Waste and Environment Management Association of Kenya v County Government of Nairobi & another (Petition 3 of 2021) [2022] KEELC 3172 (KLR) (3 August 2022) (Judgment)

Neutral citation: [2022] KEELC 3172 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

PETITION 3 OF 2021

JO MBOYA, J

AUGUST 3, 2022

BETWEEN

WASTE AND ENVIRONMENT MANAGEMENT ASSOCIATION OF KENYA ..... PETITIONER

AND

COUNTY GOVERNMENT OF NAIROBI ..... 1ST RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 2ND RESPONDENT

JUDGMENT

1. *Vide* the amended petition dated the October 19, 2021, the petitioner herein has approached the court seeking for the following reliefs;

    i. An order directed at the 1st respondent barring them from charging the petitioners members Kshs 20, 000/= per truck for a license of an authority to collect and dispose waste.

    ii. A declaration that the license to transport waste, levy charges for a license to transport waste, levy charges for a license to transport waste by the 2nd respondent is unconstitutional, null and void thus should stop forthwith.

    iii. Declaration that part 3, Items listed under CBO solid waste collection and transport especially on permit for private service providers on the charges per tonne, truck/annum is a unconstitutional and discriminatory in nature.

    iv. Declaration that there was no public participation on effecting amendment to the Nairobi City County Solid Waste Management Act, thus same is unconstitutional and the amendments made thereunder are unconstitutional.

    v. An order do issue barring the 1st respondent from discriminating the petitioners while administering tax and levies.

    vi. Costs of this petition be borne by the respondents in any event.

2. The subject petition is premised on the various grounds enumerated in the body thereof and same is further supported by the affidavit of Samuel Onyancha , sworn on even date and to which the deponent has attached a total of 10 annextures.

3. Upon being served with the subject petition, the 1st respondent duly entered appearance on the December 18, 2019 and thereafter filed grounds of opposition dated the February 10, 2020.

4. On the other hand, the 2nd respondent duly entered appearance and thereafter filed a replying affidavit sworn by Ali Mwanzei on the January 3, 2019. However, the date of swearing of the subject replying affidavit, does not appear to be correct, taking into account that the petition in question was first lodged in court on the December 16, 2019.

5. Other than the foregoing replying affidavit, the 2nd Respondent also filed a further replying affidavit sworn by one, Erastus K Gitonga, Advocate; and same was sworn on the December 8, 2021.

6. The foregoing pleadings and/or documents constitutes the totality of the documents placed on record by and/or on behalf of the parties and hence forms the fulcrum upon which the decision of the court shall be premised.

Deposition By The Parties:

Petitioner's Case:

7. *Vide* supporting affidavit sworn on the December 16, 2019, one, Samuel Onyancha, hereinafter referred to as the deponent, has averred that same is the chairperson of the petitioner and that by virtue of being the chairperson, same has been authorized and/or mandated to swear the subject affidavit.

8. On the other hand, the deponent has further averred that the subject petition has been brought for and/or on behalf of various members of the petitioner association. In this regard, the deponent has annexed assorted registration certificates on behalf of the various members of the petitioner association.

9. Other than the foregoing, the petitioner has stated that the 1st respondent herein has been charging and/or levying business permit Fees of Kshs 23, 700/= only and also charging License fee to collect and dispose waste in the sum of Kshs 20, 000/= only per company on annual basis. For clarity, it has been added that members of the petitioners association have been complying and paying the requisite license fees.

10. Nevertheless, the deponent has further averred that the 1st respondent has since began to charge the members of the petitioner association the sum of Kshs20, 000/= per truck for the authority to collect and dispose waste, which charge is ultra vires and/or contrary to the law.

11. On the other hand, it has been further averred that the decision by the 1st respondent to levy and charge the sum of Kshs 20, 000/= per truck, is being implemented in a discriminatory manner, insofar as other companies are paying for the license as a company for all the fleet trucks owned by them, whereas others are compelled to pay Kshs 20, 000/= per truck.

12. At any rate, the deponent has further averred that the decision to charge the sum of Kshs 20, 000/= per truck was arrived at and commenced by the 1st respondent, albeit without involving the members of the petitioner association and without public participation.

13. Based on the foregoing, the deponent has therefore stated that the implementation of the high charge of fees, which was reached without public participation is bound to be passed onto the consumers

and hence there is a likelihood that the consumers would not be capable of disposing garbage in a professional manner.

14. Notwithstanding the foregoing, the deponent has also stated that the consumers have a right to quality service as well as right to clean and healthy environment and that such right are bound to be infringed upon and/or violated, if the arbitrary and high charges levied by the 1st respondent are not mitigated.

15. In any event, the deponent has also stated that the high charges that are being levied on the members of the petitioners association, is also disadvantageous to the members of the association, insofar as same had since entered into and executed contracts with their respective customers fixing the operational costs and that it would be difficult for the members of the association to review and/or hike the price charged on the customers.

16. In this regard, it has been stated that the members of the petitioner association shall be therefore forced to operate at losses and therefore constitute and infringement on the economic rights of the members of the petitioner association.

17. On the other hand, the deponent has further averred that other than the business permit fees and the license fees being charged and levied by the City County Government of Nairobi, similar levies are also being charged by the 2nd respondent herein.

