



**Musyoka v Judicial Service Commission & another (Petition E004 of 2022)
[2022] KEELRC 12921 (KLR) (29 September 2022) (Ruling)**

Neutral citation: [2022] KEELRC 12921 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E004 OF 2022
K OCHARO, J
SEPTEMBER 29, 2022**

**IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010;
IN THE MATTER OF THE ALLEGED CONTRAVENTION OF
FUNDAMENTAL FREEDOMS UNDER THE CONSTITUTION OF THE
REPUBLIC OF KENYA INCLUDING ARTICLES 20, 21[1], 22, 27[1], 27[2]
28, 40, 41, 43, 47 AND 57;**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF
SECTION 5 AND 10[5] OF THE EMPLOYMENT ACT, 2007;
IN THE MATTER OF THE DOCTRINE OF LEGITIMATE EXPECTATION;
IN THE MATTER OF THE JUDICIAL SERVICE COMMISSION;
IN THE MATTER OF DETERMINATION OF THE AGE OF RETIREMENT
AS PRESCRIBED UNDER SECTION 62[1] OF THE REPEALED
CONSTITUTION, ARTICLES 167[1] 168[1], 262 AND SECTION 31[1]
OF THE SIXTH SCHEDULE OF THE CONSTITUTION OF KENYA, 2010;**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA [PROTECTION OF RIGHTS
AND FUNDAMENTAL FREEDOMS] PRACTICE AND PROCEDURE RULES, 201**

BETWEEN

MUENDO MUSYOKA PETITIONER

AND

JUDICIAL SERVICE COMMISSION 1ST RESPONDENT

CHIEF REGISTRAR OF THE JUDICIARY 2ND RESPONDENT



RULING

1. By a notice of preliminary objection dated February 4, 2022, the respondents raise an objection to the petition herein citing two principal grounds and seek that the petition be struck out with costs. The grounds being:
 - a. The petition herein is *res judicata*, High Court petition No 244 of 2014, [Justice Philip Tunoi and Justice David Onyancha v The Judicial Service Commission and 86the Judiciary](#); petition No 386 of 2015, [Justice Kalpana H Rawal v Judicial Service Commission and others](#); petition No 495 of 2014 [Justice Leonard Njagi v Judicial Service Commission, The Judiciary and the Attorney General](#) and civil appeal No 6 of 2016 [Justice Philip K Tono and Justice David A Onyancha v The Judicial Service Commission and another](#).
 - b. The petition is an abuse of the court process.
2. This court directed that the preliminary objection be canvassed by way of written submissions, direction which the parties have complied with.
3. The respondents submitted that on diverse dates between 2014 and 2016, the Hon Lady Justice Kaplana Rawal, Justice Leonard Njagi, Justice Philip Tunoi and Justice Onyancha filed petitions before the High Court challenging the retirement age of judges under article 167 [1] of the [Constitution](#). The above stated petitions were filed following a communication to judges by the Judicial Service Commission notifying them of its decision that the retirement age of all judges serving at the time of promulgation of the [Constitution](#), 2010, had been determined to be seventy years, a variation to its earlier circular to judges that the retirement age was seventy-four years.
4. According to the respondents, the petitions hereinabove mentioned [the earlier petitions] raised cross-cutting issues for determination *inter alia*:
 - a. Whether the Judicial service Commission's actions violated the petitioners' constitutional rights including, the rights under articles 27, 40, 41, and 47.
 - b. Whether the Judicial Service Commission's memo of March 27, 2014 was in breach of the petitioners' legitimate expectation to retire at the age of seventy-four years as conveyed by the earlier circular dated May 24, 2011.
 - c. What is the role and mandate of the Judicial Service Commission in the retirement of judges?
 - d. What is the retirement age of judges who were in office prior to the promulgation of the [Constitution](#)?
5. The respondents submitted that on the above stated issues in the earlier petitions, the High Court;
 - a. On breach of legitimate expectation to retire at 74 years as conveyed by the circular dated May 24, 2011, held that the commission lacked authority to determine the retirement age of judges. Consequently, the circular dated May 24, 2011 did not create legitimate expectation because the commission could not make a binding promise on the retirement age of a judge. Similarly, The commission's failure to follow due process in issuing the memos couldn't hold as the authoritative interpretation of the [Constitution](#) for the purpose of determining the retirement age of judges did not lie with the Judicial Service Commission.



