



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT KISII

CAUSE NO. E016 OF 2025

EVANS OGUTU OUMA.....**CLAIMANT**

VERSUS

MIGORI COUNTY ASSEMBLY
SERVICE BOARD.....**1ST**

RESPONDENT

MIGORI COUNTY ASSEMBLY.....**2ND**

RESPONDENT

RULING

1. By an application dated 22nd October 2025, the Respondents seek, *inter alia*, orders that the Memorandum of Claim dated 3rd July 2025 be struck out on the ground of *res judicata*; that this Court be found to lack jurisdiction pursuant to Article 234(2)(i) of the Constitution, section 77 of the County

Government Act, and sections 85, 86 and 87(2) of the Public Service Commission Act; and that the suit be dismissed with costs of the application and any other relief the Court may deem fit to grant.

2. The application is supported by the grounds on its face and the supporting affidavit of Mr. Mboya Brian, the Respondents' Legal Officer. He depones that the present suit is *res judicata*, as it raises issues similar to those in **Kisumu ELRC Cause No. E072 of 2023** and **Kisumu ELRC JR E046 of 2023**, both of which were struck out. He further avers that the Claimant has not appealed against those decisions, which therefore remain in force. Additionally, he contends that the nature of the reliefs sought divests this Court of jurisdiction in light of Article 234(2)(i) of the Constitution, section 77 of the County Government Act, and sections 85, 86 and 87(2) of the Public Service Commission Act. On that basis, he urges the Court to allow the application in the interests of justice.
3. In opposition, the Claimant filed a replying affidavit sworn on 28th October 2025. He avers that the suits cited by the

Respondents were not determined on their merits, having been struck out on preliminary grounds relating to jurisdiction. He maintains that, in those circumstances, nothing precludes him from instituting a fresh suit founded on the same issues, as the doctrine of *res judicata* applies only where a matter has been heard and finally determined on its merits.

4. The Claimant further contends that he complied with the doctrine of exhaustion by lodging a dispute before the Public Service Commission, which dismissed his application for leave to appeal out of time. He argues that, as a result, the substantive issues concerning the fairness and legality of his termination remain unresolved. It is therefore his position that the doctrine of exhaustion cannot operate to bar access to the Court where the alternative forum has declined to consider the merits of the dispute. He adds that denying him a hearing would violate his rights under Articles 48, 41 and 159(2)(d) of the Constitution, which guarantee access to justice, fair labour practices, and the administration of justice without undue regard to technicalities. He accordingly urges

the Court to dismiss the application as premature and an abuse of the court process.

5. The application was canvassed by way of written submissions.

Respondents/Applicants' Submissions

6. The Respondents identify three issues for determination, namely:

- (a) Whether the suit is *Res Judicata*;
- (b) Whether this court has jurisdiction to hear and determine the suit; and
- (c) Who bears the costs of the application.

7. On the issue of *res judicata*, the Respondents submit that the present suit is barred. They highlight the case of **Evans Ogutu Ouma v County Assembly of Migori & Migori County Assembly Public Service Board (Kisumu ELRCC No. E072 of 2023** and **Republic v Migori County Assembly Service Board Ex-parte Evans Ogutu Ouma (Kisumu ELRC JR No. E046 of 2023)**, asserting that both suits raised issues identical to those in the present suit. They

also rely on the decision of the Public Service Commission dismissing the Claimant's application for leave to appeal out of time. In support of their position, they cite section 7 of the Civil Procedure Act and the case of Kenya **Commercial Bank Limited v Muiri Coffee Estate Limited & another [2016] eKLR**, both of which underscore that a court has no jurisdiction to hear matters that have been conclusively determined in another suit. They further submit that the doctrine of *res judicata* is not subject to the principle of substantive justice under Article 159 of the Constitution, and that the Claimant has not demonstrated fraud, mistake, or lack of jurisdiction to justify reopening the matter, as discussed in the digest **Mulla, Code of Civil Procedure (18th Ed., 2012)**.

