



REPUBLIC OF KENYA



**Henry Mutua Katambo t/a Katambo & Co. CPA (K) v Dong Fang
Development Company Limited & another (Petition E071 of 2022)
[2022] KEHC 11094 (KLR) (Constitutional and Human Rights) (31 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 11094 (KLR)

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

PETITION E071 OF 2022

HI ONG'UDI, J

MAY 31, 2022

**IN THE MATTER OF ARTICLES 10(2), 19(2), (3), 20(1) & (2), 21(1),
22, 23,(3) & 24 (1) OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION
OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER
ARTICLE 35 AND 40 (5) OF CONSTITUTION OF KENYA 2010.**

AND

IN THE MATTER OF SECTIONS 4, 5, 8, & 9 OF ACCESS TO INFORMATION ACT 2016

BETWEEN

HENRY MUTUA KATAMBO T/A KATAMBO & CO. CPA (K) PETITIONER

AND

DONG FANG DEVELOPMENT COMPANY LIMITED 1ST RESPONDENT

WALTER ODEDE OBONDE T/A EW ASSOCIATES 2ND RESPONDENT

RULING

1. The petitioner is a certified public accountant while the 1st respondent is a limited liability company. The 2nd respondent is a sole proprietor trading as EW Associates. The petitioner's claim is premised on the issue of auditing of the 1st respondent's accounts for the years 2013 – 2018 where his name was presented as the auditor which was not the case. Some form of settlement was arrived at but the same has not been honoured by the 1st respondent. The petitioner claims to have unanswered issues with the Director of Criminal Investigations as a result.



2. He filed a suit at the Milimani Commercial CM's Court No E1607 of 2021 – Katambo & Co & (CPA) (K) vs Dong Fang Development Company Limited where he seeks the following prayers:-

- a) An order directing the defendant through itself, its servants, employees, nominees, assigns, agents, and/or other person or authority connected therewith to effect a discharge/clearance letter in favour of the plaintiff, clearing it from anything to do with the financial statements as well as expunging its name from any of its dealings including the Kenya Revenue Authority tax filings.
- b) An order directing the defendant through itself, its servants, employees, nominees, clearance/discharge letter with the Kenya Revenue Authority, the Directorate of Criminal Investigation and the Central Bank of Kenya.
- c) General damages
- d) Any other relief this court deems fit to grant.

The suit is dated December 10, 2021.

3. The petitioner then moved this court by way of a petition dated February 16, 2022 accompanied by a notice of motion of even date. The said notice of motion seeks the following orders:-

- i) Spent
- ii) The civil suit no MCCOMMSUI/E1607 of 2021 instituted by the parties at the Magistrate Court be stayed, pending the hearing and determination of this application.
- iii) An order of mandamus be issued against the respondents to supply the Petitioner with all the original and amended audited accounts and working papers/correspondences with Kenya Revenue Authority for the period of September 1, 2020 to January 31, 2022 in the name of the petitioner in electronic form and/or in soft copies via email, pending the hearing of this application inter-parties.
- iv) The respondents be compelled to release into the possession of the petitioner, all original and amended audited accounts in the name of the petitioner between 2013 to 2021 in electronic form and/or in soft copies via email, pending the hearing of this application inter-partes.
- v) The respondents be compelled to release to the possession of the petitioner the itax profile of the respondent's account from 2013 to 2022 in electronic form and/or in soft copies via email, pending the hearing of this application inter-partes.
- vi) An order of prohibition to be issued against the respondents through themselves, their servants, employees, nominees, assigns, agents and/or other person in authority connected therewith, to refrain from using the name of the petitioner in the conduct of their business.
- vii) The cost of this application be borne by the respondents.



4. The respondents on the other hand filed a notice of motion dated March 3, 2022 seeking the following orders:-
 - i) The honourable court be pleased strike out and or dismiss the suit herein for being an abuse of the court process.
 - ii) In the alternative, pending the hearing and final determination of Chief Magistrate's suit cited as MC COMM SUIT E 1607 of 2021 – Katambo & Co vs Dong Fang Development Co Limited, the honourable court be pleased to stay the suit herein.
 - iii) That costs of and incidental to this application be borne by the petitioner.
5. These two applications are the subject of this ruling as directed by the court on March 30, 2022.

The Petitioner's Case.

