



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. E297 OF 2021

AUTO TERMINAL JAPAN LIMITED.....PETITIONER

VERSUS

DIRECTORATE OF CRIMINAL INVESTIGATIONS.....1st RESPONDENT

THE ATTORNEY GENERAL.....2nd RESPONDENT

RULING

1. The Petitioner filed a Notice of Motion dated 28th July 2021, seeking the following orders: -

a. Spent;

b. Pending the inter-parte hearing and determination of this application and petition, the court be pleased to issue conservatory orders suspending and/or staying the criminal proceedings lodged by the 1st respondent and/or decision arising from the ECCU Inquiry File No.119/2020 Request for Investigations on fraudulent practice relating to the applicant; and

c. Pending the inter parte hearing and determination of the application and petition, this honorable court be pleased to issue a temporary order of prohibition against the 1st respondent, their agents or any other person acting at their behest from acting on or implementing the recommendations of the ECCU Inquiry File No.119/2020 Request for Investigations on fraudulent practice and relating to the petitioner.

2. This application has been challenged by the Respondents through their Notice of Preliminary objection dated 27th September, 2021. They argue that this court lacks jurisdiction to entertain the petition which offends the doctrine of sub-judice.

3. The Respondents have made reference to Nairobi High Court Constitutional Petition No. E191 of 2021. In the said petition the parties are:

Auto Terminal japan Limited – Petitioner

Versus

1. Auditor General, 2. The National Assembly, 3. Public Procurement Regulatory Authority, 4. The Attorney General and 5. Dr. Charles Nzai – Respondents

4. A background of the case as captured by the detailed account by the petitioner in Nairobi High Court Constitutional petition No. E191 of 2021 will suffice.

5. The petitioner an international company, mainly based in Japan carries out inspection and verification of used motor vehicles on behalf of governments in Asia, Europe and Africa. With this background, it applied for an international *Tender No. KEBS 019/2017-2020 on procurement of pre-export verification of conformity (PVOC) to standards services –used motor vehicle mobile equipment and used spare parts* as advertised by Kenya Bureau of Standards in 2017.

6. The petitioner was subsequently selected as one of the three companies that qualified in their technical proposal. It was thereafter subjected to additional verification ahead of the tender award to the successful bidder. Through a letter dated 10th January 2018, Kenya

Bureau of Standards let the petitioner know that its bid had been unsuccessful. The petitioner challenged this decision before the Public Procurement Administrative Review Board (PPARB) through *Petition No.14 of 2018*, which was later dismissed.

7. Soon after, the Auditor General audited the the petitioner based on the tender documents submitted for *Tender No. KEBS 019/2017-2020*, and did an audit report which was submitted to the National Assembly through a letter dated 31st July 2019. The National Assembly Committee heard the audit report and finally recommended debarment proceedings against the petitioner. The Public Procurement Regulatory Authority in its sworn affidavit dated 23rd June 2021 and filed in **Nairobi High Court Constitutional Petition No.E191 of 2021** averred having received the Special Audit Report dated 10th July 2019 from the Auditor General with a recommendation for debarment of the petitioner.

8. On the other hand, the Directorate of Criminal Investigations in its replying affidavit dated 19th July 2021 filed by the Attorney General in Nairobi High Court Constitutional Petition No.E191 of 2021 and its replying affidavit dated 9th September 2021 in this matter, states that they received a letter dated 6th January 2021 from the Public Procurement Regulatory Authority (PPRA) requesting for investigations into two companies namely; the petitioner and East Africa Automobiles Ltd (EAA). The two companies had participated in the Kenya Bureau of Standards Tender No. KEBS/T019/2017-2020. The purpose of the investigations was with reference to falsification of documents and misrepresentation of information in the bidding documents as captured in the Special Audit report by the Auditor General.

