



**Ochola v Siaya County Public Service Board (Petition E014 of 2024)
[2024] KEELRC 13428 (KLR) (16 December 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13428 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E014 OF 2024
NZIOKI WA MAKAU, J
DECEMBER 16, 2024**

IN THE MATTER OF VIOLATION OF ARTICLES 1, 2, 3, 4, 10, 19, 20, 21, 22, 23, 73, 75, 159, 174, 175, 232, 235, 258 AND 259 OF THE CONSTITUTION OF KENYA, 2010 AND IN THE MATTER OF THE VIOLATION OF THE PETITIONER’S BASIC AND FUNDAMENTAL HUMAN RIGHTS AS ENSHRINED UNDER ARTICLES 27, 28, 29, 41, 47 AND 50 OF THE CONSTITUTION OF KENYA, 2010 AND IN THE MATTER OF RULE 4 RULE 10(1) OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHT AND FUNDAMENTAL FREEDOM PRACTICE AND PROCEDURE RULES, 2013

BETWEEN

ERIC JUMA OCHOLA PETITIONER

AND

SIAYA COUNTY PUBLIC SERVICE BOARD APPLICANT

RULING

1. On 26th June 2024, the court issued judgment in favour of the Petitioner/Respondent after the matter proceeded undefended. Following this, the Applicant/Respondent, Siaya County Public Service Board, filed an application dated 8th October 2024, seeking the following orders:
 - a. Spent
 - b. The Office of the County Attorney be granted leave to come on record for the Applicant.
 - c. An order of stay be issued, staying execution of the judgment dated 26th June 2024, along with all orders and decrees arising therefrom, pending the hearing and determination of the application.
 - d. The court finds that the purported service of the Amended Petition and Application for Summary Judgment was defective and improper.



- e. The court sets aside the judgment dated 26th June 2024 and the resultant orders arising from it.
 - f. Upon setting aside, the judgment and vacating the decree and ex-parte proceedings, the court grants leave for the Applicant to file a defence to the suit.
 - g. Costs of the application be provided for.
2. In support of this application, the Applicant/Respondent contended that it had not been served with the Petition, despite the County Attorney being on record.
 3. In opposition, the Petitioner/Respondent filed a replying affidavit and a Preliminary Objection, asserting that the application was sub-judice and affirming that the Petition had been duly served.
 4. On 29th October 2024 the Court directed that the preliminary objection be canvassed first, through filing of written submissions.
 5. Petitioner/Respondent's Submissions

The Petitioner submits that the application dated 8th October 2024 is sub-judice, as it raises the same issues as those presented in the chamber summons dated 21st August 2024. He argues that both documents address similar facts and legal issues, and that the chamber summons is still active in court. The Petitioner draws attention to the definition of "sub-judice" as meaning "under judgment" signifying that a matter is currently under consideration by a judge or court. He references section 6 of the *Civil Procedure Act*, which prohibits a court from proceeding with a suit where the matter in issue is also directly and substantially in issue in a previously instituted claim between the same parties.
 6. To buttress his argument, the Petitioner highlights the reasoning of the High Court of Uganda in *Nyanza Garage v Attorney General - Kampala HCCS No. 450 of 1993*, in which the multiplicity of suits between the same parties over the same subject matter was frowned upon, noting that it led to wastage of money and time and created backlog of cases. The Petitioner submits that the application of 8th October 2024 satisfies the threefold conditions for being sub-judice as outlined in *Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR* in the following terms:
 - i. There must exist two or more suits filed consecutively.
 - ii. The matters in issue in the suits or proceedings must be directly and substantially the same, and the parties involved must be the same.
 - iii. The suits must be pending in the same or any other court having jurisdiction in Kenya to grant the reliefs claimed.
 7. The Petitioner further submits that it is the substance of the suit, rather than its form, that determines whether a matter is sub-judice. As such, he urges the court not to proceed with the application dated 8th October 2024 while the chamber summons dated 21st August 2024 is still pending. Regarding whether the application dated 8th October 2024 should be struck out for being an abuse of the court process, the Petitioner asserts that it should be. He argues that the Respondent has abused the court process by instituting multiple actions raising the same legal question.
 8. The Petitioner references Black's Law Dictionary, which defines abuse as: "Everything which is contrary to good order established by usage, that's a complete departure from reasonable use." He also cites the *Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya* case, in which the court identified the filing of multiple suits on the same matter by the same parties as an abuse of process.



