



**Nyariki & 3 others v County Government of Nyamira & 2 others (Petition
E055 of 2021) [2025] KEELRC 1829 (KLR) (24 June 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1829 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E055 OF 2021**

JK GAKERI, J

JUNE 24, 2025

IN THE MATTER OF COUNTY GOVERNMENTS ACT NO. 17 OF 2012

AND

IN THE MATTER OF FAIR ADMINISTRATION OF ACTION ACT (SECTION 3, 4 AND 12)

AND

IN THE MATTER OF THE EMPLOYMENT ACT

AND

**IN THE MATTER OF CONSTITUTIONALISM, RULE
OF LAW, NATURAL JUSTICE & GOVERNANCE**

BETWEEN

LAMECH MACHUKI NYARIKI 1ST PETITIONER

LEWIS OBURU NYARIBO 2ND PETITIONER

DOUGLAS MECHA OSORO 3RD PETITIONER

DA ISAAC ONYANCHA 4TH PETITIONER

AND

COUNTY GOVERNMENT OF NYAMIRA 1ST RESPONDENT

GOVERNOR, COUNTY GOVERNMENT OF NYAMIRA 2ND RESPONDENT

NYAMIRA COUNTY PUBLIC SERVICE BOARD 3RD RESPONDENT



RULING

1. Before the court for determination are the Petitioners Notice of Motion dated 5th February 2025 and 9th April 2025 filed under Certificate of Urgency seeking orders that: -
 1. Spent.
 2. Spent.
 3. An order of committal be made against the following
 - a. Governor Amos Nyaribo,
 - b. CEC Member Finance,
 - c. Chief Finance Officer,
 - d. Chairman Nyamira County Public Service Board,
 - e. Payroll Manager,
 - f. HRM Director,all of Nyamira County Government for a period not exceeding six months and/or a fine amounting to Kshs. 500,000 each or such amounts as the court may decide failure of which their individual properties be attached.
 4. An order be made that the costs occasioned by this motion and for obtaining leave thereof be paid by the said named contemnors.
2. The motions are expressed under Section 5 (1) of the *Judicature Act* Order 40 Rule 3, Order 51 Rule 1 of the Civil Procedure Rules and Section 1A, 3 and 3A of the *Civil Procedure Act* and are based on the grounds set out on their face and the Supporting Affidavit sworn by Douglas Mecha Osoro on 9th April 2025.
3. The Petitioners aver that the court gave orders dated 31st January 2022 that: -
 - a. The respondents retain the terms and conditions of employment of the petitioners and staff listed in the petition before the letter dated 25th August 2021.
 - b. The respondents to pay costs of the petition and application.
 - c. Respondent shall bear the costs of the suit as agreed.
 - d. The suit is marked as settled.
 - e. Mention to confirm agreement on 7th February 2022.
4. On 7th February 2022, parties recorded a consent which the court adopted as its Judgment that the respondents to pay the Petitioners counsel's costs of Kshs. 2,300,000.00 within 15 days failing which execution to issue and the matter be marked as closed.
5. The petitioners further aver that the respondents had returned the petitioners and the listed staff to their previous positions prior to the letter dated 25th August 2021 which had demoted them but failed to pay them the requisite house allowance as ordered by the court in disobedience of the court order.



6. That despite service of the court order and partial compliance the respondents have deliberately disobeyed the court orders hence putting the court into disrepute.

