



**Echom v Attorney General & another (Constitutional Petition E238 of 2024)
[2025] KEHC 12275 (KLR) (Constitutional and Human Rights) (12 August 2025) (Judgment)**

Neutral citation: [2025] KEHC 12275 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E238 OF 2024**

AB MWAMUYE, J

AUGUST 12, 2025

**IN THE MATTER OF ARTICLES 2,10, 12, 19, 20, 21, 22, 23, 27, 38, 47, 159,
165, 171, 232, 249, 258 AND 259 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF THE INTERPRETATION OF
ARTICLE 171(2)(D) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF THE ELECTION RULES OF THE
KENYA MAGISTRATES AND JUDGES ASSOCIATION**

AND

**IN THE MATTER OF THE JUDGMENT IN NAIROBI HIGH
COURT CONSTITUTIONAL PETITION NO. 442 OF 2015**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS
AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

BETWEEN

DIANA ASIRO ECHOM PETITIONER

AND

THE HONOURABLE ATTORNEY GENERAL 1ST RESPONDENT

**HON. JUSTICE STEPHEN RADIDO, HON. TOM OLANDO, HON. RHODA
YATOR, HON. HASSAN OMAR DAFAR, HON. JUSTICE EDWARD
MURIITHI & HON. ZACHARIA KIONGO (SUED IN THEIR CAPACITY**



JUDGMENT

1. The Petitioner approached this court vide a Petition dated 29th April 2024 seeking the following orders:
 - i. A declaration that Article 171(2)(d) of *the Constitution* is not a bar to either gender from the Judges of the High Court and from the Magistrate to contest and be elected as representatives of the Judges and Magistrates in the Judicial Service Commission, respectively, at any given time.
 - ii. A declaration that the High Court Judges and the Magistrates being distinct cadres with distinct constituencies, their respective representatives to the Judicial Service Commission do not depend on the gender of either cadre that is already serving in the Commission and/or at all.
 - iii. A declaration that Rules 4.2 and 4.3 of the 2nd Respondent's Election Rules violates Articles 10(2)(a) and (b), 27(1), (2), (3) and (5), 38(2)(a) and (3)(c) of *the Constitution* to the extent that it excludes the nomination and election of the representatives of Judges of the High Court and the Magistrates to the Judicial Service Commission based on gender, hence null and void.
2. The Petition was accompanied by a Notice of Motion Application dated 29th April 2024 and an affidavit in support of even date sworn by Diana Asiro Echom, an Advocate and resident of Kiambu County on the grounds that the 2nd Respondent was set to conduct election of the representative of the High Court Judges in the Judicial Service Commission (JSC) on the 24th May 2024, pending the expiry of the term of their representative on 15th May, 2024.
3. She avers that the textual interpretation of Article 171(2)(d) of *the Constitution* pegs gender representation of the judges on gender of the current representative of the magistrate and vice versa despite the decision by the High Court decision in Nairobi Constitutional Petition No. 442 of 2015 – Kevin Turunga Ithagi vs Hon. Justice Hedwig Ong'undi & Others which held that the Magistracy and the Judges are distinct cadres with distinct constituencies.
4. The Petitioner contends that unless otherwise broadly and programmatically interpreted, the disharmony created by Article 171(2)(d) of *the Constitution* upon the expiry of the inaugural JSC as provided for in paragraph 20 of the 6th Schedule to *the Constitution* has the net effect of permanently locking out female judges and male magistrates from forever contesting and being elected by their respective constituencies from sitting in the JSC.
5. The Petitioner further contends that though logically impossible, Rule 4.3 of the Election Rules of the 2nd Respondent only permits the swapping of the gender representations in the JSC in the event that the terms of both the Judges' and magistrates' representatives in the JSC comes to an end at the same time, a scenario that is nothing but a fallacy.
6. In response and in opposition to the Petition, the 1st Respondent filed grounds of opposition dated 22nd October 2024 where they averred that the Petitioners have not met the threshold under Article 165(4) for this Petition to be referred to the Chief Justice for empanelment of uneven number of judges to make judicial pronouncements.
7. They further aver that the issues addressed in the present petition were addressed in Constitutional Petition E226 of 2024 thus Res judicata.



8. The 2nd Respondent in response to the Petition filed a Replying Affidavit sworn by Daniel Sepu Mayabi, the Executive Director of the Kenya Magistrates Association dated 31st May 2024 to which he avers that the Petitioner admits that *the Constitution* expressly requires persons elected to the JSC under Article 171(2)(d) of *the Constitution* to be of the opposite gender and different cadre.
9. He further avers that the issues raised in the instant Petition were dealt with in the High Court case at Nairobi, Constitutional Petition No. E226 of 2024; Hon. Lady Justice Nancy Jacqueline Njuhi Kamau vs Kenya Magistrates and Judges Association thus the instant petition is fatally defective in that it offends the express provisions of Section 7 of the *Civil Procedure Act*, based on the doctrine of res judicata.
10. The Petition was canvassed by way of written submissions, and in compliance both parties filed and served their submissions.

