



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

JUDICIAL REVIEW NO. E030 OF 2021

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

AND

IN THE MATTER OF: ARTICLES 41 AND 47 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: SECTION 4 OF THE FAIR ADMINISTRATIVE ACTIONS ACT

AND

IN THE MATTER OF: SECTIONS 8 AND 9 OF THE LAW REFORM ACT

AND

IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF: DEMOTION AND REDUCTION OF SALARIES OF THE EX-PARTE APPLICANTS

BETWEEN

REPUBLIC..... APPLICANT

VERSUS

AG. CLERK OF THE NAIROBI CITY COUNTY ASSEMBLY1ST RESPONDENT

THE NAIROBI CITY COUNTY ASSEMBLY SERVICE BOARD2ND RESPONDENT

AND

ROBERT KHAMALA SITUMA AND 18 OTHERS.....EX-PARTE APPLICANT

RULING

1. Through an Ex-parte chamber summons application dated 11th November, 2021, that was brought pursuant to the provisions of Order 53 of the Civil Procedure Rules, filed herein on the 12th November 2021, the Ex-parte Applicants sought for leave of this Court to commence Judicial Review proceedings for the various Judicial Review Order, namely mandamus, certiorari, and prohibition. Additionally, they sought that a grant of the leave does operate as a stay of decision(s) and action(s) that are sought to be assailed through the intended Judicial Review proceedings.

2. Satisfied that the Orders sought were merited, this Court granted the leave and stay in terms of its Order that was issued on the 12th November 2021. The Order was served upon the Respondents. The service and contents thereof, have stirred the 1st and 2nd Respondent's

application herein dated 15th November 2021.

The 1st and 2nd Respondent's application

3. The Respondents through the afore-stated application, brought pursuant to the provisions of section 1A, 3 & 3A of the Civil procedure Act and Order 51, Rule 15 of the Civil Procedure Rules have sought for the following Orders;

- a) THAT this application be certified as urgent and be placed before the duty Judge and be heard *Ex-parte* in the first instance.
- b) THAT pending the *inter-partes* hearing and determination of this application, stay granted to the *Ex-parte Applicants* on the 12th November 2021, be and is hereby set aside *ex-debito justitiae* on account of being *sub judice*, for being an abuse of the court process.
- c) THAT the proceedings herein be stayed pending the hearing and determination of ELRC Petition No. E.170 of 2021, SAMMY KIPTOO, PAURINE OKUKU, JAMES MWANGI & ROBERT SITUMA (*suing on behalf of all the 39 members affected by the Nairobi City County Assembly Report and Resolutions of the 26th October, 2021 =vs= SPEAKER NAIROBI CITY COUNTY ASSEMBLY & 4 OTHERS*).
- d) In the alternative, this suit be struck out for being an abuse of the court process as the *Ex- parte Applicants* failed to disclose the existence of another matter seeking the same reliefs and are guilty of forum shopping.
- e) THAT the costs of this application be borne by the Respondents.

4. The application is anchored on the grounds obtaining on the face of the application, the supporting affidavit, and supplementary affidavit sworn by ADAH ONYANGO on 15th November 2021 and 25th November 2021, respectively.

5. The Applicants contend that the 1st, 2nd and 3rd and 4th *Ex- parte Applicants* filed a constitutional petition namely ELRC Petition No. 170 of 2021, before this Court on the 2nd November, 2021, which petition is pending hearing and determination. This matter is therefore *sub judice* and ought to be stayed and the stay granted vacated for being an abuse of the court process.

6. The Respondents/Applicants contend that contemporaneously with the aforestated petition, the *Ex-parte Applicants* filed an application which application was on the 2nd November, 2021 heard by Hon. Dr. Jacob Gakeri J. who ordered them to serve the application for an *inter-partes* hearing.

7. It was further stated that instead of fixing the application for hearing as directed by the Judge, the *Ex-parte Applicants* in a move with characteristics of forum seeking, filed the present matter over the same subject matter as is in the petition and application that Judge directed to be fixed for hearing and served.

8. That upon basis that the *Ex-parte Applicants* and specifically the 1st *Ex-parte Applicant* perjured himself, the Orders granted on the 12th November, 2021 should be set aside.

9. It is further contended by the Respondents/Applicants that the *Ex-parte Applicants* are guilty of perjury, and non-disclosure of material information to the Court. A grant of leave and leave to operate as a stay being equitable remedies, the *Ex-parte Applicants* should be disentitled of the same.

