Muchiri v Board of Management of Kenya Hospital Association & 2 others (Civil Appeal E219 of 2025) [2025] KECA 2315 (KLR) (19 December 2025) (Judgment)

Neutral citation: [2025] KECA 2315 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E219 OF 2025

DK MUSINGA, AO MUCHELULE & GV ODUNGA, JJA

DECEMBER 19, 2025

BETWEEN

SAMUEL MITHAMO MUCHIRI ..... APPLICANT

AND

THE BOARD OF MANAGEMENT OF KENYA HOSPITAL ASSOCIATION ..... 1ST RESPONDENT

PROF GITHU MUIGAI, SC, DR JANE NYAKANGO, PROF. DONALD ORINDA, DR MESHACK ONGUTI AND MS CECILIA NGALYUKA (SUED AS TRUSTEES OF THE KENYA HOSPITAL ASSOCIATION) .... 2ND RESPONDENT

KENYA HOSPITAL ASSOCIATION ..... 3RD RESPONDENT

(Being an appeal from the Ruling of the High Court of Kenya at Nairobi (Commercial & Tax Division) (P. Mulwa, J.) dated 24th March 2025 in HC.COMM E081 of 2025)

JUDGMENT

1. This appeal has, as its genesis, the ruling by the High Court, Nairobi, in High Court Commercial Case No. E081 of 2025 delivered by Mulwa, J. on 4th March 2025 in which the learned Judge dismissed the Notice of Motion dated 9th October 2023. In the proceedings giving rise to the decision appealed against, the Nai Civil Appeal No E219 of 2025 Page 1 of 27 appellant was the plaintiff, while the 1st and 2nd respondents were the 1st and 2nd respondents, respectively. The 3rd respondent, Kenya Hospital Association (the Hospital), was the interested party.
2. The brief facts of this case were that by an application dated 7th February 2025, the appellant sought, inter alia, the following orders:
    1. That leave be and is hereby granted to the Plaintiff to continue this suit as a derivative suit on behalf of the Interested Party against the Defendants.

2. That a temporary order of injunction be and hereby issued suspending the implementation of the Resolutions on election of Directors of the Board of Management and of election of Trustee of the Kenya Hospital Association of 4th December 2024, pending hearing and determination of the suit or until further orders of the Honourable Court.

3. That a temporary order of injunction be and is hereby issued restraining the 1st Defendant, whether by itself, agents, employees or anybody whosever acting on the 1st Defendant's behalf from borrowing for any Capital Expenditure for the Interested Party, Kenya Hospital Association, and or offering, executing or in any manner whichsoever using the assets of the Interested Party as collateral for a loan, pending hearing and determination of the suit or until further orders of the Honourable Court.

4. That a temporary order of injunction be and is hereby issued restraining the 1st Defendant, whether by itself, agents, employees or anybody whosever acting on the 1st Defendant's behalf from engaging in any form of Capital Expenditure, including equipment purchase, furniture and fittings, upgrade and maintenance of physical assets such as property, plants, buildings, technology, or equipment, settling pending bills, spending on any new procured projects, any ongoing projects, and undertaking new projects or investments, pending hearing and determination of the suit or until further orders of the Honourable Court.

5. That a temporary order of injunction be and is hereby issued restraining the 2nd Defendant, whether by themselves, agents, employees or anybody whosever acting on their behalf from in any manner whichsoever offering and or using the assets of the Interested Party, Kenya Hospital Association as collateral for a loan, pending hearing and determination of the suit or until further orders of the Honourable Court.

6. That a temporary order of injunction be and is hereby issued restraining the 1st Defendant, whether by itself, agents, employees or anybody whosever acting on the 1st Defendant's behalf from floating or concluding any procurement of Capital services and Projects pending hearing and determination of the suit or until further orders of the Honourable Court.

7. That a temporary order of injunction be and is hereby issued restraining the 1st Defendant, whether by itself, agents, employees or anybody whosever acting on the 1st Defendant's behalf from liquidating, encashing, or in any manner whatsoever utilizing or applying the funds belonging to and held by the Interested Party, Kenya Hospital Association, in Fixed/Call Deposits, Treasury Bonds, Infrastructure Bonds and Provident Fund, and or where liquidated from applying funds therefrom, wherever held, pending hearing and determination of the suit or until further orders of the Honourable Court.