18. Be that as it may, the deponent has averred that garbage and solid waste collection is however, a devolved function and hence only the 1st respondent is entitled to levy and collect license fees in respect of refuse collection and solid waste disposal and not otherwise.

19. Premised on the foregoing, the deponent has therefore stated that the license fees for transportation of solid waste, which is being levied and charged by the 2nd respondent, is therefore illegal, unlawful and unconstitutional.

20. On the other hand, the deponent has also averred that other than the levies and license fees by the 2nd respondent being unlawful and unconstitutional for encroaching onto the mandate of the 1st respondent, the levying of such license fees, also constitutes double taxation.

21. Owing to the foregoing, the deponent has therefore argued that it is appropriate for the honourable court to intervene and firstly, to ensure that the 1st respondent does not levy and charge license fees in a discriminatory manner, but also to avert the double taxation by both the 1st and 2nd respondents, as pertains to the same services.

22. Other than the foregoing, the deponent has implored the court to find and hold that refuse disposal and solid waste disposal are functions that belongs to the 1st respondent and therefore only the 1st Respondent ought to levy and charge the business permit fees and the requisite license fees.

Response By The 1St Respondent:

23. The 1st respondent herein filed grounds of opposition dated the February 10, 2020 and in respect of which same has raised the following grounds;

    i. The 1st respondent contends that this petition is incurably defective and that same discloses no known cause of action, whatsoever and howsoever.

        a. The honourable court lacks Jurisdiction by dint of article 165 (5) of the *Constitution 2010* as read together with section 13 (2) of the Environment and Land Court Act , 2011.

b. The petition and the application are overtaken by events.

c. The 1st respondent has been improperly sued in respect of the whole claims made in the suit. The suit is therefore not maintainable against the 1st respondent to that extent.

ii. The 1st respondent contends that part two (2) of the fourth schedule of the *Constitution 2010* grants unto the 1ST respondent the mandate for refuse removal, refuse dumps and solid waste disposal hence same cannot be faulted by the petitioner for charging for such dumping on the 1st respondent dumping site.

iii. Besides, the 1st respondent contends that its functions and mandate and those of the 2nd respondent are distinct insofar as the 2nd respondent's functions in relation to waste management are provided under the EMCA Act, 1999 and the Waste Management Regulations, 2006 and the 1st respondent's function are clearly spelt out under part two of the *Constitution , 2010* hence the issue of double taxation does not arise under the circumstance and the nature of the case.

iv. In view of the foregoing, the fact that the 2nd respondent levy charges on the petitioner for annual license fee for waste transporters does not take away the 1st respondents right to grant permits to the waste collection and disposal as provided by the 1st respondent's legislation.

v. The petitioner has not challenged the legislation that grants the 1st respondent power to charge for dumping solid waste at her dumping site hence the issue of double taxation does not arise insofar as the said taxation are anchored on the legislations.

vi. The petitioner is forum shopping away from the Environment and Land Court which has the Jurisdiction to hear and determine this petition as the issue involved are purely environmental in nature.

vii. The petition and the application dated the December 16, 2019 are therefore an abuse of the due process of court and hence same should be dismissed with cost to the 1st respondent.

Response By The 2Nd Respondent:

24. *Vide* replying affidavit which is stated to sworn on the January 3, 2019, one Ali Mwanzei, hereafter referred to as the deponent, has averred that same is the acting Director Compliance and Enforcement with the 2nd respondent and therefore same is conversant with the facts pertaining to and relating to the affairs of the 2nd respondent.

25. Further, the deponent has averred that the 2nd respondent is a statutory authority created under an Act of parliament, with the core object and purpose of exercising general supervision over all matter relating to the environment.

26. On the other hand, it has also been averred that the 2nd respondent is also tasked with the implementation of Government Policies pertaining to and concerning the environment.

27. The deponent has further averred that in the discharge and execution of her mandate, the 2nd respondent laises and or coordinates with various lead agencies including the County Governments with a view to ensuring that the County Governments discharge their mandate so as to achieve continuous improvement of waste collection methods, transportation and disposal facilities.

28. Other than the foregoing, the deponent has further averred that pursuant to the Environment Management and Coordination (Waste Management) Regulations 2006, the authorities mandated to issue annual licenses to waste transporters whose transportation vehicles have been licensed to operate.

29. Notwithstanding the foregoing, the deponent has averred that part two of the fourth schedule of the *Constitution of Kenya, 2010*, is also explicit that the County Governments shall be responsible for refuse removal, refuse dumps and solid waste disposal and that the said role does not conflict with the clearly designated role or authority granted vide the EMCA Act, 1999 and the Waste Management Regulation 2006.

30. In any event, the deponent has further stated that pursuant to the Waste Management Regulation 2006, the 2nd respondent is only mandated to ensure that the Waste transportation is only done by the licensed operators and whose transport vehicles meet the designed requirements as stipulated by the authority.

31. Premised on the foregoing, the deponent has therefore stated that the charging of annual license fees from the waste transporters by the 2nd respondent does not therefore usurp the role of the County Governments to grant Permits for waste collection and disposal, insofar as each entity has a distinct mandate granted by and/or under the relevant law.

32. Besides, the deponent has also stated that the issue of double taxation alluded to by the petitioners does not arise insofar as the issuance of a waste transportation license by the authority and issuance of permit for waste collection and disposal by the County Government does not arise since Waste transportation and waste collection are separate steps in the waste management cycle and in any event, different waste management requirements apply for each step.

