



Francis Mugambi Laichena t/a Laichena Mugambi & Ayieko Advocates LLP v Milimani Chief Magistrates Court; Wicof Limited & 2 others (Interested Parties) (Judicial Review Miscellaneous Application E017 of 2024) [2025] KEHC 1208 (KLR) (28 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1208 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E017 OF 2024
JM CHIGITI, J
FEBRUARY 28, 2025**

BETWEEN

**FRANCIS MUGAMBI LAICHENA T/A LAICHENA MUGAMBI & AYIEKO
ADVOCATES LLP APPLICANT**

AND

MILIMANI CHIEF MAGISTRATES COURT RESPONDENT

AND

WICOF LIMITED INTERESTED PARTY

DAVID THUO NGATA INTERESTED PARTY

ANGELICA WAITHERA KIMANI INTERESTED PARTY

JUDGMENT

The Applicant’s case;

1. The application that is before this court for determination is the one dated 26th February, 2024 wherein the Applicant is seeking the following orders:
 1. That an order of certiorari to be issued to bring into this Honourable court for the purposes of being quashed, the proceedings before the Milimani Commercial Court CMCC No. E996 of 2023 between Wicoff Limited & 2 Others Vs. Francis Laichena Mugambi t/a Laichena Mugambi & Ayieko Advocates LLP & Another.
 2. That an order of prohibition to be issued directed at the Respondent and the interested parties prohibiting them from pursuing, hearing and/ or continuing the proceedings in CMCC No. E996 of 2023 between Wicoff Limited & 2others Vs. Francis Laichena Mugambi t/a Laichena Mugambi & Ayieko Advocates LLP & Another.



3. That an order of mandamus to be issued to the Respondent compelling her, to forthwith terminate, dismiss and/ or strike out the suit and proceedings in CMCC No. E996 of 2023 between Wicoff Limited & 2 Others Vs. Francis Laichena Mugambi t/a Laichena Mugambi & Ayieko Advocates LLP & Another.
4. That the costs of the application be provided for.
2. The Applicant is an Advocate of the High Court of Kenya practicing under the name and style of Laichena Mugambi & Ayieko Advocates LLP.
3. It is his case that he was instructed by one Jean Mumbi Ngugi to represent her in a conveyance transaction for the sale of property LR No. 209/12823/16 and sale Agreement dated 14th July, 2022 between Jean Mumbi Ngugi (the vendor) and Wicoff Limited (the Purchaser) agreed to sell the property on a willing seller, willing buyer basis.
4. It is his case that the 1st interested party disagreed with the Vendor before completion of sale and the 1st interested party rescinded the Agreement and the purchase price was refunded, however, there was a disagreement whether or not the sum of Kshs. 9, 269, 000/= was refundable.
5. The Interested Party lodged a Complaint against the Applicant at the Advocates Complaints Commission OTC No. 255 of 2022 which according to the Applicant are unlawful, arbitrary, unreasonable, unprocedurally and substantially unfair and prejudicial.
6. According to the Applicant, while the Disciplinary Tribunal case was still pending, the interested parties with an ulterior motive filed yet another Civil suit before the Milimani Chief Magistrates Court MCCC No. E996 of 2023 over similar issues, between the same parties and seeking similar reliefs.
7. The Applicant contends that multiple suits in different fora touching on similar facts, similar issues, same parties and similar reliefs have exposed the Applicant to double jeopardy and is therefore an abuse of the Judicial and quasi-Judicial process.
8. The Applicant argues that Interested parties' conduct of filing multiple suit against the ex-parte Applicant over similar issues amounts to forum shopping, is illegal and an abuse of the justice process.
9. This could lead to different and conflicting orders being made by the different court and tribunal leading to confusion and subjecting the ex-parte Applicant to unnecessary embarrassment and procedural impropriety.
10. It is the Applicant's case that the Interested Parties have received Kshs. 4, 269, 000/= in respect of the disputed sums relating to the botched conveyance transaction in the form of undated series of cheques presented to them vide a letter dated 27th October, 2022.
11. This thus leaves a balance of Kshs 5,000,000/= which is within the Advocates Disciplinary Tribunal platform and thus the question of jurisdiction does not arise.
12. It is the Applicant's case that the Interested Parties have filed yet another complaint with the Advocates Disciplinary Tribunal through the Advocates Complaints Commission being DTC Case No 103 of 2024 which is similar to the one filed through the Secretary Advocates Disciplinary Tribunal under Private Prosecution being DTC no 255 of 2022.
13. Through the written submissions dated 20th September, 2024 it is submitted that the Interested Parties complaint to the Advocates Disciplinary Tribunal is unlawful, arbitrary, unreasonable, unprocedurally and substantially unfair and prejudicial and should either be withdrawn or struck out.



