

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAROK**

**JUDICIAL REVIEW MISC. APPLICATION NO. E002 OF 2025**

**(CORAM: HON. CHARLES M. KARIUKI – J)**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL  
REVIEW ORDERS OF CERTIORARI, MANDAMUS, AND PROHIBITION**

**AND**

**IN THE MATTER OF JSC PETITION NO. 35 OF 2024, JSC PETITION NO. 73 OF 2024  
AND JSC PETITION NO. 3 OF 2025**

**AND**

**IN THE MATTER OF ARTICLES 20, 21, 22, 23, 27, 28, 47, 48 AND 50 OF THEE  
CONSTITUTION OF KENYA, 2010 AS READ TOGETHER WITH THE PROVISIONS  
OF THE FAIR ADMINISTRATIVE ACTIONS ACT, 2015**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**JUDICIAL SERVICE COMMISSION ..... RESPONDENT/APPLICANT**

**AND**

**DARI LIMITED. ....1 ST INTERESTED**

**PARTY CHRISTOPHER ROSANA..... 2ND INTERESTED PARTY**

**NELSON HAVI. ....3RD INTERESTED**

**PARTY**

**AND**

**PARIKEN OLE ESHO ..... EX-PARTE APPLICANT**

**RULING**

**27/03/2026**

**INTRODUCTION AND BACKGROUND**

- 1) The present proceedings were initiated by an application dated 17th February 2025, in which the Ex Parte Applicant challenges what he describes as glaring procedural improprieties on the part of the Respondent in the processing of JSC Petition No. 35 of 2024, JSC Petition No. 72 of 2024, and JSC Petition No. 3 of 2025.**
- 2) On 18th February 2025, this Court granted leave to the Ex Parte Applicant to apply for orders of certiorari, prohibition, and mandamus. The Court further directed that the leave so granted would operate as a stay of the Respondent’s decision dated 27th January 2025, which required seven Judges of the Supreme Court to respond to the impugned petitions seeking their removal.**
- 3) Thereafter, the Respondent and the 1st Interested Party filed applications dated 6th March 2025 and 19th February 2025, respectively, seeking either the dismissal of these proceedings or, in the alternative, their transfer to the High Court at Nairobi on the ground that the matter was sub judice in light of**

constitutional petitions filed by the affected Judges. In a ruling delivered on 11th April 2025, this Court dismissed those applications with costs.

- 4) The matter now before the Court is a Notice of Motion dated 2nd July 2025 filed by the Judicial Service Commission (hereinafter “the Respondent/Applicant”), seeking an order staying these Judicial Review proceedings pending the hearing and determination of consolidated constitutional petitions before the High Court at Nairobi.
- 5) The substantive Judicial Review proceedings arise from the leave granted on 18th February 2025 to the Ex Parte Applicant, Pariken Ole Esho, to institute proceedings against the Judicial Service Commission (JSC). The intended reliefs concern the JSC’s decision of 27th January 2025 requiring seven Judges of the Supreme Court to respond to petitions seeking their removal.
- 6) The Respondent/Applicant contends that the issues raised herein are substantially similar to those pending before a constitutionally empaneled bench of the High Court in Nairobi in various consolidated constitutional petitions filed by the affected Judges in their personal capacities.
- 7) Specifically, the leave granted on 18th February 2025 authorized the Ex Parte Applicant to seek:
  - i. An order of certiorari to quash the JSC’s decision dated 27th January 2025 requiring the seven Judges to respond to removal petitions.
  - ii. An order OF Prohibition restraining the JSC from proceeding with those petitions; and

- iii. An order of mandamus compelling the JSC to promulgate procedural rules governing complaints against Judges.
- 8) The leave was ordered to operate as a stay of implementation of the impugned decision.
- 9) Subsequently, the seven Judges of the Supreme Court filed separate constitutional petitions before the High Court at Nairobi challenging the same decision of 27th January 2025. Those petitions were certified as raising substantial questions of law under Article 165(4) of the Constitution. The Honorable Chief Justice thereafter empaneled a three-judge bench comprising Hon. Justice Charles Kariuki (Presiding), Hon. Justice L. N. Mugambi, and Hon. Justice Bahati Mwamuye to hear and determine the consolidated petitions.