33. Further, it has also been averred that the role of the authority is to ensure that all steps within the waste management cycle are undertaken by all respective stakeholders in a manner that upholds the constitutional right to a clean and healthy environment.

34. In the premises, the deponent has averred that the mandate to license the transportation of waste and to levy charges for a license to transport waste, as discharged by the authority is supported by both the EMCA Act and the *Constitution , 2010*, insofar as the latter grants each person a right to clean and healthy environment vide article 42 thereof.

35. Premised on the foregoing, the deponent has therefore contended that the levying and charging of annual license for waste and transportation by the 2nd respondent, is therefore neither *ultra vires* nor unconstitutional either as alleged or at all.

36. In view of the foregoing, the deponent on behalf of the 2nd respondent has therefore implored the court to find and hold that the petition against the 2nd respondent is not only misconceived but, also devoid of merits.

37. Other than the replying affidavit sworn by Ali Mwanzei, whose details have been reproduced vide the proceeding paragraphs, there is also a Further affidavit sworn by one, namely, Erastus K Gitonga, on behalf of the 2nd respondent.

38. Pursuant to the further affidavit, the deponent has contended that the petitioner herein had hitherto filed and/or lodged a similar petition, namely, Milimani HCC petition Number 116 of 2016, raising substantially the same issues and which Petition has not been disposed of and/or finalized todate.

39. On the other hand, the deponent of the further affidavit has also contended that in respect of the said previous petition, the petitioner had also filed an application for conservatory orders, but which application was dismissed *vide* ruling rendered on the November 1, 2016.

40. Premised on the foregoing, it has therefore been contended that the current petition is therefore barred by the doctrine of res *sub-judice* and *res-judicata* and hence same ought to be struck out, for being an abuse of the due process of the court.

Submissions By The Parties:

a.Petitioner's Submissions:

41. The petitioner filed written submission dated the March 21, 2022 and in respect of which the petitioner have identified four issues for determination;

42. First and foremost, the petitioner's counsel has submitted that the 1st respondent herein has discriminated against her members by levying and charging different licensed fees against various members and by so doing, the 1st respondent has discriminated against members of the petitioners association.

43. Further, it has been submitted that whereas the 1st Respondent demands and charges the sum of Kshs 23, 700/= per annum, in respect of each Company engaged in Solid Waste disposal/transportation, the 1st Respondent however, has devised a Scheme where same charges annual license fees in the sum of Kshs 20, 000/= Only, albeit disproportionately.

44. Counsel for the Petitioner also submitted that whereas some of her Members are charged Kshs 20, 000/= Only, per Company in respect of solid waste transportation License, other Members are charged Kshs 20, 000/= Only, per truck on account of solid waste transportation.

45. Based on the foregoing, Counsel for the Petitioner's has therefore submitted that there has been discrimination practiced by the 1st Respondent against the Members of the 1st Petitioner Association.

46. In the premises, Counsel for the Petitioner has contended that such action where her members are treated differently in the levying of license fees, constitutes and/or amounts to discrimination, which is contrary to and in contravention of the Provisions of Article 27 (1) and (2) of the *Constitution2010* .

47. In view of the foregoing, the Counsel for the Petitioner has therefore submitted and/or contended that the Honourable Court needs to intervene and thus ensure that the license fees charged by and/or on behalf of the 1st Respondent, is charged in a manner that does not discriminate against her Members.

48. Secondly, Counsel for the Petitioner has also submitted that the mandate for Refuse removal, Refuse dumps and Solid waste disposal is a devolved mandate that was conferred upon the County Governments by dint of Part Two of the 4th Schedule of the *Constitution , 2010*, as read together with Article 186 (1) of the *Constitution 2010* .

49. Premised on the foregoing, counsel for the Petitioner has therefore submitted that the 2nd Respondent herein cannot therefore enter upon and/or encroach onto the mandate that is exclusively conferred upon the 1st Respondent by dint of the *Constitution 2010* .

50. Nevertheless, it has further been submitted that despite clear provision of Part Two of the 4th Schedule of the *Constitution , 2010*, the 2nd Respondent herein has continued to levy and charge License fees for Waste Transportation pursuant to the provisions of Sections 87, 88 and 89 of the EMCA Act, 1999.

51. Based on the foregoing, it has been submitted that the provisions of the EMCA Act, 1999, which allows the 2nd Respondent to regulate and license waste transportation within the Republic of Kenya and to charge license fees for waste transportation, are therefore contrary to and in contravention of the *Constitution 2010*. In this regard, counsel for the Petitioner has therefore submitted that the impugned Sections which are inconsistent with the *Constitution*, are therefore null and void.

52. Thirdly, the counsel for the Petitioner has submitted that though there exists a previous Petition, namely, Milimani HCC Petition No 116 of 2016, the said Petition however does not raise and/or concern the same cause of action as the subject Petition.

53. For clarity, it has been pointed out that what was in issue in the said Pettion, were the various provisions of Nairobi City County Solid Waste Management Act and not otherwise.

54. To the contrary, it has been submitted that the current Petition challenges the disproportionate charging and levying of License fees for Waste of transportation, where some members of the Petitioners Association are charged per company, whilst others are charged per truck.

