



REPUBLIC OF KENYA



**Attorney General v Owako; Otieno, Yogo, Ojuro & Co Advocates & 6 others (Interested Parties)  
(Miscellaneous Civil Suit E163 of 2021) [2023] KEHC 19858 (KLR) (24 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 19858 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
MISCELLANEOUS CIVIL SUIT E163 OF 2021  
RE ABURILI, J  
MAY 24, 2023**

**BETWEEN**

**THE HON ATTORNEY GENERAL ..... APPLICANT**

**AND**

**DAVID OSCAR OWAKO ..... RESPONDENT**

**AND**

**OTIENO, YOGO, OJURO & CO ADVOCATES ..... INTERESTED PARTY**

**KITUR & CO ADVOCATES ..... INTERESTED PARTY**

**OWITI, OTIENO, RAGOT & CO ADVOCATES ..... INTERESTED PARTY**

**KIMANGA & CO ADVOCATES ..... INTERESTED PARTY**

**KIPENDA & CO ADVOCATES ..... INTERESTED PARTY**

**NYANGA & CO ADVOCATES ..... INTERESTED PARTY**

**ONYANGO, OLEL & INGUTIAH ADVOCATES ..... INTERESTED PARTY**

**JUDGMENT**

1. This ruling determines the application dated November 26, 2021 wherein the applicant who is the Attorney general of the Republic of Kenya seeks the following orders:
  - a) That the respondent be declared a vexatious litigant
  - b) That upon that declaration, an order do issue restraining the respondent from instituting any fresh legal proceeding and or continuing any proceeding already instituted, without leave of the court.



- c) That the applicant be awarded costs of this application
2. The application is supported by the grounds on its face thereof as well as the supporting affidavit of one Sarah Amondi Juma, Litigation Counsel, Kisumu Office.
  3. It is the applicants' case that the respondent herein David Oscar Owako has filed multiple similar suits (8 suits, 5 miscellaneous applications and an appeal in the Court of Appeal) in various courts most of which are still pending and that in most of these suits, the respondent has the tendency of filing multiple frivolous applications especially applications seeking recusal of judicial officers, where any decision is made against him.
  4. The applicant further avers that the respondent's suits and applications are vexatious, scandalous and an abuse of court process as they raise unfounded allegations against judicial officers who are expected to adjudicate the matters filed by him.
  5. The applicant further avers that the respondent perpetrates slander against judicial officers and state officers through his email address heartwaverenagade7@gmail.com and that the applicant is forced to expend public resources to defend vexatious suits instituted by the respondent against state and public officers.
  6. Counsel for the applicant acknowledged that the respondent had a right to a fair hearing and to access justice but that the respondent was not seeking justice but had an ulterior motive. He further stated that the respondent filed suits against all judicial officers, court users and advocates and that in Kakamega HCCC 6 of 2019, Justice Njagi intervened and stopped the respondent from filing more applications.
  7. It was his assertion that the respondent filed cases before different courts over the same subject matter and further that he filed applications that he ended up abandoning without prosecuting them.
  8. Opposing the application, the respondent filed an affidavit in reply deposing that the instant application was overtaken by events. That he withdrew his suit against some judicial officers so this court cannot vacate its own orders.
  9. It was his contention that he was ambushed with an intended decree yet there was a pending judgement on the March 27, 2023 before Justice J Kamau of Kisumu High Court which the applicant wanted to neutralize. The respondent further contended that the applicant introduced a Court of Appeal case No 44 of 2020 where conservatory orders were expunged whereas the 3rd interested party had introduced a Court of Appeal decision that was expunged with costs.
  10. On their part, the 3<sup>rd</sup> interested party through their advocate on record Mr David Otieno adopted his affidavit deposed on the February 21, 2022 and filed in court on the February 22, 2022. Mr Otieno averred in deposition that he supported the application by the applicant/ Attorney General and reiterated the claims made both in the application as well as the submissions by Mr Kajo for the applicant before court.
  11. It was his assertion that since 2005, the respondent has filed over 10 cases relating to the sale or use of a parcel of land in which he claims to be the administrator and that during the same period of time, the respondent showed himself not interested in having the said cases concluded.
  12. Mr Otieno further asserted that on four different occasions, the respondent had applied to have Judges recuse themselves from hearing his cases by accusing them of corruption or collusion and in some cases, he abandoned the cases once he got positive orders in his favour.