#### **The Application**

- 10) By the Notice of Motion dated 2nd July 2025, the Respondent/Applicant seeks an order staying these Judicial Review proceedings pending the hearing and determination of Nairobi Constitutional Petition No. E083 of 2025 (consolidated with Petition Nos. E079 of 2025, E087 of 2025, E090 of 2025, E098 of 2025, E086 of 2025 and E089 of 2025), namely *Hon. Lady Justice Martha K. Koome, EGH, Chief Justice & President of the Supreme Court & 6 Others v Judicial Service Commission & Another; Nelson Havi & 23 Others (Interested Parties)*.
- 11) The application is expressed to be brought under Articles 159(2)(d) and (e) of the Constitution of Kenya, 2010, Sections 1A, 1B, 3A, and six of the Civil Procedure Act, and Order 51 Rule 1 of the Civil Procedure Rules.

**12) The Respondent/Applicant seeks the following orders:**

- i. Spent.**
- ii. That there be a stay of proceedings in this Judicial Review matter pending the hearing and determination of the consolidated Nairobi Constitutional Petitions; and**
- iii. That costs of the application be in the cause.**

**13) The application is premised on several grounds. First, it is contended that the leave granted on 18th February 2025 authorized the Ex Parte Applicant to seek orders of certiorari, prohibition, and mandamus directed at the JSC's decision of 27th January 2025 and at its alleged failure to promulgate procedural rules under Section 47 of the Judicial Service Act. It is further emphasized that the leave operates as a stay, thereby halting the JSC's processes relating to the removal petitions against the seven Judges.**

**14) Secondly, the Respondent/Applicant asserts that the seven affected Judges have filed separate constitutional petitions before the High Court at Nairobi challenging the same decision. These include:**

- i. Nairobi High Court Constitutional Petition No. E083 of 2025 – *Hon. Lady Justice Martha K. Koome v Judicial Service Commission & Another & Nelson Havi & 14 Others.***
- ii. Petition No. E086 of 2025 – *Hon. Lady Justice Philomena Mbete Mwilu v Judicial Service Commission & Another & Dari Limited & Another.***
- iii. Petition No. E079 of 2025 – *Hon. Lady Justice Njoki S. Ndungu v Judicial Service Commission & Another & Dari Limited & 6 Others.***

- iv. **Petition No. E089 of 2025 – *Hon. Justice Mohammed Khadar Ibrahim v Judicial Service Commission & Another & Kenya Magistrates and Judges Association & Another.***
- v. **Petition No. E090 of 2025 – *Hon. Justice William Ouko v Judicial Service Commission & Another & 8 Others.***
- vi. **Petition No. E087 of 2025 – *Hon. Justice Isaac Lenaola v Judicial Service Commission & Another & 4 Others;* and**
- vii. **Petition No. E098 of 2025 – *Justice (Dr.) Smokin C. Wanjala v Judicial Service Commission.***

15) **The Respondent/Applicant contends that the reliefs sought in those petitions substantially mirror the reliefs sought in the present Judicial Review proceedings, including orders of certiorari, prohibition and mandamus directed at the same impugned decision and the same alleged failure to promulgate regulations.**

16) **It is further averred that, by rulings delivered on 10th April 2025 and 25th April 2025, the High Court at Nairobi certified the constitutional petitions as raising substantial questions of law under Article 165(4) of the Constitution and referred them to the Honorable Chief Justice for empanelment. The Chief Justice subsequently constituted a three-judge bench comprising Hon. Justice Charles Kariuki (Presiding), Hon. Justice L. N. Mugambi, and Hon. Justice Bahati Mwamuye. Directions have since been issued for the filing of responses and submissions, and the matters are pending mention to fix a date for highlighting submissions.**

17) The Respondent/Applicant argues that, since the issues in this matter are substantially in issue before the empaneled bench—and given that the Presiding Judge of that bench is also seized of this matter—it is in the interests of justice, consistency and judicial economy that these proceedings be stayed so as to avoid duplication of judicial effort and the risk of conflicting decisions. It is further contended that the Ex Parte Applicant will suffer no prejudice, as the issues raised herein will be conclusively determined in the consolidated constitutional petitions.