14. In the Supreme Court of Kenya in Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) the court pronounced itself on the question of multiplicity of suits and the principle of sub-judice and held as follows;

“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.

In the above context, it cannot be denied that the issues and prayers sought by the Petitioner in the two Constitutional Petitions generally call for the interpretation and application of provisions of Chapter Six of *the Constitution*. The issues and orders in the two Constitutional Petitions substantially ascend from the criteria for the implementation of the provisions of Chapter Six of *the Constitution*. For the High Court to sufficiently pronounce itself in the two Constitutional Petitions, it has to interpret and apply the provisions of Chapter Six of *the Constitution* on leadership and integrity.

In Constitutional Petition No. 142 of 2017, the Petitioner challenges the constitutionality of the Working Group as well as the criteria on the implementation of the provisions of Chapter Six of *the Constitution* as established by the Working Group. The High Court has therefore been tasked to examine the constitutionality or otherwise of the criteria so established by the Working Group.

In Constitutional Petition No. 68 of 2017 the Petitioner therein challenges requirement for clearance by the state and private organs on grounds that it threatens and violates the provisions of *the Constitution*. For the High Court to determine the constitutionality of the requirement for clearance challenged by the Petitioner in Constitutional Petition No. 68 of 2017 or the Working Group criteria as well as the ‘Resolution on Complimentary Framework of Collaboration by Agencies to Ensure Compliance with Leadership and Integrity Requirements in August 2017 General Elections’ and ‘Compliance with Leadership and Integrity Requirements in the 2017 General Elections’ challenged in Constitutional Petition No. 142 of 2017, it has to examine, interpret and apply the provisions of Chapter Six of *the Constitution*.

In so doing, the High Court shall be compelled, to determine whether a Constitutional test is set up in Chapter Six of *the Constitution*, whether the set test (if any) is fit and proper, objective or subjective, the scope of application of the test, the implementing organs and bodies. These are substantially the same



issues subject of the Advisory Opinion sought by the Applicant comprised at pages 13 to 19 of the Reference before this Court.

We therefore find that this Reference, as framed, mainly raises issues of constitutional interpretation. These issues are also substantially in issue before the High Court in Constitutional Petition No. 68 of 2017 and Constitutional Petition No. 142 of 2017. In view of Article 165 of *the Constitution*, the High Court is the Court of first instance with regard to jurisdiction for interpretation and application of *the Constitution* and that Court has already been moved.

Guided therefore by these principles, and in exercise of our discretion, we decline to exercise our jurisdiction under Article 163(6) of *the Constitution*. This Reference is sub-judice and this Court will not usurp the High Court's jurisdiction under Article 165 (3).”

15. They place reliance in the case of Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR the court quoted with approval the Supreme Court advisory case above and found as follows;

“The sub judice rule like other maxims of law has a salutary purpose. The basic purpose and the underlying object of sub judice 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.

In a fairly recent decision of this court, namely JR No. 146 of 2020, which incidentally involved the Law Society of Kenya, I stated that the words “directly and substantially in issue” are used in contradistinction to the words “incidentally or collaterally in issue.” Therefore, sub judice 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. 26. Paraphrasing what I said in the above case, the key words in applying sub judice rule is that “the matter in issue is directly and substantially in issue in the previously instituted suit.” The test for applicability of the sub judice rule is whether on a final decision being reached in the previously instituted suit, such decision would operate as res-judicata in the subsequent suit. As concluded earlier, the answer to this question is a resounding yes. However, when the matter in controversy is the same, it is immaterial what further relief is claimed in the subsequent suit or suits.

As the High Court of Uganda held in Nyanza Garage v 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.”