8. The Respondents further submit that the suit meets the fivefold test for *res judicata* outlined in **Bernard Mugo Ndegwa v James Nderitu Githae & 2 others, [2010] eKLR**, namely: identity of issues, sameness of parties, sameness of title or claim, concurrence of jurisdiction, and finality of the previous decision. In conclusion the

Respondents assert that the Claimant has not explained why he filed the present suit approximately one year after the earlier suits were struck out, nor why he failed to appeal those decisions.

9. On jurisdiction, the Respondents submit that this Court lacks jurisdiction to entertain the claim. They assert that, as previously held in the struck-out suits, the Public Service Commission is the body vested with original jurisdiction to hear the dispute. They emphasize that jurisdiction is conferred by the Constitution and statute, and that the Court cannot assume jurisdiction where none exists.
10. On costs, the Respondents submit that they are entitled to the same, having been subjected to what they term as an abuse of the court process through repetitive litigation.

Claimant/Respondent's Submissions

11. The Claimant on his part maintains that suits struck out for want of jurisdiction do not give rise to *res judicata*. He asserts that in both the suits that were struck out, none was determined on its merits. He relies on the case of **John**

Florence Maritime Services Limited & another v Cabinet Secretary, Transport and Infrastructure & 3 others [2021] eKLR, in which the Supreme Court outlined the following prerequisites for *res judicata*; the former judgment or order must be final; the judgment or order must be on merit; the judgment or order must have been rendered by a court of competent jurisdiction over the subject matter and the parties; the parties in the first and the second action must be identical as well as the subject matter and cause of action.

12. On jurisdiction, the Claimant submits that the doctrine of exhaustion is not absolute, and that courts may assume jurisdiction where the alternative forum is unavailable, ineffective, or incapable of granting an adequate remedy. He contends that he presented his dispute before the Public Service Commission, but his application for leave to appeal out of time was declined, thereby exhausting that avenue. In the circumstances, he argues that denying him access to this Court would be contrary to Articles 48 and 159 of the Constitution. In conclusion, the Claimant urges the Court to

dismiss the application and to set the matter down for hearing on its merits.

Disposition

13. The matter is challenged for being *res judicata*. *Res judicata* is a Latin phrase that means “a thing adjudged”. Put another way, it refers to a thing or matter that has been finally judiciously decided on its merits and one that cannot be re-litigated between the same parties. The **Black's Law Dictionary 10th Edition** defines *res judicata* as: “An issue that has been definitely settled by judicial decision. The three essentials are that there is:

- a. an earlier decision on the issue,
- b. a final Judgment on the merits; and
- c. the involvement of same parties, or parties in privity with the original parties

14. Is the suit herein *res judicata*? This is raised as the contentious issue for determination. When cast against the definition in **Black's Law Dictionary 10th Edition** the case before me lacks some of the key ingredients for *res judicata*.

Whereas there are prior determinations against the Claimant, the determinations were not what would qualify as final judgments on the merits. It is conceded the parties are the same but the issues that were raised were not adjudicated as to bring the suit to the point of *res judicata*. The Respondent has misapprehended the applicability of this doctrine in the matter before me.

15. On the exhaustion doctrine, the Public Service Commission played its part. In an effort to ensure he complied with the doctrine of exhaustion, the Claimant lodged a dispute before the Public Service Commission. The Commission dismissed his application for leave to appeal out of time. As such, he had no recourse other than this action. The Courts in this realm have held the doctrine of exhaustion is a jurisdictional imperative which is a fetter to parties running to court prematurely. The **Black's Law Dictionary Tenth Edition** states that the exhaustion doctrine requires that a party exhaust all possible administrative or preliminary remedies before seeking relief in court. Where there is a clear procedure for redress of any particular

grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed before the jurisdiction of the Court is invoked. The Claimant followed that procedure with negative results before coming to Court.

16. The foregoing is ample to show that the preliminary objection is for dismissal. Preliminary objection dismissed albeit with no order as to costs. Directions will follow the delivery of this Ruling.

It is so ordered.

Dated and delivered at Kisumu this 28th day of April

2026

**Nzioki wa Makau, MCI Arb.
JUDGE**