13. Counsel further asserted that the court should, under Section 60 (1) (d) of the *Evidence Act*, Chapter 8 Laws of Kenya, take judicial Notice of a fact of the notoriety that the respondent insults advocates and judicial officers for no reason and that the court should exercise its powers under Cap 41 of Laws of Kenya and find that the respondent has habitually and persistently and without reasonable grounds instituted proceedings intended to vex and embarrass the courts and his opponents.
14. Mr Otieno further submitted that the court should order under Section 2(3) of Cap 41, directing that the Government Printer publishes the respondent's name in the Kenya Gazette so that everyone knows the respondent's status. He stated that the respondent had diverted attention from the application.
15. In a rejoinder the respondent further contended that it was the 3rd interested party who caused the file to be transferred to Siaya rather than to the Chief Justice as was his preference. He further contended that he was authorised by National Intelligence Service to expose the corrupt and that the Criminal Investigations Director, his friend, had asked him to send him electronic mails on what was going on in his cases.
16. The respondent stated that he had a right of association with top security organs and that he only gave information against bad judges and that the state should not gag him. He reiterated that he was a state operative and that over time, only this court, RE Aburili J and Lady Justice J Kamau had heard him.
17. The respondent reiterated that the applicants were desperate of the ruling coming on the March 27, 2023 as they had obnoxious intentions.

### **Analysis and determination**

18. I have considered the application by the Attorney as supported by the 3<sup>rd</sup> Respondent firm of advocates, Owiti, Otieno, Ragot & Co Advocates and in my view, the main issue for determination in this proceeding is whether the application is merited.
19. The law that governs vexatious proceedings in Kenya is the *Vexatious Proceedings Act* Chapter 41 Laws of Kenya which empowers the High Court, by Section 2 thereof, to declare a person a vexatious litigant.
20. The Black's Law Dictionary, Tenth Edition at page 1075 defines a Vexatious Litigant as follows:
 

' A litigant who repeatedly files frivolous law suits.'
21. In the case of *Samuel Kabiu vs Jacinta Akinyi Assistant County Commissioner Iloodokilani Ward/ Division & another [2018] eKLR*, the Court stated, inter-alia:
 

' i) Whether the application is vexatious, frivolous and an abuse of courts processes. To begin with, I will look at what amounts to a vexatious litigation in the following words.

'It is a legal action, which is brought regardless of its merits, solely to harass or subdue an adversary. It may take the form of primary frivolous lawsuit or may be repetitive, burdensome and unwarranted filing of meritless motions in a matter which is otherwise a meritorious cause of action.'



22. The *Vexatious Proceedings Act*, 2012 is an Act of parliament, which was enacted to prevent abuse of the process of the High Court and other courts by the institution of vexatious legal proceedings. Section 2(1) of the said Act provides as follows:

- ' 1. If, on an application made by the Attorney General under this section, the High Court is satisfied that any person has habitually and persistently and without any reasonable ground instituted vexatious proceedings, whether civil or criminal, and whether in the High Court or in any subordinate court, and whether against the same person or against different persons, the court may, after hearing that person or giving him an opportunity of being heard, make an order declaring such person to be a vexatious litigant.

23. A vexatious litigant was judicially defined in the case of *Attorney General v Meshack Ochieng T/a Mecko Enterprises [2019] eKLR* where the court quoted a decision in the case of *Camerado Insurance Agency v Superior Court of Sacramento County CV 52538 (STOLZ) [1993]* in which it was stated that a vexatious litigant is a person who does any of the following:

- ' a) In the immediately preceding seven-year period has commenced, prosecuted or maintained in propria persona at least five litigations other than in a small claims court that have been;  
Finally determined adversely to the person or Unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing
- b) After a litigation has been finally determined against the person, he/she repeatedly re-litigates or attempts to re-litigate in propria persona either:
  - i) The validity of the determination against the same defendant as to whom the litigation was finally determined or
  - ii) The cause of caution, claim or controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant
- c) In any litigation while acting in propria persona, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery or engages in other tactics that are frivolous'.

