



**Cytonn Investment Management PLC v Capital Markets Authority & 2 others;
Hicks (Interested Party) (Petition E414 of 2022) [2023] KEHC 17217 (KLR)
(Constitutional and Human Rights) (12 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17217 (KLR)

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

PETITION E414 OF 2022

HI ONG'UDI, J

MAY 12, 2023

BETWEEN

CYTONN INVESTMENT MANAGEMENT PLC PETITIONER

AND

CAPITAL MARKETS AUTHORITY 1ST RESPONDENT

ABUBAKAR HASSAN 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

AND

RINA HICKS INTERESTED PARTY

Failure by CMA to furnish an inquiry report to a party, after said report was referenced in published public interviews, is a violation of the right of access to information

Cytonn Investment Management PLC petitioned the High Court against the Capital Markets Authority (CMA) alleging violation of its rights under articles 35 and 47 of the Constitution after the CMA declined to release an inquiry report said to contain adverse findings. The court dismissed a jurisdictional challenge based on the doctrine of sub judice, holding that the defamation suit pending in HCCC No. E248 of 2021 was distinct from the constitutional issues raised. It found that Cytonn's right to access information had been violated, but its right to fair administrative action had not been infringed.

Reported by John Ribia

Civil Practice and Procedure - sub judice - guiding rules - applicability to constitutional petitions where a civil suit already existed - whether the High Court lacked jurisdiction to determine a matter due to the rule of sub judice where a constitutional petition contained in its subject matter and prayers, matters that were alive in a different civil suit - Civil Procedure Act, section 6.



Constitutional Law - fundamental rights and freedoms - right to access information - right to fair administrative action - failure to give a party an inquiry report that adversely affected it - where said report was referenced in a YouTube interview - whether Cytonn Investment Management PLC's right of access to information and right to fair administrative action was violated when the Capital Markets Authority declined to provide it with the inquiry report arising from regulatory investigations into its operations, a report publicly alluded to by the 2nd respondent, an employee of CMA, in a YouTube interview, and said to contain adverse findings affecting Cytonn's reputation - whether the Capital Markets Authority's refusal to disclose the inquiry report on Cytonn Investment Management PLC was a justified limitation of Cytonn's right to access information - Constitution of Kenya, article 35, and 45; Access to Information Act, section 4.

Brief facts

Cytonn Investment Management PLC lodged a constitutional petition against the Capital Markets Authority (CMA) alleging violation of its rights under articles 35 and 47 of the Constitution. The dispute arose from a regulatory inquiry conducted by the CMA into Cytonn's operations, following which the Authority issued a notice to show cause dated April 25, 2017. Cytonn responded to the notice by letter of August 12, 2017, which was replied to by the CMA on August 17, 2017. At that stage, Cytonn did not request the inquiry report. The matter resurfaced in 2021 when the CMA's Director of Market Operations, in an interview hosted on the "Money Wise" YouTube channel, publicly referred to an inquiry report allegedly containing adverse findings against Cytonn and characterizing its investment schemes in negative terms. Aggrieved, Cytonn filed HCCC No. E248 of 2021 against the officer and the host, claiming defamation.

Subsequently, Cytonn wrote to the CMA on June 20, 2022, seeking disclosure of the inquiry report to defend its reputation and enforce its constitutional rights. The CMA, by letter dated 30 June 2022, declined, citing section 13(2) of the Capital Markets Act and the pendency of the civil suit. That refusal prompted the instant constitutional petition.

Upon filing, the petition was met with a preliminary objection by the respondents and the interested party, who challenged the court's jurisdiction on grounds that HCCC No. E248 of 2021, already pending before the High Court, addressed matters related to the petition, thereby invoking the doctrine of *sub judice* under section 6 of the Civil Procedure Act. They argued that Cytonn ought to have pursued its claims within the civil suit, either through discovery or by amending the plaint.

Issues

- i. Whether the High Court lacked jurisdiction to determine a constitutional petition due to the rule of *sub judice* where the petition contained in its subject matter and prayers, which were matters that were alive in a different civil suit.
- ii. Whether Cytonn Investment Management PLC's right of access to information and right to fair administrative action was violated when the Capital Markets Authority declined to provide it with the inquiry report arising from regulatory investigations into its operations, a report publicly alluded to by the 2nd respondent, an employee of CMA, in a YouTube interview, and said to contain adverse findings affecting Cytonn's reputation.
- iii. Whether the Capital Markets Authority's refusal to provide an inquiry report on Cytonn Investment Management PLC was a justified limitation of Cytonn's right to access information.