6. The petitioner's application dated February 16, 2022 is supported by his sworn affidavit and the grounds on its face. Through them he gives a chronology of events in this matter. The matter involves incorrect statements allegedly made by the petitioner and 1st respondent to the Commissioner of Domestic Taxes in respect of the 1st respondent's accounts for the year 2013 – 2018 (HKM-7 & 8). He avers that a deed of settlement was reached between him and the 1st respondent (HKM 6).
7. He confirms being furnished with the general ledgers, bank statements, payroll records, sales ledges, cashbooks & lease documents which he diligently worked on. Thereafter his several attempts to reach out to the 1st respondent, bore no fruit and this led to his filing the suit at the chief Magistrate's Court Milimani against the 1st respondent.
8. He deposes that he later learnt that the 1st respondent had entered into an agreement for settlement with the Kenya Revenue Authority (HKM-12). His issues with the Director of Criminal Investigations remain alive.
9. In response to the application dated March 3, 2022 he filed a replying affidavit sworn on March 21, 2022. He avers that on 16th November 2022 the Court was misled into issuing directions on a non-existent application dated March 3, 2022. He avers that the prayers sought in the lower court are different from those sought herein. Further that the lower court cannot issue the constitutional declarations sought herein.
10. He believes that the determination of this petition would sought out the suit before the lower court. He adds that he has filed an application to enjoin certain parties who are not parties in the suit before the lower court. He therefore opposes the application dated March 3, 2022.

The Respondents' Case.

11. The 1st respondent filed a replying affidavit by one Zhang Yibo sworn on March 28, 2022. He deposes that there is no evidence showing that the respondent used the petitioner's name and professional credentials to make incorrect financial statements, without authorization and with a view to commit tax fraud. He admits having engaged the petitioner to audit its financial status and make audit reports as an auditor. He therefore has all the information (HKM-6).
12. He avers that any order granting the petitioner the right to the respondents' financial statements that were not prepared by him, email communications, and itax profile will be unwarranted invasion of



its privacy. It would further prejudice its commercial interests including intellectual property rights including those of the 3rd party firm of accountants that prepared the financial statements.

13. The application dated March 3, 2022 is supported by the grounds on its face and the affidavit sworn by Zhang Yibo. He avers that the matter between them and the petitioner relates to the issue of auditing of their accounts. Its his averment that the issues before the lower court and this court are similar, and have progressed. He therefore concludes that this matter is sub-judice on account of the pending matter at Nairobi Milimiani Commercial CM's Court. That the filing of this petition while the other suit is pending is prejudicial to him and violates section 6 of the *Civil Procedure Act* (cap 21 of the Laws of Kenya).
14. He asks the court to strike out or dismiss this suit with costs and in the alternative allow the petitioner exercise his right to withdraw the case with costs to the respondent/applicant.
15. In his further affidavit sworn on March 28, 2022 he deponed that the 1st respondent never misled the court in respect of the application dated March 3, 2022. He further depones that the said application is based on the fact that the two suits filed by the petitioner are founded on the same facts. He explains that to be the reason why the petitioner at paragraph 12 of the replying affidavit states that the determination of this petition will resolve the suit in the lower court.

Petitioner's Further Further Affidavit.

16. The petitioner in his further further affidavit sworn on March 29, 2022 has made similar averments to those in his earlier statements and the pleadings. I will therefore not rehash them here.

Parties submissions.

The Petitioner's Submissions

17. The petitioner's submissions are dated March 28, 2022 and filed by Ogetto, Otachi & Co advocates. Counsel submits that this court has jurisdiction to hear and determine this case by virtue of article 165(3) of the *Constitution*. He has referred to the case of:-
 - i) *Motor Vessel Lilian S vs Caltex Oil Kenya Ltd* (1989) KLR
 - ii) *Fredricks & Other vs MEC for Education & Training Eastern Cape & Others* as cited in Environment and Land Petition E013 of 2020.
 - iii) *Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 others* (2014) eKLR. He thus submits that the Petition raises issues of constitutional violations, and threatened violations of the rights of the petitioner by the respondent. That the suit cannot therefore be dismissed prematurely as the respondent/applicant seeks.
18. On whether the petition is sub-judice counsel answered in the negative. He cites section 6 of the *Civil Procedure Act* which provides:-

“

- “6. 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.

Explanation. The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court.

[Act No 10 of 1969, Sch.]”

