Kagiri & 4 others v Controller of Budget & another (Petition 168 of 2019)
[2025] KEHC 2090 (KLR) (Constitutional and Human Rights) (6 February 2025) (Judgment)

Neutral citation: [2025] KEHC 2090 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION 168 OF 2019

LN MUGAMBI, J

FEBRUARY 6, 2025

BETWEEN

RICHARD MUNGAI KAGIRI ..... 1ST PETITIONER

JAMES GACHERU KARIUKI ..... 2ND PETITIONER

PHYLLI WAMBII WAINOHO ..... 3RD PETITIONER

JOHN NGUGI MUIGAI ..... 4TH PETITIONER

ROSALINE NJERI CHANGE ..... 5TH PETITIONER

AND

CONTROLLER OF BUDGET ..... 1ST RESPONDENT

COUNTY GOVERNMENT OF KIAMBU ..... 2ND RESPONDENT

JUDGMENT

Introduction

1. The Petition dated 4th May 2019 is supported by the 1st Petitioner's affidavit in support of even date and further affidavits dated 19th July 2022 and 15th July 2024.

2. The Petitioners challenge the 2nd Respondent's failure to publish Kiambu County Appropriation Bill in the Kenya Gazette in line with Article 199(1) of *the Constitution* as read with Sections 21, 22, 23, 24 and 25 of the *County Governments Act* and Sections 131 and 132 of the *Public Finance Management Act*.

3. For this reason, the Petitioners seek the following reliefs:

a. A declaration that any document purporting to be a Supplement of the Kenya Gazette containing a Kiambu County Appropriation Bill and which document has not been published as such in the Kenya Gazette does not constitute a bill of the Kiambu County Assembly and for all intent and purposes has not taken effect as a bill of the Kiambu County Assembly.

b. A declaration that the Kiambu County Government has never at any one time or at all published any Kiambu County Appropriation bill as such in the Kenya Gazette and in a Kiambu County Gazette.

c. A declaration that the Kiambu County Government has never at any one time or at all published as such in the Kenya Gazettte and in a Kiambu County Gazette any Kiambu County Appropriation Act.

d. A prohibitory injunction do issue prohibiting the 1st Respondent from approving any withdrawals from the Kiambu County Revenue Funds otherwise than is provided by the provisions of Sections 134 of the *Public Finance Management Act* No.No.18 of 2012 until she/he is supplied with and authenticates four documents namely:

   i. A supplement to the Kenya Gazette containing a Kiambu County Appropriation Act.

   ii. The volume of the Kenya Gazette published with the authority of the Republic of Kenya where the supplement in (i) hereinabove is published.

   iii. A supplement of a Kiambu County Gazette containing a Kiambu Country Appropriation Act.

   iv. The volume of the Kiambu County Gazette where the supplement in (iii) hereinabove is published.

e. An award of a global figure in aggravated damages included in general damages for denying the Petitioners their right to a fair administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

f. An award of a global figure in exemplary damages to vindicate the strength of the law.

g. Any other or further relief that the Court may deem fit to grant.

h. Costs of this petition.

Petitioners' Case

4. The Petitioner states that the 1st Respondent has been approving withdrawal of funds from the Kiambu County Revenue Fund without the existence of a law to that effect as required under Article 228(5) of *the Constitution* and Section 5(a) of the *Controller of Budget Act*.

5. The Petitioners allege that the 2nd Respondent has never published the Kiambu County Appropriation Bill and subsequent Act in the Kenya Gazette and Kiambu County Gazette since the 2013/2014 financial year. Particularly, it is noted that this can be seen from the Kenya Gazette Notice published from 2013 to May 2019 when the instant Petition was filed.

6. The Petitioners stress that the supplement of the Kenya Gazette wherein the purported Kiambu County Appropriation Act is contained, is not a supplement to the Kenya Gazette.