The Interested Parties' case;

16. In opposition to the Applicant's Application, the Interested parties filed a Replying Affidavit by David Thuo Ngata sworn on 29th May, 2024.
17. The Interested Parties entered into a Land Sale agreement dated 14th July, 2022 with one Jean Mumbi Ngugi, for the Purchase of Land Parcel L.R NO 209/12823/16 situated at South B, Nairobi County originally agreed at a purchase price of Kenya Shillings Fifty Million Only (Kshs. 50,000,000).
18. They were represented by the firm of Kimani Charagu Advocates while Jean Mumbi Ngugi was "allegedly" represented by the Ex parte Applicant herein, being Laichena Mugambi & Ayieko Advocates LLP.
19. The Applicant was paid the whole purchase price, being Kenya Shillings Five Million (Kshs. 5,000,000) for the Deposit and an additional Kenya Shillings Forty-Four Million, Three Hundred and Eleven Thousand, Five Hundred (Kshs. 44, 311,500/-).
20. The last installment was paid upon an undertaking by the Ex-parte applicant to avail and forward the completion documents upon payment of the balance of the purchase price.
21. It is their case that upon occupation and taking possession of the demised premises, the Interested Parties were horrendously evicted from the property and accused of trespass.
22. They followed up on the matter through their Advocates then (Kimani Charagu and Company Advocates) who revealed that the Applicant had used forged documents and that the purported Seller had not executed the sale agreement and that the Applicant had misrepresented himself as the Vendor's Advocate, a fact that was a blatant lie as confirmed by the Seller Jean Mumbi that the Applicant was not her advocate.
23. The Applicant refunded a sum of Kenya Shillings Forty Million and Forty-Two Thousand, Five Hundred (Kshs. 40,042,500/=) with the promise to refund the outstanding balance of Kenya Shillings Nine Million, Two Hundred and Sixty Nine Thousand (Kshs. 9,269,000/=) on or before 28th October, 2022, which refund he is yet to make.
24. In light of the foregoing, the Interested Parties lodged a complaint at the Advocates Complaints Commission.
25. They also filed a suit against the Ex-parte Applicant in the Subordinate Court in Milimani Commercial Court CMCC No. E966 of 2023.
26. It their case that judicial review refers to the authority of the Courts to examine the actions of the legislative, executive, and various administrative arms of the government and to determine whether such actions are consistent with *the Constitution* and there are civil ways of objecting to the jurisdiction of a court on grounds of sub-judice.
27. The Interested parties (herein referred to as the IPs) argue that the Applicant should have challenged the jurisdiction of the court within the respective matters and not through filing of the proceedings before this honourable court.
28. According to them, the Applicant's attempt to invoke supervisory jurisdiction over subordinate Jurisdiction of the court under Art 165 is farfetched.
29. It is also their case that a Judicial Review matter is one that compels the court to consider constitutional rights and values whereas the matter brought out in the suit before the Subordinate Court in



- Milimani Commercial Court CMCC No. E966 of 2023, would require this court to examine the contractual rights of the parties emanating from the Agreement for Sale of Land between the parties and Professional Undertakings issued by Applicant thereto.
30. They argue that under the principle of constitutional avoidance, the jurisdiction of this Court is limited to protecting and enforcing constitutional rights and impugning administrative decisions that go beyond *the constitution* and not to determine concerns of performance of contractual obligations.
 31. They aver that the Applicant has not raised any Judicial Review questions ripe for determination by this honourable court as he has failed to demonstrate any illegality irrationality or impropriety on the part of the Respondent or the Interested Parties thus lacks Jurisdiction to hear and determine the suit as presented by the Applicant.
 32. It is averred that the suit Milimani Commercial Court CMCC No. E966 of 2023 is substantively different in nature compared to the Complaints at the Advocates Complaints Tribunal.
 33. It is the IP's case that by dint of Section 57 of *Advocates Act*, Cap 16 Laws of Kenya, the Advocates Disciplinary Tribunal is mandated to hear and determine complaints against advocates.
 34. The IPs posit that the pecuniary jurisdiction of the Advocates Disciplinary Tribunal is capped at Kenya Shillings Five Million (Kshs. 5,000,000/-) and as such, subjecting them to the Tribunal alone would leave them without recourse for the rest of the Claims sought in the Plaint.
 35. It is their argument that the decision to sue the Ex-Parte Applicant was an individual decision by the Interested Parties and not in any way by an administrative arm or the court and the law does not stop them from using whatever legal avenues available to recover their money.
 36. They buttress the claim by the Applicants that there is a multiplicity of suits with the same issues as the claims as filed before the Advocates Disciplinary Tribunal and the Chief Magistrates court are different in nature and with different results, furthermore the Chief Magistrates Court has no jurisdiction to determine professional misconduct matters.
 37. It is their submission that judicial review should not be used as an alternative to an appeal or other judicial processes. The court should only intervene where there is a clear breach of the law that cannot be remedied within the proceedings of the trial court
 38. In the case of Republic v Chief Magistrate's Court at Milimani Law Courts; Director of Public Prosecutions & 2 others (Interested Parties); Ex-parte Applicant: Pravin Galot [2020] eKLR had this to say in regards to the jurisdiction and powers of the Judicial Review Court

