

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. E683 OF 2025

JOHN SAMUEL NDERITU MIRICHU.....
...PETITIONER

VERSUS

**CABINET SECRETARY, MINISTRY OF AGRICULTURE &
LIVESTOCK DEVELOPMENT.....1ST**
RESPONDENT

**DIRECTOR GENERAL, AGRICULTURE & FOOD
AUTHORITY.....2ND RESPONDENT**

**MANAGING DIRECTOR, KENYA NATIONAL
TRADING CORPORATION.....3RD**
RESPONDENT

**CABINET SECRETARY, MINISTRY OF INVESTMENTS,
TRADE & INDUSTRY.....4TH**
RESPONDENT

**CABINET SECRETARY, NATIONAL TREASURY &
ECONOMIC PLANNING.....5TH**
RESPONDENT

**COMMISSIONER CUSTOMS & BORDER CONTROL
DEPARTMENT...6TH RESPONDENT**

ATTORNEY GENERAL.....7TH
RESPONDENT

AND

MALI SAFI COMMODITIES LTD.....1ST
INTERESTED PARTY

TRIDAH WHOLESALERS LIMITED.....2ND
INTERESTED PARTY

MASSATECH KENYA LTD.....3RD
INTERESTED PARTY

ONE COMMODITIES CO.LTD.....	4TH
INTERESTED PARTY	
DELI-CONVIE LIMITED.....	5TH
INTERESTED PARTY	
EXPORT TRADING COMPANY LTD.....	6TH
INTERESTED PARTY	
HOUSE OF PROCUREMENT LIMITED.....	7TH
INTERESTED PARTY	
KRISH COMMODITIES LTD.....	8TH
INTERESTED PARTY	
ZUCHERO TRADING LIMITED.....	9TH
INTERESTED PARTY	
CELESTE TRADING LIMITED.....	10TH
INTERESTED PARTY	
GULF BAKERS LIMITED.....	11TH
INTERESTED PARTY	
KAMILI PACKERS LIMITED.....	12TH
INTERESTED PARTY	
GLOBAL MARKETING ENTERPRISE LIMITED.....	13TH
INTERESTED PARTY	
COMPACT INLAND LOGISTICS SEZ LIMITED.....	14TH
INTERESTED PARTY	
GO RICE CO. LIMITED.....	15TH
INTERESTED PARTY	
RICE IMPORTERS ASSOCIATION OF MOMBASA.....	16TH
INTERESTED PARTY	

RULING

Introduction

1. The Petitioner in the Petition dated 23rd October 2025 challenges the Respondents' procurement process in relation

to Tender No. KNTC/TENDER/IMPORT/003/2025 – 2026 which was an invitation for interested persons to submit their bids in view of supply of duty – free rice.

2. The Tender was allegedly cancelled on 10th September 2025 soon after 16 firms were named as successful bidders on 9th September 2025. The Petitioner protests that the Respondents did not adhere to the set procedure for cancellation of tenders under Section 3 of the Public Procurement and Asset Disposal Act as read with Article 10, 201 and 227 of the Constitution.
3. Fundamentally, the Petitioner asserts that the process did not adhere to the constitutional principles of fairness, transparency, competitiveness, cost effectiveness and was also not equitable. Considering this, the Petitioner seeks the following reliefs:
 - i. A conservatory order be issued suspending the enforcement, implementation, and/or operation of gazette notice number 10353 dated July 17, 2025.**
 - ii. A conservatory order be issued suspending the enforcement, implementation, and/or operation of gazette notice number 10353 dated July 17, 2025.**
 - iii. A conservatory order be issued suspending the ongoing procurement process of importing grade 1 milled white rice duty-free.**

- iv. A conservatory order be issued suspending the ongoing procurement process of importing grade 1 milled white rice duty-free.**
 - v. Any other order that the Court may deem just and fit to grant in the interest of justice and fairness.**
4. Accompanying the Petition, the Petitioner filed a Notice of Motion Application dated 23/10/2025 seeking conservatory orders.
 5. However, in opposition, the 1st, 3rd, 4th, 5th and 7th Respondents filed a Notice of Preliminary Objection dated 29/10/25 against both the Petition and the Application.
 6. On 30/10/2025, the Court directed that the Preliminary Objection and the Application to be heard together. The Court will determine the Preliminary Objection first, should it succeed, the Court will cease jurisdiction and take no further step. If the Preliminary objection fails, the Court will proceed and determine the Application on merits.

The Application

7. The Petitioner in the Notice of Motion application of even date seeks orders that:

- i. Spent.***
- ii. Pending the hearing and determination of this Petition, a conservatory order be issued suspending the enforcement, implementation, and/or operation of gazette notice number 10353 dated July 17, 2025.***
- iii. Pending the hearing and determination of this Application, a conservatory order be issued suspending the enforcement, implementation, and/or operation of gazette notice number 10353 dated July 17, 2025.***
- iv. Pending the hearing and determination of this Petition, a conservatory order be suspending the ongoing procurement process of importing grade 1 milled white rice duty-free.***
- v. Pending the hearing and determination of this Application, a conservatory order be issued suspending the ongoing procurement process of importing grade 1 milled white rice duty-free.***
- vi. Any other order that the Court may deem just and fit to grant in the interest of justice and fairness.***

8. The Application is supported by the Petitioner's affidavit, sworn on even date and the grounds on the face of the Application. The Petitioner states that he is a small-scale rice

commercial retailer in Kenya and files this suit on his behalf and other small-scale rice retailers.