- b. On the role and mandate of the commission in the retirement of judges, found that the determination of the retirement age of judges is in the Constitution itself and that the resolution and decision by the commission through the circular and memo on the retirement age of judges was unconstitutional.
 - c. Held that the respondents had not deliberately subjected the appellant to unequal and discriminatory treatment.
 - d. On the pension rights and the alleged violation of article 40, held that the right to pension is in consonance with the retirement age of a judge set at 70 years, and rejected the argument that pension matured into a vested right upon appointment and therefore the judges stand to suffer proprietary loss if their retirement is pegged at 70 years.
6. It was submitted that on the retirement age of judges who were in office prior to the promulgation of the Constitution, the court inquired into the question of the meaning and purpose of the oath of office taken by judges under the new constitution, and considered the import of section 31[1] of the sixth schedule in relation to the Constitution and section 9 of the Judicature Act, as well as section 62[1] of the old constitution, and determined that:
- a. The oath of allegiance under section 13 of the sixth schedule taken by the judges bound them to the new Constitution with all it entailed, including article 167[1].
 - b. Section 31[2] transitioned into the new constitutional order, all public officers who were not serving under fixed period of term, including judges; and post-vetting, the judges would serve on the terms thereunder, including article 167 which states that a judge shall retire from office on attaining the age of 70 years.
 - c. With effect from the effective date, the retirement age of all judges is 70 years.
7. The respondents further submitted that the petitioners in the above stated petitions assailed the decisions by way of appeals to the Court of Appeal, namely; civil appeal No 1 of 2016 Justice Kalpana Rawal H v The Judicial Service Commission and others and civil appeal No 6 of 2016 Justice Philip K Tunoi and Justice David A Onyancha v The Judicial Service Commission and another. The Court of Appeal rendered itself on the appeals, the Constitution did not preserve and save the retirement age of judges prescribed by sections of by section 62[1] of the former Constitution as read with section 9 of the Judicature Act and section 31 of the sixth schedule to the Constitution, and that the with the effect from the effective date, the retirement age of all judges is 70 years.
8. The Court of Appeal specifically held that, both section 62[1] of the former Constitution and section 9 of the judicature Act were not transited and saved into new the Constitution by section 7 of the sixth schedule; the transitional and consequential provision of the sixth schedule that is applicable to judges is section 23, that is to say , upon successful vetting , a judge who was in office on the effective date was transited to the Constitution by section 23 of the sixth schedule and thereafter the Constitution , rather than other parts of the schedule, applied to him or her.
9. Further, that without subscribing to the oath of office, the vetted judges could not assume their offices.
10. The respondents submitted that following the Supreme Court’s decision in application No 11 of 2016, Kalpana H Rawal & 2 others v Judicial Service Commission & 2 others where the court held “the judgement of the Court of Appeal shall stand until it is either affirmed, or reversed by a competent bench of this court.”

The petition herein is a non-starter.