55. Other than the foregoing, Counsel for the Petitioner has submitted that the previous Petition, namely, Milimani HCC Petition No 116 of 2016, (which is stated to be distinct from the subject Petition) has never been heard and determined, to warrant a finding of *Res-judicata*.

56. In view of the foregoing, Counsel has therefore submitted that the Doctrine of *Res-sub-judice* and *Res-judicata*, which have been raised by and/or on behalf of the 2nd Respondent, are therefore irrelevant and inapplicable.

57. Fourthly, counsel for the Petitioner has also submitted that the issues raised at the foot of the said Petition are issues which ought to be addressed by concerned Parties beforehand and same ought not to have waited for the filing of the subject proceedings or at all.

58. Premised on the foregoing, counsel for the Petitioner sought to have the subject Petition to be allowed and costs of the Petition to be awarded to the Petitioner.

59. In support of the foregoing submissions, counsel for the Petitioner has relied on a number of decisions including *Nyarangi & 6 Others versus The Attorney General* (2008)eKLR 688, *Zab Adami versus Malta*, Application No 16631 of 2004, *Peter K Waweru v Republic* (2006)eKLR; and *Aids Law Project v Attorney General & 3 Others* (2015)eKLR.

b.1St Respondent's Submissions:

60. On behalf of the 1st Respondent, written submissions were filed on the July 13, 2022 and same has raised Five pertinent issues including whether or not this Honourable Court has jurisdiction to hear and/or adjudicate upon the subject Petition.

61. Nevertheless, it is appropriate to point out that the subject Petition was initially filed in the High court, but was subsequently transferred to this Honourable Court for hearing and disposal, after the High Court found and held that the issues in dispute touched and/or concerned the Right to Clean and Healthy Environment.

62. Based on the foregoing, it is apparent that the issue as to whether this court has Jurisdiction to entertain the subject Petition is spent and/ or has been overtaken by Events.

63. Secondly, Counsel for the 1st Respondent submitted that the 1st Respondent herein charges the License fees in accordance with the *Nairobi City County Finance Act, 2019*, which stipulates different mode

of payments, applicable to specific areas and that such charging and levying of license fees is not discriminatory, in any manner or at all.

64. Thirdly, Counsel for the 1st Respondent has further submitted that the 1st Respondent charges fees for refuse control, refuse dumps and solid waste disposal, in accordance with her mandate prescribed vide Section Two of the Fourth Schedule of the *Constitution , 2010* as read together with Article 186 (1) of the *Constitution* and hence the levying of such charges cannot be deemed and/or termed to be unlawful and/or illegal.

65. On the other hand, the 1st Respondent's Counsel has submitted that the current Petition is sub-judice Petition Number 116 of 2016, which was filed before the High Court and which remains and pending hearing and determination to date.

66. Based on the foregoing submissions, Counsel for the 1st Respondent has therefore contended that the subject Petition is therefore an abuse of the Due Process of the Court and hence ought to be Dismissed.

c.2ND RESPONDENT'S SUBMISSIONS:

67. On behalf of the 2nd Respondent written submissions were filed on the June 7, 2022 and same have raised only two pertinent issues for determination;

68. First and foremost, the counsel for the 2nd Respondent has submitted that the current Petitioner has previously lodged Milimani HCC Petition No 116 of 2016, involving the same Parties as the ones beforehand.

69. It has further been submitted that having filed the previous Petition, the subject Petition is therefore barred by the Doctrine of *Res sub-judice*.

70. Secondly, counsel for the 2nd Respondent has further submitted that the subject Petition is also *Res-judicata* and therefore barred by the provision of Section 7 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya.

71. Nevertheless, even as counsel for the 2nd Respondent has contended that the subject Petition is Res-judicata, same concedes at paragraph 11 of the written submissions that Milimani HCC Petition No 116 of 2016, which founds the submissions on Res-judicata, has not been prosecuted and is still pending hearing and determination or dismissal for want of prosecution.

72. Be that as it may, counsel for the 2nd Respondent has maintained that this court should find and hold that the subject Petition is nevertheless, barred by the Doctrine of *Res-judicata*.

73. In support of the foregoing submissions, counsel for the 2nd Respondent has relied on the decision in the case of Enock Krau Muhanji versus Hamid Abdala Mbarak (2013)eKLR, being a decision rendered by the ELC Court sitting at Malindi as pertains to the extent, tenor and scope of the Doctrine of *Res-judicata*.

Issues For Determination:

74. Having reviewed the Petition herein, the Affidavit in support thereof, the Response filed in opposition thereto; and having similarly considered the written submissions filed by and or on behalf of the Parties, the following issues do arise and are thus pertinent for determination;

    i. Whether the subject Petition is barred by the Doctrine of *Res sub-judice* and *Res-judicata* as contended by the 2nd Respondent.

ii. Whether the Members of the Petitioners Association have been discriminated against by the 1st Respondent on account of levying and charging differentiated license fees.

iii. Whether the provisions of Section 87, 88 and 89 of the *Environment Management and Coordination Act, 1999* are inconsistent with Part Two of the 4th Schedule of the *Constitution* and if so, whether same ought to be declared Unconstitutional.

iv. Whether the collection of annual license fees by the 2nd Respondent for Waste transportation encroaches onto the mandate of the 1st Respondent and if so, whether the levying of such license fees constitute Double Taxation.

Analysis And Determination

Issue Number 1

Whether the subject Petition is barred by the Doctrines of Res sub-judice and Res-judicata as contended by the 2nd Respondent.