9. He avers that vide Gazette Notice No.10353 dated 17th July 2025, the 5th Respondent informed the public that the Government would be importing 500,000 metric tonnes of Grade 1 white rice, duty free.
10. According to him, the Government in doing so is not acting in good faith. This is because the 3rd Respondent had initially advertised a tender for supply of duty-free rice, which was marred with controversies, inconsistencies leading to its abrupt cancellation.
11. The Petitioner also accuses the Government of failing to support its decision with data as the decision said driven by greed. He further contends that the importation of the duty-free rice will flood the market and leave the small-scale commercial retailers disadvantaged.

1st, 3rd, 4th, 5th and 7th Respondents' Case

12. These Respondent's through the Principal Secretary, Dr.Kipronoh Ronoh filed a Replying Affidavit sworn on 15th November 2025.
13. On a preliminary note, he swore that the Application is premised on a misrepresentation of material facts and non-

disclosure of relevant information. Further, that the Application does not also meet the threshold for issuance of conservatory orders.

14. He informs that prior to filing of this suit, there were other Petitions filed challenging the impugned Gazette Notice. These are: **HCCHRPET/E009/2025 - Farmers Party V Cabinet Secretary, Ministry of Agriculture, Livestock And Fisheries & Agriculture Food Authority & Another and HCCHRPET/E037/2025 - Ibrahim Muhumed Mohamed & Abdiaziz Moge Noor V Agriculture And Food Authority and HCCHRPET/E650/2025- Japheth Kirui Vs State Law Office.**

15. He avers that the Court in its Ruling in **HCCHRPET/E009/2025 - Farmers Party V Cabinet Secretary, Ministry of Agriculture, Livestock and Fisheries & Agriculture** allowed importation of 250,000 Metric tonnes of Grade 1 rice. This in effect granted clearance for importation of this rice and which has already been shipped into the Country. He avers that if the orders issued herein are granted, there is a risk of the same being in conflict with these orders. He further avers that the Application is res judicata as the issues raised herein have already been determined.

16. He moreover adds that there have been other matters that have been filed in Court raising similar issues being:

Constitutional Petition No. E029 of 2025 - John Nderitu Mirichu V Cabinet Secretary, National Treasury And Planning & 6 Others, Constitutional Petition No. HCCOMMISC/E1029/2025 - Taxwatch Africa V Cabinet Secretary, National Treasury and Planning & 6 Others and HCCHRPET/E650/2025- Japheth Kirui Vs State Law Office.

17. He argues that this is a clear abuse of the Court process as the parties have been filing various matters seeking conservatory orders and soon thereafter withdrawing them and filing fresh matters in pursuit of conservatory orders. Equally, he argues that the present Petition is sub judice owing to the existence of the multiple suits.
18. He contends that the existing conservatory orders presently in force are against public interest as they have disrupted the lawful regulatory and importation framework for rice thus threatening food security and market stability. As such, he argues that the balance in this matter tilts in favour of upholding the regulatory framework since issuance of the orders poses a significant threat to fundamental rights and freedoms.
19. Further from this, he avers that the Petition primarily seeks to challenge a procurement process undertaken by the Respondents. He stresses that this falls squarely within the

purview of the Public Procurement Administrative Review Board under the Public Procurement and Asset Disposal Act.

20. In light of this, he argues that this Court lacks jurisdiction to entertain this matter.

2nd Respondent's Case

21. In reaction to the Application, the 2nd Respondent, Dr. Bruno Linyiru filed a Replying Affidavit sworn on 29th October 2025.
22. He contended that the impugned Gazette Notice No. 10353 was subject of prior judicial proceedings being: **HCCHRPET/E009/2025 - Farmers Party V Cabinet Secretary, Ministry Of Agriculture, Livestock And Fisheries & Agriculture And Food Authority & Another.** He notes that the Court in its Ruling allowed importation of 250,000 metric tonnes of rice. He states that a substantial amount of this rice has already been shipped into the Country.
23. He further informs that an Appeal was preferred in the matter and is pending before the Court of Appeal in **NYERI COACAPPL/E140/2025 Farmers Party Vs. The Cabinet Secretary National Treasury & Planning & 5 Others (Arising From Kerugoya Hcchrpet/E009/2025 Farmers**

Party -Vs- The Cabinet Secretary, National Treasury & Planning And 5 Others). On this premise, he avers that this Court ought to refrain from entertaining the present Petition.

24. He as well avers that the Petition and Application offend the doctrine of sub judice as the Petitioner had previously filed **Constitutional Petition No. E029 Of 2025 - John Nderitu Mirichu V Cabinet Secretary, National Treasury and Planning & 6 Others** before the High Court at Kisumu, raising substantially identical issues. He avers that the Petitioner subsequently withdrew this matter only to refile the instant Petition.
25. In addition, he notes that there is also another Petition that raises identical issues in **HCCOMMMISC/E1029/2025 - Taxwatch Africa V Cabinet Secretary, National Treasury and Planning & 6 Others**. In this regard, the Petitioner is accused of forum shopping with the aim of attaining a favourable decision, which action is an abuse of the Court process.
26. He adds that at the present time there are other Petitions raising parallel issues being; **HCCHRPET/E009/2025 - Farmers Party V Cabinet Secretary, Ministry Of Agriculture, Livestock And Fisheries & Agriculture And Food Authority & Another and**

HCCHRPET/E037/2025 - Ibrahim Muhumed Mohamed & Abdiaziz Moge Noor V Agriculture And Food Authority and HCCHRPET/E650/2025- Japheth Kirui Vs State Law Office.

