



Republic v Board of Directors National Transport Safety Authority; Road Safety Association of Kenya Suing through David Kiarie Chairman (Exparte Applicant) (Judicial Review Application E163 of 2023) [2025] KEHC 1081 (KLR) (Judicial Review) (27 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1081 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW APPLICATION E163 OF 2023
JM CHIGITI, J
FEBRUARY 27, 2025**

BETWEEN

REPUBLIC APPLICANT

AND

**THE BOARD OF DIRECTORS NATIONAL TRANSPORT SAFETY
AUTHORITY RESPONDENT**

AND

**ROAD SAFETY ASSOCIATION OF KENYA SUING THROUGH DAVID KIARIE
CHAIRMAN EXPARTE APPLICANT**

RULING

Brief Background

1. The application that is before me for determination is the Respondent’s Notice of Motion dated 4th June 2024, where it is seeking the following orders:
 - 1) The Honourable Court be pleased to stay further proceedings in this matter pending the hearing and determination of this Application.
 - 2) The Honourable Court be pleased to strike out and dismiss the suit/Application dated 19th October 2023 and terminate the judicial review proceedings herein.
 - 3) Costs of the Application
2. It is the Applicant’s case that the suit and application as filed is res judicata as the issues raised therein have been dealt with exhaustively and settled in the judgment delivered on 19th October 2023 in



Kiambu High Court Constitutional Petition No. E021 of 2023: Road Safety Association of Kenya suing through David Kiarie, Chairman vs George Njao & The Board of Directors National Transport and Safety Authority.

3. It is also the Applicant's case that the matter as filed is sub-judice as there is a similar active suit in the High Court Constitutional and Human Rights Division High Court Constitutional Petition No. E041 OF 2023: Road Safety Association of Kenya Versus The National Transport and Safety Authority & 10 Others.
4. The Applicant contends that all the issues raised in the matter herein are res-judicata as the same were also raised and determined in the Nairobi ELRC Petition No. E002 of 2023: Edwin Oduor Were vs Board of Directors National Transport and Safety Authority & 2 Others.
5. The Applicant also argues that the suit is fatally defective for want of a proper Respondent since the named Respondent is neither a body corporate nor a juridical person capable of being sued in its own name.
6. According to them the suit should be struck out as case and the Application as filed is frivolous, vexatious and an utter abuse of the process of this Honourable Court.
7. The Respondent filed written submissions dated 13th September, 2024 in support of the notice of motion.
8. It is submitted that res judicata does not only bar the issues that were directly raised by the Petitioners in Petition No. E021 of 2023 but also all those issues which the Petitioner ought to have raised in canvassing the Petition.
9. In *Okiya Omtatah Okoiti v Communications Authority of Kenya & 14 others*, Richard Kuloba in his book, *Judicial Hints on Civil Procedure*, 2nd Ed was cited with approval as follows in that regard:

“The plea of res judicata applies not only to points upon which the first Court was actually required to adjudicate but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time”
10. It is also submitted that it is trite law that for purposes of fair administration of justice and the promotion of the rule of law a party needs not be vexed twice over the same matter as provided under Section 7 of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya enshrine the doctrine of res judicata, as follows: -

“No Court shall try any suite or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suite 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 raised, and has been heard and finally decided by such court.”
11. It is posited that the statutory provision of res judicata was interpreted by the Supreme Court in the case of *John Florence Maritime Services Limited & Another v Cabinet Secretary Transport Infrastructure & 3 Others* (Petition 17 of 2015) 2021 KESC 39/KLR where the court held that the following elements must be demonstrated for res judicata to be proved:

“a) a) There is a former judgment or order which is final;



- b) The judgment or order was on merit;
- c) The Judgment 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 the second action identical parties, subject matter and cause of action.”

12. It is submitted that suit filed by the Applicant satisfies all the four elements of res judicata as outlined by the Supreme Court and as demonstrated hereunder:

- a) There is a former Judgment rendered by Justice P. Mulwa, signed at Kiambu Law Courts, and dated 19th October, 2023.
- b) The abovementioned Judgment by Justice P. Mulwa was on merit and dispensed with the entirety of Petition No. E021 o.(2023).
- c) The Judgment rendered by Justice P. Mulwa was rendered by a competent court legally vested with the jurisdiction to not only entertain but also determine the matter.
- d) The Parties in the already determined Petition No. E021 of 2023 and the Application herein are identical. The subject matter and the Cause of action are also similar both suits, to wit, relate to the tenure of the Respondent’s Director General. The same issue was determined by Justice Mulwa as follows: -

I agree with the Respondent and the Interested Party that the entire petition has been overtaken by events since, as it stands now, the Respondent has since resumed office. It is worthy to note that the Respondent did not appoint himself into office but was recalled vide letter dated 4th May, 2023.”

