

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 360 OF 2016

**In the matter of Articles 1, 3 (1), 10, 47 (1), 50 (1), 261, 262 and 263, 47, 36 of the Constitution of the
Republic of Kenya**

and

In the matter of Articles 185, 186 and 187 of the Constitution of Kenya

and

In the matter of schedules 4 and 5 of the constitution of Kenya

Between

Zakayo Sang, Paul Koske, Benard Rono,

Paul Too, Reuber Terer, Philip Bii,

Daniel Mutai, Samuel Towett,

Richard Langat, Richard Kirui.....Plaintiff

Versus

The Attorney General.....1stRespondent

The Commissioner for Co-operative Development.....2ndRespondent

and

The Council of Governors.....1stInterested Party

Stegro Sacco Limitd.....2ndInterested Party

County Government of Bomet.....3rdInterested Party

RULING

1. This application brings to the fore a highly disturbing practice where by litigants file multiple suits in different courts over the same subject matter or substantially the same subject matter against the same parties hoping to get a favourable determination in one of them, a practice which constitutes abuse of judicial processes.

2. The court record shows that the petitioners in this petition were sued by the Respondents at the Co-operative Tribunal at Nairobi in C.T.C No. 253 of 2016. A decision was rendered against them by the Tribunal on 26th July 2016 in which the Tribunal restrained the petitioners herein their agents, servants

and or their employees or representatives from transacting business of the co-operative society.

3. Aggrieved by the said ruling, the petitioners herein filed an appeal in the high court of Kenya being appeal number 560 of 2016 and in the said appeal, the petitioners filed a notice of motion seeking *inter alia* an order staying the execution of the Tribunals ruling pending the hearing and determination of the appeal.

4. During the pendency of the appeal and the said application, the petitioners herein who are the appellants in the said appeal filed this petition. A casual examination of the petition reveals that the issues raised in the petition are substantially the same issues raised before the Tribunal and also the subject of the pending appeal and also the application referred to above. In fact prayer 7 of the petition expressly seeks a declaration that the ruling in question be declared to be of no effect, null and void *ab initio* and that the same be quashed.

5. I find the said prayer to be out rightly ridiculous because this court is not sitting on appeal and decisions of the Tribunal are challenged by way of appeal to the High court. Having filed an appealed in the High court, it was not necessary for the petitioners to file this petition attacking the same ruling under the guise of a constitutional petition, yet the petition does not raise any constitutional issues at all.

6. It is convenient to state that a constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute.[1] This court ought to discourage invocation of the constitutional process where there exists parallel or alternative statutory remedies. In *John Harun Mwau vs Peter Gastrol & 3 Others*[2] the court made the following observation:-

"Courts will not normally consider a constitutional question unless the existence of a remedy is dependent on it.....It is an established practice that where a matter can be disposed of without recourse to the constitution, the constitution should not be involved at all."

7. A justiciable controversy refers to an existing case or controversy that is appropriate or ripe for judicial determination, not one that is conjectural or merely anticipatory.[3]

8. Given the striking similarity of the facts disclosed in the petition and in the said appeal and the reliefs sought which include seeking to invalidate the ruling in question using a petition as opposed to an appeal, crucial questions do arise such as whether it is open for the petitioners to file two identical suits, seeking substantially identical reliefs and whether such conduct amounts to abuse of court process.

9. It is trite law that the court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused.[4]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. An 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."[5]

10. 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.[6] The situations that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-

(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.

(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.[\[7\]](#)

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

(g) Where an appellant files 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. [\[8\]](#)

11. Abuse of judicial process is a term generally applied to a proceeding which is wanting in *bona fides* and is frivolous, vexatious and oppressive.[\[9\]](#) Abuse of process can also mean abuse of legal procedure or improper use of the legal process.[\[10\]](#) Justice Niki Tobi JSC of Nigeria observed 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.[\[11\]](#)

12. It's settled law that a litigant has no right to pursue *paripassu* two processes which will have the same effect in two courts at the same time with a view of obtaining victory in one of the process or in both. Litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks. In my humble view, the two processes are in law not available simultaneously. The pursuit of the two processes at the same time constitutes and amounts to abuse of court/legal process.[\[12\]](#)

13. Thus, the multiplicity of actions on the same matter between the same parties even where there exist a right to bring the action is regarded as an abuse.[\[13\]](#) 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 and aim of person exercising the right, to harass, irritate, and annoy the adversary and interfere with the administration of justice.[\[14\]](#)

14. Turning to this case, I find no difficulty in concluding that the two cases, that this petition and the said appeal by the same petitioners, arising from the same set of facts and circumstances and seeking substantially the same reliefs amount to gross abuse of court process and on this ground alone I am inclined as I hereby do, to strike out this application for being an abuse of court process.

15. Turning to the merits of the application dated 21st November 2016, it is clear that prayer two of the said application seeks to stay the same order complained of in the appeal. Essentially, the applicant avers that paragraph 31 of the ruling undermines and is prejudicial to an application for stay pending in court being HCCA No. 560 of 2016, in that it implies that the said application had been dismissed without a hearing, which amounts to an error apparent on the face of the record.

16. Essentially, the applicant admits since the application in question was dismissed, inevitably the application before the High court seeking similar reliefs will fail.

17. While rendering the said Ruling, Muriith J in the ruling in question upheld a preliminary objection

raised by the Respondents and dismissed the petition. The core of the objection was that the issues raised in this petition were substantially the same issues pending in the above appeal. This is clearly captured in paragraph **18** of his Ruling.