24. Before writing this Judgment, which was delayed, this court had called for all case files wherein the respondent herein had filed suits against several parties seeking for various remedies. Some files were not available as they were still pending ruling before Kamau J such as Kisumu HCC 38 of 2009. Other files such as Siaya HCC Misc 63 of 2021 was in Siaya High Court. The other files had to be retrieved from the registries as they had different citations such as Miscellaneous cases and Civil Suits.

25. I have considered the record before me. From the material placed before me, the respondent filed HCC 38 of 2009 wherein he sued Kibos Sugar Company Limited, Chemilil Sugar Limited, Muhoroni Sugar Company Limited and several other defendants seeking eviction orders against persons allegedly residing in his land, general damages and a declaration that the sugar cane planted on the land in question being LR NO 10817/3 Kotnalel Farm in Nandi District belongs to him.



26. On the December 20, 2016, Justice DS Majanja issued orders for expedition expedite the trial and observed that the respondent did not comply with despite a reminder by the judge on the February 3, 2017 that the suit had been dismissed for failure to comply with the orders. On the February 10, 2017, the respondent applied to have Justice Majanja set aside the orders dismissing the respondent's suit and for reinstatement of the suit for hearing and the application for reinstatement was fixed for the February 21, 2017 at which time, the respondent asked Justice Majanja to disqualify himself from hearing the case.
27. The respondent subsequently filed a Notice of Appeal as well as Kisumu Court of Appeal Miscellaneous Application No 95 of 2017 in which he sought stay of execution pending the hearing and determination of an intended appeal from the ruling of Justice Majanja which application was dismissed by the Court of Appeal on October 25, 2020 and the respondent filed a suit against the Court of Appeal judges claiming they were part of a syndicate that intended to deny him his judgement.
28. On March 27, 2019, Justice T Cherere also recused herself from the suit HCC 38 of 2009 after the respondent had lodged a complaint against the judge relating to Kisumu Civil Appeal No 25 of 2017 after which the matter was transferred to Kakamega and it was issued with case file number Kakamega HCC No 6 of 2019 which did not take off owing to a myriad of applications by the respondent herein, leading to a ruling dated December 11, 2019 by Justice Jesse Njagi, barring the respondent from filing any applications or documents in that case file without leave of court. The respondent subsequently filed an application on the February 13, 2020 seeking recusal of Justice Njagi which application was dismissed by the learned judge.
29. The respondent subsequently filed an appeal in the Court of Appeal, vide Kisumu CoA Civil Appeal No 53 of 2020 and further the respondent has filed two applications in the Court of Appeal vide Miscellaneous Application No 44 of 2020, one dated 23.03.2020 where he seeks stay of the ruling of Justice Jesse Njagi and another application dated December 7, 2020 wherein he seeks stay of the ruling by the Court of Appeal delivered on December 4, 2020.
30. The respondent also filed Kisumu CMCC 254 of 2010 suing parties similar to those sued in Kisumu HCC 38 of 2009, which suit was determined in favour of the respondent but on appeal, when it came before Justice T Cherere as Kisumu HCCA 25 of 2017, a day before judgement was to be delivered, the respondent lodged a complaint against Lady Justice T Cherere before the Judicial Service Commission.
31. The respondent further filed Kisumu CMCC 242 of 2020 alleging unlawful eviction but subsequently amended the plaint and changed cause of action and enjoined, without leave of any court, the Magistrates, Deputy Registrar Kisumu/Nairobi, Registry Staff at Kisumu Law Courts, Judicial Service Commission, the Ministry of Lands, various Law Firms, an appellate Judge and High Court Judges.
32. The respondent subsequently filed Kisumu Miscellaneous Application No E60 of 2021 on 18<sup>th</sup> March 2021 wherein he sought to transfer Kisumu CMCC 242 of 2020 to the High Court but before a ruling was delivered, he filed an application to have Justice Kamau recuse herself from handling the application which had been heard.
33. On December 6, 2021, the respondent again filed Kisumu High Court Civil Misc Suit No 170 of 2021 against Justice FA Ochieng claiming for Kshs 100,000,000 damages for defamation of character and refusing to satisfy interlocutory Judgment entered against the 1<sup>st</sup> defendant to the 17<sup>th</sup> Defendants for breach of court orders and that a notice of execution of decree do issue in 30 days. The court was also being asked compel Justice Ochieng to satisfy decrees for kshs 112,121,000 and 7,000,000 against Deputy Registrars Hon Lokopoyot and Hon Wambilyanga respectively. The rest of the pleadings in that suit cannot even be comprehended by anybody else except the respondent herein.



