



**Oloo v County Government of Homa Bay & 4 others (Constitutional
Petition E001 of 2024) [2024] KEHC 17056 (KLR) (30 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 17056 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CONSTITUTIONAL PETITION E001 OF 2024**

KW KIARIE, J

APRIL 30, 2024

BETWEEN

EVANCE OTIENO OLOO PETITIONER

AND

COUNTY GOVERNMENT OF HOMA BAY 1ST RESPONDENT

THE GOVERNOR HOMA BAY COUNTY 2ND RESPONDENT

COUNTY ASSEMBLY OF HOMA BAY 3RD RESPONDENT

**COUNTY EXECUTIVE MEMBER FOR FINANCE & ECONOMIC
PLANNING 4TH RESPONDENT**

CLERK COUNTY ASSEMBLY OF HOMA BAY 5TH RESPONDENT

RULING

1. The 1st, 2nd and 4th respondents herein filed a Notice of Preliminary Objection dated the 6th day of March 2024. It was based on the following grounds:
 - a. That the matter offends the doctrine of exhaustion and, therefore, should be dismissed.
 - b. That the instant matter offends the provisions of the *Public Finance Management Act*.
 - c. The matter is res judicata and sub judice, with the same having been filed in another similar suit and of similar parties.
2. The preliminary objection was opposed on the following grounds:
 - a. The issue of subjudice cannot be raised in a preliminary objection.
 - b. That the issue of res judicata was not demonstrated.



3. A preliminary objection raises purely issues of law. The Court of Appeal in *Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Limited* (1969) EA. 696 (Sir Charles Newbold P) observed as follows:

... A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse issues. This improper practice should stop.

4. Some ingredients must be proved for *res judicata* to be successfully pleaded. These were enumerated in the case of *Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others* [2017] eKLR, where the Court of Appeal said:

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 in 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.

5. In the instant case, there was no demonstration of a previous suit between the parties. The preliminary objection cannot, therefore, turn on this ground.
6. The doctrine of sub-judice prevents a court from proceeding with the trial of any suit in which the matter in issue is directly and substantially the same as the previously instituted suit between the same parties, pending before the same or another court with jurisdiction to determine it.
7. The respondents have claimed that the matter before me is sub judice, but this has not been demonstrated.
8. In the case of *Martin Kabubii Mwangi vs County Government of Laikipia* [2019] eKLR, the issue of the doctrine of exhaustion was addressed as follows:

The exhaustion principle enunciated in precedents such as the case of *Secretary, County Public Service & Another v Hulbhai Gedi Abdille* (*supra*) does not permit an election as to the parts of a statute that one should rely on. Put another way, it removes discretion on the part of a litigant from choosing whether to follow the provision or not. In this case the suit was filed before the exhaustion of the remedy under the law, namely the provisions of Section 77 of the *County Governments Act*. The Claimant ought to have appealed against his removal to the Public Service Commission before moving the court. The suit did not fall in the category of suits that can be entertained by the court. As he did not appeal as provided for in law, the suit is a non-starter and is accordingly struck out with no order as to costs.



9. Section 15 of the *County Governments Act* provides as follows:

A person has a right to petition a county assembly to consider any matter within its authority, including enacting, amending or repealing any of its legislation.

10. I agree with the respondents that the petitioner offended the exhaustion doctrine by coming to court prematurely. Therefore, the petition is struck out with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 30TH DAY OF APRIL 2024

KIARIE WAWERU KIARIE

JUDGE

