



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**CIVIL DIVISION**  
**CIVIL CAUSE NO. 125 OF 2015 (O.S)**

**IN THE MATTER OF THE NJENGA KARUME TRUST REGISTERED TRUSTEES**

**AND**

**IN THE MATTER OF THE NJENGA KARUME TRUST**

**AND**

**IN THE MATTER OF THE TRUST IN THE WILL OF JAMES NJENGA KARUME  
(DECEASED)**

**BETWEEN**

**ALBERT KIGERA KARUME ..... 1<sup>ST</sup> PLAINTIFF**

**SAMUEL WANJEMA KARUME ..... 2<sup>ND</sup> PLAINTIFF**

**LUCY WANJIRU KARUME ..... 3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**KUNG’U GATABAKI & MARGARET NDUTA KAMITHI**

**(SUED AS TRUSTEES OF THE NJENGA KARUME TRUST ..... 1<sup>ST</sup>  
DEFENDANT**

**THE NJENGA KARUME TRUST REGISTERED TRUSTEED ..... 2<sup>ND</sup>  
DEFENDANT**

**AND**

**GRACE NJOKI NJENGA KARUME..... 1<sup>ST</sup> INTERESTED  
PARTY**

**JANE MUKUHI MATU ..... 2<sup>ND</sup> INTERESTED PARTY**

RULING

1. The late James Njenga Karume was a prominent politician and a businessman of no mean repute. He was a well known figure in Kenya. However, as with all human beings, who have to heed the decree in Ecclesiastes:3 decree that there is time for everything, a time to be born and a time to die, James Njenga Karume (hereinafter “**the deceased**”) died on 24<sup>th</sup> February, 2012 and left behind a huge estate. A Will that he left behind was propounded and proved on 3<sup>rd</sup> April, 2014 whereby the Family Court issued a Grant of Probate with written will on 5<sup>th</sup> April, 2014 to James Raymond Njenga, Stephen Ndung’u Karau and Francisca Wanjiku Kahiu. The deceased also left a Declaration of Trust dated 3<sup>rd</sup> May, 2011 incorporating the Njenga Karume Trust (hereinafter “**the Trust**”).
2. The Trust was incorporated through a Certificate of Incorporation registered under the relevant laws on 25<sup>th</sup> February, 2014, a day after his demise. According to that Certificate of Incorporation, The Registered Trustees of the Trust were the 1<sup>st</sup> Defendants in this suit. From the record, it would seem that the Plaintiffs in this suit have mounted a challenge against the Will of the deceased in the Family Court.
3. On 25<sup>th</sup> March, 2015 the Plaintiffs took out an Originating summons (hereinafter “**the O.S**”) seeking the removal of the 1<sup>st</sup> Defendants as the Trustees of the Trust. They set out six issues for determination in the said O.S. Together with the O.S, the Plaintiffs took out a Motion on Notice seeking various prohibitory and mandatory orders. When the matter came up ex-parte before Sergon J, the court was satisfied with the urgency of the matter and granted an ex-parte prohibitory order in terms of Prayer Nos. 3 and 5 of the Motion which were meant to prevent what was alleged to be wastage of the Trust properties. On 2<sup>nd</sup> April, 2015, the 2<sup>nd</sup> Defendant took out a Motion on Notice (hereinafter, “**the Motion**”) seeking to discharge the said ex-parte orders and to stay the proceedings herein on the grounds that the O.S and the Motion herein raise similar issues that are pending in **H.C Succession Cause No. 3102 of 2013**. Further on 15<sup>th</sup> April, 2015, the 1<sup>st</sup> Defendants took out a Preliminary Objection (herein “**the P.O**”) to the O.S on the grounds that this court lacks jurisdiction to entertain the suit. It is these two, the Motion dated 2/4/15 and the P.O that were argued before me on 24<sup>th</sup> June, 2015 and for which this ruling relate.
4. According to the P.O, this court lacks jurisdiction as the matter is complex, that the reliefs sought are not fit for determination by way of Originating Summons and that the O.S was a collateral attack on the **H.C Succession Cause No. 3102 of 2013**. The O.S was therefore an abuse of the court process. In his written and oral submissions, Mr. Oraro Senior Counsel for the 1<sup>st</sup> Defendant submitted that Order 37 Rules 1 and 2 of the Civil Procedure Rules were specific as to who can take out a summons under that order and for what reliefs; that the prayers and/or reliefs sought by the Plaintiffs in the O.S do not fall under the said provision of the law.
5. Mr. Oraro further submitted that Section 19 of the Civil Procedure Act provides that suits have to be filed as provided for by the rules and if not provided for, they are to be by way of Plaint; that the issues raised by the Plaintiffs can only be canvassed and be determined if brought by way of plaint where evidence could be tested through cross examination; that under Articles 25 and 27 of the Constitution of Kenya, the Defendants were entitled to a fair hearing and equal protection of the law by having the issues raised determined by way of Plaint. That this was not a mere technicality. The cases of **Kulsumbai Vs Abdulhussein (1957) EA 699** and **Bhari Vs Khan 1965 EACA 94** were cited in support of those submissions. That on the authority of **KCB Vs Oisebe (1982) KLR**, damages are supposed to be specifically claimed and proved but under an Originating Summons such as the one in this suit, the burden of proof shifts to the Defendants. To the extent that damages were sought in the O.S, the suit was fatally defective. In Mr. Oraro’s view, the O.S was not curable under Order 37 Rule 19 as that rule presupposes where a valid Originating Summons has been filed – which is not the case here. Counsel urged that since there