7. In view of the foregoing, he contends that the 2nd Respondent has neglected and refused to comply with the dictates ofArticle 199(1) of *the Constitution* as read with Sections 21, 22, 23, 24 and 25 of the *County*

Governments Act and Sections 131 and 132 of the *Public Finance Management Act*. Considering this, the Petitioners fault the 2nd Respondent for failing to adhere with this mandatory requirement for publication of any Kiambu County Appropriation Bill in the Kenya Gazette and Kiambu County Gazette.

8. The Petitioners allege that the Respondents actions have violated their right of dignity and pride as well as have failed to accord a process that is a fair administrative action in publishing this Bills as required by law.

9. Relying on the Kenya National Council for Law Reporting report, the Petitioners in their supplementary affidavit aver that the no single County Government has published any County legislation in the Kenya Gazette as required by law and neither is any in the legal depositories of authentic laws of Kenya.

10. In closing, the Petitioners indicate that this Petition is similar to Petition 134 of 2019 (Hon. Stanley Kiarie Wanjiku -M.C. A Ikinu Ward and others Versus the Controller of Budge and another).

1st Respondent's case

11. In response, the 1st Respondents filed its grounds of opposition dated 12th July 2022 on the premise that:

    i. The Controller of Budget office is established under Article 228 of *the Constitution* and Article 207 and 228(4) of *the Constitution* as read together with Section 5(a) of the *Controller of Budget Act*, 2016 and Section 109 of the *Public Finance Management Act*, 2012 requires that the Controller of Budget must authorize withdrawals from the County Revenue Fund.

    ii. Article 228(5) of *the Constitution* places a caveat on the Controller of Budget's exercise of her power in that she can only authorize withdrawals if satisfied that the withdrawal from a public fund is in accordance with the law.

    iii. In granting approval for withdrawal from the County Revenue Fund the Controller of Budget ensures conformity with all relevant laws and one such law is the Appropriation Act which is enacted by a County Assembly after an elaborate budgeting process involving the County Executive, the County Assembly and several other key players and agencies including members of the Public.

    iv. Following the High Court decision of James Gacheru Kariuki & 3 Others v Attorney General & 11 Others (2017)eKLR (James Gacheru Kariuki) delivered on 24th February 2017, as affirmed by the Court of Appeal in County Government of Kiambu v Kariuki & 3 others (Civil Appeal 137 of 2017) [2021) KECA 351 (KLR) (Civ) (17 December 2021) which confirmed the position that a county legislation does not take effect unless published in the Kenya Gazette, the Controller of Budget has always been guided by the dictum in that decision and does not consider any county legislation for purposes of granting an approval for withdrawal of funds, unless the county legislation has been published in the Kenya Gazette.

    v. The place of publication of a County legislation was settled by the James Gacheru Kariuki case.

    vi. Accordingly, the Controller of Budget does not authorize withdrawal from the County Revenue Fund unless a County legislation is published in the Kenya Gazette or a supplement thereof.

vii. The Petitioners have not produced any legislation in which they claim was the basis for withdrawal of funds and which legislation was not published in the Kenya Gazette or as a supplement thereof.

viii. The authenticity of any legislation published in the Kenya Gazette or as Supplement to the Kenya Gazette can only be tainted by the authorized and official publishers.

ix. Further the Petitioners have failed to disclose to the Court that there is a similar Petition No. E012 of 2021 pending determination in the High Court at Nyahururu wherein the Petitioners therein raise similar issues for determination regarding the publication of Nyandarua County legislations and the 2nd Petitioner herein is appearing as the 1st Petitioner in the said Petition.

x. Section 134 of the *Public Finance Management Act*, 2012 is only a stop-gap measure triggered where there is delay in assenting a County Appropriation Act for purposes of meeting the expenditures necessary to carry out the services of a county government until when an Appropriation Bill is assented to and as such it is not applicable as suggested by the Petitioners.

xi. The Petition and the Notice of Motion Application lack merit, are abuse of the court process, and a waste of judicial time and should be struck off with costs.

2nd Respondent's Case

12. The 2nd Respondent filed its Replying Affidavit through its Counsel, Mwangi K.M. sworn on 20th March 2024.

13. According to Counsel, this Petition challenges the Kiambu Appropriation Act, 2018.He depones that this was published in the Kenya Gazette Supplement No.18 (Kiambu County Acts No.9) dated 3rd July 2019.

