



**Omao v Nyamira County Assembly & 9 others; Okero & 3 others (Interested Parties)  
(Petition E047 of 2024) [2024] KEELRC 13229 (KLR) (26 November 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13229 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
PETITION E047 OF 2024  
JK GAKERI, J  
NOVEMBER 26, 2024**

**BETWEEN**

**VINCENT MARIITA OMAO ..... PETITIONER**

**AND**

**NYAMIRA COUNTY ASSEMBLY ..... 1<sup>ST</sup> RESPONDENT**

**CLERK, NYAMIRA COUNTY ASSEMBLY ..... 2<sup>ND</sup> RESPONDENT**

**KENNEDY ATUTI ..... 3<sup>RD</sup> RESPONDENT**

**DUKE MASIRA ..... 4<sup>TH</sup> RESPONDENT**

**GEORGE ABUGA ..... 5<sup>TH</sup> RESPONDENT**

**JULIUS NYANGENA ..... 6<sup>TH</sup> RESPONDENT**

**SAMUEL OGETO ..... 7<sup>TH</sup> RESPONDENT**

**JOSIA MANGERA ..... 8<sup>TH</sup> RESPONDENT**

**REUBEN MIND RIECHI ..... 9<sup>TH</sup> RESPONDENT**

**THADDEUS NYABARO ..... 10<sup>TH</sup> RESPONDENT**

**AND**

**ENOCK GORI OKERO ..... INTERESTED PARTY**

**NYAMIRA COUNTY ASSEMBLY SERVICE BOARD ..... INTERESTED PARTY**

**LAMECK SIKWEYA ..... INTERESTED PARTY**

**JOEL OMBOGI ..... INTERESTED PARTY**



## RULING

1. Before the Court for determination are the Respondents Notice of Motion dated 23<sup>rd</sup> October, 2024 seeking the striking out of the Petitioner's Notice of Motion dated 14<sup>th</sup> October, 2024 and the Petition of even date and a Notice of Preliminary Objection dated 24<sup>th</sup> October, 2024 challenging the Courts jurisdiction to hear and determine this matte on account of Section 6 of the *Civil Procedure Act* on the ground that Petition No. E008 of 2024 Enock Okero Ogori V Nyamira County Assembly & 7 Others and Kisumu Political parties Disputes Tribunal Complaint No.E004 of 2024 Lameck Sikweya and Joel Ombongi V Majority whip & 2 Others are pending at the High court in Nyamira and Kisumu and the two raise issues directly and substantially in issue in the instant Petition and Application.
2. In their Supporting Affidavit sworn Duke Onyari on 23<sup>rd</sup> October, 2023, the Respondents state that Petition herein is an abuse of the Court process as Petition E008 of 2024 is seeking similar orders as annexures show.
3. The affiant deposes that conservatory orders were issued on 11<sup>th</sup> October, 2024 by the Nyamira High Court staying implementation of the 1<sup>st</sup> Respondent's resolution passed on 8<sup>th</sup> October, 2024, suspending the Petitioner from office and the Respondents were also barred from interfering with the Petitioners discharge of his duties.
4. That the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties filed a complaint before the Kisumu Political Parties Disputes Tribunal and temporary orders were given on 24<sup>th</sup> September, 2024.
5. The Notice of Preliminary Objection dated 24<sup>th</sup> October, 2024 relies on the same grounds and seeks the same reliefs of having the Petition and the application dated 14<sup>th</sup> October, 2024 be struck out with costs.
6. The affiant further disposes that the issues in dispute before the Political Parties Tribunal are directly and substantially in dispute in Petition E008 of 2024 and thus the Application and Petition are sub judice and the Petitioner herein is a vexatious litigant and a busy body out to waste the Court's time and judicial resources and the possibility of arriving at different decisions in the matters is real and could embarrass the Court.