75. The 2nd Respondent herein has vide the Further Replying affidavit sworn on the December 8, 2021 as well as vide her submissions dated the June 7, 2022, raised and amplified the twin issues of *Sub-judice* and *Res-judicata*.

76. Premised on the foregoing contentions, it is therefore appropriate to interrogate whether the subject Petition is indeed inflicted by either the Doctrine of *Res sub-judice* and *Res-Judicata* or both.

77. In respect of the Doctrine of Sub-judice, the 2nd Respondent has submitted that the current Petitioner had previously filed and/or lodged another Petition, namely, Nairobi HCC Petition No 116 of 2016, against the same Respondents as the ones herein.

78. It has been submitted that to the extent that the Petitioner had filed and/or lodged the previous Petition, the filing and/or lodgment of the subject Petition is therefore barred by the Rule of *Res sub-judice*.

79. Suffice it to note, that for the Doctrine of *Res sub-judice* to apply, it must be shown and/or established that the previous Petition and/or proceedings is not only between the same Parties, suing in the same capacity but, that the issues in dispute are the same or substantially the same as in the latter suit.

80. In view of the foregoing, before resolving the issue as to whether or not the Doctrine of *sub-judice* is applicable in respect of the subject matter, it is expedient to discern whether the issues at the foot of the previous Petition, replicate and/or are same to the issue herein.

81. Having set sight on the Petition dated the April 4, 2016, which was filed vide Nairobi HCC Petition No 116 of 2016, it is imperative to note that the said Petition touched and/or concerned the constitutionality or otherwise of various sections of the Nairobi City County Solid Waste Management Act as opposed to the current Petition, that relates to the *County Finance Act, 2019*, which prescribes the manner and scheme for charging of the License to collect and/or dispose of solid waste.

82. At any rate, it is also evident that whereas in the previous Petition, the 2nd Respondent herein had been impleaded as an Interested Party, in respect of the subject matter, same has been sued as a substantive Respondent and hence the capacities are different.

83. Premised on the foregoing, it is my finding and holding that the two Petitions, namely, Nairobi HCC Petition No 116 of 2016 and the current Petition, do not touch on and/or concern the same Dispute and/or issues for determination.

84. Put differently, the substantive acts, which the Petitioner is challenging vide Petition No 116 of 2016, is different and separate from the subject Act of the County Assembly, which is under challenge vide the current Petition.

85. In the premises, it is my considered view that the Doctrine of *Res sub-judice*, does not apply to the subject Petition and hence the contention to that effect by and/or on behalf of the 2nd Respondent, is not only misconceived but, is also legally untenable.

86. To underscore the scope and applicability of the Doctrine of *Res sub-judice*, it is appropriate to take cognizance of the dictum of the Supreme Court of Kenya *vide* the case *Kenya National Commission on Human Rights versus Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)*[10] , where the Court 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.

87. Premised on the foregoing, it is incumbent upon any claimant keen to agitate the applicability of the sub-judice Rule, to satisfy the existence of all the ingredients, inter-alia, the existence of two or more suits before the same court, the similarity of the Parties and the sameness of the subject matter in dispute.

88. Where one of the foregoing ingredients is missing and/or absent, then the Rule on sub-judice cannot be invoked and/or applied to disentitle the Petitioner/Applicant from the right of ventilating the dispute before the court.

89. In a nutshell, I have come to the conclusion that the two Petitions, namely, Nairobi HCC Petition No 116 of 2016 and the subject Petition do not raise and or concern the said subject matter, in the manner contended by 2nd Respondent.

90. Notwithstanding the foregoing, it is also appropriate to state that the Rule of *sub-judice* cannot be used and/or relied upon to strike out and/or terminate a subsequent suit, but can only be relied upon to have the subsequent suit or proceedings stayed pending the hearing and determination of the prior suit, if any, concerning the same subject matter.

91. In the premises, assuming that the 2nd Respondent was indeed convinced that the subject Petition replicated and or touched the same issue in dispute, as Nairobi HCC Petition No 116 of 2016, then it was incumbent upon the 2nd Respondent to file an appropriate Application to stay the subject Petition.

92. To underscore the foregoing observation, it is appropriate to take cognizance of the import and tenor of the provisions of Section 6 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya. For ease of convenience, same is reproduced as hereunder;

> 6. Stay of suit
>
> 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.
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> Explanation.—The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court.

93. In view of the foregoing, I wish to state firstly, that the issue of *sub-judice* cannot be raised as part of Final submissions, where proceedings of the subject matter have been heard and concluded; and what is pending is/ are final determination, as is the case in respect of the subject Petition.

94. Secondly, it is also my considered view that if the 2nd Respondent was convinced that the subject Petition replicates Petition No 116 of 2016, then it behooved same to file and or lodge an appropriate Application beforehand, which Application would have been considered by the court and where appropriate, the Court would thus have been disposed to either grant an Order staying the subject petition or otherwise.

95. In a nutshell, the raising of the issue of sub-judice as part of the final submissions, is tantamount to closing the staple after the Horse has long bolted. Simply put, the raising of the Rule of sub-judice at this juncture is not only misconceived, but contrary, to the trite provisions of the relevant Law.

