



**Elpa & 212 others v Majani Mingi Group of Companies; Kenya Plantation
& Agricultural Workers Union & 3 others (Interested Parties) (Petition
18 of 2019) [2023] KEELRC 296 (KLR) (2 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 296 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
PETITION 18 OF 2019**

DN NDERITU, J

FEBRUARY 2, 2023

**IN THE MATTER OF VIOLATION AND/OR THREATENED VIOLATION
AND/OR INFRINGEMENT OF THE FUNDAMENTAL RIGHTS AND
FREEDOM UNDER ARTICLES 10, 19, 20, 22, 23, 24, 25(A) AND (B), 26,
28, 30, 41, 43, 48 AND 162(2) (B) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF THE EMPLOYMENT ACTS NO 11 OF 2007; SECTIONS
7, 8, 15, 17, 18, 21, 26, 27, 28, 29, 30, 37, 40, 45(5), 46, 48, 49, 74, AND 75**

AND

**IN THE MATTER OF THE EMPLOYMENT AND LABOUR RELATIONS
COURT ACT NO. 20 OF 2011, SECTIONS 3, 12, 13, 19, 20, 22, 29, AND 34**

BETWEEN

BETWEEN

**EKIRU ELIGOI ELPA 1ST PETITIONER
ROSE ANYANGO RACOKI 2ND PETITIONER
RUTH TUMNYAMBIE TUMBO 3RD PETITIONER
ISMAIL OMONDI JOHANA 4TH PETITIONER
MUSEWE N OJUONDO 5TH PETITIONER
JOSEPH ATULO AWABO 6TH PETITIONER
GEORGE OCHIENG SHIKUKU 7TH PETITIONER
ALOICE OTIENO ODEGO 8TH PETITIONER
JOHN RAGER MIGELE 9TH PETITIONER**



LYDIA WAINJA AMANGO	10 TH PETITIONER
JULIUS MUKIRIA KAMAU	11 TH PETITIONER
ROGER KAMAU	12 TH PETITIONER
PETRONILA BARAZA OUMA	13 TH PETITIONER
AKOPE LOPUNGURE AKURU	14 TH PETITIONER
ROSEMARY NABWENDE	15 TH PETITIONER
MARY AYIENDA	16 TH PETITIONER
FLORENCE MWICHWEZE	17 TH PETITIONER
MARCEL OLENGO	18 TH PETITIONER
AKURU LONGIT	19 TH PETITIONER
LILIAN KONG'ATO KIBET	20 TH PETITIONER
MILKA WANGARI CHEGE	21 ST PETITIONER
SUSAN EKAI EKAEL	22 ND PETITIONER
PHILIP OTANGA	23 RD PETITIONER
EUNICE WANJIKU KATUNDU	24 TH PETITIONER
JOHN ACHAM	25 TH PETITIONER
SUSAN APUA LOWOI	26 TH PETITIONER
ZABRON ANYANGU	27 TH PETITIONER
MARGARET KADOGO	28 TH PETITIONER
MARY ASIMIT	29 TH PETITIONER
JECINTA WANJAA NZULI	30 TH PETITIONER
SUSAN AKIRU KASIM	31 ST PETITIONER
ESTHER FOTESIA	32 ND PETITIONER
JARED OKHUYA	33 RD PETITIONER
JEMIMA MULIEBI	34 TH PETITIONER
JOHN OMBASO	35 TH PETITIONER
PETER WAFULA	36 TH PETITIONER
MARY KISIANI	37 TH PETITIONER
GEORGE OUMA OMWAKA	38 TH PETITIONER
JOSEPH AMBESA	39 TH PETITIONER
JANE WANJIKU MWANGI	40 TH PETITIONER
ALFRED OUMA	41 ST PETITIONER



