Chunky Limited v Director of Criminal Investigations (Petition E004 of 2022) [2022] KEHC 297 (KLR) (27 April 2022) (Judgment)

Neutral citation: [2022] KEHC 297 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

PETITION E004 OF 2022

JM MATIVO, J

APRIL 27, 2022

BETWEEN

CHUNKY LIMITED ..... PETITIONER

AND

DIRECTOR OF CRIMINAL INVESTIGATIONS ..... RESPONDENT

JUDGMENT

1. The Petitioner claims that it is the registered owner of the parcel of land known as LR No CR 7239, LR MN/VI/909 situated within the Kwale County. It avers that in 2005, the National Land Commission conducted public hearings on the parcels of land the Government intended to acquire for the construction of the standard gauge railway and its aforesaid land was among the ones to be acquired.

2. It avers that it took part in the hearing process and a determination dated 18th December 2015 was made confirming it was the bona fide proprietor of the land. It states that on 27th June 2017, its employees on the said land were visited by officials from the county government accompanied by two men who claimed ownership of the land and asked its staff to stop working on the land. It states that it later learnt that the subject land was under investigations by the Director of Criminal Investigations, Kinango following a complaint dated 28th June 2017 claiming ownership of LR Nos. MN/VI/909 and MN/V/910, even though they were claiming the same land under different LR Nos LR No/MN/vi/5141, LR No MN/VI/5153 and LR No MN/VI/5154.

3. It avers that the investigation file was later taken over from DCI Kinango by the DCI Headquarters for further investigations which later stalled. However, aggrieved by the slow nature of investigations and lack of information a one Julius Kea filed constitutional Petition No. 202 of 2018 seeking to compel the Director of Survey and the Director of Criminal Investigations to produce their reports and or findings with regard to investigations on parcels of land LR No. MN/VI/5141, CR 68273, MN/VI/5153, CR 68273, MN.VI.5154, CR 68637, MN/VI/909, CR 7238 and MN/V/910, CR.7964

and the constitutional court issued an order dated 14th August 2018 that the DCI report and Survey report be produced.

4. It avers that on 14th April 2021 the Directorate of Criminal Investigations produced its report which found among other things that Patrick Ndune, Mohamed Abdi Khaiye and Sahal Ahmed Dahil fraudulently acquired allotments which overlapped the Petitioners pre-existing freehold land being MN/VI/909 and MN/VI/910 belonging to Curlyb Wurly Limited. It also avers that it is the constitutional and statutory duty of the Respondent to detect and prevent crime and one way of doing this is by finalizing investigations and handing over the file to the Office of the Director of Public Prosecutions to initiate prosecution.

5. The Petitioner states that by failing to perform their constitutional and statutory duties, the Respondent is violating its constitutional rights under Article 40, 47 and 48 of the *Constitution* and they are eroding public confidence in the integrity of the two offices tasked with maintaining law and order, detecting and preventing crime. As a consequence of the foregoing, the Petitioner prays for: -

    a. A declaration that the neglect/failure/refusal by the Respondent to hand over the file to the Director of Public Prosecution violates the Petitioner's fundamental rights to expeditious and efficient administrative action, access to justice and protection of property.

    b. An order of mandamus directing the Respondent together with his agents/delegates/assignees to promptly hand over the investigation file to the Director of Public Prosecution to allow for the prosecution of all the parties connected to the fraud as established by the Directorate of Criminal Investigation Report dated 14th April 2021 and the Director of Survey Report dated 24th August 2018.

    c. An order of mandamus directing the Respondent to enforce compliance with the court ordered Director of Criminal Investigation Report.

    d. An order of mandamus directing the Respondent to enforce compliance with the court ordered Director of Survey Report dated24th August 2018.

    e. Costs of and incidental to this Petition.

    f. Such other additional incidental and or alternative reliefs or remedies as the court shall deem just and expedient.

