



**County Executive Murang'a v Njoroge & 2 others (Civil Appeal  
15 of 2017) [2022] KECA 91 (KLR) (4 February 2022) (Judgment)**

Neutral citation: [2022] KECA 91 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL 15 OF 2017  
RN NAMBUYE, W KARANJA & AK MURGOR, JJA  
FEBRUARY 4, 2022**

**BETWEEN**

**COUNTY EXECUTIVE MURANG'A ..... APPELLANT**

**AND**

**NANCY NJOROGE ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY ASSEMBLY OF MURANG'A ..... 2<sup>ND</sup> RESPONDENT**

**TITUS WAITHAKA KINYANJUI ..... 3<sup>RD</sup> RESPONDENT**

*(An appeal from the decree and orders of the Employment and Labour Court  
at Nyeri (Ongaya, J.) dated 20th December 2016 in Petition No. 9 of 2016)*

**JUDGMENT**

1. Nancy Njoroge (1st respondent) filed a Petition before the Employment and Labour Relations Court (ELRC) on 2nd December, 2016, which Petition was pronounced to be premised on Articles 41 and 232 of the [Constitution of Kenya](#), the Fair Administrative Actions Act 2015, and section 12(1) (a) of the [Employment and Labour Relations Court Act](#). In the petition, Titus Waitthaka Kinyanjui (3rd Respondent) was named as the Interested Party. He, like the petitioner were members of the Murang'a County Public Service Board (the board) which is established under section 57 of the [County Governments Act](#) 2012, which undertakes human resource functions as provided for under section 59 of the Act.
2. According to the 1st respondent, she was appointed following a competitive, fair and transparent recruitment exercise by Manpower consultants, a recruitment firm hired by the appellant. The successful applicants were then subjected to a selection process by the appellant's internal selection panel and they were sworn into office on 16th August, 2013. The person appointed chairperson was Peterson Mwangi but he stepped down and she was appointed the acting chairperson as she had been serving as the board's vice chairperson.



3. On 7th December, 2015 the board advertised through the media the position of chairperson of the board whereby she applied and the appellant hired Manpower services to conduct the recruitment exercise. Following her application, she was interviewed on 4th February, 2016 but the outcome of the process was never communicated to her or to the other applicants. On 8th July 2016, there was a re-advertisement of the same position of chairperson which did not mention the fate of the earlier advertisement and whether the previous applicants could re-apply or not. As a result of this second advertisement one Rahab Gathoni filed a Petition in ELRC No. 5 of 2016 against the County Government of Murang'a seeking information on the outcome of the earlier advertisement.
4. In this petition, the County Government of Muranga disclosed that the reason for not concluding the first recruitment process was because the Ethics and Anti-Corruption Commission (EACC) had not given clearance for the candidates shortlisted by the consultant, Manpower services. It was her case further that she had provided the necessary clearance on integrity when she applied for the position.
5. On 21st November 2016, the County government constituted an internal interview panel and interviewed candidates who had applied following the 2nd advertisement and on 24th November, 2016 the public was invited to submit any objections to the appointment of Titus Waithaka as the chairperson of the board. Before the interested party's name could be forwarded to the County Assembly (2nd Respondent) for approval, the 1st respondent moved to the ELRC seeking conservatory orders and also seeking to stop the process which she termed as discriminatory.
5. It was her case that she had been unfairly denied an opportunity to appear before the internal recruitment panel and the 2nd recruitment process did not involve an objective consultant; there had been no evidence that EACC had provided any clearance for Titus Waithaka's nomination and she believed that the governor had unfairly favoured him, thus her rights under Articles 27, 41 and 232 of the Constitution had been violated in the circumstances.

She prayed for the following reliefs:

- a) A declaration that the refusal of the appellant to process her appointment as the chairman of the Murang'a County Public Service Board in terms of the recommendations of a competent human resources recruitment agency, manpower services, was a violation of her rights to equal opportunity and freedom from discrimination as guaranteed by Article 27 of the Constitution as well as her right to fair labour practices as guaranteed by Article 232 of the Constitution.
  - b) An order directing the appellant and the 2nd respondent to proceed with the recruitment exercise of the chairman of the Murang'a County Public Service Board only in accordance with the process initially undertaken and recommendations made by manpower services
  - c) An order stopping the continued processing of the interested party or any other person as the chairman of the Murang'a county public service Board following the 2nd irregular recruitment exercise.
7. In response to the Petition, the appellant stated that the second advertisement was in July 2016 whereas the 1st respondent had moved to court on 1st December, 2016. The interview panel had found Titus Waithaka as the suitable candidate for the office of the board's chairperson. The 1st respondent had not applied for the said position after the second advertisement and that section 58(1)(a) of the *County Governments Act* did not prescribe the involvement of an independent consultant in the appointment of a chairperson. In addition, the governor had not been enjoined as a party and it was unfair that serious allegations were made against him yet he could not respond to them.



