



**Munje v County Assembly of Tana River & 2 others; Majimbo (Interested Party)
(Petition E005 of 2023) [2023] KEELRC 3472 (KLR) (7 December 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3472 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI
PETITION E005 OF 2023
M MBARÚ, J
DECEMBER 7, 2023**

BETWEEN

ISIAH MUNJE PETITIONER

AND

COUNTY ASSEMBLY OF TANA RIVER 1ST RESPONDENT

GOVERNOR, COUNTY GOVERNMENT OF TANA RIVER 2ND RESPONDENT

COUNTY GOVERNMENT OF TANA RIVER 3RD RESPONDENT

AND

GEORGIADIS A MAJIMBO INTERESTED PARTY

RULING

1. The 2nd and 3rd respondents, Governor and County Government of Tana River County filed Notice of Preliminary Objections dated 18 October 2023 objecting to the petition herein on the grounds;
 1. The petition is legally incompetent, fatally and incurably defective, non-starter, an abuse of the process of court and should be dismissed in limine with costs.
 2. Section 31 of the Office of the County Attorney Act, No. 14 of 2020 does not transition a Governor’s legal Advisor into the office of a County Attorney.
 3. The petitioner did not go through the mandatory requirements of Section 5 of the Office of the County Attorney Act, No. 14 of 2020.
 4. The petition and application are res judicata.
 5. This court lack jurisdiction to hear and determine this petition and application as filed.
2. Parties attended court and filed written submissions and also made oral submissions.

3. The 2nd and 3rd respondents submitted that the petitioner has averred in his affidavit that he had previously been appointed as the legal advisor to the 2nd respondent in the year 2017 which is not in dispute. His offer of employment letter, the terms of service allowed him to service will be contract that expires when the term of service for the Governor comes to an end or when he/she ceases to hold office; whichever comes earlier.
4. The 2nd respondent as the Governor, his term ended in August 2022 election. The petitioner's employment as the legal advisor ended.
5. In the petition, the petitioner alleges that pursuant to Section 31 of the Office of the County Attorney Act, he was appointed to the position of County Attorney through letter dated 10 October 2022 and that the appointment was to take effect on 11 October 2022 but this letter has no legal force because the petitioner had since ceased being an employee of the 3rd respondent. He could not transition into office of a county attorney as alleged. Even where the appointment was done, the petitioner did not go through the mandatory requirements of Section 5 of the Office of the County Attorney Act and his appointment did not take effect.
6. The petitioner filed Malindi Petition No. E003 of 2022 on 14 September 2022 prompted by the advertisement made by the 3rd respondent inviting applications for the position of County Attorney. Unable to prosecute the petition, the petitioner withdrew it.
7. The petitioner has failed to produce documents to support his claim that he is the County Attorney. There is no letter from the County Public Service Board or the 1st respondent approving his appointment. There is no letter of the 2nd respondent forwarding his name to the 1st respondent for vetting and approval. There is no pay slip to show that the 3rd respondent placed him in the payroll for such positions. There is no consent in Malindi Petition No. E003 of 2023 where the petitioner was claiming constructive dismissal as the County Attorney.
8. The 2nd and 3rd respondents submitted that the petitioner ceased being an employee of the 3rd respondent on 9 August 2022, the 3rd respondent invited applications for the position of County Attorney in September 2022 and the petitioner was unsuccessful. He filed Malindi Petition No. E003 of 2022 to stop the recruitment but withdrew the same and which allowed the process of appointment of a County Attorney to continue and resulted in the appointment of the interested party to such office.
9. The objections herein are purely on a point of law as held in *Mukisa Biscuit Manufacturers Ltd v Westend Distributors Ltd* [1969] EA.
10. Section 31 of the Office of the County Attorney Act does not transition a governor's legal advisor to the office of County Attorney. The petitioner was not appointed as the County Attorney of the 3rd respondent or transitioned to such office. The purported appointment of 10 October 2022 has no legal basis. In the *Kisumu Civil Appeal No. 53 of 2021 – The Governor, County of Vihiga v Evans Muswahili Ladtema & others* the court held that Section 31 of the Office of County Attorney Act does not transition a legal advisor into the office of County Attorney.
11. The Office of County Attorney Act came into force in the year 2020 while the petitioner was the legal advisor and the same lapsed on 9 August 2022. In terms of Section 31 of the Act, his position did not transition to the office of County Attorney. The petitioner did not go through the mandatory requirements of Section 5 of the Act for the appointment as County Attorney, which position was advertised and the interested party appointed.

