



Odongo v Nakuru County Government Public Service Board & 30 others (Employment and Labour Relations Petition E001 of 2023) [2023] KEELRC 2329 (KLR) (3 October 2023) (Ruling)

Neutral citation: [2023] KEELRC 2329 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS PETITION E001 OF 2023**

HS WASILWA, J

OCTOBER 3, 2023

IN THE MATTER OF ARTICLES 2, 3, 10, 12, 19, 20, 21, 22, 35, 43, 47, 48, 50, 54, 73, 75, 159, 165, 174, 175, 176, 196, 201, 232 AND 258 OF THE CONSTITUTION OF KENYA, 2010 AND IN THE MATTER OF THE COUNTY GOVERNMENTS ACT, 2012 AND IN THE MATTER OF PUBLIC APPOINTMENTS (COUNTY ASSEMBLIES) APPROVAL ACT, NO. 5 OF 2017 AND IN THE MATTER OF CONTRAVENTION OF ORDERS OF THE COURT ISSUED IN NAKURU ELRC PETITION NO. E017 OF 2022 AND IN THE MATTER OF THE ILLEGAL AND UNLAWFUL APPOINTMENTS AND EMPLOYMENT OF PERSONS TO THE POSITIONS OF CHIEF OFFICERS TO THE COUNTY GOVERNMENT OF NAKURU.

BETWEEN

KENNETH ODONGO PETITIONER

AND

NAKURU COUNTY GOVERNMENT PUBLIC SERVICE BOARD 1ST RESPONDENT

THE COUNTY GOVERNMENT OF NAKURU 2ND RESPONDENT

THE GOVERNOR, NAKURU COUNTY GOVERNMENT 3RD RESPONDENT

THE COUNTY ASSEMBLY OF NAKURU 4TH RESPONDENT

THE COUNTY EXECUTIVE COMMITTEE MEMBER FOR FINANCE & ECONOMIC PLANNING, NAKURU COUNTY GOVERNMENT 5TH RESPONDENT

THE CONTROLLER OF BUDGET 6TH RESPONDENT

THE NATIONAL TREASURY 7TH RESPONDENT

THE HON. ATTORNEY GENERAL 8TH RESPONDENT

CHERUIYOT MICHAEL KIPLANGAT 9TH RESPONDENT



ABUKI ALICE MANYANGE	10 TH RESPONDENT
NDEGWA SAMUEL NJOROGE	11 TH RESPONDENT
KAKAI EVERLINE BUNUSU	12 TH RESPONDENT
ALEX MAINA MUHORO	13 TH RESPONDENT
KOECH JOHN KIPKORIR	14 TH RESPONDENT
MALINDA JOSEPH MUTUA	15 TH RESPONDENT
MWAURA NEWTON KAMAU	16 TH RESPONDENT
NCECE JOYCE	17 TH RESPONDENT
KIMANI ROSEMARY WAMBUI	18 TH RESPONDENT
BARASA KENNEDY MUNGAI	19 TH RESPONDENT
KURGAT RICHARD KIBET	20 TH RESPONDENT
KINYANJUI MARGARET WANJIRU	21 ST RESPONDENT
KOECH CHARLES KIPNG'ETICH	22 ND RESPONDENT
MWANGI JOHN MURIMA	23 RD RESPONDENT
KURIA DAVID KAMAU	24 TH RESPONDENT
SANG BERNARD KIPKURUI	25 TH RESPONDENT
MWAURA STELLA MBAIRE	26 TH RESPONDENT
CHANGWONY CATHERINE	27 TH RESPONDENT
MUGO KENNEDY KAMBO	28 TH RESPONDENT
KAMUREN GLADYS	29 TH RESPONDENT
KAGAI MARTIN MWANGI	30 TH RESPONDENT
KAMAU EDWARD GITAU	31 ST RESPONDENT

RULING

1. The Petitioner filed this suit alongside the Notice of Motion dated 23rd January, 2023, brought pursuant to Articles 2, 3, 10, 12, 19, 20, 21, 22, 35, 43, 47, 48, 50, 54, 73, 75, 159, 165, 174, 175, 176, 196, 201, 232 and 258 of the *Constitution* of Kenya 2010, Rules 17, 28 and 32 of the *Employment and Labour Relations Court* 2016, Sections 1A,1B, 3A of the *Civil Procedure Act*, Order 40 rule 1 & Order 51 Rule 1 of the *Civil Procedure Rules* and all other enabling Provisions of the law, seeking for the following Orders;-
 1. Spent.
 2. That pending the hearing of this application inter partes, this Honourable Court be pleased to issue an order of temporary injunction directed at the 3rd, 4th, 5th, 6th and 7th Respondents, the Governor, Nakuru County Government, the Cecm Finance & Economic Planning, Nakuru



County Government, The Controller Of Budget and the National Treasury respectively, jointly and severally, restraining them, their agents, servants, employees and/or any person acting at their behest from in any manner whatsoever submitting for payment, approving, authorizing, allowing and/or permitting payment of salaries, benefits, allowances and/or any compensation whatsoever to and/or for the benefit of the 9th to the 31st Respondents herein pursuant to their illegal appointment and/or employment of 29th December, 2022 or any other date.