14. He avers that since enactment of the cited Bill, there have been more Finance Acts ad Appropriation Acts and supplementary budgets that have been approved. Considering this, Counsel asserts that the instant Petition has been overtaken by events thus moot as there is no real controversy in this matter.

15. Furthermore, Counsel avers that the instant Petition offends the threshold for constitutional petitions as established in Anarita Karimi v Republic (1976) eKLR. It is asserted that the Petition is not pleaded with precision and that the Petitioner fails to set out the provisions that are alleged to have been violated and how they have been they have been violated. On this premise Counsel argues that the Petition is an abuse of the Court process and hence should be dismissed.

Parties Submissions

Petitioners' Submissions

16. On 1st February 2022, the Petitioners through the 1st Petitioner filed submissions. The Petitioners filed further submissions dated 19th July 2022 and 15th July 2024.

17. Counsel in the submissions identified the issues for determination as:

> " whether a supplement of the Kenya Gazette is the same thing with a supplement to the Kenya gazette; Whether a county legislation contained in a Kenya Gazette supplement which Kenya Gazette supplement has not been published as such in any volume of the Kenya Gazette is capable of taking effect; whether a county Assembly legislation published in a supplement of the Kenya Gazette which is not a supplement to any volume of the Kenya

Gazette is law upon which an approval for withdrawal from a county revenue fund by the 1st Respondent herein may be based and whether the Petitioners needed to plead any fact if it is presumed by law to be true or the burden of disapproving it lies on the Respondents unless the Respondent has specifically denied it in his pleadings."

18. The 1st Petitioner submitted that Gazette is defined under Article 260 of *the Constitution* as read with Section 3 of the Section 3 of the *Interpretation and General Provisions Act* as one published by authority of the National Government, or a Supplement to the Kenya Gazette. Accordingly, it was stressed that reference is made to a supplement to the Kenya Gazette and not to a supplement of the Kenya Gazette. He stressed that this means that a supplement of the Kenya Gazette can only become a supplement to the Kenya Gazette upon publication as such to the Kenya Gazette.

19. The 1st Petitioner submitted that the necessity of publishing a County legislation in the Kenya Gazette before it takes effect was held in the case of James Gacheru Kariuki (supra) which was affirmed by the Court of Appeal in County Government of Kiambu(supra).

20. In view of this, it was submitted that the 1st Respondent's approval for withdrawal from a county revenue fund is misapprehension of *the Constitution* as the county legislation is not contained in the Kenya Gazette. Moreover, this act is aid to be in violation of Article 228(5) of *the Constitution* as read with Section 5(a) of the *Controller of Budget Act*.

21. Being that the 2nd Respondent has taken over 2 years as at 2022 to implement this, following the High Court pronouncement and affirmation by the Court of Appeal, it was argued that the 2nd Respondent had violated the Petitioners right to a fair administrative action. The 1st Petitioner as well faulted the Respondents for their failure to prove whether they had so far complied with the dictates of the law as guided by the Court in this decision.

22. In light of this, the 1st Petitioner maintained that it was obvious that there was not in place any Kiambu County Assembly Appropriation Act that has taken effect. Further that the 2nd Respondent has never at any time or at all established a County Gazette for the purposes of publication of County legislations as required by the provisions of Section 23 and 25 of the County Government Act.

1st Respondent's Submissions

23. The 1st Respondent through its Counsel, Emily Njiru filed submissions on its behalf dated 12th July 2022.

24. Counsel stated that the issues for determination were: whether the Nyahururu Petition No. E012 of 2021 is substantially similar to the present case;whether County Legislation ought to be published both at the Kenya Gazette and the County Gazette; what is the meaning of a Supplement to the Kenya Gazette; and whether Section 134 of the *Public Finance Management Act* is applicable.

