Mohammed v Ministry of Education & another; Registered Trustees of the Baptist Convention of Kenya (Interested Party) (Constitutional Petition 043 of 2021) [2022] KEHC 115 (KLR) (21 February 2022) (Ruling)

Neutral citation: [2022] KEHC 115 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CONSTITUTIONAL PETITION 043 OF 2021

JM MATIVO, J

FEBRUARY 21, 2022

BETWEEN

ABDULRAHMAN MOHAMMED ..... PETITIONER

AND

MINISTRY OF EDUCATION ..... 1ST RESPONDENT

NATIONAL LAND COMMISSION ..... 2ND RESPONDENT

AND

REGISTERED TRUSTEES OF THE BAPTIST CONVENTION OF KENYA ..... INTERESTED PARTY

RULING

1. This ruling determines both the Petitioner's/applicant's application dated 30th July 2021 and the Interested Party's Preliminary Objection dated 24th August 2021. Ideally, a Preliminary Objection takes precedent and ordinarily it ought to be determined at the earliest opportunity possible. However, on 16th September 2021 the court (Ogola J) directed that both the said application and the Objection be heard together.

2. In order to put the both application and the Objection into a proper perspective, it is necessary, albeit briefly, to highlight the facts which triggered this Petition. For starters, the Petitioner seeks declarations that the 1st and 2nd Respondents' failure to pursue to the logical conclusion the issue of the uncertainty over the ownership of LR No. MN/11/169 (on which Kiembeni Baptist Primary School a school stands (the school)) is a gross violation of children's right to free and compulsory basic education contrary to Article 53 (1) (b) of *the Constitution* and a breach of the right to property under Article 40 (1) (a) (b) of *the Constitution*. The Petitioner also prays for such other orders as the court may deem fit

to prohibit the Respondents from further infringing the children's rights. Lastly, the applicant prays for costs.

3. The Petitioner's grievance against the Respondent's as I glean it from the Petition is that on 30th July 2021, the 2nd Respondent obtained declarations in Mombasa High Court Petition No. 3 of 2006 as follows:- (i) that the operation of the said school by the Ministry of Education and the Municipal Council of Mombasa without the Petitioner's consent was a violation of its right to property; (ii) a declaration that the said property belongs to the Petitioner; (ii) an order of mandamus compelling the 1st Respondent to register the school as a private school; (iv) all the children enrolled at the school to continue from Nursery to Standard 8; (v) that the Petitioners will commence enrolment of pupils for the academic year 2013; (vi) that the school will revert to full private status upon completion of the studies for pupils enrolled under the public school system as at the academic year 2012. (vi) the 2nd Respondent to pay the Petitioner's costs and the 1st Respondent to bear its own costs.

4. It is the Petitioner's case that the 1st Respondent failed to comply with the above orders but when faced with a contempt application, it argued that the County Government of Mombasa had failed to avail the necessary application and consent under section 15 of the Education Act (Repealed) and the *Basic Education Act*, 2013. It also argued that it had come to its attention that the title to the property was said to be faulty, hence, it had requested the Ministry of lands to investigate the matter before they could act on the matter.

5. Additionally, the Petitioner states that the court injuncted the 1st Respondent from registering new pupils for the year 2015 for nursery and standard one and directed it to take all necessary steps to register the school and commence registration of new pupils as a private school in terms of the decree dated 29th December 2011. Also, the court granted the 1st Respondent liberty to pursue its review application, and if successful, the school may revert to its public status. But despite being granted leave, the 1st Respondent has not prosecuted its review application, so, the status of the school remains unclear because the admission process was frozen in 2015 impacting on the children's right free basic education. Additionally, the applicant states that its complaint to the 2nd Respondent has remained un addressed since 2017. As a consequence, the Petitioner/applicant states that the Respondents are in breach of Articles 53 (1) (b) of *the Constitution*.

6. Concurrent with the application, the Petitioner filed a Notice of Motion of even date seeking an order that pending the hearing of the Petition, the Board of Management of Kiembeni Baptist Primary School be allowed to enrol pupils in the vacant streams from Nursery School to Class 7. The applicant also prays for costs of the application. The grounds in support of the application are a replication of the averments in the Petition, so, it will add no value to rehash them here.