“ 63. Judicial Review is about the decision-making process, not the decision itself. The role of the court in Judicial Review is supervisory. It is not an appeal and should not attempt to adopt the 'forbidden appellate approach'. Judicial Review is the review by a judge of the High Court of a decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised. 64. Judicial Review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision.”



39. Reliance is placed in the case of Republic VS. Attorney General & Another Ex-Parte Ongata Works Limited [2016] eKLR referred to the case of R. (Regina) VS. Dudsheath, Ex Parte, Meredith [1950] 2 ALL E.R. 741, AT 743, where Lord Goddard C. J. held as follows:

“It is important to remember that "mandamus" is neither a writ of course nor a writ of right, but that it will be granted if the duty is in the nature of a public duty, and specially affects the rights of an individual, provided there is no more appropriate remedy...”

40. It is also submitted that jurisdiction is everything, and a court must have the authority to decide on its own jurisdiction and the Applicant ought to have raised the issue of jurisdiction in CMCC No. E966 of 2023 rather than invoking judicial review as was confirmed in Joseph Njuguna Mwaura & 2 others – Versus - Republic [2013] eKLR, where the Court of Appeal held that;

“It is incumbent upon any court intending to render an opinion or determine a matter to first ascertain the entry point to the doors of justice and that is jurisdiction. The authority of court is determined by the existence or the lack of jurisdiction to hear and determine dispute. In essence, jurisdiction is the first hurdle that a Court will cross before it embarks on its decision-making function.”

41. In the book; Public Law in East Africa published by Law Africa as quoted in National Social Security Fund v Sokomania Ltd & another [2021] eKLR, the author, Ssekaana Musa stated as follows at page 250:

“Judicial review is a discretionary jurisdiction. The prerogative remedies, the declaration and the injunction are all discretionary remedies with exception of habeas corpus which issues ex debito justitiae on proper grounds being shown. A court may in its discretion refuse to grant a remedy, even if the applicant can demonstrate that a public authority has acted unlawfully.”

42. According to the 1st IP, Article 47 of *the Constitution* and the Fair Administrative Actions Act, a party seeking judicial review must demonstrate that an administrative action has violated the constitutional right to fair administrative action. The three grounds for judicial review, as established in Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, are;

- i. Illegality
- ii. Irrationality
- iii. Procedural impropriety

43. The 1st Interested Party submits that the Applicant has not demonstrated any illegality, irrationality, or procedural impropriety in the actions of the Chief Magistrate's Court.

44. They posit that proceedings before the said tribunal have in numerous instances been described as quasi-criminal. In *Republic v Advocates Disciplinary Tribunal Amugune (Ex-parte Applicant) (Judicial Review E160 of 2022)* [2023] KEHC 23664 (KLR) (Judicial Review) (5 October 2023) (Judgment) the court stated that:

“This court appreciates the nature of the Advocates Disciplinary Tribunal proceedings. The proceedings are quasi-criminal in nature. The tribunal is clothed with the power to take strike out Advocates practicing certificates. Those who appear before the Tribunal are



advocate, who must at all times be presumed innocent until proven otherwise. They are advocates whose future is in the hands of the tribunal.”