25. On the first issue, Counsel submitted that the gravamen of the two petitions rests on the issue, whether a Supplement to the Kenya Gazette is the same as a Supplement of the Kenya Gazette. It was noted that the 2nd Petitioner herein is the same Petitioner in Petition E012 of 2021. Further that in both petitions, the Petitioners urge that the Kiambu County Government as well as the Nyandarua County Government have failed to publish their legislations as a supplement to the Kenya Gazette but instead have been publishing them as a supplement of the Kenya Gazette. In that regard, Counsel submitted that there is a risk of having two varied determinations in both matters if the two proceed as such the doctrine of sub -judice is applicable.

26. Reliance was placed in Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 Others (Interested Parties) Ref. No. 1 of 2017 (2020]eKLR where it was held that:

> "(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 subjudice 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."

27. Like dependence was placed in Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR.

28. On the second issue, Counsel submitted that this issue was effectively settled in James Gacheru Kariuki (supra) as follows:

> "a County Gazette is neither a Kenya Gazette not a supplement to the Kenya Gazette and as such, County legislation only gains legitimacy upon its publication in the Kenya Gazette or a Supplement to the Kenya Gazette."

29. This position was as appreciated above subsequently affirmed by the Court of Appeal in County Government of Kiambu (supra).

30. Turning to the third issue, Counsel also submitted that the meaning of a supplement to the Kenya Gazette was elucidated in the James Gacheru Kariuki case as follows:

> "a supplement to the Kenya Gazette is technically a Gazette, the practice being that, a Kenya Gazette Supplement is ordinarily used to publish inter alia Bills, Acts of Parliament and Legal Notices with the aim of supporting the weekly publication of the Kenya Gazette. There is therefore no material difference between a Kenya Gazette and a supplement to the Kenya Gazette... the word "Kenya Gazette" therefore must appear in the heading of a publication in either the Kenya Gazette or a Supplement to the Kenya Gazette..."

31. Accordingly, Counsel submitted that it was incumbent on the Petitioners to demonstrate that the impugned legislations had not been published in the Kenya Gazette or Kenya Gazette Supplement. Nonetheless, it was stressed that the 1st Respondent does not review any legislation for purposes of granting approval for withdrawal of funds, unless the county legislations are published in the Kenya Gazette.

32. On the final issue, Counsel submitted that the Petitioners had misconstrued the application of Section 134 of the *Public Finance Management Act*. Counsel submitted that its application can only be invoked

where at the beginning of a financial year the Appropriation Act is yet to be assented to. As such Counsel submitted that it was evident that there has to be an Appropriation Bill which is pending assent and so the Section cannot be used in perpetuity. For these reasons, Counsel submitted that the Petitioners are not entitled to the reliefs sought.

2nd Respondent's Submissions

33. Manasses, Mwangi and Associates filed submissions for the 2nd Respondent dated 20th March 2024 and set out the issues for determination as:whether the Petition offends the doctrine of particularity and precision required of constitutional petitions and whether the Petition has been overtaken by events.

34. On the first issue, Counsel submitted that the Petitioners are required to particularize the provisions that are alleged to have been violated and which the Petitioners have failed to do. In particular Counsel noted that the Petitioners had not pleaded how Articles 199(1) and 228(5) of *the Constitution* had been violated or threatened. Moreover, it was pointed out that the Petitioners were never subjected to any administrative action by the Respondents.

35. Reliance as placed in Mumo Matemo v Trusted Society of Human Rights alliance [2014] eKLR where it was held that:

> " ...the principle in Anarita Karimi Njeru underscores the importance of defining the dispute to be decided by the court...Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly.
>
> unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle."