11. According to the respondents the following issues emerge for determination in the current petition;
 - a. Whether the retirement of the affected judges before the attainment of 74 years is unlawful and amounts to an infringement of their rights to fair labour practices.
 - b. Whether the affected judges' retirement at age 70 years as opposed to the contractual 74 years is prejudicial to their pension entitlement.
 - c. Whether the decision to retire and remove the affected judges from office at 70 years and not 74 is unlawful and discriminatory as other judges similarly appointed under the repealed Constitution and who retired under the repealed Constitution before issuance of the memo were able to serve their full term of 74 years.
 - d. Whether the Judicial Service Commission's decision to unilaterally change the affected judges' retirement age is unconstitutional and amounts to the infringement of their right to fair administrative action.
12. The respondents argue that the current petition seeks to invite this court to render itself on the issue of the retirement age of judges which issue has been conclusively determined by courts of competent jurisdiction.
13. It is stated that flowing from the hereinabove brought out background, the following issues commend themselves for determination by this court on the preliminary objection, thus; whether there is a competent preliminary objection before this court; and whether the petition is *res judicata*.
14. On the 1st proposed issue, the respondents submitted that the objection is grounded on a plea of *res judicata* which is a pure point of law. Further, that courts have consistently held that questions of *res judicata* or *sub judice* are best resolved at the onset of any suit by way of a preliminary objection. To buttress this submission, reliance was placed on the case of David Nyekorach Matsang & another v Philip Waki & 3 others [2017]eKLR. The doctrine of *res judicata* can be raised through pleadings as well as by way of preliminary objection. To fortify this point, the respondents cited the Court of Appeal, decision in Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR.
15. The doctrine of *res judicata* is applicable to constitutional litigation and interpretation, just as in other criminal and civil litigation. This as was held in the case of Florence Maritime Limited [supra.]
16. On their second proposed issue the respondents submitted that the doctrine of *res judicata* is to the effect that where a decision is pronounced by a court or tribunal with jurisdiction over a particular matter, that particular matter cannot be reopened, save on appeal. Inherent in the doctrine is the principle of "cause of action estoppel", which operates to prevent a cause of action being raised or challenged by either party in subsequent proceedings, where the cause of action in the subsequent proceedings is identical to that in the earlier proceedings involving the same parties or their privies over the same subject matter.
17. It was further was further submitted that the doctrine also incorporates the "issue estoppel", which arises to prevent a party from re-litigating over an issue determined in earlier proceedings as between them. See, Mohammed Dado v Dhado Gaddae Godhana & 2 others [2017] eKLR.
18. In order for the principle *res judicata* to be invoked the following elements must be demonstrated to be present;
 - a. There is a former judgement or order which was final,



- b. The judgement or order was on merit,
 - c. The judgement or order was rendered by a court having jurisdiction over the subject matter and the parties, and
 - d. There must be between the first and subsequent action identical parties, subject matter and cause of action.
19. The respondents concluded that, the above elements considered against the circumstances of the earlier petitions and the current petition, difficulty cannot be found to discern that there obtain final judgements in the earlier petitions by competent courts, on merit, in relation to the question of the retirement age of judges who were in office prior to the promulgation of the Constitution, 2010.
20. The respondents argued that the doctrine of *res judicata* cannot be defeated just because the name[s], or character, of the parties has been changed in the subsequent litigation as is the case here. To buttress this point reliance was placed on the holding in *Njangu v Wambugu and another Nairobi HCC No 2340 of 1991* where the court held;
- “If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case cosmetic face-lift on every occasion he comes to court, then I do not see the use of the doctrine of *res judicata*.”
21. It was argued further that the interests of the affected judges on whose behalf the present petition is filed are sufficiently aligned to the interest of the parties in the earlier matters. The interests of the affected judges in instant petition are substantially identical to the interests of the judges in the earlier petitions.
22. The decision of the Court of Appeal confirming the retirement age of judges as 70 years is effective in rem, it is binding on everybody as it determined state of affairs rather than rights of parties. It follows therefore, that the mere fact that the petitioner herein was not a party in the earlier petitions does not in any way mean that he can re-open the issues by instituting fresh proceedings. On this point, reliance was placed on the case of *Okiya Omtatah Okoiti v Ministry of Lands and Urban Development & others* [2017] eKLR.
23. If the present petition were to be successful, the court’s decision will result to a judgment inconsistent with that of the Court of Appeal, and the Supreme Court’s decision hereinabove stated.