7. The Respondents did not file any response to the application and the Petition nor did they participate in the proceedings.

8. The Interested Party filed the Replying Affidavit of Francis Njeru Njomo dated 30th September 2021 in opposition to the application. The substance of its opposition is that the applicant being the Chairperson of the schools Board of Management is aware of the orders issued in Petition No. 3 of 2013; that the pupils who had been enrolled in the school on the basis of a public-school status have been systematically phased out and as at 2021 only standard 8 pupils remained who were to sit for their exams this year. Further, the Interested Party has transferred all the teachers leaving only 4 who are teaching class 8 pupils.

9. It is the Interested Party's case that the orders sought would contradict the orders issued in Petition 3 of 2006, and even if the orders are granted, they which would be of no benefit because there are no

teachers in the school. Additionally, that the applicant ceased being a parent at the school after his child exited the school. Also, that the Petitioner was not a party in Petition No. 3 of 2006, so, he cannot seek to upset the said orders. Lastly, it is the Interested Party's case that this Petition is being used to circumvent the said decision.

10. On 25th August 2021, the Interested Party filed a Notice of Preliminary Objection stating that this dispute was determined in Petition No. 3 of 2006; that the applicant now seeks to review the said orders; that this court lacks jurisdiction to entertain this case; that the Petitioner was not a party in the said case; and that the application is frivolous, vexatious and an abuse of court process.

11. In his submissions, the Petitioner's counsel cited the supremacy of *the Constitution* underscored by Article 2 (1) (4) of *the Constitution*, every person's obligation to respect, uphold and defend *the Constitution* under Article 3 and the national values and principles of governance under Article 10. He also cited several Articles of *the Constitution* and argued that a decision maker must adhere to the edicts in *the Constitution*. Additionally, he submitted that the Respondents violated section 4 of the *Fair Administrative Action Act*[1] and the *Basic Education Act*.[2] Also, he cited *Diana Kethi Kilonzo v The independent Electoral & Boundaries Commission (IEBC) & 2 others* and argued that legitimate expectation may arise out of a promise made. He argued that there is an expectation that a registered school should regardless of status enrol and teach children.

12. Responding to the Preliminary Objection, he argued that this court has jurisdiction to entertain this matter and cited *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd*[3] which defined a preliminary objection and submitted that the objection does not raise a point of law.

13. In his submissions, counsel for the Interested Party cited *Law Society of Kenya v Officer of the Attorney General & another; Judicial Service Commission (Interested Party)*[4] in which the court citing authorities underscored the principles governing issuance of conservatory orders which are an arguable prima facie case and risk of suffering prejudice in the absence of the orders. The court also held that it is a requirement that the court decides whether the grant or a denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights, and whether if an interim conservatory order is not granted, the Petition or its substratum will be rendered nugatory. Lastly, that the Court should consider the public interest and relevant material facts in exercising its discretion whether, to gnat or deny a conservatory order.

14. Counsel for the Interested Party submitted that the Petitioner has not demonstrated the nature of prejudice he has or is likely to suffer as a result of the said orders. He also argued that the application and the entire Petition are grounded on issues that have been previously heard and determined by this court. He submitted that parties are bound by the doctrine of res judicata as set out in section 7 of the *Civil Procedure Act*[5] which he argued ousts the jurisdiction of a court to try any suit or issue which had been finally determined by a court of competent jurisdiction in a former suit involving the same parties or parties litigating under the same title.

1 Act No. 4 of 2015.

2 Act No 14 of 2013.

3 {1969} EA 696.

4 {2020} eKLR.

5 Cap 21, Laws of Kenya.

15. Regarding the Preliminary Objection, he submitted that the issues presented in this Petition have been determined in Petition No. 3 of 2006, and, even if the orders are granted, they will serve no purpose because the teachers have since been transferred.

16. For starters, the Petitioner's/applicant's counsel substantially, if not wholly addressed the Petition as opposed to addressing the tests for granting conservatory orders pending hearing and determination of the Petition. I restrain myself from falling into the same trap because what is before me is not the substantive Petition but an interlocutory application seeking interim conservatory orders pending final determination of the Petition and a Preliminary Objection seeking to upset the Petition.