8. That a mandatory order of injunction be and is hereby issued compelling the 1st Defendant to, within seven (7) days of service of the Order, avail to the Plaintiff the index and register of members of the Interested Party, Kenya Hospital Association as of 30th July 2024, and as of 4th December 2024, as obligated by Section 96 and 97 of the *Companies Act*, Chapter 486 of the Laws of Kenya.

9. THAT a Mandatory Order of injunction be and is hereby issued compelling the 1st Defendant to, within seven (7) days of service of the Order, to avail to the Plaintiff Notice of Convening Board Meeting and Minutes of Board Minutes of the Board of Management of the Interested Party that vetted and approved any members of the Interested Party from 1st August 2024 to 4th December 2024.

10. That costs of the application be borne by the Defendants.

3. The gravamen of the appellant's case was that there subsisted serious breaches and default by actionable commissions of the Board of the Hospital (the 3rd respondent or the Board), so egregious that the appellant was constrained to institute the proceedings in question in order to protect the interests of the Hospital, with a view to saving it from a total shut down/insolvency. According to him, the said actions resulted in what he termed as "unprecedent loss, pilferage, asset haemorrhage, the worst form of governance and management since incorporation of the Hospital in 1952". He accused the Board of violating sections 95, 96 and 97 of the *Companies Act* (the Act) and the Articles of Association, with respect to the membership and the members' Register and for failing to file with the Registrar of Companies the updated index of register of members and declining to allow the members of the Hospital an opportunity to inspect the register and or make copies.

4. The Board was faulted for purporting to register new members of the Hospital, in contravention of Article 8 of the Articles of the Hospital and breach of the duty to exercise reasonable care, skill and diligence, resulting in loss/deficit amount of Kshs. 1,155,329,000.00, with a debt to suppliers of nearly Kshs. 3 billion. He further claimed that the Defendants intended to imprudently borrow, off shore, the sum of Kshs. 4.2 billion, using assets of the Hospital as collateral, with the likelihood of driving the Hospital to insolvency. According to him, the Board, in serious breach of fiduciary duty, presided over the Annual General Meeting of the Hospital of 4th December 2024, in contravention of provisions of the Act and Articles of Association, thus rendering the resolutions of the said meeting fatal, and invalid.

5. It was these actions, according to him, that constrained him, as member of the Hospital, to invoke the jurisdiction in section 239 of the Act, to file a derivative suit in order to protect the interests of the Hospital. It was his view that he had established a prima facie case with chances of success and that damages would not be adequate. He asserted that the balance of convenience was in favour of preservation of the subject matter of litigation, by way of injunction and that unless the court intervened as prayed for in the application, the Hospital and its members would suffer irreparable harm, including financial ruin, loss of public trust and operational collapse.

6. In response, the defendants assailed the competence of the application on the grounds that the supporting affidavit was incompetent and that the issues raised in the application were res sub judice and res judicata High Court Commercial Suit No. E 233 of 2024 – Kenya Hospital Association Limited T/A The Nairobi Hospital v Dr Edwin Kipngéno Rono & Others (HCCOMM E233 of 2024) and High Court Commercial Suit No. E544 of 2024 – Kenya Hospital Association v Becky Valerie Aela Genga-Eyama & Others (HCCOMM E544 of 2024) which were still pending. To the defendants, granting the orders sought by the appellant had the effect of crippling the operations of the Hospital, whose optimal functioning is a matter of public interest. There were other issues raised by the defendants but which do not concern us in this appeal.

7. In his impugned ruling, the learned Judge found that the defects in the supporting affidavit were curable technicalities which could be disregarded pursuant to Article 159(2) of *the Constitution*.

8. On the twin issues of res judicata and sub judice, the learned Judge found that although the suit in HCCOMM E544 of 2024 was instituted to stop a planned requisition by the defendants therein for an extra ordinary general meeting of the Hospital which was intended to remove of the Board's directors for various reasons, the requisition and call for the extra ordinary meeting was stayed in favour of the Hospital holding the AGM on 4th December 2024, whose report was filed in court. It was the learned Judge's view that any issue arising out of the AGM was best determined in that suit and not in a separate suit. The same position applied to the issues raised in the said requisition of the suit in HCCOMM

E544 of 2024, which in his view, could not be the subject of proceedings in the suit as that would offend the doctrine of res sub judice. It was his view that the issues being raised were consequent to the AGM that was conducted on 4th December 2024 since the appellant was challenging the manner in which the AGM was conducted and the resolutions taken thereof together with their effects. Those issues, he found, would best be determined by the court in HCCOMM E544 of 2024 as the outcome and report of the AGM was before that court. On the removal of the directors of the Hospital, it was found that the matter was directly in issue in the requisition that gave rise to HCCOMM E544 of 2024.