8. It also filed a preliminary objection on 6th December, 2016 stating that the petition should be dismissed with costs because it is res judicata in view of an earlier determined suit of *Rahab Gathoni Gochobi vs Murang'a County Government [2016] eKLR, Petition No. ELRC 5 of 2016* (hereinafter the former suit). In the said suit, judgment was delivered and on the issue of recruitment of the chairperson of the Board, the court held that the same should proceed and be concluded expeditiously in accordance with the law. It was contended that the 1st respondent herein had litigated through a proxy and had even filed a supporting affidavit in the former suit. In the present petition, the 1st respondent was therefore canvassing the issues in the former suit and the reliefs in the present petition were substantially the issues in the former suit, therefore the present petition was an abuse of the court process and it ought to be dismissed with costs.
9. On 6th December 2016, the court directed that both the preliminary objection dated 5th December, 2016 and the petition be urged together. Upon considering the pleadings, the affidavits and the submissions filed by the parties, the trial court identified and framed three issues for determination: whether the petition was res judicata the former suit; whether the 2nd recruitment process was lawful in view of the unfinished or pending first recruitment process and whether the 1st respondent was entitled to the reliefs sought.
10. The court went ahead and held that parties in the present petition were different from the former petition and that filing of an affidavit by the 1st respondent did not make her a party to the suit. On the second issue the court held that the initial recruitment process never concluded and it was never cancelled and that once the vacancy was declared to the public by way of initial advertisement, the appellant and the 2nd respondent's power to make a declaration of the vacancy and to invite applicants was exhausted, it was functus officio. It could not re-declare a vacancy, re-advertise it and go through a recruitment and selection process to have a second advertisement and as a result, the reliefs sought by the 1st respondent were granted with costs to her.
11. Aggrieved by this decision, the appellant moved to this Court relying on grounds, inter alia that the learned Judge erred in law:
  - i.) In failing to uphold the plea of res judicata set out in the appellants notice of preliminary objection dated 5th December, 2016 returning a verdict that effectively overturned the same courts decision delivered on 18 November 2016 over the same subject matter
  - ii.) In failing to appreciate sufficiently and or at all that he had no jurisdiction to entertain the petition in the wake of his decision of 18th November emanating from the same subject matter.
  - iii.) In revisiting the so-called second recruitment which he had approved and allowed to proceed yet quashed the same without a review application.
  - iv.) In quashing the recruitment based on the so-called uncontroverted allegations against a party who was not party to the suit
  - v.) In passing judgment that violates the right to natural justice that no party shall be condemned unheard
  - vi.) In making findings against the appellant based on allegations against the governor (a non-party) yet the two are separate and distinct legal entities.

The appellant prayed that the judgment in the trial court be set aside and besubstituted with an order dismissing the petition with costs of this appeal.



12. In its submissions, the appellant consolidated grounds 1, 2 and 3 to be an issue on res judicata saying that the matter having been previously heard and determined by the same court, the court was devoid of jurisdiction to entertain the suit. On grounds 4, 5 & 6 the appellant faulted the learned Judge for entertaining allegations against the governor who was not a party to the proceedings; and that the Judge erred in finding the allegations against a non-party were controverted and still made adverse findings on the basis of the allegations hence violating his right not to be condemned unheard and making findings against the appellant on the strength of those unsubstantiated allegations against the non-party.
13. On the ground on res judicata, it was submitted that the issues raised in Petition No. 5 of 2016 and the petition subject of this appeal were similar and the court was barred from determining them under section 7 and 8 of the Civil Procedure Act. The court erred in dismissing the preliminary objection yet there was sufficient demonstration that the issue on recruitment of the chairperson was one of the issues raised in Petition No. 5 of 2016 and the same was determined. The Judge also failed to appreciate that the 1st respondent had used a proxy to litigate in the former petition and she even swore an affidavit on 26th October, 2016. To buttress this argument reliance was placed on the decision in *Prof. Christopher Mwangi Gakuu vs Kenya National Highways Authority & 5 others [2013] eKLR* where the High Court held that:-

“It matters not in my view that some of the parties were not parties in the previous suit. The issues are the same and the real cause of action remains the same. He has in my view introduced the new parties so as to disguise his main intention from the court. This court must guard jealously its jurisdiction from such litigants.”