The Petitioner’s Response

24. As a background to his submissions, the petitioner summarized the facts leading to the current petition, the summary is substantially the same as that obtaining in the respondent’s submissions, it shall not be necessary and prudent to recite the same here again.
25. The petitioner proposes two issues for determination, thus whether the respondent’s preliminary objection is sustainable; and whether the petitioner’s petition is *res judicata*.
26. On the first issue, the petitioner submitted that the Supreme Court decision in *John Florence Maritime Services Limited & another v Cabinet Secretary, Transport and Infrastructure & 3 others* [2021] eKLR, was cited by the respondents in a manner indicative that there was no full understanding of the import of the decision. Contrary to the respondents’ submissions, the Supreme Court provided exceptions to the application of the principle in right-based litigation in the interest of justice. The court held;
- “However, though the doctrine of *res judicata* lends itself to promote the orderly administration of justice. It should not be at the cost of real injustice..... Just as the



Court of Appeal in the impugned decision noted that rights keep on evolving, mutating, and assuming multifaceted dimensions it may be difficult to specify what is rarest and clearest. We however propose to set some parameters that a party seeking to have a court give an exemption to the application of the doctrine of *res judicata*. The first is where there is potential for substantial injustice if a court does not hear a constitutional matter or issue on its merits. It is our considered opinion that before a court can arrive at such a conclusion, it must examine the entirety of the circumstances as well address the factors for and against such discretionary power In the alternative a litigant must demonstrate special circumstances warranting the court to make an exception.

27. Further fortification was sought in the case of *Okiya Omtatah Okoiti & another v Attorney General & 6 others* [2014]eKLR, where the court held;

“Whereas these principles have generally been applied liberally in civil suits, the same cannot be said of their application in constitutional matters. I say so because, in my view, the principle of *res judicata* can and should only be invoked in constitutional matters in the clearest of cases and where a party is relitigating the same matter before the constitutional court and where the court is called upon to redetermine an issue between the same parties and on the same subject matter. While therefore the principle, is a principle of the law of wide application, therefore it must be sparingly invoked in rights-based litigation and the reason is obvious.

28. It was argued that therefore, while it is correct that the principle *res judicata* is applicable in rights - based litigation, the courts have warned against applying it stringently in such cases where it is likely to cause great injustice by restricting a party from accessing redress where rights have been violated, and infringed.

29. It was further submitted that the prayers in the instant petition, relate to redress for the violation of various rights of the affected judges under the *Constitution* 2010, the *Employment Act*, 2007 and their respective contracts of employment. If the preliminary objection is allowed, the affected judges will have no avenue for redress for the violation of their rights, notwithstanding that they had no opportunity in the earlier petitions to litigate the issues in controversy.

30. By reason of the foregoing premises, the court should decline the preliminary objection and allow the petition to proceed to be heard on merit.

31. On the second proposed issue, the petitioner submitted that as to what constitutes *res judicata* was elaborated in the case of *Independent Electoral & Boundaries Commission v Maina Kiai & others* [2017] eKLR, thus,

“Thus, for the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not disjunctive, but conjunctive terms:

- a. The suit or issue was directly and substantially in issue in the former suit.
- b. That the former suit was between the same parties or parties under whom they or any of them claim.
- c. The issue was heard and finally determined in the former suit.