12. The respondents submitted that the court lacks jurisdiction to hear and determine the petition herein following the petitioner challenge to the recruitment process in Malindi Petition E003 of 2022 and the matter herein is res judicata. The petitioner was paid his terminal dues as legal advisor at the end of his tenure on 9 August 2022. The instant petition is in abuse of court process and should be dismissed with costs.
13. The interested party attended and supported submissions by the 2nd and 3rd respondents.
14. The petitioner submitted that the principles in the case of Mukisa Biscuit Manufacturing Ltd v West End Distributors Ltd [2969] EA allow a party to raise a preliminary objection on a pure point of law.
15. The petition herein is alleged to be contrary to the doctrine of res judicata contrary to Section 7 of the *Civil Procedure Act*. A party should not litigate under the same title over a matter previously addressed and heard with finality by the same court. Where a former suit is hence addressed, to avoid multiplicity of suit, the res judicata rule should apply. The petitioner filed Malindi Petition E003 of 2022 but filed Notice of Withdrawal before the matter could be heard on the merits and a decision taken. Parties did not go for hearing for the respondent to apply the doctrine of res judicata.
16. The petitioner served as the legal advisor and acting County Attorney for a period for 6 years. The fact of his appointment contested, the court can only address by call of evidence. The court has jurisdiction to hear and determine this petition on the merits.
17. The petitioner submitted that section 31 of the Office of the County Attorney Act is used by the respondents to object to the appointment of the petitioner as County Attorney. However, evidence should be called to ascertain the employment status of the petitioner, whether the petitioner served the 2nd respondent as a legal advisor and whether he transitioned to the position of County Attorney and the effect of the letter of appointment issued to this effect.
18. With regard to the requirements of Section 5 of the County Attorney Act, for one to comply thereof, evidence is required in view of the letter dated 10 October 2022 appointing the petitioner to the position of County Attorney.

Determination

19. The objection herein relates to the application of Section 5 of the County Attorney Act; the application of Section 31 of the Office of the County Government Act; and whether the doctrine of res judicata apply.
20. The letter of appointment dated 20 November 2017 by the County Government of Tana River to the petitioner is not contested.
21. The petitioner was appointed as the legal advisor from the date of the letter of appointment, 20 November 2017 and the same to expire when the terms of service for the Governor comes to an end or when he/she ceases to hold that office; whichever comes earlier.
22. The petitioner has filed letter dated 10 October 2022, being his letter of appointment by the 2nd respondent on the grounds that following his application through letter dated 3 June 2022, pursuant to Section 31 of the County Attorney Act, he was appointed as the County Attorney of the 1st respondent for a period of 6 years.
23. Whereas the petitioner was appointed on 20 November 2017 as the legal advisor for a term commensurate to the term of the 2nd respondent, the office of County Attorney only took effect with the enactment of the *Office of the County Attorney Act, 2020* in terms of Section 5 thereof. The motions

for the appointment to the position of County Attorney are spelt out to include an appointment by the Governor, the 2nd respondent with the approval of the County Assembly.

24. Through letter dated 10 October 2022, the 2nd respondent appointed the petitioner to the position of County Attorney for a term of 6 years.
25. Whether the appointment is lawful and legitimate requires call of evidence. The advertisement by the 3rd respondent calling for applicants to apply for the position of County Attorney in the context of letter dated 10 October 2022 by the 2nd respondent must be interrogated before the court can make a finding.
26. Similarly, the provisions of Section 31 of the [Office of the County Attorney Act, 2020](#) in view of the decision by the Court of Appeal in Kisumu Civil Appeal No. 53 of 2021 – The Governor, County of Vihiga v Evans Muswahili Ladtema & others must be given context herein before the court can make a determination thereof. Part of that context is the provisions Section 5 of the Office of the County Attorney Act which sets out the requirements with regard to the appointment into office of a County Attorney. Did the petitioner go through such requirements? Have the respondents complied thereof?
27. These are matters which require call for evidence.
28. The objections are also that the petition herein is res judicata. Indeed, Section 7 of the [Civil Procedure Act](#) has addressed the principle of res judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party who has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue as held in Uhuru Highway Development Ltd v Central Bank of Kenya [1999] eKLR.
29. This is also aptly captured by the Court of Appeal in Independent Electoral & Boundaries Commission Maina Kiai & 5 Others (2017) eKLR as follows;

The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.

30. The petitioner filed ELRC Malindi Petition No. E003 of 2022 – Isaiah Ndisi Munje v County Government of Tana River & others together with an application dated 6 October 2022 under Certificate of Urgency. Through application dated 1st December 2022, the petitioner filed Notice of Withdrawal of the suit. The petition did not progress for hearing. There is no determination.
31. Order 25 Rule 1 allows as follows;

At any time before the setting down of the suit for hearing the Plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the Defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action.

- 32. Therefore, Order 25 envisages that once a party withdraws or discontinues a suit such a party may file another suit and such withdrawal or discontinuation cannot be raised as a defence in a subsequent suit.
- 33. Notice of Withdrawal of Suit takes effect and brings the proceedings to an end as against each respondent.
- 34. It is not clarified in these proceedings as to whether the respondents objected to the Notice of Withdrawal of Malindi Petition No. E003 of 2022 or filed any responses or claimed for costs thereof. The suit thereof came to an end with the filing of the Notice of withdrawal and the court acknowledged the fact of withdrawal. Other factors have since come into play, the appointment of the interested party as the County Attorney.
- 35. Objections herein are found without merits and are hereby dismissed. The court will hear the petition on the merits. Costs shall abide the outcome of the petition.

DELIVERED IN OPEN COURT AT MOMBASA THIS 7 DAY OF DECEMBER 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

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