



**Kariuki (Suing as a member and in the interest of a group of persons going by the name Eintreten Association) & 4 others v Kinya & another (Constitutional Petition E007 of 2024) [2024] KEHC 16036 (KLR) (19 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16036 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CONSTITUTIONAL PETITION E007 OF 2024  
FN MUCHEMI, J  
DECEMBER 19, 2024**

**BETWEEN**

**JAMES GACHERU KARIUKI (SUING AS A MEMBER AND IN THE INTEREST OF A GROUP OF PERSONS GOING BY THE NAME EINTRETEN ASSOCIATION) ..... 1<sup>ST</sup> PETITIONER**

**MOSES MEGA GITHINJI (SUING AS A MEMBER OF AND IN THE INTEREST OF A GROUP OF PERSONS GOING BY THE NAME MALEWA SIBS ASSOCIATION) ..... 2<sup>ND</sup> PETITIONER**

**JAMES GACHIRA NGANGA (SUING AS A MEMBER OF AND IN THE INTEREST OF A GROUP OF PERSONS GOING BY THE NAME WISELIKE GROUP) ..... 3<sup>RD</sup> PETITIONER**

**RACHAEL NJERI KARIUKI (SUING AS A MEMBER OF AND IN THE INTEREST OF A GROUP OF PERSONS GOING BY THE NAME NONGAI MWARA ASSOCIATION) ..... 4<sup>TH</sup> PETITIONER**

**JOYCE NJOKI KIBUTHIU (SUING AS A MEMBER OF AND IN THE INTEREST OF A GROUP OF PERSONS GOING BY THE NAME LOBBYDALE ASSOCIATES) ..... 5<sup>TH</sup> PETITIONER**

**AND**

**MOSES KINYA ..... 1<sup>ST</sup> RESPONDENT**

**THIKA WATER AND SEWARAGE COMPANY LTD ..... 2<sup>ND</sup> RESPONDENT**



## RULING

### Brief Facts

1. The application for determination dated 25<sup>th</sup> June 2024 seeks for orders of striking out the petition dated 10<sup>th</sup> May 2024 on grounds that it offends the doctrine of sub judice.
2. The respondents filed a replying affidavit dated 9<sup>th</sup> September 2024 in opposition to the application.

### The Respondents/Applicants' Case

3. The applicants who are the respondents in the petition aver that the petitioners herein had earlier filed a similar petition at Milimani Constitutional and Human Rights Division Petition No. E327 of 2022 wherein the 2<sup>nd</sup> respondent is the 21<sup>st</sup> respondent in that Petition No. E327 of 2022. The applicants argue that the substratum of Petition No. E327 of 2022 at Milimani is similar to the present petition and is in regard to disclosure of information in line with the provisions of the [Access to Information Act](#) and other antecedent laws. Thus, the pendency of both petitions offends the legal doctrine of sub judice owing to the similarity of the subject matter of the petitions.
4. The applicants state that the disposal of Petition No. E327 of 2022 will render the present petition obsolete. The applicants further argue that this Honourable Court is bereft of jurisdiction to entertain the present Petition dated 10<sup>th</sup> May 2024.
5. The applicants further state that the petitioners are guilty of abuse of the court process owing to the multiplicity of suits to avert the ends of justice and thus the current petition is frivolous, vexatious and an abuse of the court process and should be dismissed with costs in limine.

### The Petitioners'/Respondents' Case.

6. The respondents state that the 1<sup>st</sup> applicant has sworn the affidavit dated 14<sup>th</sup> August 2024 on behalf of the 2<sup>nd</sup> applicant but he has not annexed any authority. Thus, the respondents argue that without the 1<sup>st</sup> applicant demonstrating his authority to swear the affidavit under the corporate seal of the 2<sup>nd</sup> applicant, he should not be given audience on behalf of the 2<sup>nd</sup> applicant. Therefore any averments in respect of anything concerning the 2<sup>nd</sup> applicant is bad in law, fatally defective and should be struck out.
7. The respondents aver that the 1<sup>st</sup> applicant has failed to disclose that he has filed another similar application in Nairobi Constitutional Petition No. E327 of 2022 seeking to stop implementation of the orders of the Commission on Administrative Justice made on 22<sup>nd</sup> April 2024 which orders gave rise to the institution of the current petition and which application he has since withdrawn.
8. The respondents state that the 1<sup>st</sup> applicant is not a party in Nairobi Constitutional Petition No. E327 of 2022 and therefore the doctrine of sub judice cannot apply.
9. The respondents state that the 1<sup>st</sup> applicant has not claimed that there is in force a legal provision providing on how the orders of the quasi-judicial commission on administrative justice dated 22<sup>nd</sup> April 2024 is expected to get the leave of the High Court to be enforced as a decree of the High Court in the previously commenced Nairobi Constitutional Petition No. E327 of 2022. Furthermore, the respondents argue that the 1<sup>st</sup> applicant has not claimed that Section 23(5) of the [Access to Information Act](#) is an ideal provision of law and hence not operational.