- was **Succession Cause No. 3102 of 2013** (hereinafter “**the Succession Cause**”) wherein the Plaintiffs were seeking similar reliefs, the O.S was an abuse of the court process. The cases of **Nishit Yogendra Patel Vs Pascale Mireille & Anor 2009 eKLR** and **Ismael Mboya & others Vs Mohammed Haji Isa KSM HCCC NO. 106 of 2003** were cited in support of that contention. Counsel therefore urged that the objection be upheld.
6. As regards the Motion dated 2/4/15, the same was supported by the Affidavit of one of the Trustees, Margaret Nduta Kamithi sworn on 2/4/15. It was deponed that the orders of 27/3/15 were obtained through deliberate deceit, misrepresentation or concealment of material facts as the same orders had been sought *ex parte* in the Succession Cause on 18/11/14 and denied; that this fact was not disclosed to the court when the Plaintiffs filed the present matter. That the Plaintiffs were engaged in forum shopping as two courts had now exercised their discretion differently; that the issues raised in the O.S are similar to those raised in the Summons dated 18/11/14 and 01/12/14, respectively in the Succession Cause. That the issues herein are therefore sub-judice making these proceedings to be an abuse of the court process. It was contended that the issues in this case are that the trustees are wasting the assets of the Trust; that the Trustees were neglecting the beneficiaries and were not consulting them and that the Trustees were overspending monies on themselves and employees. That all these issues were not true.
  7. It was further contended that the Plaintiffs failed to disclose that an *ex-parte* order had been sought to restrain the Management of Jacaranda Hotel from refurbishing Pizza Garden on 18/11/14; that the refurbishment was now complete; that various amounts had been disbursed to the beneficiaries and that the affidavits filed by the Plaintiffs contained falsehoods.
  8. In the written submissions and oral hi-lights in support of the Motion, Mr. Gatonye learned Counsel for the 2<sup>nd</sup> Defendant submitted that by filing the present proceedings the Plaintiffs were in abuse of the court process as the same sought similar orders as the application dated 18/11/14 filed in the Family Court; that a party should not be allowed to move from one court to another seeking similar orders. The case of **Muchanga Ltd Vs Safaris Unlimited(Kenya) Ltd (2009) eKLR** was cited in support of those submissions. In Mr. Gatonye’s view, since the issue of the succession of the estate of the deceased and the Trust feature in both proceedings, the matters were similar. The Plaintiffs had misled the court and should not be allowed to benefit therefrom. Counsel faulted the Plaintiffs for having obtained *ex-parte* orders in these proceedings without disclosing that similar orders had been sought and denied elsewhere. That the Plaintiffs had caused the court embarrassment through obtaining orders that had been denied in the Family Court whereby they had now obtained judicial advantage as against the Defendants. Counsel therefore urged that the application be allowed.
  9. The 4<sup>th</sup> Interested Party supported both the P.O and the 2<sup>nd</sup> Defendant’s Motion. Mr. Munyu, learned Counsel for the 4<sup>th</sup> Interested Party submitted that the 4<sup>th</sup> Interested Party was a party in the Succession Cause both as an executor of the Will of the deceased and a beneficiary of the Trust; that the Summons of 18/11/14 and the Motion of 25/3/15 contained the injunction to restrain the refurbishment of Pizza Garden Restaurant which prayer had been rejected by Achode J in the Succession Cause; that this fact had not been disclosed at the *ex-parte* stage. Counsel set out in his submissions what in his view were the similarity set out the similarity in the reliefs sought in both the motion of 25/3/15 and the summons of 18/11/14. It was urged on the authority of **Wangai Vs Mugambi & Anor (2013) 2 EA 474** that the present suit be stayed. Mr. Munyu further submitted that neither the existence of the Succession Cause nor the rejection of the prayer for injunction by the Family Court had been disclosed at the *ex-parte* stage yet they were material. Counsel urged that the P.O and the Motion be allowed.
  10. The PO and the 2<sup>nd</sup> Defendant’s Motion were strenuously opposed by the Plaintiffs and the 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Interested Parties. Lucy W. Karume swore a Replying Affidavit in opposition to the 2<sup>nd</sup> Defendant’s Motion. She stated that after a power point presentation of the Will and Trust at the offices of Iseme Kamau and Maema Advocates which was done after the demise of the deceased, the Plaintiffs were denied the copies thereof; that the children of the deceased had been denied information regarding the management of the assets under the Trust or the account thereof; that the children of the deceased were in the dark both regarding the Succession Cause and the running of the businesses under the will and that that is why they had given instructions to their Advocates to file for the revocation of the probate and seek other