GRACE NYOKAVI MUTTI	42 ND PETITIONER
RUTH AKWABI	43 RD PETITIONER
MARGARET ATIENO OMUOK	44 TH PETITIONER
MARGARET ATIENO OWUOR	45 TH PETITIONER
JOSEPH KIPLAGAT TUMBO	46 TH PETITIONER
CHARLES ANYIKA OMUNENE	47 TH PETITIONER
CAREN ANYANGO	48 TH PETITIONER
JAVAN MUKANA	49 TH PETITIONER
HANNA NDULULU	50 TH PETITIONER
JOANES OWITI OLECHE	51 ST PETITIONER
MAURICE OMONDI OLUOCH	52 ND PETITIONER
STEPHEN ODUOR MALOWA	53 RD PETITIONER
CAREN ANYANGO OGWAYO	54 TH PETITIONER
MWANAHAWA TEKETE ATULO	55 TH PETITIONER
CHRISTINE ANANGO OTIENO	56 TH PETITIONER
DAVID KIGOTHO GITHIMU	57 TH PETITIONER
ZAKARIA NJOROGE KAHIGA	58 TH PETITIONER
VIRGIGNIA NYAMBURA NJOROGE	59 TH PETITIONER
JANET IONISIO	60 TH PETITIONER
AGNETA ACHIENG OTIENO	61 ST PETITIONER
DOMINIC WEBEKEYA	62 ND PETITIONER
ANTON MUKHWANA WEBEKEYA	63 RD PETITIONER
PENINA CHEPKEMOI KIPRONO	64 TH PETITIONER
CATHERINE OKOTH OSORO	65 TH PETITIONER
TITUS KIPKEMOI CHIRCHIR	66 TH PETITIONER
MICHAEL ODHIAMBO MUSUMBA	67 TH PETITIONER
CHRISTINE CHEPKOECH RUTO	68 TH PETITIONER
JOSEPH OPIYO AMIENO	69 TH PETITIONER
SAMWEL OLOO NG'ANG'A	70 TH PETITIONER
JANE CHELANG'AT NGE'TICH	71 ST PETITIONER
MARIA ADHIAMBO	72 ND PETITIONER
JANE AWINO	73 RD PETITIONER



MARGARET OLAL OBUMO	74 TH PETITIONER
JOHN NG'ANG'A NJENGA	75 TH PETITIONER
MIRIAM MWANGARI MBURU	76 TH PETITIONER
SAMUEL OGILO	77 TH PETITIONER
FANUEL OCHOLA OMOLO	78 TH PETITIONER
ALICE WAMAITHA MUNGAI	79 TH PETITIONER
ROSE AOKO OKUMU	80 TH PETITIONER
EMILY ACHIENG' OUMA	81 ST PETITIONER
KIMOI CHEPKOSKEI ROTICH	82 ND PETITIONER
SAMWEL OMECHANG LOWASO	83 RD PETITIONER
ERUPE EKENO LUKWAWI	84 TH PETITIONER
MICHAEL KABAKA ANZACH	85 TH PETITIONER
MARGARET LUCHANI KUKANI	86 TH PETITIONER
EKAUDU ADIAKA IRIPON	87 TH PETITIONER
ATII IBAI LUWINANI	88 TH PETITIONER
YABAN ERUM	89 TH PETITIONER
FLORENCE INDOSIONDIANO	90 TH PETITIONER
LUCY ATIENO	91 ST PETITIONER
ALFRED OUMA NANGA	92 ND PETITIONER
RAJAB ADIAKA	93 RD PETITIONER
ROSE ACHIENG OMONDI	94 TH PETITIONER
JENIFFER NYAKECH WANGA	95 TH PETITIONER
SUSAN AKURUR KASRIM	96 TH PETITIONER
PHILIS AKINYI NDIAWO	97 TH PETITIONER
SAMWEL MITEI TUWEI	98 TH PETITIONER
CHARLES OMONDI OKUMU	99 TH PETITIONER
ELIZABETH NABALA MESHACK	100 TH PETITIONER
MARGARET AKUKU OGILO	101 ST PETITIONER
ALBAN NDIWO MAGUNGA	102 ND PETITIONER
JESIMA KADENYEKAI LUNGAI	103 RD PETITIONER
JANE AUMA OILE	104 TH PETITIONER
VINCENT OGUNDI OGOLA	105 TH PETITIONER