#### **Supporting Affidavit**

18) The application is supported by the affidavit of Winfridah B. Mokaya, the Chief Registrar of the Judiciary and Secretary to the Judicial Service Commission. She deposes that she is duly authorized and competent to swear the affidavit on behalf of the Respondent/Applicant.

19) She reiterates that on 18th February 2025, this Court granted leave to the Ex Parte Applicant to institute Judicial Review proceedings seeking orders of certiorari, prohibition, and mandamus in respect of the JSC's decision dated 27th January 2025 requiring seven Judges of the Supreme Court to respond to removal petitions. A copy of the order granting leave and stay is annexed.

20) The deponent avers that the stay order effectively restrains the JSC from discharging its constitutional mandate under Article 172 of the Constitution to promote and facilitate accountability within the Judiciary, and under Article 168(4) to consider petitions for removal of judges and determine whether they disclose grounds warranting further action.

- 21) She further deposes that the seven Judges have filed constitutional petitions before the High Court at Nairobi challenging the same decision of 27th January 2025, and annexes copies of those petitions. She sets out in detail the reliefs sought therein, which include orders of certiorari, prohibition, and mandamus similar to those sought in the present proceedings.
- 22) The affidavit also annexes copies of the rulings delivered on 10th April 2025 and 25th April 2025 certifying the constitutional petitions as raising substantial questions of law under Article 165(4), as well as communications from the Deputy Registrar notifying parties of the empanelment of the three-judge bench.
- 23) She deposes that on 16th May 2025, the empaneled bench consolidated the petitions and issued directions for filing responses and submissions, and that the matters are pending mention to fix a date for highlighting submissions.
- 24) It is her position that, since the issues in this Judicial Review matter have been recognized as meeting the constitutional threshold for determination by an enlarged bench and are currently pending before that bench, it would serve the interests of justice to stay these proceedings to avoid conflicting decisions on the same subject matter. She further avers that proceeding with this matter would amount to an inefficient and imprudent use of judicial time and resources, and that the Ex Parte Applicant will suffer no prejudice as the issues will be conclusively resolved in the consolidated constitutional petitions.

**The Replying Affidavit**

**25) The application is opposed through a Replying Affidavit sworn on 17th September 2025 by the Ex Parte Applicant, Pariken Ole Esho.**

**26) The Ex Parte Applicant avers that he has read and understood the Respondent's Notice of Motion dated 2nd July 2025 and has had the same explained to him by his advocates. He states that, as he understands it, the Respondent seeks to stay the present Judicial Review proceedings pending the hearing and determination of several constitutional petitions filed before the High Court at Nairobi by the seven Judges of the Supreme Court, namely:**

- i. Nairobi Constitutional Petition No. E083 of 2025 – Hon. Lady Justice Martha Koome, EGH, Chief Justice and President of the Supreme Court of Kenya v Judicial Service Commission & Nelson Havi & 15 Others.**
- ii. Petition No. E086 of 2025 – Hon. Lady Justice Philomena Mbete Mwilu v Judicial Service Commission, Attorney General & 2 Others.**
- iii. Petition No. E079 of 2025 – Hon. Lady Justice Njoki S. Ndungu v State Law Office, Judicial Service Commission & Others.**
- iv. Petition No. E087 of 2025 – Hon. Justice Isaac Lenaola v Judicial Service Commission, Katiba Institute & 4 Others.**
- v. Petition No. E088 of 2025 – Hon. Justice Mohammed Khadar Ibrahim v State Law Office, Judicial Service Commission & 2 Others.**
- vi. Petition No. E089 of 2025 – Hon. Justice Mohammed Khadar Ibrahim v State Law Office, Judicial Service Commission & 2 Others.**

- vii. **Petition No. E090 of 2025 – Hon. Justice William Ouko v Judicial Service Commission & Another, Kenya Magistrates and Judges Association & Others; and**
- viii. **Petition No. E098 of 2025 – Justice (Dr.) Smokin C. Wanjala v Judicial Service Commission.**