- consequential orders in the Succession Cause; She deponed that this suit is as against the Trustees whilst in the Succession Cause, it was against the Executors of the Will; that the assets in both suits are different; that the 1<sup>st</sup> Defendant had filed an affidavit in the Succession Cause averring that the Family Court had no jurisdiction to deal with the matters touching on the Trust.
11. It was further deposed that the Defendants had kept the children of the deceased away from the operations of the businesses and assets of the Trust; that the main prayer in the Succession Cause is the revocation of the probate and the other prayers are only consequential. Lucy Karume denied the tabulation of the disclosures on allowances and accounts presented by the 2<sup>nd</sup> Defendant in its application. She detailed the wrongs and breaches allegedly committed by the Defendants which she stated were the basis for the suit herein. She finally deponed of the deceased poor state of health towards the last days of his life when most of the legal documents under challenge were allegedly executed.
12. Mr. Musyoka and Mr. Munga appearing for the Plaintiffs submitted that the suit before court is about the Trust which is properly brought by way of Originating Summons under Order 37; that the questions set out in the O.S for determination relate to the Trust which is in accordance with Order 37 Rule 1(a) (c) (e) and (g) of the Civil Procedure Rules. That the matter cannot be said to be complex yet no Replying Affidavit had been filed by the Defendants and that when filed, directions can be made under Order 37 Rule 17. Counsels submitted that the case of **Kulsumbhai Hussein (supra)** relied on by the Defendants was decided before Order 37 Rule 19 was enacted to allow complex matters to proceed by way of Plaint and it was therefore not good law. That on the authority of **Macharia Mwangi Vs Mwangi Kagiri (2014) eKLR**, there was no abuse of court process as the court should be concerned with doing substantive justice rather than technicalities. That the governing law between this suit and the Succession Cause are different.
13. Mr. Musyoka and Mr. Munge further submitted that in the Succession Cause, the Plaintiffs had only moved to challenge the will as they believe the deceased was not in his proper mind when he wrote the same while in the present proceedings, the Plaintiffs are challenging the acts of the Trustees; that both the P.O and Motion were meant to stifle the Plaintiffs' attempts to stop the plunder of the assets under the Trust. That a court of justice and equity should not allow technicalities to shut its eyes to the loud cries for justice for the children of the deceased. Counsels concluded that the injunction application in these proceedings was filed to preserve the assets of the Trust. That the Defendants were holding properties worth billions while the children of the deceased were not being catered for. They urged that the P.O and the Motion be dismissed.
14. On their part, the 2<sup>nd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Interested Parties filed Grounds of Opposition to the P.O and the Motion. They contended that the orders of 27/3/15 were made on merit and should not be set aside; that they were meant to protect and preserve the substratum of the suit for the benefit of all beneficiaries. Mr. Wena who appeared for these Interested Parties however made no submissions.
15. As regards the 3<sup>rd</sup> and 8<sup>th</sup> Interested Parties, Learned Counsel Mr. King'ara filed both a Preliminary Objection and submissions. He submitted that the P.O cannot be based on points of law as it is based on rules of practice that are not law; that what was being raised was an objection of form which was in breach of Order 2 Rule 14 of the Civil Procedure Rules. The case of **Alice Aloo Betty Vs Said Mohamed Said & 2 others (2014) eKLR** was cited in support of that submission. It was further submitted that the jurisdiction of this court under Article 165 of the Constitution is unlimited and Order 37 cannot be said to have limited that jurisdiction. Counsel urged that the objection on the want of form be dismissed. Mr. King'ara opined that, the doctrine of sub judice cannot form the basis of the P.O as it will require the analysis of evidence. The case of **Oraro Vs Mbaja (2005) 1KLR 141** was cited in support of that submission. That since the Defendants admit that some of the prayers in the suit property hinge on order 37, the summons was valid under the authority of **General Tools Ltd Vs & Electrical Equipment Vs Equatorial Commercial Bank Ltd & Anor (2009) eKLR**. That since the principal prayer in the OS was for accounts since 2012, the suit was squarely under Order 37 of the Civil Procedure Rules. That under Order 37 Rule 11, a declaration for rights of a beneficiary has to be by way of an Originating Summons. Counsel therefore urged that the P.O and the Motion be declined.

16. In rejoinder, Mr. Oraro, Senior Counsel submitted that the fact that the Trustees (1<sup>st</sup> Defendant) had a duty to account, it did not give the Plaintiffs the right to disregard the rules of procedure; that the Plaintiffs should go to the Family Court and pursue their applications there. Counsel dissuaded the court from venturing into matters touching on the merit of the case at this stage and urged that the Defendants' contentions be upheld.
17. I have carefully considered the Affidavits on record, the written submissions, the oral highlights thereon by Learned Counsel and the authorities relied on. That I have not rehearsed herein all the authorities cited, is not out of deference to Counsel. I appreciate their otherwise incisive and enlightening elucidation of the law and facts. This is a Preliminary Objection and a Motion to discharge orders made ex parte for grounds set out herein above. I propose to begin with the Preliminary Objection.
18. The first complaint by the 1<sup>st</sup> Defendant is that the Plaintiffs' suit as pleaded breaches the 1<sup>st</sup> Defendant's rights to fair trial, equal protection and equal benefit of the law under Articles 25 and 27 of the Constitution. That by instituting the suit that constitutes complex issues by way of an Originating Summons, the Plaintiffs have shifted the normal burden of proof from themselves to the Defendants who would not have the benefit of testing any evidence of the Plaintiffs through cross-examination as would have been in a normal suit. I agree with Mr. Oraro S.C.'s submission that the Defendants' constitutional rights must be safeguarded at all costs. This court is enjoined by dint of Article 3(1) of the Constitution to respect and protect the rights of the 1<sup>st</sup> Defendant as pronounced in the Constitution.
19. The question that arises however, is whether the suit as pleaded actually violates the rights of the Defendants as submitted by Counsel. In **Kulsumbai Vs Abdulhusein (1957) EA 699**, it was clearly held that the procedure of instituting suits by way of Originating Summons is meant to enable simple matters to be settled by the court without the expenses of instituting an action in the usual manner. That it is a procedure meant for simple straight forward and not serious and complex issues. That is why, the law itself in Order 37 specifies those specific issues that are to be determined by way of an Originating Summons. The legislature did not leave it to the parties or the court to determine what these simple matters are to be. The law expressly set them out in Order 37 Rule 1 of the Civil Procedure Rules. However, the law itself realizes that these simple issues set out in Order 37 Rule 1 that are to be dealt with by way of originating Summons may mutate to be complex and therefore gives a redress by granting the court the discretion to order such a suit to be tried as if commenced by way of Plaint. This discretion is set out in Rule 19 of that Order.
20. In this regard, a close examination of Order 37 will show that whether meant for simple disputes only, a party to a suit commenced under that Order is given statutory safeguards in compliance with Articles 25 and 27 of the Constitution. Firstly, a defendant in an Originating Summons is allowed to file an Affidavit in Reply to either admit or contest the allegations made against him in such Summons. Secondly, the court is clothed with the discretion and power under Rule 19 of that Order to order that an Originating Summons be dealt with as if it had been begun by way of a Plaint in the event the issues mutate to be complex. That power and discretion is exercisable by the court at any stage of the proceedings.
21. In view of the foregoing, if at any stage, it will appear to the court that the issues raised by the present O.S are serious, complex and require proof by way of tested evidence, the court will be perfectly entitled to order the suit be proceeded with as if it was a normal suit. In doing so, the court will have safeguarded the Defendant's right to a fair trial and equal protection of the law. The evidence and issues will then be tested through cross-examination and no prejudice will be suffered by any party. Accordingly, I reject the contention that the suit as framed will prejudice the Defendants in their defence as alleged or at all.
22. In any event, I do not think that in an O.S the burden of proof shifts to the Defendants as a matter of course. In my view, the Plaintiff must first establish by way of evidence, the basis for seeking the issues or questions framed to be determined in a particular way or in his favour before the Defendant can be called upon to answer in response.
23. Mr. King'ara, learned Counsel for the 3<sup>rd</sup> and 8<sup>th</sup> Interested Party submitted that the Objection by the 1<sup>st</sup> Defendant was technical and did not meet the criteria set out in **Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**. That it does not raise a