18. It is important to note that the applicant is the County Government of Bomet. From the papers filed in court, it is clear that the interested party was not a party before the Tribunal nor is it a party in the appeal and one wonders how and why it seeks to set aside an order rendered in proceedings in which it was not a party.

19. I have carefully considered the application, grounds relied upon and submissions by the advocates and the core issue is whether the application meets the test for review. The High Court has a power of review, but the power must be exercised within the framework of section **80** Civil Procedure Act[15] and Order **45** Rule 1 of the Civil Procedure Rules, 2010.

20. Section **80** of the Civil Procedure Act[16] provides as follows:-

80. Any person who considers himself aggrieved-

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act,

May apply for a review of judgement to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

21. Order **45** Rule **1** of the Civil Procedure Rules, 2010 provides as follows:-

45 Rule 1 (1)Any person considering himself aggrieved-

(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) By a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay.”

22. If we construe the phrase "any person" to be wide enough to include the first interested party, the next test would be whether it has sufficient grounds to warrant this court to grant the orders sought.

23. Section **80** gives the power of review and Order **45** sets out the rules. The rules in my view restrict the grounds for review. In my view, the above rule lays down the jurisdiction and scope of review limiting it to the following grounds; **(a)** discovery of new and important matter or evidence which after exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; **(b)** on account of some mistake or error apparent on the face of the record, or **(c)** for any other *sufficient reason* and whatever the ground there is a requirement that the application has to be made without un reasonable delay.

24. Discussing what constitutes “*sufficient reason*” in an application for review, the Supreme Court of India in the case of *Ajit Kumar Rathvs State of Orisa & Others*[17] had this to say:-

“the power can be exercised on the application of a person on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression “any other sufficient reason” used in Order 47 Rule 1 means a reason sufficiently analogous to those specified in the rule”

25. A similar view was expressed by *Akiwumi & O’kubasu JJA* in the case of *The official Receiver and Liquidator vs Freight Forwarders Kenya Limited*[18] that “these words only mean that the reason must be one that is sufficient to the court to which the application for review is made and they cannot without at times running counter to the interests of justice ‘be limited to the discovery of new and important matters or evidence, or occurring of a mistake or error apparent on the face of the record”

26. I also find useful guidance in the decision of **Kwach, Lakha and O’kubasu JJA** in the case of *Tokesi Mambili and others vs SimionLitsanga*[19] delivered on 28th March 2003 where they held as follows:-

i. *In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.(Emphasis added)*

ii. *Where the application is based on sufficient reason it is for the Court to exercise its discretion.*

27. The allegation that the order will prejudice an existing application is not and cannot be a new matter or sufficient ground to grant a review. The court of appeal (Omolo, O’kubasu & Githinji JJA) In *Francis Origo & Another vs Jacob Kumali Mungala*[20] succinctly stated:-

‘In an application for review an applicant must show that there has been discovery of new and important matter or evidence which after due diligence was not within his knowledge or could not be produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason AND most importantly the applicant must make the application for review without unreasonable delay’

28. I am alive to the fact that the discretion donated to the court under section **80** of the Civil Procedure Act is unfettered, but for the discretion to be exercised in favour of the applicant, the application for review must be based on the grounds specified under Order **45** or on any sufficient reason.

29. I humbly find that the applicant has not demonstrated that there has been discovery of new and important matter or evidence which after due diligence was not within its knowledge or could not be produced at that time nor has it shown that there is some mistake or error apparent on the face of the record nor has he proved that there is any other sufficient reason to warrant the court to exercise its discretion in its favour.

30. In conclusion I find that this is not a proper case for this court to exercise its discretion in favour of the applicant and that the application before me does not satisfy the grounds for review. Accordingly, the application dated 21st November 2016 is hereby dismissed with costs to the petitioners, the Respondents and the second interested party.

Orders accordingly

Dated, Delivered and Signed at Nairobi this 24th day of July 2017

John M. Mativo

Judge

[1]<http://www.yourdictionary.com/constitutional-question>

[2]{2014}eKLR

[3] [Board of Optometry vs. Colet](#), 260 SCRA 88, July 30, 1996; [Gozun vs. Liangco](#); citing [Galarosa vs. Valencia](#), 227 SCRA 728, 737, November 11, 1993; [Office of the Ombudsman v. Judge Ibay](#), 364 SCRA 281, September 3, 2001.

[4] [Agnes Muthoni Nyanjui & 2 Others vs Annah Nyambura Kioi & 3 Others](#), Succ Cause no 920 of 2009

[5] [Black Law Dictionary, Sixth Edition Black, Henry Campbell, Black Law Dictionary Sixth Edition, Continental Edition 1891- 1991 P 990 P 10-11](#)

[6] [Public Drug Co V Breyerke cream Co](#), 347, Pa 346, 32A 2d 413, 415

[7] [Jadesimi V Okotie Eboh](#) (1986) 1NWLR (Pt 16) 264

[8] (2007) 16 NWLR (319) 335.

[9] In the words of **Oputa J.SC** (as he then was) in (1998) 4SCNJ 69 at 87.

[10] Ibid

[11] Supra Note 1

[12] Supra note 1

[13]Ibid

[14] Ibid

[15] Cap 21, Laws of Kenya

[16] Ibid

[17] 9 Supreme Court Cases 596 at Page 608

[18][Civil Appeal No. 235 of 1997](#); {1997} LLR 7356

[19]

[20] [Civil Appeal No. 149 of 2001](#); {201} LLR 4720, {2005} 2 KLR 307