Musau & 2 others v Independent Electoral And Boundaries Commission & 2 others (Election Petition 2 of 2013) [2022] KEHC 10764 (KLR) (27 June 2022) (Ruling)

Neutral citation: [2022] KEHC 10764 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

ELECTION PETITION 2 OF 2013

GV ODUNGA, J

JUNE 27, 2022

BETWEEN

THOMAS MALINDA MUSAU ..... 1ST PETITIONER

STEPHEN NDAMBUKI MULI ..... 2ND PETITIONER

JOHN NTHULI MAKENZI ..... 3RD PETITIONER

AND

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 1ST RESPONDENT

LEONARD OKEMWA RETURNING OFFICER ..... 2ND RESPONDENT

STEPHEN MUTINDA MULE ..... 3RD RESPONDENT

RULING

1. By an application dated November 24, 2021, the 3rd Respondent herein seeks the following orders:

    1. That the 2nd and 3rd Petitioners notice of motion dated July 29, 2020 seeking *inter alia* stay of execution of all execution proceedings against the 2nd and 3rd Petitioners be dismissed for want of prosecution.

    2. That in the alternative the order issued on August 4, 2020 by Honourable Justice H F Ongundi staying all execution proceedings against the 2nd and 3rd Petitioners pending the hearing and determination of the 2nd and 3rd petitioners notice of motion dated July 29, 2020 be vacated and or lifted.

    3. That the 2nd Petitioners do pay the storage charges of Motor Vehicle registration number KBA 136H make Toyota Hilux from the date of attachment on June 8, 2020 to the date of its release from the storage yard at S K Dhahabu Motors Ltd.

4. That the 3rd Respondent be awarded costs of this Application.

2. According to the applicant, this court issued warrant of attachment given June 15, 2020 to P M Kamuya trading as Crater View Auctioneers to execute and recover costs of Kshs 2,621,789.00/= awarded to the 3rd Respondent by this Honourable court. Pursuant to the foregoing, the Auctioneer proclaimed and attached the 3rd Petitioners Motor Vehicle registration No KBA 136H on July 8. 2020 and advertised it for sale by public auction on August 5, 2020 in the standard newspaper of July 27, 2020.

3. Consequently, the 2nd and 3rd Petitioners filed their application dated July 29, 2020 so as to prevent the sale of the aforementioned Motor Vehicle which application was placed before Ongudi, J on August 4, 2020 and the Judge granted an order for stay of all execution proceedings against the Applicants pending the hearing and determination of the Application.

4. It was averred that since the grant of the exparte orders, the 2nd and 3rd Petitioners have never fixed their application for hearing for a period of about sixteen (16) months and the 3rd Respondent has suffered and continues to suffer great prejudice and injustice since he cannot execute to recover costs awarded by this court on May 22, 2018.

5. It was noted that upon the collection of Motor Vehicle KBA 136H by Mr P M Kamuya, the same is being held at S K Dhahabu Motors storage yard at Kshs 500,000/= per day which storage charges continue to accumulate each day hence it is fair and just for the 2nd and 3rd Petitioners who are responsible for the said high storage charges due to their indolence in prosecuting their application to be ordered to pay the same.

6. On behalf of the Applicant, reliance was placed on *Utalii Transport Company Limited & 3 Others vs NIC Bank Limited & Another* Civil Case No 32 of 2010 and it was contended that sixteen (16) months have lapsed hence there has been an inordinate delay in prosecution the said Application. According to the applicant, the alleged failure by the 3rd Respondent's Advocates and or the 1st Petitioner's Advocates forward a copy of the petition to the 2nd and 3rd Petitioners' Advocate is not sufficient reason as to why the 2nd and 3rd Petitioner delayed in prosecuting their application since a litigant ought to always remain the driver of his or her case.

7. It was submitted that if indeed the 2nd and 3rd Petitioners were interested in prosecuting their Application, they ought to have expeditiously secured a mention date before this court for further direction on that Application. Accordingly, the said 2nd and 3rd Petitioners have been indolent in prosecuting their Application and they cannot shift blames on other Advocates since it was their duty to ensure that they take steps to prosecute the Application.

8. It was submitted that failure to prosecute the said Application demonstrates that the 2nd and 3rd Petitioners are no longer interested in prosecuting the same and by dint of Order 17 Rule 2 (1) of the *Civil Procedure Rules, 2010*, the Application is ripe for dismissal for want of prosecution. The applicant submitted that he has suffered and continues to suffer great prejudice and injustice since he cannot execute to recover costs awarded by this court.

9. It was urged that the best order for the interest of justice is for this Honourable court to dismiss the Application dated July 29, 2020 since the 2nd and 3rd Petitioner have demonstrated lack of interest in prosecuting it. According to the Applicant, the said Application has been parked in the court's registry with the intention to obstruct expeditious course of justice and to create a false sense of backlog of cases hence amounting to abuse of court process.

10. The Respondents did not respond to the application.

Determination

11. I have considered the issues raised herein. It is true that on August 4, 2020, more than 1 and ½ years ago, Ongudi, J considered the application dated July 29, 2020 and grant a temporary stay of execution pending inter partes hearing thereof. Todate the said application has not ben prosecuted and the 2nd and 3rd Petitioners who filed the same have not offered any explanation for not prosecuting the same.

12. There is no doubt that this Court tis clothed with inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of its process prevent an abuse of its process. As appreciated by Kimaru, J in *Rev. Madara Evans Okanga Dondo vs Housing Finance Company of Kenya* Nakuru Hccc No. 262 of 2005:

> " The court will always invoke its inherent jurisdiction to prevent the abuse of the due process of the court. The jurisdiction of the court, which is comprised within the term "inherent", is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of the substantive law; it is exercisable by summary process, without plenary trial, it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of the court. The inherent jurisdiction of the court enables the court to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process. In sum, it may be said that the inherent jurisdiction of the court is virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."

13. In *Meshallum Wanguhu vs. Kamau Kania* Civil Appeal No. 101 of 1984 1 KAR 780 [1987] KLR 51; [1986-1989] EA 593, Hancox, JA (as he then was) emphasised that it is a residual jurisdiction, which should only be used, in special circumstances in order to put right that which would otherwise be a clear injustice. Such special circumstances include where the process of the Court is being abused

14. This jurisdiction, though reserved under section 3A of the *Civil Procedure Act*, is not a jurisdiction conferred by section 3A of the *Civil Procedure Act* as such but merely reserved thereunder. In *First American Bank of Kenya Ltd vs Gulab P Shah & 2 Others* Nairobi (Milimani) HCCC No 2255 of 2000 [2002] 1 EA 65 it was appreciated that the law is not that the High Court is only vested with inherent power and jurisdiction to prevent abuse of the Court process or to further the ends of justice only in matters falling within the *Civil Procedure Act* and Rules but that the Court is clothed with inherent powers and jurisdiction all the time in all causes irrespective of legislative or other juridical foundations of any such cause or matter before it as the juridical root of the Court's inherent power does not lie in section 3A of the *Civil Procedure Act* but in the nature of the High Court as a Superior Court of judicature.

15. The fact that the courts have inherent power was appreciated by Musinga JA, when he observed in the case of *Equity Bank Limited vs West Lnk Mbo Limited* [2013] eKLR, that inherent power is the

authority possessed by a Court implicitly without it being derived from the *Constitution* or statute which power enables the judiciary to deliver on their constitutional mandate.

16. In *Bremer Vulcan Schiffbar and Maschinen Fabrick vs. South Indian Shipping Corporation Ltd* [1981] AC 909, it was noted that:

> " Lord Diplock in relation to the inherent powers of the High Court, typified such powers as enabling the court to take necessary actions to maintain its character as a court of justice. According to Lord Diplock,
>
> "It would dampen the constitutional role of a court if as a court of justice it were not armed with power to prevent its process being misused, in such a way as to diminish its capability to arrive at a just decision of the dispute."

17. In *Kenya Bus Services Ltd & Others vs Attorney General and Others* [2005] 1 EA 111; [2005] 1 KLR 743 it was held:

> " It is trite law that an ex parte order can be set aside by the judge who gave it or by any other judge. The Civil Procedure Rules provide for this. Our Constitution does assume the existence of supportive Civil Procedure regime in so far as the same is not inconsistent with the *Constitution*. There is nothing inconsistent with the *Constitution* in the act or principle of setting aside of *ex parte* orders for good reasons. If an order obtained in a Constitutional application is incompetent or improperly obtained there cannot be any valid reason why the court would not have the jurisdiction to set it aside. Setting aside would be properly justified on grounds of doing justice and fair play and good administration of justice and therefore in furtherance of public policy...Where there is no specific provision to set aside the courts power or jurisdiction would spring from the inherent powers of the court. Whereas ordinary jurisdiction stems from the Act of Parliament or statutes, the inherent powers stem from the character or the nature of the court itself – it is regarded as sufficiently empowered to do justice in all situations. The jurisdiction to exercise these powers was derived, not from statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason such jurisdiction has been called "inherent". For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent the process being obstructed and abused. Such a power is intrinsic in a superior court, its very lifeblood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction, which is inherent in a superior court of law, is that which enables it to fulfil itself as a court of law. The judicial basis of this jurisdiction is therefore the authority of the Judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner. The need to administer justice in accordance with the *Constitution* occupies an even higher level due to the supremacy of the *constitution* and the need to prevent the abuse of the Constitutional provisions and procedure does occupy the apex of the judicial hierarchy of values. Therefore the Court does have the inherent powers to prevent abuse of its process...It has the same power to set aside ex parte orders, which by their very nature are provisional." See *The Reform of Civil Procedure Law and Other Essays in Civil Procedure* (1982) By Sir Isaac J H Jacob and *WEA Records Limited vs Visions Channel 4 Limited & Others* (1983) 2 All ER 589; *R vs Land Registrar Kajiado & 2 Others Ex Parte John Kigunda* HCMA No 1183 of 2004.

18. As was held by the Court of Appeal in *Safaricom Limited vs. Ocean View Beach Hotel Limited & 2 Others* Civil Application No. 327 of 2009 while citing I H Jacob, *The Inherent Jurisdiction of the Court* (1770) Current Legal Problems:

> " The essential character of a Superior Court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a Superior Court; it is its very lifeblood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction which is inherent in a Superior Court of law is that which enables it to fulfil itself as a court of law. The juridical basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner."

19. The circumstances under which this power is invoked were reiterated by Kimaru, J in *Stephen Somek Takwenyi & Another vs David Mbuthia Githare & 2 Others* Nairobi (Milimani) HCCC No 363 of 2009 as hereunder:

> " This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilised legal process it is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract res judicata rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it".

20. I associate myself with the holding in *Karuri & Others vs. Dawa Pharmaceuticals Company Limited and Others [2007] 2 EA 235* that nothing can take away the courts inherent power to prevent the abuse of its process by striking out pleadings or striking out a frivolous and vexatious application.

21. Dealing with what constitutes abuse the Court of Appeal in *Muchanga Investments Limited vs Safaris Unlimited (Africa) Ltd & 2 Others* Civil Appeal No 25 of 2002 [2009] KLR 229 expressed itself as hereunder:

> " A court of law would not be entitled in our view to abdicate its cardinal role of making a determination. Section 57(8) contemplates a speedy process to have the rights of both the caveator and caveatee determined and not a protracted trial. In our view, the often quoted principle that a party should have his day in court should not be taken literally. He should have his day only when there is something to hear. No party should have a right to squander

judicial time. Hearing time should be allocated by the court on a need basis and not as a matter of routine.

Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice.

We have no doubt that what is before us is a matter that could have been determined summarily and the matter finalized. We are certain this is what is contemplated by section 57 of the Registration of Titles Act cap 281 and also Order 36 of the *Civil Procedure Rules*.

We approve and adopt the principles so ably expressed by both Lord Roskil and Lord Templeman in the case of *ASHMORE v CORP OF LLOYDS* [1992] 2 ALL E.R 486 at page 488 where Lord Roskil states:

"It is the trial judge who has control of the proceedings. It is part of his duty to identify crucial issues and to see they are tried as expeditiously and as inexpensively as possible. It is the duty of the advisers of the parties to assist the trial judge in carrying out his duty. Litigants are not entitled to the uncontrolled use of a trial judge's time. Other litigants await their turn. Litigants are only entitled to so much of the trial judges' time as is necessary for the proper determination of the relevant issues."

At page 493 of the same case Lord Templeman delivered himself thus:

..."an expectation that the trial would proceed to a conclusion upon the evidence to be produced is not a legitimate expectation. The only legitimate expectation of any plaintiff is to receive justice. Justice can only be achieved by assisting the judge."

To underscore the point that the learned judge should not have dismissed the application to strike out, it is important to touch on the law relating to Originating Summons.

This Court, in the case of *Mucheru v Mucheru* [2002] 2 EA 455 held that the procedure of Originating Summons is intended to enable simple matters to be dealt with in a quick and summary manner. Surely an inquiry of rights pertaining to caveat is not a complicated matter. This Court has also in a stream of authorities, approved Sir Ralph Windham CJ"s holding in *Saleh Mohammed Mohamed v PH Saldanha 3 Kenya Supreme Court* (Mombasa) Civil Case Number 243 of 1953 (UR) where his Lordship said:-

" Such procedure is primarily designed for the summary and "ad hoc" determination of points of law construction or of certain questions of fact, or for the obtaining of specific directions of the court such as trustee administrators, or (as here) the courts own executive officer. That dispatch is an object of the proceedings is shown by Order XXXVI, which provides that they shall be listed as soon as possible and be heard in chambers unless adjourned by a judge into court."

In the case of *Fremar Construction Co Ltd v Mwakisiti Navi Shah* 2005 e KLR at page 6 where the Court said:-

" Trials are not merely held to glorify the hallowed principle that disputes ought to be heard and determined on oral evidence in open court. Unless a trial is on discernable issues it would be farcical to waste judicial time on it."

Finally, the third point is, whether in the circumstances the respondents had abused the process of the court. We must therefore determine if, in the circumstances the Originating Summon as framed, constituted an abuse of the court process. In this connection, we are

greatly concerned that even after Mr Church had admitted that his occupation or possession was based on a tenancy he still did use the 1st respondent company to file an Originating Summons and claim a purchasers interest and also claim as an adverse possessor. In our view he, knowingly and dishonestly used the legal process to accomplish an ulterior purpose to that of the court process, which is to protect the interests of justice. We are of course aware that we cannot comprehensively list all possible forms of abuse of court process and that we cannot formulate any hard and fast rule to determine whether in any given facts, abuse is to be found or not, but in the circumstances of this case we do think that since the Originating Summons was instituted in the face of the admission of tenancy, this, in our view, does constitute an abuse of the court process. The 1st respondent and Mr Church did manifestly exploit the process whereas it was in our view clear to them that they lacked good faith in instituting the Originating Summons thereby causing prejudice and delay. The action was also wanting in bona fides and was oppressive to the appellant. All these in our view constitute abuse of process.

To re-inforce the point, abuse of process has been defined in Wikipedia, the free encyclopedia:

> " The person who abuses process is interested only in accomplishing some improper purpose that is collateral to the proper object of the process, and that offends justice."
>
> In *Beinosi v Wiyley* 1973 SA 721 [SCA] at page 734F-G a South African case heard by the Appeal Court of South Africa, Mohomad CJ, set out the applicable legal principle as follows:-
>
> "What does constitute an abuse of process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of "abuse of process." It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective."
>
> Again the Court of Appeal in Abuja, Nigeria in the case of Attahiro v Bagudo 1998 3 NWLL pt 545 page 656, stated that the term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it.

In the Nigerian Case of *Karibu-Whytie J Sc in Sarak v Kotoye* (1992) 9 NWLR 9pt 264) 156 at 188-189 (e) the concept of abuse of judicial process was defined:-

> " The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice ..."
>
> The same Court went on to give the understated circumstances, as examples or illustrations of the abuse of the judicial process:-

(a) Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action 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 courts 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 a respondent's notice.

(d) (sic) meaning not clear))

(e) Where there is no loti of law supporting a Court process or where it is premised on frivolity or recklessness."

22. It cannot be gainsaid that a party who moves the Court ex parte and after getting temporary orders goes to sleep and fails to fix the matter for inter partes determination abuses the process of the court. To invoke the court process for the purposes of achieving ends for which it is not meant clearly amounts to abuse of the court process. To invoke ex parte jurisdiction of the court to obtain orders and then treat the same as permanent orders cannot be anything but abuse of the process of the Court. A court of law ought not to be turned into a parking lot for cases whose movers are not prepared to proceed with expeditiously or to buy time or gain some undeserved mileage or advantage. If that is brought to the attention of the Court the Court must bring to an end the abuse of its process and the culprit must bear the consequences. One of the circumstances giving rise to abuse of court process as identified in *Satya Bhama Gandhi vs. Director of Public Prosecutions & 3 others* [2018] eKLR, involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party and includes where the application is brought by a desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent. That is clearly the position in the instant application.

23. In the result, I find merit in this application. Accordingly, I issue the following orders:

1. The 2nd and 3rd Petitioners notice of motion dated 29th July, 2020 seeking inter alia stay of execution of all execution proceedings against the 2nd and 3rd Petitioners be and is hereby struck out as being an abuse of the Court process.

2. That the 2nd and 3rd Petitioners do pay the storage charges of Motor Vehicle registration number KBA 136H make Toyota Hilux from the date of attachment on June 8, 2020 to the date of its release from the storage yard at S K Dhahabu Motors Ltd.

3. That the 3rd Respondent be awarded costs of this Application.

24. It is so ordered.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 27TH DAY OF JUNE, 2022.

G V ODUNGA

JUDGE

Delivered in the absence of the parties.

CA Susan**