3. That pending the hearing inter partes of this application inter partes, the Honourable Court be pleased to issue an order of temporary injunction directed at the 9th to the 31st Respondents restraining them from in any manner whatsoever assuming office, carrying and/or continuing to carry out and/or perform any duties and/or functions of the office of County Chief Officer, Nakuru County Government in their respective Departments thereof pursuant to their illegal appointment and/or employment of 29th December, 2022 or any other date.
 4. That pending the hearing of this Petition, this Honourable Court be pleased to issue an order of temporary injunction directed at the 3rd, 4th, 5th, 6th and 7th Respondents, the Governor, Nakuru County Government, The Cehm Finance & Economic Planning, Nakuru County Government, The Controller Of Budget and the National Treasury respectively, jointly and severally, restraining them, their agents, servants, employees and/or any person acting at their behest from in any manner whatsoever submitting for payment, approving, authorizing, allowing and/or permitting payment of salaries, benefits, allowances and/or any compensation whatsoever to and/or for the benefit of the 9th to the 31st Respondents herein pursuant to their illegal appointment and/or employment of 29th December, 2022 or any other date.
 5. That pending the hearing inter partes of this Petition, the Honourable Court be pleased to issue an order of temporary injunction directed at the 9th to the 31st Respondents restraining them from in any manner whatsoever assuming office, carrying and/or continuing to carry out and/or perform any duties and/or functions of the office of County Chief Officer, Nakuru County Government in their respective Departments thereof pursuant to their illegal appointment and/or employment of 29th December, 2022 or any other date.
 6. That costs of this application be provided for.
2. The Application is based on the grounds on the face of the application and the supporting affidavit of the petitioner deposed upon on 23rd January, 2023. The affiant stated that the genesis of this case arose on 27th September, 2022, when the 1st respondent placed an advert in the Standard newspaper seeking for qualified candidate to fill in 21 positions for County Chief Officers(COs). The Applications were received and the Applicants shortlisted, then interviewed between 24th and 28th, October, 2022.
 3. On 29th October, 2022, the 3rd Respondent announced in a press briefing that the 9th to 28th Respondents had qualified and are recommended for appointment and the vetting process was to be carried out between 14th and 17th November, 2022.
 4. It is contended that the nomination and approval hearing of the 9th to 28th Respondents herein was sham and a gross violation of the Constitution, the County Government Act, the Public Appointment (County Assemblies Approvals) Act as well as the National values of governance and Principles of Public service.
 5. In light of that, the Petitioner herein moved this Court by Petition no. E017 of 2022, where this Court issued interim Orders on 15th November, 2022, barring the County Assembly from proceeding with the



- Approval hearing of the COs, vetting of the said COs, Approving and or Appointing the nominated COs, which orders were to subsist until the Petition is heard and determined.
6. While the ELRC Petition E017 of 2022 was pending hearing, the 1st Respondent submitted a fresh list, pursuant to interviews conducted between 24th and 28th October, 2022 and 23rd December, 2022, nominating 24 persons being the 9th to 31st Respondents herein and an approval hearing date was scheduled for 29th December, 2022. Consequently, the Petitioner sought to stop the approval hearing by its application of 28th December, 2022, which application was allowed by the Court and the Orders served on the Respondents on the same day via email and WhatsApp, while the physical copies were served on the Respondent the next day on 29th December, 2022.
 7. It is stated that the process server, tried effective service on 28th December, 2022 but unable to since it was past 5 pm. That he arrived at the County premises on 29th December, 2022 at 8 am but was denied access to serve the Court orders from 8 am to 10.46 am for the sole reason of defeating the Orders of this Court and to allow for the approval hearing to go on as planned until completion. That despite being unable to serve physical copies on 28th December, 2022, the said orders were served on email and WhatsApp and uploaded on all social media platforms as such the Respondents were aware of the existence of the said orders.
 8. The Petitioner stated that as soon as the approval hearing was concluded, the 9th to 31st Respondents herein were appointed as the County COs, in a clear move to disregard the Orders of the Court and therefore that the Respondents were in contempt of Court Orders.
 9. It is averred that no fresh process of employment i.e. advertisement, shortlisting, interviewing and or selection was undertaken by the Respondents to culminate to the list of 23rd December, 2023, hence the nomination and subsequent appointment was illegal, irregular and improper. In any event that there were no vacancies existing for the position of County Chief Officer. Moreover, that the County Public Service Board was not quorate to conduct the nominations. Additionally, that the three nominees, being the 29th to 31st Respondents herein had not been selected for nominations by the 1st Respondent in its report pursuant to the interviews on 24th and 28th October, 2022.
 10. He also stated that the departments of Co-operatives & Entrepreneurship, Public participation and Citizen engagement and Gender, social services and Inclusivity had not been advertised in the advertisement of 27th September, 2022, therefore the nominations of persons into the said departments is illegal, null and void.
 11. It is the petitioner's case that the advertisement of 24th December, 2022 by the 4th Respondent, violated statutory timelines under section 7 of the *Public Appointment (County Assemblies Approvals) Act*, which require that such notice should be issued at least seven (7) days prior to to the date of approval hearing and the said notice should be published in at least two dailies of national circulation.
 12. The Petitioner also took issue with the fact that the Respondents sought for views on the suitability of the nominated persons, yet they gave only one official day for submissions of such memoranda, which time was in violation of the principles of Public participation.
 13. The Petitioner states that the acts of the Respondents are in violation of the values and principles of Public service enunciated under Article 232 of the *Constitution*, contravene national values and in breach of the provisions of Articles 73 and 75 of the *constitution*.
 14. He stated that unless the court intervenes and suspend the illegalities by the Respondents, the people of Nakuru County will incur unsurmountable loss and damage through pilferage of public resources and employment of persons who have not been properly vetted and their suitability established.