17. In addressing the application, I prefer to recall that Article 23 of *the Constitution* which engrains the authority of courts to defend and enforce the Bill of Rights. The Article provides that the High Court has jurisdiction, to hear and determine applications for violation or infringement of, a right or fundamental freedom in the Bill of Rights. The Article goes a step further to prescribe the remedies available from the court. It states that in any proceedings brought under Article 22, a court may grant appropriate relief, including- (a) A declaration of rights; (b) An injunction; (c) A conservatory order etc.

18. Pursuant to 22(3) of *the Constitution*, *The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013[6] was promulgated. Rule 23 provides that despite any provision to the contrary, a Judge before whom a Petition under Rule 4 is presented shall hear and determine an application for conservatory or interim order. Conservatory orders are by definition decisions arrived at by a court of law to maintain status quo to ensure that circumstances do not change while a matter is before a court of law pending judgement. Conservatory orders ensure that nothing changes circumstantially in a matter, pursuant to the existence of other factors to be determined by the court. The applicable test has always been in granting a conservatory order, the danger looming over the realization of rights must be imminent, real and not theoretical. In determining whether a conservatory order should be granted, the court is not invited to make conclusive findings of fact or law on the dispute before it. The court's jurisdiction at this point is limited to examining and evaluating the materials placed before it, to determine whether the applicant has made out a prima facie case to warrant grant of a conservatory order. In determining whether to grant or refuse the application, the court is guided by established principles. These principles were rightly recognized in *Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others*[7] as follows: -

    a. The Applicant ought to demonstrate an arguable prima facie case with a likelihood of success and that in the absence of the conservatory orders he/she is likely to suffer prejudice.

    b. The Court should decide whether a grant or a denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.

    c. Whether if an interim conservatory order is not granted, the Petition or its substratum will be rendered nugatory.

6 Legal Notice No. 117 of 2013.

7 {201 5} e KLR.

d. Lastly, that the court should consider the public interest and relevant material facts in exercising its discretion.

19. An applicant seeking a conservatory order is mandated to demonstrate that should the court fail to grant a conservatory order, there is a high probability of him/her suffering prejudice as a result of the violation or threatened violation of *the Constitution*. However, this must be weighed against public interest. From the foregoing, it is evident that conservatory orders are a unique instrument in the protection of the Bill of Rights. They may only be granted by courts of law upon being satisfied that several pre-requisite conditions exist. Conservatory orders are distinct from remedies almost similar in nature such as injunctions.

20. With the above principles in mind, I now examine the applicants' application. There is no doubt that courts have an overriding duty to promote justice and prevent injustice. Its trite that from this duty, there arises an inherent power to stop threat or violation of *the Constitution* or the Bill of Rights pending determination of the main dispute. The provisions of *the Constitution* conferring powers upon the High Court to grant such remedies as conservatory orders pending determination of the main dispute are a device to advance justice and not to frustrate it.

21. That the court has power to, if it considers that circum-stances so require, to issue conservatory orders to preserve the respective rights of either party pending the final decision is not in doubt. This power has as its object to preserve the respective rights of the Parties, pending a decision of the court, and presupposes that irreparable prejudice shall not be caused to rights which are the subject of dispute in judicial proceedings. It follows that the court must be concerned to preserve by such measures the rights which may subsequently be adjudged by the court to belong either to the Applicant or to the Respondent.

22. As stated earlier, the applicant deployed a lot of energy addressing the legal foundation of the Petition including citing the right to legitimate expectation but said nothing about the applicable tests. Further, an evaluation of the grounds cited and the tests discussed above, leave no doubt that the Petitioner has failed to satisfy the tests to merit the conservatory orders sought. Having so concluded, the upshot is that the Petitioner's application 30th July 2021 is unmerited and fit for dismissal.

23. I now turn to the Preliminary Objection. The substance of the objection as I see it is captured in ground number 5 of the Preliminary Objection that the application and the Petition are frivolous, vexatious and otherwise an abuse of the process of the court. The basis of this assertion is that the issues presented in this case are res judicata having been determined in Petition No. 3 of 2006. Res judicata is provided for in Section 7 of the *Civil Procedure Act*.[8] Its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgement between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit.