**27) The Ex Parte Applicant deposes that the issues raised in the present application were previously considered and determined by this Court in a ruling delivered on 11th April 2025. He states that in that ruling, the Court dismissed two earlier applications filed by the Respondent and the 1st Interested Party, dated 6th March 2025 and 19th February 2025, respectively. He annexes a copy of the said ruling.**

**28) He avers that in those earlier applications; he had been accused of acting as a proxy for the seven Judges of the Supreme Court and that it had been argued that this matter was sub judice on account of the constitutional petitions filed in Nairobi. He further states that the Respondent and the 1st Interested Party had strongly urged the Court to dismiss the present matter or, in the alternative, to transfer it to the High Court in Nairobi. The Court, however, declined to do so.**

**29) The Ex Parte Applicant further deposes that following delivery of the ruling of 11th April 2025; the Respondent filed a Notice of Appeal dated 23rd April 2025 signifying its intention to challenge that ruling before the Court of Appeal. However, instead of prosecuting the intended appeal, the Respondent has now filed the present application, which he contends seeks to re-litigate and advance substantially the same arguments that were raised in the earlier applications.**

- 30) He avers, on advice of counsel, that since this Court already declined to find that the matter was sub judice or to transfer it to Nairobi, the issues raised in the present application are res judicata and cannot properly be reopened.
- 31) The Ex Parte Applicant further contends that the Respondent's argument that there is a risk of conflicting decisions between this Court and the High Court in Nairobi is unfounded. He deposes that the Judge presiding over the present matter is also the Presiding Judge of the bench empaneled to hear the consolidated constitutional petitions in Nairobi, together with Justice Bahati Mwamuye and Justice L.N. Mugambi. In his view, this circumstance eliminates any real risk of inconsistent or conflicting determinations.
- 32) He further deposes, on advice of counsel, that the present Judicial Review proceedings do not offend the sub judice rule. He distinguishes the constitutional petitions filed by the Supreme Court Judges from the present proceedings. According to him, the petitions in Nairobi raise elaborate constitutional issues and challenge the merits of the decision by the Respondent to admit JSC Petition Nos. 35 of 2024, 72 of 2024, and 3 of 2025. In contrast, the present proceedings are confined to a judicial review of the lawfulness and propriety of the Respondent's decision-making process in admitting the petitions. He asserts that this Court is not concerned with the merits of the complaints against the Judges but rather with the legality of the procedure adopted by the Respondent. He therefore maintains that although matters may arise from similar facts, they are fundamentally distinct and separate causes of action.

**33) The Ex Parte Applicant also accuses the Respondent of lack of candor and bad faith. He deposes that while the Respondent has sought dismissal or stay of these proceedings on account of the Nairobi petitions, it has not adopted a similar position in the Nairobi High Court Constitutional Petition No. E358 of 2025, Federation of Women Lawyers in Kenya (FIDA) v Judicial Service Commission & Another, which he contends raises similar issues. He annexes a copy of that petition and asserts that the Respondent has neither sought to stay nor transfer that matter, thereby demonstrating inconsistency in its approach.**

**34) In conclusion, the Ex Parte Applicant contends that the present application lacks merit, is an abuse of the court process, and ought to be dismissed with costs.**

#### **The Respondent/Applicant's Submissions**

**35) The Respondent submits that the issues raised in the present Judicial Review application are directly and substantially in issue in the consolidated Constitutional Petitions pending before the High Court. In its view, the questions presented in this matter are not novel or distinct but mirror those already placed before the Court in the said Petitions.**

**36) The Respondent identifies two issues for determination: first, whether the instant matter is sub judice; and second, whether these proceedings ought to be stayed pending the hearing and determination of the consolidated Constitutional Petitions.**

**37) On the question of whether the matter is sub judice, the Respondent anchors its argument on the statutory and constitutional framework. It relies on Section 6**

of the Civil Procedure Act, which bars a court from proceeding with a matter in which the issues are directly and substantially in issue in a previously instituted suit between the same parties, pending before a court of competent jurisdiction. While acknowledging that judicial review proceedings are sui generis and governed principally by the Law Reform Act and Order 53 of the Civil Procedure Rules, the Respondent refers to the decision in *Edward R. Ouko v Speaker of the National Assembly & 4 Others*[2017] KEHC 8576 (KLR), where Odunga J. (as he then was) held that although Section 6 does not strictly apply to judicial review proceedings, the High Court retains inherent jurisdiction under Section 3A of the Civil Procedure Act to prevent abuse of its process and may invoke sub judice principles in the interests of justice.

