



**Moyo v County Government of Murang'a (Civil Appeal  
461 of 2018) [2023] KECA 1003 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KECA 1003 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 461 OF 2018  
HA OMONDI, JM MATIVO & GWN MACHARIA, JJA  
JULY 28, 2023**

**BETWEEN**

**HON AUGUSTINE GAKURE MOYO ..... APPELLANT**

**AND**

**COUNTY GOVERNMENT OF MURANG'A ..... RESPONDENT**

*(Being An Appeal from the ruling and orders of the Employment and Labour  
Relations Court (Mbaru, J.) dated on 28th July 2016 in Petition No. 24 of 2016)*

**JUDGMENT**

1. On March 15, 2016, the appellant, who was then the Deputy Governor of Muranga County, filed petition No 24 of 2016 before the Employment and Labour Relations Court, which revolved around a house that had been leased for him by the respondent who entered into a lease agreement with the landlord; carried out renovations, furnished and upgraded it to the appellant's taste; and the appellant took possession of the premises in July 2013. Come October 2015, he was informed that the Salaries and Remuneration Commission (SRC) and the Kenya National Audit Office (KNAO) that it was illegal for the County Government to provide housing to the appellant; a decision was then made to surcharge him for the funds spent in leasing, renovating and furnishing the house; the appellant then vacated the house but left the furniture.
2. The appellant described as illegal, and an unfair administrative action, the move to instruct the County Paymaster to start making the appropriate deductions which covered Kshs 2,160.00/- for rent, and deposit for rent, 4,830,187/- for renovation of the premises, such that by March 2016, a sum of Kshs 3,495,090/- had been recovered. The appellant urged the court to order a stop to the deductions as he was in occupation for only 15 months, and the balance unrecovered would be for furniture which belonged to him, yet the deductions were continuing. He sought inter alia, a permanent injunction to stop the surcharge on his salary and a refund of the money already recovered.



3. The appellant concurrently filed a Notice of Motion of even date where he urged the court to issue temporary orders of injunction to restrain the deduction or withholding of his salary in a bid to recover the funds, pending the hearing of the claim.
4. The respondent opposed both the petition and the application through its replying affidavit, as well as a preliminary objection to the effect that the petition was res judicata and was a collateral attack on a judgment of a court of competent jurisdiction over the same subject matter, so the trial court lacked jurisdiction to entertain the matter. The respondent's argument was that the applicant had filed Milimani Constitutional and Human Rights Division Petition High Court Petition No 412 of 2015, complaining about the wrongful deductions from his emoluments, arising from lease of the residential premises.
5. The court (Onguto, J), in its judgment pointed out that in as much as the applicant may have had a genuine dispute regarding the deductions which affected his salary and emoluments, the remedy did not lie in filing a blanket constitutional petition, and he had no valid constitutional grievance; and that he was at liberty to seek redress through other avenues. Accordingly, the petition was dismissed.
6. The respondent further pointed out that the petitioner filed a notice of appeal but instead of pursuing the appeal opted to file a similar petition urging the court to address similar constitutional issues that the High Court in Milimani Constitutional and Human Rights Division Petition No 412 of 2015 rejected.
7. In its ruling, the trial court (Mbaru, J), noted that Article 165 (5)(b) and 162 of the Constitution established the court to hear and determine employment and labour relation disputes and that proceedings could be commenced by memorandum of claim, application or petition; that it had jurisdiction to deal with the rights and fundamental freedoms arising from relationships defined in section 12 of the Employment and Labour Relations Court Act.
8. The ELRC further noted that the appellant in the instant case admitted to filing Milimani Constitutional and Human Rights Division Petition No 412 of 2015 and also the current petition as the High Court did not address the substantive issues(s) that the respondent arbitrarily exercised its powers to make deductions from the appellant's salary. The court also noted that where the cause of action relates to employment and labour relations, such disputes ought to be filed before the Employment and Labour Relations Court.
9. The trial court also noted that the judgment in Milimani Constitutional and Human Rights Division Petition No 412 of 2015 found the petition to be wanting and that the jurisdiction of the court under Articles 22 and 165 of the Constitution ought not to have been invoked and also further noted that the appellant had other avenues for redress.
10. The trial court questioned why the appellant, being fully aware that in Milimani Constitutional and Human Rights Division Petition No 412 of 2015 the court found the petition wanting in terms of Articles 22 and 165, chose to again use the same Article 22 to approach the ELR court. The court found that the issue in the present petition had already been decided by a competent court; and that the matters in dispute in Milimani Constitutional and Human Rights Division Petition No 412 of 2015 were directly similar and that the parties were the same as the present petition.
11. The court also noted that the appellant had abandoned the notice of appeal and, as such, the decision in Milimani Constitutional and Human Rights Division Petition No 412 of 2015 (supra) still stood, and there was a final determination that there was no breach of the alleged violations of his rights under the Constitution. The court in the final analysis found that a similar petition as the previous



one dismissed in Petition No 412 of 2015, and could not be reintroduced before the court. The respondent's objection was held as valid and dismissed the petition and application with costs.

