 73(2)(a) and 232(1)(f)(g) and 232(2) of the Constitution of Kenya 2010.
- (b) A declaration that the appointment of the 2nd Respondent as the Agency Director, Assets and Recovery Agency was done in violation, 27, 28, 73(2)(d), 232(1)(e)(f) and (g) of the Constitution.
- (c) A declaration that the people of Kenya are entitled to a refund of all salaries, benefits and any other monies paid to the 2nd Respondent from public funds guaranteed to public officers.

- (d) An order of certiorari to be issued to quash the decision of the 1st Respondent to appoint the 2nd Respondent as the Agency Director of the Assets Recovery Agency in April 2021 or thereabouts.
- (e) Costs of the petition be borne by the Respondents.
- (f) Any other relief that the Honourable court may deem fit.

In opposition to the petition, the Respondents filed a replying affidavit sworn on 20th January 2025 by Ntaara Karimi.

The Petitioners case.

That the facts and circumstances surrounding the instant petition are detailed in the petition dated 31st May, 2025 and the supporting affidavit therein. For continuity, the facts relied upon are as follows:

That the 1st Respondent appointed the 2nd Respondent as the substantive Director of Assets Recovery Agency (hereinafter “Agency”). Prior to her appointment, the 2nd Respondent was a Colonel at the Kenya Defence Forces.

The Petitioner stated that section 53(2) of the Proceeds of Crime and Anti-Money Laundering Act. Cap 59A of the Laws of Kenya (POCAMLA) provides that the 1st Respondent upon recommendation by the Assets Advisory Board appoint a fit, competent and proper person to be Director of Agency. At the time of the appointment of the 2nd Respondent the Assets Recovery Advisory Board was not operational. Thus, it is impossible for the 2nd Respondent to have been recommended for appointment by a body that was not operational prior to her appointment.

That despite the above, the 2nd Respondent continues to hold herself out as the substantive Director by carrying out the duties and responsibilities of the Director of the Agency as provided for in law.

The Petitioner stated further that the 2nd Respondent has at all material times been receiving and continues to receive salary and benefits from the Agency which receives funds allocated to it by Parliament in accordance to section 54A (1) of POCAMLA.

The Petitioner said that it's Advocate through a letter dated 18th April 2024, wrote to the 1st Respondent inquiring *inter alia*;

- (a) The date the position of Director, Assets Recovery Agency was advertised in accordance with the legal and regulatory framework governing advertisement of public offices.
- (b) The names of all the applicants;
- (c) The names of the shortlisted candidates
- (d) The scores of the shortlisted candidates;
- (e) The letter recommending the 2nd Respondent for appointment in accordance with section 53(2) of the Act.

That the letter sought to confirm whether the appointment of the 2nd Respondent was made in accordance with the strict constitutional provisions governing the appointment to a public office as defined in Article 260 of the Constitution and in compliance with the values and principles of public service under Article 232 and in accordance with section 53(2) of the Act.

The Petitioner stated that the said letter also sought to confirm whether the appointing authority being the 1st Respondent therein adhered to the strict constitutional provisions provided for under Articles 10(1)(c), 10(2)(c), 73(1)(a), 73(2)(a), (b), (d), 232(1)(e), (f), (g), (i), 232(2). That the said letter was received on 19th April 2024 and no response has ever been received to date.

The Respondent's case

That according to the Respondents:

- a. the subject matter in this petition is moot as it was determined in a ruling dated 31st December, 2024 by the High Court in Nairobi Petition number 17 of 2021 (Commission for Human Rights and Justice (CHRJ) versus Assets Recovery Agency, the Hon. Attorney General and Alice Mate).
- b. Article 35 of the Constitution cannot be the basis of issuance of a declaratory order in the manner sought by the Petitioners.
- c. The petition is *res judicata* and contrary to section 6 of the Civil Procedure Act since this honorable court is a court of equal status/concurrent jurisdiction with the High Court.

DETERMINATION

The parties filed written submissions which the court has carefully considered together with the deposition by the parties in the petition itself and supporting documents and the replying affidavit of the Respondent which raised the issue of mootness and *res judicata*.

The issues for determination are therefore:

- (a) Whether the doctrines of mootness and/or res judicata are applicable in light of the ruling delivered in Nairobi, Petition number 17 of 2021;
- (b) Whether the Petitioners are entitled to the prayers sought,
- (c) Who should bear the costs of the suit.

On the issue of mootness, the Petitioners submit that they disagree with the findings of L. N. Mugambi J. in High Court Constitutional and Human Rights Division **Petition No. 17 of 2021** in the Ruling dated 31st December 2024 especially on the interpretation of section 23 of the Interpretation of Statutes and General Provisions Act which decision is not binding on this court.

That the High Court in determining a preliminary objection in the said petition found that the impugned provisions of the proceeds of Crime and Anti-Money Laundering Act, 2019 having been repealed and/or amended by the proceeds of Crime and Anti-Money Laundering (Amendment) Act 2021, rendered the petition moot.

That the High Court in arriving at its decision relied on the provisions of section 23 of the interpretation of statutes and General Provisions Act, without considering the provision of section 23(3) (d) of the Act which provides that:-

“Where a written law repeals in whole or in part another written law, then unless a contrary intention appears the repeal shall not ---

(a)---

(b)---

(c)---

(d)---

(e) affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid and any such investigation, legal proceedings or remedy as may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made.”