10. The Respondents/Applicants state that if the Orders sought are not granted, an untidy situation would ensue. A situation where courts of concurrent jurisdiction are issuing conflicting orders which may lead to an embarrassment of the Court and injure its integrity and standing.

11. It is further asserted that if the Court does not grant the Order, it shall be tantamount to allowing the *Ex-parte Applicants* to lie on oath and engage in forum seeking. This has the potential effect of denting the credibility of the Judge who granted Orders on basis of non-disclosure by the *Ex-parte Applicants*.

12. According to the Respondents/Applicants, what the *Ex-parte Applicants* seek to assail in the main motion is a report of the Justice and Legal Affairs Committee that recommend reversal of the promotions that were done in circumstances that demonstrated fraud, favouritism, discrimination, contempt of Court, nepotism, breach and disregard of the law hence subjecting the Assembly to possible loss of funds and skewed organizational structure.

13. The report cited a host of irregularities and illegalities, consequently making recommendations for rectification of the same.

14. Following the report and the recommendations thereof, which were adopted by the County Assembly, the 2nd Respondent got constrained to take action to correct the anomaly by taking urgent measures to address the budget deficit, conduct staff rationalization, not surcharge any employee who was a beneficiary of the irregular promotions, and re-advertise the positions as by law required, to enable an open transparent recruitment to eligible employees and other Kenyans.

15. The Respondents/Applicants assert that the matters complained of in the current proceedings are distinctly similar with those raised in ELRC Petition No. 170 of 2021. The matter herein should be stayed pending the hearing and determination of the Petition to avoid a scenario where two Courts arrive at different findings.

16. According to the Respondents/Applicants, the *Ex-parte Applicants* filed another suit through proxies, ELRC Petition 157 of 2021, filed on 12th October, 2021 that raises same issues as those raised in Petition number 171 of 2021, and the current proceedings.

17. In answer to issues raised in the *Ex-parte Applicant's* replying affidavit filed herein, the Respondents/Applicants, contend that a notice of withdrawal of a petition becomes effective upon the Court hearing both parties as to the juridical effect of the notice of withdrawal.

18. It further asserted that the issues in ELRC Petition E.170 of 2021 filed by the *Ex-parte Applicants* are fundamentally similar, only that the *Ex-parte Applicants* have cleverly and mischievously avoided to mention the report of justice and legal affairs committee, which recommended the reversal of the promotions.

19. The *Ex-parte Applicants* stand to benefit most from the proceedings initiated under ELRC Petition No. E.157 of 2021, if the same were to be successful, reason why it is by implication a proxy petition even though the *Ex-parte Applicants* are not parties therein.

The Ex-parte Applicants response

20. The *Ex-parte Applicants* oppose the application upon basis of the replying affidavit sworn by the 1st *Ex-parte Applicant* on the 19th November 2021.

21. The *Ex-parte Applicants* contend that they previously filed a constitutional petition being ELRC Petition No. 170 on the 2nd November 2021 contemporaneously with an application of even date. That when the application was placed before the Judge, he did not give any interim orders. He directed that a hearing date for the application be picked in the registry.

22. They further stated that before the petition would be served on the Respondents/Applicants it dawned on them that they had made a fundamental error and sought to withdraw the petition and application wholly by a notice of withdrawal dated 4th November 2021. A notice of withdrawal which was duly filed in Court. In the circumstances the application and the petition were not served upon the Respondents. The petitioners, were not keen to proceed with the same.

23. It is contended further that the petition having been withdrawn before service and the Respondents having not entered appearance, the Respondents cannot claim that the suit herein is sub judice as there is no suit pending before any court between the parties in respect of the same subject matter.

24. The *Ex-parte Applicants* state that the failure to mention the existence of ELRC Petition No. 170 of 2021 in the verifying affidavit does not amount to material non-disclosure.

25. By reason of the premises foregoing, they cannot be accused of perjury.

26. It is stated that even if the said petition were to be still subsisting, the issues raised in the petition are radically different from the one in the proceedings herein.

27. The two suits are fundamentally different as the subject matter, the cause of action and the prayers sought are dissimilar.

28. As regards Petition No. 157 of 2020, the *Ex-parte Applicants* contend that they are not parties to the suit therein. They have no knowledge of the same and any proceedings therein.

29. The parties in this matter are not the same as those in Petition No. 157 of 2020. The principle of sub-judice cannot therefore be raised.