pure point of law. According to Oraro S.C, the 1<sup>st</sup> Defendant’s objection dated 15/4/15 raises a point of law to the effect that the prayers sought on the O.S are either not provided for under Order 37 of the Civil Procedure Rules, or are incapable of being sought under the procedure set out therein.

24.I have looked at the issues put forward for determination in the O.S dated 25/3/15. They are basically four; firstly, whether the 1<sup>st</sup> Defendants should be removed as Trustees of the Trust; secondly; examination of the management of the Trust by the 1<sup>st</sup> Defendants; thirdly, bringing the 1<sup>st</sup> Defendants to account for their management or mismanagement of the Trust and finally assessing the loss and damage, if any, suffered by the Trust and making the 1<sup>st</sup> Defendants as Trustees to account for it. The question that arises therefore is, are these four (4) issues matters that are provided for under Order 37 Rule (1) of the Civil Procedure Rules?

25.Order 37 Rule 1 of the Civil Procedure Rules provides:-

***“1. The executors or administrators of a deceased person, or any of them, and the trustees under any deed or instrument, or any of them, and any person claiming to be interested in the relief sought as creditor, devisee, legatee, heir, or legal representative of a deceased person, or as cestui que trust under the terms of any deed or instrument, or as claiming by assignment, or otherwise, under any such creditor or other person as aforesaid, may take out as of course, an originating summons, returnable before a judge sitting in chambers for such relief of the nature or kind following, as may by the summons be specified, and as circumstances of the case may require, that is to say, the determination, without the administration of the estate or trust, of any of the following questions-***

***(a) any question affecting the rights or interest of the person claiming to be creditor, devisee, legatee, heir or cestui que trust;***

***(b) .....***

***(c) the furnishing of any particular accounts by the executors, administrators or trustees, and the vouching, when necessary, of such accounts;***

***(d) .....***

***(e) directing the executors, administrators or trustees to do, or abstain from doing, any particular act in their character as executors, administrators or trustees;***

***(f) .....***

***(g) the determination of any question arising directly out of the administration of the estate or trust.” (Underlining provided)***

26.From the foregoing, it is quite clear that a person interested in the relief sought as a ***cestui que trust*** under the terms of any deed or instrument is permitted to approach the court for the determination of the questions set out under Order 37 Rule 1. I have carefully examined the Affidavit in support of the O.S by Albert Kigera Karume. He depones that; he and his co-Plaintiffs are children of the late James Njenga Karume; that under the Trust, the subject of this suit, the children of the late Njenga Karume are cited and identified as some of the beneficiaries of the Trust. These assertions have not been denied. I have on my part examined the Declaration of Trust dated 03/05/2011 and produced as “AK7”. Clause 1.2 of the recitals therefore identify the children of the deceased, of which the Plaintiffs, as some of them as some of the beneficiaries under the Trust.

27.A careful examination of Order 37 Rule 1 of the Civil Procedure Rules will show that, beneficiaries of a trust are among the persons entitled to bring an action by way of an Originating Summons and seek the determination of the questions set out under Rule 1 of Order 37.

28. The principal issues sought for determination in the present O.S are the management or mismanagement, as the case may be, of the Trust by the 1<sup>st</sup> Defendants as Trustees; accounts of the Trust and the consequent removal of the Trustees if found to have abused their mandate either under the Trust or the law. In my view, these are issues that squarely fall under Order 37 Rule 1 (a), (c), (e) and (g). The issue of damages is peripheral or only consequential. To that extent the case of **KCB Vs Oisebe (supra)** relied on by the 1<sup>st</sup> Defendants is inapplicable. Accordingly, I reject the contention that the O.S has not been properly taken out and hold that grounds 1 and 2 of the Preliminary objection are without basis and are accordingly dismissed.
29. That leaves grounds 3 and 4 of the P.O for determination. These are to the effect that the O.S is a collateral attack on the **Succession Cause No. 3102 of 2013** and that it is an abuse of the process of the court. I propose to determine these grounds together with the Motion dated 2<sup>nd</sup> April, 2015 by the 2<sup>nd</sup> Defendant. That Motion is to the effect that the O.S is in breach of Section 6 of the Civil Procedure Act in view of the matters pending in **Succession Cause No. 3102 of 2013** and is therefore an abuse of the court process. The second issue in that Motion is that the ex-parte orders of 27/3/15 were obtained through fraud, deceit and material non-disclosure and therefore should be discharged.
30. The principle of sub judice is provided for under Section 6 of the Civil Procedure Act, Cap 21 Laws of Kenya which provides:-