Held

1. The High Court's jurisdiction flowed from the Constitution and statute and could not be ousted merely because of the pendency of another matter. The issues raised in the two suits were distinct, one being a private claim in tort and the other concerning alleged violation of constitutional rights. The challenge on jurisdiction was dismissed.
2. Under section 6 of the Civil Procedure Act, no court shall proceed with a suit where the matter in issue was directly and substantially the same as that in a previously instituted suit between the same parties and pending before a competent court. The doctrine of *sub judice* was intended to avoid



multiplicity of suits, prevent abuse of court process, and guard against the risk of conflicting decisions. A constitutional petition, like any other civil proceeding, was amenable to the *sub judice* rule, and in determining its application the court was required to look at the substance of the claim rather than the prayers sought.

3. The earlier suit was premised on defamation arising from alleged statements made in an interview, whereas the instant petition was anchored on the violation of constitutional rights arising from denial of access to an inquiry report. While both suits involved overlapping parties, the constitutional issues raised were distinct and not directly in issue in the earlier civil suit.
4. Prayers which sought an apology and damages for reputational injury, were substantially the same as the subject matter in HCCC No. E248 of 2021. On this aspect, the doctrine of *sub judice* applied. The court declined to entertain those claims. The issue of alleged constitutional violations under articles 35 and 47 of the Constitution was properly before it, while the defamation claim remained within the province of the civil court.
5. The petitioner sought a copy of an inquiry report from the 1st respondent, but the request was declined on the basis of section 13(2) of the Capital Markets Act and the pendency of a related civil suit. The right to access information under article 35 of the Constitution and section 4 of the Access to Information Act was a fundamental right, which could only be limited under the strict exemptions in section 6(1) of the Act and article 24 of the Constitution. The 1st respondent was therefore required to justify its refusal within those parameters.
6. While the 1st respondent cited statutory restrictions, it failed to demonstrate how the requested report fell within the exemptions contemplated under section 6(1) of the Access to Information Act. The reasons advanced did not establish that disclosure would, for instance, undermine national security, prejudice commercial interests, or impede due process of law. As such, the refusal was unjustified and amounted to a violation of the petitioner's constitutional right to access information under article 35(1)(b) of the Constitution.
7. Article 47 of the Constitution on fair administrative action had not been violated, since the petitioner was afforded an opportunity to respond to the notice to show cause during the inquiry and the 1st respondent gave reasons, albeit inadequate, for declining to release the report. The violation therefore lay solely in the denial of the right to access information, and not in breach of fair administrative action.

Petition partly allowed.

Orders

- i. *Declaration issued that the refusal by the 1st respondent to furnish the petitioner with a copy of the inquiry report alluded to by the 2nd respondent in his interview with the interested party amounted to a violation of the petitioner's right of access to information pursuant to article 35(1)(b) of the Constitution.*
- ii. *An order of mandamus was issued compelling the 1st respondent to forthwith release to the petitioner a copy of the inquiry report alluded to by the 2nd respondent in his interview with the interested party.*
- iii. *The petitioner was awarded half of the costs of the petition.*

Citations

Cases

Kenya

1. *Attorney General v Kituo Cha Sheria, Abebe Dadi Tullu & 6 others* Civil Appeal 108 of 2014; [2017] KECA 773 (KLR) - (Explained)
2. *Equity Bank Limited v West Link Mbo Limited* Civil Application 78 of 2011; [2013] KECA 320 (KLR) - (Explained)
3. *Katiba Institute v Presidents Delivery Unit, Andrew Wakabiu, Nzioka Waita & Joseph Kinyua* Constitutional Petition 468 of 2017; [2017] KEHC 2183 (KLR) - (Explained)