30. The *Ex-parte Applicants* have taken a position that the instant application is defective, contending that Judicial Review proceedings are *sui generis* and the Civil Procedure Rules, save for Order 53, are not applicable. The Court cannot therefore invoke the provisions of section 1A, B and 3A of the Civil Procedure Act and Order 51 to grant the Respondents' / Applicants' application.

31. It is further contended that once leave has been granted, the issues raised in the Respondent's application ought to have been raised in the substantive motion.

The Respondents' / Applicants' submissions

32. The Respondents / Applicants through their written submissions filed pursuant to the directions of this Court have identified two issues that they hold are the issues that emerge for determination by this Court, namely;

a) Whether Petition number E.170 of 2021 is withdrawn.

b) Whether the issues in ELRC Petition E.170 of 2021 are the same as in these proceedings and whether same amounts to an abuse of court.

33. On the issue as to whether Petition ELRC E.170 of 2021 is withdrawn, counsel for the Applicants submits that it is not in contention that the parties in the constitutional petition are the same as the *Ex-parte Applicants*. Too, that the Court on the 2nd November, 2021, declined to grant interim reliefs therein and directed the to pick a hearing date at the Registry. This prompted them to abandon the Petition by filing a notice of withdrawal and consequently filing these Judicial Review proceedings.

34. Counsel further submitted that institution and withdrawal of constitutional petitions is guided by the Constitution of Kenya / Protection of Rights and Fundamental Freedoms) Practice Rules, 2013. Under Rule 27 (1) & 2 thereof, It is provided that a party may withdraw a petition by filing a notice of withdrawal and the court shall after hearing the parties to the proceedings, decide the juridical effect of that decision.

35. Therefore, unlike in any other suit, the withdrawal of a constitutional petition is not automatic upon filing a notice of withdrawal. Withdrawal cannot be achieved merely by notice.

36. It is further submitted that where a law prescribes a special procedure that must be complied with, parties are bound to follow that specific procedure.

37. Counsel urges this Court to be guided by the Court of Appeal decision in **Harry John Paul Arigi & 3 others =vs= Board Kenya Ports Authority and 2 others [2016]**, to find that a party must comply with the procedure set out in Rule 27 (2), and that a notice of withdrawal that has not been subjected to the procedure is of no effect.

38. The Court is urged to consider that rule 27(3) leaves open the possibility of another party taking over the petition given the public interest question involved in constitutional petitions. This informs the insistence of a hearing to determine the juridical effect.

39. On this issue counsel does a sum up by stating that the ELRC Petition E.170 of 2021 is still alive and therefore the proceedings herein are *sub judice* and amount to an abuse of the court process.

40. As to whether this suit is an abuse of the court process, the Respondents'/Applicants' counsel submits that the Judicial Review proceedings application seeks to challenge the demotions done by the 2nd Respondent. The demotions are a product of the report that is being challenged in the petition. That the *Ex-parte Applicants* have cleverly coached their documents herein, to avoid a mention of the report, so that the sub judice rule catches not up with them.

41. The foundation of both suits is the report that recommended the reversal of the promotions. If this were not so then there would not have been the attempt to withdraw the same.

42. The Respondents / Applicants further argue that the *Ex-parte Applicants* were duty bound to divulge to the Court that there had been a prior matter which they withdrew. This they did not.

43. The withdrawal was occasioned by the fact that, interim orders were declined by court. The *Ex-parte Applicants* have exhibited themselves as parties who were set by hook and crook to get the orders, even if it meant through an abuse of the court process.

44. The Court cannot proceed with a case where the matters in dispute are substantially the same as is in existing proceedings before a court of competent and concurrent jurisdiction.

45. Counsel submits that consolidation of the matters is not an option in their circumstances. The only options available are an order for stay of the proceedings or dismiss them. He fortifies this submission by the decision in **Paul Kihara Kariuki, Attorney General and 2 others, Ex-parte Law Society of Kenya [2020] eKLR**.

46. In conclusion, it is urged that this Court does find the present Judicial Review proceedings fit for dismissal as being an abuse of the court process.

The Ex-parte Applicants' submissions

47. Counsel for the *Ex-parte Applicants* in his written submissions suggests the following issues as the issue that he considers issues for determination on the Respondents'/Applicants' application herein, namely:

- a) Whether the application herein is defective.
- b) Whether the current proceedings are sub judice and therefore an abuse of the court process.
- c) Whether the court should grant the orders sought.

