

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KIBERA
PETITION NO. E012 OF 2025

NAIROBI BEAUTY WORLD LIMITED.....1ST
PETITIONER
ABDIRAHMAN HASSAN.....2ND
PETITIONER
FATHIYA SHEIKH ALI.....3RD
PETITIONER

VERSUS

ANTI-COUNTERFEIT AUTHORITY.....1ST
RESPONDENT
SIME DARBY OILS PROFESSIONAL SDN.....2ND
RESPONDENT
KENYA INDUSTRIAL PROPERTY INSTITUTE.....3RD
RESPONDENT
DIRECTOR OF PUBLIC PROSECUTIONS.....4TH
RESPONDENT

RULING

1. By a Petition dated 23rd September 2025, the Petitioners sought declaratory, prerogative and compensatory relief arising from the seizure and continued detention of their goods under ACA File No. ACA/HQ/ENF/IPRC/69/2023. They prayed that the court declares the seizure unlawful and unconstitutional for violating their rights to property, fair administrative action, dignity and freedom from arbitrary enforcement. They further contend that the complaint initiating the enforcement action, as well as the application leading to expungement proceedings, was lodged by a person without legal standing, contrary to section 33 of the Anti-Counterfeit Act, and is therefore invalid.
2. They also sought a declaration that any intended arrest, detention or prosecution by the 1st and 4th Respondents is unlawful and amounts to harassment in violation of Articles 29, 47, 49 and 50 of the Constitution. They prayed for an order of mandamus to

compel the 1st Respondent to release all seized goods, and prohibition restraining the 1st and 4th Respondents, their officers or agents, from arresting, charging or prosecuting them in connection with the impugned complaint or any complaint made by the alleged agents of the 2nd Respondent. They also sought declarations of entitlement to compensation and an award of general damages for arbitrary deprivation of property, unlawful seizure, psychological distress, reputational injury, business disruption and violation of constitutional rights. Costs and any appropriate further relief are also sought.

3. Simultaneously, the Petitioners filed a Notice of Motion seeking conservatory orders to halt any investigation, arrest, detention or prosecution arising from the impugned complaint, and to restrain similar action based on any complaint by the 2nd Respondent's agents. They also sought interim release of the seized goods and protection from harassment or threatened criminal action. The Court granted interim orders restraining the Respondents from interfering with the Petitioners' liberty pending the hearing of the Petition.
4. On 1st October 2025, the 1st Respondent lodged a Preliminary Objection, arguing that the Petition is res judicata, the issues having been determined in **HCCHRPET E118/2024** before Justice Mugambi. It further claimed that the Petition is barred by sub judice in light of Milimani **CMCC No. E2199/2024** (withdrawn on 11 September 2025) and by active proceedings in **HCCOMM E604/2023**, where the 2nd Respondent enjoys injunctive relief. It also invoked constitutional avoidance and asserted that the interim orders should be set aside for failure to make full

disclosure, relying on **Owners of Motor Vessel “Lilian S” v Caltex Kenya Ltd.**

5. The 1st Respondent’s Replying Affidavit dated 8th October 2025 set out facts in support of these objections.
6. The 2nd Respondent filed its own Preliminary Objection on the same res judicata ground and further asserted that the Petition is sub judice **HCCA E204/2021** and **HCCOMMA E288/2024**, and is an abuse of process.
7. The 4th Respondent (DPP) also raised a Preliminary Objection, adopting the arguments of the 1st and 2nd Respondents, and contending that the Court is functus officio by virtue of the judgment in **HCCHRPET E118/2024**.
8. The 3rd Respondent responded by affidavit dated 6th October 2025. Written submissions were filed by the 2nd Respondent on 6th October and by the Petitioners on 9th October 2025. Oral submissions were made on 13th October 2025.
9. Mr. Onyony, Learned Counsel for the 2nd respondent argued that the issues of seizure, arrest and prosecution are res judicata, relying on **Kenya Commercial Bank Ltd v Muiri Coffee Estate Ltd[2016]eKLR**. He further submitted that pending suits in **HCCA E204/2021** and **HCCOMMA E288/2024** render the Petition sub judice, relying on **Kenya National Commission on Human Rights v AG & 17 Others [2020]eKLR**. He contended that multiple parallel proceedings amount to abuse of process.
10. Learned Counsel for the 1st Respondent supported these arguments, adding that similar relief had been sought in earlier proceedings and that trademark infringement matters remain pending in **HCCOMM E604/2024** and **HCCA E204/2021**.