27. In light of the doctrine of sub judice, he argues that this Court lacks jurisdiction to entertain this matter. He for this reason urges the Court to dismiss both the Petition and the Application.

6th Respondent's Case

28. In response to the Application and Petition, the 6th Respondent filed its Grounds of Opposition dated 12th November 2025 on the basis that:

- i. The Respondent is authorized under the Kenya Revenue Authority Act, 1995 to administer Revenue Acts of Parliament and Regulations listed under the First Schedule to the Kenya Revenue Authority Act, 1995 which includes the East Africa Community Customs Management Act.*
- ii. Section 5 (2) of the East Africa Community Customs Management Act, 2004 provides that (2) the 6th Respondent shall be responsible for the management and control of the Customs including the collection of, and accounting for, Customs revenue in the respective Partner State.*
- iii. The 6th Respondent does not take part in the allocation of quotas of imports and its mandate is only to ensure that the goods that enter or leave the country as per the set legal framework and all permits are available.*

- iv. *Both the Notice of Motion Application and Petition do not disclose alleged violations perpetrated by the 6th Respondent as required by the principles set in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR.***
- v. *The Petition fails to achieve the threshold for a Constitutional Petition as set by Mutunga Rules (Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013).*
- vi. *The Gazette Notice did not give specification on who can import duty free rice into Kenya and the Petitioners have failed to provide evidence that certain classes of people (including those that allegedly won the tender) have been seen stopped from importing duty free rice within the quota.*
- vii. *The Gazette Notice is an executive directive aimed at mitigating rice shortage in the Country. Courts have been restrained from interfering with such executive processes at this interim stage.*
- viii. *Prematurely suspending the Gazette Notice at this point not only strains the local consumer who will be subjected to a shortage.*
- ix. *The 6th Respondent being the government agency responsible for collection and accounting of taxes is mandated by law to follow the Gazette Notice published on 28th July 2025 and the Orders of the Court in **Kerugoga HCCHRPET E009 of 2025: Farmers Party Vs. State Law Office.***

- x. *Noting that the Gazette Notice is time-bound, any suspension is final in nature and may simply render the Gazette Notice nugatory.*
- xi. *The Petitioner has failed to demonstrate the public interest being protected by the Petition and the Notice of Motion application.*
- xii. *It is in public interest that the Court only acts when there is a demonstrable injury and not on apprehension.*
- xiii. *The prayers sought are in a final nature and have the effect of making a determination on the Petition without the Respondents having an opportunity to place the documents and responses before the Court.*
- xiv. *The application and Petition should be dismissed as the Petitioner have failed to demonstrate the prejudice they would suffer if the Orders are not granted.*

Other Parties Case

29. The other Parties' response to the Application is not in the Court File or Court Online Platform (CTS).

The Preliminary Objection

30. The 1st, 3rd, 4th, 5th and 7th Respondents filed a Notice of Preliminary Objection dated 29th October 2025, the subject of this ruling. They objected to the Petition on the basis that:

- i. The Application and Petition violates the doctrine of exhaustion hence the Court lacks jurisdiction to hear and determine it.***
- ii. The matter is a procurement dispute falling under the dispute resolution mechanism of the Public Procurement Administrative Review Board under the Public Procurement Asset Disposal Act.***
- iii. The Application and Petition militates against the Ruling issued in Kerugoya HCCRPET E009/2025 on 19th August 2025.***
- iv. The Application and Petition is a clear abuse of the Court process as there are ongoing suits in KERUGOYA HCCRPET E009/2025, MOMBASA HCCRPET E037/2025, KISUMU HCCRPET E029/2025, NAIROBI HCCRPET E1029/2025 and NAIROBI HCCRPET E650/2025 and clearly the instant Application and Petition is sub judice and should be struck out.***
- v. The Court should take notice of the numerous attempts in defeating public interest as upheld by Court in KERUGOYA HCCRPET E009/2025 by filing of multiple suits before different Courts hence amounting to abuse of the Court process in this Court.***
- vi. The Petitioner has not discharged the evidentiary burden required of them to demonstrate which right or duty is owed to it and the manner it has been violated by the Respondents.***

- vii. In sum, the instant Application and Petition is primarily hinged on suspending enforcement, implementation and operation of the impugned Gazette Notice No. 10353 dated 17th July 2025, which in effect can only issue on appeal, which mechanism is not within the jurisdictional remit of this Court.**

Submissions to the Application

31. The Parties submissions to the Petitioner's Application are not in the Court file or Court Online Platform (CTS), save for the Petitioner and 1st and 2nd Respondent.