15. The Application herein was opposed by the Respondents with the 6th, 7th and 8th Respondents filing Grounds of Opposition, dated 28th February, 2023 based on the following grounds; -
1. That the Petition does not disclose any cause of action against 6th, 7th, and 8th Respondents.
 2. The Applicant has failed to demonstrate to the required degree of precision that the 6th, 7th, and 8th Respondents have failed and or refused to act as per their legal mandate.
 3. The Application is thus an abuse of court process and should therefore be dismissed with costs.
16. The 1st, 2nd, 3rd, 5th and 9th to 31st Respondents herein raised a Preliminary Objection dated 7th March, 2023, based on the following grounds;
1. The suit falls short on the doctrine of Res-Subjudice, under section 6 of the *Civil Procedure Act*, as there is suit on the same subject matter pending determination under Nakuru Elrc Petition No. E017 Of 2022.
 2. The petitioner has not exhausted the statutory remedy provided in section 77(2) of the *County Government Act, 2012*.
17. On 25th April, 2023, the 9th to 31st Respondents herein raised another Preliminary Objection dated 24th April, 2023 on the following grounds; -
1. That this Court lacks jurisdiction to entertain the Petition and the Application pursuant to the Provisions of sections 77(1) of the County Government Act, and Section 85, 86 & 87 of the *Public Service Commission Act*.
 2. That petitioner lacks the locus standi to bring a case before this Court subject to the provisions of section 12(3) of the *Employment and Labour Relations Court Act*.
 3. That in any case, the Petition and the application are both bad in law, frivolous, vexatious and an abuse of Court Process.
18. Similarly, the 4th Respondent raised another Preliminary Objection dated 14th March, 2023 based on the following grounds; -
1. That the petition is bad in law, fatally defective and unsustainable and is an abuse of the court process.
 2. That the petitioner's present suit is res judicata and an abuse of the court's process as the issues in the present petition have been previously decided by this Honourable Court between the same parties in Nakuru Elrc Petition Number E017 Of 2022 *Kenneth Odongo v Nakuru County Government Public Service Board & Others* (the former suit).
 3. That the 3rd Respondent in Nakuru Elrc Petition Number E017 Of 2022 (the 4th Respondent herein) made a preliminary objection dated 16th November, 2022 which sought to strike out the Petition on the grounds: -
 - i. That this Honourable court had no jurisdiction to deal with matters raised in the petition.
 - ii. That the petitioner had no locus standi.
 - iii. That the petitioner had not exhausted other administrative remedies before approaching this court.



4. That on 29th November, 2022, this Honourable court in made a ruling to a 3rd Respondents Preliminary objection the effect the preliminary objection had no merit and the petition would proceed to hearing.
5. That aggrieved by the ruling, the 3^o Respondent in the former suit lodged an appeal at the court of appeal vide a memorandum of appeal dated 2.4 December, 2020 which led to the appeal serialized as Nakuru Court Of Appeal Civil Appeal No E 136 Of 2022, which is still pending determination.
6. That the matters in dispute in the former suit are directly or substantially in dispute in the present petition.
7. That section 7 of *Civil Procedure Act* bars the filing of this present petition and that section is wide enough to encompass parties who ought to have been brought in the previous suit but the plaintiff elected not to so bring.
8. That the present petition amounts to litigation by instalments whereby the petitioner was pound to bring his entire case at once.
9. That the doctrine of *res judicata* prohibits parties by suing in bits and pieces or giving a subsequent case a legal face lift by merely changing parties who are part of the earlier petition filed.
10. That the courts must always be vigilant to guard litigants evading the doctrine of *res judicata* by introducing new causes of action with a view to giving the case a different complexion from the one that was given to the former suit so as to seek the same remedy before the court.
11. That there must be an end to litigation and that a party should not be vexed twice over the same cause.
12. That by re-opening issues that had already been heard and determined, the present Petitioner in his Petition is merely subjecting the Respondents to double jeopardy against the rules of fair hearing.
13. That the doctrine of *res judicata* as well acts as an issue estoppel which bars a person from re-litigating matters already ruled on by the Court.
14. That issue estoppel as taken together with *res-judicata* are to the effect that once an issue has been judicially determined by a competent court, the same cannot again form the basis of fresh litigation and furthermore parties must avoid litigating in instalments and must raise all issues in one litigation.
15. That once a matter is found to offend the principle of *res judicata*, the trial court is expected to down its tools as it can no longer continue hearing the matter.
16. That the doctrine of *res judicata* bars a party from claiming additional remedies in respect of a cause of action, between the same parties or their agents, that has been determined by a court of competent jurisdiction.
17. That the doctrine of *res judicata* applies also to situations where either matters which could have been brought in were not brought in or parties who could have been enjoined were not enjoined.
18. That besides being *res judicata*, the present petition offends the doctrine of sub judice.



