



**Ali t/a Top Model Apparels & 44 others v Commissioner General Kenya
Revenue Authority, James Githi Mburu & 3 others (Petition 167 of 2018)
[2023] KEHC 24446 (KLR) (Constitutional and Human Rights) (31 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24446 (KLR)

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

PETITION 167 OF 2018

HI ONG'UDI, J

OCTOBER 31, 2023

BETWEEN

**MOHAMMED ALI T/A TOP MODEL APPARELS & 44 OTHERS & 44
OTHERS PETITIONER**

AND

**COMMISSIONER GENERAL KENYA REVENUE AUTHORITY, JAMES GITHI
MBURU 1ST RESPONDENT**

SUSAN NYARIBO 2ND RESPONDENT

DANIEL KAGIRA 3RD RESPONDENT

KENYA REVENUE AUTHORITY 4TH RESPONDENT

RULING

1. This brief is in relation to the petitioners' Notice of Motion dated 14th July 2021 and the respondents' preliminary objection dated 16th September 2021.

The Application

2. The Notice of Motion application was filed under Section 5 of the *Judicature Act*, Cap 8 and Rules of the Supreme Court of England, Sections 1A, 1B and 3A of the Civil Procure Rules, 2010 and Article 159 of *the Constitution*. The petitioners seek orders that:
 - a. Spent.
 - b. This honourable Court be pleased to cite the 1st respondent who is the Commissioner General KRA for contempt of Court and punish him by imprisonment for a period not exceeding 6



months or a fine not exceeding Ksh.5,000,000 or both such fine and such imprisonment for deliberately disobeying the orders of this Court made on the 12th November 2020.

- c. This honourable Court be pleased to cite the 2nd and 3rd respondents respectively who are officers of the 4th respondent, for contempt of Court and punish them by imprisonment for a period not exceeding 6 months or a fine not exceeding Ksh.5,000,000 or both such fine and such imprisonment for deliberately disobeying the orders of this Court made on the 12th November 2020.
 - d. Any other further orders of the Court be granted geared towards protecting the dignity and authority of the Court.
 - e. The costs of this application be provided for.
3. The petitioners' case was supported by the 1st to 17th petitioner's director, Mohammed Hussein Ali's affidavit of even date. He avers that this Court found in favour of the petitioners in its judgment dated 12th November 2020. In particular the Court in view of the 4th respondent's breach of the *Tax Procedures Act*, 2015 and Article 47 of *the Constitution*, issued an order of certiorari quashing all its demand notices to the petitioners in respect of the tax claims in the said dispute. The demand notices were with regard to tax claims for the years 2015 -2016.
 4. He deposes that they informed the 4th respondent of the Court's pronouncement and decree, vide a letter dated 27th November 2020. He notes that the 4th respondent in turn filed a Notice of Appeal in protest to the Court's finding.
 5. He further deposed that despite the clear court orders the 4th respondent through Agency Notices addressed to Khetia Dropers Limited, Amar Fabrics Limited, SOC Stores Limited copied to Moyo Impex Limited (the 22nd petitioner) demanded tax for the period that this Court had issued the order of certiorari.
 6. In response, he avers that on 31st May 2021 he wrote an email to the 4th respondent's officer advising that issuance of the fresh agency notices was in violation of the Court order issued on 12th November 2020. He avers that the 4th respondent has continued to issue agency notices the latest being on 2nd June 2021. The application has therefore been filed because of the respondents' blatant disobedience to the issued court order.
 7. The petitioner as well filed a supplementary affidavit dated 22nd October 2021 in response to the respondents' preliminary objection and reply. He decries the preliminary objection as being similar to one that had been filed herein and found to have no merit. Basically, the respondent's objection concerned a challenge to Mohammed H. Ali's authority to plead on behalf of the other petitioners and that the matter ought to have been filed before the Tax Appeals Tribunal.
 8. He claims that the respondents actions are only geared toward frustrating compliance with the court orders and so an abuse of the court process.