45. Section 60(4) of the *Advocates Act* states as follows:

“After hearing the complaint and the advocate to whom the same relates, if he wishes to be heard, and considering the evidence adduced, the Tribunal may order that the complaint be dismissed or, if of the opinion that a case of professional misconduct on the part of the advocate has been made out, the Tribunal may order—

- (a) that such advocate be admonished; or that such advocate be suspended from practice for a specified period not exceeding five years; or
- (c) that the name of such advocate be struck off the Roll; or
- (d) that such advocate do pay a fine not exceeding one million shillings; or
- (e) that such advocate pays to the aggrieved person compensation or reimbursement not exceeding five million shillings, or such combination of the above orders as the Tribunal thinks fit.”

46. It is further submitted that section 193A of the Criminal Procedure Act allow concurrent civil and criminal proceedings arising from the same issue which view was considered in Paul Gathuru Kariuki & another v Eens Limited & another [2021] eKLR held that:

“... the pendency of a criminal suit is not a bar to civil proceedings, provided that such concurrent matters are filed and pursued lawfully and in good faith. The reading of the Plaint in this matter shows that the subject matter herein is in respect to ownership of the suit land, while the core issues in Criminal Case No. 482 of 2012 Republic v John Gitau Kung’u and others are the purported fraudulent acts of the accused persons with respect to the suit property. The outcomes of these two suits are independent of each other and unlikely to be parallel or contradictory, as the jurisdiction of the Criminal Court does not extend to nullification of title documents which have been acquired unlawfully.”

47. It is their case that the application for consideration before this honorable court is fatally misplaced and it is a waste of judicial time as the Applicant’s claim that the Chief Magistrate’s Court court has acted irregularly, illegally and with procedural impropriety in admitting the suit before it. This is an attack on the integrity, sanctity and independence which this court must rise to fiercely defend.

The Respondents case;

48. This court is satisfied that the Respondents were granted leave to file a response None were filed. There was no court attendance by the Respondent on the numerous occasions when the matter came up for mention.

Analysis and determination;

49. Following are the issues for determination;

- i. Whether this court has jurisdiction.
- ii. Whether the applicant has demonstrated the grounds for prayers sought.



Whether this court has jurisdiction;

50. The Applicant is seeking orders of certiorari, prohibition and mandamus against the Respondent which is a subordinate court on which premise.
51. In Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, the Supreme Court held as follows on jurisdiction:
- “ A court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law.”
52. The judicial review jurisdiction of this Court flows from Article 165 (6) of *the Constitution* which provides that the High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function.
53. Judicial Review jurisdiction is exercised by this court on the basis of Article 47 of *the Constitution* against any person. I find that this high court has jurisdiction to entertain and determine this suit.

Whether the applicant has demonstrated the grounds for the grant of the prayers sought;

54. Section 7 of the *Fair Administrative Action Act* provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision.
55. In order to succeed in this suit, the Applicant must demonstrate that its case meets and fulfils the principles as enunciate in the case of Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, Miscellaneous Application Number 643 of 2005 (UR) where in it was held,

Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality....

Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: Re An Application by Bukoba Gymkhana Club [1963] EA 478 at page 479 paragraph “E”.

Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (Al-Mehdawi v Secretary of State for the Home Department [1990] AC 876).”

56. The Applicant argues that the Complaints filed at the Advocates Disciplinary Tribunal are unlawful, arbitrary, unreasonable, unprocedurally and substantially unfair and prejudicial.