19. That the concept of sub judice that where an issue is pending in a court of law for adjudication between the same parties, any other court is barred from trying that issue so long as the first suit goes on.
 20. That section 6 of the *Civil Procedure Act* expressly 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.
 21. That from the same facts which the petitioner has relied on to bring the present petition, he has filed an application for contempt of court against the 1st, 2nd, 3rd, 4th, and 15th respondents herein and others in Nakuru Elrc Petition Number E017 Of 2022.
 22. That the issue of jurisdiction of the Employment and Labour Relations Court to hear the petition serialized as Nakuru Elrc Petition Number E017 Of 2022 which has issues that are directly similar to this petition and which seeks for similar prayers is pending before the Nakuru Court of Appeal as Civil Appeal No E 136 Of 2022.
 23. That in the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided as the same is against the principle of Article 159 of the *Constitution* of Kenya, 2010.
 24. That there can be no justification in having Nakuru Elrc Petition Number E001 Of 2023 and Nakuru Elrc Petition Number E017 Of 2022 being heard parallel to each other and risk having different outcomes over the same issues in dispute.
19. In a rejoinder, the petitioner filed a further Affidavit sworn on 20th March, 2023 stating that the issues raised in this Petition and the former petition are completely different and the facts in that case are also different in that in the former Application, he was seeking for an orders to nullify the interviews and the nomination of the 9th to 28th Respondents and stop the approval hearing. However, the current petition challenges the nomination carried out on 23rd December, 2022, interviews conducted on 24th -28th 2022 and the subsequent appointment of the 9th to 31st Respondents.
 20. He clarified that he needed to file a separate petition from the former petition for the reason that there was need to seek an order for nullification of the appointment of the 9th to 31st Respondents, which could not be sought in the previous applications. Secondly that the 9th to 31st Respondents herein had merely been listed as interested parties in the former Petition and thirdly that there was need to introduce new parties such as 5th, 6th, 7th, 8th, 29th, 30th and 31st Respondents who were not in the previous Petition and whose presence was necessary because of the reliefs being sought.
 21. He maintained that the current suit is not res judicata as the suit has never been heard and determined on the main issues raised herein.
 22. The 1st, 2nd, 3rd and 5th Respondents, in opposition of the Application by the Petitioner, filed a replying affidavit sworn on 20th April, 2023 by Dr. Samuel Mwangi Mwaura, the acting County Secretary. The affiant stated that he was part of the process that resulted in the appointment of the 9th to 31st Respondents herein. He avers that the the appointment of the said officers was plagued with busy bodies who sponsored legal suits to derail the delivery of services for the people of Nakuru County.



23. He states that the petitioner herein filed this case, despite having another case challenging the same issues. He however states that the process of recruitment of the said COs was beyond reproach as the County advertised for the said vacancies on 27th September, 2022, out of which the 3rd Respondent recommended persons for nomination on 29th October, 2022 and approval hearing conducted by the 4th Respondent.
24. It is stated that the Respondents in the previous suit had raised a preliminary objection on the jurisdiction of this Court to entertain the petition, considering that the nominees had not been employed to clothe this Court with jurisdiction. This Court dismissed the preliminary objection, a move that aggrieved the Respondents and appealed to the Court of Appeal under Nakuru Civil Appeal No. E136 of 2022 and Civil Appeal No. E137 that emanated from the decision of this Court in ELRC Petition no. 16 of 2022.
25. It is averred that while the said Appeal was pending determination, the 3rd Respondent submitted a fresh list of nominees that was subsequently vetted by the 4th Respondent and appointed on 29th December, 2022, without any suitability motion raised against them.
26. It is stated that the Court of Appeal in Civil Appeal number 136 and 137 of 2022, rendered itself on the Appeal and held that this Court lacked jurisdiction to entertain the suit the dispute between the parties in the first place for the reason that nomination process was devoid of an employer-employee relationship and therefore cannot be handled in ELRC Court and this Court ought to have down its tools for lack of jurisdiction.
27. The affiant stated further that the Court of Appeal found the Petitioner without any locus standi as the issues raised in the said petition related to nomination process which should have been filed in the High Court. Further that the Court of Appeal found the petitioner had not exhausted the statutory remedies under section 87(2) of the *Public Service Commission Act*. Accordingly, that the Court of Appeal allowed the Appeal and struck out the Petitions of filed in this Court and hence the current and Application and the main suit must fall for being surrogates of ELRC Petition No. 17 of 2022, whose backbone was plucked by the Court of Appeal.
28. The 4th Respondent herein filed another Application dated 25th April, 2023, expressly to have been filed pursuant to Sections 1A, 1B, & 3A of the *Civil Procedure Act*, Order 51 Rule 1 of the *Civil Procedure*, section 12 of the *Employment and Labour Relations Court Act*, 2011, Article 162(2) of the *Constitution* and all other enabling provisions of the law, seeking for the following Orders:-
 1. Spent.
 2. The petition and the Notice of Motion dated 23rd January, 2023 be struck out and or dismissed with costs.
 3. That costs of the Application to be provided for.
29. The Application is supported by the grounds on the face of the Application and the affidavit of Dr. Samuel Mwangi Mwaura, the Acting secretary of the 2nd Respondent. He reiterated the contents of its replying affidavit sworn on 20th April, 2023 as indicated above and urged this Court to dismiss the Application and the Petition herein with costs to the Respondents.
30. In response to the Application of 24th May, 2023, the Petitioner swore a replying affidavit on 26th May, 2023 stating that whereas the Court of Appeal rendered itself on Civil Appeal No. 136 of 2022 , the same was in respect of ELRC Petitioner number E017 of 2022 and not with regard to the current Petition, which he stated is independent and distinct from that former Petition, which he urged this



Court to carefully interrogate the facts before applying the Judgement of the Court of Appeal to this proceedings.