- d. The court that formally heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”
32. According to the petitioner, the respondents have not satisfied the above stated elements. The petitioners in the earlier matters are different from the petitioner in the current proceedings. The petitioner in the current proceedings is a public spirited Kenyan and a human rights defender who filed the present petition having noted the plight of the various judges who were appointed as judges of the High Court and the Court of Appeal of Kenya under section 62[1] of the repealed Constitution as read together with section 9 of the Judicature Act. The current petition is the only representative of the affected judges and the judgements issued previously cannot therefore be said to have been in rem.
33. The former petitions were initiated by individual judges, in their individual capacities, and they are not parties in the current petition.
34. To bolster the foregoing point, the petitioner, placed reliance on the case of Fatma Tahir Sbeikh [suing as the administrator of the estate of Tabir Sbeikh Said [deceased] v KCB Bank Kenya Limited [2021] eKLR, where the court stated;
- “The matter must be between the same parties or parties under whom they or any of them claim. Since judgements and decrees bind only parties and their privies [those claiming under them] it must be that besides a repeat of issues litigated previously, there must be a repeat of parties to the action. Parties to an action are those whose names are on the record at the moment a decision is passed and it does not matter that such party was not on the record at the commencement of the proceedings. Similarly, if in the course of proceedings but before the decision, a party is struck off the record or dies then he ceases to be a party and a plea of *res judicata* cannot be sustained if the parties are different “
35. The court was urged to note that an employment contract is personal to the employee, creating relations as between the employer and employee specifically. Consequently, it cannot be said that the affected judges have been heard on the issues in dispute, either in the previous decisions, or at all, to make this petition *res judicata*. Their right to be heard was infringed on.
36. It was contended that the issues raised in the current proceedings are substantially different from the issues in the earlier matters. What amounts to “directly and substantially the same” was elaborated in the case of Kibundi v Mukobwa & another [1993] eKLR, thus;
- “..... A matter cannot be said to have been directly and substantially in issue in a suit unless it was alleged by one party and denied or admitted either expressly or by necessary implication by the other..... Whether a matter was directly and substantially in issue in a former suit is to be determined by reference to the pleadings, the issues and judgement.”
37. The petitioner contends that as much as he admits that the circumstances giving rise to the instant petition stem from premature retirement of judges, which was also the basis of the earlier petitions, the issues raised in the current petition are different from those raised in the earlier concluded petitions.
38. The petitioner argues further that the circumstances of the current petition are not similar to those surrounding the earlier petitions. The foundational basis of the instant petition is employment and labour law as opposed to the basis in the earlier decided petitions which were purely constitutional law.
39. It was further argued that the current petition raises novel issues that were not considered in the prior matters on the issue of retirement of judges including;



- a. the protection of employment terms and accrued rights of the affected judges under the employment contracts and whether such terms can be altered or overruled unilaterally without consulting them and obtaining their consent as envisaged under section 10[5] of the [Employment Act](#).
 - b. The right to be heard before alteration of the employment terms for individual judges;
 - c. the infringement of the right to fair labour practices under article 41 of the [Constitution](#) of Kenya, 2010 and the unlawful alteration of the employment terms of the affected judges contrary to the provisions of the [Employment Act](#), 2007;
 - d. Whether the retirement notices issued to some of the affected judges upon attainment of the age seventy [70] years were contrary to their contractual retirement age and therefore infringement of their employment contracts and their rights under the [Employment Act](#);
 - e. Whether the promulgation of the new Constitution can unilaterally alter the terms of an employee's employment contract.
40. In his submissions, the petitioner sought to demonstrate that those issues that the respondents claim to be identical with those that commend themselves for determination in the current petition, aren't. That whereas breach of legitimate expectation was made an issue in the former petitions, the basis thereof was solely in reference to legitimate expectation created by the circular that was issued. In the instant petition, the claim for breach of legitimate expectation is based on the fact that the decision to prematurely retire the affected judges is contrary to the legitimate expectation created by their employment contracts that their retirement age was seventy-four.
41. It was further submitted that whereas the claim regarding discrimination under article 27 of the [Constitution](#) was raised in the earlier petitions, it was raised under circumstances different from those forming the basis for the claim under the instant petition. The basis in the instant matter being the changing of terms of employment of the affected judges solely because a new [Constitution](#) had been promulgated to the detriment of the affected judges, was unfair differential and discriminatory treatment.
42. The petitioner further submitted that in the earlier petition - *Justice Philip K Tunoi and Justice David A. Onyancha* [supra], the issue of unfair labour practices and infringement of article 41 of the [Constitution](#) was only raised in submissions not in pleadings, flowing from this, the court declined to address the issue. The issue of the right to fair labour practices was therefore never resolved as alleged by the respondents.
43. The substantial issue before this court stems from the employment rights and terms of employment of the affected judges which issues have not previously been raised and decided before any other court.
44. The petitioner submitted that in order for a bar of res judicata to be successfully invoked the five elements must be all present before a suit is deemed re judicata. To support this submission, reliance was placed on the case of [Kenya Commercial Bank Limited v Benjoh Amalgamated Limited](#) [2017] eKLR.