96. In respect of the Doctrine of *Res-judicata*, my short answer to the submissions by the 2nd Respondent is that the said Doctrine pre-supposes that a similar dispute, raising same issues between the same Parties and/or their Representatives, has hitherto been heard and determined by a court of competent Jurisdiction.

97. Consequently, before impleading the Doctrine of *Res-judicata*, it implores the Party agitating the said Doctrine to place before the court evidence of the existence and prior determination of a similar dispute by a court of competent jurisdiction.

98. However, in respect of the subject matter, the 2nd Respondent herself has submitted, nay conceded, that the previous Petition, namely, Nairobi HCC Petition No 116 of 2016 is still pending.

99. To vindicate the foregoing observation, it is appropriate to reproduce paragraph 11 of the 2nd Respondents written submissions. For convenience same is reproduced as hereunder;

> " Paragraph 11:
>
> "I am alive to the fact that the high court petition No 116 of 2016 has not been prosecuted for a long time and that it contains a pending application for dismissal for want of prosecution".

100. Premised on the foregoing submissions, can one reasonably contend that the current Petition is barred by the Doctrine of *Res-judicata*. To my mind, the admission that the said previous Petition has not been prosecuted and is therefore pending, negates the invocation and application of the Doctrine of *Res-judicata*.

101. Perhaps at this juncture, it is expedient to restate the holding of the Court of Appeal in the case of *John Florence Maritime Ltd v The Cabinet Secretary, Transport, Infrastructure & Public Works & Another* (2015)eKLR, where the Court of Appeal stated as hereunder;

> " From the above, the ingredients of res judicata are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title and lastly that the court or tribunal before which the former suit was litigated was competent and determined the suit finally (see *Karia & Another v the Attorney General and Others* [2005] 1 EA 83.
>
> Res judicata is a subject which is not at all novel. It is a discourse on which a lot of judicial ink has been spilt and is now sufficiently settled. We therefore do not intend to re-invent any new wheel. We can however do no better than reproduce the re-indention of the doctrine many centuries ago as captured in the case of *Henderson v Henderson [1843] 67 ER 313*:-
>
> ".....where a given matter becomes the subject of litigation in and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time....."

102. In a nutshell, my answer to issue number one is that neither the Rule on *Res-sub-judice* nor the Doctrine of *Res-judicata* are applicable to and in respect of the subject Petition, either as contended by the 2nd Respondent or at all.

Issue Number 2

Whether the Members of the Petitioners Association have been discriminated against by the 1st Respondent on account of levying and charging differentiated License fees.

103. The Petitioner herein has contended that the 1st Respondent has been charging some of the Petitioner's Members Kshs 20, 000/= Only, per truck for a License of an authority to collect and dispose waste, whilst on the other hand, charging other Members the same sum, albeit per Company.

104. Premised on the foregoing contention, the Petitioner has therefore contended that her Members have been discriminated against by the 1st Respondent, based on the manner in which the 1st Respondent is levying the impugned charges on account of license to collect and dispose solid waste.

105. Suffice it to note that the Petitioner has thereafter proceeded to attach to the Supporting Affidavit various Documents, read, annextures, in an attempt to establish that indeed the 1st Respondent has been charging and/or levying differentiated license fees against various members.

106. Nevertheless, I have looked at the annextures which have been alluded to, namely, the authority to collect and dispose waste, which are alleged to constitute the basis of (sic) the impugned discrimination.

107. However, I must state that the annextures which have been displayed by the Petitioner herein running from pages 175 to 193, are explicit in their contents and tenor. For clarity, the said annextures depict that the amount of Kshs 20, 000/= Only, is chargeable on the basis of authority to collect and dispose waste on annual basis. For clarity, the annextures all relate to the year 2019.

108. In any event, it is also appropriate to add that the license/ authority to collect and dispose waste is issued in respect of designated and authorized Motor vehicle(s), which have been disclosed and whose details have been supplied by the Applicant of the license at the time of making the application.

109. To my mind, the authority to collect and dispose waste, also designates the relevant/disclosed vehicles, perhaps so as to eschew usage of unlicensed motor vehicles for purposes of collection, transportation and disposal of solid waste.

110. Nevertheless, I have not been able to discern from the totality of the annextures displayed, any circumstance and/or situation, where some Members of the Petitioner Association are charged the sum of Kshs 20, 000/= Only, per truck whilst others are charged Kshss 20, 000/= Only, per company, either as alleged or at all.

111. To my mind, it was incumbent upon the Petitioner herein, not only to make averments pertaining to discrimination in the charging of license fees by the 1st Respondent on her Members, but it was also incumbent upon same to place before the Court credible and sufficient evidence to prove same.

112. In my considered view, the Burden of proving that indeed various Members of the Petitioner Association were discriminated against laid on the Petitioner, to discharge on a Balance of Probabilities. However, the discharge of such burden is not the same as making hollow allegations and leaving same for the Court to see whether there is some semblance of proof.

113. Sadly, in respect of the subject Petition, no credible and/or sufficient evidence has been tendered to vindicate the allegations of discrimination against the Petitioner or at all.