24. The section contemplates 5 conditions which, when co-existent, will bar a subsequent suit. The conditions are:- (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; (ii) the former suit must have been between the same parties or privies claiming under them; (iii) the parties must have litigated under the same title in the former suit; (iv) the court which decided the former suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit.[9]

8 Cap 21, Laws of Kenya.

9 *See Lotta v Tanaki {2003} 2 EA 556*.

25. The doctrine of res judicata has been the subject of several judicial decrees in this country. For example, in *Qayrat Foods Limited v Safiya Ahmed Mohamed & 6 others*[10] the court cited *James Karanja alias James Kioi (Deceased)*[11] which outlined the rudiments of *res judicata* as: -

> " For the doctrine of Res Judicata to apply, three basic conditions must be satisfied. The party relying on it must show: - (a)That there was a former suit or proceeding in which the same parties as in the subsequent suit litigated;(b) the matter in issue in the latter suit must have been directly and substantially in issue in the former suit; (c)that a court competent to try it had heard and finally decided the matters in controversy between the parties."

26. The former East African Court of Appeal in *Gurbachan Singh Kalsi v Yowani Ekori*[12] stated: -

> " Where a given matter becomes the subject of litigation in, and of 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 a 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 the parties to form an opinion and pronounce a judgement, 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...No more actions than one can be brought for the same cause of action and the principle is that where there is but one cause of action, damages must be assessed once and for all...A cause of action is every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

27. The Supreme Court of Kenya in *Kenya Commercial Bank Limited v Muiri Cofee Estate Limited & another* stated: -

> " (52) Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights.
>
> (54) The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.

10 {2020} e KLR.

11 {2014} e KLR.

12 Civil Appeal No. 62 of 1958.

(58) Hence, whenever the question of res judicata is raised, a Court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The Court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a Court of competent jurisdiction

(59) That Courts have to be vigilant against the drafting of pleadings in such manner as to obviate the res judicata principle was judicially remarked in E.T v. Attorney-General & Another, (2012) eKLR, thus: "The Courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the Court. The test is whether the plaintiff in the second suit is trying to bring before the Court in another way and in a form of a new cause of action which has been resolved by a Court of competent jurisdiction."

28. From decided cases, the key concept to be gleaned is if any judicial tribunal in the exercise of its jurisdiction delivers a judgment or a ruling which is in its nature final and conclusive, the judgment or ruling is res judicata. It follows that if in any subsequent proceedings (unless they be of an appellate nature or review) in the same or any other judicial tribunal, any fact or right which was determined by the earlier judgment or ruling is called in question, the defence of res judicata can be raised. This means in effect that the judgment or ruling can be pleaded by way of estoppel in the subsequent case.

29. As Somervell L.J.[13] stated, res judicata covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them. A litigant will not be allowed to litigate a matter all over again once a final determination has been made. A party will be estopped from raising issues that have been finally determined in previous litigation, even if the cause of action and relief are different. The purpose is obviously to prevent the repetition of lawsuits between the same parties, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions by the different courts on the same issue.[14]

30. The basic requirements for res judicata are the same cause of action, the same relief involving the same parties was determined by a court previously. In assessing whether the matter raises the same cause of action, the question is whether the previous judgment involved the 'determination of questions that are necessary for the determination of the present case and substantially determine the outcome of the case.

31. Res Judicata is one of the factors which limits a court's jurisdiction. This doctrine serves a salutary purpose which is key to the due administration of justice. It requires that there should be an end to litigation or conclusiveness of judgment where a court has decided and issued judgment then parties should not be allowed to litigate over the same issues again. The doctrine requires that one suit one decision is enough and there should not be many decisions in regard of the same suit. It is based on the need to give finality to judicial decisions. Res Judicata can apply in both a question of fact and a

13 In *Greenhalgh vs Mallard (1) (1947) 2 All ER 257.*

14 *Caeserstone Sdot-Yam Ltd vs World of Marble and Granite 2000 CC and others 2013 (6) SA 499 (SCA) paras 20-21.*

question of law, so, where the court has decided based on facts it is final and should not be opened by same parties in subsequent litigation.[15]

32. A judicial decision made by a court of competent jurisdiction holds as correct and final in a civilized society. So, res judicata halts the jurisdiction of the court to protect the finality of the decision. That is why it is one of the factors affecting jurisdiction of the court. The effect is that the court is prevented from trying the case in limine.[16] The rule of res judicata presumes conclusively the truth of the decision in the former suit.[17] Res judicata, also known in the US as claim preclusion, is a Latin term meaning "a matter judged." This doctrine prevents a party from re-litigating any claim or defense already litigated. The doctrine is meant to ensure the finality of judgments and conserve judicial resources by protecting litigants from multiple litigation involving the same claims or issues.