10. The respondents argue that the matter directly and substantially in issue in the current petition emanates from the transaction of the petitioners requisitioning for the grant of access to specific information in the custody of the 2<sup>nd</sup> applicant on 4<sup>th</sup> December 2023 and the refusal of the applicants jointly or in the alternative to grant access to the requisitioned information within 7 days of 22<sup>nd</sup> April 2024 as ordered by the administrator of the [Access to Information Act](#). The respondents further argue that the institution of Nairobi Constitutional Petition No. E327 of 2022 did not extend any immunity for any acts/omissions in the daily discharge of their statutory mandate.
11. The respondents further state that the subject matter in the Nairobi petition is the negligence, ignorance and/or refusal to comply with the provisions of the [Water Act](#) and [Legal Notice No. 60 of 2017](#), the 2<sup>nd</sup> applicant transforming from a private limited liability company to a public limited liability company.
12. The respondents state that the application is not merited, bad in law and a clear abuse of the court process.
13. The applicants filed a Supplementary Affidavit dated 11<sup>th</sup> October 2024 and state that the entire affidavit deponed by the petitioners is argumentative and offends provisions of Order 19 of the Civil Procedure Rules and ought to be struck out.
14. The 1<sup>st</sup> applicant avers that he has annexed a resolution from the 2<sup>nd</sup> applicant authorising him to plead and execute pleadings on his behalf. The applicants reiterate that the petition dated 10<sup>th</sup> May 2024 offends the doctrine of sub judice.
15. The petitioners/respondents filed a Supplementary affidavit dated 13<sup>th</sup> November 2024 and state that the 1<sup>st</sup> applicant has not demonstrated any minutes of the board of management of the 2<sup>nd</sup> applicant authorizing him or any other person to act on behalf of the 2<sup>nd</sup> applicant. Instead the 1<sup>st</sup> applicant has annexed a purported resolution which ought to have been accompanied by minutes by the board which the 1<sup>st</sup> applicant has failed to annex. Further, the petitioners state that the purported special resolution of the 2<sup>nd</sup> applicant is not attested to by any of the directors of the board of management of Thika Water and Sewerage Company Limited. Thus, the petitioners aver that the 1<sup>st</sup> applicant has not demonstrated any authentic authority from the board of directors of the 2<sup>nd</sup> applicant to act on behalf of the water company.
16. The petitioners state that the withdrawal notice of the application filed in Nairobi Petition No. E327 of 2022 by the respondents was never served to them.
17. The petitioners argue that the 1<sup>st</sup> applicant has a burden to prove that the current petition is sub judice despite the fact that he has not stated what he believes to be the subject matter in any of the two petitions.
18. The petitioners state that the application dated 28<sup>th</sup> June 2022 filed alongside Nairobi Petition No. E327 of 2022 seeks to be granted access to the specific information to facilitate them protect the provisions of Article 226(5) of [the Constitution](#). The petitioners further state that in the main petition, Nairobi Petition No. E327 of 2022 the pleadings and the reliefs sought do not have anything to do with access to the specific information sought by them on 4<sup>th</sup> December 2023 but have everything to do with the non-compliance with the [Water Act](#) as re-enacted in the year 2016.
19. The petitioners further state that the applicants have not demonstrated how the orders of the Commission of Administrative Justice made on 22<sup>nd</sup> April 2024 are capable of getting the leave of the High Court in accordance with the provisions of section 23(5) of the [Access to Information Act](#) through



the previously filed Nairobi Petition No. E327 of 2022 for the orders to be enforced as the orders of the High Court.

20. The petitioners aver that the 1<sup>st</sup> applicant was not a party in Nairobi Petition No. E327 of 2022 but he is the principle respondent in the current petition as the statutory information officer designate of the 2<sup>nd</sup> respondent in accordance with Section 7(1) of the [Access to Information Act](#).
21. The petitioners aver that the transaction that culminated into the accrual of the cause of action in the current petition is a requisition for the grant of access to specific information in the custody of the 2<sup>nd</sup> applicant and the requisition was done on 4<sup>th</sup> December 2023 while in Nairobi Petition No. E327 of 2022 the matter directly and substantially in issue is the negligence, ignorance and refusal of the water companies transiting to public limited liability companies from private limited liability companies that they were before the re-enactment of the [Water Act](#) in the year 2016.
22. Parties put in written submissions.