Analysis & Determination

45. From the grounds upon which the respondent's preliminary objection is predicated, and the submissions by counsel for the parties herein, I distil broad issues for determination on the preliminary objection, thus;



Is the petitioner's petition herein *res judicata* the earlier proceedings? Is the petition herein an abuse of the court process?

46. Res judicata is a form of estoppel and operates through the application of two doctrines or species; cause of action estoppel [in the American jurisdiction [claim preclusion] and issue estoppel [called by the Americans collateral estoppel or issue exclusion] – Garry D Watson, Duplicative Limitation: Issue estoppel, Abuse of process and the death of mutuality, Canadian Bar Review. Volume 69, number 4 [1990], p623 – 668. Cause of action estoppel denotes that where a legal claim and liabilities of two or more parties have cases, conclusively adjudicated on a prior action, the claims may not be relitigated. On the other hand, issue estoppel is equally a principal of public policy, which however spotlights not on causes of action or claims but on issues. It prohibits re-litigation of issues that a court has rendered itself on in a prior matter [suit]. If an issue has been determined in a prior litigation, issue estoppel applies even if the new litigation involved a different cause of action. The relationship between cause of action estoppel and issue estoppel was aptly described by Diplock LJ in *Thoday v Thoday* [1964] P 181 at page 197-198, thus;

“The particular type of estoppel relied upon by the husband is estoppel per rem judicatam. This is a generic term which in modern law includes two species. The first species, which I will call cause of action estoppel’ is that which prevents a party to an action from asserting or denying, as against the other, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the parties. If the cause of action was determined to exist, ie judgement was given upon it, it is said to be merged in the judgment, or, for those who prefer latin, transit in rem judicatam. If it is determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped *per rem judicatam*. This is simply an application of the rule of public policy expressed in latin maxim, ‘nemo debet bis vexari pro una eadem causa’. In this application ‘causa’ bears the literal meaning.”

47. Cause of action the way this court knows it, and as it should be known by any legal mind, denotes a fact or facts that enable a person to found an action against another. I have carefully considered the earlier petitions herein, and the current petition, I have no doubt that all of them are anchored on similar facts for the reliefs sought against the respondents. The facts revolve around the retirement age of judges post the 2010 *Constitution* and the memorandum by the 1st respondent. The parties did not address the court elaborately on claim estoppel, and how it applies to the instant matter. In *Working Harbour & Dock Board v Trade Indemnity Co Ltd [No 2]* [1938] 2 All ER 101, at pp 105-106 Lord Atkin stated;

“The question will always be open whether the second action is for the same breach or breaches as the first, in which case the ordinary principles governing the plea of res judicata will prevail. In the present case in my opinion, the plaintiffs are suing on precisely the same breaches as those in the first action, and for the same damages, though on different evidence..... I am satisfied that the first action raised issues of all contractors’ breaches and treated, and meant treat, the engineers’ certificate as conclusive proof of both the breaches and the losses arising therefrom Reluctant, however, as a judge may be to fail to give effect to the substantial merits, he has to keep in mind principles established for protection of litigants from oppressive proceedings. There are merits behind the maxim *nemo bis vexari debet pro eadem causa*.”