- 11.** Mr. Mulati, Learned Counsel for the DPP associated himself with these submissions.
- 12.** For the Petitioners, Ms. Sinana conceded that **HCCHRPET E118/2024** existed but argued that the parties, causes of action and issues differ. She submitted that the present Petition concerns continued detention of goods beyond statutory timelines and raises fresh constitutional questions. She relied on **John Florence Maritime Services Limited & Another vs Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015)(2021)KESC 39 (KLR)**
- 13.** On sub judice, she argued that pending trademark suits concern distinct issues and do not bar constitutional scrutiny of the Respondents' conduct. She maintained that the Petition raises genuine constitutional grievances and is not an abuse of process.

Issues for determination

14. I have considered the Preliminary Objections, the Replying Affidavit by the 1st Respondent, the written and oral submissions by the parties, the list of authorities and all material submitted. The following issues arise for my determination.
- a) Whether the instant Petition is *res judicata*;
 - b) Whether the instant Petition is *sub judice*;
 - c) Whether the proceedings herein constitute abuse of court process.

Analysis

a) Whether the instant Petition is *res judicata*

15. The Supreme Court in **John Florence Maritime Services Limited & Another vs Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015)(2021)KESC**

39 (KLR) extensively considered the application of the doctrine of *res judicata* in constitutional petitions. The court states as follows;

“84. Just as the Court of Appeal in its impugned decision noted that rights keep on evolving, mutating and assuming multifaceted dimensions it may be difficult to specify what is rarest and clearest. We however propose to set some parameters that a party seeking to have a court give an exemption to the application of res judicata. The first is where there is potential for substantial injustice if a court does not hear a constitutional matter or issue on its merits. It is our considered opinion that before a court can arrive at such a conclusion, it must examine the entirety of the circumstances as well as address the factors for and against exercise of such discretionary power.

85. in the alternative a litigant must demonstrate special circumstances warranting the court to make an exemption.

86. We restate the elements that must be proven before a court may arrive at the conclusion that a matter is res judicata. For res judicata to be invoked in a civil matter the following elements must be demonstrated:

- (i) There is a former Judgment or order which was final;*
- (ii) The Judgment or order was on merit;*
- (iii) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and*
- (iv) There must be between the first and the second action identical parties, subject matter and cause of action.”*

16. The doctrine of res judicata once raised and when successfully proven acts as a bar that prevents the court from further interrogating the issues before it.
17. The Supreme Court has made clear that the elements of res judicata operate independently. A party invoking the doctrine must prove each one distinctly and to the court's satisfaction. Having reviewed the judgment of Justice Mugambi in **HCCHRPET E118/2024**, delivered on 26th June 2025, I am satisfied that it was a final decision on the merits after a full hearing.
18. The earlier petition was filed on 5th March 2024 following the seizure of goods on 18th December 2023. It was brought by the 2nd and 3rd Petitioners against the 1st and 4th Respondents. The present Petition includes Nairobi Beauty World Limited as the 1st Petitioner and the Kenya Industrial Property Institute as the 3rd Respondent, neither of whom were parties in the first action. The 2nd Respondent here was only an Interested Party in the earlier suit. The parties are therefore not identical.
19. On the cause of action and subject matter, the first Petition was rooted in an apprehension of imminent prosecution and alleged violations of rights under Articles 10, 25, 27, 28, 29 and 47. At that time, the 1st Respondent remained within the statutory three-month period permitted for detention and possible prosecution under the Anti-Counterfeit Act. The prayers in that Petition challenged the ongoing investigations and the threatened arrest and prosecution.
20. Justice Mugambi held, at paragraph 98, that the 1st Respondent acted reasonably in pursuing the complaint of trademark infringement, and that its mandate entitled it to continue investigations despite the Registrar's ruling.

21. In contrast, the present Petition introduces new issues, including the claim that the continued detention of the goods violates Article 40. This is a fresh question not addressed in the first action. The Petition also seeks mandamus to compel release of the seized goods, a remedy neither sought nor considered previously. These matters require substantive examination to determine whether the 1st Respondent's conduct violates the Constitution and whether any damages are due.
22. For these reasons, the Preliminary Objections on this ground must fail.

b) Whether the instant petition is sub judice

23. Section 6 of the Civil Procedure Act provides that no court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.
24. The Court of Appeal in **Nguruman Limited vs Nielsen & another (Civil Appeal No. 20 of 2018 (2023) KLR** propounded a three-tier test in determining whether a suit is sub judice thus;
- (i) The suit or issue is directly and substantially in issue in the former suit;
 - (ii) Whether the former suit was between the same parties or parties under whom they or any of them claim; and

(iii) Whether those parties were litigating under the same title.