DAVID NDERITU	106 TH PETITIONER
ZABLON OILE ONGALO	107 TH PETITIONER
AMANA LOIRIAN	108 TH PETITIONER
JOSHUA MUGO KURIA	109 TH PETITIONER
JOHN OBADO	110 TH PETITIONER
WAIHERA KAMAU MAINA	111 TH PETITIONER
JOHN MAINA KAMAU	112 TH PETITIONER
SHEM TIM WANJALA	113 TH PETITIONER
PIUS OKISE OLOYE	114 TH PETITIONER
ALOYCE WAMEYO ODUOR	115 TH PETITIONER
PAMELA NAFULA	116 TH PETITIONER
TARI	117 TH PETITIONER
JOSEPH EWESIT ALIAN	118 TH PETITIONER
WICKLIFE ASHITIBA	119 TH PETITIONER
JAMES OLUTOLA OMUYOYI	120 TH PETITIONER
JOHN OMOLO ANYIKO	121 ST PETITIONER
JOSEPH KIPYEGON CHANGWONY	122 ND PETITIONER
OMARI RAJABU LIBERIA	123 RD PETITIONER
PETER OTIENO	124 TH PETITIONER
EUNICE ATIENO AREJA	125 TH PETITIONER
SAMUEL CHERUITYOT KIPYEGHON	126 TH PETITIONER
DANIEL KIPLAGAT CHIRCHIR	127 TH PETITIONER
SMOWL OGITA	128 TH PETITIONER
AYABAN ETUMO	129 TH PETITIONER
JOSEPH KIBIEGON CHEPKWONY	130 TH PETITIONER
HARRISON AMAKOBE	131 ST PETITIONER
ROSE OYUCHO OGOLA	132 ND PETITIONER
PATRICK OKUMWA ITUKHA	133 RD PETITIONER
PETER KIARIE GATUKU	134 TH PETITIONER
SUSAN WANJIKU WAWERU	135 TH PETITIONER
JEDIDA GATHONI GITAU	136 TH PETITIONER
JOSEPH ESONGUL NANOBURAK	137 TH PETITIONER



ELUNYA LUOTUMOE EGULE	138 TH PETITIONER
VIRGINIA NYAMBURA NJOROGE	139 TH PETITIONER
LABAT LUBANG'A KIBERENGE	140 TH PETITIONER
MARY AKORI LOIMAN	141 ST PETITIONER
MARGARET OIRI OTIENO	142 ND PETITIONER
DISMAS OTIENO AUNYA	143 RD PETITIONER
MARY WANJIKU NJUGUNA	144 TH PETITIONER
FLORENCE AKHASAYA MUTAMBI	145 TH PETITIONER
LOROO ERUM	146 TH PETITIONER
KAGALI EMANYANGA KEBERENGE	147 TH PETITIONER
JULIA WANJIKU KINYENJE	148 TH PETITIONER
VERONICA WANJIKU GITHANI	149 TH PETITIONER
EUNICE WANJIKU GATUNDU	150 TH PETITIONER
JANE JERONO SOY	151 ST PETITIONER
SAMWEL KIBET KEMOI	152 ND PETITIONER
MICHAEL OMONDI ODHUONGO	153 RD PETITIONER
CHRISTINE CHEPCHIRCHIR MAGARAMA	154 TH PETITIONER
ALICE ADHIAMBO OBONGO	155 TH PETITIONER
MICHAEL OBONGO OPIYO	156 TH PETITIONER
MARY NJOKI IRUNGU	157 TH PETITIONER
COLLETA LITABI ASHIONO	158 TH PETITIONER
JOASH OKANYA OLUTERU	159 TH PETITIONER
PHILICE ADHIAMBO KIARA	160 TH PETITIONER
JOSEPH MBUYA OMIENO	161 ST PETITIONER
MARIA CHERONO	162 ND PETITIONER
MUSA MALOBA ATHEWA	163 RD PETITIONER
JULIUS NJAU WANJOHI	164 TH PETITIONER
TERESIA ODERO OBIERO	165 TH PETITIONER
JOHN OUYA	166 TH PETITIONER
KIMURU NDUATI KIMURI	167 TH PETITIONER
JANE CHEMUTAI MITAI	168 TH PETITIONER
JULIUS MUSUMBA MALALA	169 TH PETITIONER