9. According to the learned Judge, 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. In this case he found that "the pith and substance of this suit is wholly identical to the earlier suit, HCCOMM E544 of 2024" and held that it would be untidy for the court to consider the outcome of the AGM both in the suit before him and the earlier suit as there was a great risk of coordinate courts granting conflicting orders.

10. The learned Judge further noted that the issue of the Kshs. 4.2 billion borrowing that was being raised by the appellant was a matter in issue in HCCOMM E233 of 2024 where the court held that the issue would best be raised and addressed in HCCOMM E544 of 2024.

11. In conclusion, the learned Judge, while reserving his comments on the merits of the case, found that the issues in the suit were similar and were likely to be raised in HCCOMM E544 of 2024. He directed that pursuant to section 6 of the *Civil Procedure Act*, the suit be mentioned alongside HCCOMM E544 of 2024 for possible consolidation and expedited hearing and determination.

12. That was the decision that aggrieved the appellant and provoked this appeal, which is based on the grounds that the learned Judge erred in law and in fact: in holding that the action in HCCOMM E081 was sub judice HCCOMM E544 of 2024; in holding that the action in HCCOMM E081 was sub judice HCCOMM E233 of 2024; in failing to determine whether or not the claim in HCCCOMM E081 could be continued as a derivative action; in failing to determine whether or not the appellant had established a prima facie case with a probability of success, and would suffer irreparable injury which would not adequately be compensated by an award of damages; in failing to determine whether or not the appellant had demonstrated special circumstances on the request for a mandatory injunction; and that the learned Judge disregarded precedent and stare decisis on questions of sub judice, derivative action, restraining and mandatory injunctions and thereby erred in law.

13. We heard this appeal on this Court's virtual platform on 24th November 2025 when learned counsel, Mr Nelson Havi and Mr.Biko Ashioya appeared for the appellant, learned counsel, Mr Stanley Kinyanjui, appeared for the 1st respondent, learned counsel, Mr I. S Ogejo with Ms Kwamboka, appeared for the 2nd respondent, and learned counsel, Mr O'Kubasu, appeared for the 3rd respondent. Counsel relied on their written submissions which they briefly highlighted.

14. On behalf of the appellant, it was submitted that the finding of sub judice by the High Court was erroneous as the appellant was not a party to HCCOMM E544 of 2024 and HCCOMM E233 of 2024. It was contended that the impugned resolutions of 4th December 2024 together with the actions intended to be taken by the 1st and 2nd respondents on the basis thereof could not possibly have been the subject matter of the previous suits.

According to the appellant, he sought leave to continue the suit before the High Court as a derivative action on behalf of the 3rd respondent, of which he is a member, based on breach of fiduciary duties by the 2nd respondent, which occasioned actual and imminent loss to the public and the 3rd respondent. Accordingly, a case for the grant of leave was made out, taking into account the illustrated facts surrounding the background of the dispute. Citing, sections 30, 239 and 240 of the *Companies Act*,

Gower and Davies, Principles of Modern Company Law (8th Ed) and the case of Isaiah Waweru Ngumi & 2 Others v Muturi Ndungú [2016] eKLR, the appellant emphasised that the purpose of the leave requirement in derivative actions is so that the courts can balance between invading the discretionary field of the management of a corporation and the need to hold faithless directors accountable for actions or omissions which fall outside the ambit of the protection of the business. It was submitted that leave ought to have been granted by the High Court. On the authority of Adrian Kamotho Njenga v Law Society of Kenya & 14 Others High Court Petition No. E025 of 2021 and Directline Assurance Co. Ltd v Dr Samuel Kamau & 11 Others, Civil Suit No. E328 OF 2024, it was submitted that injunctions were granted in circumstances similar to the instant case and that injunctions can be granted in respect of internal affairs of a limited liability company. According to the appellant, absent injunctive orders, the Hospital would collapse, with consequent losses and untold injury and suffering of the insuring public. On the strength of Directline Assurance Co. Limited v Dr Samuel Kamau Macharia & 11 Others (supra), it was submitted that a mandatory injunction was necessary to ensure that the ends of justice are not defeated by the 2nd respondent. We were asked to balance the wider public interests of patients of the Nairobi Hospital and members of the 3rd respondent on one hand, against those of the members of the Board of the 1st respondent and trustees of the 2nd respondent on the other hand. To the appellant, the balance favours the preservation of the Hospital from further plunder and pilferage, hence the injunction sought should have been issued.