6. On 29th March 2022, Mr, Makuto, counsel for the Respondent informed the court that he had filed a reply to the Petition and submissions. He promised to forward copies to the court, but to date, he has not. Accordingly, I have written this judgment without the benefit of the Respondent's response to the Petition and its submissions.

7. In his submissions, the Respondent's counsel cited *MWK & another v Attorney General & 3 others*[1] in support of the holding that the rights and fundamental freedoms in the Bill of Rights belong to the each individual and are not granted by the State. He cited Article 21 which commands the State and every state organ to respect, protect, promote and fulfil the Bill of Rights subject to the limitations in Article 24. Also, counsel cited *Geoffrey K. Sang v Director of Public Prosecutions*[2] in support of the holding that whereas the discretion given to the Respondents to investigate criminal offences is not to be lightly interfered with, that discretion must be properly exercised and where the court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared

1 [2017] e KLR.

2 [2020} e KLR.

towards the vindication of the commission of a criminal offence, the court will not hesitate to bring such proceedings to a halt. He submitted that this court has the power and duty to ensure that the discretion vested in the Respondent is exercised in accordance with the law. Also, he cited *CK (A child) through (Ripples International as her guardian and next of friend) v Commissioner of Police/Inspector General of the National Police Service* in support of the proposition that in the criminal justice system the police play a critical role and its abdication from that role inevitably deprives claimants access to courts and lead to miscarriage of justice or deny justice altogether. He cited the functions of the National Police Service under section 24 of the *National Police Service Act*.[3]

8. Before addressing the issues raised in this case, I find it apposite to address pertinent questions which cannot be ignored. One is the existence of Petition ELC No 9 of 2018 filed by the Petitioner herein and another against 11 Respondents among them Patrick Ndune, Mohamed Abdikhaiya and Sahal Mohamed Dahil who are incidentally mentioned at paragraph 23 of the instant Petition. Other parties mentioned severally in this Petition who are also Respondents in the said case are the Director of Surveys and the National Land Commission. On 19th January 2022, the ELC Court, Mombasa ordered that the said file be transferred to the ELC Court, Kwale and specifically mentioned 4 other cases related to the said Petition.

9. Another case mentioned in this case is Petition No. 202 of 2018 filed by a one Juilius Kea Mbaka against the Director of Criminal Investigations and the Director of Survey. The Petitioner is one of the Interested Parties in the said case. Annexure G to the Petitioner's affidavit is a court order issued in Petition 202 of 2018 directing the Director of Criminal Investigation "...pending the hearing and determination of the Petition to inter alia release the investigation report relating to Plot No, 909/VI/MN." I note that this was an interim order, and it is not clear whether the final order has been issued. Also relevant is the investigation report dated 14th April 2021 marked as annexture H which the Petitioner now seeks an order that this court compels the Respondent to release to the Director of Public Prosecutions.

10. The existence of the said cases and the documents referred to above raise pertinent questions which cannot be ignored. One is the question whether the persons mentioned in the said cases ought to have been enjoined in these proceedings. The question as I see it is whether they are likely to be affected by the orders sought.

11. The question whether persons likely to be affected by a court judgment or order are entitled to be heard was aptly articulated by the Supreme Court of India in *Prabodh Verma v State of U.P.*[4] and *Tridip Kumar Dingal v State of W.B.*[5] The principles discernible from the said decisions are that a person or a body becomes a necessary party if he is entitled in law to defend the orders sought in a legal forum. The term "entitled to defend" confers an inherent right to a person if he or she is affected or is likely to be affected by an order to be passed by any legal forum, because there would be violation of natural justice. This is because the principle of audi alteram partem has its own sanctity. That apart, a person

[3] Act No. 11A of 2011.

[4] {1984} 4 SCC 251.

