



Long’olenyang v Public Service Commission & 2 others (Petition E106 of 2022) [2023] KEELRC 571 (KLR) (2 March 2023) (Ruling)

Neutral citation: [2023] KEELRC 571 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E106 OF 2022
MN NDUMA, J
MARCH 2, 2023**

BETWEEN

BENSON LIMO LONG’OLENYANG PETITIONER

AND

PUBLIC SERVICE COMMISSION 1ST RESPONDENT

**PRINCIPAL SECRETARY, MINISTRY OF LANDS AND PHYSICAL
PLANNING 2ND RESPONDENT**

MINISTRY OF LANDS AND PHYSICAL PLANNING 3RD RESPONDENT

RULING

1. The 1st respondent filed a preliminary objection dated July 13, 2022 to wit;
 1. The issues raised in this matter are res judicata.
 2. This petition is an abuse of the court process.
2. The court notes at the outset that the preliminary objection is vague and unclear as it does not specifically state why the suit before court is *res judicata*. Instead the 1st respondent explains the objection in lengthy submissions where he states that the petitioner filed Nairobi ELRC Petition No. E044 of 2020 on the same grounds and issues raised in the present petition.
3. The objector states that the reliefs sought in petition E044 of 2020 were as follows:-
 - a. A declaration be and is hereby issued that the decision contained in letter reference number 2011230549/91 dated 26th August, 2020 directing the Petitioner to proceed on transfer to Mwingi Land Registry with immediate effect violates articles 27, 42 and 47 of *the Constitution* of Kenya, 2010.



- b. An Order of judicial review quashing the decision of the Respondents contained in the letter reference number 2011230549/91 dated August 26, 2020 directing the Petitioner to proceed on transfer to Mwingi Land Registry with immediate effect.
 - c. An Order of prohibition restraining the Respondents from in any manner whatsoever interfering with the petitioner's access to his office at the Nairobi Land Registry or any relevant offices within Nairobi Registry and discharging his duties as Senior Land Registration Officer.
 - d. An Order that the Petitioner is entitled to twelve month's salary as compensation for unfair labour practices.
 - e. An Order that cost of the petition be provided for.
4. That petition E044 of 2020 was dismissed by Maureen Onyango J. on July 16, 2021 for lack of merit as a result of which the petitioner filed Nairobi Court of Appeal Civil Application No. E433 of 2021 whereupon he obtained a consent Order of status quo to maintain his work station at Nairobi and not to be subjected to any transfer from the Headquarters of the Ministry of Lands and Physical Planning at Nairobi to any other station pending the hearing and determination of the Appeal.
 5. That the only issue for determination in the present petition, which was the issue for determination in Petition 044 of 2020 is whether the transfer of the petitioner is in violation of the Constitution. The Objector states this matter is res judicata having been determined by Maureen J.
 6. The court is referred to the judgment in Petition 044 of 2020. The court is also referred to the Court of Appeal decision in *KCB Limited v Benjob Amalgamated Limited* [2017] eKLR where the court while addressing the issue of res judicata stated:-

“The doctrine is provided for in our jurisprudence by dint of section 7 of the Civil Procedure Act which provides;

“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.”
 7. The 1st respondent submits that there is a repeat litigation by the petitioner each time the respondents attempt to transfer him.
 8. That the conduct by the petitioner amounts to harassment of the respondents, is exhausting, frivolous, vexatious, a waste of judicial time and waste of public resources and ought to come to an end.
 9. The Petitioner responds in its submissions that the present objection is not a pure point of law but is premised on a set of contested facts which ought to be determined upon hearing on the merits of the suit.
 10. The court is referred to the case of *Hassan Ali Jobo & another v Suleiman Said Shabal & 2 others* – Supreme Court of Kenya Petition No. 1213[2014] eKLR in which the Supreme Court cited with approval *Mukhisa Biscuit Manufacturers Limited v West End Distributors Limited* [1969] EA 696 as follows:-

“...a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side



are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion....”

11. The petitioner submits that the present suit is not res judicata, is based on different facts and issues for determination arising from fresh happenings or violations. It is immaterial that similar happenings had been litigated upon and concluded but fresh ones have now arisen.
12. It is clear from the pleadings that the happenings are different and are contested. That the objection is an abuse of Court process and it be dismissed.
13. Upon a careful consideration of the pleadings by the parties and the submissions, it is clear that petition 044 of 2020 dealt with a matter that had happened on 26th August, 2020. The present petition arises from matters that took place in June, 2022. These are clearly two different set of facts.
14. This Court has not yet been informed of the outcome of the filed appeal from the decision of Maureen Onyango, J. in Petition 044 of 2020.
15. Clearly, the objection raised does not meet the requirements of res judicata which are:-
 - (a) The suit or issue was directly and substantively in issue in the former suit.
 - (b) The former suit was between the same parties or parties under whom they or any of them claim.
 - (c) Those parties were litigating under the same title.
 - (d) The issue was heard and finally determined in the former suit.
 - (e) The Court that formerly heard and determined the suit was competent to try the subsequent suit or the suit in which the issue is raised.
16. The Preliminary Objection lacks merit and is dismissed with costs in the cause.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 2ND DAY OF MARCH, 2023.

MATHEWS N. NDUMA

JUDGE

Appearance

M/s Manani for 1st respondent

M/s Kotonya for petitioner

Mulili for 2nd and 3rd respondents

Ekale – Court Assistant