Under section 7 of the Civil Procedure Act, any matter which is a ground of attack or defence in such former suit shall be deemed to have been a matter directly and substantially in issue in the former suit.

14. The grounds relied on and the reliefs sought in the former petition were directly and substantially in issue in the present petition, and that this position applies in cases where parties who ought to have been enjoined to the former suit were not enjoined. The trial court still acknowledged that the 1st respondent had sworn an affidavit in the former suit but went ahead and dismissed the preliminary objection. In addition to the above, the trial court in the former suit had pronounced itself differently on the issues but when the same issues were canvassed in the present petition, the court gave a contrary opinion tantamount to the court sitting on appeal on its own decision in the former suit and pronouncing itself thereon differently.
15. Turning to the ground on the adverse findings against the governor who was not a party and its effect on the court’s decision in Petition No. 9 of 2016, we were urged to find that no transcripts of the said text messages were annexed to the 1st respondent’s affidavit in support of her petition. Neither was the governor joined as an interested party despite these strong allegations made against him on the basis of which the court made adverse findings against the appellant herein and the governor, finding that their actions amounted to a contravention of Article 236 of the Constitution that protects public officers from victimization or intimidation.
16. Further that the governor was condemned unheard contrary to the right to fair hearing as was held in *Mbaki & others vs. Macharia & Another (2005) 2EA*. The governor was not present to controvert the allegations thus his right to a fair hearing had also been violated and it matters not that the same



decision would otherwise have been arrived at as was held by the court in *David Oloo Onyango vs. The A.G, Civil Appeal No. 152 of 1986* wherein the court expressed itself, inter alia, that:-

“ A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at.”

Finally, we were urged to find merit in the appeal and allow it with costs.

17. In submissions filed on behalf of the 1st respondent, on the issue of res judicata, it was submitted that the appellant misinterpreted the court's finding in the former suit by proceeding with the recruitment process and disregarding her legitimate expectation together with the other persons who had previously been interviewed and also the appellant could not disregard the constitutional and statutory requirements of fair administrative action. The 1st respondent faulted the process through which Titus Waithaka Kinyanjui, the interested party had been recruited since it was marred with procedural irregularity, procedural unfairness, substantive illegality and unfairness.
18. On the issue of res judicata, the Court was urged to find that for res judicata or estoppel to apply it must be shown that: the parties to the case are the same or substantially the same; the issues being litigated are the same or substantially the same; the grounds of attack in the former case have to be the same in the latter case and that issues have been determined with finality by a court of competent jurisdiction. It was submitted that the parties in the former suit were not the same; Rahab Gathoni filed the suit in her own right as a member of the public who was unhappy with the way in which the appellant handled the recruitment process and only asked the 1st respondent to swear an affidavit in good faith, the allegation that she was litigating through proxy was unfair, speculative and unfounded. The subject in the former suit was on the second recruitment which was impugned by the decision therefore the events that led to the present petition had not occurred by the time the decision was made in the former suit. The present petition was as a result of the decision in the former and the recruitment of Titus Waithaka Kinyanjui, which process was discriminatory and she was excluded from the internal recruitment process. These issues could therefore not be raised in the former case as Titus Waithaka Kinyanjui had not been recruited.
19. On the ground of nonjoinder of the governor, it was submitted that the county government is a juristic person that acts through natural persons like a governor, therefore his acts could be attributed to the county government. On non-joinder of Rahab Gathoni Gichohi as an interested party in the present petition, this did not defeat the suit and the court can still determine issues before it. The 1st respondent in her petition did not rely on any grounds relied on in the former case notwithstanding that the relief quashing the recruitment process may have been coincidentally similar. The reliefs in the former suit were premised on the process per se whereas in the present petition it was the events that occurred from the 21st November, 2016.

Finally, we were urged to dismiss the appeal with costs.