Submissions to the Preliminary Objection

1st, 3rd, 4th, 5th and 7th Respondents'

32. Deputy Chief State Counsel, Kaumba S.O. filed submissions dated 6th November 2025.
33. Counsel reiterating these Parties responses submitted that the instant suit relates to the integrity and legality of the procurement proceedings, a subject falling within the jurisdiction of the Public Procurement Administrative Review Board. Second, invokes the doctrine of sub judice in view of the ongoing suits and equally this suit militates against the Ruling issued in **Kerugoya HCCRPET E009/2025**.
34. On the first point, Counsel submitted that the Petitioner seeks a conservatory order suspending the ongoing

procurement process of importing grade 1 milled white rice, duty - free. Counsel submitted that this is provided for under Section 28(1)(a) of the Public Procurement and Asset Disposal Act wherein the Public Procurement Administrative Review Board is clothed with the jurisdiction of entertaining such disputes. This is as such argued to be offensive to the doctrine of exhaustion. Reliance was placed in **Justus Kariuki Mate & another v. Martin Nyaga Wambora & another (2017) eKLR** where it was held that:

“From the facts of this case, it is clear to us that the integrity of Court Orders stands to be evaluated in terms of their inner restraint, where the express terms of the Constitution allocate specific mandates and functions to designated agencies of the State. Such restraint, in the context of express mandate allocation under Constitution, is essential, as a scheme for circumventing conflict and crisis, in the discharge of government responsibility. No governmental agency should encumber another to stall the constitutional motions of the other. The best practice from the comparative lesson, signal that the judicial organ must practice the greatest care, in determining the merits of each case.”

35. Comparable reliance was placed in **Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) (Petition E007 of 2023) [2023] KESC 113 (KLR), United Bank of India vs Satyawati Tondon & Others; (2010) 8 SCC** and **R v National Environmental Management Authority, CA No 84 of 2010; [2011] eKLR**.

36. On the second point, Counsel submitted that the issue of importation of rice as a result of the impugned Gazette Notice and the consequential procurement proceedings are the subject of the cited suits, earlier filed in public interest before other Courts. In light of this, Counsel stressed that the matter is sub judice and thus an abuse of the Court process. Reliance was placed in **Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] eKLR** where it was held that:

“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.”

37. Further reliance was placed on **Thiba Min. Hydro Co. Ltd v Josphat Karu Ndwiga [2013] eKLR**, and **Gathariki v**

Cheko Plot Owners Association & another (Civil Appeal 116 of 2019) [2025] KECA 313 (KLR).

38. Lastly, Counsel submitted that this matter goes against the Ruling delivered in **Kerugoya HCCRPET E009/2025** in that it allowed the impugned importation of rice. For this reason, Counsel stressed that a Court of concurrent jurisdiction cannot proceed to issue an order counteracting the issued order. Counsel reasoned that the essence of this Application is not available to this Court.

39. To buttress this point reliance was placed in **Philip Kipchirchir Moi v the Hon. Attorney General & Another (Nairobi Petition No. 65 of 2012) [2013] eKLR** where it was held that:

“I must begin by dispelling the fallacy that the Constitutional and Human Rights Division of the High Court in Nairobi has jurisdiction to superintend, supervise, direct, guide, shepherd and/or purport to mend the mistakes, real or perceived, of other Divisions of the High Court in Nairobi or elsewhere in Kenya. In spite of the continued and consistent stand of judges of that Division that it cannot have been the intention of the framers of the Constitution that such a position should exist, parties in every conceivable case, continue to invoke that fallacious and misguided jurisdiction.”

40. More was placed on **Peter Ng’ang’a Muiruri v Credit Bank Ltd & 2 others (Nairobi Civil Appeal No. 203 of 2006); [2008] eKLR** and **Kenya Hotel Properties**

Limited v Attorney General & 5 others (Petition No. 16 of 2020); [2022] KESC 62 (KLR).

The Petitioner

41. The Petitioner in response to both his Application and the Preliminary Objection filed submissions dated 12th November 2025 through E.N. Namude Associates and Advocates. The issues underscored for discussion are: *whether the notice of Preliminary Objection meets the required threshold in law and whether the Petitioner's application for the grant of conservatory orders has merit.*
42. On the first issue, Counsel submitted that the Petitioner's case is that the impugned Gazette Notice which was made pursuant to Section 114 (2) of the East African Community Customs Management Act, as read with item 20 of Part B of the Fifth Schedule to the Act, is defective for it lacks a proper legal foundation. For this reason, its enforcement and implementation ought to be halted as any importation resulting from the notice will be a result of illegal procedure. Counsel emphasized that it is apparent in the circumstances of this case that the entire process, did not follow the proper procedure, resulting in a violation of constitutional provisions.
43. Counsel relying on Section 27 of the Public Procurement and Asset Disposal Act contended that since the Petitioner was

not a participant in the procurement process the issues raised herein should be addressed by this Court not the Procurement Administrative Review Board as alleged. Counsel as well opposed the assertion that the matter in **KERUGOYA HCCRPET E009/2025** is similar to this matter.

44. On the second issue, Counsel submitted that the conservatory orders are granted when there's an issue involving public interest and that for the orders to be granted, the applicant must demonstrate a prima facie case with a likelihood of success and also demonstrate that the applicant's case would be nugatory if the orders are not granted. Reliance was placed in **Centre for Rights Education and Awareness (CREAW) & 7 Others v Attorney General, [2011] eKLR** where it was held that:

"It is important to point out that the arguments that were advanced by counsel and that I will take into account in this ruling relate to the prayer for a conservatory order in terms of prayer 3 of the petitioner's application and not the petition. I will not, therefore, delve into a detailed analysis of facts and law. At this stage, a party seeking a conservatory order only requires demonstrating that he has a prima facie case with a likelihood of success and that, unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution."