The Respondents' case and Preliminary Objection

9. The respondents in reply to the application filed their replying affidavit dated 15th September 2021 through the 2nd respondent who is an officer of the 4th respondent. She states that the application is misconceived and brought in bad faith.
10. She deposes that the Court in its pronouncement dated 12th November 2020 made an order of certiorari quashing all demand notices issued to the petitioners by the 4th respondent in respect of the



- tax claims in dispute. This is because the procedure in which they were arrived at failed to follow the due process as laid out in the [Tax Procedures Act](#). Accordingly, the 4th respondent complying with the court orders halted the tax collection process and lifted the demand notices dated 16th and 19th April 2018.
11. She emphasizes however that the Court did not invalidate the assessments for outstanding taxes. She makes known that when the petition was determined by the Court, the deponent, Mohamed Hussein Ali had nine pending appeals at the Tax Appeals Tribunal arising from assessments. The Tax Appeals Tribunal with reference to this Court's judgement gave the parties, the 4th respondent and the 6th, 7th, 8th, 9th, 10th, 11th, 13th, 14th, 18th, 19th and 24th petitioners an opportunity to make submissions on whether the judgment had quashed both the assessments and the demand notice.
 12. She deposes that the deponent admitted that the Court had only quashed the demand notices that required payment of taxes within 7 days and not the assessments. In view of this, the Tribunal with the consent of the parties including the deponent proceeded to make a determination on the Appeals before it and rendered its judgment in favour of the 4th respondent.
 13. It is further deposed that the deponent filed his witness statements before the Tribunal but failed to show up on the day of the hearing and the statements were withdrawn. Aggrieved by the Tribunal's judgement the deponent instructed his advocates to file an appeal on behalf of the 6th, 7th, 8th, 9th, 10th, 11th, 13th, 14th, 18th, 19th and 24th petitioners.
 14. In light of the stated account, she deposes that the contempt of court application has been brought maliciously as concerns the assessments determined by the Tribunal in its judgment which the deponent was party to and not the demand notices quashed by this court.
 15. She informs that the 22nd petitioner, Moyo Impex following the Tribunal's pronouncement did not object to the assessment and as a result the 4th respondent moved to collect the tax through Agency Notices dated 27th May 2021 as provided under Section 42 of the [Tax Procedures Act](#). The 4th respondent also issued Agency Notices dated 2nd June 2021 to the 25th petitioner, Ken Iron and Steel Limited. The 25th petitioner however chose to appeal the Tribunal's decision at the High Court being High Court Income Tax Appeal No E066 of 2021 Ken Iron & Steel Vs Commissioner Investigations and Enforcement which is still pending before the Commercial Division.
 16. To that end, she avers that the application is an abuse of the court process and ought to be dismissed with costs to the respondents.
 17. The respondents' preliminary objection is premised on the grounds that:
 - i. The affidavit in support of the application is sworn by a stranger by his own admission at paragraph 1 and without authority.
 - ii. The issues in contention in the Application dated 14th July 2021 are subject to ongoing litigation at the High Court Commercial and Tax Division -Tax Appeal No E066 of 2021 Ken Iron & Steel Vs Commissioner of Investigations and Enforcement.

The Parties' submissions in view of the application

The Petitioners' submissions

18. The firm of MGA Law and Company LLP on behalf of the petitioners filed written submissions dated 8th June 2023 and identified the issues for determination as:
 - i. Whether the cited parties had knowledge of the court order made on 12th November 2020.



- ii. Whether the cited party breached the terms of the court order made on 12th November 2020 and ought to be punished.
19. On the first issue and while relying on the supporting affidavit counsel answered in the affirmative. To buttress this point reliance was placed on the case of Basil Criticos v Attorney General and 8 others (2012)eKLR where it was held that where a party clearly acts and shows that he had knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary. Similar reliance was placed on the cases of Kenya Tea Growers Association v Francis Atwoli and 5 others (Petition No.64 Of 2010) and Archdiocese of Nairobi Kenya Registered Trustees (St.Joseph Mukasa Catholic Church Kahawa West) v National Land Commission and 2 others (2017)eKLR.
20. On the second issue, counsel submitted that according to the Black's Law Dictionary, contempt is a disregard or disobedience to the orders of a judicial body. Relying on the case of Archdiocese of Nairobi Kenya Registered Trustees (supra) he stressed that court orders are not made in vain and are meant to be complied with. That orders once made remain valid unless they are set aside on review or appeal. Comparable support was placed on the cases of Teachers Service Commission v Kenya National Union of Teachers and 2 others (2013)eKLR, Econet Wireless Kenya Ltd v Minister for Information and Communication of Kenya and another(2005)eKLR and Gladys Vuldi and another v Daniel Kipketer Rugut(2019)eKLR.
21. Counsel submitted hence that the respondents having knowledge of the court order still went ahead and breached it. In the face of this blatant disobedience he stressed that this court ought to find the respondents guilty of contempt of court.