13. The applicant argues that it is not proper for parties to have piecemeal litigation and that a party ought to litigate in one suit all matters that belong to that subject in controversy and it is not sufficient therefore for the Petitioner to allege now that the issues he has raised for interpretation were not covered by the previous suit more so when the Petitioners participated in those proceedings and was instrumental in framing the issues for determination.

14. Reliance is placed in the case *Speaker of the National Assembly & Another v Senate & 12 others (Civil Appeal E084 of 2021)* [2021] KECA 282(eKLR) thus:

“The philosophy behind the principle of res judicata is that there has to be finality; litigation must come to an end. It is a rule to counter the all-too human propensity to keep trying until something gives. It is meant to provide rest and disclosure, for endless litigation and agitation does little more than vex and add costs. A successful litigant must reap the fruits of his success and the unsuccessful one must let go.”

15. On the issue of sub judice, they invoke Section 6 of the *Civil Procedure Act* which states 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.”



16. It is posited that the import of the provision of Section 6 of the Civil Procedure Act was expounded in the case of Civil Appeal No. 83 of 2017 Joel Kenduiywo vs District Criminal Investigation Officer Nandi & 4 Others (2019) eKLR where the court held as follows: -

“Section 6 of the Civil Procedure Act is meant to prevent abuse of the court of process where parallel proceedings are held before two different courts with concurrent jurisdictions or before the same court at different times. This is to obviate a situation where two courts of concurrent jurisdiction arrive at different decisions on the same facts, evidence and cause of action.”

17. Reliance is also placed in the case of Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) where the court had occasion to pronounce itself on the subject of sub-judice. It aptly stated:

“(67) The term 'sub-Judice' is defined in Black's Law Dictionary 9th Edition as: "Before the Court or Judge for determination." The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-Judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives”

18. The Ex- Parte Applicant in opposition to the Respondent's Notice of Motion dated 4th June, 2024 filed a Replying Affidavit by David Kiarie sworn on 6th June, 2024 and written submissions dated 23rd September, 2024.

19. They argue that on the 24th April, 2023 the Respondent sent the Director General to a thirty (30) days compulsory leave, however the Director General did not proceed for leave which necessitated their Petition in Kiambu High Court, Petition E163 of 2023 seeking the following orders:

- i. A declaration that the Respondent conduct of re-appointing himself without the reinstatement by the Board and pending investigations is unconstitutional and is contrary to Article 10(2), 73, 75, and 232 of the Constitution of Kenya, 2010.
- ii. An order of prohibition to remove from this Honourable court and prohibit the Respondent from resuming his term as Director General National Transport Safety Authority until that period when the Board will reinstate and/or clear him.
- iii. Costs of the petition.
- iv. Any other relief this Honourable Court may deem fit to grant.



20. Thereafter, on the 4th May, 2023, ten (10) days after the said suspension, the Respondent reinstated the Director General without conducting investigations as earlier promised to the Public and by extension the Ex-parte Applicant.
21. According to them, the Kiambu Petition was purely to prevent resumption of office by the Director General until he was cleared by the Respondent and not challenging the decision of the Respondent dated 4th May, 2023 which their instant suit for Judicial review application seeks to stay.
22. They contend that the decision of the board was rendered after filing of the Kiambu Petition hence it is misleading for them to cite res judicata doctrine.
23. To them the Kiambu Petition E163 of 2023 is different from the instant Judicial Review Application as the Kiambu Petition sought to bar the Director General from resuming office after the suspension while the latter is Challenging the board's decision dated 4th May, 2023.
24. It is their argument that Respondent's decision dated 4th May, 2023 reinstating the Director General offends article 10 of the Constitution on National Values and Principles of Governance inter alia, Accountability, transparency, Integrity and Respect to the Rule of Law hence the decision is vitiated by illegality and ought to be quashed.
25. It is posited that the Nairobi ELRC Petition No. E002 of 2023 Edwin Oduor Were =vs= Board Of Directors Ntsa & 2 Others was filed on 5th January, 2023 by Edwin Were under his constitutional right to challenge the term of the Director General and not the Board's decision to recall him after being sent on annual leave. The petition was filed way before the current subject matter arose thus there shall be no conflicting orders from the Court as the decision of the Board made on the 4th of May, 2023 has never been challenged in Court.
26. It is the Ex -Parte Applicant submission that The doctrine of res judicata finds its genesis in Section 7 of the Civil Procedure Act, Cap. 21 of the Laws of Kenya which provides that: -