36. In addition, Counsel submitted that the Petitioners are required to demonstrate the alleged violations in line with Section 107 of the *Evidence Act* as the burden to do so is placed on them. Reliance was placed in Godfrey Paul Okutoyi (suing on his own behalf and on behalf of and representing and for the benefit of all past and present customers of banking institutions in Kenya) v Habil Olaka – Executive Director (Secretary) of the Kenya Bankers Association Being sued on behalf of Kenya Bankers Association) & another [2018] eKLR where it was held that:

> " It is a principle of law that he who asserts must prove, and in this regard, Section 107(1) of the *Evidence Act* (Cap 80) provides that "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist". It is therefore the duty of the person who asserts that there is a breach of section 44 of the *Banking Act* to prove by evidence that that indeed is the case. That is why section 109 of the *Evidence Act* again provides that "The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

37. On the second issue, Counsel submitted that the Petition had nonetheless been overtaken by events as the Appropriation Act that was in place at the time the Petition was filed had lapsed. To buttress this

point reliance was placed in Daniel Kaminja & 3 others (suing as Westland Environmental Caretaker Group) v County Government of Nairobi [2019] eKLR where it was held that:

> " A matter is moot if further legal proceedings with regard to it can have no effect, or events have placed it beyond the reach of the law. Thereby the matter has been deprived of practical significance or rendered purely academic. Mootness arises when there is no longer an actual controversy between the parties to a court case, and any ruling by the court would have no actual, practical impact."
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> And that,
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> > "No court of law will knowingly act in vain. The general attitude of courts of law is that they are loathe in making pronouncements on academic or hypothetical issues as it does not serve any useful purpose. A suit is academic where it is merely theoretical, makes empty sound and of no practical utilitarian value to the plaintiff even if judgment is given in his favour. A suit is academic if it is not related to practical situations of human nature and humanity."

38. According to Counsel due to this, the Petition cannot be applied to the subsequent Appropriation Acts as that would raise an entirely new cause of action which was not pleaded in the Petition and is legally prohibited. Reliance was placed in Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR where it was stated that:

> " It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded."

39. Like dependence was placed in Local Empowerment for Good Governance & 6 others v Community Executive Committee Member Finance & Economic Planning - County Government of Mombasa & 2 others [2021] eKLR. For this reason, it was argued that the Petitioners are not entitled to the reliefs sought.

Analysis and Determination

40. It is my considered opinion that the issues that arise for determination are as follows:

    i. Whether the Petition offends the doctrine of sub judice.

    ii. Whether the Petition is moot.

    iii. Whether a supplement of the Kenya Gazette and a supplement to the Kenya gazette is one and the same and whether a county legislation contained in a Kenya Gazette supplement which Kenya Gazette supplement has not been published as such in any volume of the Kenya Gazette is capable of taking effect

    iv. Whether the Petitioners are entitled to the reliefs sought.

Whether the Petition offends the doctrine of sub judice

41. In its grounds of opposition, the 1st Respondent asserted that the instant matter is sub judice since there was asimilar Petition, No. E012 of 2021 that was pending determination in the High Court at

Nyahururu hence offends the doctrine of sub judice. It was the 1st Respondent's contention that the issue for determination was on publication of County legislation just as in this Petition and in fact, the 2nd Petitioner was the 1st Petitioner in the Nyahururu Petition E021 of 2021.

42. The doctrine of sub judice is encapsulated under Section 6 of the *Civil Procedure Act* as follows:

> Section 6:
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> Stay of suit
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> 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.

43. The doctrine was elaborated by the Court in Okiya Omtatah Okoiti & 2 others v Cabinet Secretary, Ministry of Health & 2 others; Kenya National Commission on Human Rights (Interested Party) [2020] eKLR as follows:

> " 99. The term "Sub-judice" is defined in Black's Law Dictionary 10th Edition as:
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> > "Before the Court or Judge for determination."
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> 100. A court dealing with sub judice stated that:-
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> A matter which is still pending in Court un-decided or still under consideration is therefore sub-judice and that is precisely the position with regard to Kerugoya Environment and Land Court Civil Appeal No. 60 of 2014. I hold the view that a Constitutional Petition is amenable to the sub-judice rule just like any other civil proceeding and that explains the insertion of the words "or proceedings" in Section 6 of the *Civil Procedure Act*. I am therefore satisfied that this Constitutional Petition is sub-judice in view of the pendency of the appeal at this Court in which substantially the same issues have been raised.
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> While this Court affirms the Petitioner's right to approach it to enforce a Constitutional right, it must also be made clear that this Court has a duty to ensure that its process is not abused. This petition is clearly an abuse of the process of this Court and the law enjoins me to make appropriate orders to bring such process to an end.
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> Hon. Justice Luka Kimaru in the case of Stephen Somek Takwenyi & Another vs. David Mbuthia Githare & 2 Others Nairobi (Milimani) HCCC No.363 of 2009 held as follows:-
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> > "This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilized legal process it is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties. It can be used properly but can also be used

> improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognize as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only.
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> But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract res judicata rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it."