38) In that regard, reliance is placed on the decisions in *Commissioner of Lands v Hotel Kunste Ltd*, *Sanghani Investment Limited v Officer in Charge Nairobi Remand and Allocation Prison*, and *Kenya Bus Services Ltd & Others v Attorney General & Others*, which affirm that a superior court possesses inherent jurisdiction to prevent abuse of its process. Further reliance is placed on *Nyanza Garage v Attorney General* for the proposition that multiplicity of suits over the same subject matter clogs the administration of justice and should be discouraged.

39) The Respondent also invokes the decision of the Supreme Court in *Kenya National Commission on Human Rights v Attorney General; IEBC & 16 Others (Interested Parties)(Advisory Opinion Reference 1 of 2017)[2020] KESC 54 (KLR)*, where the Court explained that the doctrine of sub judice is intended to

prevent parallel litigation over the same subject matter and to avoid conflicting decisions by courts of competent jurisdiction. Additional reliance is placed on the Court of Appeal decision in *Abdulkadir A. Khalif v Principal Secretary Ministry of Lands & Physical Planning & 4 Others* [2020] KECA 621 (KLR); *National Land Commission & Another*, which endorsed the position that the test for sub judice includes whether a final decision in the earlier suit would operate as *res judicata* in the subsequent suit. Reference is also made to *Republic v Paul Kihara Kariuki & 3 Others: Law Society of Kenya (Ex Parte Applicant)* [2020] KEHC 10142 (KLR).

40) From these authorities, the Respondent distils the applicable test as whether the matter in issue is directly and substantially in issue in a previously instituted suit and whether a final determination in that earlier suit would operate as *res judicata* in the later proceedings.

41) On the commencement of judicial review proceedings, the Respondent contends that such proceedings commence upon the filing of the substantive Notice of Motion after leave has been granted, rather than upon filing the Chamber Summons for leave. In support, it cites *Republic v Chuka University Ex Parte Kennedy Omondi Waringa & 35 Others* [2016] KEHC 4338 (KLR), where the Court held that the substantive Motion is what originates judicial review proceedings, the leave stage being merely preliminary. The Respondent submits that the consolidated Constitutional Petitions were filed prior to the substantive Notice of Motion herein dated 7th March 2025 and filed on 10th March 2025, and therefore pre-date the present proceedings for purposes of Section 6.

42) With respect to the identity of issues and reliefs, the Respondent argues that although the present matter is framed as a judicial review application and the others as constitutional petitions, the substance of the disputes is identical. All challenge the decision of the Judicial Service Commission made on 27th January 2025 and seek orders of certiorari to quash that decision, prohibition to restrain further proceedings, and mandamus to compel promulgation of procedural rules. Reliance is placed on *Thiba Min. Hydro Co. Ltd v Josphat Karu Ndwiga* [2013] KEHC 2017 (KLR) for the proposition that sub judice is determined by the substance of the dispute rather than the form in which it is presented. On that basis, the Respondent maintains that a final decision in the consolidated Petitions would operate as *res judicata* in this matter, rendering these proceedings sub judice.

43) On whether the proceedings should be stayed, the Respondent invokes the principles governing stay of proceedings as articulated by Ringera J. (as he then was) in *Global Tours & Travel Ltd* and cited with approval in *Gichuhi Macharia & Another v Kiai Mbaki & 2 Others* [2016] KEHC 5149 (KLR). These principles underscore that stay of proceedings is discretionary and must be guided by the interests of justice, requiring the Court to weigh the pros and cons, consider the need for expeditious disposal of cases, ensure optimal use of judicial time, and assess whether the application was brought promptly. The Respondent further relies on *Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 Others* [2009] KECA 453 (KLR), where the Court of Appeal emphasized that judicial time is a scarce resource to be managed efficiently.