The Respondents' Submissions

22. The respondents' in opposition to the petitioner's application filed through their counsel, Judith N. Kithinji written submissions and a list of authorities dated 8th March 2023. She identified the only issue for determination as:

Whether the 1st to 3rd respondents deliberately disobeyed the court orders dated 12th November 2020.
23. While citing the case of Sheila Cassatt Issenberg and another v Anthony Macharia Kinyanjui(2021)eKLR she submitted that for contempt to be established a number of elements must be satisfied. That is a party must have disobeyed an order that was directed to them and had personal knowledge of it. As such there cannot be deliberate or willful disobedience of the court order unless the contemnor has knowledge of the order having been served or having personal knowledge of it. Further the applicant must prove the terms of the order and the failure by the respondent to comply. She relied on the cases of Samuel M. N. Mweru and others v National Land Commission and 2 others (2020) eKLR and Republic v Ahmad Abolfathi Mohammed and another (2018) eKLR. She thus submitted that the respondents had not disobeyed the court order.
24. With reference to the 1st respondent counsel submitted that the agency notices had been issued by the 2nd and 3rd respondents and not the 1st respondent hence he did not breach the court order. Counsel also pointed out that the letter dated 27th November 2020 by the petitioner was not served on the 1st, 2nd & 3rd respondents. It was hence stressed that the petitioners had not proved whether the order was directed at them and that they had personal knowledge of the same. Likewise, that the petitioners failed to show that the respondents' action amounted to disobedience of the court order.



25. Turning to the 2nd respondent, Counsel submitted that this respondent issued agency notices dated 27th May 2021 against Moyo Impex Limited in compliance with Section 42 of the [Tax Procedures Act](#). She noted that the 2nd respondent did not take any action in respect of the demand notices quashed by the court. It was further noted that Moyo Impex Limited did not lodge an objection to the assessment issued by the 4th respondent as required under Section 51(1) and (2) of the [Tax Procedures Act](#). He pointed out that the other petitioners contested these assessments before the Tax Appeals Tribunal and a decision was rendered.
26. On the part of the 3rd respondent, Counsel submitted that this respondent issued agency notices dated 2nd June 2021 against Ken Iron and Steel Limited also in compliance with the law. The agency notice was with reference to the taxes found due by the Tax Appeals Tribunal in TAT Appeal No.232 Ken Iron and Steel Limited v Commissioner of Investigations and Enforcement in its judgment dated 28th May 2021. Counsel submitted that just as did the 2nd Respondent no action was taken with regard to the quashed demand notices. The impugned action was in relation to the judgment rendered by the Tribunal.
27. Counsel submitted that the application was devoid of merit as the petitioners had failed to prove their case to the required standard and so ought to be dismissed with costs.

The Parties' Submissions in view of the Preliminary Objection

The Respondents' Submissions

28. The respondents in support of their preliminary objection filed written submissions dated 3rd November 2021. Counsel identified two issues for determination, namely:
 - i. Whether the affidavit in support of the application is sworn by a stranger.
 - ii. Whether the petitioners erred in law by filing an application for contempt on a matter which is yet to be concluded.
29. On the first issue, Counsel submitted that according to Order 19 Rule 3 of the Civil Procedure Rules, 2010, affidavits are confined to such facts as the deponent is able in his own knowledge to prove. In this regard she pointed out that the impugned agency notices were issued specifically to the 22nd and 25th petitioners by the respondents yet the deponent made known that he is the director of the 1st to 17th petitioners.
30. In view of this, Counsel submitted that the deponent was a stranger to this proceeding and further failed to show that the 22nd and 25th petitioners granted him authority to file the instant application on their behalf. Counsel thus argued that the affidavit was incompetent and defective as the deponent lacked capacity to swear the same.
31. To buttress this issue reliance was placed on the case of *P.M.M. Private Safaris v Kevin Ijatia* (2006)eKLR where it was held that since the insurer was not a party to the proceedings the affidavit was sworn by a stranger. Additional reliance was placed on the case of *Macfoy v United Africa Company*, 3 ALL ER 1169 and *Adetoun Oladeji (NIG) LTD v Nigeria Breweries PLC S.C. 91/2002*.
32. On the second issue, Counsel submitted that the application was in relation to the agency notices dated 27th May 2021 and 2nd June 2021 issued upon the 22nd and 25th petitioners by the respondents. She submitted that the 22nd petitioner did not object to the assessments before the Tax Appeals Tribunal. That the 25th petitioner objected to the assessment by filing an appeal at the Tax Appeals Tribunal under Tax Appeal No.232 of 2018 Ken Iron and Steel Limited vs Commissioner of Investigation and