KIBET CHEPKURUI CHERUIYOT	170 TH PETITIONER
CLEOPHUS OTIENO AYOO	171 ST PETITIONER
AYIERA J OMACH	172 ND PETITIONER
JOHN OMUCHENGA IZOBERI	173 RD PETITIONER
KHALIL KOLA MUSA	174 TH PETITIONER
MARY ANYANGO OBIENO	175 TH PETITIONER
PETITIONER BOAS OCHIENG	176 TH PETITIONER
IRENE AWUOR ONYANGO	177 TH PETITIONER
ESTHER LUTHERU EKURU	178 TH PETITIONER
ANNAH EKOMWO RET	179 TH PETITIONER
PLISTA AWUOR ODHIAMBO	180 TH PETITIONER
MARY MURINJUI	181 ST PETITIONER
SELINA MUKOYA BULINGA	182 ND PETITIONER
MARIA OTIENO ODHIAMBO	183 RD PETITIONER
CIKOYE OMANYI	184 TH PETITIONER
MARY WAIRIMA RONDOS	185 TH PETITIONER
JOHN OTIENO MUSUMBA	186 TH PETITIONER
JOSEPH UMA OMIENO	187 TH PETITIONER
NAWOINGROT LOOCHU	188 TH PETITIONER
SAMSON KIPCHILAT	189 TH PETITIONER
ELIZABETH KABON BIWOT	190 TH PETITIONER
ELIZABETH TALAI KIPKOECH	191 ST PETITIONER
MARY AKINYI NYUNJA	192 ND PETITIONER
GRACE KEMOI ARUSEI	193 RD PETITIONER
JECINTA ATUKO EBETET	194 TH PETITIONER
SUSAN ANYANGO OGUTU	195 TH PETITIONER
PETER OMWAKWE	196 TH PETITIONER
JAPHETH ABUCHERI ANYANGA	197 TH PETITIONER
CHARLES BARAZA OKUMU	198 TH PETITIONER
MASLIANA AUMA HANDA	199 TH PETITIONER
SARAH CATHERINE WESONGA	200 TH PETITIONER
JOSEPH KENYATA LUPETE	201 ST PETITIONER



JOSEPH EKADELI EYENAN	202 ND PETITIONER
WILSON TANU CHEBI	203 RD PETITIONER
JAMES ARACHA AMARA	204 TH PETITIONER
MARY AWUOR OBARE	205 TH PETITIONER
ELIZABETH MASIRO WANZETSE	206 TH PETITIONER
MORBERT OPONDO RAKULA	207 TH PETITIONER
ROSEMARY NAMUSI	208 TH PETITIONER
LEAH NYOKABI MUHIA	209 TH PETITIONER
SYLVINE JEPKEMOI KOROR	210 TH PETITIONER
LUCY JEPKECH KIPROP	211 TH PETITIONER
IBRAHIM ODONGO SIRISIA	212 TH PETITIONER
ROSE NYENDE ASTIUA	213 TH PETITIONER

AND

MAJANI MINGI GROUP OF COMPANIES RESPONDENT

AND

KENYA PLANTATION & AGRICULTURAL WORKERS
UNION INTERESTED PARTY

NATIONAL HOSPITAL INSURANCE FUND BOARD OF
MANAGEMENT INTERESTED PARTY

NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES . INTERESTED
PARTY

COMMISSIONER OF DOMESTIC TAXES INTERESTED PARTY

RULING

I. Introduction

1. Vide an amended petition dated May 20, 2022 drawn by Arusei & Co Advocates the petitioners are seeking the following –
 - i. A declaration that the petitioners were the respondent’s employees and therefore, they were entitled to all terminal dues accorded to every other employee upon retirement/termination of employment: and above all to be treated fairly and with dignity.
 - ii. A declaration that the action by the respondent to deny the petitioners their terminal dues together with all the other rights accorded to the employees by the law was illegal; unfair labour practices; unconstitutional and a violation of the petitioners rights to the equal protection of the law.