45. Additional reliance was placed in **Munya v Kithinji & 2 others [2014] KESC 30 (KLR)**.

46. Counsel submitted that Petitioner's case is that Articles 27, 35, and 46 of the Constitution were violated when the Government chose to import duty-free rice without a clear legal basis. It was argued that the entire process lacks transparency and accountability, aspects of which should be examined further at the hearing of the Petition.

The 2nd Respondent

47. In response to both the Preliminary Objection and Application, the 2nd Respondent through Theuri Wesonga and Company Advocates filed submissions dated 10th November 2025. Counsel highlighted the key issues as: *whether the Petition is sub judice, whether the institution of the present Petition amounts to an abuse of the court process and whether the preliminary objection and conservatory order meets the threshold.*

48. On the first issue, Counsel relying in Section 6 of the Civil Procedure Act submitted that this suit offends the doctrine of sub judice owing to the earlier pending suits revolving around the same matter. Counsel stressed that sub judice is a jurisdictional bar that can be raised as a preliminary objection as held in **Republic v Paul Kihara Kariuki, Attorney General & 2 others ex parte Law Society of Kenya [2020] eKLR.**

49. Comparable reliance was also placed in **Thiba Min. Hydro Co. Ltd**(supra) and **Kenya National Commission on Human Rights**(supra).
50. On the second issue, Counsel submitted that in light of the existence of the doctrine of sub judice and Petitioner’s awareness of the multiple suits in this matter, this suit is an abuse of the Court process. Reliance was placed in **Stephen Somek Takwenyi & Another vs. David Mbutia Githare & 2 Others Nairobi (Milimani) HCCC No. 363 of 2009** where it was held that:

“This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilized legal process, it is the machinery used in the courts of law to vindicate a man’s rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognize as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of

court may and usually do provide for its frustration in some instances. Others attract res judicata rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it.”

51. Further reliance was placed on **Energy Regulatory Commission v John Sigura Otido [2021] KECA 1060 (KLR), Daniel Mugendi v Kenyatta University & 3 Others [2013] eKLR** and **Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 Others [2009] eKLR**.

52. Counsel in addition underscored that this matter is in direct conflict with the Ruling in **Kerugoya HCCRPET E009 of 2025**, which authorized the importation of rice in question. Counsel emphasized that a Court of concurrent jurisdiction lacks the mandate to sit in appeal, review, or otherwise re-open the findings of another Court. As such, this clearly affirms that a Court of the same level, or any other Court, cannot purport to review or vary an order already made by a competent Court in a separate proceeding as held in **Manchester Outfitters Limited & 2 Others v Galot Holdings Limited & 3 Others [2025] KEELC 6626 (KLR)**.

53. On the final issue, Counsel submitted that the Petition revolves around *Tender No. KNTC/TENDER/IMPORT/003/2025-2026* which was issued by the 3rd Respondent. Counsel submitted that this dispute

relates to the Public Procurement and Asset Disposal Act, 2020 as deals with the integrity and legality of ongoing procurement proceedings.

54. Counsel highlighted that this jurisdiction is vested in the Public Procurement Administrative Review Board under Section 28(1) (a) of the Public Procurement and Asset Disposal Act. Considering this, Counsel stressed that the Petitioner was required to exhaust this mechanism before approaching this Court under the doctrine of exhaustion. Counsel equally relied in **Justus Kariuki Mate & another (supra)** to buttress this point.
55. Equally reliance was placed in **Speaker of National Assembly v Karume [1992] KLR 21, United Bank of India Vs. Satyawati Tondon & others;(2010) 8 SCC and R v National Environmental Management Authority, CA No. 84 of 2010; (2011) eKLR.**

ANALYSIS AND DETERMINATION

56. It is my considered opinion that the issues that arises for determination are:
- i. Whether the 7th Respondent's Preliminary Objection is merited.***
 - ii. Whether the Petitioner's Application for conservatory orders should be allowed.***

Whether the 7th Respondent's Preliminary Objection is merited.

57. The threshold of a Preliminary Objection was summarized in ***Mukisa Biscuit Manufacturers Ltd -vs- Westend Distributors Ltd, (1969) EA 696 page 700*** when the Court observed as follows: -

'So far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration.

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion..."

58. Likewise, the Court in **Dismas Wambola v Cabinet Secretary, Treasury & 5 others [2017] KEHC 8777 (KLR)** observed as follows:

"...a preliminary objection may only be raised on a "pure question of law." To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.

In law, a question of law, also known as a point of law, is a question that must be answered by

applying relevant legal principles to interpretation of the law. Such a question is distinct from a question of fact, which must be answered by reference to facts and evidence as well as inferences arising from those facts.”

59. The 1st Respondent challenges this Court’s jurisdiction on the basis of the doctrine of exhaustion and doctrine of sub judice. The twin -issues if successfully argued constitute a jurisdictional bar that would stop the Court from entertaining the merits of the case hence are pure points of law.
60. In regard to the doctrine of exhaustion, the 1st, 3rd, 4th, 5th and 7th Respondents argued that the instant dispute ought to have been resolved under the mechanism provided for in the Public Procurement and Asset Disposal Act hence the Petitioner has prematurely invoked this Court’s jurisdiction.
61. The Supreme Court in **Waity vs Independent Electoral & Boundaries Commission and Three Others [2019] KESC 54 (KLR)** elaborated the doctrine of exhaustion of remedies as follows:

“[63] Where the Constitution or the law, consciously confers jurisdiction to resolve a dispute, on an organ other than a court of law, it is imperative that such dispute resolution mechanism, be exhausted before approaching the latter. Were it not so, parties would bide their time, overlooking the recognized forums, and later springing a complaint at the courts.