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been 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”
27. According to the Ex parte Applicant, the doctrine should meet the following criteria
 - a. There is a former Judgment or order which was final;
 - b. The Judgment or order was on merit;
 - c. The Judgment 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 the second action identical parties, subject matter and cause of action.
28. They contend that the subject matter in the Kiambu Petition and the suit filed before this honourable court are totally different. The only commonality is that the Exparte Applicant is also the petitioner in the Kiambu Petition.
29. The Kiambu Petition was also seeking different prayers were as follows:



- i. A declaration that the Respondent conduct of re-appointing himself without the reinstatement by the Board and pending investigations is unconstitutional and is contrary to Article 10(2), 73, 75, and 232 of the Constitution of Kenya, 2010.
 - ii. An order of prohibition to remove from this Honourable court and prohibit the Respondent from resuming his term as Director General National Transport Safety Authority until that period when the Board will reinstate and/or clear him.
 - iii. Costs of the petition.
30. Reliance is placed in the case of *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others* [2021] eKLR wherein the Supreme Court disagreed with the Court of Appeal and found that the doctrine of res judicata was not applicable in the matter which was similar to the instant JR Application. The Court held that: -
- “From the face of it, it would appear that the issues in the present suit and JR 130 of 2011 are directly and substantially the same. However, the Appellants herein predicated their petition on inter alia grounds that the bilateral agreement should have been approved by Parliament in order to form party of Kenyan law and in failing to do so, the Respondents contravened Article 2.”
31. Reliance is also placed in the case of *Okiya Omtatah Okoiti & Another v. Attorney General & 6 Others*, High Court Const. and Human Rights Division, Petition No. 593 of 2013 [2014] eKLR, where Lenaola J. (at paragraph 64) thus stated:
- “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 law of wide application, therefore it must be sparingly invoked in rights- based litigation and the reason is obvious.”
32. In addition to their replying affidavit, the Ex- Parte Applicant also filed Grounds of opposition dated 6th June, 2024. They contended that:
1. The application is frivolous, vexatious and an abuse of the Court process.
 2. The application lacks merit and offends the principles of natural justice as it has already been settled vide this Honourable Court Ruling delivered on the 29th April, 2024.
 3. The Orders sought in the Application are similar with the Preliminary Objection dated 28th November, 2023 which this Honourable Court delivered its ruling on.
 4. The Applicant is wasting this Honourable Court’s Judicial time in filing the Instant application which mirrors its P.O dated 28th November, 2023 and the same ought to be dismissed summarily.
33. The Applicant prays that the Court dismisses with costs the Respondent’s Notice of Motion dated 4th June, 2024 and determine the matters raised on the Judicial Review Application on merit.



Analysis and determination;

34. The following issues crystalize for determination:
- i. Whether the suit as filed is Res Judicata.
 - ii. Whether the suit as files is sub judice.
 - iii. Whether the Respondent has been properly sued.
 - iv. Who bears costs.
35. Through a Notice of Preliminary of Objection dated 28th November 2023 the Applicant herein raised issue of jurisdiction of this Court as well as an issue of res judicata. The same was dismissed by this court and nothing stopped the Applicant from filling the instant Application.
36. Section 7 of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya enshrine the doctrine or re judicata, as follows: -
- “No Court shall try any suite or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suite 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 raised, and has been heard and finally decided by such court.”
37. The Supreme Court in the case of John Florence Maritime Services Limited & Another v Cabinet Secretary Transport 7 Infrastructuree & 3 Others (Petition 17 of 2015) 2021 KESC 39/KLR where the court held that the following elements must be demonstrated for res judicata to be proved:
- “ a) a) There is a former judgment or order which is final;
- b) The judgment or order was on merit;
- c) The Judgment 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 the second action identical parties, subject matter and cause of action.”
38. Upon perusing the pleadings in the different suits that have been refered to above, this court is satisfied that the parties are not the same in the different suits.
39. For instance, the Respondent in the petition number E021 of 2023 is one of George Njao. He is not a party to the instant suit.
40. The petitioner in a petition number E02 of 2023 is Edwin Were. This person is not a party to the instant suit.
41. Case No.E 41 of 2023 has 12 Respondents. Nine of these Respondents are not parties to the instant suit.
42. The Applicant has not met the threshold of what amounts to res judicata or subjudice in the circumstances.



Determination;

43. The applicant has failed to prove that it is entitled to the orders sought and the same lacks merit.

Order:

44. The Application dated 4th June 2024 is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF FEBRUARY 2025.

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J. M. CHIGITI (SC)

JUDGE