31. It is his case that no preliminary objection on jurisdiction has been filed in this case and no Appeal has thus been filed on any of the issues raised in the current Petition to warrant the Application of the decision of the court of Appeal to the facts of this case.
32. He stated that the court of Appeal reached a conclusion that the Court in the former petition did not have jurisdiction because the employer-employee relationship had not been established, On the converse, the 9th to 31st Respondent herein have since been appointed as COs as such employer-employee relationship has now been created. Further that the issue of failing to exhaust dispute resolution mechanism under 77 of the County Government Act cannot be raised herein because the Appointments of the COS were made by the Governor with approval of the county assembly and not by the County Public Service Board.
33. The affiant stated that the Respondents contravened the Orders of this Court which were still in force and not set aside in proceeding with the nomination and vetting process and subsequent appointment. Also that the Petitioner has made steps to prefer an Appeal to the Supreme Court on the decision rendered by the Court of Appeal, at the same time sought for stay of proceedings therefore that if this Court dismisses this suit at this stage, it will render the intended Appeal to Supreme Court and the stay application before Court of Appeal nugatory.
34. The affiant stated that in the event this Court finds that the decision of the Court of Appeal affect the Petition herein, to stay the proceedings in this suit, until their Application at the Court of Appeal dated 28th April, 2023 is determined.

Petitioner's Submissions.

35. The Petitioner filed two sets of submissions, one on 21st March, 2023 and another set one on 5th July, 2023.
36. In support of their Application dated 23rd January, 2023, the Petitioner identified two issues for determination; whether this Suit is res-judicata and whether the Orders sought should be granted. On the first issue, it was submitted that section 7 of the Civil Procedure Act provides for *res-judicata* and gives four conditions that must be met before a suit or Application is declared res-judicata. He listed the conditions as follows; the subject matter must have been directly and substantially in issues in the previous application, the matter must have been between the same parties, must be instituted before a court of competent jurisdiction and lastly the issues raised must have been heard and finally determined by such a court.
37. Accordingly, it was submitted that the suit herein is not res judicata because; Firstly, the previous suit being ELRC Petition No. 17 of 2022 has not been heard and determined, secondly, that the issues raised and the prayers sought in the said petition are different from those raised in this petition, in that the previous Petition concerned itself with actions that took place between 21st September, 2022 to 17th November, 2022, whereas the current Application is in relation to the actions that took place between 23rd December, 2022 and 29th December, 2022. Further, that the previous Petition is on recruitment and specifically the nomination process while the current Petition deals with approval, appointment and employment of the 9th to 31st Respondents which took place on 29th December, 2022.
38. It was submitted that since the cause of action for the current petition arose later after the filling of the previous suit, the issues raised herein could not have been accommodated in that petition. To support this argument, the Petitioner relied on the case of Martin Nyaga Wambora V Speaker of the County



Assembly of Embu & 3 Others [2014] eklr, where the Court held that subsequent processes that take place after a suit has been determined form the subject of a new matter and hence cannot be said to be *res-judicata*. Consequently, that the issues in these Petitions have not been determined by the Court, therefore that the issue of *res-judicata* cannot arise.

39. On whether the prayers sought should issue, it was submitted that the Petitioner herein has meet all the conditions for issuance of injunctive Orders as propounded in *Giella V Cassman Brown* case. If the injunctive orders sought are not granted, the public stand to suffer as public monies will be expended to pay persons who are illegally in office. He added that it's not disputed that the 9th to 31st Respondents herein were appointed in defiance of a Court Order barring any approval hearing and subsequent appointment until the Application is heard and determined. Therefore, since the appointments were in violation of this Court Orders, they are a nullity as was held in *Martin Nyaga Wambora V Speaker of the County Assembly of Embu & 3 Others* (*Supra*).
40. Additionally, that allowing persons to hold office who were appointment in disobedience of Court Court could amount to aiding and abetting the disobedience as stated in *Judicial Service Commission V Speaker of the National Assembly & Another* [2013] eklr.
41. On the Preliminary Objection and the Respondents application dated 24th April, 2023, the Petitioner submitted on whether this Court has jurisdiction to determine the Application and the suit in light of the Section 77(1) of the *County Government Act* and argued that Section 77(1) provides for Appeals to Public Service Commission on decision that are made by the County Public Service Board in exercise of disciplinary Control, which issue is not the one before Court. He stated that the issue in dispute is with regard to the nomination and appointment of the 9th to 31st Respondent which was done by the Governor with approval of the County assembly of the Nakuru Court who do not fall under the ambit of section 77(1) of the *Act*, to require the Applicant to appeal their actions to PSC.
42. On *locus standi* to bring this suit, it was submitted that the Petitioner filed this suit as a member of the Public, being a resident of Nakuru County and Consumer of public services of Nakuru County. Therefore, that he is empowered under Article 22 and Article 258 of the *Constitution* as read with Section 4 of the *Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 under legal notice number 117 of 28th June, 2013. Further that Section 2 of the Rules, defined High Court to include Courts of equal status such as this Court, therefore that he has *locus standi*. To support this argument, the Petitioner relied on the case of *Okoiti v Attorney General; Njenga (Interested Party)* (Petition E101 of 2020) [2022] KEELRC 2 (KLR).
43. Accordingly, that any person can bring a complaint for violation of the *Constitution*, as long as the issue in question is employment in nature and that person bringing the claim need not be an employee or employer. In support of this the Petitioner relied on the case of *Trusted Society of Human Right Alliance V Nakuru Water and Sanitation Services Company and Another* [2013] eklr where the Court held that:-

