



REPUBLIC OF KENYA



**Ombongi v Kisii National Polytechnic & 4 others (Petition
E031 of 2023) [2024] KEELRC 493 (KLR) (6 March 2024) (Ruling)**

Neutral citation: [2024] KEELRC 493 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E031 OF 2023
S RADIDO, J
MARCH 6, 2024**

BETWEEN

DENNIS OMBONGI PETITIONER

AND

KISII NATIONAL POLYTECHNIC 1ST RESPONDENT

**KISII NATIONAL POLYTECHNIC GOVERNING COUNCIL 2ND
RESPONDENT**

DAVID MWANGI 3RD RESPONDENT

DR SIMON ONYANSI NYAKWARA 4TH RESPONDENT

PROF KISILU KITAINGE 5TH RESPONDENT

RULING

1. Dennis Ombongi (the applicant) sued the Respondents on 22 November 2023, outlining a multiplicity of causes of action being, unfair termination of employment; the unlawfulness of the appointment of David Mwangi (3rd Respondent) as the Principal of Kisii National Polytechnic (1st Respondent); the illegality of Dr Simon Onyasi Nyakwara holding office as Chair of the Governing Council of the Kisii National Polytechnic; unlawful constitution of the Governing Council of the 1st Respondent, and that the Respondents had violated his constitutional rights.
2. On 4 January 2024, the 3rd – 5th Respondents filed a Notice of Preliminary Objection contending:
 - i. That the Honourable Court is devoid of the requisite jurisdiction as the Petitioner/applicant shall (sic) have preferred an appeal as his two claims in the subordinate Court Kisii CMELRC No. E015 of 2021 and No. E019 of 2022 were dismissed.



- ii. That the Petition herein is res judicata, a matter that has been adjudicated by a competent Court and therefore may not be pursued further by the same parties; Kisii CMELRC No. E015 of 2021 and No E019 of 2022;

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

- iii. Competency of the petition that the 3rd, 4th and 5th Respondents assert that the Petition herein does not meet the precision threshold required in the Constitutional Petitions as held in *Anarita Karimi v Republic* (1979) eKLR.
 - iv. That in the circumstances, the entire Notice of Motion application together with the Petition herein is procedurally and substantively bad in law, frivolous, vexatious and an abuse of the process of Court, hence suitable to be dismissed and/or struck out with costs to the Respondents.
3. The Court gave directions on the Notice of Preliminary Objection on 30 January 2024, as a result of which the Respondents filed their submissions on 22 February 2024 (should have been filed and served before 14 February 2024) and the applicant on 1 March 2024.
 4. On 6 February 2024, the applicant purported to file an Amended Petition without securing the leave of the Court.
 5. The Court has considered all the material placed before it.

Res judicata

6. The Respondents advanced the plea of res judicata to object to the competency of the Petition on the basis that the applicant had instituted Kisii Chief Magistrate Cause No. E015 of 2021, *Denis Mboga Ombongi v Kisii National Polytechnic & Ar* and Kisii Chief Magistrate Cause No. E019 of 2022.
7. The material on record shows that Kisii Chief Magistrate Cause No. E015 of 2021 was withdrawn before a hearing on the merits whilst Kisii Chief Magistrate Cause No. E019 of 2022 was struck out for lack of jurisdiction.
8. The Causes were not heard and determined on the merits and, therefore, all the elements of res judicata as envisaged under section 7 of the *Civil Procedure Act* have not been met.
9. The plea of res judicata fails.

Constitutional threshold

10. The Respondents also contended that the Petition did not meet the pleading threshold contemplated by the principles outlined in *Anarita Njeru Karimi v R* (1979) eKLR.
11. According to the Respondents, the Petition merely cited Articles 25, 27, 28, 29, 40, 41, 43, 47 and 50 of *the Constitution* without setting how and to what extent the constitutional rights had been infringed.
12. Because of the epistolary jurisdiction in Article 22(3) of *the Constitution*, this Court is of the view that the failure to plead with specificity the alleged violations by the Petitioner acting in person ought not to be determinative of the Petition.



Multiplicity of causes of action

13. The applicant's employment was terminated on 23 August 2021. The applicant was apparently taken through a disciplinary process culminating in the termination of his employment. It is not in dispute that the applicant moved other Courts to challenge the termination as unfair, before approaching this Court.
14. Apart from challenging the unfairness of the termination of his employment, the applicant seeks to interdict the appointment of the 3rd to 5th Respondents to the various offices held with the 1st and 2nd Respondent.
15. The applicant has not clearly stated the dates of appointment of the 3rd to 5th Respondents apart from alleging that the applicable legal framework governing the appointments was not adhered to.
16. Disputes concerning termination of ordinary employment are normally instituted under the Employment and Labour Relations Court (Procedure) Rules, 2016 as read with the [Employment and Labour Relations Court Act](#) and the [Employment Act](#), 2007.
17. The Rules have provided the manner in which the Court should be approached. The applicant's action for unfair termination of employment does not implicate any constitutional issues which ought to be resolved through the route now invoked.
18. The actions challenging the appointment and or continued holding on to office of the 3rd to 5th Respondents are anchored on [the Constitution](#) and other statutes and not the [Employment Act](#), 2007.
19. It is clear to the Court that the applicant has mixed causes of action which should not have been pursued together.
20. The mix-up of the causes of action would not lend to an expeditious and proportionate determination of the Petition, and on that ground, the Court finds that the Petition is in abuse of the court process in terms of Ground (iv) of the Notice of Preliminary Objection.

Conclusion and Orders

21. Arising from the above, the Petition is struck out with liberty granted to the Petitioner to commence distinct causes of action challenging the fairness of the termination of his employment, and the appointment of the Respondents within the law.
22. Each party to bear own costs.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 6TH DAY OF MARCH 2024.

RADIDO STEPHEN, MCIArb

JUDGE

Appearances

For Petitioner in person

For 1st and 2nd Respondents Mr Nderitu, Senior Litigation Counsel, Office of the Attorney General

For 3rd – 5th Respondents Sam N. Mainga & Co. Advocates

Court Assistant Chemwolo