4. *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested parties)* Advisory Opinions Application 1 of 2017; [2020] KESC 54 (KLR) - (Explained)
5. *Kivanga Estates Limited v National Bank of Kenya Limited* Civil Appeal 217 of 2015; [2017] KECA 591 (KLR) - (Mentioned)
6. *Legal Advice Centre aka Kituo Cha Sheria v Communication Authority of Kenya* Judicial Review 472 of 2014; [2015] KEHC 7356 (KLR) - (Explained)
7. *Macharia & another v Kenya Commercial Bank Limited & 2 others* Application 2 of 2011; [2012] KESC 8 (KLR); [2012] 3 KLR 199 - (Explained)
8. *Mue, Njonjo & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others* Presidential Election Petition 4 of 2017; [2017] KESC 5 (KLR) - (Explained)
9. *Nairobi Law Monthly v Kenya Electricity Generating Company and 2 others* Petition 278 of 2011; [2013] KEHC 6054 (KLR) - (Mentioned)
10. *Ndii & others v Attorney General & others* Petition E282, 397, E400, E401, E416 & E426 of 2020 & 2 of 2021 (Consolidated); [2021] KEHC 9746 (KLR) - (Explained)
11. *Okoti, Okiya Omtatah & 2 others v Cabinet Secretary, Ministry of Health & 2 others; Kenya National Commission on Human Rights (Interested Party)* Petition 140, 28 & 128 of 2020 (Consolidated); [2020] KEHC 10350 (KLR) - (Explained)
12. *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* Civil Appeal 50 of 1989; [1989] eKLR; [1989] KLR 1 - (Explained)
13. *Secretary, County Public Service Board, Secretary, Wajir County Government v Hulbhai Gedi Abdille* Civil Appeal 202 of 2015; [2017] KECA 643 (KLR) - (Explained)
14. *Speaker of the National Assembly v Karume* Civil Application 92 of 1992; [1992] KECA 42 (KLR); [2008] 1 KLR 425; [1992] KLR 21 - (Explained)
15. *Trusted Society of Human Rights Alliance & 3 others v Judicial Service Commission* Petition 314 of 2016; [2016] KEHC 3581 (KLR) - (Mentioned)
16. *Vania Investments Pool Limited v Capital Markets Authority & 8 others* Civil Appeal 92 of 2014; [2014] KECA 452 (KLR) - (Explained)

Uganda

Tinyefuze v Attorney General of Uganda (Constitutional Petition No 1 of 1996) [1997] UGCC 3 (25 April 1997) - (Explained)

Statutes

Kenya

1. Access to Information Act, 2016 (Act No 31 of 2016) section 6 (1); 4, 9, 21 - (Interpreted)
2. Capital Markets Act (cap 485A) sections 13 (2); 35A - (Interpreted)
3. Civil Procedure Act (cap 21) section 6 - (Interpreted)
4. Constitution of Kenya, 2010 articles 10, 24, 35, 47 - (Interpreted)

Advocates

None mentioned

JUDGMENT

1. The petition dated August 18, 2022 was filed under various articles of the Constitution for the alleged violation of articles 10 and 35(1)(b) & (2) and 47 of the Constitution. The petitioner seeks the following orders :



- a. A declaration be issued that the refusal by the 1st respondent to furnish the petitioner with a copy of the inquiry report alluded to by the 2nd respondent in his interview with the interested party amounts to a violation of the petitioner's right of access to information pursuant to article 35(1)(b) of the Constitution.
- b. A further declaration be issued that the failure by the 1st respondent to grant the petitioner a chance to respond to the allegations under investigations before finalizing its inquiry has the unconstitutional purpose and effect of violating the petitioner's right to fair administrative action pursuant to article 47 of the Constitution.
- c. An order of *mandamus* be issued compelling the 1st respondent to forthwith release to the petitioner a copy of the inquiry report alluded to by the 2nd respondent in his interview with the interested party.
- d. In the alternative to prayer (c) above, if the honourable court establishes that the 2nd respondent alluded to a non-existent report, an order do issue directing the 1st respondent to issue a public apology to the petitioner for uttering incorrect, untrue and misleading information which had the direct consequence of occasioning serious reputational injury and a run on the fund managed by the petitioner.
- e. A consequential order to prayer (d) above, be issued directing the 1st respondent to pay general damages of Kshs 20,000,000 to the petitioner for the inexcusable reputational injury and impermissible violation of the petitioner's rights to fair administrative action and access to information pursuant to articles 35(1)(b) and 47 of the Constitution.
- f. An order of costs and interest to the petitioner.

The Petitioner's case

2. The petitioner's case was supported by its supporting affidavit of August 22, 2022 and a supplementary affidavit of November 14, 2022, both sworn by Faith N Claudi, the petitioner's legal officer. She averred that the petition was premised on the 1st respondent's refusal to furnish its inquiry report to the petitioner. Further that on June 20, 2022, the petitioner vide a letter addressed to the 1st respondent sought for the said report which had adversely mentioned it but the information was never availed.
3. She deposed that when the 2nd respondent appeared on the interested party's youtube show called Moneywise, he made reference to an inquiry published by the 1st respondent that disparagingly mentioned the petitioner. It was noted that the 2nd respondent's reference to the petitioner as a Ponzi scheme in the show was not only defamatory but also caused serious injury to its reputation. As a result of this act a multitude of investors withdrew their funds from the petitioner.
4. In the supplementary affidavit, she averred that the civil defamation suit was distinct from the instant constitutional petition. Further that the existence of the civil suit was not a bar to seeking information which is its constitutional right under article 35(1)(a) of the Constitution.