### Response

7. In his Replying Affidavit sworn by Vincent Mariita Omas, the Petitioner/Applicant deposes, in opposition to the application that the same is misconceived bereft of any legal, factual and evidential foundation. That it is convoluted to make sense and lacks specificity and ought to be dismissed for incompetence.
8. That the instant Petition seeks to challenge the legality of the suspension revisited upon the 1<sup>st</sup> Interested Party and was lodged as a Constitutional Petition.
9. That Section 6 of the *Civil Procedure Act* requires two similar suits with one being 1<sup>st</sup> in time pending in different Courts and the Applicant must prove the presence or more than one suit over the same subject matter instituted before the other and pending in Courts of competent jurisdiction and same parties or representatives.



10. The affiant further deposes that while Petition E008 of 2024 Mr. Enock Ogori Okero is the Petitioner suing 9 Respondents, in the instant Petition Vincent Mariita Omas is the Petitioner who has sued 11 Respondents and one Interested Party and is more comprehensive and expansive.
11. That the others touch on the suspension issues peripherally and is thus no sub judice and cites authorities in support.
12. The affiant argues that striking out of pleadings denies a litigant an opportunity to be heard on the issues raised.
13. That public interest issues in the Petition militates against the orders sought.

### **Applicant's submission**

14. As to whether the Petition and Notice of Motion dated 14<sup>th</sup> October, should be struck out Counsel for the Respondents answers the question affirmatively citing a receipt dated 11<sup>th</sup> October, 2024 for Petition E008/2024 Enock Okero Ogori V Nyamira County Assembly & Clerk Nyamira County Assembly & 7 Others to urge that the instant Petition is a cut and paste or replica of Nyamira Petition E008 of 2024 and issues of suspension of the 1<sup>st</sup> Interested Party and or removal from office are for determination in the suit and are the issues sought to be canvassed in the present Petition.
15. Counsel argues that the number of Respondents is inconsequential as sub judice is concerned with issues that are directly and substantially in issue in the other suit.
16. It is submitted that although the Respondent admits that the dispute filed in the Kisumu Political Parties Dispute Tribunal and Petition E008 of 2024 overlap on the reliefs sought, it is all the reliefs sought in Nyamira High Court Petition except one.  
Counsel urges that the Petitioner should bear the costs of the suit.

### **Petitioner's Submissions**

17. Counsel for the Petitioner argues that the instant Petition is challenging the suspension of the Speaker County Assembly of Nyamira by the County Assembly Service Board, that it was conducted in violation of *the Constitution*, County Assembly Service Act and the *Employment Act* and the Petitioner filed the Petition in his own capacity as a resident of Nyamira County and it had not been shown that he is a representative of the Petitioner in Petition No. E008 of 2024 and the Court's jurisdiction is not the same and the instant suit does not violate the sub-judice rule.
18. Reliance is made on the sentiments of the Court in *Aura V Cabinet Secretary, Ministry of Health & 11 Others: Kenya Medical Practitioners and Dentist Council & Another (Interested Parties) [2024] KEHC 8255 (KLR)* where the Court held that the Petition challenged under the sub judice rule was not sub judice on the basis of number of Respondents, parties and issues.
19. Concerning the allegation of abuse of Court process, Counsel submitted that *the Constitution* of Kenya grants any party the right to lodge a claim to challenge any action which threatens or violates *the Constitution* or any other law and ought to have an opportunity to be heard on merit.

### **Analysis and determination**

20. It is common ground that the Petitioner instituted the instant suit on 14<sup>th</sup> October, 2024 at 19:18pm under Certificate of Urgency and the Notice of Motion came up for consideration on 15<sup>th</sup> October, 2024.



