



**Ouma v Migori County Assembly Service Board & another (Cause E072 of 2023) [2023] KEELRC 3253 (KLR) (7 December 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3253 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**  
**CAUSE E072 OF 2023**  
**CN BAARI, J**  
**DECEMBER 7, 2023**

**BETWEEN**

**EVANS OGUTU OUMA ..... PETITIONER**

**AND**

**MIGORI COUNTY ASSEMBLY SERVICE BOARD ..... 1<sup>ST</sup> RESPONDENT**

**MIGORI COUNTY ASSEMBLY ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. This ruling relates to a notice of preliminary objection dated September 26, 2023, brought by the respondents premised on the following grounds: -
  - i. That the claim/proceeding, which stems from the County Government Service, violates article 234(2) (i) of the Constitution, section 77 of the County Government Act, and sections 86 and 87(2) of the Public Service Commission Act. This Court lacks jurisdiction to decide this matter.
  - ii. That the application is *res judicata* because the same orders were sought and granted in Petition No. E032 of 2022, Evans Ouma v. County Assembly Service Board of Migori.
2. The Respondents pray for the dismissal of this petition together with costs.
3. The preliminary objection was heard on November 6, 2023, where counsels for both parties made oral submissions.
4. Mr. Obiero submitting for the Respondents, argued that the application herein, is *res judicata* since this Court issued similar orders as those sought herein in Petition No. E032 of 2022, which orders were granted and are still active in that file.
5. It is counsel's submission that the application in the matter offends section 7 of the Civil Procedure Act.



6. It is the Respondents further submission that this suit offends article 234(2)(i) of the Constitution, section 77 of the County Government Act and Sections 86 and 87(2) of the Public Service Commission Act, 2017, which require that persons dissatisfied with the decision of the County Public Service Board to appeal to PSC.
7. It is counsel's submission that the prayers in the claim are for the review of a decision taken by the County Assembly Service Board of Kisii. He submits further that article 176 of the Constitution, defines County Governments to constitute both County Assembly and County Executive.
8. Mr. Obiero finally submits that the Applicant/Claimant ought to have exhausted all available dispute resolution mechanisms before invoking the jurisdiction of this court. He placed reliance in the case of *Likale Moses Sande v County Government of Kakamega & 3 others* [2021] eKLR.
9. Mr. Owino submitting for the Applicant/Claimant, sought to rely in the case of *John Kamau Kimani v. County Government of Transzoia & another* (2014) eKLR for the holding that an application for *res judicata* cannot be brought by way of a preliminary objection, but by notice of motion where pleadings are annexed to enable the court determine whether the matter is *res judicata*.
10. It is counsel's further submission that *res judicata* issues are issues of facts and not law, and that the Court will need to acquaint itself with the pleadings that made the matter *res judicata*. It is submitted further that the Respondents referred to a ruling rendered in another matter and which was not mentioned in the notice of preliminary objection so as to allow the Applicant/Claimant to respond, and which is the sole reason *res judicata* should be raised through a notice of motion.
11. It is Mr. Owino's submission that the preliminary objection on *res judicata* does not meet the test in *Mukisa Biscuits v. West End Distributors*.
12. On the question of jurisdiction, Counsel submitted that various courts have taken different positions on whether the provisions of Article 234(2)(i), read with section 77 of the County Government Act and sections 86 and 87(2) of the PSC Act apply to County Assemblies.
13. It is submitted that in the case of *John Mwirithi Mutie v Speaker Kiambu County Assembly & 2 others; County Secretary Kiambu County Government & another (Interested Parties)* [2022] eKLR, the Court while faced with similar circumstances, noted that section 77 of the County Government Act, relates only to County Public Service and that the court distinguished between County Assembly Service and County Public Service.
14. It is Counsel's further submission that County Assembly falls under Part III and not Part VI of the County Government Act. It is his submission that to require County Assemblies to submit to PSC, is a violation of the principle of separation of powers.
15. It is his submission that County Assembly Service Board is not part of the County Executive, and hence County Assembly employees need not submit to the PSC.
16. It is submitted that the complaint in this matter is marred with irregularity and procedural illegality, hence exceptional circumstances to the exhaustion doctrine apply.

### **Determination**

17. I have considered the notice of preliminary objection and the oral submissions by both Counsels. The issues for determination are:
  - i. Whether the Applicant/Claimant's application is *res judicata*; and



- ii. Whether this Court has jurisdiction to hear and determine the Claimant's suit.
18. The threshold of what constitutes a Preliminary Objection was set out in the case of *Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors* [1969] EA 696 where it was held that a preliminary objection must be raised on a pure point of law and not where issues of facts needed to be ascertained.
  19. Likewise, the Supreme Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* Civil Application No. 36 of 2014 [2015] eKLR held that a preliminary objection should be founded upon a settled and crisp point of law.
  20. The first question is whether an issue on res judicata is a pure point of law. The Court of Appeal in *Nicholas Njeru V the Attorney General and 8 Others* Civil Appeal No. 110 of 2011 [2013] eKLR stated that the doctrine of res judicata is aimed firstly, at bringing an end to litigation, and secondly, to protect an individual from being harassed twice on the same account of litigation.
  21. The ruling delivered by this Court and which is said to render the application herein res judicata, was delivered in Petition No. E032 of 2022, between the Applicant/Claimant herein, and the same Respondents. The Counsel for the Applicant asserts that this does not satisfy the test in the *Mukisa Biscuits* case (Supra) for reason that the same is a different matter and which issue was not brought out in the Notice of Preliminary Objection to enable them respond.
  22. The Applicant/Claimant's application seeks to suspend a letter dated 4<sup>th</sup> July, 2022, dismissing him from the service of the Respondents. The ruling rendered by this Court on October 6, 2022, did suspend the operations of the same letter of July 4, 2022, and this is a fact that needs not be ascertained.
  23. In the case of *Tee Gee Electrics and Plastics Company Ltd v Kenya Industrial Estates Limited* [2005] KLR 97 the Court stated:

“ Both the policy rationale as well as our case law lean in the direction that a suit will only be deemed to be barred by res judicata when it was heard and determined on the substantive merits of the case as opposed to suits that are dismissed on preliminary technical points. Res Judicata bars a future suit only when the case is resolved based on the facts and evidence of the case or when the final judgment concerned the actual facts giving rise to the claim. For example, dismissal of a case for lack of subject matter or because the service was improper or even for want of prosecution does not give rise to judgments on the merits and therefore do not trigger the plea of res judicata. The last issue (dismissal for want of prosecution) was the issue in *The Tee Gee Electrics and Plastics Company Ltd v Kenya Industrial Estates Ltd* [2005] KLR 97; LLR CAK 6880. Here the Court of Appeal was explicit that *res judicata* does not apply if the earlier suit was dismissed for want of prosecution as the same was not heard on merits”
  24. Additionally, I do agree with Counsel for the Petitioner that issues to do with Res Judicanta can only be raised through Notice of Motion so as to enable production of the previous suit that renders current suit res judicata.
  25. I return that the application herein is not res judicata premised on the fact that the petition in the previous suit has not been determined and the orders granted related to a different letter.
  26. On the issue of jurisdiction, the question is whether article 234(2)(i) read with section 77 of the *County Government Act* and sections 86 and 87(2) of the *PSC Act*, 2017, apply to County Assembly Service.



27. The Applicant/Claimant's position is that the employees of County Assembly or the County Assembly Service, are not subject to the appellate mandate of the Public Service Commission, as they are not part of the County Executive, and to subject them, would amount to violation of the principle of separation of powers.
28. The *County Government Act* defines county public service thus: -  
 “means the collectivity of all individuals performing functions within any department of the county government or its agency, but does not include the governor, deputy governor, members of the county executive committee and the members of the county assembly”
29. From the foregoing definition, the only persons that do not form part of the County Public Service are Governors, their Deputies, Members of County Executive Committee and Members of County Assembly.
30. Persons serving in the County Assembly Service are not excluded from this definition, and which leads me to the conclusion that employees of County Assemblies are part of the County Public Service, and hence subject to the provisions of Article 234(2)(i) read with Section 77 of the *County Government Act* and Sections 86 and 87(2) of the *PSC Act*, 2017
31. The Court of Appeal in the case of *Secretary County Public Service Board and another v Hulbhai Gedi Abdille* (2017) eKLR, upheld the appellate mandate of the PSC in the following words:  
 “There is no doubt that the Respondent initiated the judicial review proceedings in utter disregard to the dispute resolution mechanism availed by Section 77 of the Act. The section provides not only the forum through which the Respondent could agitate her grievance at first instance, but the jurisdiction thereof is a specialized one specifically tailored by legislators to meet needs such as the Respondent's. In our view the most suitable and appropriate recourse for the Respondent was to invoke the appellate procedure under the Act rather than resort to the judicial process in the first instance.”
32. Further, in *Abdikadir Suleiman v County Government of Isiolo & another* [2015] eKLR the Court held that;  
 “Article 234(2) (i) of the *Constitution*, provides that the Public Service Commission is vested with the function and power to hear and determine appeals in respect of county governments' public service. Article 262 defines “public service” to mean the collectivity of all individuals, other than state officers, performing a function within a state organ. Accordingly, and firstly, the court holds that the power of the Commission to hear and determine appeals in respect of county governments' public service constitutionally applies only to public officers, and not state officers, in the service of the county governments or any other state organ. Secondly, the court holds that section 77 of the *County Governments Act*, 2012, amplifies and brings into operation article 234(2) (i) of the *Constitution*.”
33. The Applicant/Claimant herein falls in the group defined as public officers, and which again, is confirmation that the provisions of article 234(2) (i) and section 77 of the *County Government Act* applies to him.
34. In light of the foregoing, I find and hold that there exists alternative forum for the Applicant/Claimant to agitate his complaint and has therefore prematurely invoked the jurisdiction of this Court.



35. In the final analysis, the Respondents' preliminary Objection succeeds, and the applicant/claimant's application dated September 22, 2023, and the memorandum of claim of even date are struck out with costs.

36. Orders accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 7<sup>TH</sup> DAY OF DECEMBER, 2023.**

**C. N. BAARI**

**JUDGE**

Appearance:

N/A for the Applicant/Petitioner

Mr. Obiero present for the Respondents