Petitioner's Submissions

11. The Petitioner filed written submissions dated 6th January 2024 where she submitted that the doctrine of res judicata bars the same parties from relitigating over an issue which has already been settled on merits as between them by a court of competent jurisdiction. Since the Petitioner was not a party to and neither was she privy to the parties or proceedings in Nairobi Constitutional Petition No. E226 of 2024; Hon. Lady Justice Nancy Jacqueline Njuhi Kamau vs Kenya Magistrates and Judges Association, the present petition cannot be deemed as res judicata. Reliance was placed in the case of Mumira v Attorney General (Constitutional Petition No. E007 of 2020) [2022]KESC 271 (KLR) and John Florence Maritime Services Limited & Another v Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015) [2021] KESC 39 KLR.
12. The Petitioner contends that Article 171(2)(d) in itself is not discriminatory but provides for balancing and/or equality to ensure both genders are represented however, the 2nd Respondent's restrictive interpretation of this provision has resulted in an absurdity where male judges are to represent the judge's cadre and female judges are barred from vying for these positions based on their gender and vice versa is true to the magistrate's cadre. The Petitioner relied on the case of Leina Konchellah & Others v Chief Justice and President of the Supreme Court of Kenya & Others; Speaker of the National Assembly and Others (Interested Parties) [2021]eKLR which held that the Court should not interpret *the Constitution* in a manner that creates an absurd result or goes contrary to other provisions that touch on similar issues.
13. She also contends that Rule 4.2 and 4.3 of the 2nd Respondent's Election Rules are discriminatory and unconstitutional by limiting and/or restricting the democratic rights of judges and magistrates to elect a representative of their choice by purporting to direct which gender shall be elected when.

1st Respondent's Submissions

14. The 1st Respondent filed written submissions dated 3rd March 2025 and submitted that the doctrine of res judicata prevents a litigant from returning to court to claim further reliefs not claimed in the earlier action and this court having determined similar issues in Petition E226 OF 2024, it is functus officio. Reliance was placed on Section 7 of the *Civil Procedure Act* Cap 21 Laws of Kenya and the cases of Re Estate of Riungu Nkuuri (Deceased) [2021]eKLR, Wamanda and 2 others vs Egoli Estates Limited & another (Environment and Land Case Civil Suit 103 of 2020) [2024] KEELC 1416 (KLR) (14 March 2024) (Ruling), Maumbwa & 3 others v Kisemei (Civil Appeal E009 of 2021) [2022] KEHC 10416 (KLR) (26 May 2022).



15. The 1st Respondent contends that the Petitioner has failed to demonstrate how the 1st Respondent has violated his rights and freedoms as per the threshold set in the Anarita Karimi Njeru (1976-1980) 1 KLR 1272 case. They also relied on the case of Kulraj Singh Bhangra v Director General, Kenya Citizens and Foreign Nationals Management Service [2014] eKLR and Daniel Chacha Muriri v Attorney General [2012] eKLR .
16. They further contend that the constitutional limitation of a right does not accord the person whose rights have been limited the right to challenge the validity of constitutional provisions limiting such rights. Moreover, the Petitioner’s grievance can only be resolved by an amendment of *the Constitution* as envisaged under Articles 255, 256 and 257 of *the Constitution* of Kenya, 2010.
17. They further submitted that it is upon the party who alleges discrimination to demonstrate that indeed there was unreasonable differential treatment accorded to him or her to amount to real discrimination. The court will then determine whether the action complained of is discriminatory and applies an objective test to see whether there is reasonable justification or rationality in the action.

2nd Respondent’s Submissions

18. The 2nd Respondent filed written submissions dated 12th March 2025, where they submitted that the mere changing of one party in a suit does not negate the doctrine of res judicata in constitutional litigation. In addition, they stated that the doctrine of res judicata applies to constitutional petitions such as the one present before court and should therefore be dismissed. They relied on Supreme court cases of John Florence Maritime Services Limited & Another v Cabinet Secretary Transport and Infrastructure & 3 Others (Petition 17 of 2015) 2021 eKLR and Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another Motion No 42 of 2014 [2016] eKLR among others.

Analysis And Determination

19. Having carefully considered the Petition, the responses as well as parties rival submissions, and the issues arising thereto can be reduced to the following: -

a. Whether the petition herein is fatally defective for being res judicata

20. The doctrine of Res judicata is embodied or anchored on Section 7 of the *Civil Procedure Act*, where it provides as follows: -

“No court shall try any suit or issue in which the matter directly and subsequently in issue has been directly and subsequently in issue in a former suit between the same 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.”

21. Hence, in John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment), the Supreme Court held:

“ 59. For res judicata to be invoked in a civil matter the following elements must be demonstrated:

- 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.