15. Opposing the appeal, the 2nd respondent cited the case of Kenya National Commission on Human Rights v Attorney General & Others [2020] eKLR as setting out the grounds for consideration in invoking the doctrine of sub judice. It was contended that the injunction sought in HCCOMM E081 of 2025, restraining the 1st defendant from implementing the resolution passed at the AGM of the Hospital was the same order sought in HCCOMM E544 of 2024 which is still pending, and that the matter in contention in both cases is the manner in which the General Meeting was convened, conducted and ultimately, the outcome thereof together with its effect. It was noted that the suit in HCCOMM 544 of 2024 was filed prior to the filing of the suit from which this appeal originated, and that both suits are pending before courts of competent jurisdiction. Further, the proceedings in HCCOMM E081 of 2025, HCCOMM E544 of 2024 and HCCOMM 233 of 2024 among other numerous suits, revolve around the 3rd respondent, hence there is a common party in all the suits. We were urged to uphold the impugned ruling on the authority of the cases of Joel Kenduiywo v District Criminal Investigation Officer, Nandi & 4 Others [2019] eKLR.

16. It was submitted that to grant leave to the appellant to continue the proceedings as a derivative suit would open a pandora's box where any member of the company disgruntled by any action by the members of the Board can go outside the Memorandum and Articles of Association and institute legal proceedings as he pleases, without exhausting the dispute resolution mechanism availed in the Memorandum and Articles of Association of the Hospital. The case of Isaiah Waweru Ngumi and 2 Others v Muturi Ndungu, Kiambu HCCC No. 6 of 2016 was cited to reiterate that the court should consider the seriousness of the alleged wrong-doing by conducting a cost -benefit analysis of the intended action. In this case the 2nd respondent's position was that the appellant had not demonstrated the considerations stipulated in section 241(2) of the *Companies Act* in order to warrant leave to continue the suit as a derivative one.

17. On the denial of injunction, it was submitted that the power to grant injunctions is discretionary and must be exercised reasonably, judiciously and on sound legal principles. On the basis of the holdings in Giella v Cassman Brown and Co. Ltd (1973) EA 358 and Mrao Ltd v First American Bank of Kenya Ltd (2003) KLR, it was asserted that the appellant had not demonstrated a prima facie case in light of wanton abuse of the court process. We were urged to dismiss the appeal with costs.

18. The 3rd respondent submitted that the court declined to address the appellant's purported grievances since the same issues were properly before the court in a different matter and the court was alive to the sub judice rule that barred it from considering the said issues. Citing the principles for the grant of injunctions as stipulated in Giella v Cassman Brown Case and Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] KECA 606, it was submitted that the court should not express any concluded view on the dispute between the parties. It was the 3rd respondent's case that since the application offended the sub judice rule, the application failed the test of prima facie proof and had to lapse on that basis as was held in Kenya Commercial Finance Co. Ltd v Afraha Education Society [2001] 1 EA 86, Ogega & 7 Others v Ochwoga & Another [2024] KEELC 1805, and Njiraini v Co-operative Bank of Kenya Ltd [2025] KEHC 15496.

19. The 3rd respondent took the view that since the appellant agreed that the issues in controversy emanate from or revolve around the 3rd respondent's AGM held on 4th December 2024, the learned Judge was right in finding that the issues relating to the impugned AGM were the subject of HCCOMM E544 of 2024. Notwithstanding that the appellant was not a party to the previous suits, he would still be barred from re-litigating issues already being addressed in another suit as was held in Kenya National Commission on Human Rights v Attorney General & Others [2020] KESC 54. The case of Export Processing Zones Authority v Kapa Oil Refineries Limited & 6 Others [2014] KECA 864 was cited for the position that an appellate court has a limited function in an appeal from grant or refusal of injunction and has no jurisdiction to exercise an independent original discretion of its own but must defer to the High Court Judge's exercise of discretion. It was submitted that the appellant failed to satisfy the requirement for grant of temporary injunctive orders.