**“6. No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”** (Underlining mine)

31. That provision is in mandatory terms by the use of the term “shall”. Accordingly, where a matter falls squarely under that provision, the court is denied jurisdiction from continuing with such a matter. The spirit behind that provision is to avoid an embarrassment to court where different courts of the same jurisdiction arrive at different results on a same issue. The provision is also meant to bar litigants from forum shopping and to maintain the integrity of the judicial process while avoiding abuse of the judicial process.
32. For the principle of subjudice to apply, several requirements must be met. There must be in existence a previous suit or proceeding; the subject matter question must be directly and substantially in issue in both proceedings; the proceedings must be between the same parties or parties under whom any of them claim; the parties must be litigating under the same title and finally, both courts must have jurisdiction to grant the relief sought.
33. When dealing with Section 6 aforesaid in the case of **Wangai Vs Mugambi & Another EALR (2013) E.A. 474, Odunga J** held at page 48 that:-

***“Therefore where a party decides to file suit after suit between the same parties with the same cause of action with either an intention of vexing or annoying his opponent and without pursuing the first suit in the production line to its logical conclusion, that action may be construed to amount to an abuse of the process of the court....”***

At page 485: -

***“It is not the form in which the suit is framed that determines whether it is subjudice but the substance of the suit. .....*”**

34. As regards abuse of the court process, it was held in the case of **Muchanga Investments Ltd Vs Safaris Unlimited (Africa) Ltd & 2 others (2009) eKLR.**

***“In BEINOSE VS WITLES 1973 SA 721 (SCA) at page 734 F-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 the 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 by the rules of the court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective.....’*

*In the Nigerian case of KARIBU-WHYTIE JSC in SARAK VS KOTOYE (1992) NWLR 9PT 264) 156 at 188-89 ( 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. It’s 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 action on the same subject matter against the same opponent on the same issues or a multiplicity of action in the same matter between the same parties even where there exists a right to bring the action.*
- b. *Instituting different actions between the same parties simultaneously in different courts even through in 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 lot; of law supporting a court process or where it is premised on frivolity or recklessness.*

*We are of the view that the circumstances of the case before us, falls squarely in illustration (e) above, in that there was no valid law supporting the process followed by the respondent.”*

These then are the principles to be applied when considering an allegation of abuse of court process.

35. In the matter before court, it was contended that the Plaintiff’s had abused the court process by instituting the present proceedings yet they had already filed similar proceedings seeking similar reliefs in the Succession Cause. It was contended that prayer No. 3 of the Summons dated 18<sup>th</sup> November, 2014 was similar to prayer Nos. 3 and 4 of the Motion dated 25<sup>th</sup> March, 2015; that prayer Nos. 5 & 6 of the summons dated 18/11/14 mirrored prayer Nos. 5 & 6 of the Motion of 25<sup>th</sup> March, 2015 and that prayer No. 14 of the Summons of 18<sup>th</sup> November, 2014 was similar to ground Nos. (xvi), (xii) of the motion of 25/3/15. These relate to injunction against the trustees, restraint on alleged demolition of Pizza Garden Restaurant and non-payment of school fees. The Plaintiffs denied that there was any multiplicity of proceedings.
36. As suggested by the parties during the hearing of the matter, this court called for the file of **Succession Cause No. 3102 of 2013**. The court compared the applications dated 18<sup>th</sup> November, 2014 and 1<sup>st</sup> December, 2014 with the Motion dated 25<sup>th</sup> March, 2015. The Summons dated 18<sup>th</sup> November, 2014 was consequent upon an application for the revocation of the Grant of Probate given to the Executors of the Will of the deceased made on 5<sup>th</sup> February, 2014. The relevant parts of the Summons dated 18<sup>th</sup> November, 2014 are prayer Nos. 3, 5 and 6. These are as follows: -

**“3. That pending the hearing and determination of this application the Executors of the will dated 6<sup>th</sup> June, 2011, James Raymond Njenga, Stephen Ndung’u Karau and Francisca Wanjiku Kahiu and the Trustees of the Njenga Karume Trust be restrained by themselves, their agents and representatives from selling, charging to any Bank or Financial Institution or transferring any assets or any interest in the assets for and/or managed on behalf of the estate of James Njenga Karume (Deceased).**

4. ....

**5. That pending the hearing and determination of this application the Executors of the will dated 6<sup>th</sup> June, 2011 and the Trustees of the Njenga Karume Trustees be restrained by themselves, their agents, servants and representatives from charging the title for the property known as Land Reference No. 209/8369, also known as Jacaranda Hotel Limited.**

**6. That pending the hearing and determination of this application the Executors of the will dated 6<sup>th</sup> June, 2011 and the Trustees of the Njenga Karume Trust be restrained by themselves, their agents, servants and a representatives from doing any further destruction or demolition on the property known as Land Reference No. 209/8370, also known as Pizza Garden. “ (Underlining mine)**

37.Faced with the application containing the foregoing prayers, the **NJENGA KARUME TRUST REGISTERED TRUSTEES** filed the Summons dated 1<sup>st</sup> December, 2014 and sought a declaration that the Family Court had no jurisdiction to adjudicate issues touching on the Njenga Karume Trust as the assets held thereunder were not part of the estate of the deceased. They also sought an injunction against the Plaintiffs from interfering with the assets under the Trust.