12. The appellant was aggrieved by the outcome, and has filed an appeal on grounds that the learned Judge erred by invoking the doctrine of res judicata, and finding that the dispute regarding his salary deductions had been conclusively determined; and misinterpreted the entire judgment of the High Court, thus arriving at an erroneous decision to strike out the petition in limine.
13. The respondent urged us to dismiss the appeal.
14. We have considered the appeal, the submissions and the applicable law. Our mandate on a first appeal as set out in rule 31(1) (a) of the Rules of this Court is to reappraise the evidence and draw our own conclusions. In *Peters vs Sunday Post Limited [1958] EA 424*, the predecessor of this Court, the Court of Appeal for Eastern Africa, stated that:

' Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide.'
15. This duty to evaluate the evidence on the record in order to come to its own independent conclusion on the evidence has been reiterated in [\*Abok James Odera t/a AJ Odera & Associates vs John Patrick Machira t/a Machira & Company Advocates \[2013\] eKLR\*](#).
16. In our view, the main issue in this appeal is whether the petition was res judicata. We have perused the pleadings in Milimani Constitutional and Human Rights Division Petition No 412 of 2015 made pursuant to Article 22, and alleging violation of his (appellant's) rights under Articles 40 (3b), 41 (1), 41 (2) and 47 of the [\*Constitution\*](#) of Kenya, where the appellant, gave a chronology of events from the time, he was elected Deputy Governor of Muranga County, the residential house which stood on LR 28844, that was negotiated for, leased for him, renovated, furnished and refurbished; and the abrupt termination of the lease, and the subsequent deduction of monies from his salary to recover the funds expended, which action he termed as unwarranted and illegal. He sought, inter alia, a permanent injunction to stop the surcharge on his salary and a refund of the money already recovered.
17. The respondent's position was that the Petition did not constitute any constitutional complaint.
18. The trial court dismissed Petition No 412 of 2015 after determining the matter, and found that the petitioner had not demonstrated any violations under article 22 and 165 of the [\*Constitution\*](#). The appellant then filed a notice of appeal, which he however abandoned, and then filed Petition No 24 of 2016 claiming the same violations and praying for various constitutional reliefs similar to the ones in petition No 412 of 2015.
19. The court in Milimani Constitutional and Human Rights Division Petition No 412 of 2015 was of the view that a party that alleges their rights to have been violated or threatened must with reasonable precision state the relevant articles of the [\*Constitution\*](#) stated to have been violated or under threat of violation and must illustrate the manner in which the respondent has infringed on those rights. See [\*Mumo Matemu vs Trusted Society of Human Rights Alliance and 5 Others Civil Appeal No 290 of 2012 \(2012\) eKLR\*](#).



20. On the issue of res judicata, the substantive law is found in section 7 of the *Civil Procedure Act* Cap 21 which provides:

' No court shall try any suit or issue in which the matter 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 in which the issue has been subsequently raised, and has been heard and finally decided by such court.'

21. The *Black's Law dictionary 10<sup>th</sup> edition* defines res judicata as,

' An issue that has been definitely settled by judicial decision the 3 essentials are (1) an earlier decision on the issue, (2) a final judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties.'

22. In order to decide as to whether an issue is res judicata a court of law should also look at the decision claimed to have settled the issues in question to ascertain:

- i. What issues were really determined in the previous petition.
- ii. Whether they are the same in the subsequent petition and were covered by the decision.
- iii. Whether the parties are the same or are litigating under the same title and that the previous petition was determined by a court of competent jurisdiction.

23. In petition No 412 of 2015, the appellant pleaded violation of various constitutional rights including the right to be heard prior to the decision to surcharge him and arbitrary deprivation of property in the form of his salary and sought for several remedies including a permanent injunction to stop the surcharge on his salary and a refund of monies already recovered. This petition was opposed on the grounds that it lacked merit owing to the fact that it did not reveal any constitutional complaint or violations. The trial court heard the petition and dismissed the same for want of proof of any violation or threat of violation of the petitioner's constitutional rights.

24. In petition 24 of 2016 the appellant pleaded violations to his right to a fair hearing, right to administrative action and right to property and sought various constitutional reliefs including declarations and orders of injunction and refund. This petition was equally opposed on the grounds that the same was res judicata.

25. The trial court in Petition No 24 of 2016 considered the judgment in petition No 421 of 2015 and was satisfied that the trial judge in his judgment made a final determination and conclusive judgment therein.

26. This Court in The *Independent Electoral and Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR* stated:

' The rule/doctrine of res judicata serves the statutory aim of bringing finality to litigation and affords parties closure and respite from the specter of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court.'



- 27. We note that clearly, the issues in the two petitions are similar and so are the parties. If the appellant wanted his issue sorted he ought not to have filed another petition seeking similar orders, but should have moved on with the notice of appeal, which was abandoned.
- 28. It is not in doubt that the court in Milimani Constitutional and Human Rights Division Petition No 412 of 2015 was one of competent jurisdiction, and its decision stood, the same having not been appealed against. The court in dismissing the petition took its time to go through the evidence presented by the petitioner and found that there was no alleged violation of the appellant’s rights and found no breach. Having found that no violation of the appellant’s rights had been demonstrated and the petition standing dismissed, the appellant, if he so desired had the option of pursuing a normal employment claim against the respondent.
- 29. Consequently, we hold that this appeal lacks merit and is dismissed with costs to the respondent.

**Dated and delivered at Nairobi this 28<sup>th</sup> day of July, 2023.**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

**J. MATIVO**

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**JUDGE OF APPEAL**

**G. W. NGENYE - MACHARIA**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original*

*Signed*

**DEPUTY REGISTRAR**