- iii. That the respondent to present all the employment records of the petitioners for the calculation/tabulation of their right/correct terminal dues entitled to each petitioner.
 - iv. A declaration that the petitioners are entitled to their terminal benefits together with the interest appurtenant to.
 - v. A declaration that the discharge vouchers signed by the employees upon termination of their employment were not and/or cannot be interpreted to include the terminal dues not paid to the petitioners and to that extent the discharge voucher is not conclusive and is impugned.
 - vi. An order that exemplary damages be awarded to the petitioners for the respondent's acts of oppression and arbitrariness to the petitioners for subjecting them to difficulties for all these years.
 - vii. An order to compel the respondent to pay the petitioners severance pay, prorata salary for the period of employment, days worked and overtime, gratuity pay, benevolent contributions made by the petitioners and such other appropriate reliefs as this honourable court shall deem just and fit to grant; and
 - viii. Costs of the petition and interest thereon at court rates.
2. The respondent entered appearance through Sheth & Wathigo Advocates dated October 16, 2019 after it was served with the original petition dated October 7, 2019. The 1st interested party appointed KTK Advocates to act for it and the 4th interested party appointed Shijenje Johnson, advocate, to act for him. The 2nd and 3rd interested parties have so far not filed any papers on record.
 3. Vide a notice of preliminary objection (hereinafter the po) dated February 22, 2022 filed in court on March 16, 2022 the respondent raised the following three preliminary points for determination by this court before the main cause is heard –
 1. That the entire petition herein be dismissed as it offends the principle of lis pendens and sub-judice pursuant to section 6 of the *Civil Procedure Act* on account that the subject matter is pending before a competent court in Nakuru ELRC No E015 of 2020.
 2. That the claim herein be dismissed as the same is res judicata pursuant to section 7 of the *Civil Procedure Act* having been decided by a court of competent jurisdiction in Nakuru Industrial Cause No 76 of 2013.
 3. That the claim herein is statute barred as it offends the provisions of section 90 of the *Employment Act* which makes the entire claim fatally defective and ripe for dismissal ab initio.
 4. When this matter came up in court for directions on March 23, 2022 the court directed that the PO be heard first and that the same be canvassed by way of written submissions by counsel for the parties. Counsel for the respondent and for the petitioners filed their respective written submissions on May 23, 2022. On July 20, 2022 counsel for the 1st interested party informed the court that they were not filing any submissions. with the leave of court, the petitioners' counsel filed supplementary submissions on July 26, 2022. Counsel for the 4th interested party did not file submissions, while the other interested parties, as stated above, have so far not filed any papers in court.



5. This ruling is hence in regard to the PO issued by the respondent raising the three issues alluded to above.

II. Submissions by respondent's counsel

6. Counsel for the respondent identifies the three issues for determination by this court in the PO to be whether this cause is *lis pendens* and *sub-judice*, *res judicata*, and or whether this cause is statutorily time barred. This court agrees that those are the three main issues, and then there is the issue of costs of the PO and the main cause, just in case the court finds either of the three issues in the affirmative and hence strikes out the petition.
7. Counsel has cited *Mukhisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696 and *Oraro v Mbaja* (2005) eKLR among other decisions in delineating what constitutes a proper PO.
8. As far as this court understands the applicable law and principles, a PO is a point or points of law that if successfully argued may dispose of a cause or an issue in controversy between parties. Such a PO may relate to any legal issues and the same may relate to the main cause or even an interlocutory application or proceedings. The PO may be raised on legal grounds such as jurisdiction of the court, legal capacity of a party, *res judicata*, bar or estoppel by law, incurably defective pleadings, or any other such grounds based on the Constitution, statute law, or precedents.
9. A most distinguishing feature of a PO from any other objection is that it should be based on law not on contested facts which may require a court to interrogate the pleadings and or call for evidence. The issue(s) should be so readily visible, *prima facie*, that the trial court should not require a legal microscope or binocular to see, identify, and isolate the legal issues in contest in the PO. The PO becomes even clearer where the facts that would obscure the law are either admitted and or agreed by and between the parties.
10. As at the time of writing this ruling the respondent and the interested parties have not filed their responses to the petition. The court shall hence not speculate on what responses or defences shall be raised against the claims in the petition by the respondent and the interested parties.
11. On *lis pendens* and *sub-judice* counsel has relied on section 6 of the *Civil Procedure Act* arguing that the issues raised by the Petitioners herein are the subject matter in Nakuru ELRC No E015 of 2020. Counsel argues that the same issues had also been raised and determined in an earlier cause being Nakuru ELRC No 76 of 2013. Counsel has cited *ANN V RMK* (2021) eKLR in support of this argument.
12. However, the respondent has not provided the court with the proceedings in Nakuru ELRC No E015 of 2020 and Nakuru ELRC No 76 of 2013 in support of the foregoing allegations and the court has thus not been put in the picture as to who the parties and issues are in those causes.
13. On *res judicata*, counsel has cited section 7 of the *Civil Procedure Act* which provides as follows –

“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.”
14. The essence of the doctrine of *res judicata* is to avoid duplicity of causes and forum-shopping. Litigation should come to an end in one way or the other. The denial of a party to file and prosecute



