



**IN THE REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**

**ELRC. CAUSE NO. PETITION E077 Of 2021**

NYAGWA MESHACK ONINDO.....1<sup>ST</sup>PETITIONER

ASIAGO RICHARD OGONCHO.....2<sup>ND</sup> PETITIONER

MOUKO NELSON MUOGO.....3<sup>RD</sup> PETITIONER

-VERSUS-

TEACHERS SERVICE COMMISSION.....RESPONDENT

**RULING**

1. This ruling relates to the Notice of Preliminary Objection dated 25.5.2021 by which the Respondent seeks for the suit to be struck out with costs for the following grounds:

(a) **The Petition and the application are res judicata**

(b) **The Honourable court lacks jurisdiction to grant the orders sought by dint of section 7 of the Civil Procedure Act.**

(c) **The petition and the application are bad in law, mischievous, vexatious and an abuse of the court process.**

**SUBMISSIONS**

2. Ms. Ngere, learned counsel for the Respondent submitted that the petition herein is res judicata because the same issue of transfer from Migori TTC to primary school was fully litigated in petition 83 of 2018 by this court; that all the prayers sought in the instant suit are similar to the earlier suit save for the prayer for damages and costs which have been left out; that the same parties are involved in the two suits and they are litigating under the same title. Consequently, the counsel contended that the court lacks jurisdiction to entertain the current petition since it is res judicata.

3. For emphasis the counsel relied on various judicial precedents from the Court of Appeal which advance the Respondent's case that the petition herein is res judicata including **Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others[2017]eKLR**, **Kenya Commercial Bank Limited v Benjoh Amalgamated Limited[2017]eKLR**, **Mburu Kinyua v Gachini Tutu[1978]eKLR** and **John Florence Maritime Services v Conken Cargo Forwarders Limited[2015]eKLR** where the courts discussed and upheld the doctrine of res judicata and its purpose in administration of justice.

4. The Respondent further relied on **Pop-in (Kenya) Ltd & 3 Others v Habib Bank AG Zurich [1990]eKLR** to emphasise that it is an abuse of court process to relitigate matters which are res judicata. Therefore, she urged the court to strike out the petition for being res judicata and also an abuse of court process.

5. Mr. Ochiel, learned counsel for the petitioners opposed the Preliminary Objection for being fundamentally frivolous since the instant petition relates to a demotion done on 10.5.2021 which is distinct from the cause of the demotion done in August 2018 which was litigated in the earlier petition. He contended that the letters dated 10.5.2021 advised the Petitioners to treat the letter dated 28.8.20`8 as cancelled and as such the new letter constituted a new cause of action.

6. For emphasis he relied on **Attorney General v Andrew Maina Githinji[2016]eKLR** where the Court of Appeal defined '**cause of action**' as a factual situation, the existence of which entitled

party to obtain a remedy against the other. He further relied on **John Florence case**, *supra* where the Court of Appeal cautioned that res judicata, ‘*should only be involved in constitutional litigation in the clearest of the cases*’ because ‘*rights keep on evolving, mutating and assuming multifaceted dimensions.*’

7. He maintained that despite the earlier decision, the Respondent has once again conducted itself unlawfully and contended that the objection should be rejected because it is based on a narrow meaning of res judicata. He further contended that in the **Maina Kiai case**, *supra* the court held that for res judicata situation to occur, all the elements for the doctrine must be present.

8. In a brief rejoinder, Ms. Ngere submitted that in paragraph 49 of the judgment in the previous petition the court held that there was reasonable justification for the transfer of the Petitioners to primary schools and declined to quash the decision. She further submitted that the impugned letters herein informed the Petitioners the reason for transfer. Finally, she reiterated that the suit herein is res judicata.

## **DETERMINATION**

9. There is no dispute that the objection by the Respondent raises a pure point of law. In **John Florence case** *supra*, the Court of Appeal held that the issue of res judicata can be raised by way of Preliminary Objection. Consequently, the only issue for determination is whether the instant petition is res judicata.

10. The doctrine of res judicata in Kenya is anchored on section 7 of the Civil Procedure Act which provides that:

***“No court shall try any suit or issue which the matter directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”***

11. The doctrine has been the subject of decisions by courts both locally and abroad as submitted above. In **Kenya Commercial Bank Limited**, *supra* the Court of Appeal and held that:

***“The elements of res judicata have been held to be conjunctive rather than disjunctive. As such, the elements reproduced below must all be present before a suit or an issue is deemed res judicata on account of a former suit:***

***(a) The suit or issue was directly and substantially in issue in the former suit.***

***(b) The former suit was between the same parties or parties under whom they or any of them claim.***

***(c) That parties were litigating under the same title.***

***(d) The issue was heard and finally determined in the former suit.***

***(e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”***

12. The purpose of the doctrine has also been the subject of court decision as submitted by counsel above. In **Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others**[2017]eKLR, the Court of Appeal held that:

***“The rule or doctrine of res judicata serves the statutory 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 waste of time and resources in an endless round of litigation at the behest of 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 rests in the public interest for swift, sure and certain justice.”***

13. In view of the foregoing meaning and justification of the bar of res judicata, I now turn to answer the question whether the instant suit or the issues raised are res judicata vis -a-vis the earlier Petition no. 83 of 2018 Nyagwa Meshack Omindo, Asiago Richard Ogoncho & Muoko Nelson Muogo v Teachers Service Commission, Maryclare Indire, Chief Principle Migori Teachers Training College and TSC County Director Migori County.