**44) It is submitted that the issues in question have already been certified under Article 165(4) of the Constitution as raising substantial constitutional questions, that a three-judge bench has been empaneled, and that considerable judicial resources have been allocated. The Respondent notes that the same presiding Judge is seized of both matters and contends that there is a real risk of conflicting decisions if both proceed independently. It further submits that no prejudice will be suffered by the Ex Parte Applicant, as the issues will be conclusively determined in the consolidated Petitions.**

**45) In conclusion, the Respondent/Applicant submits that the present Judicial Review proceedings are sub judice under Section 6 of the Civil Procedure Act. Alternatively, the Court is urged to invoke its inherent jurisdiction under Section 3A to prevent abuse of process. It is contended that, in the interests of justice, judicial economy, and consistency of decisions, these proceedings should be stayed pending the determination of the consolidated Constitutional Petitions. The Court is therefore urged to allow the Notice of Motion dated 2nd July 2025 and grant an order staying these proceedings pending the hearing and determination of the consolidated Constitutional Petitions before the High Court in Nairobi.**

#### **The Ex Parte Applicant's Submissions**

**46) The Ex Parte Applicant submits that the Respondent's application is anchored on Section 6 of the Civil Procedure Act and is premised on the doctrine of sub judice, whose purpose is to prevent multiplicity of suits between the same**

parties over the same subject matter and to avoid the risk of conflicting decisions by courts of competent jurisdiction.

47) He contends that for the doctrine to apply, it must be demonstrated that there are two or more suits involving the same subject matter; that the earlier suit was instituted before the later one; that both suits are pending before courts of competent jurisdiction; and that they are between the same parties or their representatives litigating under the same title.

48) On the principles governing stay of proceedings, the Ex Parte Applicant relies on *Chege v Gachora* [2024] KEHC 5821 (KLR), where the High Court reiterated that stay of proceedings is a matter of judicial discretion to be exercised in the interests of justice. In that decision, the Court cited with approval *Global Tours & Travels Limited*, where Ringera J. emphasized that the Court must weigh the pros and cons of granting or refusing a stay, taking into account factors such as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, the optimal utilization of judicial time, and whether the application was brought expeditiously.

49) The Ex Parte Applicant further relies on *Halsbury's Laws of England*, 4th Edition, Vol. 37, for the proposition that stay of proceedings constitutes a grave interruption of a party's right to prosecute his case and should be granted sparingly and only in exceptional circumstances.

50) He submits that, in light of the earlier ruling delivered on 11th April 2025, dismissing similar applications, the issues raised in the present application are

res judicata. In that regard, he cites Section 7 of the Civil Procedure Act and relies on the Supreme Court decision in *Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others* [2014] eKLR where the Court articulated the rationale and essential elements of the doctrine of res judicata, emphasizing that it bars re-litigation of issues that have been conclusively determined by a court of competent jurisdiction between the same parties litigating under the same title.

51) The Ex Parte Applicant contends that the Respondent is precluded from reopening issues that were directly and substantially determined in the ruling of 11th April 2025. Having elected to file a Notice of Appeal, the Respondent cannot, he argues, return to the same Court to re-argue identical points under the guise of a fresh application.

52) He further submits that the apprehension of conflicting decisions is unfounded, noting that the Judge presiding over the present matter is also the Presiding Judge of the three-judge bench empaneled to hear the consolidated Constitutional Petitions in Nairobi.

53) Additionally, the Ex Parte Applicant argues that the present Judicial Review proceedings are fundamentally distinct from the constitutional petitions. Whereas the constitutional petitions challenge the merits of the Respondent's decision to admit the impugned petitions before the Judicial Service Commission and raise extensive constitutional questions, the present matter is confined strictly to a judicial review of the legality and procedural propriety of

the Respondent's decision-making process, rather than the merits of the complaints against the Judges.

54) On that basis, he submits that the suits are neither identical in subject matter nor in the nature of the reliefs sought, and that the doctrine of sub judice is therefore inapplicable.

55) In conclusion, the Ex Parte Applicant maintains that the Respondent's Notice of Motion dated 2nd July 2025 is devoid of merit, is barred by the doctrine of res judicata, and does not meet the stringent threshold for the grant of a stay of proceedings. He accordingly prays that the application be dismissed with costs.