[5] {2009} 1 SCC 768.

or an authority must have a legal right or right in law to defend or assail. As was held in by the Supreme Court of India in *Canara Bank v Debasis Das:*[6]

> "Natural justice has been variously defined. It is another name for common sense justice. Rules of natural justice are not codified canons. But they are principles ingrained into the conscience of man. Natural justice is the administration of justice in a common-sense liberal way. Justice is based substantially on natural ideals and human values. The administration of justice is to be freed from the narrow and restricted considerations which are usually associated with a formulated law involving linguistic technicalities and grammatical niceties. It is the substance of justice which has to determine its form. Principles of natural justice are those rules which have been laid down by the courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice."

12. And again: -

> "Concept of natural justice has undergone a great deal of change in recent years. Rules of natural justice are not rules embodied always expressly in a statute or in rules framed there under. They may be implied from the nature of the duty to be performed under a statute. What particular rule of natural justice should be implied and what its context should be in a given case must depend to a great extent on the facts and circumstances of that case, the framework of the statute under which the enquiry is held. The old distinction between a judicial act and an administrative act has withered away. The adherence to principles of natural justice as recognized by all civilized States is of supreme importance...."

13. I have severally stated in previous decisions that the notion of Principles of Natural Justice and its application in Justice delivery system is not new. It seems to be as old as the system of dispensation of justice itself. It has by now assumed the importance of being, so to say, "an essential inbuilt component" of the mechanism, through which decision-making process passes, in the matters touching the rights and liberty of the people. It is no doubt, a procedural requirement but it ensures a strong safeguard against any Judicial or administrative; order or action, adversely affecting the substantive rights of the individuals.

14. Importantly, the *Constitution* recognizes a duty to accord a person procedural fairness or natural justice when a decision is made that affects a person's rights, interests or legitimate expectations. It is a fundamental rule of the common law doctrine of natural justice that, generally speaking, when an order is made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it.[7] Our courts have been consistent on the importance of observing the rules of natural

6 {2003} 4 SCC 557.

7 *Kioa v West* (1985), Mason J.

justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made.[8]

15. The above excerpts state the basic principle behind the doctrine of natural justice, that is, no order should be passed behind the back of a person who is to be adversely affected by the order. The Supreme Court of India put it succinctly in *J.S. Yadav v State of U.P. & Anr*[9] thus:

> "No order can be passed behind the back of a person adversely affecting him and such an order if passed, is liable to be ignored being not binding on such a party as the same has been passed in violation of the principles of natural justice. The principles enshrined in the... Code of Civil Procedure... provide that impleadment of a necessary party is mandatory and in case of non-joinder of necessary party, the petitioner-plaintiff may not be entitled for the relief sought by him. The litigant has to ensure that the necessary party is before the court, be it a plaintiff or a defendant, otherwise the proceedings will have to fail..."

16. I am alive to the fact that before me is a constitutional Petition governed by *The Constitution of Kenya (Protection on of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*.[10] Rule 5 (b) provides that a Petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every proceeding deal with the matter in dispute.

17. The decisions cited above are graphically clear on who are necessary parties. All the parties named in the said cases and those mentioned or likely to be implicated in the alleged investigations whether adversely or otherwise are necessary parties in these proceedings. This is because the alleged investigation report relates to the same parcels of land the subject of the said cases. Also, no one knows whether the alleged effort to push for the prosecution is aimed at adding an advantage or creating a disadvantage to any of the parties in the pending cases and whether the prosecution if it is mounted is designed to achieve a collateral purpose of putting pressure on any of the parties to disadvantage him or her in the said cases. All the affected persons have a legal and legitimate expectation to be heard before any orders touching on the said investigations are granted. It cannot be assumed that they will all be happy with the orders sought in this case. A court ought not to decide a case without the persons who would be vitally affected by its judgment being before it as respondents or as interested parties. Arising from the above discussion, it follows that the Petitioner's omission to enjoin all the persons likely to be affected by the orders sought is its greatest undoing. It would be improper for this court to issue the orders sought without hearing persons likely to be affected by the same orders. On this ground alone, I decline to grant the orders sought.