22. The Supreme Court further stated thus in respect of the applicability of res judicata to constitutional petitions:

“ 81. We reaffirm our position as in the Muiri Coffee case that the doctrine of res judicata is based on the principle of finality which is a matter of public policy. The principle of finality is one of the pillars upon which our judicial system is founded and the doctrine of res judicata prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruits for one party, and liability for another party, conclusively. To further bolster our position, we borrow from the decision from India in Karam Chand another v Union of India and others on 24 April, 2014 where it was restated the principles upon which the doctrine of res judicata is founded as follows:

29. ...it is clear that the rule of res judicata is mandatory in its application and should be invoked in the interest of public policy and finality. The matters which have actually been decided would also apply to the matters which have been impliedly and constructively decided by the court. These principles are to be applied to preserve the doctrine of finality rather than frustrate the same. The doctrine of res judicata is the combined effort of public policy so as to prevent repeated taxing of a person to litigation. It is primarily founded on the following three maxims:

- (1) nemo debet bis vexari pro una et eadem causa: no man should be vexed twice for the same cause.
- (2) interest republicae ut sit finis litium: it is in the interest of the state that there should be an end to a litigation; and
- (3) res judicata pro veritate occipitur: a judicial decision must be accepted as correct.

...The doctrine of res judicata is conceived not only in the larger public interest which requires that all litigation must sooner rather than later come to an end but is also founded on equity, justice and good conscience.”

23. 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 former suit was between the same parties or parties under whom they or any of them claim.
- c. Those 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.
24. The same elements were applied in the decision in *Uhuru Highway Development Ltd v Central Bank of Kenya* [1999] eKLR which rendered the elements as follows:
- “(a) the former judgment or order must be final;
 - (b) the judgment or order must be on merits;
 - (c) it must have been 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 identity of parties, of subject matter and cause of action.”
25. 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 protection against wastage of time and resources in an endless round of litigation to obtain a favourable outcome. The foundations of *res judicata* thus rests on the public interest for swift, sure and certain justice.
26. I am guided by the decision of *William Koross v Hezekiah Kiptoo Komen & 4 Others* [2015] which stated 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 closure, for endless litigation and agitation does little more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go.
- Speaking for the bench on the principles that underlie *res judicata*, Y.V.Chandrachud J in the Indian Supreme Court case of *Lal Chand v Radha Kishan*, AIR 1977 SC 789 stated, and we agree;
- “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 which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue.”

27. Section 7 of the *Civil Procedure Act* is followed by a number of explanations, among them no. 6, whose terms are that where persons litigate bona fide in respect of a private right claimed in common for themselves and others, all persons interested in such right shall be deemed to be claimed under the person so litigating.

28. In the instant petition, the plea of *res judicata* was pleaded and it is common ground that the dispute in Constitutional Petition No. E226 of 2024; Hon. Lady Justice Nancy Jacqueline Njuhi Kamau vs Kenya Magistrates and Judges Association involved the 2nd Respondent and a different party but had similar issues to the ones in the instant petition.



29. It is also not in dispute that the matter was determined and the High Court gave the following orders:
- a. That Article 171 (2) (d) is clear, does not leave room for innovative interpretation and cannot be read so as to read the possibility of two women or two men being elected by the 2nd Respondent to represent judges and magistrates in the JSC at the same time;
 - b. That the application of Article 171(2)(d) of *the Constitution* does not amount to differential treatment, as there is reasonable justification and rationality as dictated by *the Constitution*.
 - c. That Rule 4.2 of the Respondent’s Election Rules is in conformity with Article 171(2)(d) of *the Constitution* because it only gives effect to the Constitutional requirement.
 - d. On the issue of reliance of High Court Constitutional Petition 442 of 2015 where it was held that the magistracy and judges are distinct cadres with distinct constituencies this court noted that the matter is on appeal.
30. The Petitioner contends that the instant Petition is not res judicata reason being that the parties are different. However, I am guided by explanation no. 6 to Section 7 of the *Civil Procedure Act*. By dint of the provision, the Petitioner and all other persons ought to have raised all the issues in the Petition in the earlier suit, even if it meant applying to amend the suit for that purpose.
31. In *Henderson v Henderson (1843-60) All ER 378*, the Court of Chancery stated thus, regarding the need for parties to bring forward their entire claims:
- “... Where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect to a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgement, 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.”
32. From the foregoing, I agree with the Respondents and I find that the judgment in Petition No. E226 of 2024 is binding and it determined the same cause of action as the one in the present Petition; despite the Petitioner not being the same as the one in the former Petition. In the circumstances, I find that the instant Petition is res judicata.
33. From my findings above, my final orders are that:
- a. The Petition is hereby dismissed
 - b. In the interests of justice, each party shall bear its own costs
34. Orders accordingly. File closed accordingly.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 12TH DAY OF AUGUST, 2025.

.....

BAHATI MWAMUYE

JUDGE



In the presence of: -

Counsel for the Petitioner -Mr Bukowa h/b Mr Khaemba

Counsel for the 1st Respondent – No appearance

Counsel for the 2nd Respondent - M r Wambola h/b Mr Ongoya

Court Assistant -Ms Neema