33. Even though the parties did not avail to this court the pleadings filed in Petition No. 3 of 2006, a reading of the orders issued in the said case and the arguments presented before me leave no doubt that the issues presented in this case were actually addressed in the orders issued in the said case. This is further confirmed by the fact that the applicant in these proceedings seeks to impugn the Respondent for not complying with the said orders. In fact, one wonders why the applicant never moved the court in the said case to enforce the orders instead of filing fresh proceedings.

34. I note that the Petitioner claim that he is the Chairperson of the Schools Board of Management. It does not escape the court's attention that the school was the Petitioner in Petition No. 3 of 2006. It is also evident that the Petitioner through these proceedings seeks to advance the interests of the school as captured in the orders issued in Petition No. 3 of 2006. The Petitioner has purported to introduce the National Land Commission in these proceedings as a party. Mere addition of parties in a subsequent suit or omission of a party or party's or introducing a new ground or a new prayer(s) does not necessarily render the doctrine of res judicata inapplicable because a party cannot escape the wrath or res judicata by simply undertaking a cosmetic surgery to his pleadings or introducing new grounds to secure earlier refused orders. If the added grounds, or parties or prayers peg the claim under the same title as the parties in the earlier suit, the doctrine will still be invoked.[18] Res judicata covers issues which could have been raised in the earlier proceedings. In any event, the National Land Commission was not a party in the said suit. One wonders why and how the Petitioner seeks to force it to comply with the orders, yet, it was not a party nor were the said orders issued in rem.

35. The second hurdle standing on the way of this Petition is also related to the doctrine of res judicata. Complementary to the doctrine of res Judicata is the conception that, when a judicial tribunal becomes functus officio in respect of a particular case, its powers and jurisdiction are exhausted in respect of that issue. A judicial tribunal, after giving a decision as to the merits of a case, ceases to exist as an instrumentality in its previous form or at all, or is deprived of all the judicial functions it previously possessed, it is functus officio in respect of the issues decided.[19]

15 http://www.kenyalawresourcecenter.org/2011/07/res-judicata.html -Accessed on 16 December 2017.

16 Ibid.

17 Ibid.

18 *Republic vs Registrar of Societies - Kenya & 2 Others Ex-Parte Moses Kirima & 2 others [2017] e KLR*.

19 See *Nyandoro & Company Advocates v National Water Conservation & Pipeline Corporation and Kenya Commercial Bank Group Limited Garnishee Miscellaneous Civil Application No. 241 of 2019*.

36. A court which, after a trial, has given a valid decision determinative of right, liability or status, has no jurisdiction to recall it whatever mistakes may have been made in facts or law.[20] This test is applicable only if there happens to have been a "final" and "determinative" decision, after a trial; and that a judicial tribunal becomes functus officio in this sense only in relation to a particular matter, not in respect of all matters. For a judicial tribunal to become functus officio, it must have delivered a valid judgment, decree or order of a final and conclusive nature and res judicata must have come into existence. The High court pronounced itself severally as evidenced by the various rulings/orders mentioned earlier. This court is being invited to issue orders which have the effect of reviewing/ overturning a ruling rendered by the High Court. I decline the invitation to travel along this forbidden route.

37. Next, I will address the question whether this Petition is an abuse of court process. Notwithstanding the fact that the High Court had already pronounced itself, the Petitioner undeterred filed the instant Petition. The civil justice system depends on the willingness of both litigants and lawyers to try in good faith to comply with the rules established for the fair and efficient administration of justice. When those rules are manipulated or violated for purposes of delay, harassment, or unfair advantage, the system breaks down and, in contravention of the fundamental goal of the Civil Procedure Rules, the determination of civil actions becomes unjust, delayed, and expensive.