38.As regards the Motion dated 25<sup>th</sup> March, 2015, it contains a total of nine (9) substantive prayers. Two prayers, Nos. 3 and 5 thereof, have suggested by the Defendants identified as being similar to the prayers I have set out above in the Succession Cause. These read as follows: -

**“3. The Defendant/Respondent by themselves and/or through their employees servants and/or agents be restrained by way of a temporary injunction from selling, transferring charging, mortgaging, disposing off or wasting in any way whatsoever the immoveable properties Managed and/or held under the NJENGA KARUME TRUST pending the hearing and determination of this application.**

4. ....

**5. The Defendants/Respondents by themselves and/or through their employees, servants and/or agents be restrained by way of a Temporary Injunction from further demolishing, destroying wasting or in any way whatsoever interfering with the operations and dealings of the restaurant and business known as Pizza Gardens on the property known as Land Reference Number 209/8370 Westlands pending the hearing and determination of this application.”**

39.From the foregoing, it is quite clear that save for prayers No. 5 in both the Summons of 18<sup>th</sup> November, 2014 and Motion of 25<sup>th</sup> March, 2015 all the other prayers in the three applications are different. Prayer No. 3 of the Summons dated 18<sup>th</sup> November, 2014 was in respect of the “**assets or any interest in the assets and/or managed on behalf of the Estate of James Njenga Karume**” whilst prayer No. 3 in the Motion of 25<sup>th</sup> March, 2015 the subject matter is the “assets under the Njenga Karume Trust” of course there is a distinct difference between the assets of the Trust and the assets forming part of the estate of the Late James Njenga Karume. Accordingly, it is not correct that prayer No. of the Summons of 18<sup>th</sup> November, 2014 is similar to prayer No. 3

- and 4 of the Motion dated 25<sup>th</sup> March, 2015 as contended.
40. As already observed, for sub-judice rule to apply, there must be two parallel proceedings, where the parties are the same litigating under the same title, the subject matter must be the same and same reliefs must be sought. I have looked at the Succession Cause in the Family Court file. The Summons of 18<sup>th</sup> November, 2014 was directed at the Executors of the will and the Trustees of the Njenga Karume Trust with a view to safeguard the assets of the estate of the deceased. In the Motion of 25<sup>th</sup> March, 2015, the same is directed at the Trustees to safeguard the assets of the Trust. Surely, the parties and subject matter cannot be said to be the same. This is borne by the Summons dated 1<sup>st</sup> December, 2014 wherein the Njenga Karume Registered Trustees told the Family Court in no uncertain terms probably rightly so, that it lacked jurisdiction to deal with assets belonging to the Trust as its jurisdiction only extended to the assets forming part of the estate of the deceased. In my view therefore, save for prayer No. 5 in both the Summons dated 18<sup>th</sup> November, 2014 and the Motion dated 25<sup>th</sup> March, 2015, the principle of subjudice does not apply.
41. The question that arises is, what is to be done to the Motion dated 25<sup>th</sup> March, 2015 now that the court has found that one prayer, No 5 thereof, out of the nine (9) substantive prayers therein is in breach of Section 6 of the Civil Procedure Act. Section 6 bars a court from dealing with a matter that is in breach of that provision. After careful examination, I am of the view that neither the Originating Summons nor the Motion dated 25<sup>th</sup> March, 2015 can be said to fall in any of the five principles of abuse of judicial process enunciated in the **Sarak Vs Kotoye Case (supra)** as upheld by the Court of Appeal in the **Muchanga Investments Vs Safaris Unlimited (Africa) Case (Supra)**. I propose to deal with the fate of the Motion dated 25<sup>th</sup> March, 2015 as I deal with the last issue raised in the 2<sup>nd</sup> Defendant's Motion, the ex parte orders of 25<sup>th</sup> March, 2015.
42. The Defendants contended that the orders of 25<sup>th</sup> March, 2015 were obtained fraudulently, deceitfully and with material non-disclosure. That the Plaintiff's did not disclose that there existed **Succession Cause No. 3102 of 2013 wherein** similar orders had been sought and denied ex-parte by Achode J. **In Uhuru Highway Development Ltd Vs Central Bank of Kenya & 2 others (1995) eKLR** the Court of Appeal held as follows: -

*“The principle which is sometimes known as the principle of R -Vs- Kensington Income Tax Commissioners Ex-parte Princes Edmon de Polignac (1917) KB 486 is well known and has been consistently applied in this country. In this courts recent decision in the case of The Owners of the Motor Vessel “Lillian S” Vs Caltex (Kenya) Ltd Civil Appeal No. 50 of 1989, Kwach J.A in his judgment in that case, put it beyond doubt that the principle of the Kensington Income Tax Commissioners Case (Supra) applied with equal force here I need only refer to the following passage from the judgment of Warrington L. J in that case at page 509 quoted with approval by Kwach JA, which sets out the principles: -*

*‘it is perfectly well settled that a person who makes an ex parte application to the court, that is to say, in the absence of the person who will be affected by that which the court is asked to do is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings and he will be deprived of any advantage may have already obtained by him. This is perfectly plain and requires no authority to justify it.’*