- The respondent then had the claim against the Judge published in the newspapers and he annexed to his subsequent documents filed into court evidence of how he had broadcast the suit against Justice Ochieng for defaming him and refusing to pay him decretal sums, despite the respondent allegedly having interlocutory judgments in the said sums of money. He also filed into Court an alleged OB extract where he reported Justice Ochieng to the DCI for detaining him and refusing to pay him the sums alluded to above on account that the respondent herein had killed his father. A ruling in that case in respect of the application initiating the suit was rendered on October 25, 2022 by Justice Kamau, dismissing the respondent's application and directing that the respondent should not file any pleadings or applications in that file without leave of court. That file remained stagnant to date after that ruling.
34. Again in MISC E125 OF 2021, the respondent filed that matter against several parties including Judges, advocates, magistrates, Deputy Registrars, public officers and court staff in the application dated 1<sup>st</sup> September 2021, he sought to arrest Judgment in Kisumu HC Misc E60 of 2021 claiming that the ruling to be delivered is illegal hence the judge must be stopped from delivering it. He also sought orders for execution for kshs 650,000,000 interlocutory judgment to issue within 30 days against the defendants/respondents. Judge Farah Amin then recess duty Judge, gave directions for the dates to be taken at the Registry. That application is still pending in the file.
  35. In yet another suit Kisumu HCC MISC 139 of 2021, filed against several parties including Judges and Magistrates, which suit was later transferred to Siaya High Court, and was given the case file number Siaya HC MISC Case NO 63 of 2021, the Court readied the matter for hearing and no sooner had directions been given for trial than the respondent herein sought leave of court to file an application to enjoin Justice PJ Otieno of Kakamega High Court claiming that the learned Judge, while he was still in private practice as an advocate, had colluded with his client to deny the respondent his rights. The court at Siaya High Court, presided over by myself, dismissed the respondent's application upon which the respondent filed an application before me, for setting aside of that ruling, my recusal from hearing that case and also sought orders that I, as the presiding Judge who dismissed his application for joinder of Justice PJ Otieno, be enjoined in the said suit as a defendant.
  36. The same situation happened in the much-hyped judgment which the respondent kept reminding this Court that it was pending delivery of a judgment for over Kshs 112 million. The ruling delivered by Kamau J on May 28, 2023 in HCCA 38 of 2009 dismissed the application which claimed that the defendants had not filed any defence in the suit. The Court found that there was a defence on record and therefore it could not enter judgment against a party who had a defence on record. The respondent had in the same suit given the court conditions that should the court not give judgment in his favour, then the Judge should transfer the case to the Chief Justice because no judge or judicial officer in this region can guarantee him justice.
  37. I say so because the respondent wants to choose which Judge or judicial officer should hear and determine his case and on his own terms not on terms of the law. For example, in Kisumu HC Misc Case No E060 of 2021, on September 16, 2021, he wrote to court by hand, threatening to sue Justice Kamau, the Deputy Registrar Hon Linah Akoth for signing orders issued by Justice Kamau and he also threatened to sue Justice Ochieng in the same case and threatened to send his reasons to the Judiciary Ombudsman, ODPP to provide evidence on alleged glaring malice by the said officers. That letter was copied to the Chief Justice, provincial Police officer. On the same day, he demanded that the file be placed before Justice Ochieng for directions which the latter Judge refused to give directions as demanded and the learned Judge warned that a party cannot decide which court shall handle his or her matter.
  38. In the above matter, the respondent had filed proceedings enjoining both sitting and former High Court Judges and Judges of the Court of Appeal, advocates, Deputy Registrars, public officers in the