20. We have considered the submissions made by the parties in this appeal. In determining this application, it is important to understand the issues that the learned Judge addressed himself to. In the impugned ruling, the learned Judge expressed himself as hereunder:

> " The Defendants have also claimed that some of the issues raised by the Plaintiff are res sub judice and res judicata HCCOMM E544 of 2024, HCCOMM E233 of 2024 and HCCHRPET E361 of 2024. From the Plaint of HCCOMM E544 of 2024 (annexed), it shows that the same is in respect of the Hospital fighting off a planned requisition by the defendants therein for an Extra Ordinary General Meeting of the Hospital. The requisition therein sought the removal of the Board's directors for various reasons. It is common ground that the requisition and call for the Extra Ordinary Meeting was stayed in favour of the Hospital holding the AGM on 4th December 2024 and a report on the same has been filed in court. It therefore follows that any issue arising out of the AGM is best to be determined in that suit and not in a separate suit. This also goes to the issues raised in the said requisition of the suit in HCCOMM E544 of 2024. The same cannot be the subject of proceedings in this suit as this will obviously offend the doctrine of res sub judice.
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> Going through the plaint and the present application, it is clear that the issues now being raised by the Plaintiff are consequent to the AGM that was conducted on 4th December 2024. The Plaintiff is challenging the manner in which the AGM was conducted and the resolutions taken thereof together with their effects. In my view, these are issues that will best be determined by the court in HCCOMM E544 of 2024 as the outcome and report of the AGM is before that court. The Plaintiff also seeks the removal of the directors of the Hospital, a matter that is directly in issue in the Requisition that gave rise to HCCOMM E544 of 2024.

> The concept of sub judice is that where an issue is pending in a court of law for adjudication between the same parties, any other court is barred from trying that issue so long as the first suit goes on. In such a situation, an order is passed by the subsequent court to stay the proceedings and such order can be made at any stage. 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. I find that the pith and substance of this suit is wholly identical to the earlier suit, HCCOMM E544 of 2024.
>
> It will be untidy for the court to consider the outcome of the AGM both in this suit and the earlier suit as there is a great risk of coordinate courts granting conflicting orders. I also note that the issue of the Kshs. 4.2 billion borrowing that has now been raised by the Plaintiff herein was a matter in issue in HCCOMM E233 of 2024 where the court (Dr. Mugambi J.,) held that this issue would best be raised and addressed in HCCOMM E544 of 2024."

21. It is clear from the above excerpt that the only issue that was dealt with by the learned Judge was whether the suit was sub judice. It is true that there were other issues in the application such as whether the appellant ought to have been granted leave to continue with the suit as a derivative suit and whether the injunctive orders sought were merited. No determinations were made with respect to these issues, one way or the other. Mr Ogejo's view was that since the learned Judge did not expressly allow the said reliefs, they were deemed as having been denied. This submission was based on explanation 5 to section 7 of the *Civil Procedure Act* which provides that:

> Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

22. The Act does not state that any relief not expressly granted by the decree is denied. It only states that for the purposes of section 7 of the *Civil Procedure Act*, such relief is deemed as having been refused. The effect of the word deem, in legal parlance, was explained by the East African Court of Justice in Prof. Peter Anyan'g Nyong'o and 10 Others v Attorney General of Kenya & Others [2007] 1 EA 5; [2007] 2 EA 5; [2008] 3 KLR (EP) 397, where it was held that:

> " The word "deemed" is commonly used both in principal and subsidiary legislation to create what is referred to as legal or statutory fiction and the legislature uses the word for the purpose of assuming the existence of a fact that in reality does not exist...The word "deemed" is used a great deal in modern legislation. Sometimes it is used to impose for the purpose of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible."

23. It is therefore our view that the legal or statutory fiction is rebuttable, either expressly by a different statute or by judicial pronouncement. In this case, the learned Judge expressly stated that:

> " It is for the above reasons that I reserve my comments on the merits of this case and find that the issues herein are similar and are likely to be raised in HCCOMM E544 of 2024. Taking into account the import and tenor of the provisions of section 6 of the *Civil Procedure Act*, and the fact that this court is the one ceased of HCCOMM E544 of 2024, I hereby proceed to decree that the instant matter be mentioned alongside HCCOMM E544 of 2024 for possible consolidation and expedited hearing and determination. And considering the

nature of the dispute, each party shall bear its own costs of this application. The interim orders in place are hereby discharged."