43. In **Brinks MAT Ltd Vs Elcombe (1988) 3 ALL ER 188 Slade LJ** held: -

*“Nevertheless, the nature of the principle, as I see it, is essentially penal and in its application the practical realities of any case before the court cannot be overlooked. By their very nature, ex-parte applications usually necessitate the giving and taking of instructions and the preparation of the requisite drafts in some haste. .... while in no way discounting the heavy duty of candour and care which falls on persons making ex-parte applications, I do not think the application of the principle should be carried to*

*extreme lengths.....”*

44. In the same judgment, Ralph Gibson L. J observed as follows: -

***“In considering whether there has been relevant non-disclosure and what consequences the court should attach to any failure to comply with the duty to make full and frank disclosure the principles relevant to the issues in these appeals appear to me to include the following: -***

- i. ***The duty of the applicant is to make a full and fair disclosure of all material facts.....***
- ii. ***The material facts are those which it is material for the judge to know in dealing with the application as made; materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers.....***
- iii. ....
- iv. ....
- v. ***If material non-disclosure is established the court will be institute to ensure that the Plaintiff who obtains an ex-parte injunction without full disclosure is deprived and advantage he may have derived by that breach of duty.....***
- vi. ***Whether the fact not disclosed is if sufficient materiality to justify or require immediate discharge of the order, without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application.....***
- vii. ***Finally, it is not every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded. See Bank Mettat- Vs Nicpour 1985 FSR 87 AT 90 per Denning Mr. The curt has a discretion notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex-parte order, nevertheless to continue the order or to make a new order in terms:***

***... When the whole facts, including that of the original non-disclosure are before it, (the court) may well grant such second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed.”***

45. From the foregoing, the duty bestowed upon an applicant at the ex-parte stage to make full and frank disclosure of all material facts cannot be gainsaid. Such disclosure extends to all that is within such applicant’s knowledge as well that which he can ascertain by making reasonable inquiries. The disclosure includes material or facts against such applicant. Materiality is to be determined by the curt and on one else and; material facts is that which whose knowledge will affect the court’s decision making or is relevant for the court to know in reaching a decision on the issue before it. It is in the discretion of the court to discharge or not to discharge an order made where material non-disclosure is alleged.

46. Was there material non-disclosure in obtaining the orders of 27th March, 2015? It was contended for the Defendants that the Plaintiffs failed to disclose at the ex-parte stage that they had made a similar application before the Family Court and Achode J had declined to grant the orders ex-parte. I have already found that save for Prayer No. 5 of the Motion, there had been no other similar application to the motion dated 25<sup>th</sup> March, 2015 before the Family Court. My view, however, is that since Prayer No. 5 of the Motion dated 25<sup>th</sup> March, 2015 was similar to Prayer No. 5 of the Summons dated 18<sup>th</sup> November, 2014, it was incumbent upon the Plaintiffs either to exhibit the said Summons in the application before this court or to candidly disclose that such a prayer had been made in the Succession Cause but declined ex-parte. A party cannot be allowed to withhold from court information that may be crucial in the determination of a dispute. Of course it

- would have been upon Seron J, when considering the Motion of 25<sup>th</sup> March, 2015 ex parte, to determine whether he could still grant prayer No. 5 ex-parte notwithstanding that the same had been sought in the Summons (against both the 1<sup>st</sup> Defendant and the Executors of the Will of the Deceased). However, the Judge was not given that opportunity by the Plaintiffs.
47. It is clear from the authorities considered above that Section 6 bars a court from considering a matter that is subjudice; that where a party fails to make material disclosure at the ex-parte stage, any advantage he may have obtained as a result of the non-disclosure must be lost of him; that the order made as a result of non-disclosure of material facts is amenable to be discharged. In this regard, what then should be the fate of the order of 27/3/15 and the Motion of 25/3/15 generally? I think that in order to answer this question, I should look at what both the Preliminary Objection and the Motion of 2<sup>nd</sup> April, 2015 sought.
48. The Preliminary objection sought that the Originating Summons be struck out for lack of jurisdiction and for being an abuse of the process of the court. For reasons set out above, and in particular that the Originating Summons seeks to interrogate issues touching on the Trust, I find that this court has jurisdiction to determine the Originating Summons and there is nothing in the Originating Summons to suggest that it is an abuse of the process of the court. Accordingly, I find that the Preliminary Objection was not validly taken. Accordingly, the same is dismissed in its entirety with costs to the Plaintiffs and the 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Interested Parties.
49. On the other hand, the 2<sup>nd</sup> Defendant's Motion sought for the discharge of the order of 27<sup>th</sup> March, 2015 and for the stay of the proceedings in this suit until the applications dated 1<sup>8th</sup> November, 2014, and 1<sup>st</sup> December, 2014 in the Succession Cause are heard and determined.
50. The order of 27<sup>th</sup> March, 2015 contained two limbs. The first limb was for the preservation of the assets of the Trust. No such orders had been sought in either the Summons of 18<sup>th</sup> November, 2014 or that of 1<sup>st</sup> December, 2014. That part of the Order was not in any way, therefore, in breach of either Section 6 aforesaid or the rule as to full and frank disclosure. The second limb sought to restrain the Defendants from dealing with the property known as L.R. No. 209/8370 in a certain way. A similar prayer had been sought and declined ex-parte in the Summons dated 18<sup>th</sup> November, 2014. In this regard, it is this second limb of that order that was in breach of both Section 6 of the Civil Procedure Act and the rule as to material non-disclosure. In the circumstances, can this court discharge the Order of 27<sup>th</sup> March, 2015 in its totality?
51. I have considered the principles set out in the **R Vs Kensington Income Tax Commissioners case (Supra)**. A court has to consider each case according to its own peculiar circumstances while applying any principles of law. The case before me is very peculiar. It raises two important issues. These are, to what extent can a rich man/woman or a poor man/woman exercise control over his wealth or poverty, for that matter, beyond his grave, and secondly the administration of Trusts in this country. That is what the Originating Summons seeks to put before this court.
52. The assets the subject of the Trust is huge. There have been allegations made on oath that the same are being mismanaged and/or plundered under the Defendants watch. The objective of the Trust has been given under Clause 3 thereof to be: -