Enforcement. The Tribunal heard the matter and delivered its judgment dated 28th May 2021 in favour of the 4th respondent. Dissatisfied with the pronouncement the 25th petitioner filed an appeal at the High Court (Commercial and Tax Division) under Income Tax Appeal No.E066 of 2021: Ken Iron and Steel Limited vs Commissioner of Investigation and Enforcement which is still ongoing.

33. In view of this Counsel submitted that the respondents could not be held in contempt for a matter that is pending determination before another Court where no order has been issued. She hence submitted that the application was defective and so should be dismissed.

The Petitioners' submissions to the preliminary objection

34. The petitioners filed its written submissions dated 9th November 2021 through the firm of MGA and Company Advocates where Counsel sought to discuss the following issues:
- i. Whether the affidavit in support of the application is valid.
 - ii. Whether the petitioners erred in law in filing an application for contempt of Court.
35. Counsel on the first issue submitted that while the party seeking enforcement of the court order has private interests in securing compliance, the Court ought to grant enforcement because of the broader public interest in obedience of its court orders. Counsel pointed out that the deponent was a leading party in the main suit where the court order was issued in respect of all the petitioners not only the 22nd and 25th petitioners. He went on to note that the deponent had filed the suit having been aggrieved that the respondents in unconcealed disobedience had issued the impugned notices in the same exact words as those that had been quashed by this Court.
36. On the second point, Counsel relying on the case of Muhiu Holdings Limited v Hames Muhu Kangari(2017)eKLR submitted that a preliminary objection must be on a pure point of law and so should not be blurred with factual details that can only be proved with adducing evidence. In this case he submitted that this objection was marred with factual elements. This is because the 4th respondent to satisfy this objection would have to produce the record of appeal to show that the issues in the tax appeal are similar to those cited in the petitioners' application. He cited the case of Muhiu Holdings Limited (supra) in support and submitted that the court held that evidence cannot be introduced to prop up a preliminary objection.
37. To this end he submitted that the respondents' preliminary objection lacked merit and was an attempt to delay the instant proceedings.

Analysis and Determination

38. Having considered the pleadings and submissions of the parties herein, I find the issues that arise for determination to be:
- i. Whether the preliminary objection dated 16th September 2021 is merited.
 - ii. Whether the respondents are in contempt of the Court orders dated 12th November 2020.

Issue No. (i) Whether the preliminary objection dated 16th September 2021 is merited

39. The respondents opposed the application herein on the premise that the deponent lacked the requisite authority to file the supporting affidavit to the application on behalf of all the petitioners yet he is only a director to the 1st to 17th petitioners. It was noted that no evidence had been adduced to indicate whether he had received this authority from the other petitioners. The second argument was that there



is an ongoing appeal with reference to the issues raised herein. These allegations were objected to by the deponent.

40. The threshold of a preliminary objection was set out by the Court of Appeal in the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969]EA 696 as follows:

“...a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit.”

41. The Court went further to note that:

“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 the 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 preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.”