The 1st and 2nd Respondents' case

5. The 1st and 2nd respondents filed their replying affidavit dated September 30, 2022 through the 2nd respondent who is the director marketing operations of the Authority. He deposed that following the alleged defamatory statements the petitioner had through its then advocates, Lewis and Company Advocates served the respondents with a cease and desist letter dated August 25, 2021. The petitioner



then through a different firm, Saroni and Stevens Advocates, through a demand letter dated June 20, 2022 sought a copy of the inquiry report alluded to in the interview.

6. He deposed that the petitioner had failed to disclose that it had also filed a defamation suit in the High Court namely HCCC E248 of 2021 Cytonn Investment Management PLC v Abubakar Hassan and Rina Hicks which is still pending. Further that the circumstances leading to the two suits were the 2nd respondent's remarks in the interested party's youtube interview. He added that the prayers sought in both were also similar. The petitioner did another letter dated July 6, 2022 demanding for the information. This was despite being informed that the issues ought to be sorted out in the civil case, which was pending. This petition was later on filed.
7. He deposed that the 1st respondent's reason for denial was to avoid / prevent impediment of the due process of law and ability to give an adequate judicious final decision in an active matter before it as provided for under section 6(1) of the [Access to Information Act](#). He deposed that upon conducting an inquiry into the operations of the petitioner in 2017, the 1st respondent issued a notice to show cause letter dated April 25, 2017 to the petitioner, which responded to it. The 1st respondent issued a further letter dated August 17, 2017 wherein it disclosed all the relevant information relating to the notice. He stated that the petitioner did not seek for additional information thereafter.
8. It was further deposed that the 1st respondent has an elaborate dispute resolution mechanism which the petitioner had failed to exhaust before approaching the court, in respect of the inquiry report and the notice to show cause. He deposed that the petitioner's approach to the court, five (5) years later was an attempt to circumvent the dictates of the Capital Markets Act.
9. The 3rd respondent did not file any response or submissions in this matter. It however relied on the 1st and 2nd respondents' response and submissions.

The Interested Party's case

10. The interested party filed her replying affidavit dated November 22, 2022 where she deposed that the petitioner had failed to disclose that it had filed civil suit HCCC Case No E248 of 2021 which is pending. The said civil case was in relation to the statements made in her Youtube Channel. She averred that the petition is an abuse of the court process and a fishing expedition.

The Petitioner's submissions

11. The petitioner through the firm of Saroni and Stevens Advocates filed written submissions dated January 23, 2023. Counsel submitted that the respondents violated the petitioner's right of access to information since the petitioner's letters dated June 20, 2022 and July 6, 2022 seeking information were not actioned by the 1st respondent. This he argued was a breach of the petitioner's rights under articles 10 and 35 as read with sections 4, 9 and 21 of the [Access to Information Act](#). He asserted that the respondents' argument that the information could not be released owing to section 13(2) of the [Capital Markets Act](#) was not sustainable as the dictates of the [Constitution](#) under article 35 are supreme to statutes.
12. Countering the respondents and interested party's allegation that the suit is *sub judice*, counsel submitted that the distinctiveness in the two matters was the nature of the remedies sought. He contended that the civil remedies sought in the defamation suit were not related to the question of violation of the petitioner's constitutional rights. To support this argument he relied on the case of [Katiba Institute v Presidents Delivery Unit & 3 others](#) (2017)eKLR where it was held that the right to information is not affected by the reason why a citizen seeks information or even what the public



officer perceives to be the reason for seeking information. This therefore reinforces the fact that article 35 does not in any way limit the right to access information. Also see:

- (i) [Nairobi Law Monthly v Kenya Electricity Generating Company and 2 others](#) (2013) eKLR,
 - (ii) [Trusted Society of Human Rights Alliance & 3 others v Judicial Service Commission](#) (2016) eKLR, among others.
13. Counsel further submitted that following the petitioner’s request for the information, the respondent indicated that section 13(2) of their Act prohibits disclosure of the information sought. He argued that this reason did not fall within the ambit of section 6(1)(a) and 6(2)(j) of the [Access to Information Act](#). According to him, the 1st respondent’s limitation failed the test stipulated under article 24 of the [Constitution](#). He further noted that where a public authority seeks to deny access to information it bears the onus of justifying the refusal (See [Trusted Society of Human Rights Alliance \(supra\)](#)). It’s therefore his submission that the respondents were obliged to respect the petitioner’s constitutional rights as held by the Court of Appeal in the case of [Attorney General v Kituo cha Sheria & 7 others](#) (2017) eKLR.
 14. On the second issue, counsel urged the court to be guided by article 259(1) of the [Constitution](#) and the principle that the law is always speaking as stated by the Court of Appeal in the case of [Equity Bank Limited v West Link Mbo Limited](#) (2013) eKLR in resolving this matter. Also see: [David Ndi & others v Attorney General & others](#) (2021) eKLR where the principles of constitutional interpretation were outlined.
 15. Counsel concluded by stating that the petitioner’s right of access to information had been violated by the 1st respondent with no justification. For that reason, he submitted that the petitioner was entitled to the sought reliefs as discussed in the case of [Tinyefuze v Attorney General of Uganda](#) (1997) UGCC3.