Respondent's case

7. By a Replying Affidavit sworn by Rael Kwamboka Momanyi on 14th May, 2025, the affiant deposes that she was the Nyamira County Chief Officer, Department of Public Service Management.
8. The affiant deposes that the instant application is res Judicata, the petitioners' application dated 15th September 2023 which raised similar issues and attached her Replying Affidavit to that application sworn on 9th November 2023.
9. The affiant further deposes that the motion dated 15th September 2023 was heard and determined vide ruling delivered on 6th June 2024 which the affiant attached.
10. The affiant averred that the ruling delivered on 6th June 2024 had neither been reviewed nor appealed against and the instant application was in contravention of Section 7 of the [Civil Procedure Act](#).
11. The affiant reiterated the deposition in the response to earlier application that the consent dated 31st January 2022 did not render the petitioners' terms of employment immutable or immune from review in so far as the jurisdictional competence of Salaries and Remuneration Commission (SRC) was concerned and the special house allowance the petitioners were demanding ceased to exist pursuant to the SRC circulars and the court addressed the issue in its ruling of 6th June 2024.
12. Finally, the affiant deposed that the instant application was devoid of merit and the contempt proceedings were an abuse of court process.
13. In addition to the Replying Affidavit, the respondents filed a Notice of Preliminary Objection dated 20th April 2025 against the entire proceedings on grounds that: -
 1. The petitioners' applications vide Notices of Motion dated 5th February 2025 and 9th April 2025 stand in contravention of the principle of res judicata under Section 7 of the [Civil Procedure Act](#). That the Petitioners filed an identical application vide Notice of Motion dated 15th September 2023 which the court heard and determined conclusively vide ruling on 6th June 2024.
14. The respondents pray that the notices of motion be dismissed with costs.
15. The petitioners did not respond to the Notice of Preliminary Objection but submitted on it.

Respondent's submissions

16. Counsel maintained that the Notice of Motion dated 15th September 2023 was based on grounds similar to those relied upon in the instant application and the respondent responded to the application substantively by the Replying Affidavit of Rael Momanyi.
17. Reliance was place on the decisions in Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd (1969) EA 696 and Independent Electoral and Boundaries Commission V. Maina Kiai & 5 Others (2017) eKLR.
18. As to whether the Petitioners applications were res judicata, counsel relied on the provisions of Section 7 of the [Civil Procedure Act](#) and explanatory notes and the Court of Appeal decision in Independent Electoral and Boundaries Commission V. Maina Kiai & 5 Others (supra), to urge that the court was precluded from hearing or determining a suit similar to a former suit and because the Petitioners'



Notice of Motion dated 15th September 2023 was heard and determined, the instant applications were res judicata.

Petitioners' submissions

19. As to whether the petitioners' applications were res judicata, counsel for the petitioners argued that the Preliminary Objection by the respondents was an afterthought and made in bad faith as it was intended to frustrate the petitioners' attempt to realize the fruits of justice and they had misconstrued Section 7 of the *Civil Procedure Act* and allowing it would defeat the court's overriding objective of facilitating affordable and expeditious resolution of the suit.
20. Counsel addressed the two issues raised by the petitioners as the reduced house allowance and the disciplinary issue of Mecha Douglas Osoro.
21. Reliance was placed on the decision in *Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd (1969) EA 696* and *Independent Electoral and Boundaries Commission V. Jane Cheperenger & 2 others (2015) eKLR* and *Attorney General V. Andrew Mwaira & another (2016) eKLR*, to underline the elements of a Preliminary Objection.
22. As to whether the instant applications were an abuse of court process, counsel submitted that they were not and were meritorious and placed reliance on the sentiments of Court of Appeal in *Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 Others (2009) eKLR*, to urge that the petitioners were granted leave to institute contempt proceedings on 1st April, 2025, served the respondents who did not respond, hearing was fixed and directions on the filing of submissions given, thus there was no abuse of court process.
23. Finally, counsel submitted that as costs follow the events and the petitioners had disproved the allegation of res judicata, the Notice of Preliminary Objection ought to be dismissed with costs.

Analysis

24. It is trite law that whenever a Preliminary Objection is raised it ought to be disposed of at the earliest possible opportunity because it has the potential of disposing of the matter before its hearing and final determination.
25. In this instance, the respondents are challenging the petitioners' applications dated 5th February 2025 and 9th April 2025 on the ground of being res judicata the application dated 15th September 2023.
26. It is common ground that the most authoritative articulation of the essentials of a Preliminary Objection are the sentiments of Law JA and Sir Charles Newbold. P in *Mukisa Biscuit Manufacturing Co. Ltd V. West End Distributors Ltd (Supra)* cited by both parties, where Law JA stated: -

...A Preliminary Objection consists of a pure point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."
27. Sir Charles Newbold P stated that –

A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are



correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion...”