20. When the appeal came before us for virtual plenary hearing, learned counsel Mr. Ng'ang'a Mbugua appeared for the appellant while Ms. Mwihi held brief for Mr. Muriithi for the 1st respondent. Mr. Njenga who appeared for the 3rd respondent informed us that the 3rd respondent had since passed on and the appeal against him was therefore, marked as having abated pursuant to rule 99(2) of the Court of Appeal Rules. In his oral highlights, Mr. Ng'ang'a emphasized strongly that the learned Judge made serious adverse findings against the governor who was not joined as a party to the proceedings and who was therefore condemned unheard. He submitted that among the allegations made against the governor were that he was biased against the 1st respondent and that the said bias was said to have been



manifested through some text messages, which were never annexed to the 1st respondent's affidavit. He reiterated that the said findings were at the core of the final decision made in the petition.

21. In response, Ms. Mwihiaki maintained that it was for the governor to apply to be joined as a party to the proceedings if he deemed it necessary to respond to the allegations made against him in his personal capacity, otherwise he was well represented by the county government.
22. Having gone through the record of appeal in its entirety, the rival written and oral submissions by learned counsel and the applicable law, particularly as enunciated in the authorities filed by the parties, we discern the issues falling for our determination as; whether Petition No. 9 of 2016 is res judicata Petition No. 5 of 2016 and whether the trial court erred in making adverse findings against a non-party in Petition no. 9 of 2016.
23. We remind ourselves that, our duty as a court of first appeal is to re-evaluate, re-analyze and re-consider the evidence adduced before the trial court and draw out our own conclusions. In *Gitobu Imanyara & 2 others vs Attorney General [2016] eKLR*, wherein this Court stated that;

“[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect”

In *Peters v. Sunday Post Ltd [1958] EA 424*, the Court held 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 had plainly gone wrong, the appellate court will not hesitate so to decide”

24. The 1st respondent had filed a petition against the appellant and the 2nd respondent in regard to the recruitment process that had resulted in the nomination of Titus Waithaka Kinyanjui (since deceased). The 1st respondent served as a member of the Board and became its vice chairperson on 16th August, 2013 and after stepping down from the chair in November 2014, she was appointed in an Acting capacity as chairperson of the Board. On 7th December, 2015 the County government advertised for the position of the substantive chairman to the Board and the 1st respondent applied for the position. As stated earlier, she was interviewed but no result was communicated and later there was a re-advertisement for the same position on 8th July, 2016. This is the root of the two Petitions No. 5 of 2016, to be referred as “former suit” and 9 of 2017. However, the appeal to this court is purely from Petition No. 9 of 2017. The appellant had filed a preliminary objection on grounds that the petition was res judicata Petition No. 5 of 2016.
25. The appellant argues that the issue in regard to the recruitment of the chair to the Board was directly an issue in the former suit. That fact is not disputed. Section 7 of the *Civil Procedure Act* provides in regard to res judicata 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.

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.”

First the issue in dispute in the former suit must be directly and substantially in issue in the present suit where the doctrine is pleaded. Secondly, the parties in the former suit should be the same parties or parties under whom they or any of them claim, or litigating under the same title and lastly the court which heard the former suit was competent and it made a final determination. In *Kamunya & Others vs Pioneer General Assurance Society Ltd [1971] E.A. 263*, res judicata was held to be a bar to subsequent proceedings involving same issues that had been finally and conclusively been decided by a competent court in a prior suit between the same parties or their representatives.

26. The appellant urged that the issues in the petition were substantially similar to the issues in the former suit. This was opposed by the 1st respondent who urged that the issues in the petition subject to this appeal arose after the determination of the former suit and that the appellant had misinterpreted the judgment in the former suit. The petitioner in the former suit was Rahab Gathoni against Murang’a County Government, and it is alleged by the appellant that there is a further supporting affidavit sworn by the 1st respondent in that petition and therefore this makes parties the same, an issue disputed by the 1st respondent. Rahab Gathoni is not a party in the present petition.
27. On record there is an affidavit sworn by Nancy Waithira Njoroge pursuant to orders of the trial court granted on 4th October, 2016. In this affidavit she acknowledges to have been a member of the Board and acting vice chairperson, she further confirms that indeed interviews were conducted and she attended one on 4th February, 2016 and the results of the said interview were yet to be disclosed only for another advertisement to be issued on 8th July, 2016 in respect of the same position.