The Petitioners therefore submit that the amendments and repeal of the impugned provisions do not affect these legal proceedings or the remedies sought. That the prayers sought ought to be granted as if the repealing written law had not been made.

The Petitioners submit secondly, that the legality and constitutionality of how the 2nd Respondent was appointed has not been addressed by the Respondents. The Petitioners submit therefore that the prayers sought in the petition are not moot relying on the maxim that the conduct of state actions such as the Respondents if wrong cannot go without a remedy for equity will not suffer any wrong without a remedy.

That the court should not turn a blind eye to the alleged blatant violations of the law. That Respondents have not denied that the 2nd Respondent was appointed without due process. That the 2nd Respondent is still in office following a flawed process and the court in ***Nairobi Petition Number 17 of 20021*** did not address itself to that issue. That the 2nd Respondent's

appointment is an employment issue which is not within the jurisdiction of the High Court.

That Article 10(1) and 10(2) of the Constitution provide those national values and principles of governance in this Article bind all state organs, state officers, public officers and all persons whenever any of them;

- (i) Applies or interprets the Constitution
- (ii) Enacts, apply or interprets any law; or
- (iii) Makes or implement public policy decisions.

That these values and principles include good governance, integrity, transparency, rule of law and accountability.

That the court should dismiss the legal objections raised in the replying affidavit to determine the petition on the merits and grant the reliefs sought in the petition.

The Respondent in its written submissions submitted that the petition lacks merit in that the same is *res judicata* having been determined in the previous suit referred herein.

The Respondent referred the court to the case of ***Commission for Human Rights and Justice versus Assets Recovery Agency and another; Alice Mate (Interested Party) (Constitution Petition 17 of 2021, [2024] KEHC 16470 KLR (Constitutional Human Rights (3, December 2024) (Ruling)***. The Respondent stated that the present petition blatantly violates

the core facets of the doctrine of *res judicata* as codified under section 7 of the Civil Procedure Act which provides:

“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 issue in which such issue has been subsequently raised, and has been heard and finally decided by such court.” [Emphasis ours].

The court was also referred to the Supreme Court decision in ***Kenya Commercial Bank Limited versus Muiri Coffee Estate Limited and another, Motion No. 42 of 2014 [2016] eKLR*** where it was held that:

“Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights.”

The court was also referred to the case of ***Bernard Mugo Ndegwa versus James Nderitu Githae and 2 others, [2010] eKLR*** which requires the following elements to be established:

- i. The matter in issue must be identical in both suits
- ii. The parties in the suit must be the same or litigating under the same title.
- iii. The claim or title in the previous suit must be the same as one in the subsequent suit

- iv. The court that determined the previous suit must have had jurisdiction.
- v. The previous suit must have been heard and finally determined

The court has considered the facts of the case and found that petition 17 of 2021 (Supra) involved the same parties. The issues in dispute are identical in both suits. The High Court of Kenya, has jurisdiction to determine the constitutional issues raised in petition No. 17 of 2021 (Supra).

That the High Court, per L. N. Mugambi J heard and finally determined the suit at paragraph 36 of the Ruling as follows:

“36 In the light of the amendments to and/or repeal of the impugned provisions that formed the substratum of this petition, it is my finding that the instant petition has been rendered moot and the jurisdiction of this court to determine this matter no longer exists by reason of mootness.”

The Petitioner if dissatisfied with the ruling of the High Court ought to have appealed the decision but not to file a second petition before a court of equal status alleging that the High Court had no jurisdiction to determine the employment and labour issues that underlay the constitutional issues raised in petition 7 of 2021. This court having been appraised of all facts is now in a position to definitely determine that the present suit ticks all the prerequisites of *res judicata*. The court returns that the present suit is *res judicata* and the court lacks jurisdiction to determine it.

Furthermore, the court was made aware by counsel for the parties that the 2nd Respondent has since served her term and left the employment of the Assets Recovery Agency as the Director which appointment was the core subject of the dispute in both petition 17 of 2021 and the present petition.

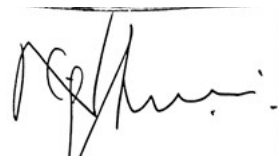
The court is satisfied that the ruling of Mugambi J. in petition 17 of 2021, rendered all the prayers sought in this petition academic. The court is fortified in this belief by the fact that the 2nd Respondent herein who was the interested party in petition 17 of 2021 has since served her term and left the employment of the said Agency.

In addition to the finding that this matter is *res judicata* which finding deprives this court the necessary jurisdiction to hear and determine this suit, the court would also be involved in an academic exercise the factual basis of the petition having been overtaken by events and the court would merely be engaged in an academic exercise.

Accordingly, the petition is struck out the court having no jurisdiction to hear and determine the same and the subject matter being moot in the first place.

The parties to bear their own costs of the suit this being a public interest litigation.

Dated at Nairobi this **27th Day of November 2025.**

A handwritten signature in black ink, appearing to be 'Ngũgĩ', is written over a horizontal line. The signature is cursive and somewhat stylized.

Mathews Nduma

JUDGE

Appearance:

Mr. Kariuki for Petitioner

Ms. Akuno for Respondents

Mr. Kemboi – Court Assistant

ORIGINAL