18. The practice of litigants filing parallel proceedings seeking orders likely to affect persons rights in other pending disputes should be highly disfavoured, loathed and abhorred for obvious reasons. One

[8] See *Onyango v. Attorney General*, ***Nyarangi, JA*** asserted at *page 459 that:-"I would say that the principle of natural justice applies where ordinary people who would reasonably expect those making decisions which will affect others to act fairly."* At *page 460* the learned judge added:-*"A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at." And in Mbaki & others v. Macharia & Another, at page 210, the Court stated as follows:- "The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard."*

[9] {2011} 6 SCC 570, at Paragraph 31.

[10] L.N. No. 117 of 28 June 2013.

consequence of the said practice is that it amounts to abuse of court process. I have severally stated that[11] the court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused. The black's law dictionary defines abuse as everything, which is contrary to good order established by usage that is a complete departure from reasonable use. An abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use.[12] The situations that may give rise to an abuse of court process are indeed in exhaustive. It involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-

19. Abuse of court process creates a factual scenario where a party is pursuing the same matter by two-court process. In other words, a party by the two-court process is involved in some gamble; a game of chance to get the best in the judicial process.[15] A litigant has no right to purse paripasua two processes, which will have the same effect in two courts at the same time with a view of obtaining victory in one of the process or in both. In several decisions of this court, I have stated that litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks. Pursuing two processes at the same time constitutes and amounts to abuse of court/legal process.[16] Its not clear why the Petitioner did not seek the order sough in this case in Petition 202 of 2018.

11 See e.g. *Agnes Muthoni Nyanjui & 2 Others vs Annah Nyambura Kioi & 3 Others* Succ Cause no 920 of 2009 and *Graham Rioba Sagwe & Others vs Fina Bank Limited & Others*, Pet No. 82 of 2016.

12 *Black Law Dictionary, Sixth Edition Black*, Henry Campbell, *Black Law Dictionary Sixth Edition, Continental Edition* 1891- 1991 P 990 P 10-11.

(a) Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.

(b) Instituting different actions between the same parties simultaneously in different court even though on different grounds.

(c) Where two similar processes are used in respect of the exercise of the same right.

(d) Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.

(e) Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.[13]

13 *Jadesimi v Okotie Eboh* (1986) 1NWLR (Pt 16) 264.

(f) Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.

(g) Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.

(h) Where two actions are commenced, the second asking for a relief which may have

been obtained in the first.[14]

14 *(2007) 16 NWLR (319) 335.*

15 Justice Niki Tobi JSC of Nigeria.

16 See e.g. *Agnes Muthoni Nyanjui & 2 Others vs Annah Nyambura Kioi & 3 Others* Succ Cause no 920 of 2009 and *Graham Rioba Sagwe & Others vs Fina Bank Limited & Others*, Pet No. 82 of 2016.

20. Thus, the multiplicity of actions on the same matter between the same parties even where there exist a right to bring the action is regarded as an abuse.[17] The abuse lies in the multiplicity and manner of the exercise of the right rather than exercise of right per se. The abuse consists in the intention, purpose and aim of person exercising the right, to harass, irritate, and annoy the adversary and interface with the administration of justice.[18] Again, to the extent that filing of multiple suits amounts to abuse of court process is a ground for this court to decline the orders sought.

21. The other pertinent question is whether this suit is sub judice. The suit presents a scenario of not only having parallel proceedings on the same issues involving the same parties but also a great risk of coordinate courts granting conflicting orders. Section 5 of the *Civil Procedure Act*[19] provides that any court shall, subject to the provisions herein contained, have jurisdiction to try all suits of a civil nature excepting suits of which its cognizance is either expressly or impliedly barred. The operative words in this provision are "expressly" or "impliedly barred."

22. Section 6 of the *Civil Procedure Act*[20] expressly provides 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.

23. As stated above, at the time this case was filed, there were pending cases involving the same land and the same parties. In fact, in HCC Petition No 202 of 2018, an order was issued directing the Respondent in this case to release the investigation report. Nothing was said on the impact the order sought in this case will have on the said case. The latin term for pending suit is *lis pendens* . The Black's Law Dictionary[21] defines lis pendens, as a Latin expression which simply refers to a "pending suit or action." The Oxford Dictionary of Law[22] defines the expression in similar terms. In the context of Section 6 of the *Civil Procedure Act*[23] which encapsulates the principles that underpin the rule, it simply means that no court ought to proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previous instituted suit or proceeding; and or the previously instituted suit or proceedings is between the same parties; and or the suit or proceeding is pending in the same or any other court having jurisdiction to grant the reliefs claimed.

24. The basic purpose and the underlying object of Section 6 is to prevent the courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of same cause of action, same subject matter and the same relief. This is to pin down the parties to one litigation so as to avoid the possibility of contradictory verdicts by two courts in respect of the

17 Ibid.

18 Ibid.

19 Cap 21, Laws of Kenya.

20 Ibid.

21 *8th Ed.*

22 *5th Ed.*

23 Cap 21, Laws of Kenya

same relief and is aimed to prevent multiplicity of proceedings.[24] The words "directly and substantially in issue" are used in contradistinction to the words "incidentally or collaterally in issue." Therefore, Section 6 would apply only if there is identity of the matter in issue in both the suits, meaning thereby, that the whole of the subject- matter in both the proceedings is identical.

25. The question which follows is whether the matters in issue in this case are also directly and substantially in issue in previously instituted suits. The key words in Section 6 are "the matter in issue is directly and substantially in issue in the previously instituted suit." The test for applicability of Section 6 is whether on a final decision being reached in the previously instituted suit, such decision would operate as res-judicata in the subsequent suit. However, when the matter in controversy is the same, it is immaterial what further relief is claimed in the subsequent suit.

26. For section 6 to come into play, the matter in issue in the suits has to be directly and substantially in issue in the previous suit. The court may in proper cases invoke its inherent jurisdiction to make such orders as may be necessary for the ends of justice or to prevent abuse of its process. This may be done where the tests of sub judice apply. As the High Court of Uganda held in *Nyanza Garage vs. Attorney General*:-[25]

> " In the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided. It is in the interest of the parties because the parties are kept at a minimum both in terms of time and money spent on a matter that could be resolved in one suit. Secondly, a multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating and or adding to the backlog of cases courts have to deal with. Parties would be well advised to avoid a multiplicity of suits."

27. For the doctrine of sub judice to apply the following principles ought to be present:- (a) There must exist two or more suits filed consecutively; (b) The matter in issue in the suits or proceedings must be directly and substantially the same, the parties in the suits or proceedings must be the same or must be parties under whom they or any of them claim and they must be litigating under the same title, the suits must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

28. The uncompromising manner in which courts have consistently enforced the sub judice rule was best captured in *Thiba Min Hydro Co. Ltd v Josphat Karu Ndwiga*,[26] which held that it is not the form in which the suit is framed that determines whether it is sub judice, rather it is the substance of the suit, and that, there can be no justification in having the two cases being heard parallel to each other. I have considered the prayers sought in this case. The subject matter in this case and the order issued in Petition 202 of 2018. I have no doubt that they relate to the same subject matter and the same issues. The import is this this Petition is sub judice and on this ground alone, I dismiss it.

29. Despite my findings in the issues discussed above I will address the Petition on merit. Article 245 (4) of the *Constitution* provides that no person may give a direction to the Inspector General with respect to— (a) the investigation of any particular offence or offences; (b) the enforcement of the law against any particular person or persons; or..."

[24] *National Institute of Mental Health & Neuro Sciences v C. Parameshwara*, (2005) 2 SCC 256.

[25] HCCS No. 450 of 1993.

[26] {2013} e KLR.

30. The above provisions are meant to guarantee the independence of the National Police Service in the performance of its functions provided at section 24 of the *National Police Service Act*[27] which include:- (e) investigation of crimes; (g) prevention and detection of crime; (h) apprehension of offenders; (i) enforcement of all laws and regulations with which it is charged; and (j) performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time.

31. The functions of the Directorate of Criminal Investigations are provided at section 35 of the *National Police Service Act*[28]. They include—undertaking investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cybercrime among others; maintaining law and order; detecting and preventing crime; apprehend offenders; and performing any other function conferred on it by any other written law.

32. A reading of the above provisions leaves no doubt that the police are legally obligated, once they witness or are informed of a crime, to investigate the offence. The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law. These obligations arise from the *Constitution* and are affirmed by the *National Police Service Act*. In terms of the above provisions, the functions of the police are to investigate crimes. Any other answer would give rise to indignation.

33. Mandamus will issue to compel a person or body of persons who has failed to perform a duty to the detriment of a party who has a legal right to expect the duty to be performed.[29] Originally a common law writ, Mandamus has been used by courts to review administrative action.[30] In *Republic v County Secretary, Nairobi City County & Another ex parte Tom Ojienda & Associates*[31] I discussed in detail the tests for granting an order of Mandamus. I find it useful to recall the eight tests for Mandamus as set out in *Apotex Inc. vs. Canada (Attorney General)*,[32] discussed in *Dragan vs. Canada (Minister of Citizenship and Immigration)*.[33] The eight factors that must be present for the writ to issue are:-

    (i) There must be a public legal duty to act;

    (ii) The duty must be owed to the Applicants;

    (iii) There must be a clear right to the performance of that duty, meaning that:

        a. The Applicants have satisfied all conditions precedent; and

        b. There must have been:

            I. A prior demand for performance;

27 Act No. 11A of 2011.

28 Act No. 11A of 2011.

29 See *Kenya National Examinations Council vs R ex parte Geoffrey Gathenji Njoroge & 9 Others* {1997} eKLR.

30 W. G. & C. Byse, *Administrative & Review Law, Cases and comments* 119-20 (5th ed. 1970). Originally, mandamus was a writ issued by judges of the King's Bench in England. American courts, as inheritors of the judicial power of the King's Bench, adopted the use of the writ.

31 {2019} e KLR.

32 1993 Can LII 3004 (F.C.A.), [1994] 1 F.C. 742 (C.A.), aff'd 1994 CanLII 47 (S.C.C.), [1994] 3 S.C.R. 1100.

33 2003 FCT 211 (CanLII), [2003] 4 F.C. 189 (T.D.), aff'd 2003 FCA 233 (CanLII), 2003 FCA 233).

II. A reasonable time to comply with the demand, unless there was outright refusal; and

III. An express refusal, or an implied refusal through unreasonable delay;

(iv) No other adequate remedy is available to the Applicants;

(v) The Order sought must be of some practical value or effect;

(vi) There is no equitable bar to the relief sought;

(vii) On a balance of convenience, mandamus should lie.

34. The grant of the orders or Certiorari, Mandamus and Prohibition is discretionary. The court is entitled to take into account the nature of the process against which Judicial Review is sought and satisfy itself that there is reasonable basis to justify the orders sought. In this regard, it is important to mention that there are several cases pending in court touching on the same subject. Above all, there is Petition No. 202 of 2018 in which an order was issued directing the Respondent to release the same report. One wonders why the Petitioner did not seek the order sought herein in the said case. Also relevant is the finding on the sub judice rule and abuse of court process which are sufficient to disentitle the Petitioner grant of discretionary orders.

35. Applying the law tests to the facts and circumstances of this case, I find and hold that the Petitioner has not established any basis for the court to grant the orders sought. Accordingly, the Petitioner's Petition dated 1st February 2022 fails. I dismiss it with no orders as to costs.

Right of appeal

SIGNED, DATED DELIVERED VIRTUALLY AT MOMBASA THIS 27 TH DAY OF APRIL 2022.

JOHN MATIVO

JUDGE