The petitioner in the former suit was seeking, inter alia, reliefs as follows as against the Murang’a County Government:

- “a) A declaration be issued to declare that the respondent’s conduct infringed articles 10, 35 and 232 of the constitution
- b) A declaration be issued to declare that by inviting applications for the position of the chairperson Murang’a County public service board in July 2016, the respondent breached the county government Act 2013 and by extension Article 232 of the Constitution
- c) The honorable court be pleased to uphold articles 10 and 232 of the Constitution by issuing orders of injunction:
  - i. Restraining the respondent from proceeding any further with the inviting applications or conducting interviews for the position of chairperson Murang’a county public service Board
  - ii. Compelling the immediate cancellation of recruitment for the position of the chairperson Muranga County Public Service Board.”



The court held that the dispute was about the lawfulness of the recruitment of the Board's chairperson and since the county government had provided the information requested by filing it in court prayers a, b and c were declined.

28. Further that the petitioner had not shown how Article 232 of the Constitution or the provisions of the County Government Act, 2012 had been contravened thus the remedy was also declined. On restraining the county government from inviting the applications and conducting interviews for the position of chairperson and compelling the cancellation of recruitment for the position of the chairperson, the court held that since the advertisement had been issued and the previous applicants were not barred from re-advertising, there was no justification for the cancellation of the recruitment for the position of the chairperson. Instead the court ordered that the process should be concluded expeditiously and in accordance with the applicable law.
29. From the above findings of the trial court, it is clear that the court considered the initial recruitment process and was satisfied that the process had been sufficiently explained and endorsed the same. The court also sanctioned the subsequent recruitment process with a caveat that the recruitment be carried out in accordance with the law. The appellant could not therefore challenge the same process. We appreciate the fact that the appellant was not a petitioner in the former petition. She nonetheless swore an affidavit in support of that petition and she cannot wriggle out of that petition by claiming that she was not "a party" to the petition.
30. If she wanted to challenge any other aspect of the recruitment exercise, including prescribing the nitty gritty of the procedure she wanted followed (as she outlined in her petition), she ought to have applied to be formally joined as a petitioner or made the said prayers through the petitioner, who she was supporting. From the reasoning of the court in the former suit, we are left with no doubt that the issues canvassed in the former suit were substantially the same or directly the same in these two petitions. The issues raised in the former suit were after the second advertisement and the petitioner wanted to know what happened to the initial process and once this was tabled the issue on recruitment was also determined by the court and the Interested Party Titus Waithaka was not barred from being recruited as long as it was done within the applicable law.
31. The 1st respondent has not tabled any document before the court to state that the procedure was flawed. Her main contention is that she was not interviewed, but how could she be interviewed yet she admits she did not apply for the position in the second advertisement.
32. In regard to prayer C. in the present petition, on an order to be issued directing the appellant and the 2nd respondent from proceeding with the recruitment exercise, the issue had already been determined in the former suit when the court held that the recruitment should proceed within the applicable law. This implies that prayer B cannot be granted for the reason that the second advertisement had taken place and applications had been received and the court had stated in the former suit that there was no justification for the cancellation of the recruitment of the position of chairperson. We have no hesitation in concluding that Petition No. 9 of 2016 was res judicata.
33. In addition to the above, a party who alleges that her rights have been contravened has to set out with precision that which she complains of, the provisions said to be infringed and the manner in which they are alleged to be infringed, as was held in the celebrated case in *Anarita Karimi Njeru vs The Republic (1976 - 1980) KLR 1272*. The petitioner did not have a constitutional right to be appointed chairperson of the Board. She had an equal right with all the other applicants to be considered and any of them could have qualified for the appointment.



34. Turning to the ground on the adverse findings by the court on a non-party, we find that the acts complained of on the part of the governor were not done by the governor in his personal capacity but in his capacity qua governor. There was therefore no need for the governor to be joined as a party to the petition for him to respond to the allegations. The affidavit by the County Secretary Mr. P. K. Mukuria, would have sufficed to respond to those allegations. Although the learned Judge appears to have dealt at length with the said allegations against the governor resulting into his finding that the governor had exerted undue pressure in the recruitment process, it is not denied that the 1st respondent did not reapply for the position during the repeated process in spite of the court's finding in its earlier judgment that those who had applied for the position in the first recruitment were at liberty to re-apply. Having excluded herself from the process, the 1st respondent could not in the same breath complain that she was not considered for the position in question.
35. We think we have said enough to demonstrate that this appeal has merit. Accordingly, we allow it and set aside the judgment of the Employment and Labour Relations Court allowing the petition and substitute therefor an order dismissing the petition with no order as to costs.

**DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF FEBRUARY, 2022.**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