#### **ANALYSIS AND DETERMINATION**

56) **Issues for Determination**

57) Having carefully considered the Notice of Motion dated 2nd July 2025, the affidavits on record, and the rival submissions of counsel, the following issues arise for determination:

- i. Whether the present application is barred by the doctrine of res judicata in light of the ruling delivered on 11th April 2025.
- ii. Whether the instant Judicial Review proceedings are sub judice within the meaning of Section 6 of the Civil Procedure Act, or under the Court's inherent jurisdiction.
- iii. If not barred, whether the Respondent/Applicant has satisfied the principles governing the grant of an order for stay of proceedings.

58) I now proceed to analyze each issue in turn.

**(I) Whether the Application is Barred by Res Judicata**

- 59) The Ex Parte Applicant contends that this Court, in its ruling of 11th April 2025, dismissed earlier applications seeking dismissal or transfer of these proceedings on grounds of sub judice. It is argued that the present Motion merely re-litigates issues already conclusively determined.
- 60) The doctrine of res judicata is codified in Section 7 of the Civil Procedure Act. The Supreme Court in *Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others* [2014] eKLR (Supreme Court of Kenya) articulated the elements of the doctrine as follows: the matter in issue must have been directly and substantially in issue in a former suit; the former suit must have been between the same parties or parties claiming under them; the issue must have been heard and finally determined; and the court that determined it must have been competent.
- 61) The rationale for the doctrine is to bring litigation to finality and to prevent abuse of the court process through repetitive suits.
- 62) It is therefore necessary to interrogate the scope of the ruling delivered on 11th April 2025. From the record, that ruling determined applications seeking dismissal or transfer of this cause to Nairobi on the grounds that the matter was sub judice. The present application, however, seeks a stay of proceedings pending the determination of consolidated constitutional petitions, which have since been certified under Article 165(4) and placed before an empanelled bench.
- 63) While the argument of sub judice overlaps, the relief sought is distinct. The earlier applications sought dismissal or transfer; the present Motion seeks a

stay pending the determination of proceedings that have since evolved, been consolidated, certified as raising substantial constitutional questions, and fixed before a three-judge bench.

64) Res judicata does not bar a court from entertaining a fresh application where there are material changes in circumstances. The Court of Appeal in *Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 Others* [2009] eKLR (Court of Appeal at Nairobi, Civil Appeal No. 25 of 2002) emphasized that the doctrine is intended to prevent abuse of process, not to shut out legitimate procedural applications grounded on new developments.

65) In my view, the empanelment of a three-judge bench under Article 165(4) and the consolidation of multiple constitutional petitions constitute material developments that were not in existence in their current procedural posture at the time of the earlier ruling.

66) Accordingly, the present Motion is not barred by res judicata.

(II) Whether the Present Proceedings are Sub Judice

67) Section 6 of the Civil Procedure Act bars a court from proceeding with a suit in issue is directly and substantially in issue in a previously instituted suit between the same parties pending before a court of competent jurisdiction.

68) The Supreme Court in *Kenya National Commission on Human Rights v Attorney General; Independent Electoral and Boundaries Commission & 16 Others (Interested Parties)* [2020] eKLR (Supreme Court of Kenya, Petition No. 1 of 2017) explained that the purpose of the sub judice rule is to prevent parallel

litigation over the same subject matter and to avoid conflicting decisions by courts of competent jurisdiction.

69) The Court of Appeal in *Abdulkadir A. Khalif v Principal Secretary Ministry of Lands & Physical Planning & 4 Others; National Land Commission & Another (Interested Parties)* [2020] eKLR (Court of Appeal at Nairobi further clarified that the applicable test includes whether a final decision in the earlier suit would operate as *res judicata* in the subsequent proceedings.

70) The Respondent argues that the consolidated constitutional petitions were filed prior to the filing of the substantive Notice of Motion herein, relying on *Republic v Chuka University Ex Parte Kennedy Omondi Waringa & 35 Others* [2016] eKLR (High Court of Kenya), where the Court held that judicial review proceedings commence upon the filing of the substantive Motion and not at the leave stage.

71) Even assuming that the constitutional petitions predate the substantive Motion herein, the critical inquiry is whether the issues are directly and substantially identical.