“The court has considered the provision and finds that under the section, parties to the proceedings before the court are not limited to those in an employee-employer relationship. In particular, under section 12(2) of the *Act*, any person can bring before the court a case against an employer, employee, a trade union, an employer's organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law. The court finds that the court has jurisdiction under section 12(2) because the petitioner not being in an employer-employee relationship with the respondent, the respondent has been moved against in its capacity as an employer... he court further holds that in mapping out the boundaries to determine jurisdiction, the court must consider the



four crucial traditional elements of jurisdiction namely parties, territory or geographical area, remedies that may issue and subject matter in dispute. The court holds that the authority to decide will relate to the parties, the territory or geographical area of the dispute, the remedies that may issue and the subject matter involved. Depending on the authority to decide as may be conferred, all the four parameters may be pertinent or one or two of them may apply. In the opinion of the court, unless any of the four results into a bar to jurisdiction in the given case or circumstance, presence of any of the four as permitting jurisdiction will be sufficient for the court to assume jurisdiction and proceed to entertain and determine the case at hand.”

44. On that basis, the Petitioner submits that this Court has jurisdiction as the main issues for determination revolve around the employment of the 9th to 31st Respondents, which issues can only be determined by this Court.
45. The Petitioner submitted further that the Application of the Court of Appeal decision in Civil Appeal number 136 of 2016 is erroneous in that the decision rendered was with regard to ELRC Petition No. E17 of 2022 and not on this Petition. Further that the Court of Appeal held that this Court did not have jurisdiction because the Interested parties in that suit were nominees and yet to be appointment to bring in the employer-employee relationship, which is not the case herein, because the 9th to 31st Respondent have been appointment and are now employees of the County Government of Nakuru. Additionally, that the appointment of the 9th to 31st Respondents herein was done by the Governor with approval of the County Assembly with exclusion of the County Public Service Board. He argued, in any event, that the Petitioner has taken steps to appeal the decision of the Court of Appeal to the supreme Court.
46. In conclusion, the Petitioner urged this Court to determine the Application herein on merit as it is substantially different from the previous one in ELRC Petition 17 of 2022.

The 1st, 2nd 3rd, 5th and 9th to 31st Respondents’ Submissions.

47. The Respondents, in support of their preliminary objection dated 7th March, 2023, submitted that the Petition and the Application herein offends the doctrine of sub-judice as provided for under section 6 of the *Civil Procedure Act*. They argued that the position of the law is that a matter that is on trial before a court of law cannot be adjudicated before another court if the subject matter and the issues are the same with a matter pending before a court of law. Accordingly, that the suit and the Application herein raises similar issues with those raised in ELRC Petition No. E17 of 2022 because the parties are the same and the issues are the same as such offends the doctrine of sub-judice as discussed in the case of *Republic V Commissioner of Domestic Taxes; Panalpina Airflo Limited (Ex parte)*[2019] eklr and the case of *Republic V Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya* [2020] eklr where the Court relied on a decision rendered by the High Court of Uganda in in *Nyanza Garage v Attorney General*, where the court held that;-

“In the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided. It is in the interest of the parties because the parties are kept at a minimum both in terms of time and money spent on a matter that could be resolved in one suit. Secondly, a multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating and or adding to the backlog of cases courts have to deal with. Parties would be well advised to avoid a multiplicity of suits.”



48. They also relied on the case of *Kinatwa Cooperative Savings and Credit Society Limited V Kinatwa Prestige Revenue Ltd*[2021] eKLR where the Court relied on the case of *In the case of Kenya Bankers Association versus Kenya Revenue Authority*,2019 eKLR the court had this to say on the issue of Res sub judice;

“in addition, it is clear that the matters in issue in the suits or proceedings are directly and substantially the same. The parties in the suits or proceedings are the same. The ex parte applicant herein, is litigating on behalf of its 47 members, some of whom are parties in the existing suits. The suits are pending in the High Court which has jurisdiction to grant the relief claimed. A cursory look at the prayers sought in this case show that they relate to the same subject matter. However, the principle of sub judice does not talk about the “prayers sought” but rather “the matter in issue” I find that the matters in issue in the suits are substantially the same. In *Re the matter of the Interim Independent Electoral Commission*, the Supreme Court cited with approval the Australian decision where it was held: -

“... we do not think that 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...”