### **The Applicants' Submissions.**

23. The applicants rely on Section 6 of the [Civil Procedure Act](#) and the cases of Kenya National Commission on Human Rights vs Attorney General; [Independent Electoral & Boundaries Commission & 16 Others \(Interested Parties\) \(Advisory Opinion Reference 1 of 2017\)](#) [2020] KESC 54 (KLR) (Constitutional and Human Rights) (7 February 2020) (Ruling) and Kenya Bankers Association vs Kenya Revenue Authority [2019] eKLR and submit that the petitioners herein filed Petition No. E327 of 2022 in the High Court Milimani Nairobi against the 2<sup>nd</sup> applicant herein who is the 67<sup>th</sup> respondent in the previous petition, among other water companies. The applicants argue that the substance of the instant petition is similar to Petition No. E327 of 2022 as the courts in both petitions will interrogate the provisions of the [Access to information Act](#). A determination of either of them will render the other spent and of no further use. The applicants argue that the law requires in such a situation, a subsequent suit is stayed under Section 6 of the [Civil Procedure Act](#) because of the rule of res sub judice.
24. The applicants submit that the rationale behind the sub judice rule is to prevent a situation of having conflicting orders emanating from two or more different courts over the same subject matter. To support their contentions, the applicants rely on the case of David Ndii & Others vs Attorney General & Others [2021] eKLR. The applicants further submit that proceeding with the instant petition will amount to gross abuse of the court process as the courts may be embarrassed upon reaching a different determination from the determination of the Milimani Constitutional Court in Petition No. E327 of 2022.

### **The Petitioners/Respondents' Submissions.**

25. The petitioners rely on the case of Kenya National Commission on Human Rights vs Attorney General; [Independent Electoral & Boundaries Commission & 16 Others \(Interested Parties\)\(Advisory Opinion Reference 1 of 2017\)](#) and submit that the applicants have not mentioned what they believe to be the subject matter in any of the petitions thereby failing to prove their claim that the current petition is sub judice. Furthermore, the petitioners submit that the 1<sup>st</sup> applicant is not a party in Nairobi Petition No. E327 of 2022 and therefore doctrine of sub judice fails in that regard.

### **The Applicants' Supplementary Submissions.**

26. The applicants submit that the petitioners/respondents filed a Further Affidavit titled Supplementary Affidavit deponed on 13<sup>th</sup> November 2024 without the leave of the court. The applicants pray that the said affidavit is struck out for want of leave of court as the same sought to introduce new evidence



which they did not have the opportunity to respond to. To support their contentions, the applicants rely on the case of *Steven Kariuki vs George Mike Wanjohi & Others* [2013] eKLR and submits that the same amounts to trial by ambush and militates against the right to a fair trial.

27. The applicants submit that the supplementary affidavit as filed by the respondents is oppressive and prejudicial to them. The applicants further submit that the respondents are simply seeking to seal loopholes in their replying affidavit in the guise of a supplementary affidavit.
28. The applicants rely on the case of *Bugerere Coffee Growers Limited vs Sebaduka & Another* [1970] EA 147 and submit that they attached a resolution of the company dated 20<sup>th</sup> May 2024 which appointed the 1<sup>st</sup> applicant to sign pleadings, swear statements and deal in any manner on behalf of the company. Thus, the applicants argue that the company has not impugned the resolution passed by appointing the 1<sup>st</sup> applicant as its authorized agent and therefore the requirement by the respondents to avail the minutes is an absurdity in the presence of a valid resolution of the company.

## The Law

### Whether the petition dated 10<sup>th</sup> May 2024 is sub judice.

29. The doctrine of sub judice is established in Section 6 of the *Civil Procedure Act* and provides:-

No court shall proceed with the trial of any suit or proceedings 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 the 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.
30. *Mativo J. (as he then was)* discussed the concept of sub judice in *Republic vs Paul Kihara Kariuki, Attorney General & 2 Others ex parte Law Society of Kenya* [2020] eKLR where he stated as follows:-

.....there exists the concept of sub judice which in Latin means “under judgment.” It denotes that a matter is being considered by a court or judge. The concept of sub judice that where an issue is pending in a court of law for adjudication between the same parties, any other court is barred from trying that issue so long as the first suit goes on. In such a situation, order is passed by the subsequent court to stay the proceeding and such order can be made at any stage.
31. The Supreme Court in *Kenya National Commission on Human Rights vs Attorney General; Independent Electoral & Boundaries Commission & 16 Others (Interested Parties)*[2020] eKLR stated:-