Such a scenario would be a clear recipe for forum shopping, an undertaking that must never be allowed to fester in the administration of justice. We are fortified in this regard, by the persuasive authority by the Court of Appeal, in Geoffrey Muthinja Kabiru & 2 Others; [2015] eKLR; wherein the Appellate Court observed:

“It is imperative that where a dispute resolution mechanism exists outside the Courts, the same be exhausted before the jurisdiction of the Courts be invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts.”

62. Further the Supreme Court in **Mumba & 7 others (Sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Munyao & 148 others (Suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme) [2019] KESC 83 (KLR)** stated:

“...We hold that if indeed the appellant had any dispute with the RBA, he ought to have followed the route prescribed by the RBA, before proceeding to the High Court. We hold like the court below, and for the reasons we have given,

that the appellant's petition lacked merit and was for dismissal."

[118] In the pursuit of such sound legal principles, it is our disposition that disputes disguised and pleaded with the erroneous intention of attracting the jurisdiction of superior courts is not a substitute for known legal procedures. Even where superior courts had jurisdiction to determine profound questions of law, first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute.

[119] Such a deferred jurisdiction and the postponement of judicial intervention and reliefs until the mandated statutory or constitutional bodies take action rests, not alone on the disinclination of the judiciary to interfere with the exercise of the statutory or any administrative powers, but on the fact of a legal presumption that no harm can result if the decision maker acts upon a claim or grievance. Such formulation underlies the analogous cases, frequently cited for the exhaustion doctrine, in which the court refuses to enjoin an administrative official from performing his statutory duties on the ground that until he has acted the complainant can show no more than an apprehension that he will perform his duty wrongly, a fear that courts will not allay. Such cases may be expressed in the formula that judicial intervention is premature in the absence of administrative action."

63. There are however exceptional cases where the doctrine of exhaustion does not apply. In **William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] KEHC 10266 (KLR)** stated:

“60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the Constitution or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court’s jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others [2018] eKLR.

62. In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed

constitutional violations are not mere “bootstraps” or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.”

64. The preamble to the Procurement and Assets Disposal Act states:

An Act of Parliament to give effect to Article 227 of the Constitution; to provide procedures for efficient public procurement and for assets disposal by public entities; and for connected purposes.

65. The Act under Section 3 sets out the guiding principles of the procurement process as follows:

Public procurement and asset disposal by State organs and public entities shall be guided by the following values and principles of the Constitution and relevant legislation—

- i. The national values and principles provided for under Article 10;*
- ii. The equality and freedom from discrimination provided for under Article 27;*
- iii. Affirmative action programmes provided for under Articles 55 and 56;*
- iv. Principles of integrity under the Leadership and Integrity Act (Cap. 185C);*
- v. The principles of public finance under Article 201;*

- vi. *The values and principles of public service as provided for under Article 232;*
 - vii. *Principles governing the procurement profession, international norms;*
 - viii. *Maximization of value for money;*
 - ix. *Promotion of local industry, sustainable development and*
 - x. *protection of the environment; and*
 - xi. *Promotion of citizen contractors.*
66. Discussing the procurement process in a nutshell, the Court in **Okoti v Kenya Ports Authority & 5 others; Portside Freight Terminals Limited & 8 others (Interested Parties) [2023] KEHC 20571 (KLR)** observed as follows:

“137. Article 227 of the constitution, in my view, provides the minimum threshold when it comes to public procurement and asset disposal. Being the minimum threshold, it is my view that in public procurement and asset disposal, the starting point must necessarily be the constitution. Any procurement must therefore, before considering the requirements in any legislation, rules and regulations, meet the constitutional threshold of fairness, equity, transparency, competitiveness and cost-effectiveness. In other words, any other stipulation whether in an enactment or in

the tender document can only be secondary to the said constitutional dictates.

138. In the case of PPRB v KRA Misc.Civil Application No. 540 of 2008, eKLR the court had this to say:

“ To my mind, failure by the Respondents to have regard to mandatory provisions of the Act concerning procurement procedures... violated the purpose of the Act which is clearly stated in Section 2...I find that any breach of a mandatory statutory provision does prejudice in some way the Section 2 objectives...Adherence to the applicable law is the only guarantee of fairness and in the case of procurement law the only guarantee of the attainment of fair competition, integrity, transparency, accountability and public confidence. There cannot be greater prejudice to the applicant than failure by the decision maker to comply with positive law. Failure to adhere to the applicable law, gives rise to a presumption of bias and prejudice contrary to the argument put forward by the Respondent’s counsel.”

67. On dispute resolution, the Act under Section 167 provides as follows:

Request for a review

(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act, or the Regulations, may seek administrative review

within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.

- (2) *A request for review shall be accompanied by such refundable deposit as may be prescribed in the regulations, and such deposit shall not be less than ten per cent of the cost of the contract:*

Provided that this shall not apply to tenders reserved for women, youth, persons with disabilities and other disadvantaged groups.