9. The petitioner's main contention in Nairobi High Court Constitutional Petition No. E191 of 2021 is therefore that the Auditor General acted outside the set constitutional and statutory mandate by instituting debarment proceedings based on a tender which the petitioner had not been successful in. In addition the petitioner claims that the Auditor General failed to afford them a hearing prior to release of its audit report in accordance with Articles 47 and 50 of the Constitution.

10. With this in mind, the petitioner filed the instant application supported by Dr. Isaac Peter Kalua's sworn supporting affidavit also dated 28th July 2021 and the summarized grounds set out on the face of the application that:

i. The petitioner received a letter dated 3rd June 2021 from Kenya Bureau of Standards containing a report 'ECCU Inquiry File No.119/2020 - Request for investigations of fraudulent practice' from the 1st respondent with reference to Tender No. KEBS 019/2017-2020.

ii. The 1st respondent's action was pegged on the Auditor General's and National Assembly's Public Investments Committee recommendations for debarment. The petitioner states that the same were stayed by the Court in Judicial Review Application No.88 of 2020; EAA Co. Ltd v Public Procurement Regulatory Authority vide a ruling dated 30th April 2020 and later in Judicial Review Application No.104 of 2020; Republic vs Clerk of the National Assembly and 2 others vide a ruling dated 16th October 2020.

iii. The findings in the 1st respondent's ECCU Inquiry File No.119/2020 are averse to the petitioner as it states that the petitioner does not exist in United Kingdom;

iv. The petitioner was not granted a fair hearing. This is because it was not given an opportunity to respond to the 1st respondent's investigations before the 1st respondent finalized its report.

11. The petitioner while reiterating the contents of its grounds avers that the 1st respondent's conclusion was based on the opinion of 5 persons who were questioned by the officer who visited Clipper House in Tilbury Port and the absence of branding in the building to indicate the petitioner's operations there. It claims that had they been given an opportunity to be heard, the 1st respondent would have been made aware of the facts surrounding the petitioner's company in United Kingdom which is registered as a company there. The petitioner avers that it furnished the 1st respondent and the Kenya Bureau of Standards with the above information in its letters dated 4th June 2021.

12. It is accordingly the petitioner's case that its subjection to criminal proceedings based on unsubstantiated allegations will cause irreparable harm to its international reputation and further that the petitioner risks becoming inoperative as a result of being blacklisted in the international market and its investor losing confidence in its operations.

13. The respondents in opposing to the Notice of Motion application and petition, filed a replying affidavit dated 9th September 2021 sworn by Chief Inspector Peace M. Maithya stating that this court lacks jurisdiction to entertain the matter by virtue of offending the doctrine of sub judice. This he explains is because the issue in dispute arises from the Special Audit Report by the Auditor General as considered by the Public Investments Committee and Public Procurement Regulatory Authority regarding tender No. KEBS 019/2017- 2020 the subject in, Nairobi High Court Constitutional Petition No. E191 of 2021.

14. He avers that the orders of stay referred to by the petitioner in **Judicial Review Application No.88 of 2020; EAA Co. Ltd v Public Procurement Regulatory Authority** and **Judicial Review Application No.104 of 2020; Republic vs Clerk of the National Assembly and 2 others** were only with reference to East Africa Automobiles Ltd (EAA) as the petitioner was not a party to the said suits. Nonetheless it is noted that the orders have since been vacated, as the suits were withdrawn by the applicants.

15. The 1st respondent states that it was requested to engage in the investigations so as to offer its expertise in investigations in light of the enquiry file No.ECCU119/2020 as prepared by the Auditor General and the Public Investment Committee. It is the Respondents' case that the investigations were done pursuant to the provisions of the National Police Service Act and as such were compliant with Article 47 of the Constitution.

16. The deponent avers that the petitioner recorded a statement with the 1st Respondent's office prior to its decision in the letter dated 21st

May 2020. Further, that the petitioner was granted a hearing before the Public Investment Committee prior to the National Assembly's Committee conclusion and recommendations. In addition the petitioner appeared before its investigators on 10th December 2020 and undertook to provide documents in support of its case which has not been done to date.