The 1st and 2nd Respondents’ submissions

16. The firm of Waweru Gatonye and Company Advocates on behalf of the 1st and 2nd respondents filed written submissions and a list of authorities dated February 20, 2023. Counsel begun by stating that the petition was frivolous and an abuse of the court process as at the time of filing the suit the petitioner had a pending defamation suit HCCC No E248 of 2021 Cytonn Investment Management PLC v Abubakar Hassan and Rina Hicks.
17. He argued that the issues raised in the cited suit are the same as those submitted in this petition being the 2nd respondent’s interview with the interested party in his youtube channel, “Money wise”. Counsel contended that this was not only prejudicial to the respondents but also undermines the dignity of the court process as it is *sub judice*. Citing the Court of Appeal case of [Kivanga Estates Limited v National Bank of Kenya Limited](#) (2017) eKLR counsel noted that filing one suit in one court after another amounts to abuse of the process of court and went on to hold that public interest demands that there be finality in litigation.
18. On the second issue, counsel submitted that the respondents refusal to issue the information was covered under section 6(1)(b)(d)(g)(h) which provides for exemptions to the disclosure of information. He contended that the information sought was an inquiry that was conducted by the 1st respondent pursuant to its statutory mandate. He went on to state that section 13(2) of the [Capital Markets Act](#) provides that the 1st respondent is barred from disclosing any information acquired regarding an investigation. He thus argued that the inquiry was done pursuant to the 1st respondent’s statutory mandate where the petitioner was also given an opportunity to respond to the allegations made against it. He therefore submitted that the respondent’s refusal to grant the information was justified in view



of article 24 of the Constitution as it would have impeded the due process of law. He added that the petitioner could still have accessed the information through the civil suit.

19. Counsel next submitted that the petitioner had failed to exhaust the available mechanisms before approaching the court. He submitted that the Capital Markets Act under section 35 has an elaborate dispute mechanism where the instant dispute could have been resolved. It was thus his contention that the petitioner ought to have filed his complaint before the Capital Markets Tribunal.
20. He further argued that the courts have held that where there is a clear procedure for redress of a particular grievance in the Constitution or an Act of Parliament the procedure must be followed. He urged that this position was confirmed in the cases of:
 - (i) Speaker of the National Assembly v James Njenga Karume (1992) eKLR,
 - (ii) Vania Investment Pool Limited v Capital Markets Authority & 8 others CA No 92 of 2014
 - (iii) Secretary, County Public Service Board & another v Hulubhai Gedi Abdille (2017) eKLR.
21. The interested party did not file written submissions.

Analysis and Determination

22. Having carefully considered the parties pleadings and submissions, I find that the issues that arise for determination are:
 - i. Whether this Court has jurisdiction to entertain this petition;
 - ii. Whether the petitioner's constitutional rights under articles 35(1) and 47 of the Constitution were violated by the respondents; and
 - iii. Whether the petitioner is entitled to the reliefs sought.

Whether this court has jurisdiction to entertain this petition

23. This court's jurisdiction was challenged by the respondents and interested party on the ground that the petitioner had on October 6, 2021 filed a suit HCCC No E248 of 2021 Cytonn Investment Management PLC v Abubakar Hassan and Rina Hicks which is still pending and it raises issues related to this petition. The petitioner on the other hand contested this notion, stating that the two matters were distinct in that the cited suit was a defamatory suit while this petition relates to violation of constitutional rights.
24. The court in the classic case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1 stated as follows on jurisdiction:

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."



25. The Supreme Court further made a clear statement on jurisdiction in the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR as follows:

“(68) A court’s jurisdiction flows from either the *Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings...

Where the *Constitution* exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the *Constitution*. Where the *Constitution* confers power upon Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

26. The challenge to this court’s jurisdiction revolves around the concept known as the doctrine of *sub judice*. According to the respondents the civil and constitutional courts of the High Court have equal jurisdiction. Considering this, it was argued that the petitioner ought to have presented its whole case before the civil court. The respondents contended that the petitioner could seek for the documents during discovery in the pre-trial process in the civil suit. Similarly, that the petitioner had the option of amending its plaint to accommodate the prayers herein. The respondents in the end decried the prejudicial position they were in as a result of the two parallel suits before the same court.
27. The law on the doctrine of *sub judice* is found under section 6 of the *Civil Procedure Act* which states 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.”