114. As pertains to the incidences of Proof and the Burden of proof, it is appropriate to underscore and restate the Dictum of the Supreme Court of Kenya in the case of *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others* [2020] eKLR, where the Supreme Court observed as hereunder;

> (49) Section 108 of the *Evidence Act* provides that, "the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;" and Section 109 of the Act declares that, "the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."
>
> [50] This Court in *Raila Odinga & Others v Independent Electoral & Boundaries Commission & Others*, Petition No 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:
>
> "...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden...."
>
> (51) In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional. Only with this threshold transcended,

would the burden fall to 1st respondent to prove the contrary. In the light of the turn of events at both of the Superior Courts below, it is clear to us that, by no means, did the burden of proof shift to 1st respondent.

115. Other than the fact that the Petitioner herein has not placed before the court any sufficient or credible evidence to denote discrimination against her members, it is also appropriate to state that the charging of different licensing fees, by itself, does not constitute and/or amount to discrimination within the scope and purview of Article 27 (1) and (2) of the *Constitution 2010* .

116. It would be important to recall and this is evident from part of the documents that have been exhibited by the Petitioners, that some charges are levied against Medium sized Companies with different amount of vehicles whilst others are charged against Large scale Companies with a different number/ size of fleets.

117. On the other hand, the Petitioner has also put forth evidence of the business permit license where the fees charged are clustered between other transportation company with one vehicle, Small transportation Company with between two to five vehicles and Medium transport Company of between six to thirty vehicles. In this regard, it is evident that the 1st Respondent has been charging differentiated fees, in accordance of each cluster.

118. To my mind, the charging of such differentiated fees/license, cannot ipso facto be termed to be discriminatory, insofar as the basis of differentiation is well underlined and delineated.

119. Simply put, the charging of different/varying amounts by the 1st Respondent, premised on a disclosed and well explained basis, though distinct against the members cannot constitute discrimination, in the manner advocated and/or sought by the Petitioner herein.

120. To buttress the foregoing observation, it is imperative to restate the holding of the Court in the case of *James Nyasora Nyarangi & 3 others v Attorney General,* [2008] eKLR the court defined discrimination as:

> " Discrimination which is forbidden by the *Constitution* involves an element of unfavourable bias. Thus, firstly on unfavourable bias must be shown by a complainant. And secondly, the bias must be based on the grounds set out in the Constitutional definition of the word "discriminatory" in section 82 of the *Constitution*.
>
> Both discrimination by substantive law and by procedural law, is forbidden by the *Constitution*. Similarly, class legislation is forbidden but the *Constitution* does not forbid classification. Permissible classification which is what has happened in this case through the challenged by laws must satisfy two conditions namely:-
>
> (i)) it must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and
>
> (ii) the differentia must have a rational relation to the object sought to be achieved by the law in question;
>
> (iii) the differentia and object are different, and it follows that the object by itself cannot be the basis of the classification."

121. Taking the cue from the foregoing observation, it is my finding and holding that there exists legitimate circumstance, where an Authority and/or Body, like the 1st Respondent herein, can levy differentiated

charges against specific persons, premised on inter-alia, the nature and size of business or number of fleets, operated by such organizations.

122. In such situations, the differentiated rates, applied and/or levied, does not *ipso facto* constitute discrimination. In any event, it must not be lost on the court that the 1st Respondent has clearly underscored the basis and/or foundation belying the different licenses and or fee charges.

123. In a nutshell, even assuming that evidence had been placed before the Court, to premise the allegation of discrimination, the Petitioner would still be obligated to show that the different treatment, on the basis of different scale of license fee charged, is contrary to and in contravention of Article 27 (1) and (2) of the *Constitution 2010* , which stipulates the basis/ yardstick for ascertaining existence or otherwise of Discrimination.

Issue Number 3

Whether the provisions of Section 87, 88 and 89 of the Environment Management and Coordination Act, 1999 are inconsistent with Part Two of the 4th Schedule of the *Constitution* and if so, whether same ought to be declared Unconstitutional.

124. The Petitioner herein filed very elaborate submission dated the March 21, 2022 and in respect of which same singled out Four issues for determination.

125. Relevant to the issue herein, the Petitioner's counsel contended that Sections 87, 88 and 89 of the EMCA Act, 1999 are Unconstitutional as the duties, alluded to vide the said Sections, were devolved to the 1st Respondent by the *Constitution , 2010*.

126. Having isolated and or highlighted the foregoing issue for determination, the Petitioner's counsel has thereafter proceeded to and made very extensively submissions and thereafter invited the court to find and hold that indeed the impugned Sections are unconstitutional.

127. Nevertheless, I wish to point out that the Petition which was filed by and or on behalf of the Petitioner herein was pretty short and very Economical in content and lacking in particulars.

128. First and foremost, there is no paragraph that has outlined the impugned Sections of the EMCA Act, 1999 and similarly there are no particulars, which have been pleaded and/or supplied to underscore the manner in which the impugned Sections contravene and/or violates Part Two of the 4th Schedule of the *Constitution*.

129. To my mind, it was incumbent upon the Petitioner herein, to specifically raise his complaint in the body of the Petition and thereafter venture to supply the requisite particulars complained of, in the established manner.

130. Without belaboring the trite and established requirement of the law, it is imperative to restate that the Petitioners/Litigants approaching the court must appreciate that the Petition is the driving vehicle, upon which the Relief(s) sought are premised, anchored and or founded.

131. Consequently, if a Petitioner fails to plead the requisite Claims, Issues and reliefs in the body of Petition, the Petitioners cannot augment and/or plug the evident lapses by filing comprehensive written submissions, in the manner that the Petitioner herein has done.