17. The Respondents argue that the application and petition are in essence geared towards directing the 1st Respondent on how to conduct its investigations contrary to the Constitution and the law, a posture that the court should reject. They call for a dismissal of the application with costs.

18. The petitioner filed written submissions dated 1st December 2021 in opposition to the respondents Notice of preliminary objection dated 27th September 2021 through James Oketch & Co. Advocates. Counsel submits that the issues for determination are *whether the preliminary objection raises a pure point of law and whether the current suit is sub judice*.

19. On the first issue the petitioner submits that the preliminary objection raises contested facts and issues thus failing the required threshold. This is because the court has to delve into further interrogation and enquiry of the facts in **Nairobi High Court Constitutional Petition No.E191 Of 2021** which is contrary to the element of a preliminary objection. To buttress this argument he relied on numerous authorities including the cases of **Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others (2015)eKLR**, **Kenya Union of Commercial Food and Allied Workers v Water Resource Management Authority & Another (2015)eKLR**, **Football Kenya Federation v Kenyan Premier League Limited & 4 others(2015)eKLR**, **Republic v Eldoret Water & Sanitation Company Limited Ex parte Booker Onyango & 2 Others(2007) eKLR** and **Consumers Federation of Kenya V Toyota Motors Corporation & 5 others, Pet. No.455 of 2018**.

20. On the question whether the suit is sub judice, counsel submits that the issues and parties in the two suits are distinct. He argues that the issue in Petition 191 of 2021 is with regards to the proceedings at the Public Procurement Regulatory Authority while the present matter concerns the 1st respondent's investigations concerning the petitioner. It is their case that these components can only be ascertained by the court's examination of the pleadings, facts and evidence in the two suits. In support of the sub judice argument reliance is placed on the case of **Charles Onchari Ogoti v Safaricom Limited & another (2020)eKLR**.

21. In conclusion, counsel contends that contrary to the respondents' assertion, striking out the petition would be a draconian measure which can only be exercised as last resort as held in the case of **Co-operative Merchant Bank Ltd. V George Fredrick Wekesa Civil Appeal No.54 of 1999** is cited in support.

22. The respondents filed written submissions dated 30th November 2021 through learned Principal State Counsel Mr. Thande Kuria. He argues that the substratum in both matters challenges the constitutionality of the Auditor General's decision to conduct a special audit on the Kenya Bureau of Standards Tender No. KEBS/019/2017-2020. The Auditor General's Audit Report was adopted by the National Assembly Public Investment Committee who went ahead and recommended debarment proceedings against the petitioner. The 1st respondent was further invited to conduct further investigations into the audit report owing to its expertise.

23. Counsel contends that the only difference in the suits is that the Director of Criminal Investigations and Attorney General have been sued together in this petition. To him this mere addition does not take away the substance of the suit and hence no justification in sustaining the present suit. He adds that the matter in issue is also directly in issue in Petition No.191 of 2021 where the petitioner is litigating under the same title. In support reliance is placed on the cases of **Thiba Min Hydro Co. Ltd v Josphat Karu Ndwiga(2013)eKLR**, **In the Matter of the Interim Independent Electoral Commission (2011) eKLR**, **Kampala High Court Civil Suit No.450 of 1993**, **Nyanza Garage v Attorney General** and **Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others(Interested parties)(2020)eKLR**.

24. Mr. Thande submits that this court in making a determination should be guided by the question whether it can determine the issues in the present suit without delving into the issues raised in Petition No.E191 of 2021. Another question would be whether if the prayers in Petition No.E191 of 2021 are granted the finding will have an effect on this suit. Based on the above arguments, counsel submits that the suit should be struck out as allowing the suit to go on would burden the respondents who have to defend the suit twice.