48. As I see it, the principle articulated by Lord Atkin applies to the facts here. In all the circumstances I come to a conclusion that all the constituent elements of cause of action estoppel are established on the facts.
49. For issue estoppel to apply, and parties are in concurrence in their submissions, certain requirements must be met. Three of the four requirements for application of issue estoppel are uncontroversial and generally accepted in all jurisdictions. The same issue must be involved in the initial and subsequent litigation; the issue must have been actually litigated and determined in the initial matter and the determination must have been necessary to the outcome of the litigation; and the decision on the issue in question must have been final.
50. The 4th requirement is the mutuality/same parties' requirement. The only persons who can take advantage of the estoppel, or bound by it are the parties in the previous proceedings or their privies. The argument for this requirement therefore, being that no other person can take advantage of it or be bound by it if he or she wasn't a party to the previous proceedings. This is the position that the petitioner has taken in affronting the respondent's preliminary objection, and I shall deal with the approach shortly hereinafter.
51. In order for a court to render itself adequately and fairly on the plea of *res judicata*, the court must identify the issues that were there for determination and determined in the initial suit[s] and interrogate whether or not they are directly and substantially in issue in the subsequent suit[s].
52. In the earlier petition of *Kalpana H Rawal v Judicial Service Commission*[supra], the following issues were for determination and were actually determined, as can be discerned from the judgment in regard thereof, thus;
- a. What is the retirement age of judges who were in office prior to the promulgation of the [Constitution](#), 2010?
 - b. Whether the JSC has any mandate or role in the regulation of sittings of judges and whether the advertisement of a vacancy in the office of the Deputy Chief Justice was lawful.
 - c. The nature and function of transitional and consequential provisions in the [Constitution](#).
 - d. Whether the respondent's action violated the petitioner's constitutional right.
53. It is important to state that among the constitutional rights that were alleged to have been violated, and which the court in the above stated petition considered were the right to fair administrative action under article 47 of the [Constitution](#), 2010, right to equality and freedom from discrimination under article 27, right to protection of right to property, under article 40, right to fair labour practices under article 41 [2] [b].
54. In the [Leonard Njagi v Judicial Service Commission & 2 others](#), on the issues the court stated;
- “ 42. Based on the pleadings, submissions and documents availed by the parties, we consider the following to be issues that are the subject of the controversy herein: -
1. What is the effect of the Supreme Court petition No 13A of 2013 on this petition?
 2. The historical background, nature and context of the Kenyan Constitution.



3. The nature and function of the transitional and consequential provisions and principles of interpretation of the Constitution.
4. Whether the JSC's notification of the retirement age violated the petitioner's constitutional rights.
5. Whether the JSC memo of March 27, 2014 was in breach of the petitioner's legitimate expectation to retire him at seventy-four [74] as conveyed by the circular dated May 24, 2011.
6. The role of the JSC in the retirement of judges.
7. What is the retirement age of judges who were in office prior to the promulgation of the 2010 Constitution.
8. Costs."

55. From the judgment in Philip K Tunoi & another v Judicial Service Commission and another [2015], it is not difficult for one to discern that the issues that were determined therein were: -
- a. Whether the respondent's actions violated the petitioner's constitutional rights.
 - b. Whether the JSC memo of March 27, 2014 was in breach of the petitioner's legitimate expectation to retire at the age of seventy-four years as conveyed by the circular dated May 24, 2011.
 - c. What is the nature and function of the transitional and consequential provisions under the Constitution?
 - d. What is the retirement age of judges who were in office prior to the promulgation of the Constitution, 2010?
56. The court has duly considered the judgments in the earlier matters, and the issues that were framed by the court[s] that dealt with them, and get persuaded that there are issues that cut across the matters and that they are as were summed up by the respondent's counsel in the respondent's submissions.
57. The petitioner's counsel has identified issues that he holds flow for determination in the current petition. The court has hereinabove in extenso brought them out. Looking at the issues, the issues that were determined in the earlier petitions, I have no doubt that the issues are substantially similar, that the courts determined the issues with finality, and that determination on the issues influenced the outcome of those matters.
58. By reason of this premise, the distinction that the petitioner's counsel has purported to draw between the issues in the current petition and those in the earlier petitions is with due respect incorrect and that does not change the similarity between the issues.
59. To this extent issue estoppel applies against the petitioner.
60. Having said this, there is one issue that I must address, the 4th controversial requirement of issue estoppel – the mutuality / same parties requirement. The petitioner's counsel has raised it in his submissions and called on this court to find that the parties in the instant petition are not similar to those in the original petitions, or their privies, and consequently find against the preliminary objection.
61. At this point the court then needs to address itself whether the traditional mutuality principle, is rational and sound in policy terms, considering that the object of issue estoppel is to relieve parties