Lands Office and Judicial Staff together with Judicial Service Commissioners. In the application filed on September 15, 2021, the respondent sought to arrest judgment and at the same time seeking to execute decree for kshs 650,000,000. He also sought for recusal of a Judge in the same matter while demanding that a specific Judge, Karanja J, of Busia High Court who was the Recess duty Judge do effect the judgment rendered by Abida Aroni J on June 9, 2010.

39. The respondent's suits and decisions made in each of the cases mentioned in the application herein are spewed all over Kenyalaw.org case search and therefore it is no secret that the suits that he has filed against the various parties are all intended to vex those parties and that he has no intention of having any of those suits concluded on merit or otherwise.
40. Despite my recommendation in the Siaya matter, MISC 63 of 2021, just as Justice Kamau did recommend in her ruling in Kisumu HC MISC E060 of 2021 that the respondent gets legal aid for prosecution of his claims, he has remained adamant saying he has the right to represent himself.
41. He also moves around the courts handling his cases while carrying hidden cameras and taking photographs of judges and judicial officers and other highly placed public servants and state officers threatening judicial officers with complaints of alleged imagined corruption simply because they have dismissed his frivolous claims. He blatantly vilifies judicial officers and advocates who appear for his adversaries. His intention is to scare every judicial officer and judge and advocate so that he gets favourable outcomes out of fear of being reported to NIS or JSC. This court's efforts to have him engage a lawyer even on pro bono basis from the National legal Aid Board was met with resistance with the respondent claiming that it was in his right to represent himself. This is evidenced from the kind of bulky documents that he files into court attaching photographs of Judges, Judicial Officers and state officers such that at one time in the Siaya High Court matter, the email was blocked by his bulky documents, affecting other court users.
42. The conduct of the respondent is extremely vexing and adversely affects the administration of justice. He enjoys traumatising his victims and fantasizes about the multimillion-shilling claims that the courts have refused to give him through execution of imagined judgements.
43. Courts are independent in decision making and they are not expected to be cowed by litigants who threaten them with complaints at the Judicial Service Commission or to the national Intelligence Service of DCI so that what the respondent does is to waste judicial time so that judges and magistrates spent their judicial time responding and or answering to complaints at JSC or DCI on perceived corruption simply because they have made decisions adverse to the respondent's interests. That is a mockery of justice in Kenya. Judicial authority is given to the courts and tribunals by the people of Kenya. The respondent is not the only litigant who has lost claims before courts. There are avenues for ventilating one's loss and that is by way of appeal and not going around the same court with hidden cameras, taking photographs of judges and judicial officers or by seeking to enjoin the judges, judicial officers, judicial staff and advocates to the suits where they were never parties in the first place.
44. This court observes that the Respondent is representing himself without guidance of an advocate and he is out to seek relief via various avenues that the law provides. Article 48 Constitution of Kenya guarantees every person the right to access justice. In addition, Article 50 (1) of the Constitution guarantees every person the right to a fair hearing and Article 159 of the Constitution which provides that in exercising judicial authority, the courts and tribunals shall be guided by the following principles:
  - (a) Justice shall be done to all, irrespective of status;
  - (b) Justice shall not be delayed;



- (c) Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);
- (d) Justice shall be administered without undue regard to procedural technicalities; and
- (e) The purpose and principles of this Constitution shall be protected and promoted.