48. It is submitted that Respondents brought the application under Section 1 A, B and 3 A of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules. They seek to have the suit struck out and the Orders granted at leave stage be set aside.

49. Counsel for *argues* that it is trite law that Judicial Review proceedings are *sui generis*. They are neither civil nor criminal in nature. Therefore, the Civil Procedure Rules are inapplicable to them. To buttress this, counsel puts reliance on the holding in the case of **Edward R. Ouko v Speaker of the National Assembly & 4 others [2017] eKLR**, thus:

“Sub Judice, strictly speaking is provided under section 6 of the Civil Procedure Act which in the preamble to the Act is “An Act of Parliament to make provision for procedure in civil courts”. It is, however, now well settled that Judicial Review applications are neither criminal nor civil in nature. See Commissioner of Lands vs. Kunste Hotels Ltd (1995-1998) 1 EA 1.

14. In Commissioner of Lands vs. Hotel Kunste Ltd (supra) and Sanghani Investment Limited vs. Officer in Charge Nairobi

Remand and Allocation Prison [2007] 1 EA 354 it was held that Judicial Review jurisdiction is a special jurisdiction which is neither civil nor criminal and the Civil Procedure Act does not apply since it is governed by sections 8 and 9 of the Law Reform Act being the substantive law and Order 53 of the Civil Procedure Rules being the procedural law. Therefore, strictly speaking section 6 of the Civil Procedure Act does not apply to Judicial Review proceedings.

50. Further reliance was placed on the case of **Republic vs Public Procurement Administrative Review Board & 2 others [2013] eKLR** where the court stated as follows:

“First and foremost, it must be made clear that the provisions of the Civil Procedure Act as well as the Rules made thereunder do not ordinarily apply to Judicial Review proceedings since the Civil Procedure Act is expressed to be “An Act of Parliament to make provision for procedure in civil courts” yet Judicial Review proceedings are neither civil nor criminal proceedings.”

51. It was consequently asserted that by reason of the foregoing premise the orders sought in the Respondents’ application are unknown in Judicial Review proceedings and therefore untenable.

52. True, institution and withdrawal of Petitions are guided by the Constitution of Kenya (Protection of Rights & Fundamental Freedoms) Practice Rules, 2013 otherwise known as “**Mutunga Rules**”, under **Rule 27** by providing;

“27(1) The petitioner may—

on notice to the Court and to the respondent, apply to withdraw the petition; or with the leave of the Court, discontinue the proceedings.

The Court shall, after hearing the parties to the proceedings, decide on the matter and determine the juridical effects of that decision.

Despite sub rule (2), the Court may, for reasons to be recorded, proceed with the hearing of a case petition in spite of the wish of the petitioner to withdraw or discontinue the proceedings.

53. Counsel states that for a matter to be *sub judice*, there must be pending suits and that this is what the court in the case of **Republic vs Commissioner of Domestic Taxes; Panalpina Airflo Limited (Ex-parte) [2019] eKLR**, stated;

“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 c

54. Counsel further submitted that the *Ex parte* Applicants have demonstrated that the Petition was withdrawn wholly by a notice of withdrawal dated 4th November 2021. The said withdrawal was made before the Application was served upon the Respondents in that case, and accordingly the central question that arises in these proceedings is then, what happens when the Respondents were never served or responded to the Petition which had been withdrawn? While Rule 27 requires leave of court, a holistic reading of the said Rule implies that leave so granted by the court is only applicable where the proceedings had already been set in motion, namely, by parties filing and exchanging the requisite pleadings in the matter. In the present case, the Petition was withdrawn wholly without any participation by the Respondents in that Petition.

55. He submitted further that looking at paragraph 5 of the Supporting Affidavit sworn by **ADA ONYANGO**, there is an admission by the Respondents that the said Application was not served upon them as per the directions of the court.

56. It is argued that as much as the Respondents argue that they entered appearance in the said Petition, they have not denied the fact that they never responded to that application. While they have annexed a Notice of Appointment in the Supplementary Affidavit, there is no proof that the same was ever filed in court or served upon the parties. In the circumstances, they have not demonstrated any prejudice or inconvenience they have suffered in respect to Petition No. 170 of 2021.

57. Counsel urges the court to construe Rule 27 in a manner that will promote the rights and fundamental freedoms of the *Ex-parte* Applicants as enjoined by Article 259 of the Constitution. That what the Respondents are seeking is so drastic in nature with a potential effect of evicting the *Ex- parte* Applicants from the seat of justice.