38. The above circumstances raises the question whether the instant application is an abuse of court process. The court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused. The Black's Law Dictionary defines abuse as "Everything which is contrary to good order established by usage that is a complete departure from reasonable use. Abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use."[21]

39. The concept of abuse of court/judicial process is imprecise. It involves circumstances and situations of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents.[22]

40. I have severally held that the situations that may give rise to an abuse of court process are indeed in exhaustive. They involve situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. Examples include:

    a. Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.

    b. Instituting different actions between the same parties simultaneously in different court even though on different grounds.

    c. Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and respondent notice.

20 (1943-4) 68 C.L.R. at p. 590.

21 *Black Law Dictionary, Sixth Edition Black, Henry Campbell, Black Law Dictionary Sixth Edition, Continental Edition 1891- 1991 P 990 P 10-11.*

22 *Public Drug Co V Breyerke cream Co*, 347, Pa 346, 32A 2d 413, 415.

d. Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.

e. Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.[23]

f. Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.

g. Where an appellant file an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.

h. Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent.[24]

41. Abuse of judicial process is a term generally applied to a proceeding which is wanting in bona fides and is frivolous vexations and oppressive. In the words of Oputa JSC, abuse of process can also mean abuse of legal procedure or improper use of the legal process.[25]Justice Niki Tobi JSC [26]opined that abuse of court process creates a factual scenario where a party is pursuing the same matter by two court process. In other words, a party by the two-court process is involved in some gamble, a game of chance to get the best in the judicial process.[27]

42. The point to underline is that a litigant has no right to purse paripasua more than once processes which will have the same effect at the same time or at different times with a view of obtaining victory in one of the process or in both. I have in previous decisions stated that litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. Litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks. If at all the Petitioner has a personal Interest in the dispute (which has not been disclosed), then, the least he could have done is to apply to be enjoined in the existing suit, but not to purport to file a new suit, worse still, purporting to advance the interests of the Petitioner in the other suit which is impermissible.

43. Multiplicity of actions on the same matter between the same parties even where there exists a right to bring the action is regarded as an abuse.[28] The abuse lies in the multiplicity and manner of the exercise of the right rather than exercise of right per se. The abuse consists in the intention, purpose

23 *Jadesimi vs. Okotie Eboh* (1986) 1NWLR (Pt 16) 264.

24 (2007) 16 NWLR (319) 335.

25 In the Nigerian case of *Amaefule & other v The State.*

26 *Agwusin vs Ojichie*

27 Ibid.

28 Ibid.

and aim of person exercising the right, to harass, irritate, and annoy the adversary and interfere with the administration of justice.[29]

44. Abuse of court process is an obstacle to the efficient administration of justice. Tinkering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which such abuse cannot complacently be tolerated consistent with the good order of society.

45. The concept of abuse of process extends to the use of the court's processes in a way that is inconsistent with two fundamental requirements arising in court proceedings. These are, first, that the court protects its ability to function as a court of law by ensuring that its processes are used fairly by State and citizen alike. The second is that unless the court protects its ability to function in that way, its failure will lead to an erosion of public confidence. The court's processes will be seen as lending themselves to oppression and injustice.[30]The concept of abuse of process overlaps with the obligation of a court to provide a fair trial. How can a fair trial be guaranteed when parties drag each other to court over issues which have been litigated and determined between the same parties? By now it's evident that the instant Petition fits the description of abuse of court process as delineated in the decided cases discussed above.

46. The infinite judicial resources should be deployed elsewhere in addressing deserving cases not already determined issues. The Petition having failed to surmount all the issues discussed above, I find and hold that the Preliminary Objection succeeds. The Petition is fit for dismissal. The Petition having collapsed, it follows that the application also falls. The upshot is that I dismiss both the Petition dated 30th July 2021 and the application also dated 30th July 2021 with costs to the Interested Party.

Orders accordingly

SIGNED, DATED DELIVERED AND ELECTRONICALLY AT MOMBASA THIS 21STDAY OF FEBRUARY 2022.

JOHN M. MATIVO

JUDGE

29 Ibid.

30 *Clark vs R* {2016} VSCA 96 at [14].