Analysis And Determination

25. Upon perusal of the parties pleadings and submissions the issues that arise for determination at this stage are:

- i. *Whether the respondents' Notice of Preliminary objection dated 27th September, 20221 has met the threshold of a preliminary objection.*
- ii. *Whether the petitioner's application dated 28th July 2021 offends the doctrine of sub judice.*

26. What constitutes a preliminary objection was ably examined in the case of **Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd (1969) EA 696** which was emphasized by the Supreme Court of Kenya in the case of **Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others [2014] eKLR** as follows at paragraph 31:

“To restate the relevant principle from the precedent-setting case, Mukisa Biscuit Manufacturing Co Ltd –vs. - West End Distributors (1969) EA 696:

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

jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration....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”.

27. Likewise, the Supreme Court further pronounced itself on the purpose of a preliminary objection in the case of **Independent Electoral & Boundaries Commission –v- Jane Cheperenger & 2 Others [2015] eKLR** as follows:

“[21] The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.” (Emphasis added).

28. The petitioner submits that the respondents’ preliminary objection raises disputed facts and issues, hence failing the required threshold. Counsel argues that to handle the issues this court must delve into further interrogation and enquiry of the facts in **Nairobi High Court Constitutional Petition No. E191 Of 2021** which is contrary to the elements of a preliminary objection. As ably guided by the authorities set out above, a preliminary objection speaks to a question of law not facts. It is reasonable to deduce from the actualities of this case that the preliminary objection raised by the respondents falls squarely in the category of questions of points of law as defined in the classic case of **Mukisa Biscuit** (supra). This is because it challenges this court’s jurisdiction to hear the instant application owing to the doctrine of sub judice. It is my considered view contrary to the petitioner’s contention that the preliminary objection as raised by the respondents is sustainable. This is because it raises a point of law as is expected.

29. Moving over to the second issue, the respondents argue that the substratum in this matter and Nairobi High Court Constitutional Petition No. E191 Of 2021 challenges the constitutionality of the Auditor General’s decision to conduct a special audit on the Kenya Bureau of Standards Tender No. KEBS/019/2017-2020. It is this audit report that has led to investigations by the 1st respondent as requested by the Public Procurement Regulatory Authority. The respondents add that the only difference in the suits is that the 1st and 2nd respondent have been sued together. The petitioner on the other hand argues that the issues and parties in the two suits are distinct. Counsel submits that the issue in Nairobi High Court Constitutional Petition No. E191 Of 2021 is with regards to the proceedings at the Public Procurement Regulatory Authority while the present matter concerns the 1st respondent’s investigations in respect of the petitioner.

30. The guiding principles upon which courts make findings on the question of sub judice is founded in the Civil Procedure Act, Cap 21 under Section 6. This Section 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.

31. The Supreme Court while discussing the principle of sub judice in the case of **Kenya National Commission on Human Rights** (supra) opined 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.”

32. Likewise, the High Court in the case of **Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR** noted that while determining whether the sub judice rule applies one should reflect on the following:

“29. The uncompromising manner in which courts have consistently enforced the sub judice rule was best explained in Thiba Min Hydro Co. Ltd v Josphat Karu Ndwiga,[13] 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...A simple test would be whether this court can determine the issues raised in this case and allow or decline the prayers sought in these proceedings without delving into the issues pending in HCJR 010 of 2020 and that if the prayers sought are granted in the said case, whether they will have an impact on the instant suit.”

33. Equally, the essence of the doctrine of sub judice was captured in the recent High Court case of **David Ndi & others v Attorney General & others [2021] eKLR** as follows:

“508. The rationale behind this provision is that it is vexatious and oppressive for a claimant to sue concurrently in two Courts. Where there are two Courts faced with substantially the same question or issue, that question or issue should be determined in only one of those Courts and the Court will, if necessary, stay one of the claims.”