28. The Supreme court in the case of *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested parties)* (2020) eKLR on the topic stated 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 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.”

29. Discussing the *sub judice* rule in the context of enforcement of constitutional rights, this court in the case of *Okiya Omtatah Okioti & 2 others v Cabinet Secretary, Ministry of Health & 2 others; Kenya National Commission on Human Rights (Interested Party)* [2020] eKLR opined as follows:

“100. ...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*....

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...”

30. The court citing the case of *Legal Advice Centre aka Kituo Cha Sheria v Communication Authority of Kenya* [2015] eKLR with approval at paragraph 102 went on to observe as follows:

“...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*:-

“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.”

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:

“...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...”

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.” (Emphasis added).



31. For ease of reference the 1st and 2nd respondents attached a copy of the pleadings in civil suit HCCC No E248 of 2021. That suit as can be read from the pleadings is premised on the allegations that the 1st defendant (2nd respondent herein) during his interview with the 2nd defendant (the interested party herein) on her youtube channel called “Money wise” uttered alleged defamatory statements by referring to the petitioner as a ponzi scheme. The petitioner therefore claimed that the alleged defamatory words were false and malicious and in effect injured it’s reputation.
32. As discussed above, for a matter to qualify as *sub judice*, the following four elements must be present. First, there must be two or more suits filed consecutively. Second, the matter in issue in the suits must be directly and substantially in issue in both. Thirdly, the parties in the suits must be the same or must be parties under whom they or any of them claim and are litigating under the same title. Lastly, the suits must be pending in the same or any other court having jurisdiction to grant the relief claimed.
33. Unquestionably the first and fourth elements in this petition are also in the civil suit. The only difference in the parties appearing is the addition of the 1st respondent which is not a party in HCCC No E248 of 2021. Regard is however had to the reasoning that, 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. I believe this is applicable in the context of this case because, it is discernable that the interview was done by the 2nd respondent as an officer of the 1st respondent and not in his personal capacity.
34. The matter in issue in suit HCCC No E248 of 2021 is primarily the civil tort of defamation. It is obvious that the foundation of this petition is not the impugned interview and the contents thereof. Riding on the basis of HCCC No E248 of 2021, the petitioner approached this court citing violation of constitutional rights, by denial of the inquiry report. This violation is not one of the issues in the civil suit. Considering this, I find that the issue of constitutional violation is not directly and substantively in issue in HCCC No E248 of 2021.
35. On the flipside, the petitioner at prayers (d) and (e) is perceived to urge this court to issue the orders with respect to the alleged reputation injury caused by the respondents. This is in addition to the constitutional violation issue. The prayers read as follows for context:
 - d) In the alternative to prayer (c) above, if the honourable Court establishes that the 2nd respondent alluded to a non-existent report, an order do issue directing the 1st respondent to issue a public apology to the petitioner for uttering incorrect, untrue and misleading information which had the direct consequence of occasioning serious reputational injury and a run on the fund managed by the petitioner.
 - e) A consequential order to prayer (d) above, be issued directing the 1st respondent to pay general damages of Kshs 20,000,000 to the petitioner for the inexcusable reputational injury and impermissible violation of the petitioner’s rights to fair administrative action and access to information pursuant to articles 35(1)(b) and 47 of the Constitution.
36. Guided by the principles set out above, these two prayers i.e prayers (d & e) are fundamentally and directly in issue in suit HCCC No E248 of 2021. This court as a result is barred from accepting an invitation to make a determination on an issue competently placed before another court with the requisite jurisdiction. Proceeding with such a suit would essentially be in breach of the doctrine of *sub judice*.
37. From the foregoing, I find that the substantive issue on violation of constitutional rights is distinct from the defamatory aspect in the civil suit. In this regard, I do not find the constitutional issue on



violation of article 35 and 47 of the Constitution raised herein to be *sub judice*. On the contrary, the issue on the alleged defamation that led to injury of the petitioner's reputation is pending determination before the civil Court. As such this court shall not interrogate that issue in the ensuing discussion.