21. The Court directed the Petitioner to serve the Petition upon the Respondents and inter parties hearing slated for 24<sup>th</sup> October, 2024.  
The matter was not certified urgent.
22. On 24<sup>th</sup> October, 2024, Mr. Mariita holding brief for Mr. Mainga and Mr. Mokuwa were present for the Petitioner/Applicant and Respondents respectively.
23. Mr. Mokuwa notified the Court that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had been served via email while others had not, but disclosed that he had already filed the instant application to strike out the Petition and application by the Petitioner for being copy pay of Nyamira High Court Petition E008 of 2024. He also disclosed that he had filed a Preliminary Objection (herein after Preliminary Objection). Mr. Mariita had not received the Preliminary Objection and sought time to respond to the Respondent's application and the same be canvassed by way of written submissions and directions were given.
24. On 7<sup>th</sup> November, 2024 as Counsels could not agree on whether to submit orally, or in writing, the Court accorded them 7 and 3 days respectively, as requested to file submissions, not exceeding 3 pages and a ruling reserved for 26<sup>th</sup> November, 2024.
25. Documents attached to the Supporting Affidavit of Duke Onyari dated 23<sup>rd</sup> October, 2024 reveal that one Mr. Enock Okero Ogori filed Petition No. E008 of 2024 at the Nyamira High Court on 23<sup>rd</sup> October, 2024.
26. Stripped off the side issues, the Notice of Motion and Petition before the Nyamira High Court dated 10<sup>th</sup> October, 2024 seeks reliefs similar to those sought in ELRC Petition E047 of 2024 and most of the reliefs save for one are a replica of those in Nyamira High Court Petition E008 of 2024.
27. The similarities between the two Petitions and Applications is unmistakable. A few examples commend themselves for illustrations purposes.
28. The interim reliefs sought in the Applications dated 14<sup>th</sup> October, 2024 in Petition ELRC No. E047/2024 and High Court Petition No. E008 of 2024 are as follows:
  - i. Reliefs number one (1) on certification of urgency is identical.
  - ii. Relief No. 2 is identical.
  - iii. Relief No.3 is identical.
  - iv. Petition ELRC No. E047/2024 has an additional relief on the suspension of Gazette Notice No. 13376 dated 11<sup>th</sup> October, 2024
  - v. Relief No.4 in the Notice of Motion before the Nyamira High Court is relief No.5 of Petition E047 of 2024 before the ELRC.
  - vi. Reliefs No. 5 in Petition No. E008/2024 is relief No. 6 of Petition No. E047 of 2024.
  - vii. Relief No. 6 of Petition No. E008/2024 is relief No. 7 of Petition No. E047 of 2024.
  - viii. Relief No. 7 of Petition E008/2024 is relief No. 8 of Petition No. E047/24.
  - ix. Relief No.8 in Petition No. E008 of 2024 is relief No. 9 of Petition No. E047 of 2024.
  - x. Relief No. 9 in Petition No. E008 of 2024 is relief No. 10 of Petition No. E047 of 2024.



29. Finally, the final orders sought by the Petitioner in the two (2) Petitions are strikingly similar if not identical as follows
- a. Remedy (a) of Petition No. E008 of 2024 is a replication of remedy (A) in Petition ELRC No. E047 of 2024.
  - b. Remedy (b) of Petition No. E008 of 2024 is a replica of remedy (B) in Petition No. E047 of 2024.
  - c. Remedy (c) of Petition No. E008 of 2024 is remedy (C) in Petition No. E047 of 2024.
  - d. Remedy (d) of Petition No. E008 of 2024 is remedy (D) of Petition NO. E047 of 2024.
  - e. Petition ELRC No. E047 of 2024 has an additional remedy of a declaration that Gazette Notice Number 13376 dated 11<sup>th</sup> October, 2024 degazetting the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Interested Parties be revoked and reinstatement of Gazette Notice No. 14017.  
In its place Petition No. E008 of 2024 seeks compensation by way of general damages.
  - f. Remedy (f) of Petition No. E008 of 2024 is remedy (G) of Petition No. E047 of 2024.
30. The foregoing similarities notwithstanding, whether or not a suit is sub judice depends on the issue(s) for determination. However, from the foregoing examples it is notable that Nyamira High Court Petition No. E008 of 2024 was drafted and signed earlier than Petition No. E047 of 2024 but was filed on 23<sup>rd</sup> October, 2024 at 1420hrs after Petition No. E047 had been considered and interim conservatory orders not granted.
31. From the documents filed by the Applicant/Respondent in support of their Notice of Motion and Preliminary Objection, it is decipherable that Nyamira High Court Petition No. E008 of 2024 and Petition No. E047 of 2024 have a common ancestry and one was drafted after the other.
32. This is discernible from the identical nature of the two Petitions noting that they appear to have been filed in different Courts for strategic reasons.
33. In the Courts considered view, it is not coincidental that Petition E008 of 2024 was filed on the eve of the inter partes hearing of ELRC Petition No. E047 of 2024 on 23<sup>rd</sup> October, 2024.
34. It is common ground that Nyamira High Court Petition No. E008 of 2024 progressed rapidly and to the Petitioner's advantage as conservatory orders were issued and subsequently contempt proceedings filed.
35. Strangely, the Petitioner in Petition ELRC No. E047 of 2024 maintains that his Petition addresses the issue of the speaker's suspension as its foundation yet Petition No. E008 of 2024 addresses the same issue and in the same manner.
36. The issue(s) for consideration cannot, in the Court's view be fundamentally different.
37. Needless to underscore both Petitions are challenging the purported or alleged indefinite suspension or removal from office of the Nyamira County Assembly Speaker, the Petitioner in Nyamira High Court Petition No. E008 of 2024.
38. In determining whether ELRC Petition No. E047 of 2024 is sub judice, the Court is guided by the provisions of Section 6 of the [Civil Procedure Act](#) and Case law.