44. Further, the Court made reference to the case of Legal Advice Centre aka Kituo Cha Sheria v Communication Authority of Kenya [2015] eKLR and at paragraph 102 of its judgment stated:

> " ...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 and this may be done where the principles of sub judice would be applicable. As was held by the High Court of Uganda in Nyanza Garage vs. Attorney General Kampala HCCS No. 450 of 1993:-
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> > "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."
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> However the principle of sub judice does not talk about the "prayers sought" but rather "the matter in issue". In Re the Matter of the Interim Independent Electoral Commission Constitutional Application No. 2 of 2011 [2011] eKLR the Supreme Court cited with approval the Australian decision in Re Judiciary Act 1903-1920 & In re Navigation Act 1912-1920 (1921) 29 CLR 257 where it was held:
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> > "...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..."
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> It is therefore my view that in determining whether or not sub judice applies, it is the substance of the claim that ought to be looked at rather than the prayers sought.
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> ...with respect to the issue whether the parties in the proceedings are the same or are parties under whom they or any of them claim and whether they are litigating under the same title although a superficial look at the parties shows that they are not, my view is that one of the

thinking driving forces underlying the principle of sub judice is the need to avoid making conflicting decisions from the same or similar facts.

The Respondent relied on explanation 6 to Section 7 of the *Civil Procedure Act* as locking out any pretense by the Applicant that the parties in both proceedings are not the same. The said explanation states:

> Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating. In my view, for this explanation to apply, the claim must either be in respect of a public right or if in respect of a private right, it must be claimed in common for the applicant/petitioner and others."

45. Additionally, in David Ndii & others v Attorney General & others [2021] eKLR the Court held that:

> " 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."

46. A claim that a similar matter exists is factual matter that has to be proved by evidence. Indeed, the 1st Respondent is required to tender proof that establishes the following elements to the satisfaction of the Court, to wit, the existence of the two or more suits; that the issue in the suits substantially the same; the parties are the same and the suits are pending before the Court or another Court.

47. Despite the 1st Respondent asserting the doctrine of sub judice in relation to the current Petition, there was no evidence that was tendered backing its claim as to the existence of a similar suit. The 1st Respondent thus failed to discharge its burden of proof on this issue and thus fell short of the requirements of Section 107 of the *Evidence Act*. In the absence of clear-cut evidence on this allegation, the contention that this suit offends the doctrine of sub judice inevitably collapses.

Whether the Petition is moot

48. The 1st Respondent submitted that the Petition is moot as the issues raised therein are no longer live controversies. According to the 2nd Respondent, the Petition assails Kiambu Appropriation Act, 2018 which has since been repealed and many other Acts have been subsequently enacted hence does not present a real or live controversy.

49. The Court in Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others [2020] eKLR quoting from the Black's Law Dictionary described mootness as follows:

> " 64. In Black's Law Dictionary, 8th edition, a "moot case" is defined as "a matter in which a controversy no longer exists; a case that presents only an abstract question that does not arise from existing facts or rights", and as a verb, as meaning "to render a question as of no practical significance".