132. At this juncture, it is appropriate to restate the holding in the case of *Anarita Karimi Njeru versus Republic*, (1979)eKLR, where the Court observed as follows;

> " The issues in a Constitutional Petition require to be pleaded with clarity and in a concise manner so as to enable the court to appreciate the complaints laid before the court."

133. Recently, the necessity for pleading with specificity and reasonable clarity was also underscored by the Court of Appeal in the decision in the case of *Mumo Matemu versus Trusted Society of Human Rights Alliance and 5 Others*(2013)eKLR, where the Honourable Court observed as hereunder;

> " It was the averment of learned counsel for the 1st, 5th and 6th respondents that the petition had cited with precision complaints regarding the violation of Articles 10 and 73 of the *Constitution*; that Article 159 of the *Constitution* enjoined the courts to administer justice without undue regard to procedural technicalities.
>
> We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point".
>
> However, our analysis cannot end at that level of generality. It was the High Court's observation that the petition before it was not the "epitome of precise, comprehensive, or elegant drafting." Yet the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the *Constitution* and the overriding objective principle under section 1A and 1B of the *Civil Procedure Act* (Cap 21) and section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party.

134. Premised on the foregoing decisions, it is crystal clear that a Party cannot be allowed to travel far and yonder beyond the scope of pleadings filed and thereafter seek to sneak claims/reliefs which do not form part of the Pleadings before the court, by way of Exhaustive Written submissions.

135. Suffice it to note that the Petitioner herein was bound by the Economical Petition placed before the court and if same, for once imagined that there was need to make further additions, same ought to have applied for liberty to Further amend, which was not the case.

136. In a nutshell, the Petitioner is bound by the contents of the Amended Petition and to the extent that same did not implead the constitutionality or otherwise of the impugned Sections, same is prohibited and barred from agitating the alleged unconstitutionality.

137. To buttress, the foregoing statement of the law, it is expedient to repeat the often-cited holding in the case *Independent Electoral and Boundaries Commission versus Stephen Mutinda Mule & Others* (2014) eKLR, where the Honourable Court of Appeal observed as hereunder;

> " As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....
>
> In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

138. Before departing from the subject issue, it is also worthy to remind the Petitioner and her counsel that written submissions filed by and/or on behalf of the Parties cannot take the place and/or surplant the Pleadings or the Evidence.

139. Consequently, before crafting and filing the elaborate written submissions adverting to issue which were not captured vide the pleadings, it behooved the Petitioners to have sought for leave to further amend the Petition, to embody the issues beforehand.

140. To buttress the observation that submissions cannot replace and/or substitute Pleadings and/or Evidence it is appropriate to take cognizance of the case of *Daniel Toroitich Arap Moi versus Mwangi Stephen Muriithi & another* [2014] eKLR, where the Court stated as hereunder;

> " Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."

141. In the premises, my answer to issue number three is to the effect that same was neither specifically pleaded nor particularized in the manner required under the law to warrant an exhaustive and substantive interrogation of same.

ISSUE NUMBER 4

Whether the collection of annual License fees by the 2nd Respondent for waste transportation encroaches onto the mandate of the 1st Respondent and if so, whether the levying of such license fees constitute Double taxation.

142. The Petitioners herein have also contended that the 2nd Respondent have also been charging and levying annual license on account of transportation of waste, refuse removal and solid waste disposal and have in this regard contended that the levying of such license fees, is unconstitutional, null and void.

143. I need to point out that the levying and/or charging of such annual license/fees by the 2nd Respondent is premised on the existing provisions of the EMCA Act, 1999 and the Environment Management Waste Regulations 2006, which have not been found and declared unconstitutional.

144. In any event, the unconstitutionality or otherwise of the said fees/license, would have arisen if the impugned provisions, which premise the levying of same, were found and declared to be unconstitutional.

145. However, having found and held that the relevant provisions of the EMCA Act, 1999 were not sufficiently addressed and/or alluded to in the body of the amended Petition, no exhaustive and substantive determination could ensue.

146. Premised on the foregoing, it is my finding and holding that the determination of the subject issue herein would be superficial and academic in scope and tenor. Consequently, it is my considered view that the issue herein is moot, to the extent that the foundation and/or fulcrum upon which same is anchored remain in situ.

Final Disposition

147. Having dealt with the various issues that were highlighted for determination and having endeavored to answer each and every itemized issues, it is now appropriate to render a conclusion, essentially on the merits or otherwise of the Petition.

148. To my mind, each and every singular determination of the issues highlighted, save for issue number one, have been in the negative. In the premises, I come to the conclusion that the Petition herein is devoid and bereft of merits and thus courts dismissal.

149. In a nutshell, the Amended Petition dated the October 19, 2021 be and is hereby Dismissed.

150. Nevertheless, given that the Petition was mounted for and/or on behalf of various stakeholders in pursuit of the Right to Clean and Healthy Environment as underscored vide Article 42 of the *Constitution 2010* , I find and hold that it is therefore an appropriate matter to decree that Each Party bears own costs.

151. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3RD ____ DAY OF AUGUST 2022.

HON. JUSTICE OGUTTU MBOYA

JUDGE

In the Presence of;

Kevin Court Assistant

Mr. Mukungu h/b Kyobika for the Petitioner

Mr. E K Gitonga for the 2nd Respondent

No appearance for the 1st Respondent