See also Hassan Ali Joho & Another V. Sulaiman Said Shabal & 2 Others (2014) eKLR
Hassan Nyanje Charo V. Khatib Mwashetani & 3 Others (2014) eKLR

28. In determining whether a plea of res judicata meets the threshold of a Preliminary Objection, the court is guided by the sentiments of the Court of Appeal in Independent Electoral & Boundaries Commission V Maina Kiai & 5 Others (supra) as follows: -

...We think not. Res judicata is a matter properly to be addressed in limine as it does possess jurisdictional consequences because it constitutes a statutory peremptory preclusion of a certain category of suits. That much is clear from Section 7 of the *Civil Procedure Act* 2010; 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.

29. Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

- a. The suit or issue was directly and substantially in issue in the former suit.
- b. That former suit was between the same parties or parties under whom they or any of them claim
- c. Those parties were litigating under the same title.
- d. The issue was heard and finally determined in the former suit.
- e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised...

30. The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and bounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and judicial processes would be rendered a noisome nuisance and brought to disrepute and columny. The foundations of res judicata thus rest in the Public interest for swift, sure and certain Justice”.

The foregoing sentiments of the Court of Appeal leave no doubt in this court’s mind that the rule or principle of res judicata meets the threshold of a preliminary objection as articulated in judicial decisions.

31. As to whether the Petitioners’ applications dated 5th February, 2025 and 9th April 2025 are res judicata the application dated 15th September 2025, the court proceeds as follows: -

It is common ground and the record is clear that the four Petitioners in the instant applications filed a Notice of Motion dated 15th September 2023 before this court, and puzzlingly, the orders sought in that motion are identical to those sought in the instant



applications, save for order No. 3 where the fine sought is the sum of Kshs. 500,000 as opposed to the sum of Kshs. 1000,000 in the earlier application.

32. Equally, and correctly submitted by the respondents, the grounds relied upon are identical as is the Supporting Affidavit and the crescendo is the fact that on the signature page the date was changed by hand.
33. Evidently, the instant applications are a carbon copy of the earlier application with a few insignificant modifications to make them appear dissimilar.
34. By a Ruling delivered on 6th June 2024, the court addressed the issue of contempt of court alleged by the petitioners and found that the officers named were not in contempt of court orders issued on 31st January 2022.
35. The court found that the Applicants had not proved a case of contempt of court and dismissed the motion with costs.
36. Analogous to the instant applications, the former application was on contempt of court orders issued on 31st January 2022 and 7th February 2023, the applicants herein were the same applicants in the earlier motion, litigating under the same title, the issue was heard and determined in the former motion and the court had jurisdiction to hear and determine the previous motion and the instant applications.
37. In the Court's view, all the requirements of the rule or doctrine of res judicata have been met.
38. The applicants' submission that the respondent's Notice of Preliminary Objection was an afterthought intended to frustrate the applicants from accessing justice is bereft of merit in the face of verifiable evidence that the applicants replicated the former application with a few modifications hoping to secure the proverbial second bite at the cherry akin to abuse of judicial function as contented by the respondents.
39. The sentiments of the Court of Appeal in *Muchanga Investments Ltd V Safaris Unlimited (Africa) Ltd & 2 others* (Supra) are instructive:

The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding which is wanting in bona fides and frivolous, vexatious and oppressive”

40. Similarly, in *Edna Cheron Bore V Sire Bank Ltd & Pampa Chunasscaria Ltd* (2024) Kote 1034 KLR, Mrima J expressed himself as follows:

Abuse of the Court Process is a settled legal principle applicable on two fronts. First, from a public interest perspective, duplication of proceedings is a waste of precious court time and resources. That is in addition to the risk of inconsistent findings which threaten to bring the administration of Justice into disrepute. Second, from a private interest perspective, it is highly vexatious and oppressive to the opposite parties not only in terms of time and cost but also in that dry run” of the claim in the prior proceedings affords the plaintiff an opportunity to refine its case and work around any defence, evidence or explanation that the opposite party in the subsequent action puts forward.”



41. Having heard and dismissed the previous application with costs, the court is satisfied that the applicants motions dated 5th February 2025 and 9th April 2025 ought not to have been filed and amount to an abuse of the court process and are res judicata.
42. Consequently, the Notice of Motions dated 5th February 2025 and 9th April 2025 respectively, are struck out with costs to the respondents.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 24TH DAY OF JUNE, 2025.

DR. JACOB GAKERI

JUDGE

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