45. Although the Respondent is entitled, like every person to all rights to access justice and the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body, and whereas by declaring him a vexatious litigant will limit his right to enjoy these rights under the Constitution, in my most considered view, the limitation of these rights which are not absolute, is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors. These rights in my view are not absolute as they do not fall under the rights made absolute by Article 25 of the Constitution and are therefore justifiable limited in the case of a vexatious litigant, by the Vexatious Proceedings Act, as contemplated under Article 24 of the Constitution which provides as follows:

' Limitation of rights and fundamental freedoms

- (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including,
  - (a) The nature of the right or fundamental freedom;
  - (b) The importance of the purpose of the limitation;
  - (c) The nature and extent of the limitation;
  - (d) The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
  - (e) The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.
- (2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—
  - (a) In the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;
  - (b) Shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and



- (c) Shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.
- (3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.
- (4) The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.
- (5) Despite clause (1) and (2), a provision in legislation may limit the application of the rights or fundamental freedoms in the following provisions to persons serving in the Kenya Defence Forces or the National Police Service—
  - (a) Article 31 — Privacy;
  - (b) Article 36 — Freedom of association;
  - (c) Article 37 — Assembly, demonstration, picketing and petition;
  - (d) Article 41 — Labour relations;
  - (e) Article 43 — Economic and social rights; and
  - (f) Article 49 — Rights of arrested persons.

46. Under Article 25 of the [Constitution](#), the following rights and fundamental freedoms shall not be limited:

- (a) Freedom from torture and cruel, inhuman or degrading treatment or punishment;
- (b) Freedom from slavery or servitude;
- (c) The right to a fair trial; and
- (d) The right to an order of habeas corpus.

47. I agree with the persuasive decision in the High Court of South Africa, Mpumalanga Division (Middleburg Local Seat) Case Number 3542/2020 between [Zenani France Sibanyoni versus Executive Mayor of Nkangala, District Municipality](#), Municipal Manager Nkangala, District Municipality, Stanford Mofore NO, Eskom Kusile Power Station and Engen Oil where Langa J stated as follows:

- ' (51) Declaring one a vexatious litigant of course comes with serious negative implications inter alia that the person may not exercise his right of access to the courts as he would under normal circumstances. While one is mindful of this right of access to courts and therefore to justice, it is, however, necessary for the court to intervene in order to protect the victims of this abuse of court process who have been repeatedly harassed and caused to spend money as a result of the unmeritorious litigation by the applicant. Although declaring him a vexatious litigant prima facie amount to a limitation of his right of access to



courts, it is however, a justified limitation permissible in terms of section 36 of the Constitution.

- (52) The courts have stated that in appropriate cases this right can be limited but that this limitation can be evaded by persuading a court or judge that the proceedings instituted or to be instituted will not constitute an abuse of the process of the court. In addition, the person can still appeal if not satisfied with the decision of the court or judge refusing him permission to institute legal proceedings. The following remarks by the Constitutional Court in *Beinash* above, are apposite respect of this matter: 23 [18] When one considers, for purposes of section 36(1)(c), the extent of the restriction permitted by the Act, it seems clear that the restriction itself can only occur through an order of court. The order is then confined to the specific person or persons at whom it is directed; it has no direct effect on the public generally. An order restricting a litigant is only made in circumstances where the court is satisfied that the malfasant has 'persistently and without reasonable grounds instituted legal proceedings'. If a judge does not make the order in a judicially permissible manner, then there is always the right to appeal. [19] While such an order may well be far-reaching in relation to that person, it is not immutable. There is escape from the restriction as soon as a prima facie case is made in circumstances where the judge is satisfied that the proceedings so instituted will not constitute an abuse of the process of the court.<sup>16</sup> When we measure the way in which this escape-hatch is opened, in relation to the purpose of the restriction, for the purposes of section 36(1)(d), it is clear that it is not as onerous as the applicants contend, nor unjustifiable in an open and democratic society which is committed to human dignity, equality and freedom. The applicant's right of access to courts is regulated and not prohibited. The more remote the proposed litigation is from the causes of action giving rise to the order or the persons or institutions in whose favour it was granted, the easier it will be to prove bona fides and the less chance there is of the public interest being harmed. The closer the proposed litigation is to the abovementioned causes of action, or persons, the more difficult it will be to prove bona fides, and rightly so, because the greater will be the possibility that the public interest may be harmed. The procedure which the section contemplates therefore allows for a flexible proportionality balancing to be done, which is in harmony with the analysis adopted by this Court, and ensures the achievement of the snug fit to protect the interests of both applicant and the public.'