Whether the petitioner's constitutional rights under article 35 and 47 of the Constitution was violated by the respondents

38. The petitioner averred that vide a letter dated June 20, 2022, it sought information from the 1st respondent. This information related to the enquiry report alluded to by the 2nd respondent in his interview with the interested party. The 1st respondent in response through its letter dated 30th June 2022 declined to issue the information citing the civil suit HCCC No E248 of 2021. Further, the 1st respondent deposed that section 13(2) of Capital Markets Act provides that the 1st respondent is not allowed to disclose any information acquired during its inquiry processes to persons unless ordered by a court of law. The petitioner nonetheless continued to ask for the report from the 1st respondent in its further letter dated 6th July 2022.
39. The right to access information is a universal right that is upheld in various international instruments. Nationally, this right finds its roots in the Constitution under article 35 of the Constitution. This article provides as follows:
- i. Every citizen has the right of access to--
 - a. information held by the State; and
 - b. information held by another person and required for the exercise or protection of any right or fundamental freedom.
 - ii. Every person has the right to the correction or deletion of untrue or misleading information that affects the person.
 - iii. The State shall publish and publicise any important information affecting the nation.
40. article 35 of the Constitution is effected by the Access to Information Act No 31 of 2016. Section 4 of the Act expounds this right as follows:
- i. 4. Right to information
Subject to this Act and any other written law, every citizen has the right of access to information held by—
 - a. the State; and
 - b. another person and where that information is required for the exercise or protection of any right or fundamental freedom.
 - ii. Subject to this Act, every citizen's right to access information is not affected by—
 - a. any reason the person gives for seeking access; or
 - b. the public entity's belief as to what are the person's reasons for seeking access.



41. The Supreme Court while discussing the essence of this right in the case of *Njonjo Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others* [2017] eKLR opined as follows:

“(13) article 35(1)(a) and (b) of the *Constitution*, read with section 3 of the *Access to Information Act* would thus show without unequivocation that all citizens have the right to access information held by the state, or public agencies including bodies such as the 2nd respondent. In addressing that issue, the court in *Petition No 479 of 2013 Rev. Timothy Njoya v Attorney General & another*; [2014] eKLR, it was held;

“A plain reading of section 35(1)(a) reveals that every citizen has a right of access to information held by the State which includes information held by public bodies such as the 2nd respondent. In *Nairobi Law Monthly v. Kengen* (supra) the court dealt with the applicability of the right to information as follows;

“The second consideration to bear in mind is that the right to information implies the entitlement by the citizen to information, but it also imposes a duty on the state with regard to provision of information. Thus, the state has a duty not only to proactively publish information in the public interest... this, I believe, is the import of article 35(3) of the *Constitution* of Kenya which imposes an obligation on the state to ‘publish and publicise any important information affecting the nation’, but also to provide open access to such specific information as people may require from the state”.

(14) This right to access to information is, however, not absolute and there may be circumstances in which a person may be denied particular information. Specifically procedures are provided in a law on how a person ought to access information held by another person and particularly a State organ or entity.”

42. It is not refuted that the right to access information is one of the hallmarks of our democratic principles which binds all state organs and persons under article 10 of the *Constitution*. The only circumstances under which this right can be limited is provided for under section 6(1) of the *Access to information Act* as follows:

- i. Pursuant to article 24 of the *Constitution*, the right of access to information under article 35 of the *Constitution* shall be limited in respect of information whose disclosure is likely to—
 - a. undermine the national security of Kenya;
 - b. impede the due process of law;
 - c. endanger the safety, health or life of any person;
 - d. involve the unwarranted invasion of the privacy of an individual, other than the applicant or the person on whose behalf an application has, with proper authority, been made;



- e. substantially prejudice the commercial interests, including intellectual property rights, of that entity or third party from whom information was obtained;
- f. cause substantial harm to the ability of the Government to manage the economy of Kenya;
- g. significantly undermine a public or private entity's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration;
- h. damage a public entity's position in any actual or contemplated legal proceedings; or
- i. infringe professional confidentiality as recognized in law or by the rules of a registered association of a profession.

43. The facts of this case reveal that the genesis of this matter was an inquiry conducted by the 1st respondent on the petitioner as required of it under its mandate under the Capital Markets Act CAP. 485A Laws of Kenya. Following the inquiry the 1st respondent issued a notice to show cause letter dated April 25, 2017 to the petitioner who responded vide a letter dated August 12, 2017. This was subsequently responded to by the 1st respondent in its letter dated August 17, 2017. It is noted from the correspondence that the petitioner did not seek to be supplied with a copy of the inquiry report at that juncture.

44. While the petitioner asserted that it was not given an opportunity to respond to the allegations, it is clear from the annexed correspondence that the 1st respondent engaged the petitioner in the process of inquiry and gave it an opportunity to respond.

45. The matter was later revived when the 2nd respondent in an interview with the interested party alluded to the inquiry report. This aggrieved the petitioner who filed a defamatory suit under HCCC No E248 of 2021 and the instant petition for violation of his constitutional rights.