49. On that basis, the Respondents urged this Court to find the Petition and the Application sub-judice and proceed to strike it out.
50. The Respondent herein submitted further that the petition and the Application herein touches on recruitment, selection and appointment of Chief Officers of Nakuru County, which employment issues should have been raised with the Public Service Commission as provided for under section 77 of the *County Government Act*. For that reason, since the law provides a way a dispute mechanism is to be handled, the Petitioner ought to have exhausted all internal mechanisms before filing this suit as was held in *Speaker of National Assembly V Karume* [1992] eKLR and the case of *Geoffrey Muthinja Kabiru & 2 others v Samuel Munga Henry & 1756 Others* [2015] eKLR. On that basis, the Respondent argued that the suit and the Application herein is premature, unripe and improper before the Court and urged this Court to dismiss the Application and the suit.
51. The 2nd and 3rd Respondent submitted in support of their grounds of opposition dated 20.3.2023 that argued that the suit herein is res-judicata as provided for under section 7 of the *Civil Procedure Act*, for the reason that the matter has directly and substantially been raised in ELRC Petition E17 of 2022, which case is also between the parties herein and the Application decided by both this Court and on appeal by the Court of Appeal.
52. The Respondent submitted that the move taken by the Petitioner in filing this suit, when ELRC Petition E17 of 2022 was alive and subject of Appeal No. 136 of 2022, was a clear demonstration of abuse of Court process, which this Court should frown upon and strike out the Application and the entire suit for being res judicata and an abuse of Court process.
53. With regard to the Respondents Application dated 25th April, 2023, it was submitted that the Petition herein is a derivative of ELRC Petition E17 of 2022, which the petitioner challenged the appointment process of the Nakuru County Chief Officers, that became subject of Appeal Number 136 and 137 of 2022. That the Court of Appeal rendered itself to the effect that the petitions were premature and the Court lacked jurisdiction to determine the Application and the Suit and proceeded to strike out the Petition.



54. Similarly, that the Court of Appeal held that the Petitioner, Kenneth Odongo, did not have locus standi to institute the Petition for the reasons that he is not any of the parties recognized under Section 12(2) of the *Employment and Labour Relations Court Act*. It was also argued that the Court lacks jurisdiction to entertain this Petition as was held in court of Appeal in Civil Appeal case number 136 and 137 of 2022.
55. On whether the Petitioner has exhausted statutory remedies, the Respondent relied on the case of *Albert Chaurembo Mumba & 7 others V Maurice Munyao & 148 others* [2019] eklr and argued that section 7(10) of the *Public Appointment (County Assemblies Approval) Act*, 2017, requires any aggrieved party to raise any concerns on suitability of nominated candidates with the Clerk of the assembly. Hence, the Petitioner's concerns should have been Addressed by the County Assembly and not at this Court as the first port of call.
56. It was also submitted that section 77 of the *County Government Act*, provide another avenue for dispute resolution through an appeal to the Public Service Commissions, which the Petition ought to have explored before filing a suit in this Court. On that note, it was argued that since the statutory remedies were not exhausted, the Petition and the Application is premature before this Court.

4th Respondent's Submissions.

57. The Respondent here submitted in support of its preliminary objection that the suit and the Application herein is res-judicata as it satisfies all the conditions under section 7 of the *Civil Procedure Act*. In this, they cited the case of *E.T v Attorney General & Another* [2012] eklr and the case of *The Independent Electoral and Boundaries Commission V Maina Kiai & 5 others* [2017] eklr. Additionally, that since a similar suit has already been filed by the Petitioner, this subsequent suit amount to abuse of Court process as stated in *Jetlink Express Limited v East Africa Safaris Air Express Ltd* [2015] eklr where the Court relied in the case of *Muchangi Industries Limited v Safaris Unlimited (Africa) Limited and 2 others (supra)*, a bench of this Court, Bosire, Onyango Otieno and Nyamu, JJ.A discussed at length what constitutes abuse of the court process as defined in Wikipedia the free encyclopedia:-

“The person who abuses process is interested only in accomplishing some improper purpose that is collateral to the proper object of the process and that offends justice. In *Beinosi v Wiley* [1973] SA 721 (SCA) at page 734 F-G a South African case heard by the Appeal Court of South Africa, Mohamad CJ set out the applicable legal principle as follows:- ‘What does constitute an abuse of process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all encompassing definition of the concept of ‘abuse of process.’ It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective.’

58. It was submitted that the issues of; Jurisdiction of this Court, the locus of the Petitioner and non-exhaustion of statutory remedies, had been raised before this Court in the Respondents' preliminary Objection filed in the previous Petition, however the Court dismissed the Preliminary Objection, which became the subject of Appeal in the Court of Appeal. The Court of Appeal on hearing of the parties, found the Petitioner without locus, the Court without jurisdiction and also that the Petitioner had not exhausted the statutory remedies, upholding the preliminary objection and dismissing the Application, together with the Petition. Consequently, that since the suit herein raises similar issue with the ones raised in the previous petition, the Court ought to be guided by the Court of Appeal decision and down its tools as it lack jurisdiction. Thus the only logical conclusion is for this Court to find it lacks jurisdiction and proceed to strike out the Application and the Petition herein.