57. The Applicant also argues that over and above this, the interested parties filed Civil suit in the Milimani Chief Magistrates Court being MCCC No. E996 of 2023 which is predicated on similar issues, between the same parties seeking similar reliefs.
58. This court has taken note of the fact that the Applicant does not dispute owing any monies to the Interested Parties. He contends that the sums owed is based on the post dated cheques he issued and the matter should be heard by the Disciplinary Tribunal.
59. On 12th December, 2022 The Disciplinary Tribunal order that:
- “We have perused the complaint lodged under Section 60 (3) of the *Advocates Act* (CAp 16 of the Laws of Kenya) and find that a prima facie case has been established in this matter. It should be placed for plea.”
60. Section 60 (3) of the *Advocates Act* provides:
- Where a complaint is referred to the Tribunal under Part X or subsection (1) the Tribunal shall give the advocate against whom the complaint is made an opportunity to appear before it, and shall furnish him with a copy of the complaint, and of any evidence in support thereof, and shall give him an opportunity of inspecting any relevant document not less than seven days before the date fixed for the hearing: Provided that, where in the opinion of the Tribunal the complaint does not disclose any prima facie case of professional misconduct, the Tribunal may, at any stage of the proceedings, dismiss such complaint without requiring the advocate to whom the complaint relates to answer any allegations made against him and without hearing the complaint
61. It is not disputed that the Applicant falls under the jurisdiction of the Advocates Disciplinary Tribunal which was established under Section 57 of the *Advocates Act* Cap 16 Laws of Kenya, for the purposes of dealing with professional misconduct on the part of Advocates.
62. The Tribunal has the mandate to receive a complaint from any person against an advocate accused of disgraceful and dishonorable conduct incompatible with the status of an Advocate.
63. It is for this reason that Advocate’s Disciplinary Tribunal Cause No. 103 of 2024 and DTC No 255 of 2022 were placed before it.
64. Section 58(5) of the *Advocates Act* provides that in all proceedings the Tribunal shall be deemed for the purposes of Chapter XI of the *Penal Code* (Cap. 63) to be judicial proceedings and for the purposes of the *Evidence Act* (Cap. 80) to be legal proceedings.
65. The Applicants have not adduced evidence to show how the proceedings before the Advocates Disciplinary Tribunal are unlawful, arbitrary, unreasonable, unprocedural, substantially unfair and prejudicial and I so hold.
66. On the issue of sub judice, Section 6 of the *Civil Procedure Act* which provides: -
- “No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”



67. The Supreme Court of Kenya in *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others* had occasion to pronounce itself on the subject of sub-judice. It aptly stated: -

(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.

(68) In the above context, it cannot be denied that the issues and prayers sought by the Petitioner in the two Constitutional Petitions generally call for the interpretation and application of provisions of Chapter Six of *the Constitution*. The issues and orders in the two Constitutional Petitions substantially ascend from the criteria for the implementation of the provisions of Chapter Six of *the Constitution*. For the High Court to sufficiently pronounce itself in the two Constitutional Petitions, it has to interpret and apply the provisions of Chapter Six of *the Constitution* on leadership and integrity.

(69) In Constitutional Petition No. 142 of 2017, the Petitioner challenges the constitutionality of the Working Group as well as the criteria on the implementation of the provisions of Chapter Six of *the Constitution* as established by the Working Group. The High Court has therefore been tasked to examine the constitutionality or otherwise of the criteria so established by the Working Group.

70. In Constitutional Petition No. 68 of 2017 the Petitioner therein challenges requirement for clearance by the state and private organs on grounds that it threatens and violates the provisions of *the Constitution*. For the High Court to determine the constitutionality of the requirement for clearance challenged by the Petitioner in Constitutional Petition No. 68 of 2017 or the Working Group criteria as well as the ‘Resolution on Complimentary Framework of Collaboration by Agencies to Ensure Compliance with Leadership and Integrity Requirements in August 2017 General Elections’ and ‘Compliance with Leadership and Integrity Requirements in the 2017 General Elections’ challenged in Constitutional Petition No. 142 of 2017, it has to examine, interpret and apply the provisions of Chapter Six of *the Constitution*.

(71) In so doing, the High Court shall be compelled, to determine whether a Constitutional test is set up in Chapter Six of *the Constitution*, whether the set test (if any) is fit and proper, objective or subjective, the scope of application of



the test, the implementing organs and bodies. These are substantially the same issues subject of the Advisory Opinion sought by the Applicant comprised at pages 13 to 19 of the Reference before this Court.

(72) We therefore find that this Reference, as framed, mainly raises issues of constitutional interpretation. These issues are also substantially in issue before the High Court in Constitutional Petition No. 68 of 2017 and Constitutional Petition No. 142 of 2017. In view of Article 165 of *the Constitution*, the High Court is the Court of first instance with regard to jurisdiction for interpretation and application of *the Constitution* and that Court has already been moved.

(73) Guided therefore by these principles, and in exercise of our discretion, we decline to exercise our jurisdiction under Article 163(6) of *the Constitution*. This Reference is sub-judice and this Court will not usurp the High Court's jurisdiction under Article 165 (3).