- multiplicity of causes over the same subject matter also allows jurisprudential stabilization by avoiding and or limiting the possibility of courts arriving at conflicting findings and conclusions over the same subject matter based on the same facts and evidence. It also saves time and costs to parties and court.
15. As it should be the case, the 1st respondent has raised the PO at the earliest opportunity available – See [*Independent Electoral Boundaries Commission v Maina Kiai & 5 others*](#) (2017) eKLR.
 16. Counsel has submitted that the petitioners herein were part of a larger group who were represented by the 1st interested party as the claimants in Nakuru ELRC No 76 of 2013. Counsel submits that the issues raised in this petition were the same issues raised in that cause and that the same were deliberated on by a court of competent jurisdiction and a verdict rendered, which judgment has not been challenged by way of a review or appeal.
 17. Counsel has cited [*Kasamba Enterprises Limited V Equity Bank \(Kenya\) Limited*](#) (2022) eKLR and [*William Koross \(Legal Representative of Elijah CA Koross\) v Hezekiah Kiptoo Komen & 4 others*](#) (2015) eKLR among other decisions in laying emphasis that adding new parties or prayers in a cause whose subject matter has been concluded does not offer an escape route for a cause that is *res judicata*.
 18. Counsel passionately argues that if the petitioners are unhappy with the consent judgment recorded in Nakuru ELRC No 76 of 2013 they ought to have applied for review in the same cause or appeal against the said judgment. Counsel submits that filing a new cause is not an option available to the claimants herein. Counsel argues that since the former cause was concluded as alluded to above this instant petition is *res judicata* and that this court is *functus officio* and hence prays that the same be struck out with costs in limine.
 19. On the third issue of this cause being statutorily time barred, counsel has cited section 90 of the [*Employment Act*](#) and section 4(1) of the [*Limitation of Actions Act*](#) as the law that prohibits and bars the petitioners from filing this petition. Counsel argues, without prejudice to the arguments advanced in regard to the cause being *res judicata*, that if the petitioners had any good cause of action they ought to have filed the same within three years of the cause of action arising.
 20. Counsel submits that Nakuru ELRC No 76 of 2013 was concluded by way of a consent judgment recorded on November 2, 2015 and this should signal that the cause of action by the petitioners arose before 2013 and was concluded in 2015. According to counsel the claim by the petitioners is therefore statutorily time barred.
 21. Counsel submits that the petition herein by the petitioners is a classic example of abuse of court process and cites [*Muchanga Investments Ltd v Safaris Un-Limited \(Africa\) Ltd & 2 others*](#) (2009) KLR 229 to buttress that argument. On this ground counsel again prays that this petition be struck out with costs.

III. Submissions By Petitioners' Counsel

22. The petitioners' counsel has cited Mukhisa Biscuits case (*Supra*) in delineating the boundaries of a proper PO. Counsel submits that counsel for the respondent has misconstrued the nature of the petition herein. Counsel submits that as per their prayers in this petition the petitioners are seeking various remedies which were neither litigated in Nakuru ELRC No 76 of 2013 and nor are they the subject matter in Nakuru ELRC No E015 of 2020. Counsel argues that in any event this petition was filed in 2019 before Nakuru ELRC No E015 of 2020 was filed and that the issues and parties in the petition are different from those that were the subject matter in Nakuru ELRC No 76 of 2013.
23. Counsel submits that in any event the respondent has not availed any materials before this court to establish that the subject matter in the two causes and the parties are the same as those in this petition. Counsel has cited [*George Kamau Kimani & 4 Others v County Government of Trans-Nzoia & another*](#)



- (2014) eKLR to buttress the argument that the PO must fail as the allegations by the respondent have not been substantiated and that such substantiation cannot be achieved without this court receiving evidence from the parties.
24. On the third issue of statutory bar to the petition, counsel submits that the petition is neither time barred under the *Limitation of Actions Act* nor under section 90 of the *Employment Act*. Counsel has relied on *Oraro v Mbaja* (2005) eKLR and *IEBC v Jane Cheperenger & 2 others* (2015) eKLR in emphasizing that the PO by the respondent is in total abuse of the process of court as this court is being called upon to go out of its way to investigate contested facts and search for pleadings in the aforementioned causes, which materials are mentioned by the respondent in the PO, yet it has not presented or availed the said pleadings and materials to court.
 25. In the supplementary submissions counsel reiterates the submissions summarized above and categorically states that there is nothing in common between this petition and ELRC No 76 of 2013 and No E015 of 2020.
 26. Counsel concludes that in view of the remedies sought in the petition the same is neither against the principles of *lis pendens*, *res judicata*, nor statutorily time barred under *Limitation of Actions Act*, *Employment Act*, or indeed any other law or at all and prays that the PO be dismissed with costs.