58. He submits that even if it were to be said that the suit was still subsisting, **Petition No.E. 170 of 2021** raises issues which are fundamentally different from the ones raised herein. It is the substance of the suit, and not just the parties involved which would determine whether the suit is *sub judice*, to buttress this Counsel cites the case of **Thiba Min Hydro Co. Ltd vs. Josphat Kara Ndwiga (2013) eKLR**; where the Court opined:

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

59. Demonstrating that the matters are different, Counsel submitted that the said petition, which the Respondents conveniently failed to annex,

- a) Challenged the report of the Justice and Legal Affairs Committee which was adopted by the Nairobi City County Assembly
- b) Challenged the alleged violations of the constitutional fundamental rights and freedoms of the petitioners therein as a result of the report tabled by the Justice and Legal Affairs Committee.
- c) Sought to restrain the Respondents therein from interfering with the organizational structure adopted on 17th April 2020.
- d) Sought a permanent injunction restraining the Nairobi City County Assembly Service Board from taking or conducting any step in relation to the report and resolutions of the Justice and Legal Affairs Committee.

60. He submits that different from the petition, the current matter seeks to quash the decision by the Respondents to demote and review/reduce the salaries of the *Ex-parte Applicants* and to compel the Respondents to reinstate them to their lawful positions with full rights as to job rank/group.

61. He sums up the submission on the issue of *res sub judice* by stating that by reason of the premises, the two matters are fundamentally different as the subject matter, the cause of action and the prayers sought are dissimilar.

62. In respect to **Petition No. 157 of 2020**, Counsel submits that the *Ex-parte Applicants* are not parties to that matter, and therefore the issue of *sub judice* does not arise. They are not privy to proceedings in the suit or any orders issued by the court in that suit.

63. On the allegation that the *Ex-parte Applicants* have a hand in the aforesaid petition, it was submitted that the Respondents have not established any connection between the litigants herein and those in Petition No. 157 of 2020. In the circumstances, this court is urged to disregard this argument by the Respondents.

64. On whether the Orders sought in the application can be granted, it was submitted that the jurisdiction of this court to set aside orders granted at the leave stage is very limited. Ordinarily, where the Respondents find issue with the orders granted at leave stage, the best approach would be to raise the issues in the substantive motion for final determination by the court. To fortify this Counsel placed reliance on the case of ***Panda Clearing and Forwarding Ltd vs= Kenya Ports Authority & 2 others [2016] eKLR*** which is quoted with approval by the Court of Appeal in the case of ***Aga Khan Educational Services Ltd vs= Attorney General And 3 others [2004] eKLR*** thus:

“We would, however, caution practitioners that even though leave granted ex-parte can be set aside on an application, that is a very limited jurisdiction and will obviously be exercised very sparingly and on very clear-cut cases, unless it be contended that judges of the superior court grants leave as a matter of course. We do not think that is correct. Unless the case is an obvious one, such as where an Order of certiorari is being sought and it is clear to the court that the decision sought to be quashed was made more than six months prior to the applicant coming to court, and there is, therefore, no prospects at all of success, we would ourselves discourage practitioners from routinely following the grant of leave with applications to set leave aside. Fortunately, such applications are rare and like the judges in the United Kingdom, we would also point out that the mere fact that an applicant may in the end have great difficulties in proving his case is no basis for setting aside leave already granted.”

65. He asserts that the issues raised by the Respondents herein would require the court to examine the merit or otherwise of the matter herein, which would render meaningless the substantive motion. He notes that the Respondents aver that Petition No. E.170 of 2021 challenges the report of the Justice and Legal Affairs Committee while this matter challenges the Board’s decision to demote the *ex-parte Applicants*.

66. It is further submitted on this point that Respondents have annexed the impugned report, the subject matter in **Petition No. 170 of 2021** and stated that the report made a recommendation for the reversal of the promotions and, fresh advertisement on an account that the promotions were done illegally. Therefore, if the court were to proceed to determine and issue the orders sought, then the court will effectively be deciding on the merits of the decision herein. The orders sought at this stage by the Respondents require examination of the said report of the Justice and Legal Affairs Committee as well as contrasting the said report against the suit herein.

67. It is further submitted that effectively, the issues raised in the application to set aside the leave/striking out of the suit go to the merits of the application. They cannot be entertained at this stage.