The term sub judice is defined in *Black’s Law Dictionary* 9<sup>th</sup> Edition as: “Before the Court or Judge for determination.” The purpose of the sub judice rule is to stop the filing of 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 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.
32. From the foregoing, it is clear that the key words in applying the sub judice rule is that the matter in issue is directly and substantially in issue in the previous instituted suit. The petitioners herein filed a



petition dated 10<sup>th</sup> May 2024 seeking for disclosure of information pursuant to the Information Act, from the 2<sup>nd</sup> respondent following an order by the Commission on Administrative Justice dated 22<sup>nd</sup> April 2024. The petitioners argue that their constitutional rights under Articles 10(2)(a), 33, 35(1)(a), 43, 47 and 174(c) of *the Constitution* have been infringed as the respondents have neglected to furnish them with information they sought vide their letter dated 5<sup>th</sup> December 2023 contrary to the *Access to Information Act*. The petitioners have also filed a petition in High Court Milimani being Petition no. E327 of 2022 between themselves and 15 other petitioners and 70 respondents with the 2<sup>nd</sup> respondent herein being the 21<sup>st</sup> respondent in the said petition. The substratum of the said petition involves access to information whereby the petitioners require the respondents to disclose the list of names, email addresses and telephone numbers of all directors and the periods of their individual tenure starting 9<sup>th</sup> March 2013 to date; list of all company secretaries names, email addresses and telephone numbers and the periods of times they individually served from 9<sup>th</sup> March 2013 to date; list of the names, email addresses and telephone numbers of the Managing Directors of the individual companies, the payrolls of the individual companies as at 9<sup>th</sup> March 2013, 9<sup>th</sup> March 2016 and June 2022; loan agreements acquired by individual companies from 9<sup>th</sup> March 2013 to date and audited accounts of the individual companies between 9<sup>th</sup> March 2013 to date. A cursory glance at the two petitions shows that the substratum of both petitions is similar and the 2<sup>nd</sup> respondent in the current petition is a party in Petition No. E327 of 2022 which calls for similar information to be disclosed by the respondents in the two petitions.

33. The petitioners have annexed a Notice of Withdrawal of the Milimani Petition No. E327 of 2022 whose date is not clear purporting to show that they applied to withdraw the said petition sometimes in 2024. However, said notice does not show the month of the notice. Furthermore, no order granting orders of withdrawal by the court were attached. This means that the said petition is still pending at Milimani Constitutional and Human Rights Division. During the filing of this petition before this court dated 10<sup>th</sup> May 2024, the petitioners herein did not disclose the existence of the Milimani petition. The subtraction of both petitions is for orders against the respondents to disclose information as detailed in the foregoing paragraphs of this ruling.
34. Further, the test for applicability of the sub judice rule is whether on a final decision being reached in the previously instituted suit, such decision would operate as res judicata in the subsequent suit. In this regard, if the court in Nairobi HC Petition No. E327 of 2022 renders its decision the same would operate as res judicata in the present petition. If this court was to proceed and determine this petition which was filed about two (2) years after the Milimani Petition, there is likelihood of contradicting the findings of the court in the earlier petition which would cause embarrassment to the court and to the judiciary as an institution. The purpose of the sub judice rule is to prevent such scenarios.
35. If the petitioner wanted to join more or other parties in the original petition, they have the option of applying to amend the petition. Filing a similar petition in another court is a recipe for chaos and confusion as well as an abuse of the court process.
36. In regard to the issue of the 2<sup>nd</sup> applicant riding on the affidavit of the 1<sup>st</sup> respondent, it is my view that the facts of the status of the petitions can be brought out by either one or both applicants since it concerns issues based on the law and not on facts. It does not matter whether the 1<sup>st</sup> applicant is a party to Milimani Petition No. E327 of 2022. What matters is the existence of two similar petitions seeking similar orders and which involve some of the parties before this court and which seek for similar prayers based on the same facts.



37. Having established that an earlier petition of the year 2022 exists in another court of concurrent jurisdiction, I find that the respondents have satisfied the requirements of sub judice rule. As such, the petition dated 10<sup>th</sup> May 2024 is improperly before this court and should not be entertained.
38. Consequently, this petition dated 10/05/2022 offends the sub judice rule and is hereby struck out with costs to the respondents.
39. It is hereby so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 19<sup>TH</sup> DAY OF DECEMBER 2024.**

**F. MUCHEMI**

**JUDGE**