34. Basically, for the doctrine of sub judice to stand in the instant suit, the four principles examined above must be present. That is, there must exist two or more suits filed consecutively, the matter in issue in the suits or proceedings must be directly and substantially the same, the parties in the suits must be the same and they must be litigating under the same title and the suits must be pending in the same or any other court having jurisdiction in Kenya. To begin with, a look at the facts of this case discloses that there undoubtedly exists two matters filed consecutively and that both matters are before this court.

35. Moving on to the other features, the origin of the issues in the two suits is common in that it stems from the Special Audit report that was issued by the Auditor General with regards to the Kenya Bureau of Standards Tender No. KEBS/019/2017-2020. The 1st respondent was enjoined in the matter by virtue of an invitation by the Public Procurement Regulatory Authority acting on the Auditor General's report seeking its investigation and expertise in the matter. The petitioner pleads that it is apprehensive that subjection to the criminal proceedings based on unsubstantiated allegations will cause irreparable harm to its international reputation, with the risk of becoming inoperative as a result of being blacklisted from the international market and further its investor losing confidence in its operations.

36. This refers to the recommended debarment proceedings against the petitioner as is in issue in Nairobi High Court Constitutional Petition No. E191 Of 2021. If actualized, the debarment as the petitioner argues will have the effect of it being blacklisted in the international market. This in essence is its central concern in both suits.

37. It is logical to deduce that, the 1st respondent's investigations are premised on the Auditor General's report which if the prayers sought in Nairobi High Court Constitutional Petition No. E191 Of 2021 are granted would be rendered futile regarding the recommendations for debarment of the petitioner. The only distinction in the instant suit is the possible criminal proceedings that would be instigated because of the 1st respondent's investigations in this matter. My view is that in as much as the issues in the two suits are the same there is an element in this petition which is not in Petition No. E191 of 2021. The element is that of the 1st Respondent who is not a party in petition No. E191 of 2021 investigating the report and coming up with a recommendation which may or may not lead to the arrest of the petitioner. This is something that came up after the decision by the National Assembly had been made. The petitioner could have sought to amend its petition to bring the 1st Respondent on board but elected not to do that.

38. I believe it is worth echoing the value of the doctrine of sub judice in the administration of justice as captured in the cited authorities above and similarly in the case of **William Odhiambo Ramogi & 2 others v Attorney General & 6 others [2018] eKLR** where it was observed that:

“56. The purpose of this principle is to avoid instances where multiple suits are filed by the same parties on the same issues before Courts of competent jurisdiction. In Standard Chartered Bank Limited –Versus- Jenipher Atieno Odok, HCCC No. 120 of 2003, Warsame J. (as he then was), had the following to say about the doctrine of sub judice:

It is not within the rights of parties to engage in multiplicity of suits as the multiplicity of suits is meant to obstruct due process of law, and when a party shows design to abuse the powers of the Court, such actions must be stopped to avoid unnecessary costs and waste of judicial time.”

39. Considering the analysis and the findings above, I do find that because of the role played by the 1st Respondent who is not a party in petition No. E191 of 2021 and the fear created on the Petitioner, this matter cannot be said to be wholly sub-judice. The clear reason is that the pleadings in Petition No. E191 of 2021 cannot address the petitioner's fears raised in this petition since the same is not pleaded there. I therefore find that: -

1. The Preliminary Objection partially succeeds to the extent that this petition shall be consolidated with High Court Constitutional Petition No. E191 of 2021. The lead file shall be petition No. E191 of 2021.

2. The petitioner is at liberty to file brief supplementary submissions to the Preliminary Objection dated 21st June, 2021 filed in petition No. E191 of 2021 by the 1st Respondent therein.

3. Highlighting of submissions on 31st January, 2022.

Orders accordingly.

DELIVERED ONLINE THIS 21ST DAY OF DECEMBER, 2021 IN OPEN COURT AT MILIMANI, NAIROBI.

HEDWIG I. ONG'UDI

Judge of the High Court