24. Our understanding is that the other issues were deferred by the learned Judge to be dealt with once the contemplated consolidation was done. Being of that persuasion, our determination in this appeal will be restricted to the finding by the learned Judge that the issues raised by the appellant were res sub judice HCCOMM E544 of 2024 and HCCOMM E233 of 2024.

25. Sub judice rule is grounded on section 6 of the *Civil Procedure Act* which 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.

26. In order to meet the criteria for sub judice rule, the court must be satisfied that:

1. The suit or issue is directly and substantially in issue in the previously instituted suit.
2. The previous suit or proceeding and the current suit are between the same parties or parties under whom they or any of them claim.
3. The parties are litigating under the same title.
4. The suit or proceeding is pending in the same or any other court.
5. The court before which the suit or proceedings is pending has jurisdiction in Kenya to grant the relief claimed.

27. Since the sub judice rule is akin to the res judicata doctrine save that, while the former applies where the suits in question are still pending and the latter applies where the previous suits have been determined, the principles applicable in both instances are the same. The purpose of the sub judice rule, as stated by this Court in Kenya Ports Authority v William Odhiambo Ramogi & 8 Others [2019] eKLR is to avoid multiplicity of suits by the same parties over the same issues. The Supreme Court, while addressing itself to the same issue, in Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) (supra) held that:

> " 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."

28. The principle promotes the duty of the court in enforcing overriding objective in section 1A of the *Civil Procedure Act* as mirrored in section 3A of the *Appellate Jurisdiction Act*. In sections 1B and 3B of the respective Acts, it is provided that:

    1. For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—

        a. the just determination of the proceedings;

        b. the efficient disposal of the business of the Court;

        c. the efficient use of the available judicial and administrative resources;

        d. the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

        e. the use of suitable technology.

29. In our view, the filing of multiplicity of suits by parties or their representatives on the same or substantially the same subject matter violates the overriding objective since it goes contrary to the duty to efficiently dispose of the business of the court. By engaging the courts in different suit where the issues may be disposed of in one suit, the sub judice rule ensures that the available judicial and administrative resources are efficiently used. It is invoked 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. 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. They should therefore be avoided once the court's attention is brought to the fact of existing suits or proceedings.

30. In determining whether the rule applies, this Court in Thika Min Hydro Co. Ltd v Josphat Karu Ndwiga (2013) eKLR opined that:

> "It is not the form in which the suit is framed that determines whether it is sub judice. Rather it is the substance of the suit and looking at the pleading in both cases."

31. Therefore, to rephrase the position in E.T. v Attorney General & Another (2012) eKLR the courts must always be vigilant to guard against litigants evading the doctrine of sub judice by introducing new causes of action in subsequent suits so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court, in another way and in form of a new cause of action, a matter which is the subject of another suit in a court of competent jurisdiction. Parties cannot therefore evade the doctrine of sub judice by merely adding other parties or causes of action in a subsequent suit or by giving their case some cosmetic face lifting.

32. Having ourselves re-evaluated the material on record, as we are duty bound to do, we agree with the learned Judge that the subject matter of HCCOMM NO. E544 was the halting of the planned requisition by the defendants, in that suit, for an extra ordinary general meeting of the Hospital that was intended to remove the Board's directors. The requisition and call for the extra ordinary meeting was stayed in favour of the Hospital holding the AGM on 4th December 2024, which was done and its report filed in court. We agree that any issue arising out of that AGM is best determined in that suit and not in a separate suit. The issue of the removal of the directors of the Hospital was correctly found to be directly in issue in the requisition that gave rise to HCCOMM NO. E544 of 2024. On the other hand, the issue of the Kshs. 4.2 billion borrowing raised by the appellant was a matter in issue in

HCCOMM NO. E233 of 2024 where the court held that the issue would best be raised and addressed in HCCOMM E544 of 2024.

33. We agree with the learned Judge's conclusion that the pith and substance of the suit was wholly identical to HCCOMM NO. E544 of 2024, hence the risk of coordinate courts granting conflicting orders.

34. Instead of staying the suit from which this appeal arises, which is what the law requires, the learned Judge, in his wisdom, instead directed that the matters be consolidated, which we believe was in furtherance of the overriding objective.

35. In the premises, we find no merit in this appeal, which we hereby dismiss with costs to the respondents.

36. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 19 TH DAY OF DECEMBER, 2025.

D. K. MUSINGA (PRESIDENT)

.....

JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

.DEPUTY REGISTRAR