Section 6 provides that:



No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim litigating under the same title where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed.

39. In *Kenya Bankers Association V Kenya Revenue Authority* [2019] eKLR the Court stated as follows;

“However, the Principle of sub judice does not talk about the prayers sought but rather “the matter in issue”.

40. In the matter of *IEBC* [2011] eKLR The Supreme Court cited with approval an Australian decision where it was held:

“...we do not think the word “matter” means a legal proceeding, but rather the subject matter for determination in a legal proceeding. In our opinion, there can be no matter...unless there is some right, duty or liability to be established by the determination of the Court...”

41. *Matavo J* (as he then was) expressed similar sentiments in *Republic V Paul Kihara Kariuki, Attorney General & 2013 Law Society of Kenya* [2020] eKLR.

42. The rationale of the sub judice rule was also addressed in *David Ndi & Others V Attorney General & Others* [2021] eKLR, a bench of 5 judges. See also *Kinatwa Co-operative Savings & Credit Society Ltd V Kinatwa Prestige Ltd* [2021] eKLR *Limo J.* observed as follows:

43. The Court finds no reason why the parties in *Petition E008/2024* cannot finalize the case.

44. The Court, however reiterates the rendition of the Supreme Court in *Kenya National Commission on Human Rights V Attorney General, Independent Electoral and Boundaries Commission & 16 Others* [2020] as follows:

“The term ‘sub-judice’ is defined in *Black’s Law Dictionary 9<sup>th</sup> Edition* as “Before the Court or Judge for determination”. The purpose of the sub-judice rule is to stop the filing of 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”.

45. The *res sub-judice* rule also discourages abuse of Court process as pursuing the same matter in different courts of competent jurisdiction, as in the current scenario is nothing more but a game of chance or gambling to get the best in the judicial process as opined by Justice *Niki Tobi JSC* in the Nigerian case of *Amaefule & Others V The State* cited by *Matavo J.* (as he then was) in *Satya Bhamu Gandhi V. Director of Public Prosecutions & 3 Others* [2018] eKLR.



46. According to Mativo J. (as he then was) instituting a multiplicity of suits on the same subject matter, against the same opponent ranks high in the abuse of the Court process as does forum shopping. Both are inimical to the administration of justice.
47. In the end, granted that the existence of two suits is not contested and the subject matter is substantially the same, if not identical, one was instituted before the other, both are pending before courts of competent jurisdiction, and the parties are substantially the same, the Court is satisfied that the Applicant has successfully invoked the doctrine of res sub-judice.
48. The upshot of the foregoing is that ELRC Petition No. E047 of 2024 be and is hereby stayed pending the hearing and final determination of Nyamira High Court Petition No. E008 of 2024.

Costs to the Applicant.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 26<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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.

**DR. JACOB GAKERI**

**JUDGE**