48. See also *Beinash and Another v Ernst & Young and Others (CCT12/98) [1998] ZACC 19; 1999 (2) SA 116 (CC); 1999 (2) BCLR 125 (CC) (2 December 1998)*.

49. In this matter, although the respondent claims that he had withdrawn his claims against some judicial officers, in the matter which was transferred to Siaya High Court for hearing owing to his vexing of the Judges in Kisumu High Court, it is clear that the nature of his claims is so vexing that every time he loses a claim, he enjoins the Judge to those proceedings and takes their photographs and splashes it all over saying that the Judge was corrupt and compromised to decide against the respondent. The respondent is undeterred. He knows his rights under the Constitution yes, but he also must know that other persons too have rights hence he has a responsibility to respect those rights including the right to privacy and inherent dignity. The respondent shall not be allowed by courts to exercise his rights in vilification of the reputation of Judges, Judicial officers, Judicial Staff, advocates and other state and



public officers through litigation. The respondent has no doubt lost focus of his causes of action and instead, he has chosen the path of drugging even adjudicators into the arena of his litigation which he does not wish to be determined either way for him to move to the next level of adjudication.

50. From the above it is clear that the respondent continues to file similar issues in the proceedings before different Judges and Judicial officers and once a court rules against him or he even senses that a court might rule against him, the respondent seeks to either have the Judge or judicial officer recuse him/herself or have the matter transferred to a different court and he has even agitated and demanded as stated earlier, that the files be transferred to the Chief Justice because no Judge or Judicial Officer in this Region can guarantee him Justice.
51. I am satisfied that the respondent herein has abused the court process by persistently and without reasonable grounds instituting legal proceedings and enjoining or seeking to enjoin unnecessary parties to his litigation including Judges and Judicial Officers who decide against him and advocates of adverse parties. I find that a case has been made out for the granting of the relief sought in the application. The respondent has made several applications for various Judges and judicial officers to recuse themselves in different courts whenever the court is at the step of progressing with the matter before it. The respondent further files application after application all aimed at halting or slowing down the progress of the suits before the courts. The respondent is not before this court with clean hands. He has aided to the lagging of cases before the courts, which is contrary to the spirit and letter of Article 159(2) (b) of the Constitution which commands that court shall, in exercise of their judicial authority, ensure that justice is not delayed.
52. The respondent, in my view, has made efforts to water down the independence of the judiciary and the decisional independence of the Judges and the Judicial officers contrary to Article 160 of the Constitution which stipulates that:
- ' Independence of the Judiciary
- (1) In the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.'
53. Therefore, in order to stop Mr David Oscar Owako's persistent and ungrounded litigation against the interested parties and other parties who include Judges and Judicial officers as well as judicial staff and advocates of adverse parties, an order interdicting the respondent in terms of Section 2 of the Vexatious Proceedings Act falls to be granted.
54. In my view the applicant has demonstrated that the respondent is a vexatious litigant.
55. In the end, I hereby find and hold that the applicant's application is merited. I allow it and order as follows:
- A. That the application by the Attorney General pursuant to the provisions of section 2(1) and (3) of the Vexatious Proceedings Act, Cap 41 Laws of Kenya is allowed;
- B. That the respondent herein David Oscar Owako is hereby restrained from instituting in court any fresh legal proceedings and or continuing any proceeding already instituted, without leave of the court;
- C. That the order herein shall, on the authority of this court be published in the Kenya Gazette pursuant to section 2(3) of the Vexatious Proceedings Act;
- D. That each party shall bear their own costs of the application;



E. That this file is accordingly closed. No further proceedings shall be filed herein

56. I so order.

**Dated, Signed and Delivered at Kisumu this 24th day of May, 2023**

**R.E. ABURILI**

**JUDGE**