9. Applicant/Respondent's Submissions

The Applicant submits that a Preliminary Objection is not the proper method for addressing the issue of sub judice. It asserts that sub judice requires ascertainment of facts and evidence something which cannot be done through a Preliminary Objection. In support of this contention, it places reliance on *Ita v Nyaga* (Environment & Land Case 26 of 2020) KEELC 22514 (KLR) (1 November) (Ruling) where the court noted that while a violation of the sub judice rule only served to stay proceedings, a preliminary objection would result in the dismissal of a matter. Therefore, the best way to address sub judice was through an application, not a Preliminary Objection. Additionally, the Applicant references the case of *Margaret Wachu Karuri v John Waweru Ribiro* [2021] eKLR as quoted in *Kiyo & another v Kangemi Rumwe Women Group Limited & 3 others; Njuguna (Interested Party)* (Constitutional Petition E001 of 2022) [2022] KEELC 14467 (KLR) (31 October 2022) (Ruling) where the court in addressing whether sub-judice can be raised as a preliminary point stated as follows:

“For the court to determine whether the issues herein were directly and substantially in issue with the other suit, it is this court’s considered view that it will have to ascertain facts and probe evidence by ascertaining whether the issues raised in the instant suit are the same as the ones in the appeal aforesaid and further interrogate the prayers sought whether they are the same and relate to the same issues. On whether or not the same is sub-judice, facts have to be ascertained, and a preliminary objection cannot be raised on disputed facts. Therefore, this court holds and finds what has been raised by the defendant/objector does not amount to a preliminary objection, and thus the preliminary objection is not merited.”

10. In further opposition to the preliminary objection, the Applicant asserts that even if the matter were to offend the sub judice rule, the appropriate remedy would not be the striking out of the application dated 8th October 2024. In this regard, the Applicant once again refers to the ruling in *Ita v Nyaga* (supra). Additionally, it draws attention to the Supreme Court decision of Kenya National Commission on Human Rights v Attorney General; *Independent Electoral & Boundaries Commission & 16 others (Interested Parties) (Advisory Opinion Reference 1 of 2017)* [2020] KESC 54 (KLR) (Constitutional and Human Rights) (7 February 2020) (Ruling) where the Supreme Court clarified that the purpose of the sub-judice rule is to prevent the filing of a multiplicity of suits between the same parties over the same subject matter, thereby avoiding abuse of court process and diminishing chances of courts issuing conflicting decisions over the same subject matter. In conclusion the court stated that if the matter filed later offends the sub-judice rule, it should be stayed pending determination of the matter filed earlier. In conclusion, the Applicant submits that the preliminary objection lacks merit and should be dismissed with costs.

11. The issue before the Court is whether the application of 8th October 2024 is sub judice. As you all know, sub judice means matters before a judge or a court and matters before the judge for consideration. In essence it bars the discussion of the matters by the public generally but more acutely for the members of the bar and the bench. It is argued by the Respondent that even if the matters are sub judice the correct approach should have been an application seeking stay of the second motion and not raising a preliminary objection as was done herein. I am persuaded that in matters sub judice there has to be an interrogation of facts. As held in the case of *Margaret Wachu Karuri v John Waweru Ribiro* (supra):-

For the court to determine whether the issues herein were directly and substantially in issue with the other suit, it is this court’s considered view that it will have to ascertain facts and probe evidence by ascertaining whether the issues raised in the instant suit are the same as the ones in the appeal aforesaid and further interrogate the prayers sought whether they are the same and relate to the same issues. On whether or not the same is sub-judice, facts have to be



ascertained and a preliminary objection cannot be raised on disputed facts. Therefore, this court holds and finds what has been raised by (the) defendant/objector does not amount to a preliminary objection, and thus the preliminary objection is not merited.” [underline supplied for emphasis]

12. This Court is being asked to ascertain disputed facts, determine whether the chamber summons and the notice of motion application before the court are similar. Preliminary objections should be raised on a pure point of law and cannot be raised if any fact has to be ascertained. Further, a preliminary objection is argued on assumption that all the facts pleaded by the other side are correct and which if argued as a preliminary point may dispose of the suit. See *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696. The preliminary raised herein is therefore misplaced and entirely unmerited. It must as a consequence be dismissed with costs to the Respondent since it does not lie. Preliminary objection dismissed with costs to the Respondent.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 16TH DAY OF DECEMBER 2024

NZIOKI WA MAKAU, MCIARB.

JUDGE