42. Likewise, the Court in the case Oraro vs. Mbaja[2005] eKLR on the nature of preliminary objections observed that:

“A preliminary objection is now well identified as and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection and yet it bears factual aspects calling for proof or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary objection anything that purports to be a preliminary objection must not deal with disputed facts and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”

43. The preliminary objection in this matter is first founded on the notion of lack of legal authority as none was proved to have been granted by the other petitioners. The Court in the case of Abdulla Abshir & 38 others v Yasmin Farah Mohamed [2015]eKLR while discussing a similar matter observed as follows:

“9. Before considering the application on merit, I think it is important to deal with the issue of lack of authority in filing the current suit is capable of disposing off the matter. Mr. Muragara, Learned Counsel for the Respondent submitted that the 1st Applicant having no authority of the other 38 Applicants to bring the current suit in the suit and the application are incompetent and the application should be dismissed on that ground alone. Ms Asli submitted that although no authority had been executed by the other Applicants, the 1st Applicant had sworn in the Verifying Affidavit that he had the authority of the other 38 Applicants to swear the Verifying Affidavit on their behalf.

10. Order 1 Rule 13 of the Civil Procedure Rules provides:-

“13.

- (1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other



of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.

- (2) The authority shall be in writing signed by the party giving it and shall be filed in the case.” (Emphasize added)

11. In *Chalicha Farmers Co-operative Society Ltd Vs George Odhiambo & 9 others* (1987) eKLR, the Court of Appeal observed on representative suit thus:-

“This suit raises some points to be considered in law. The first is that when the summonses were served, only four entered appearances and filed defences. At the time of the hearing two of those who filed joint defences attended and participated in the hearing. One of those who neither entered appearance nor filed defence attended and participated in cross-examining the Plaintiff’s witnesses. Others never entered appearances or filed defences or attended the hearing. Their claim is that they had appointed the first Respondent, George Odhiambo, as their spokesman. The question is, is that the proper procedure? If George Odhiambo was to represent them then, either Order 1 Rule 8 or Rule 12 of the Civil Procedure Rules should have been followed. It was not proper in that respect and the trial judge should not have allowed George Odhiambo to represent and proceed with the suit as he did. The Trial judge in allowing the suit to proceed as a representative suit caused miscarriage of justice in that the suit should have proceeded on formal proof and judgment entered for the plaintiff against those who did not enter appearance and/or filed defences, and against those who did not attend at the trial. George Odhiambo could not have been allowed to represent other defendants without written authority. This caused miscarriage of justice.”

12. From the foregoing, it is quite clear that a party in a proceeding cannot purport to appear, plead and act on behalf of others until and unless he is so authorized to do so in writing and the authority is filed in such a proceeding. To my mind therefore, a statement in an affidavit that one has the authority of the co-plaintiffs or co-defendants is not enough. Such an authority, properly signed by the party giving the authority, must be filed in the proceeding.”

44. Equally, the Court in the case of *Peter Onyango Onyiego Vs - Kenya Ports Authority*[2004] eKLR opined as follows:

“The Oxford Dictionary of Law 4th Edition defines affidavit as “A sworn written statement used mainly to support certain applications and in some circumstances, as evidence in court proceedings”. From these definitions it is clear that an affidavit is a sworn statement usually given to be used as evidence. So anybody swearing an affidavit on behalf of a corporation



can also give evidence for or on behalf of a corporation.... All other affidavits can be sworn on behalf of individuals or corporations by anybody as long as that person is possessed of the facts and or information that he depones on..."

45. Furthermore, the Civil Procedure Rules, 2010 provide under Order 19 Rule 3 (1) that matters to which affidavits shall be confined are facts that the deponent is able of his own knowledge to prove.
46. An analysis of the instant application and its supporting affidavit divulges that the deponent herein did not get the authority of the 18th to 45th petitioner and in particular the 22nd and 25th petitioner whose agency notices the deponent has sought to rely on, to represent, appear, act or plead on their behalf. This is clear because there is no written authority signed by these petitioners and filed in this Court.
47. While it is evident that lack of such an authority does not necessarily void the proceedings rather it incapacitates the person purporting to represent the other petitioners, it is clear that no suit has been brought by the other petitioners save for the 1st to 17th as represented in this application. Considering this, there is no case before this Court that remains unprosecuted by the other petitioners in the context of this case to necessitate determination by this Court. In the circumstances of this case, I find thus that the deponent herein lacks the requisite authority to sustain this suit.
48. The other objection is premised on the basis that High Court Commercial and Tax Division -Tax Appeal No E066 of 2021 Ken Iron & Steel Vs Commissioner of Investigations and Enforcement which raises the issues herein in ongoing. The instant application is premised on two agency notices dated 27th May 2021 directed to the 22nd petitioner and 2nd June 2021 directed at the 25th petitioner. The alleged ongoing proceedings are with reference to the 25th petitioner agency notice.
49. The genesis of the dispute is the substantive suit which was premised on the service of demand notices upon the petitioners by the 4th respondent on various dates between 16th April 2018 and 19th April 2018 for underpaid taxes. The petitioners complained that in the notices the period indicated for the unpaid taxes is 2015-2016 in some instances and in other instances that said period was ambiguously indicated as "XX". The petitioners argued thus that the demands violated the procedures for assessment and audit for tax purposes as laid down in the provisions of the *Tax Procedures Act*, 2015.
50. This Court in its judgement dated 12th November 2020 in favour of the petitioners found and ordered as follows:

"67. It is necessary to state, for purposes of clarity, that the Respondent is entitled to commence afresh the recovery of any tax due from any of the petitioners, subject to compliance with the laws of the land. This statement finds support in the holding in Republic v Kenya Revenue Authority & another Ex-parte Tradewise Agencies [2013] eKLR that:

"33. As the agency notice had already been issued and as the same has been quashed there is no longer any reason to grant the prohibition sought as the Respondent if it still intends to proceed with its claim will have to start the process afresh in accordance with the law. As was held in Re: *National Hospital Insurance Fund Act* and Central Organisation of Trade Unions (Kenya) Nairobi HCMA. No. 1747 of 2004 [2006] 1 EA 47, once a quashing order is given the decision making body has to act in accordance with the law and the Court cannot make the decision for the challenged body. Since the purpose of certiorari is to bring



up and quash the impugned orders, that having been done there is no necessity for an order of prohibition since there is no longer any threat present of an illegal action. See *Re Hardial Singh and Others* [1979] KLR 18; [1976-80] 1 KLR 1090.”

68. From the analysis in this judgement I find the appropriate reliefs are:
- a. A declaration is issued that the Respondent is in breach of the *Tax Procedures Act*, 2015 and Article 47 of *the Constitution*, and that any actions flowing from the said actions are unconstitutional, unlawful and void.
 - b. An order of certiorari is issued removing into this Court and quashing all demand notices issued to the petitioners by the Respondent in respect of the tax claims in dispute in these proceedings.
 - c. The petitioners shall have the costs of the proceedings from the Respondent.”

51. Palpably the impugned demand notices were quashed as a result of their lack of compliance with the dictates of the *Tax Procedures Act*. In essence the 4th respondent was not barred from demanding the unpaid taxes, but was ordered to instigate the demand afresh in compliance with the law. The dispute thereafter was accordingly presented before the Tax Appeal Tribunal and a pronouncement made on 28th May 2021 in favour of the 4th respondent. The 25th petitioner aggrieved by the decision subsequently filed its appeal on 7th June 2021 under High Court Commercial and Tax Division -Tax Appeal No E066 of 2021.

52. Section 6 of the *Civil Procedure Act* in this regard provides as follows:

Stay of suit

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.

53. The essence of this bar was well discussed in the case of *Daniel Kipkemoi Bett & another v Joseph Rono* [2022] eKLR as follows:

“21. The import of the concept is that as soon as the Court finds a matter sub-judice it stays immediately the proceedings until the prior one is heard and determined. On this point, the Supreme Court of Kenya in *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)*, stated therein as follows: -

“[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.”

54. Undoubtedly this Court by the operation of the law is barred from entertaining proceedings that are already before another competent Court. In the context of this case the agency notice relied on by the deponent is with regard to the 25th petitioner who has since filed an appeal against the Tribunal’s decision before the High Court Commercial Division.
55. The upshot of the foregoing and for the reasons stated herein, this Court finds weight in the grounds cited in the preliminary objection as they raise points of law. Accordingly, it is my humble finding that the respondents’ preliminary objection dated 16th September 2021 has merit and is hereby allowed. It follows that the Notice of Motion dated 14th July, 2021 was filed prematurely and is hereby struck out with costs.
56. Orders accordingly.

DELIVERED VIRTUALLY, SIGNED AND DATED THIS 31ST DAY OF OCTOBER, 2023 IN OPEN COURT AT NAIROBI

H. I. ONG’UDI

JUDGE

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