- of the cost and vexation of multiple law suits; conserve judicial resources, and prevent inconsistent decisions and encourage reliance on adjudication – See *Allen v MCurry*, 449 U.S 90 at page 94 [1980].
62. Employing non-mutual issue estoppel brings in the possibility of findings in a single case to have a far-ranging impact by effectively determining cases involving only one of the original parties as is in the instant petition.
63. Comparative jurisprudence reveal that courts have abandoned mutuality by using the device, abuse of court process. In *Hunter v Chief constable of West Midlands* [1982] AC Lord Diplock held: -
- “The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.”
64. Keenly considering the instant petition, in my view, it seeks to impugn the correctness of the earlier decisions. It involves a collateral attack on the correctness of the decisions.
65. In Canada, in the case of *Bank of BC v Singh* [1987], 17 BC LR [2nd] 256 [BCSC] Lyon J.A stated: -
- “I agree..... that a plea of estoppel is not available. However, to permit the statement of claim to proceed would be an abuse of process and that is the principle applicable in considering this doctrine, it seems to me prudent to avoid hard and fast institutionalized rules such as those which attach to the plea of issue estoppel. By encouraging the determination of each case on own facts against this general principle of the plea of abuse, serious prejudice to either party as well as to the proper administration of justice can be best avoided We must be vigilant to ensure that the system does not become unnecessarily clogged with repetitious litigation of the kind here attempted. There should be an end to this litigation. To allow the plaintiff to retry the issue of representation would be a classic example of abuse of process – a waste of time and resources of litigants and the court and an erosion of the principle of finality so crucial to the proper administration of justice.”
66. In *Bomac Construction Limited v Stevenson* [1986], 48, Sask R 62 [CA] the Saskatchewan Court of Appeal stated: -
- “One cannot conclude that the ends of justice are best served by permitting such a situation to prevail. If the plaintiff in separate actions wish to stand their right to a separate trial where the facts and issues and defendants are identical with another claim, they must take the chance of having their claim follow the result in the first action. Similarly, the defendant liability must be taken as having been established in the first action. The rule otherwise would permit an abuse of process through the prospect of a multiplicity of actions, inconsistent results and no fitting end to litigation process.”
67. One sees not any reason why the petitioner herein or the affected judges did not move the court to be enjoined in any of the earlier petitions instead of giving their claim a “wait and see” approach. They had the opportunity to be enjoined, before the earlier petitions were duly adjudicated upon, they failed to seize the opportunity.
68. I am persuaded that non-mutual issue estoppel is applicable against the petitioner, for that is what the justice of this matter requires, considering the whole public policy object that the doctrine of *res*



judicata serves, and that the fact that litigation over the Judges' retirement age is being re-opened more than six [6] years after the initial matters over this central issue were finally concluded.

69. Assuming that my holding on applicability of the non-mutual estoppel is wrong, still the petitioner's petition cannot be saved on account of the mutuality requirement. Its circumstances as hereinabove brought forth, and on the strength of the various decisions this court has cited, the principle of abuse of court process operates against the same neatly. it should be struck out.
70. By reason of the foregoing premises, the respondent's preliminary objection is sustained, the petitioner's petition is struck out. Litigation over the retirement age of judges who were in service pre-2010, should be allowed to rest. Since this was a public interest litigation, each party shall bear its own costs in this petition.

RULING READ, SIGNED AND DELIVERED VIRTUALLY ON THE 29TH SEPTEMBER, 2022.

OCHARO KEBIRA

JUDGE

In presence of

Ms. Kyalo for Murugu for the Petitioner.

Ms. Saina for the Respondent.

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

OCHARO KEBIRA

JUDGE