IV. Determination

27. This court agrees with counsel for both parties that there are three issues for determination as raised in the PO by the respondent. The first issue is whether this cause is against the principle of *lis pendens* and therefore *sub-judice*, the second is whether the petition is *res judicata*, and the third is whether the cause is statutorily time barred by virtue of section 4 of the *Limitation of Actions Act* and section 90 of the *Employment Act*.
28. On the first issue, there are no pleadings or materials placed before this court in demonstrating that indeed Nakuru ELRC No 76 of 2013 concerned the same parties as those in this petition who were litigating over the same subject matter, and that the cause was heard and determined by a court of competent jurisdiction with finality. Likewise, there are no materials placed before this court illustrating that Nakuru ELRC No E015 of 2020 is still pending in court and that the subject matter thereof is the same as that in this petition and the parties therein are the same as those in this petition and or parties claiming under them or on their behalf.
29. In view of the foregoing paragraph, the respondent is discreetly calling upon this court to go out of its way and investigate the two causes to determine if the subject matter is the same and if the parties are the same. The petitioners have vehemently denied, in the submissions by their counsel, that the two causes and this petition relate to the same subject matter and or that the parties are the same. This leaves the facts contested and the PO as raised by the respondent fails to meet the threshold of a proper PO as enunciated in Mukhisa Biscuits case (*Supra*), a leading authority on what constitutes a proper PO.
30. As stated elsewhere the respondent and the interested parties have not filed their responses to the petition and no documents have been filed by them which this court could have made reference to in ascertaining the allegations made by the respondent in the submissions in support of the PO, which facts, in any event, are vigorously contested by the petitioners in submissions by their counsel.
31. In the foregoing circumstances, this court cannot ascertain whether this cause is either *lis pendens*, *Sub-judice*, or *res judicata* without calling for evidence. The PO is hence premature and improperly grounded and this court so holds and hence the two first grounds of the PO shall fail.



32. On the third issue of this petition being statutorily time barred, the petitioners, deliberately or otherwise, have not disclosed in the petition when they were terminated or dismissed by the respondent. Of course, this is a serious omission in the pleadings and leaves a gaping hole in the petition affecting the merits thereof. However, the respondent and the interested parties have not filed their responses to the petition, as at the time of this court rendering this ruling, making it difficult for the court to ascertain if the claims and prayers in this petition are indeed time barred. Counsel for the petitioners, without any elaboration or support, has submitted that there is no time limitation for constitutional petitions. Counsel for the respondent did not address this germane issue.
33. This court is not willing to deal with the foregoing issue at this juncture and, albeit suo motto, make a ruling without allowing counsel for both parties to fully address the same in due course after fully establishing the fact as to when the petitioners were terminated or dismissed and therefore when the cause of action arose. This ground must therefore fail as well as the facts are not disclosed and the respondent and the interested parties have not responded to the petition to enable the court determine if the fact of when the cause of action arose is contested or not.
34. For the foregoing reasons, all the three grounds upon which the PO is founded shall fail at this stage. However, this does not mean that a proper PO may not be appropriately raised upon materials and uncontested facts being established, bearing in mind that a PO can only succeed upon points of law as applied on admitted and or uncontested facts.

V. Costs

35. Ordinarily, costs follow event. However, this court observes that the PO herein has been raised prematurely and hence it is difficult to establish and consider all factors that may apply had the PO been raised with all the materials placed before court and facts settled on what is admitted and what is contested. For the foregoing reasons, this court orders that the costs be in cause.

VI. Orders

36. Flowing from the foregoing, in regard to the preliminary objection by the respondent as contained in the notice dated February 22, 2022 this court makes the following orders –
 - a. The said entire PO is dismissed with costs in the cause.
 - b. The respondent and the interested parties are ordered to file and serve their responses and other materials in reply to the petition within 14 days of this ruling.

DATED, DELIVERED VIRTUALLY, AND SIGNED AT NAKURU THIS 2ND DAY OF FEBRUARY, 2023.

.....
DAVID NDERITU
JUDGE