72) The Ex Parte Applicant contends that the constitutional petitions challenge the merits of the JSC's decision and raise broad constitutional questions, whereas this cause is confined to the legality and procedural propriety of the decision-making process under Articles 47 and 50 of the Constitution and the Fair Administrative Action Act.

73) It is settled that sub judice is determined by substance rather than form, as held in *Thiba Min. Hydro Co. Ltd v Josphat Karu Ndwiga* [2013] eKLR (High Court of Kenya).

74) A perusal of the pleadings shows that both the judicial review proceedings and the constitutional petitions challenge the same decision of 27th January 2025 and seek substantially similar remedies—certiorari, prohibition, and mandamus—directed at the same impugned conduct and the same alleged failure to promulgate regulations under Section 47 of the Judicial Service Act.

75) In addition, therefore, the issues substantially overlap. A determination by the empanelled bench upholding or quashing the impugned decision would directly affect, and potentially dispose of, the core issues in this matter.

76) I am therefore satisfied that the present proceedings fall within the ambit of sub judice, or at the very least engage the Court’s inherent jurisdiction under Section 3A of the Civil Procedure Act to prevent multiplicity of proceedings and inconsistent determinations, as recognized in *Kenya Bus Services Ltd & 2 Others v Attorney General & 2 Others* [2005] eKLR (High Court of Kenya at Nairobi).

### (III) Whether a Stay of Proceedings Should Issue

77) Stay of proceedings is a discretionary remedy. The governing principles were articulated by Ringera J. in *Re Global Tours & Travel Ltd* [2000] eKLR (High Court of Kenya at Nairobi, Winding Up Cause No. 43 of 2000), and approved in *Gichuhi Macharia & Another v Kiai Mbaki & 2 Others* [2016] eKLR (High Court of Kenya). The Court must weigh the pros and cons, consider the need for

**expeditious disposal of cases, the optimal use of judicial time, and whether the application has been brought expeditiously.**

**78) It is also recognized, as stated in *Halsbury's Laws of England*, that a stay of proceedings is a grave interruption of a party's right to prosecute his case and should not be granted lightly.**

**79) In the present case, the following considerations are material:**

**80) The consolidated constitutional petitions have been certified under Article 165(4) as raising substantial constitutional questions.**

**81) A three-judge bench has been duly empanelled.**

**82) The impugned decision of 27th January 2025 is the central subject in both proceedings.**

**83) Considerable judicial resources have already been allocated to the consolidated petitions.**

**84) The Presiding Judge of the empanelled bench is also seized of this matter, thereby reducing any speculative risk of inconsistency but not eliminating duplication.**

**85) Judicial time is a scarce public resource. As observed in *Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 Others*, courts must guard against parallel processes that amount to abuse of process or inefficient use of judicial resources.**

**86) Balancing the competing considerations, I am persuaded that allowing both processes to proceed independently would risk duplication of judicial effort and**

could render one set of proceedings superfluous depending on the outcome of the consolidated petitions.

87) Further, no demonstrable prejudice has been shown that cannot be cured by participation in, or reliance upon, the outcome of the consolidated constitutional petitions.

88) In the circumstances, and in the interests of orderly administration of justice, judicial economy, and consistency of decisions, I find that this is an appropriate case for the exercise of discretion in favor of a stay.

#### **Determination**

89) For the foregoing reasons, I find that:

- a) The present application is not barred by res judicata.
  - b) The issues in this Judicial Review matter are directly and substantially in issue in the consolidated constitutional petitions pending before the empanelled bench.
  - c) The interests of justice warrant a stay of these proceedings pending the hearing and determination of the consolidated Constitutional Petitions before the High Court at Nairobi.
- i. Accordingly, the Notice of Motion dated 2nd July 2025 is hereby allowed.
  - ii. There shall be a stay of proceedings in Judicial Review Misc. Application No. E002 of 2025 pending the hearing and determination of the consolidated Constitutional Petitions.
  - iii. Costs shall be in the cause.

**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS  
APPLICATION, THIS 27TH DAY OF MARCH.2026.**

**CHARLES KARIUKI**

**JUDGE**