Analysis and determination

68. Outstanding on the Respondents’ / Applicants’ application, for determination by this Court are prayers 3, 4 and 5 of the same, namely;

(i) That the proceedings herein be stayed pending the hearing and determination of ELRC Petition No. E.170 of 2021 Sammy Kiptoo, Pauline Alluku, James Mwangi and Robert Situma ***[suing on behalf of all the 39 members affected by the Nairobi City County Assembly Report and Resolution of 26th October, 2021]*** vs= ***Speaker Nairobi City County Assembly & 4 others.***

(ii) In the alternative this suit, be struck out for being an abuse of the court process as the *Ex-parte Applicants* failed to disclose the existence of another matter seeking the same reliefs and also guilty of forum shopping.

(iii) Costs of this application be borne by the Respondent.

69. From the material placed before me by the Respondents/Applicants, I get it that the prime ground upon which their application is predicated is that the matter herein is *sub judice* Petition number E.170 of 2021. In our system, the *sub judice* rule or rather principle flows from the provisions of section 6 of the Civil Procedure Act, Cap 21 Laws of Kenya, which provides;

“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceedings between the same parties, or parties under whom any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the reliefs claimed.”

70. In Civil litigation the central role that this principle plays cannot be underestimated. It aids to prevent courts of concurrent jurisdictions from simultaneously entertaining and adjudicating upon two parallel litigations with reference to the same cause of action. It restricts chances of having two contradicting judgments by two courts, over same subject matter. It prevents wastage of court's and, the parties,' time and resources. This furthers the overriding objective of courts.

71. Public confidence in a judicial system functioning in as key as it is to a stock market. I cannot agree more with counsel for the Respondents'/Applicants' submissions on the need to engage the principle, whenever a situation that requires its employment emerge.

72. The doctrine of res-sub judice can be invoked by a party subject to the condition that in the later suit or proceedings the matter in issue in the previously instituted suit between the same parties is the same. The law has presented very stringent requirements for invoking the doctrine. The doctrine is well orchestrated with solemn object to prevent courts of concurrent jurisdiction from simultaneously trying two parallel suits and avoid conflicting findings. Legislature has employed key words “the matter in issue is directly and substantially in issue in contradiction to” incidentally or collaterally.”

73. The fundamental test to attract the doctrine is whether on a final decision in the previous suit such decision would operate as res judicata in the subsequent suit- ***National institute of mental health and Neuro Sciences v.C.Parameshwara,[2005] 2 SCC 256.***

74. In order for section 6 of the Civil Procedure to be attracted, there must be two or more suits or proceedings that are alive, as a starting point. In this view I am fortified by the holding in the case of ***Republic vs= Commissioner of Domestic Taxes: Panalphina Airflo Limited (Ex-parte) 2019 eKLR***, where the court stated;

“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.”

75. Order 53 of the Civil Procedure Rules contemplates two forms of proceedings to be undertaken thereunder. First, those relating to a chamber summons application for leave to commence Judicial Review proceedings for orders of mandamus, prohibition or certiorari. Second, the Judicial Review proceedings, initiated through a notice of motion application pursuant to Rule 3 of the Order.

76. It is imperative to state that the proceedings are independent of each and have different life spans.

77. The Respondents' / Applicants' application herein in essence attacks the proceedings that were pursuant to the provisions of Order 53 Rules 1 and 2, the first proceedings. The proceedings which I say are normally for the specific purpose for which they were designed, were duly concluded when the order for leave to commence the Judicial Review proceedings was granted. The proceedings got spent. There are no proceedings pending that can be stayed or struck out.

78. Even if one were to say that Petition No. E.170 of 2021 is pending there is nothing herein that can be said to be sub judice the petition therefore.

79. Consequently, I find the application bereft of merit and it is hereby dismissed with costs.

80. Imperative to state that the Respondents'/ Applicants' application raises very vital issues which in my view would only be raised appropriately in the Judicial Review proceedings, that Ex Parte Applicants are to institute under Order 53 Rule 3 of the Civil Procedure Rules.

81. I will therefore not delve into the merits or otherwise of the other arguments raised herein for and against the application. In case the Respondents / Applicants want to revisit the application once the notice of motion is filed.

82. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY OF NOVEMBER, 2021

OCHARO KEBIRA

JUDGE

Delivered in presence of;

MR. THEURI FOR THE RESPONDENT.

MR. KHAEMBA FOR EX-PARTE APPLICANT ABSENT.