- (3) *A request for review shall be heard and determined in an open forum unless the matter at hand is likely to compromise national security or the review procedure.*

- (4) *The following matters shall not be subject to the review of procurement proceedings under subsection (1)—*

- a) the choice of a procurement method;*
- b) a termination of a procurement or asset disposal proceedings in accordance with section 63 of this Act; and*
- c) where a contract is signed in accordance with section 135 of this Act.*

68. Section 173 of the Act on the powers of Review Board provides as follows:

Upon completing a review, the Review Board may do any one or more of the following—

- a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;*

- b) *give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;*
- c) *substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;*
- d) *order the payment of costs as between parties to the review in accordance with the scale as prescribed; and*
- e) *order termination of the procurement process and commencement of a new procurement process.*

69. In addition, Section 175(1) details the power of an appeal from the Review Board as follows:

- a) *A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision, failure to which the decision of the Review Board shall be final and binding to both parties.*
- b) *The application for a judicial review shall be accepted only after the aggrieved party pays a percentage of the contract value as security fee as shall be prescribed in Regulations.*
- c) *The High Court shall determine the judicial review application within forty- five days after such application.*
- d) *A person aggrieved by the decision of the High Court may appeal to the Court of Appeal within seven days of such decision and the Court of*

Appeal shall make a decision within forty-five days which decision shall be final.

- e) *If either the High Court or the Court of Appeal fails to make a decision within the prescribed timeline under subsection (3) or (4), the decision of the Review Board shall be final and binding to all parties.*
- f) *A party to the review which disobeys the decision of the Review Board or the High Court or the Court of Appeal shall be in breach of this Act and any action by such party contrary to the decision of the Review Board or the High Court or the Court of Appeal shall be null and void.*
- g) *Where a decision of the Review Board has been quashed, the High Court shall not impose costs on either party.*

70. A careful perusal of the Petition and its Supporting affidavit reveals that the Petitioner was aggrieved Respondents' procurement decision hence instituted this Petition asserting violation of the constitutional rights with the reference point being the impugned tendering process for importation of the white rice.

71. The Act in my view has established clear mechanisms and procedures for resolution of disputes arising out public procurement processes. Section 167 of the Act provides that a party aggrieved by a decision relating to the procurement process shall, in the first instance, seek administrative review before the Public Procurement Administrative Review Board. The Act further ousts the jurisdiction of this Court

except by way of judicial review or appeal arising from the decision of this Board.

72. In this matter, the Petitioner as is discernible was not a party in the tendering process and contends that he filed this Petition in public interest and on behalf of other small-scale rice farmers. The Act under Section 170 provides that parties who can seek a review are:

The parties to a review shall be—

- a) *the person who requested the review;*
- b) *the accounting officer of a procuring entity;*
- c) *the tenderer notified as successful by the procuring entity; and*
- d) *such other persons as the Review Board may determine.*

73. The Act provides for '*such other persons*' under Section 170 (d) of the Act, opening the door for other persons not directly involved in the tendering process to seek a review. Nothing therefore stopped the Petitioner from moving the Review Board to consider the propriety of the impugned procurement process and if dissatisfied with the decision therefrom, appeal the decision to the High Court.

74. The Petitioner ignore the statutory remedy before the Review Board hence the Petition is barred by the doctrine of exhaustion.

75. Accordingly, it is my humble view that the Petition was filed prematurely contrary to the express provisions of the Public Procurement and Asset Disposal Act.
76. The other jurisdictional ground argued by the Respondents was based on the principle of sub judice. Section 6 of the Civil Procedure Act sets out this principle as follows:

“No Court shall proceed with the trial of any suit or proceeding on 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 or proceedings is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed.”

77. The Supreme Court in **Kenya National Commission on Human Rights (supra)** had the occasion to pronounce itself on the subject of sub judice as follows:

“[67] The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject

matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”

78. Delving into the principle the Court in Kenya Bankers Association v Kenya Revenue Authority [2019] KEHC 12178 (KLR) observed as follows:

“30. The basic purpose and the underlying object of Section 6 is to prevent the courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of same cause of action, same subject matter and the same relief. This is to pin down the parties to one litigation so as to avoid the possibility of contradictory verdicts by two courts in respect of the same relief and is aimed to prevent multiplicity of proceedings.

31. The words "directly and substantially in issue" are used in contradistinction to the words "incidentally or collaterally in issue." Therefore, Section 6 would apply only if there is identity of the matter in issue in both the suits, meaning thereby, that the whole of the subject-matter in both the proceedings is identical.

32. The question which follows is whether the matters in issue in this case are also directly and substantially in issue in previously instituted suits. The key words in Section 6 are "the matter in issue is directly and substantially in issue in the previously instituted suit." The test for applicability of Section 6 is whether on a final decision being reached in the previously instituted suit, such decision would operate as res-judicata in the subsequent suit. However, when the matter in controversy is the same, it is immaterial what further relief is claimed in the subsequent suit.

33. For section 6 to come into play, the matter in issue in both the suit has to be directly and substantially in issue in the previous. 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. This may be done where the tests of sub judice apply. As was held by the High Court of Uganda in Nyanza Garage vs. Attorney General:-

"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."

