



**Kagai v Dzuya & 7 others; Registrar of Political Parties & another
(Interested Parties) (Employment and Labour Relations Petition
E008 of 2024) [2024] KEELRC 2438 (KLR) (3 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2438 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E008 OF 2024
MN NDUMA, J
OCTOBER 3, 2024**

BETWEEN

JOSEPH KAGAI PETITIONER

AND

NELSON DZUYA 1ST RESPONDENT

JOSHUA KUTUNY 2ND RESPONDENT

NAOMI SHABAN 3RD RESPONDENT

ANGWENYI JIMMY NURU ONDIEK 4TH RESPONDENT

PETER OLE MOSITET 5TH RESPONDENT

MUTAVA MUSYIMI 6TH RESPONDENT

JOEL KIBE 7TH RESPONDENT

THE ATTORNEY GENERAL 8TH RESPONDENT

AND

REGISTRAR OF POLITICAL PARTIES INTERESTED PARTY

JUBILEE PARTY OF KENYA INTERESTED PARTY

JUDGMENT

1. The petitioner filed the petition on 23/01/2024 against the 1st to 8th respondents and joined the 1st and 2nd interested parties to the suit seeking the following reliefs:



1. A declaration that the 1st – 7th respondents by concurrently holding office as officials of a political party and public officers are violating the Constitution and the law.
2. A declaration that by concurrently holding office as officials of a political party and public officers, the 1st – 7th respondents violated chapter 6 of the Constitution as read with Article 232(2)(b) of the Constitution, section 12 of the Political Parties Act and section 23 of the Leadership and Integrity Act.
3. Subject to prayer 1, a declaration that the 1st – 7th respondents were unlawfully remunerated during the periods in which they acted concurrently in their respective capacities as appointees in the public office and as officials of the Jubilee Party of Kenya – a political party
4. An order directing the 1st interested party to refund, within 30 days of the judgment of the court, all remuneration unlawfully earned during the periods in which they acted concurrently in their respective capacities as appointees in the public office and as officials of the Jubilee Party of Kenya – a political party
5. Should the respondents elect to continue acting in their positions as public officers in their respective state corporations, an order directing the Registrar of Political Parties to amend the register of officials of the Jubilee Party of Kenya in line with the findings of the judgment of this court within 14 days thereof.
6. Such other orders and/or reliefs as the court may deem fit.
7. Costs of the petition

Facts of the petition

2. The 1st to 7th respondents were vide gazette notice No. 3195 of 22/3/2022, appointed by Jubilee Party's National Delegates Convention as national officials of the party in various capacities.
3. As at the date of the petition the said respondents still held those positions in the Jubilee Party and had not resigned.
4. That the 1st to 7th respondents were at the material time public officers, holding positions in various state corporations duly appointed in the months of May, August and October 2023 as set out in the petition at page 4 as follows:



S/No.	Name	Current Jubilee Party position	State appointment	Gazette Notice No.
1.	Nelson Dzuya	National chairperson	A member of the non-governmental organization coordination board	13861 carried in vol CXXV – No. 225 OF 13 th October 2023
2.	Joshua Kutuny	Deputy Secretary General	Chairperson of the Kenya Copyright Board	14523 carried in vol CXXV – No. 234 OF 27 th October 2023
3.	Naomi Shaban	Deputy Party leader (outreach)	Chairperson of the Tobacco Control Board	13858 carried in vol CXXV – No. 225 OF 13 th October 2023
4.	Angwenyi Jimmy Nuru Ondiek	Deputy party leader (strategy)	Chairperson and member of the National Heroes Council	13869 carried in vol CXXV – No. 225 OF 13 th October 2023
5.	Peter Ole Mositet	Deputy party leader (programs)	Chairperson of the Nairobi Metropolitan Area Transport Authority Board	5440 carried in vol CXXII – No. 150 OF 7 th August 2023
6.	Mutava Musyimi	Deputy National Organizing Secretary	Chairperson of the Presidential task force on the review of the legal and regulatory framework governing religious organizations in Kenya	5661 carried in vol CXXV – No. 103 of 5 th May 2023
7.	Joel Kibe	National chairperson of the Business Council	Member of the Council of the University of Nairobi	13867 carried in vol CXXV –



