



REPUBLIC OF KENYA



KENYA LAW
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**Yator & another v Kenya Judicial Staff Association (KJSA) & another (Constitutional
Petition E007 of 2025) [2025] KEHC 1165 (KLR) (28 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1165 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CONSTITUTIONAL PETITION E007 OF 2025**

AC BETT, J

FEBRUARY 28, 2025

BETWEEN

ERIC YATOR 1ST PETITIONER

FAITH MUTAVE 2ND PETITIONER

AND

THE KENYA JUDICIAL STAFF ASSOCIATION (KJSA) 1ST RESPONDENT

THE KENYA JUDICIAL STAFF ASSOCIATION ELECTIONS

BOARD 2ND RESPONDENT

RULING

1. The Petitioners filed a Petition dated 24th February 2025 in which they seek the following orders:-
 - a. A declaration that the decision of the 2nd Respondent to reject candidates based on the alleged non-membership of their nominators is unconstitutional, discriminatory, and unfair.
 - b. A declaration that Rule 3.4 is ambiguous and unconstitutional to the extent of its ambiguity and application in that state.
 - c. A declaration that the election process has been tainted with unfairness due to unequal access to membership information and undue influence.
 - d. An order directing the Respondents conduct fresh nominations after availing members' register.
 - e. An order compelling the Respondents to publicly disclose the full KJSA membership register to all candidates to ensure fairness and transparency.
 - f. An order for costs of this Petition to be borne by the Respondents.



- g. Any other relief that this Honourable Court may deem just and appropriate in the circumstances.
2. The Petition is premised on the grounds that the Respondents have contravened the Petitioner's Constitutional rights to wit Article 38, 36 and 50 (2) (a) of the Constitution that protects the Petitioner's political rights, right to association and right to a fair hearing.
 3. The Petitioners also contend that their right to a fair administrative action under Article 47 of the Constitution and Section 4 (1) of the Fair Administrative Action Act was violated.
 4. Further, the Petitioners allege that the Respondents have contravened Article 24, 27 and 38 of the Constitution.
 5. The Petitioners contemporaneously filed an application under Certificate of Urgency seeking to suspend the elections of the 1st Respondent slated for 1st March 2025 by a conservatory order restraining the Respondents from procuring election platform and conducting elections of the National Executive Council of the 1st Respondent.
 6. In response, the Respondents filed a Replying Affidavit and Preliminary Objection dated 26th February 2025 in which it raised the following issues:-
 1. That this Honourable Court lacks jurisdiction to hear and determine the Petition and Notice of Motion both dated 24th February 2025 by virtue of the Decree given by Justice Lawrence Mugambi on 6th December 2024 in Milimani HCCHRPET E243 of 2024 as Consolidated with Milimani HCCHRPET E264 of 2024 directing that the jurisdiction to hear disputes relating to the KJSA Elections vests absolutely with the KJSA Election Board, the 2nd Respondent herein.
 2. That the Petition and Notice of Motion both dated 24th February 2025 is sub-judice as the conduct of the KJSA elections set for 1st March 2025 is in execution of the Decree given on 6th December 2024.
 3. That the Petition and Application offend the provisions of Section 15 of the Civil Procedure Act and Rule 8(1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, having been instituted in the Kakamega High Court, while the cause of action in the suit arose in Nairobi, where the offices of the Respondents sits.
 4. That for the above reasons, the Petition dated 24th February 2025 and the accompanying Notice of Motion of even date are incompetent and ought to be dismissed with costs.
 7. The court directed that the Preliminary Objection be disposed of first as it raised issues touching on the jurisdiction of the court.
 8. The Respondents submit that this Honourable Court lacks jurisdiction to hear and determine the Petition because by virtue of a Decree dated 6th December 2024 in Milimani HCCHRPET No. E243 of 2024 as consolidated with Petition No. E264 of 2024, the jurisdiction to hear disputes relating to the KJSA elections vests with the 2nd Respondent which is the Elections Board. The Petitioners did not address this issue at all.
 9. In respect to the second issue, Ms. Kinaga for the Respondents submit that this matter is sub-judice as the issues raised therein are the same issues raised in Milimani HCCHRPET No. E243 of 2024 and consolidated with Petition No. E264 of 2024.