34. For the doctrine of sub judice to apply the following principles ought to be present:- (a) There must exist two or more suits filed consecutively; (b) The matter in issue in the suits or proceedings must be directly and substantially the same, the parties in the suits or proceedings must be the same or must be parties under whom they or any of them claim and they must be litigating under the same title, the suits must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

79. The 1st, 3rd, 4th, 5th and 7th Respondents raised the issue of sub judice citing **Kerugoya HCCRPET E009/2025** where Ruling was delivered in relation to the Tender on 19th August 2025. The Petitioner opposed this contention insisting that the instant Petition solely revolves around constitutional issues in relation to a flawed procurement process that has affected small scale rice farmers.
80. For context, the Petitioner in the Petition chiefly challenges the enforcement, implementation and operation of Gazette Notice Number 10353 which concerns importation of the white rice. The Court in **Kerugoya HCCRPET E009/2025 (Farmers Party v Cabinet Secretary, National Treasury and Planning & 5 others [2025] KEHC 12168 (KLR)** observed that the matter focused on the following:

“By Notice of Motion dated 7/8/2025, the Petitioner which claims to represent the farmers of Kenya “a political party whose objectives is among other things to safeguard the interests of

ordinary farmers and whose membership majorly comprises of ordinary farmers” sought conservatory orders in terms that -

“That there be and is issued a conservatory order staying the implementation of the decision of the Cabinet Secretary, National Treasury and planning and the cabinet secretary, Agriculture and Livestock Development vide gazette No. 10353 published on the 28th July 2025 in a special issue of Kenya Gazette Volume CXXVII - NO. 161 approving duty free importation of 500,000MT of grade 1 rice from the 28th July 2025 up until 31st December 2025 pending the hearing and determination of this petition.”

81. The Court in the end noted as follows:

“Conclusion

40. The solution in this case appears to be two-fold - containment of drop in farm price by phased importation of the deficit and encouragement of local production by the assured mop-up of the farmers’ stocks and paddy by contract such the one demonstrated with the Mwea Rice farmers. As scheme that ensures not more than is necessary to meet the deficit is imported, while keeping the price of the product stable, is what is called for.

41. Granted the Petitioner’s optimism for good produce in the year and with the Respondents data as to the necessary quantities of local demand against production, and being careful not to cause a food shortage crisis, the court would, at this stage of the hearing of the case, allow the implementation of the Gazette Notice but not for the entire import window of six (6)

months ending 31 December 2025 that it grants and not for the entire volume of rice to be imported, but with a limit of half of the amount so that only a total of 250,000 MT of rice is imported and for a shorter window of three months ending 31st October 2025 and subject to continuous monitoring to establish the deficits in view of the paddy rice harvested from the farms and the mop-up of similar stocks in the farmers stores and the need to meet any shortages by further duty free import permits as necessary. This Court undertakes its duty under the Mitubell decision to clarify and “indicate that the orders it is issuing, are interim in nature, and that the final judgment shall await the crystallization of certain actions” as indicated hereinbelow.

42. The Respondents will be required to file an update and compliance report with the Court on the expiry of the import window on 31/10/2025, for further directions as necessary.

43. In view of the many uncertainties in the matter with regard to the production of the paddy in the fields, the mop-up exercise and the price changes, the Court shall give all the parties in the suit liberty to apply for further orders.

Orders

44. Accordingly, for the reasons set out above, the Court finds merit in Petitioner’s case for a conservatory order to the extent indicated hereinbelow and makes the following specific orders:

- 1. The Respondents shall implement the Kenya Gazette Notice No. 10353**

Published On The 28th July 2025 In A Special Issue Of Kenya Gazette Volume Cxxvii - No. 161 To The Extent Only of importation of 250,000 MT of rice and for the period ending Friday 31st October 2025.

- 2. The Respondents shall file in Court, such Reports indicating the progress of the mop-up exercise and accurate information as to the local production of rice and the resultant deficit by 3/11/2025.**
- 3. Liberty to apply.**
- 4. Cost in the cause.”**

82. Clearly, the core issue that is before this Court and the Kirinyaga High Court Petition are evidently identical- they all revolve around the importation of white rice under the impugned Gazette Notice. The parties in the instant and Kirinyaga High Court suit are not the same but the substratum similar hence there is issue-based estoppel in view of the substantive issue both suits.

83. As was held by this Court in **Okoiti v Matiangi (Cabinet Secretary Interior) & 20 others [2024] KEHC 11695 (KLR)**-

“32. It is important to underscore that res judicata not only bars an identical suit from being re-litigated between the same parties or their representatives but also deals with issue-based estoppel thereby preventing any issue in a former suit that had been decided in that former suit from being reintroduced by a party or the representative of such party in a later claim/suit even though the suit may be different where the issue in the former suit recurs. Such a party or his representative will be prevented from reopening the issue afresh.”

84. This Court further stated:

“35. In the previous suit Petition No. 447 of 2016 an order of declaration was issued in relation to the subject matter which was a declaration against seizure and destruction of gaming slot machines. A declaration by its nature is an order in rem. Even persons who were not parties in that suit could avail themselves the benefit of a declaratory relief. The instant petition is brought in public interest and relates to the same subject matter as the former petition. This is therefore a perfect res-judicata barred case.”

85. In the circumstances therefore, I am satisfied that the present matter is also barred by the doctrine of sub judice and the doctrine of exhaustion of remedies.

86. Considering this, the Court does not have the jurisdiction to exercise in regard to the application for the conservatory order.

87. The upshot is that the preliminary objection succeeds. The Petition is hereby struck out.

88. I make no orders as to costs.

Dated, signed and delivered virtually at Nairobi this 26th day of February, 2026.

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L N MUGAMBI

JUDGE

ORIGINAL