25. In support of their claim that the Petition herein is sub judice, the Respondents have referred me to three cases; **HCCA E204 of 2021 Nairobi Beauty World vs Sume Darby Oils Professionals SDN.BHD** and **HCCOMMA E288 of 2024 Nairobi Beauty World vs Sume Darby Oils Professionals SDN.BHD** and **Nairobi HCCOMM E604 of 2023 Sime Derby Oils Professionals SDN.BHD vs Nairobi Beauty World Limited.**

26. In respect to **HCCA E204 of 2021 Nairobi Beauty World vs Sume Darby Oils Professionals SDN.BHD**, the 2nd Respondent has availed a Ruling in that matter delivered by Justice Christine Meoli on 24th January 2023. Notably, the only parties in the said application were the 1st Petitioner and the 2nd Respondent in the instant Petition. None of the other parties herein were parties in that application.

27. The said application sought among other orders, stay of execution of the decision of the Registrar of Trademarks, substitution of the Memorandum of Appeal with a substantive Notice of Motion among others. In the final orders, the learned judge granted leave to the Applicant therein to file an appeal in compliance with the Trade Marks Rules within ten (10) days of the ruling. After issuance of the said orders, that file was marked as closed.

28. It is thus clear in my mind that the issues raised in that application are quite distinct from the controversies and orders sought in the instant Petition. Further, the said file was marked as

closed way back in 2023 hence cannot be said to be pending within the meaning of section 6 of the Civil Procedure Act.

29. With respect to **HCCOMMA E288 of 2024 Nairobi Beauty World vs Sume Darby Oils Professionals SDN.BHD**, I have seen the Notice of Motion application dated 1st October 2024 between the 1st Petitioner and the 2nd Respondent herein. principally, the application seeks to set aside the decision of the Assistant Registrar of Trademarks delivered on 9th April 2021. I find that none of the issues in that application has been raised for determination in this Petition hence it. Fundamentally, the application therein is an appeal while the Petition before court cites and alleges constitutional violations by other parties, not just the 2nd Respondent herein.

30. In regard to **HCCOMM E604 of 2023 Sime Derby Oils Professionals SDN.BHD vs Nairobi Beauty World Limited**, whereas the pleadings in that suit have not been availed to me, I have been referred to a ruling delivered by Justice Peter Mulwa on 24th April 2025 granting an injunction against the 1st Petitioner herein, Nairobi Beauty World Limited from infringing on the Plaintiff's (2nd Respondent herein) registered trademark No. 111560 CBC BRAND (WORDS AND DEVICES) pending hearing and determination of the substantive infringement proceedings.

31. From the nature of this order, it is clear that the said action relates to infringement proceedings which are quite different from the issues raised in the present constitutional Petition. In the instant case, the court is called upon to inter alia, determine whether or not the continued detention of the Petitioners' goods by the 1st Respondent violates the Petitioners' right to property under Article 40 of the Constitution.

32. Accordingly, I find that the parties in this Petition are not litigating under the same issues and that the issues raised herein are not substantially in dispute in the pending suit and application before the High Court. As such, the Preliminary Objection on the ground of sub judice must fail.

c) Whether the instant proceedings are an abuse of court process

33. The High Court in Satya Bhamu Gandhi vs Director of Public Prosecutions (2018) KLR stated that,

“The situation that may give rise to an abuse of court process are indeed exhaustive. It involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:

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

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

(iii) Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and respondent notice.

(iv) Where an application for adjournment is sought by a party to an action to bring another application to court

for leave to raise an issue of fact already decided by a court of law.

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

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

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

(viii) Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent.”

34. In the instant case, I am not satisfied that the Petitioners have done or acted in a manner consistent with the analogous grounds listed above. I am of the view that at this stage, the Petitioners have presented genuine grievances that deserve a day in court. The Respondents will equally have their day to challenge the Petitioners case. The Court will thereafter interrogate the respective parties' positions and make a decision based on the law and facts before it.

35. In view of the above analysis, I find that the Preliminary Objections are lacking in merit and are hereby dismissed with costs to the Petitioners.

36. For the avoidance of doubt, the conservatory orders issued on 23rd September 2025 shall remain in force pending the determination of the Petition. I accordingly direct that the Petition be set down for hearing.

Orders accordingly.

**Ruling dated and delivered virtually this 25th day of
November 2025**

**D. KAVEDZA
JUDGE**

In the presence of:

Ms. Sinama for the Petitioners

Ms. Nyawaga for the 1st Respondent

Ms. Karimi Court Assistant.