19. Counsel has also referred to the Supreme Court Advisory Opinion Reference No 1 of 2017, *Kenya National Commission on Human Rights vs Attorney General; Independent Electoral and Boundaries Commission & 16 others (interested parties)* [2020] eKLR which set the threshold for operations of sub-judice 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 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.”

20. Its counsel’s submission that the matter before the lower court has only two (2) parties while this one has three (3) parties with a pending application for enjoinder of two others. According to him some parties are similar and the reliefs sought are different and can only be granted by this court.
21. On whether the subject matter in the two suits is the same counsel submits they are not the same. He explains that the suit in the lower court relates to the Agreement between the 1st respondent and the petitioner in respect of the contract for correction and subsequent clean-up of the 1st respondent’s book’s of accounts as filed with Kenya Revenue Authority.
22. Further that the petition herein relates to the summons, the petitioner continues to receive from departments within Kenya Revenue Authority for investigation against alleged tax fraud and money laundering by the 1st respondent. That the petitioner pleads specific constitutional violations, breaches and threats and seeks constitutional orders and declarations, which can only be issued by a constitutional court.
23. He referred to the case of *Kenya Bankers Association vs. Kenya Revenue Authority* 2019 eKLR where the court stated thus on the issue of sub judice:-

“In addition, it is clear that the matters in issue in the suits or proceedings are directly and substantially the same. The parties in the suits or proceedings are the same. The parties in the suits or proceedings are the same. The *ex parte* applicant herein, is litigating on behalf of its 47 members, some of whom are parties in the existing suits. The suits are pending in the High Court which has jurisdiction to grant the relief claimed.



A cursory look at the prayers sought in the case show that they relate to the same subject matter. However, the principle of sub judice does not talk about the “prayers sought” but rather “the matter in issue” (Emphasis added) I find that the matters in issue in the suits are substantially the same. In Re-the matter of the Interim Independent Electoral Commission, the Supreme Court cited with approval the Australian decision where it was held:-

“... we do not think that the word “matter”means a legal proceeding, but rather the subject matter for determination in a legal proceeding. In our opinion there can be no matter ...unless there is some right, duty or liability to be established by the determination of the court...”

24. Further the Court of Appeal in Joel Kenduiywo v District Criminal Investigation Officer Nandi & 4 others [2019] eKLR stated thus:-

“Section 6 of the Civil Procedure Act is meant to prevent abuse of the court of process where parallel proceedings are held before two different courts with concurrent jurisdictions or before the same court at different times. This is to obviate a situation where two courts of concurrent jurisdiction arrive at different decisions on the same facts, evidence and cause of action. The filing of the petition before the trial court in the face of the consent order in ELC No 231 of 2012 was clearly an abuse of court process and sub judice. The trial court cannot therefore be balanced for so holding.”

25. He has referred to one of the prayers in the application being stay of the proceedings in the lower court and therefore prays for costs. On the application dated February 16, 2022 he submitted that the petitioner relies on the affidavits. The petitioner referred to bundles of authorities which were never uploaded in the system as they were bulky.

The Respondents Submissions.

26. The respondents filed submissions dated April 4, 2022 by Ms HKM Associates. Counsel referred to section 6 of the Civil Procedure Act and submits that for a suit to be caught up by the doctrine of sub-judice the following must be proved:-

- i) There is more than one suit over the same subject matter;
- ii) That one suit was instituted before the other
- iii) That both suits are pending before courts of competent jurisdiction, and lastly;
- iv) That the suits are between the same parties or their representatives.

27. On whether the two suits are similar counsel referred to the case of Mohan Galot vs Walter Omosa Nyakundi & 21 others vs Pravin Galot & 2 others (Interested parties) (2020) eKLR where the court held:-

“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 looking at the pleadings in both cases,and there can be no justification in having the two cases being heard parallel to each other. That would not only be an affront to the sub-judice rule but would also be in violation of the overriding objective of the Civil Procedure Act which requires under section 1B that there be an “efficient use of the available judicial and administrative resources”



28. Counsel further referred to the case of *Kenya Bankers Association vs Kenya Revenue Authority* (supra) also referred to by the Petitioner where Mativo J stated:-

“A cursory look at the prayers sought in this case shows that they relate to the same subject matter. However the principle of sub-judice does not talk about prayers sought but rather the matter in issue. I find that the matter in issue in the suits are substantially the same...”