59. The Respondent in concurrence with the 9th to 31st Respondents' submissions in support of the Notice of Preliminary Objection dated 24th April, 2023, reiterated that the Court does not have jurisdiction to determine the petition herein, That the Petitioner lacks locus standi to institute the suit herein and therefore that the suit is bad in law and a candidate for dismissal.
60. I have examined all evidence and submissions of the parties herein.
61. I will first delve into disposing of the preliminary objection herein filed by the respondents who indicated that this court lacks jurisdiction to determine this Petition by virtue of Section 77 (2) of the County Government Act 2012 and Section 85, 86 & 87 of the PSC Act.
62. The respondent also raised a preliminary objection to the effect that this claim is res-judicata as a similar matter has been decided by the court in Petition No. E17/2022.
63. In reference to the issue of jurisdiction Section 77 (2) of the County Government Act 2012 states as follows;

“77(2) The Commission shall entertain appeals on any decision relating to employment of a person in a county government including a decision in respect of—

- (a) recruitment, selection, appointment and qualifications attached to any office;
- (b) remuneration and terms and conditions of service;
- (c) disciplinary control;
- (d) national values and principles of governance, under Article 10, and, values and principles of public service under Article 232 of the *Constitution*;
- (e) retirement and other removal from service;
- (f) pension benefits, gratuity and any other terminal benefits; or
- (g) any other decision the Commission considers to fall within its constitutional competence to hear and determine on appeal in that regard”.

64. In the case of National Assembly v The Hon. James Njenga Karume CA No. 192 of 1993 JJA, Kwachu Cocker & Muli stated that;-

“...where there is clear procedure to redress any particular grievance, prescribed by the *constitution* or an Act of Parliament that procedure should be strictly followed...”

65. Section 85, 86 & 87 of the PSC Act also provide a clear procedure for dispute resolution for any party dissatisfied by a decision of the CPSB which provides as follows;-

“ 85. Appeal from County Government public service

The Commission shall, in order to discharge its mandate under Article 234(2) (i) of the *Constitution*, hear and determine appeals in respect of any decision relating to engagement of any person in a County Government, including a decision in respect of—

- (a) recruitment, selection, appointment and qualifications attached to any office;



- (b) remuneration and terms and conditions of service;
- (c) disciplinary control;
- (d) national values and principles of governance, under Article 10 and values and principles of public service under Article 232 of the *Constitution*;
- (e) retirement and other forms of removal from the public service;
- (f) pension benefits, gratuity and any other terminal benefits; or
- (g) any other decision the Commission considers to fall within its constitutional competence to hear and determine an appeal in that regard.

86. Procedure for appeal

- (1) Any person who is dissatisfied or affected by a decision made by any authority or person in respect of a County Government public service may appeal to the Commission against the decision.
- (2) An appeal under subsection (1) shall be in writing and made within ninety days from the date of the decision: Provided that the Commission may consider an appeal out of time if, in the opinion of the Commission, the circumstances warrant it.
- (3) The Commission shall make regulations to guide the hearing and determination of appeals from the county public service boards.
- (4) After considering an appeal under this section the Commission may—
 - (a) uphold the decision;
 - (b) set the decision aside;
 - (c) vary the decision as it considers to be just; or
 - (d) give such directions as it may consider appropriate with respect to the decision.

87. The Commission may co-opt experts

- (1) The Commission may in hearing and determining appeals from the County Governments' public service, co-opt relevant experts depending on the nature of the appeal.
- (2) A person shall not file any legal proceedings in any Court of law with respect to matters within the jurisdiction of the Commission to hear and determine appeals from county government public service unless the procedure provided for under this Part has been exhausted.”



66. In the current petition, the petitioner seeks orders to injunct the respondent from acting in any matter for the benefit of the 9th to 31st respondents who they aver have been illegally appointed.
67. That indeed is not a decision of CPSB as envisaged under Section 85, 86 & 87 of *PSC Act* and Section 77 (i) of the *County Government Act* which envisages an appeal over a decision made by the CPSB on a person or purported exercise of disciplinary control against any county public officer.
68. The impugned decision herein was not made by the CPSB and is therefore not appellable to the PSC.
69. That notwithstanding, the issue of the matter being res-judicata has also been raised in the preliminary objection herein.
70. Indeed this court determined Petition E17 of 2022 where a preliminary objection was also raised on the court's jurisdiction to deal with the matter.
71. On 29th November, 2022 this court made a ruling against the preliminary objection dismissing it accordingly.
72. The respondents lodged an appeal on this matter in Nakuru CA No. E136 of 2022 which is still pending for determination.
73. In view of this fact, if I were to determine the issue of my jurisdiction in handling this matter, I will be handling a matter which is similarly pending before the Court of Appeal.
74. In this regard, I find the issue of jurisdiction is sub judice and I will therefore down my tools and proceed no further.
75. The issues raised by the petition are not therefore determinable at this point unless a decision is made by the Court of Appeal to the effect that this court has jurisdiction to handle it.
76. I will therefore not determine the merits of the petition until a decision is made by the Court of Appeal on the jurisdiction of this court, in the pending application.
77. Costs will be in the cause.

RULING DELIVERED VIRTUALLY THIS 3RD DAY OF OCTOBER, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Achieng holding brief for Chege for 2nd Respondent – present

Mwangi holding brief for Karanja for 4th respondent – present

Mwaniki for petitioner