- 5 That the above facts have not been controverted or denied by the respondents or by the Registrar of Political Parties who is the custodian of records of officials of all political parties in Kenya by dint of section 34 and 34(c) of the *Political Parties Act*.
6. That Article 77 of the *Constitution* of Kenya 2010 provides
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- (1) A fulltime state officer should not participate in any other gainful employment.
- (2) Any appointed state officer shall not hold office in a political party.”
7. That section 23 of *Leadership and Integrity Act* provides: -
- “4 An appointed state officer or public officer shall not engage in any political
- (2) activity that may compromise or seen to compromise the political neutrality for the office subject to any laws relating to elections
- (3) Without prejudice to the generality of subsection (2) (1) a public officer shall not:
- (a) engage in activities of any political party or candidate or act as an agent of a political party or a candidate in an election;
- (b) publicly support for or opposition against any political party or candidate participating in an election.”
8. The petitioner states that a public officer in terms of Article 260 of the *Constitution* means: -
- “(a) Any state officer; or
- (b) Any person other than a state officer who holds a public office and “public office” means an office in the national government, county government or public service.
- “ If the remuneration and benefits of the officer are payable directly from the consolidated fund or directly out of money provided by parliament.”
9. Furthermore, section 12 of the *political parties Act* 2011 provides:
- “(1) a public officer shall not: -
- a. Be eligible to be a founding member of a political party
- b. Be eligible to hold office in a political party.
- c. Engage in political activity that may compromise or be seen to compromise the political neutrality of the person’s office or
- d. Publicly indicate support for or opposition to any political party or candidate in any election.”



Response

10. The respondents filed a replying affidavit sworn to on 15/2/2024 by the 2nd respondent the Deputy Secretary General of Jubilee Party and a member of the National Executive Committee of the party, the 2nd interested party.
11. The deponent states that the matters raised by the petitioner in this suit are sub judice as they are subject of multiple suits at the High Court.
12. That in view of the orders in Nairobi High Court Civil Appeal No. E630 of 2023 dated 13/7/2023, the status quo in the leadership of the Jubilee Party be maintained as per Gazette Notice No. 3195 of 22/3/2022 pending the hearing and determination of the interlocutory applications filed in the matters, listed in paragraph 23(a) to (e) of the replying affidavit and the fact that various matters filed by Hon. Jeremiah Kioni are still alive in the court the prayers sought in the petition are sub judice and the court should not delve into the issues raised or grant the reliefs sought.
13. That the issue of the legality or otherwise of the appointments of the 1st to 7th respondents into various offices as asserted by the petitioner is premature as there are multiple suits that are pending in the High Court relating to the leadership of the Jubilee Party filed through the firm of advocates that are on record for the petitioner in this matter. That the issues raised by the petitioner in this petition are pegged on the determination of the matters pending in the High Court.
14. That the petition be dismissed with costs. Furthermore, the 1st to 7th respondents are not public officers as was affirmed in the case of *Katiba Institute and another versus Attorney General and another; Julius Waweru Karangi and 128 others (interested parties)* [2021] Eklr.

Determination

15. The parties filed written submissions which the court has carefully considered together with the deposition and documentary evidence placed before court and the issues for determination are:
 - i. Whether this matter is sub judice.
 - ii. Whether the 1st to 7th respondents were officials of the Jubilee Party at the time they were appointed public officers in various state corporations

Is the petition sub judice?

16. The Supreme Court of Kenya in the case of *Kenya National Commission on Human Rights versus Attorney General; Independent Electoral and Boundaries Commission and 16 others (interested parties)* KLR stated as follows on the sub judice rule:
 - (67) The term ‘sub-judice’ is defined in *Black’s Law Dictionary* 9th Edition as: “Before the court or judge for determination.” “The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending



before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives...” Emphasis added.

17. From the above, the other or several suits filed must be between same parties or those claiming under them over the same subject matter and the two or multiple suits must have been filed before different courts of competent jurisdiction. Where it is established that the above has occurred the matter that is filed later ought to be stayed in order to await the determination to be made in earlier suit.
18. In the present matter, the respondents have failed to demonstrate that the multiple suits pending at the High Court are between the same parties as the the parties in the present petition; that the multiple suits are over the same subject matter and that the other courts have competent jurisdiction to determine the subject matter before this court in the present petition.
19. The court is satisfied this suit before court is not sub judice and the preliminary objection is dismissed.