10. The Respondents argue that the principle of sub judice does not apply to this petition as the parties are different and as the petitions in Milimani Court were not heard substantively and a decision rendered by the court, but the parties to the petition compromised the petition by recording a consent. The Petitioners contend that one cannot tell when or whether the consent has been adopted as an order of the court.
11. The Respondents further submit that the elections scheduled for 1st March 2025 are being held in execution of the Decree of the court given on 6th December 2024 in Milimani HCCHRPET E243 of 2024 as consolidated with HCCHRPET No. E264 of 2024 and which are set for execution vide the elections scheduled for 1st March 2025.
12. On their part, the Petitioners argue that they were not aware of the Decree being referred to by the Respondents as they were not party to the earlier Petitions nor the consent order and only came to learn of the existence of the Decree a day ago.
13. In further objection to the Petition, the Respondents further state that the Petition offends the provisions of Section 15 of the *Civil Procedure Act* and Rule 8 (1) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 (the Mutunga Rules) as the Respondents sit in Nairobi and the suit ought to have been instituted in Nairobi. On their part, the Petitioners submit that this court is seized with jurisdiction under Article 165 of *the Constitution* and in any event, the election is being conducted virtually and the 1st Petitioner works in Butere Law Courts within the jurisdiction of this honourable court.

Analysis and Determination

14. I have considered the rival submissions of the parties herein. The issues raised are whether the Petition is sub judice and whether this court has jurisdiction to hear and determine the Petition. The issue of jurisdiction is two-pronged. The first is whether the Petition should have been filed in Nairobi. Secondly, it is whether the dispute should have been filed before the KJSA Elections Board.
15. I will first address the issue of geographical jurisdiction. I am of the view that the Petition cannot be struck off merely because it was filed in this court. Article 165 (b) (3) of *the Constitution* grants this court jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. The current Petition raises the issues contemplated in Article 165 (b) (3) of *the Constitution*.
16. In the case of *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai Estate of & 4 others* [2013] eKLR, the Supreme Court considered the issue of jurisdiction to address violation of fundamental rights under *the Constitution* and stated thus:-

“The Kenyan Constitution has given the High Court the exclusive jurisdiction to deal with matters of violations of fundamental rights (Article 23 as read with Article 165 of *the Constitution*). The High Court, on this point, has correctly pronounced itself in a judgment by Justices Nambuye and Aroni, in *Protus Buliba Shikuku v R, Constitutional Reference No. 3 of 2011, [2012] eKLR*.

...

113. Thus, in answer to Mr. Nowrojee’s first two questions posed to the Supreme Court, my answer is this: There is no injustice that *the Constitution* of Kenya is powerless to redress.”



17. I am therefore persuaded and I find and hold that this court is well seized of this matter and has the requisite jurisdiction to hear and determine this Petition. In any event, if the Respondents object to the matter being heard and determined by this court, they would be at liberty to apply for transfer of the same to another court of concurrent jurisdiction.
18. On the issue of sub judice, the aim of the doctrine of sub judice is to prevent conflicting decisions by different courts, to save judicial time by avoiding multiplicity of law suits, and to protect the integrity of the court.
19. The doctrine of sub judice applies to suits between the same parties or their representatives; to suits over the same subject matter, suits pending in courts with equal jurisdiction.
20. I have perused the Decree issued on 11th December 2024 in Milimani HCCHRPET E243 of 2024 as consolidated with HCCHRPET No. E264 of 2024. Contrary to the Petitioners' submissions, the consent order was adopted as an order of the court on 6th December 2024 when the parties appeared before Hon. Justice L. R. Mugambi. In the circumstances, the same is a valid order of the court.
21. The order concerns the elections of national office holders of the 1st Respondent. It is not in dispute that the Petitioners are members of the 1st Respondent and are therefore deemed to have been party to the said Petitions.
22. The issue of sub judice was considered in the case of Republic v. Paul Kihara Kariuki, AG & 2 others, Ex parte Law Society of Kenya [2020] eKLR where the court applied the principles of sub judice in a case involving the Law Society of Kenya (LSK) and stated that it mattered not that the earlier suit was filed by the Branch of LSK while the current suit was filed by the main body. The court stated as follows:-
 - “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.
 27. 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.”
 28. At the risk of repeating myself, 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. The mere fact that the applicant in the earlier suit is a Branch of the Law Society of Kenya, while the applicant in the instant suit is the main body does not change the situation. The Branch is suing on behalf of its members. As stated earlier, should the court determine the earlier suit either way, it will render the issues in the instant suit res judicata. Put differently, the outcome of the earlier suit will apply to the entire membership of the Law Society.”