46. At this point I would wish to state that contrary to the 1st and 2nd respondents' argument, the Capital Markets Tribunal established under section 35A of the Act does not have jurisdiction to make a determination on the alleged violation of a fundamental right under the Constitution. Its jurisdiction is clearly defined under section 35A of the Act, which states as follows:

- (4) The Tribunal shall, upon an appeal made to it in writing by an aggrieved party following a determination by the Authority on any matter relating to this Act, inquire into the matter and make an award thereon, and every award made shall be notified by the Tribunal to the parties concerned and the Authority as the case may be.

47. Back to the dispute at hand, the petitioner sought for the inquiry report from the 1st respondent. The 1st respondent in its affidavit contested the request for the information owing to the pending civil case. It further suggested that the same could be obtained during the discovery process in the civil suit, and that it was not obligated to release information obtained in its inquiry processes.

48. While it is unquestionable that the 1st respondent is legally required to make such inquiries as part of its mandate, it's noted that the reason for refusing to grant the information was section 13(1) and (2) of the Act. This section provides as follows:

Furnishing of information to the Authority

- i. The Authority or any person officially authorized in that behalf by the Authority may, by notice in writing, require any person to furnish to the Authority or to the authorized person,



within such period as is specified in the notice, all such returns or information as specified in such notice.

- ii. The Authority or any member thereof, or any officer or servant of the Authority, shall not disclose to any person or use any return or information acquired under subsection (1) except for the purpose of achieving the objectives of the Authority unless required to do so by a court of law.
49. While the above section is relied on, the 1st respondent did not undertake to demonstrate how the information required fitted this category and how it qualified under section 6(1) of the Act. The only information is that there was an inquiry made on the petitioner which produced the conclusion set out in the pleadings. The genesis and source of information or how the information was acquired is not made known. It is for this reason not clear whether the information was acquired by the 1st respondent in its independent investigations or information supplied to it by other persons.
 50. It is important to emphasize that the right to access information is not limited unless a party seeking to limit it proves that the limitation is justified under article 24 of the Constitution as guided by section 6(1) of the Access to Information Act. It is not enough for one to state that it is not allowed to disclose the information sought.
 51. On the other hand the Access to Information Act does not limit the manner or time frame within which one can seek the information desired to enforce a constitutional right. Had it been so the Act could have clearly indicated the same. I say this in reference to the 1st respondent's suggestion of the manner the petitioner ought to have sought the information.
 52. In addressing such a person's request for information, the Constitution demands that this act by the body which is an administration action be done within its dictates. In respect of this, article 47(2) of the Constitution provides that:
 - i. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
 53. In my view, a private or public entity is required irrespective of the decision that maybe made by it, to give reasons to the person seeking the information showing why the sought information cannot be released. From the material placed before this court, the 1st respondent in its letter dated 30th June 2022 (AH-4) responded to the petitioner's letter listing its reasons for refusing to release the information sought. I have studied this response by the 1st respondent and find that the reasons given by 1st respondent did not fall under the exemptions set out under section 6(1) of the Access to Information Act.
 54. The 1st and 2nd respondents did not demonstrate as expected, how their refusal was in line with the provisions of the law. It is my humble finding that the 1st respondent's unqualified decision to decline to issue the information sought by the petitioner violated its right to access information under article 35(1)(b) of the Constitution.
 55. On the other hand I find that the 1st respondent did not violate the petitioner's right under article 47 of the Constitution, reason being that it was granted an opportunity to respond to the issues raised vide the notice to show cause. Similarly the 1st respondent responded to the petitioner's correspondence seeking the inquiry report, while giving its reasons for not furnishing the said report. There was therefore noted correspondence.
 56. The above being my findings I come to the conclusion that the petition only succeeds partially in terms of the violation of article 35 of the Constitution, and the following orders are issued:



- i. A declaration that the refusal by the 1st respondent to furnish the petitioner with a copy of the inquiry report alluded to by the 2nd respondent in his interview with the interested party amounts to a violation of the petitioner's right of access to information pursuant to article 35(1)(b) of the Constitution.
- ii. Prayer (b) is dismissed.
- iii. An order of *mandamus* to issue compelling the 1st respondent to forthwith release to the petitioner a copy of the inquiry report alluded to by the 2nd respondent in his interview with the interested party.
- iv. Prayer (d) is dismissed. They are the subject of HCCC No E248 of 2021.
- v. Prayer (e) is dismissed. They are the subject of HCCC No E248 of 2021.
- vi. The petitioner is awarded half (1/2) of the costs of the petition.

Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 12TH DAY OF MAY 2023 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT

