



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CIVIL SUIT NO. E001 OF 2020

PETER KILONZO KIOKO.....APPLICANT

VERSUS

MONARCH INSURANCE CO. LTD.....RESPONDENT

AND

KISAKWA NDOLO KING`OKU(Sued as Legal Representative

of the Estate of Mwanika Kisakwa (deceased)...INTERESTED PARTY

RULING

1. According to the Plaintiff/Applicant herein, he took and paid for a third party insurance with the Defendant herein in respect of his Vehicle Registration No. KBB 772A under insurance cover policy number SLIM/0800/000012/2013 which vehicle was involved in an accident on 9th November, 2014 in which one **Mwanika Kisakwa** (deceased) died. Consequently, the interested party herein as his legal representative filed a suit in the Machakos CM's Court Civil Suit No. 59 of 2016 against the Plaintiff in which the Interested Party was awarded KShs. 1,559,500 plus costs and interests. During the primary suit the Defendant appointed the firm of Mogaka Omwenga as advocates in exercise of its subrogation rights to defend the Plaintiff but later the said law firm ceased from acting.
2. According to the Plaintiff, the Defendant, pursuant to sections 5 and 10 of the **Insurance (Motor Vehicle Third Party Risks) Act**, Cap 405 (the Act) is legally obliged to settle the said decretal sum. However, though the Defendant did not repudiate liability under the said contract of insurance or cancel or avoid the policy, it has failed or refused to settle the said claim thus abandoning the Plaintiff against whom execution is on the verge. As a result of the foregoing, the Plaintiff pursuant to section 10 of the said Act instituted these proceedings seeking declaratory orders, a suit which the Defendant has not responded to.
3. According to the Plaintiff, before the commencement of this suit the Plaintiff issued the Defendant with a statutory Notice and Notice of Intension to sue a declaration suit if they will not settle the interested parties claim in CMCC 59/2016.
4. By a Notice of Motion dated 7th October, 2020, the Plaintiff herein substantially seeks an order staying the execution of the said judgement and decree pending the hearing and determination of this suit.
5. According to the Plaintiff his claim against the Defendant is extremely meritorious with high probability of success and hence it would be in the interest of justice that the execution of the decree in the primary suit be stayed pending the determination herein. It was his case that since the interested party has already taken out a Notice to Show Cause against him, substantial harm will be occasioned to him unless the stay sought is granted. The Plaintiff averred that the reason why he has not settled the decretal sum in the primary suit is because he has neither funds nor property which can be sold to recover the decretal sum
6. In his replying affidavit, the interested party herein deposed that the judgement in the primary suit was delivered on 5th February, 2019 and to date the Plaintiff has not satisfied the same. It was disclosed that the Plaintiff herein on 17th August, 2018, lodged Civil Appeal No. 103 of 2018 in which he sought stay of the proceedings in the primary suit which application was dismissed on 9th November, 2018. It was further averred that the Plaintiff herein sought stay of judgement in Civil Appeal No. 31 of 2019 pending the hearing of the said appeal and that a conditional stay was granted but the said conditions were never complied with.
7. Based on legal advice, the Interested Party averred that one cannot seek a declaration in a matter when an appeal on quantum and liability is pending. Based on the matters stated in paragraph 6 above, it was contended that the present application is res judicata since related applications for stay of execution and proceedings were heard and determined by this Court and no appeals were filed against those

determinations. The Interested Party averred that the Plaintiff is being mean with the truth by failing to disclose the foregoing.

8. On behalf of the Plaintiff/Applicant, it was submitted that he will suffer substantial loss unless the orders are made this is so because the interested party has issued a notice to show cause and that before the notice to show cause, the interested party had attached another person's motor vehicles believing they belong to the Plaintiff and after the Hearing of the Objection proceedings the motor vehicles were released to the owner and the interested party changed the mode of execution to notice to show cause. It was submitted that the Applicant is an elderly man and if committed to civil jail and at this time of Corona Pandemic he will suffer as he has a bad health.

9. According to the Applicant although he proposed to the interested party to allow him to pay the decretal sum by monthly installment of Ksh30,000 the interested party refused the offer and is pushing for the Applicant to be sent to civil jail.

10. It was submitted that since the Applicant has requested for entry of default judgement, this Court ought to allow him to prove his case against the Defendant. In support of this submission the Applicant relied on Xplico Insurance Company Limited vs. Mary Nthambi Mutua [2019] eKLR in which the Court cited the decision of the Court of Appeal in the case of Justus Mutiga & 2 Others vs. Law Society of Kenya & Another [2018] eKLR where the Court of appeal held that:

“limiting the compensation payable by the underwriter who has received premiums; particularly in the face of an innocent third party who is armed with a court judgment, is unjustifiable. It offends the very essence of insurance; which is to ensure mitigation against risks that result in loss. In particular, it defeats the very objective of compulsory third party insurance cover, if an innocent victim is left to recover the bulk of his claim against the insured personally.”

11. It was submitted that this application has been made without unreasonable delay as immediately the Defendant was notified of the lower court judgment and refused to pay the Plaintiff filed this suit and the present application. The Applicant expressed his willingness to give a bank guarantee as security for the due performance of the decree or order as may be ultimately be binding on him.

12. It was submitted that the Applicant is a pauper as he stopped the sand harvest business after his motor vehicle was involved in an accident and the motor vehicle was a written off after the accident and since the insurance did not compensate him of the motor vehicle he stopped the business and as such he cannot afford to deposit the decretal sum in court. In this regard, he relied on the case of Focin Motorcycle Co. Limited vs. Ann Wambui & Another [2018] eKLR in which the court relied in the case of Arun C Sharma vs. Ashana Raikundalia T/A Rairundalia & Co. Advocates and stated that:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor...Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

13. It was submitted that the Applicant has shown a sufficient cause for the orders to be granted. According to the Applicant, in light of the overriding objective stipulated in sections, 1(A) and 1(B) of the *Civil Procedure Act* the court is not limited to the provisions of Order 42 Rule 6 of the *Civil Procedure Rules* as the court is enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act* or in the implementation of any of its provisions.

14. On behalf of the Interested Party, it was submitted that the plaintiff/applicant filed an appeal no. 103/2018 on 17th August, 2018 after he was refused an adjournment which appeal is still pending. In the said appeal the applicant filed a Notice of Motion for stay of proceedings pending the hearing of the appeal and on 9th November, 2018 **Justice Kemei** dismissed the application for stay of proceedings and no appeal was filed against the decision.

15. After the judgement the subject of this declaratory suit in CMCC no. 59/2016, the applicant was aggrieved on both Liability and Quantum and he filed Machakos Civil Appeal No. 31/2019 and a Notice of Motion for stay of execution. This court granted a stay to the applicant on condition that half of decretal sum to be paid while the other half be deposited in an interest earning account. However, the applicant failed to comply and obey the court orders and the application for stay stood dismissed automatically. It was submitted that the applicant having refused to comply with conditional stay granted by this Court waited until when the interested party/respondent moved the court for execution is when the declaratory suit was filed. In the Interested Party's view, the orders sought are in vain and cannot be granted for reasons that the declaratory suit is prematurely filed since the judgement the subject of the declaratory suit was appealed against in Civil Appeal No. 31/2019 and the appeal has not been heard to date. According to the Interested Party, unless and until the appeal on Liability and Quantum is heard and determined, the insurance company at this moment is under no obligation to pay any money to indemnify the applicant.

16. It was submitted that Civil Appeal No. 103/2018 and 31/2019 involved the applicant and the interested party respondent. The prayer for stay of proceedings and stay of execution in this declaratory suit were heard substantially by competent courts and determined. The present application by the applicant is now res judicata and an abuse of the court process and should be dismissed with costs.

Determination

17. I have considered the issues raised in this application.

18. In this case it was contended that this application is res judicata. It is contended that the plaintiff/applicant filed an appeal no. 103/2018 on 17th August, 2018 after he was refused an adjournment which appeal is still pending. In the said appeal the applicant filed a Notice of

Motion for stay of proceedings pending the hearing of the appeal and on 9th November, 2018 **Justice Kemei** dismissed the application for stay of proceedings and no appeal was filed against the decision.

19. In the case of **Lotta vs. Tanaki [2003] 2 EA 556** it was held as follows:

“The doctrine of res judicata is provided for in Order 9 of the Civil Procedure Code of 1966 and 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. The scheme of section 9 therefore contemplates five 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.”

20. It is clear that in the earlier application what was sought was an application for stay of proceedings pending an appeal against a decision declining an adjournment. By then no judgement had been entered against the Applicant herein. Accordingly, the matter which was the subject matter of the earlier application cannot be said to be the same as the subject matter of the instant application since the circumstances have since changed. In **Kanorero River Farm Ltd. & 3 Others vs. National Bank of Kenya Limited Nairobi (Milimani) HCCC NO. 699 of 2001 [2002] 2 KLR 207**, the defendant chargee had initially sought to exercise its statutory power of sale over the properties belonging to the plaintiffs and the plaintiffs filed a suit challenging the validity of the statutory notices and sought an injunction restraining the defendant. The parties later recorded a consent by which they agreed to have the application settled and the defendant be at liberty to issue fresh notices. The defendant thereafter issued fresh notices of their intention to exercise its statutory power of sale and the plaintiff once again filed suit challenging the validity of those statutory notice, claiming that the statutory power of sale had not arisen and that the intended sale was in contravention of the mandatory provisions of the Auctioneers Rules. The defendant opposed the application on the grounds that the issue was *res judicata* and that the application was incompetent. **Ringera, J** (as he then was) held as follows:

“The question is whether in those circumstances the plaintiffs could institute a fresh application for interlocutory relief. In the Court’s judgement provided the fresh application is grounded on new facts, which could not have been relied on in the earlier application, it would not be precluded by the doctrine of *res judicata*. That is precisely the case here. The consent order allowed the defendant to serve fresh statutory notices... A new factual situation was created. It could not have been the intention of the parties when they recorded the consent and the law itself could not possibly contemplate that those fresh notices and other consequential steps taken pursuant to them could not be challenged on proper legal grounds. If the opposite were the case, the defendant would have in effect been given *carte blanche* to realise its security without necessarily complying with all the necessary and pertinent legal requirements provided it had issued fresh notices. It would have been permissible for it, for example, to issue defective notices or flout with impunity the provisions of the Auctioneers Rules, 1997. No court of equity would countenance that. A fundamental assumption of the consent order was that competent statutory notices would be served and the defendant would comply with the law. In the circumstances of this case, the doctrine of *res judicata* does not preclude the application now before the court.”

21. In **Mburu Kinyua vs. Gachini Tuti [1978] KLR 69; [1976-80] 1 KLR 790** and **Churanji Lal & Co vs. Bhaijee (1932) 14 KLR 28** it was held that:

“However, caution must be taken to distinguish between discovery of new facts and fresh happenings. The former may not necessarily escape the application of the doctrine since parties cannot by face-lifting the pleadings evade the said doctrine. In the case of *Siri Ram Kaura vs. M J E Morgan* Civil Application No. 71 of 1960 [1961] EA 462 the then East African Court of Appeal stated as follows:

‘The principle of estoppel per *rem judicatam* may apply to a decision made in the course of execution proceedings and not in a suit. It may be assumed that the principle would apply to other interlocutory applications. The binding force of the previous judgement depends not upon the provision of the Indian Act (which corresponds to section 7 of the Kenya Civil Procedure Ordinance); but upon general principles of law...The general principle is that a party cannot in a subsequent proceeding raise a ground of claim or defence which has been decided or which, upon the pleadings or the form of issue, was open to him in a former proceeding between the same parties. The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of *res judicata*...The law with regard to *res judicata* is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in a litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show you that this is a fact which entirely changes the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have been ascertained by me before...The point is not whether the respondent was badly advised in bringing the first application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when he made his first application. The admission by the appellant that he was without assets and could not pay the cost was a fact which entirely changed the aspect of the case, and the respondent could not, by reasonable diligence, have discovered that fact when he made the first application for security for costs because the appellant could not then be found: the officers of the court had failed to find the appellant and the respondent did not know where he was. It has not been suggested, or if it has, there is no evidence to support the suggestion, that the respondent could have discovered whether the appellant had or had not assets sufficient to pay the costs without interrogating the appellant. There was no receiving order in bankruptcy or anything of that kind which a search would

have brought to light. The circumstances at the date of the first application were that the appellant's whereabouts were unknown and it was not known to the respondent and could not by reasonable diligence be ascertained whether he could or would not pay the costs: the circumstances at the date of the second application were that he had been traced and had admitted on oath that he had no assets and could not pay. That was an entire change in circumstances and the principle of *res judicata* did not prevent the learned Vice-President from making the order which he made on the second application...The power to order security for payment of costs under rule 60 of the Court of Appeal Rules is a discretionary power which, under the rule, may be exercised at any time. It is, of its nature, a discretion intended to be exercised according to the circumstances existing at the time of the hearing of the application and can be exercised again if the circumstances change materially.”

22. In my view the fact that the Applicant filed an application in appeal no. 103/2018 for stay of proceedings pending the hearing of the appeal against the denial of adjournment does not render the present application *res judicata*.

23. Based on the same reasoning, the fact that the applicant's application for stay pending appeal against the finding in CMCC no. 59/2016 on both Liability and Quantum in Machakos Civil Appeal No. 31/2019 does not render this application *res judicata* since the substance of the two applications were different. I will however return to the matter later in this ruling.

24. I have considered the application, the affidavits both in support of and in opposition to the application herein as well as the submissions filed. It is clear that what the Applicant seeks in this application is to stay execution of the decree in the primary suit pending the determination of this suit. The application is however predicated, *inter alia*, upon section 1A and 1B of the **Civil Procedure Act** and Order 22 of the **Civil Procedure Rules**. Sections 1A and 1B of the **Civil Procedure Act** provide for the overriding objective of the **Civil Procedure Act** and states as follows:

1A(1) The overriding objective of this Act and the rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The Court shall, in exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

1B For the purpose of furthering the overriding objective specified in section 1A, the court shall handle all matters presented before it for the purpose of attaining the following aims-

(a) the just determination of the proceedings;

(b) the efficient disposal of the business of the court;

(c) the efficient use of the available judicial and administrative resources;

(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(e) the use of suitable technology.

25. To my mind the overriding objective does not create a cause of action. As was held by **Lord Woolf** in **Swain v. Hillman [2001] 1 All ER 91** at pp 94 and 95:

"It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and, I would add, generally, that it is in the interests of justice. If a claimant has a case which is bound to fail, then it is in the claimant's interests to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know this as soon as possible...Useful though the power is under Part 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial. As Mr Bidder put it in his submissions, the proper disposal of an issue under Part 24 does not involve the judge conducting a mini trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily."

26. Therefore, where there is no cause of action or no real prospect of success in a suit, the overriding objective cannot be invoked to sustain proceedings. Similarly, it cannot be invoked to terminate an otherwise valid claim. In this case nowhere in sections 1A and 1B of the **Civil Procedure Act**, is there a power to stay execution in matter that has been heard and determined pending the determination of a new suit.

27. The same position applies to Article 159(2)(d) of the Constitution. As was held by the Supreme Court in **Michael Mungai vs. Housing Finance Co. (K) Ltd & 5 other [2017] eKLR**:

“We hasten to add that before us is not an issue that can be wished away by the provisions of Article 159 of the Constitution, as mere technicalities. Before a Court of law can invoke Article 159 of the Constitution and focus on substantive justice, the Court must at the first instance be properly moved and there must be before it a legitimate and cognizable cause of action. In

the case of *Raila Odinga v I.E.B.C & Others (2013) eKLR*, this Court said that Article 159(2)(d) of the Constitution simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the court. We are unable to see before us a prima facie cause of action that can warrant invocation of Article 159 of the Constitution for the question, what is it that is before us" remains unanswered."

28. I associate myself with the decision of the Court of Appeal (Kiage, JA) in *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR* that:

"I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned."

29. As regards Order 22 of the *Civil Procedure Rules*, the closest provision is rule 25 thereof which provides as follows:

Where a suit is pending in any court against the holder of a decree of such court in the name of the person against whom the decree was passed, the court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided

30. What this provision means is that A files a suit against B and obtains a judgement therein. However, B files a separate suit against A. B is in those circumstances entitled to seek that pending the hearing and determination of the subsequent suit, the execution in the earlier suit be stayed. That is not the scenario in the instant matter. The applicant herein is not seeking judgement against the interested party. It is seeking judgement against its insurer, the Defendant. There is no judgement which the insurer has obtained against the applicant which is sought to be stayed in these proceedings. It follows that the said provision is inapplicable.

31. However, whereas an insured may well be entitled to seek a declaration that its insurer is entitled to settle the claims covered under the insurance policy, that statutory right of action does not bar a person who is injured from executing the decree issued in his favour against the insured directly.

32. As I have held hereinabove, the fact that the applicant's application for stay pending appeal against the finding in CMCC no. 59/2016 on both Liability and Quantum in Machakos Civil Appeal No. 31/2019 does not render this application res judicata since the substance of the two applications were different. This Court cannot however close its eyes to the fact that by granting the present application, the applicant will in effect obtain a stay of execution of the judgement in CMCC no. 59/2016 so that he would have achieved through the backdoor what he failed to achieve through his failure to comply with the conditions imposed on him in order to enjoy stay of execution.

33. In my view, to grant the orders sought in those circumstances would amount to a grave abuse of the process of the Court. In *Mitchell and Others vs. Director of Public Prosecutions and Another (1987) LRC (const) 128*, it was held that:

"...in civilized society legal process 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, it can be used improperly, and so abused. An instance of this is where 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 recognize as legitimate use of that process. But the circumstance in which abuse of process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes extrinsic evidence only. But if and when it is shown it 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 instance. Others attract the 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 proceedings, or put an end to it. This inherent power has been used time and again to put a summary end to a process which seeks to raise and have determined an issue which has been decided against the party issuing it in earlier proceedings between the parties."

34. As was held by the Court of Appeal in *Muchanga Investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 Others Civil Appeal No. 25 of 2002 [2009] KLR 229*:

"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 Summons 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 iota of law supporting a Court process or where it is premised on frivolity or recklessness.”

35. In dealing with the issue of abuse of the process of the Court **Kimaru, J** in *Stephen Somek Takwenyi & Another vs. David Mbuthia Githare & 2 Others Nairobi (Milimani) HCCC No. 363 of 2009* expressed himself as follows:

*“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.”*

36. Similarly, **Kimaru, J** in *Rev. Madara Evans Okanga Dondo vs. Housing Finance Company of Kenya Nakuru Hccc No. 262 of 2005* held:

“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.”

37. In *Re Jokai Tea Holdings Ltd. (1993) 1 ALL ER 630* it was held that:

“Where the Court has to decide what consequences should follow from non-compliance with an order that a pleading be struck out unless further and better particulars are served within a specified time, the relevant question is whether such failure to comply with the “unless” order is intentional and contumacious...The court should not be astute to find excuses for such failure since obedience to such preemptory orders is the foundation of its authority, but if the non-complying party can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances, the failure ought not be treated as contumacious and ought not to disentitle him to the rights which he would otherwise have enjoyed.”

38. The applicant contends that he is an elderly man and if committed to civil jail and at this time of Corona Pandemic he will suffer as he has a bad health. He further states that he is unable to afford to settle the decretal sum and has no property capable of being attached. In my

view, an order for committal to jail is not automatic. It therefore follows that the course of committal to civil jail will only be resorted to in appropriate cases and the guidelines for determining whether a particular case is appropriate for such course must necessarily depend on whether the conditions stipulated under section 38 of the *Civil Procedure Act* have been fulfilled. The course to be adopted by the Court in such circumstances was explained in **Braeburn Limited vs. Gachoka and Another [2007] 2 EA 67** as follows:

“Rules 18 and 32 of Order 21 of the Civil Procedure Rules do meet and in a very special way in relation to a debtor surpass the standard laid down in the Constitution for the deprivation of a person’s liberty. This is so because the deprivation of a person’s liberty whether for contempt of court (under section 72(1)(b) of the Constitution), or for default to pay a money decree, is in the nature of criminal proceedings and for a person to suffer the loss of liberty, it must be in the words of that hackneyed phrase, be proved beyond reasonable doubt, that he has the means to pay but that he has refused and/or neglected to pay...To Conform with that high standard proof, the discretion conferred upon the court to either issue a warrant of arrest and instead issue a notice calling upon the judgement to appear before the court on a day to be specified in the notice and show cause why he should not be committed to prison, must be construed, strictly, that is to say mandatorily, that upon an application by a decree holder for execution of a money decree by way of arrest and committal to prison the court to which an application is made for issue of a warrant of arrest shall in the instance first issue a notice to the judgement debtor to appear in court and show cause why he should not firstly be arrested, and secondly, committed to prison. That is the first step towards the execution of a decree for payment of money...The second step is the examination of the judgement debtor when he appears in court. Of course if he does not appear, the court issuing the notice in the first instance is at liberty to issue a warrant of arrest and if arrested, the judgement debtor may be detained in prison pending his appearance in court and may be released upon provision of security to ensure his attendance or appearance in court...If however the debtor appears to the notice to show cause, which is mandatory, in terms of the said Order 21, rule 35, or pursuant to his arrest and appearance before he can be committed to prison, it is the duty of the decree holder (who has sought the arrest and committal of the judgement debtor to prison) to satisfy the court that the judgement debtor is not suffering from poverty or any other sufficient cause and is able to pay the decretal sum that: (i) the judgement debtor, with the object or effect of obstructing or delaying the execution of the decree: (a) is likely to abscond or leave the local limits of jurisdiction of the Court; (b) has, after the institution of the suit, in which the decree was passed, dishonestly transferred, concealed or removed any party of his property or committed any other act of bad faith in relation to his property; or (ii) the judgement-debtor has or has had since the date of the decree , the means to pay the amount of the decree, or some substantial part thereof and refuses or neglects or has refused or neglected, to pay the same, but in calculating such means there shall be left out of account any property which is exempted from attachment, in execution of the decree; or (iii) that the decree is for a sum for which the judgement-debtor was bound in a fiduciary capacity to account (trustees or persons holding moneys in a professional capacity or in trust)...In essence, the judgement debtor should be examined in the manner envisaged in Order 21, rule 36 as to the debtor’s total wealth and indebtedness to determine the judgement debtor’s total ability or inability to pay and whether such inability to pay is from poverty or other sufficient cause. It is only after the court is satisfied of these matters, after subjecting the judgement-debtor to due process in the manner construed, the requirements of mandatory notice, before a warrant of arrest may be issued for his arrest and compulsion to attend or appear before a court can decree for payment of a money debt be executed upon a judgement debtor by way of arrest and committal to prison...The execution of a judgement decree by way of arrest and committal to prison is extreme in nature. It deprives a citizen of his liberty, to do so, the highest standards, that is to say, the constitutional safeguards as to due process by way of notice of intended execution of the decree by way of arrest and committal be given to the judgement debtor as a first step and as a second step, a due inquiry and satisfaction to the court, by the decree holder, as to judgement debtor’s ability to pay and refusal and/or neglect to pay, and therefore the necessity to punish him for contempt of a court order by depriving him of his liberty...It is clear under both section 38 of the Civil Procedure Act and Order 21, rule 35(1) that no judgement-debtor will, on account of his inability from poverty or other sufficient reason, be arrested and committed to prison...The section is not vindictive and the Court, in the exercise of its discretion would not order the imprisonment of a defaulting trustee unless it was likely to be productive of payment...”

39. It ought to be appreciated that the burden falls on the decree holder to prove that the conditions in section 38 of the *Civil Procedure Act* have been fulfilled. In my view that burden can only be satisfied by way of evidence in form of an affidavit. In other words, it is my view that a notice to show cause ought to be by way of a formal application supported by an affidavit to which the judgement debtor ought to respond so that the Court can make a determination as to whether the case is one fit for the invocation of the drastic remedy of committal to civil jail. Committal to civil jail is a very drastic remedy that ought to be granted only in cases where there is strict compliance with the provisions of the law. Before a person is committed the Court must be satisfied that that person was duly served and an opportunity of being heard afforded to him. To send a person to jail without being heard amounts to a breach of the rules of natural justice especially when the law casts the burden on the decree holder as it does in this case.

40. It is therefore my view that if the Plaintiff satisfies the Court in the primary suit on the allegations he makes herein, that Court may well not commit him to jail. In other words, the Plaintiff relies on speculations in order to obtain the orders he seeks herein.

41. In this case I find no merit in the application dated 7th October, 2020 which I hereby dismiss with costs.

Read, signed and delivered in open Court at Machakos this 18th day of January, 2021.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Mutinda Kimeu for Mr Tamata for the Plaintiff

Mr Musya for Mr A. K. Mutua for the Interested Party