23. It is my finding that the issues concerning the KJSA elections are sub judice. The court in the earlier Petitions ordered that elections be held within ninety (90) days. These are strict timelines. The court also directed that any disputes arising from the conduct of the elections shall be handled by the Elections Board which is the 2nd Respondent. The parties were granted liberty to apply.
24. A simple interpretation of the order is that parties can approach the court in the said Petition in the event they are aggrieved. The Petitioners are therefore estopped by the doctrine of sub judice from instituting a different Petition touching on the election process of the 1st Respondent’s national officials.
25. The Respondents have also objected to this Petition on the ground that the KJSA Elections Board, the 2nd Respondent herein is vested with the absolute jurisdiction to handle the disputes arising from the election and hence this court lacks jurisdiction. Order No. 5 of the Decree dated 6th December 2024 states as follows:-

“ 5. THAT the Elections Board shall be mandated to handle any disputes arising in relation to the election.”

26. The Petitioners did not address this ground save to claim ignorance of the Decree. In this, I find the Petitioners not to be candid with the court. The forthcoming elections are being held in pursuance of the aforesaid Decree. Moreover, the 1st Petitioner has in her Affidavit dated 24th February 2025 in support of the Petition, annexed a copy of a Ruling delivered by the Chairperson of the Elections Board in which the consent Decree is alluded to. It cannot be gainsaid that the Petitioners are beneficiaries of the said consent. By not disclosing the existence of the earlier Petitions which is evident from the pleadings that they were aware of, the Petitioners acted in abuse of the process of the court.
27. Be that as it may, by dint of the consent Decree, the 2nd Respondent has jurisdiction to handle the dispute herein, this being a pre-election dispute. The Petition should have been filed before the Elections Board in the first instance. There is no evidence of the Petitioners lodging a dispute before the Elections Board before resorting to this court since the Ruling dated 19th February 2025 was in regard to general concerns held by several aspirants who raised the following issues for consideration:-

- “ 1. Extension of time for those unsuccessful applicants to get correct nominations.
2. That the list of members/those eligible as nominators was not published by the KJSA Secretariat.
3. That the KJSA Rules and Regulations were not sent to the members in advance.”



28. I am therefore of the view that the Petitioners filed this Petition prematurely. The doctrine of exhaustion therefore applies to preclude this court from hearing and determining this Petition. In the case of Geoffrey Muthiga Kabiru & 2 others v. Samwel Munga Henry & 1756 others [2015] eKLR, the Court of Appeal rendered itself thus:-

“It is plain to see then, that the Church did have a place a rather elaborate system for dispute resolution which the plaintiffs in the various suits ought to have had recourse to, and exhausted, before litigating in court. We concur with the learned Judge’s categorical finding at paragraph 75 of his judgment thus;

“That though the court has jurisdiction to deal with the plaintiffs complaints it is premature as they did not strictly follow the Church Constitution, providing for dispute resolution mechanism.”

29. The aforesaid case was cited in Muchiri v. Independent Electoral & Boundaries Commission & 3 others [2024] KEHC 9980 (KLR) in which the court stated as follows:-

“In this regard disputes such as election related disputes required by statute to be resolved through a dispute resolution panel; or disputes such as those under membership and church constitutions, or those under a commercial or such-like contract for mediation, arbitration or other first-instance adjudication, must first undergo resolution through the selected mechanisms before being litigated in court. This is what Article 159 of *the Constitution* envisages when it commands the courts to exercise judicial authority in compliance with the principle of promoting the use of alternative dispute resolution mechanisms.”

30. Flowing from the above, I find that the Petitioners failed to seek redress from the KJSA Elections Board in the first instance. And in failing to do so, the Petitioners did not utilize the dispute resolution mechanism set out by the court. In the premises, this court lacks jurisdiction to hear and determine this Petition.

31. The upshot is that the Petition is struck off with no order as to costs.

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

A. C. BETT

JUDGE

In the presence of:

Mr. Abok for Petitioners/Applicants

Ms. Kinaga and Mr. Mulama for Respondents

Court Assistant: Polycap