***“.... to hold the Trust Fund upon trust and to administer the same to promote the maintenance education and advancement in life of the Beneficiaries who are individual persons and to advance the business prospects and interests of the entities referred to in Clause 1.2 (vi) and 12 (viii) above.”***

53. In the Affidavit in support of the 2<sup>nd</sup> Defendant's Motion, the Defendants have attempted to respond to the allegations made by the Plaintiffs. Some of the allegations made against the Defendants on oath are: -
- a. **that out of Kshs.76,756,579/- stated by the Defendants to have been used for the beneficiaries in the year 2013, a total sum of Ksh.69,000,000/- thereof was give to only one beneficiary;**
  - b. **that those beneficiaries who have refused to “toe the Defendants’ line” are not given any monthly allowances or catered for;**

- c. **that in September, 2013, one of the beneficiaries, one Michelle Wariara, was hospitalized in Tokyo Japan and the Defendants refused to cater for her medical bills;**
- d. **that the Trustees withheld the Declaration of Trust document from the beneficiaries since the demise of Njenga Karume in February, 2012 until 8<sup>th</sup> December, 2014 when they only produced it in an application in the Succession Cause No. 3102 of 2013 in order to ward off the Plaintiffs attempt to interfere with Trust Assets by way of an injunction;**
- e. **that no accounts of the Trust have ever been prepared, produced and published to the beneficiaries;**
- f. **that the Trustees are acting in a discriminatory manner amongst the beneficiaries of the Trust;**
- g. **that the Trustees diverted delivery of tea deliveries from the Trust Asset known as Kachoroba Farm to a Competitor known as Karirana Tea Estate, where the Trust Chairman has an interest, and that as a result of which a factory where the deceased had a controlling shareholding suffered loss of Ksh.178,557,303/-**
- h. **serious conflict of interest in the management of the Trust.**

54. It is debatable if the settlor, i.e. the deceased, would have approved such acts on the part of the people he trusted with his noble intentions in respect of his wealth. If the allegations be true, I think no court of law and equity cannot have its conscience pricked. Even a court with no conscience, will develop one as a result! I know that all these allegations remain just that, mere allegations. Mine is to consider the principle of subjudice and material non-disclosure vis a vis the orders sought by the 2<sup>nd</sup> Defendant. I have taken into consideration all the foregoing. I have also considered that these proceedings affect not only the parties before me but also the larger beneficiaries of the Trust some of who may be too young to have appeared or mount any challenge against the Defendants. Indeed, the orders also affect the Interested Parties who opposed the 2<sup>nd</sup> Defendant's Motion. I have also considered the suggestion made during the hearing of this matter that an Application had been made to amend the Summons dated 18<sup>th</sup> November, in the Succession Cause to remove the offending parts. I have also considered the fact that the Order of 27<sup>th</sup> March, 2015 contains two limbs, the second of which has fallen foul with the rules of procedure. The first limb does not only benefit the Plaintiffs but also all the beneficiaries of the Trust. Save for the Plaintiffs, the rest of the beneficiaries including the Interested Parties who are benefiting from that order were not involved in the "iniquity" of material non-disclosure.

55. In the circumstances, does the court apply the biblical proverb in Ezekiel 18:1 that, "**the parents have eaten sour grapes and the children's teeth are set on edge**" and discharge the entire order of 25<sup>th</sup> March, 2015 or does it insist on individual responsibility? I think in this case, individual responsibility should prevail whereby the parent's teeth should be set on edge and spare those of the children. That to discharge the entire order of 27/3/15 will be unfair and unjust. It will affect those beneficiaries, including the Interested Parties, who are benefiting from it yet they were not involved in the subject "**Wrongs**" committed by the Plaintiffs. If the order is fully discharged, the innocent beneficiaries might find it difficult to make any other application for similar orders. In any event it will lead to further costs which can be avoided at this stage.

56. Accordingly, applying the principle No. (vii) by Ralph Gibson L.J in **Brinks MAT Ltd Vs Elcombe case (supra)**, that not every non-disclosure will lead to automatic discharge of the impugned order; being mindful of the dictates of Article 159 (2) (d) of the Constitution; in order to "**set on edge only the teeth of the offending Plaintiffs**" and in the exercise of the inherent jurisdiction of this court and for the ends of justice, I will partially allow the 2<sup>nd</sup> Defendant's application as follows:-

- a. **The order of 27<sup>th</sup> March, 2015 is hereby varied to the extent that order No.3 thereof is discharged forthwith but Order No. 2 thereof is to remain in force until the hearing and**

**determination of the Motion dated 25/3/15.**

- b. Prayer Nos. 5 and 6 in the Motion dated 25/3/15 are hereby stayed pending the hearing and determination of the Summons dated 18/11/14 and 1/12/14 respectively, in Succession Cause No.3102 of 2013.**
  
- c. The plaintiffs shall bear the costs of the 2<sup>nd</sup> Defendant's application dated 2<sup>nd</sup> April, 2015 and those of the 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Interested Parties.**

It is so ordered.

.....

**A. MABEYA**

**JUDGE**

Dated, Signed and Delivered at Nairobi this 17<sup>th</sup> day of September, 2015.

.....

**JUDGE**