Whether the appointments of the 1st to 7th respondents to various state corporations violated the constitution and the law?

20. The 1st to 7th respondents have not effectively rebutted the evidence presented by the petitioner that at the time they were appointed to various state corporations as public officers in May, August and October 2023 they were also national officials of the Jubilee Party in terms of the gazette notice no. 3195 of 22/3/2022.
21. The court finds that the petitioner has proved that the 1st to 7th respondents were public officers at the same time they were officials of a political party named Jubilee.
22. The issue for consideration is whether the petitioners were notified of this anomaly and put on terms to make a choice as to which of the two positions held by each one of them, they intended to keep.
23. The assertion by the respondents that the validity of appointment of the 1st to 7th respondents to various Jubilee Party positions was awaiting determination in various suits between other parties other than the petitioner and the respondents and in this matter does not resolve the issues in dispute here.
24. Whether or not the party positions of the 1st to 7th respondents were impugned in pending litigation is neither here nor there. The fact of the matter is that the petitioner has proved on a balance of probability that each of the seven (7) respondents were holders of both political party office and public office as at the time of filing this suit.
25. As the court stated in the case of *Ben Murumbi Sibanya and another versus Ethics and Anti-corruption Commission; Registrar of Political Parties and another (interested parties)* [2021] eKLR , a public officer, within the meaning of Article 260 of the *Constitution* of Kenya, shall not hold a political office or engage in political activity that may compromise or be seen to compromise the political neutrality of the office subject to any laws relating to elections.
26. The court went on to state:
 36. It is pursuant to Article 232(3) that the *leadership and integrity Act*, was enacted by parliament to guide the code of ethics of all public officers including those in state corporations such as the 1st petitioner.
 37. Whereas a lecturer at an institution of higher learning enjoys academic freedom and is not barred from expressing his or her political opinion, such an officer is bound to relinquish his position if he is appointed or elected to an office in a political party. Holding the office of lecturer at a public university and at the same time holding an appointed office of chairperson



of a disciplinary committee in a dominant political party amounts to performing daily and/or continuous political activities that may be seen to compromise the political neutrality of the office of lecturer in a public university within the meaning of section 23(2) of the Leadership and Integrity Act as read with section 12(1) (c) of the Political Parties Act.”

27. The bottom line is that the appointment of the seven (7) respondents while they held political office of the Jubilee Party violated Article 232(2) b of the Constitution of Kenya 2010, and section 23(2) of the Leadership and Integrity Act as read with section 12(1) (c) of the Political Parties Act.
28. Accordingly, the petition has merit and the court finds so and grants the following orders: -
- a. The 1st to 7th respondent ought not to hold office as officials of a political party and public office at the same time as that violates Article 232(2) b of the Constitution and section 23(2) of the Leadership and Integrity Act as read with section 12(i)(c) of the Political Parties Act.
 - b. The 1st to 7th respondents are granted opportunity to make an election as to which office they wish to relinquish and which one they opt to retain and the court puts the seven (7) respondents to such terms to exercise their discretion within 30 days of this order failing which the position held in the state corporation or public office pursuant to the stated appointment as public officers shall automatically be relinquished by the respondents.
 - c. There is no evidence before court of actual or any remuneration made to the seven (7) respondents, by Jubilee Party while they held the public offices they were appointed to. The prayer that the respondents refund remuneration paid to the respondents, while they held two positions is dismissed for lack of prove.
 - d. This being a public litigation, the court finds that each party to meet their own costs of the suit.
29. For the avoidance of doubt the EACC was struck-out of the suit and the same does not appear as a party in the judgment of this court.

DATED AT NAIROBI THIS 3RD DAY OF OCTOBER, 2024

MATHEWS NDERI NDUMA

JUDGE

Appearance:

Mr. Awele with M/s. Oseko for petitioner

Mr. Manyala for 1st to 7th respondent

Mr. Kioko for 1st interested party

Mr. Njomo for 2nd interested party

Mr. Kemboi – Court Assistant