29. Counsel submits that the two matters are similar and before competent courts. The issue is therefore the same and the petitioner is using two different avenues to resolve it. On this he refers to the cases of:-

- i. *David Ndi & others vs Attorney General & others* 2021 eKLR
- ii. *Joel Kenduiywo vs District Criminal Investigating Officer Nandi & 4 others* 2019 eKLR.

He thus submits that where there are two (2) courts faced with substantially the same question, that question should be determined in only one of those courts. Counsel contends that the sought addition of Kenya Revenue Authority and another by the petitioner will not assist him since the subject matter remains the same.

Analysis and Determination

30. Having carefully considered both applications, the submissions, the cases cited and the Law, I find two issues falling for determination namely:-

- i) Whether this matter is subjudice
- ii) Whether the petitioner has met the threshold for grant of the orders sought.

31. Before I get to the identified issues I wish to first deal with an issue raised by the petitioner in respect of the application dated March 3, 2022 and the court directions of March 16, 2022. On this date Mr Asule for the petitioner/Applicant and M/s Ayimba for respondents were present. M/s Ayimba informed the court of the application dated March 3, 2022 which she sought to be given priority. As part of his response Mr Asule told the court this, “We have been served with the notice of motion dated 3rd March but the verifying affidavit is not commissioned.” So it is clear the application was served. The court was not able to confirm the filing of the application due to internet challenges but the same was later uploaded. To avoid any further delays the court directed the respondent to re-serve the application and avail a hard copy to the court which was done. So how was the court misled into giving directions? There was no such a thing.

32. There is no dispute that this court is clothed with jurisdiction, by virtue of article 165(3) to deal with this petition. There is also no dispute that there is a matter pending before the Chief Magistrate’s Court Milimani Commercial Cause No E 1607 of 2021 instituted by the petitioner herein. The same was filed before the petition before this court.

33. Section 6 of the *Civil Procedure Act* (quoted elsewhere in this ruling) clearly forbids the hearing of a similar matter by different courts. The reason for this caution under section 6 of the *Civil Procedure Act* is to avoid two courts dealing with same issue which may end up with contradictory decisions. Besides that the decisions may be the same but why waste the 2nd court’s time when the initial court could well handle the matter?

34. From the pleadings before the two courts the issue here is about auditing of the 1st respondent’s accounts. Whether it was by the petitioner or by the 2nd respondent that is the mandate of the body



dealing with investigations. Secondly the petitioner is talking of breach of contract between him and the 1st respondent and that he wants his name cleared by the Director Criminal Investigations.

35. In this petition he seeks to access certain documents in possession of the 1st & 2nd respondents. This matter would have been resolved had the settlement agreement been complied with. That is the subject of the matter before the lower court. The petitioner is not saying he applied for production of the documents he seeks and the lower court declined to grant it. This is part of the issues that are dealt with during the pre-trial conference in civil cases under order 11 of the Civil Procedure Rules i.e. exchange of documents. Why has the petitioner not sought for those documents in the lower court just to come here and camouflage them here as constitutional issues?
36. It is clear that the substratum of these two matters is just the same. What the petitioner seeks to obtain from this court can easily be obtained by an order to produce before the lower court. The petitioner is the one filing all these suits and it is him who has all the facts. He will therefore not choose which prayers to make before which court as it suits him, when he is relying on the same facts.
37. In the case of Barclays Bank of Kenya Ltd vs Elizabeth Agidza & 2 others [2012] eKLR the court held that:-

“... if the controversy in the subsequent suit can be conveniently and properly adjudicated upon in the previous suit, by virtue of the enactment of sections 1A & 1B of the Civil procedure Act, section 6 will still apply. This is so because the overriding objective of the Civil Procedure Act is for expeditious and proportionate resolution of civil disputes between parties.”

38. I therefore find that whatever the petitioner is trying to bring before this court can be conveniently and properly handled by the lower court as it relates to the audited financial accounts. Further the Director of Criminal investigations is simply carrying out his mandate, to put the records straight. All in all I find that this petition is sub-judice and should not have been field here after the filing of Chief Magistrates Commercial Court (Nairobi Cause No E -1607/2021.
39. For the above reasons the petition and notice of motion both dated February 16, 2022 are struck out with costs.

Orders accordingly.

DELIVERED VIRTUALLY, SIGNED AND DATED THIS 31ST DAY OF MAY, 2022 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. ONG’UDI

JUDGE OF THE HIGH COURT