14. I have carefully considered the submissions by both counsel for the Petitioners and the Respondent. I have also considered the pleadings in the Petition No. 83 of 2018 and in the instant petition. I have further considered the judgment rendered on 30.7.2020 in the former petition. The dispute in issue in the former petition was transferring the Petitioners from Migori Teachers Training College to undisclosed primary schools as primary school teachers despite their qualifications as graduate teachers some holding Masters degrees and pursuing PHD.

15. In the said case they alleged that the action amounted to demotion and a violation of their rights and freedoms as enshrined in Article 27,28,29,41 and 47 of the Constitution. Consequently, they sought declaration that the said rights and freedoms were violated, an order of certiorari to quash the said demotion or transfer from Migori Teachers Training College to unnamed primary schools; compensatory damages for violation of their fundamental rights and freedoms and costs.

16. After hearing the suit, this court rendered its judgment on 30.7.2020 in which the court found that the Respondent had a justifiable reason to transfer the Petitioners from Migori Teachers Training College to primary schools to do the duties of primary school teachers. As a result, the court declined to quash the impugned decision. However, the court faulted the procedure followed in carrying out the said decision and awarded the Petitioners damages. According to a copy of the Notice of Appeal annexed to the Replying Affidavit by the Respondent herein, the Petitioners were dissatisfied with the said judgment and preferred an appeal against the same.

17. In the present petition, the same Petitioners have sued the Teachers Service commission alone for again demoting them without prior hearing from the position of lecturers by transferring them to teach in unnamed primary schools in far-away counties. The demotion was allegedly done by a letter dated 10.5.2021 and the Petitioners contend that their right to fair labour practices and fair administrative action under Article 41 and 47 of the Constitution have again been violated. Consequently, they pray for declaration that their rights under Article 41 and 47 of the Constitution have been violated; an order of certiorari to quash the Respondent's decision dated 10.5.2021 to demote them from Migori TTC to primary schools, and damages for violation of Petitioners rights.

18. Having considered the pleadings in this petition and the previous Petition No. 83 of 2018, it is clear that:

(a) The same parties are involved save that in the present petition two respondents were dropped

(b) The dispute is the same in the two suits namely demotion through transfer from Migori TTC to teach in primary schools in violation of their right under Article 41 and 47 of the Constitution

(c) The parties are suing under the same title.

(d) The reliefs sought are the same save in the instant suit the prayer for costs has been dropped.

(e) The issues involved were heard and fully determined on merits by this court and they are now the subject of appeal to the Court of Appeal as per the Notice of Appeal exhibited by the Respondent in the reply to the instant petition.

(f) There is no dispute that this court which determined the dispute by the judgment rendered on 30.7.2020 was competent and is still competent to determine the instant petition and the issues raised therein.

19. The said judgment was clear that the decision to transfer or demote the Petitioners from the position of lecturer back to primary school teacher was justified and declined to quash the same. That decision remains as it has not been reversed through review or appeal. Consequently, it cannot be relitigated afresh since it is now res judicata.

20. Likewise, the reliefs sought in the instant petition were considered in the previous Petition no. 83 of 2018 and were either granted or denied and reasons therefor given. The same are therefore, also res judicata and cannot be raised for a second determination herein because they relate directly or indirectly to the decision to demote and transfer the Petitioners from the position of lecturer at Migori TTC to primary teacher contained in the letters dated 13.7.2018.

21. As a by the way, I wish to observe that the letters dated 10.5.2021 were merely re-directing the transfer of the Petitioners as earlier directed in the earlier letters dated 13.7.2018 to other counties namely Busia, Kakamega and Nandi. Consequently, if they felt aggrieved by the said action that did not entitle them to bring the old dispute back for fresh litigation by the same court. They are presumed to know better what to do in the circumstances.

22. Having found that the petition herein is res-judicata, I uphold the Preliminary Objection by the Respondent and proceed to. strike out the petition and the application dated 18.3.2021 with costs.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 17TH DAY OF JUNE, 2021.**

**ONESMUS N. MAKAU**

**JUDGE**

**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 15<sup>th</sup> April 2020, this Ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**ONESMUS N. MAKAU**

**JUDGE**