50. Furthermore, in Daniel Kaminja & 3 others (Suing as Westland Environmental Caretaker Group) v County Government of Nairobi [2019] eKLR the Court expounded on this issue as follows:

> " 26. A case or issue is considered moot and academic when it ceases to present a justiciable controversy by virtue of supervening events, so that an adjudication of the case or a declaration on the issue would be of no practical value or use. In such instance, there is no actual substantial relief which a petitioner or applicant would be entitled to, and which would be negated by the dismissal of the case. Courts generally decline jurisdiction over such cases or dismiss them on grounds of mootness, save when, among others, a compelling constitutional issue raised requires the formulation of controlling principles to guide the bench, the bar and the public; or when the case is capable of repetition yet evading judicial review.
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> 27. The legal doctrine known as 'mootness' is well developed in constitutional law jurisprudence. Accordingly, a case is a moot one if it.
>
> > "...seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has actually been asserted and contested, or a judgment upon some matter which, when rendered, for any reason, cannot have any practical effect upon a then existing controversy."
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> 28. Furthermore, a case will be moot-
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> > "...if the parties are not adverse, if the controversy is hypothetical, or if the judgment of the court for some other reason cannot operate to grant any actual relief, and the court is without power to grant a decision."
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> 29. Barron and Dienes put it succinctly when they observe that "a case or controversy requires present flesh and blood dispute that the courts can resolve."[20]Loots, a South African constitutional commentator, endorses these sentiments and points out that a case-
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> > "....is moot and therefore not justiciable if it no longer presents an existing or live controversy or the prejudice, or threat of prejudice, to the plaintiff no longer exists."
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> 30. However, a court will decide a case despite the argument of mootness if to do so would be in the public interest."

51. Equally, the Court of Appeal in National Assembly of Kenya & another v Institute for Social Accountability & 6 others [2017] eKLR guided as follows:

> "(14) The mootness doctrine is entrenched in the common law. The Black's Law Dictionary, Ninth Edition, defines a moot case as:
>
> > "A matter in which a controversy no longer exists; a case that presents only an abstract question that does not arise from existing facts or rights."

In an article entitled "Federal Jurisdiction to Decide Moot Cases" published in the University of Pennsylvania Law Review [1946] Vol. 94 – No. 2, the author, Sidney A. Diamond explains the essence of the doctrine thus:

> "Common – law courts have long recognized the strict requirement that permits only cases presenting judicial controversies to be decided. This is a jurisdictional limitation. If the parties are not adverse, if the controversy is hypothetical, or if the judgment of the court for some other reason cannot operate to grant any actual relief, the case is moot and the court is without power to render a decision."

14.1 In the United States of America, it is a constitutional requirement that federal judicial power extends to "cases" and to "controversies" [section 2(1) of Article 111 of the American Constitution]. Neither our Constitution nor our laws explicitly prohibits the courts from determining abstract, hypothetical or contingent cases or appeals. If follows that the common law is the exclusive source of the mootness doctrine in our jurisdiction. The doctrine is based on judicial policy whose main functions are to protect the functional competence of the courts to make law by ensuring adequate adversity of the parties and judicial economy – that is, rationing scarce judicial resources amongst competing claimants..."

52. A careful and detailed perusal of the pleadings by the Petitioners clearly show that what is in issue in this Petition is not just the Kiambu Appropriation Act, 2018. The overriding concern in the petition is that that the 2nd Respondent has since 2013 up to the time of institution of this Petition in 2019 not published the Appropriation Acts in the Kenya Gazette as required under Article 199(1) of *the Constitution*. The reliefs sought are also indicative of this fact, particularly (a), (b), (c which are to the effect that:

a. A declaration that any document purporting to be a Supplement of the Kenya Gazette containing a Kiambu County Appropriation Bill and which document has not been published as such in the Kenya Gazette does not constitute a bill of the Kiambu County Assembly and for all intent and purposes has not taken effect as a bill of the Kiambu County Assembly.

b. A declaration that the Kiambu County Government has never at any one time or at all published any Kiambu County Appropriation bill as such in the Kenya Gazette and in a Kiambu County Gazette.

c. A declaration that the Kiambu County Government has never at any one time or at all published as such in the Kenya Gazette and in a Kiambu County Gazette any Kiambu County Appropriation Act.

53. For this reason, the contention that this Petition is moot is untenable as it is did not target the publication of the Kiambu Appropriation Act, 2018 but the general compliance with Article 199 (1) of *the Constitution* by the 2nd Respondent.