68. The complaints before the Advocates Advocates Disciplinary Tribunal are related to the question whether the Applicant's professional conduct while Milimani Chief Magistrate's Court in CMCC No. E996 of 2023 concerns the questions of fraud and misrepresentation.

69. The outcomes that ultimately flow from these two jurisdictions are very distinct and they are guided by totally different and distinct legislative frameworks.

70. In the case of Republic vs. Advocates Disciplinary Committee Interested Party Daniel Mutisya Ngala Ex parte Danstan Omari Mogaka [2015] eKLR, Korir J said as follows:

“The onus of determining whether an act amounts to professional misconduct belongs to the Disciplinary Tribunal. It would amount to usurpation of that mandate were the court to decide what amounts to professional misconduct.”

71. The suits are different and seeking different reliefs and the argument of sub judice fails and I so hold.

72. In the case of Republic v Chief Magistrate Criminal Division & Another, ex parte Mildred Mbuya Joel (2013) eKLR where the court delivered itself in the following words:

“It is not enough to simply state that the criminal proceedings ought to be halted because there are pending civil proceedings touching on the same subject matter. Neither does it suffice to be content with stating that because there is an existence of a civil dispute or suit; the entire criminal proceedings commenced based on the same set of facts are an abuse of the court process. There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution. In absence of concrete grounds for supposing that a criminal prosecution is an “abuse of process”, is a “manipulation”, “amounts to selective prosecution” or such other processes, or even supposing that the applicants might not get a fair trial as protected in *the Constitution*, it is not mechanical enough that the existence of a civil suit precludes the institution of criminal proceedings based on the same facts. As rightly submitted on behalf of the Respondents, section 193A of the *Criminal Procedure Code* Cap 75 Laws of Kenya provides for concurrent civil and criminal proceedings.”



73. In the instant application, the applicant has not demonstrated how his right will be infringed by the proceedings in the lower court. He has also not demonstrated how the suit in the lower court is an abuse of the court process. It is only where an abuse of the court process has been established that the High Court will intervene and stop the prosecution.
74. Section 193A of the *Criminal Procedure Code* on this issue provides that:
- “Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”
75. In the case of Francis Matheka & 10 others v Director of Public Prosecutions & another (2015) eKLR. The Court held as follows:
- “With respect to the Applicants' innocence, that is an issue for the trial Court. To determine the same would amount to this Court on a judicial review application usurping the powers of the trial Court and that is not the jurisdiction conferred on this Court in these kinds of proceedings. It must be remembered that justice must be done to both the complainant and the accused and where there is evidence upon which the prosecution can reasonably mount a prosecution, it is not for the High Court in a judicial review proceeding to inquire into the sufficiency or otherwise of such evidence since the High Court ought not to usurp the role of the trial court in determining the merits of the criminal case.”
76. Section 9(2) (a) of the Victims Protection Act, provides that victims assist the courts to obtain a clear picture of what happened (to them) and how they suffered as a result of the offenders conduct or omission.
77. Victim participation in criminal cases should meaningfully contribute to the justice process. Article 50 of *the constitution* provides for the right to fair hearing.
78. In Abdullahi v Director of Public Prosecutions & 5 others (Constitutional Petition E021 of 2024) [2025] KEHC 703 KLR it was the finding of the court thus:
- “That said, the superior courts have always expressed their abhorrence to the use of the criminal justice system to settle a matter which is in essence seems to be civil in nature. For instance, in Republic vs Chief Magistrate’s Court Mombasa Ex-parte Ganijee and Another(2002) KLR 703 the High Court expressed itself as follows;- “ It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice and no one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, prohibition and/or certiorari will issue and go forth... When a remedy is elsewhere provided and available to a person to enforce an order of a civil court in his favour, there is no



valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement. For in a criminal case a person is put in jeopardy and his personal liberty is involved. If the object of the appellant is to overawe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court... In this matter the interested party is more actuated by a desire to punish the applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose is to further that ulterior motive and that is when the High Court steps in..."

Disposition;

79. It is this court's finding that the Applicant has not demonstrated how the Respondent has acted in excess of jurisdiction or power conferred to it by the law.
80. I find that the application lacks merits.

Order;

The Application dated 26th February 2024 is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF FEBRUARY 2025

J. M. CHIGITI (SC)

JUDGE