> Whether a supplement of the Kenya Gazette and a supplement to the Kenya gazette is one and the same and whether a county legislation contained in a Kenya Gazette supplement

which Kenya Gazette supplement has not been published as such in any volume of the Kenya Gazette is capable of taking effect

54. It was the Petitioners' case that any document purporting to be a Supplement of the Kenya Gazette containing Kiambu County Appropriation Bill but which document had not been published as such in the Kenya Gazette did not constitute a bill of the Kiambu County Assembly. Secondly, the Petitioners argue that a supplement of the Kenya Gazette can only become a supplement to the Kenya Gazette upon publication as such in the Kenya Gazette.

55. The requirement of publication of county legislation to be published in the Kenya Gazette pursuant to Article 199 (1) of *the Constitution* was put to rest in James Gacheru Kariuki (supra) where the Court stated:

> "38. As I have already stated above in my analysis of the first issue, a County Gazette is neither a Kenya Gazette nor a supplement to the Kenya Gazette and as such, County legislation only gains legitimacy upon its publication in the Kenya Gazette or a supplement to the Kenya Gazette. Further, as already elaborated upon, the definition of a County Gazette completely departs from the meaning of the term 'Gazette' as used in Article 199 and defined in Article 260 of *the Constitution*. A County Gazette and which is a creation of the *County Governments Act* and not *the Constitution* cannot in any event supersede in its publication, the Kenya Gazette."

56. This was affirmed by the Court of Appeal in County Government of Kiambu (supra) as follows:

> "We note with approval that the learned judge's findings that a County Gazette is neither a Kenya Gazette nor a supplement to the Kenya Gazette, as it departs from the definition of a County Gazette used in article 199 and defined in article 260. Indeed, pursuant to Article 199 of *the Constitution*, section 25 of the *County Governments Act* was enacted to provide additional requirements with regards to publication of County Legislation. We agree with the learned judge that any additional requirements contemplated under article 199 should not derogate from the mandatory duty necessitating publication of County Legislation in the Kenya Gazette or its supplement, and no legislation can waive the need for such publication."

57. As to whether the supplement of the Kenya Gazette and a supplement to the Kenya Gazette mean one and the same thing or are different, the critical point to note from the reading of the authorities already referred to is that for a county legislation to take effect, it must be published in the Kenya Gazette as provided for in *the Constitution*. The Petitioners push to have this Court decide which is which between the Supplement to the Kenya Gazette or Supplement of the Kenya Gazette is an inconsequential splitting of hairs. I am guided in reaching this position by the case of Kariuki & another v CEC Nyandarua County & 7 others [2022] KEHC 16665 (KLR) where it was observed as follows:

> "In my view, the petitioner's attempt to distinguish between a supplement to and/or the Kenya Gazette of and the Kenya Gazette is fruitless and a misinterpretation of the law as they are one and the same thing according to Article 260 of *the Constitution*. Within the ordinary meaning, a supplement means a thing added to something else in order to complete or enhance it. Supplemental means completing or making an addition to, in this case, the Kenya Gazette and does not denote something that is completely different from the Gazette. There was no material difference between the supplement to the Kenya gazette and the

Kenya gazette as was held in James Gacheru Kariuki & 3 Others v Attorney General & 11 Others [supra]....

Accordingly, although the *County Governments Act* dictates that county legislation should be published in both the Kenya Gazette and County Gazette, the legislation only gain legitimacy after being published in the Kenya Gazette or a supplement to the Kenya Gazette..."

58. The 2nd Respondent's affidavit confirms that together with the Appropriation Bill and Act, there is an attached supplement to the Kenya Gazette for the years 2018, 2022 and 2024. This is proof that the 2nd Respondent complied with Article 199 (1) of *the Constitution* which effectively displaces the allegation by the Petitioners to the contrary.

59. This Petition thus lacks merit and is hereby dismissed in its entirety.

60. Each Party shall bear its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 6TH DAY OF FEBRUARY, 2025.

.....

L N MUGAMBI

JUDGE