Mbiriri v Kariuki & 2 others (Environment & Land Case 527 of 2017) [2022] KEELC 15347 (KLR) (5 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15347 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 527 OF 2017

JO MBOYA, J

DECEMBER 5, 2022

BETWEEN

DAVID STEPHEN KAMIRI MBIRIRI .... PLAINTIFF

AND

WASHINGTON NJOGU KARIUKI .... 1ST DEFENDANT

MUNIU KURIA (NOW DECEASED) .... 2ND DEFENDANT

EMBAKASI RANCHING COMPANY LIMITED .... 3RD DEFENDANT

RULING

Introduction and Background

1. Vide Notice of Motion Application dated the 16th September 2022, the Plaintiff/Applicant has sought for the following Reliefs;

   i. Thatthis Application be certified as urgent and be heard ex-parte in the first instance.

   ii. Thattaxation Proceedings filed by the 1st Defendant/Respondent be stayed pending the hearing and determination of this Application.

   iii. Thatthis Honourable Court be pleased to Review its Ruling and Orders given on 27th January 2022 and the same be set aside.

   iv. Thatthis Honourable Court be pleased to review its Ruling and Orders given on 22nd December 2017 and the same be set aside and this suit be reinstated.

   v. Thatthis Honourable Court do grant a Temporary Injunction restraining the 1st Defendant/ Respondent, his servants, agents, relatives, employees or anyone acting on his behalf from alienating, trespassing, constructing, disturbing the Plaintiff's possession or encroaching on the plaintiff's home and/or in any other manner dealing, interfering with Plots No. N235

and N235B (surveyed & mapped as Nairobi Block 105 (Embakasi Ranching)/14373 and 105(Embakasi Ranching)/14389 respectively) situate in Ruai area, Nairobi pending the hearing and determination of the main suit herein.

vi. Thatthe Officer Commanding Ruai Police Station to ensure compliance with the Order above.

vii. Thatcosts of this application be granted to the Plaintiff/Applicant.

2. The instant Application is premised and anchored on the numerous grounds which have been enumerated in the body of the Application herein and same is further supported by the affidavit of the Plaintiff/Applicant sworn on the 16th September 2022, to which the Plaintiff/Applicant has annexed and attached a total of seven documents.

3. Upon being served with the instant Application, the 1st Defendant/Respondent filed a Replying affidavit sworn on the 22nd November 2022; and to which same has exhibited 3 annexures, inter-alia, a copy of the Judgment which was rendered vide Nairobi CMCC No. 4302 of 2004.

4. Be that as it may, the Application herein came up for hearing on the 23rd November 2022, whereupon same was canvased and disposed of by way of oral submissions.

Submissions by the Parties:

a. Plaintiff's/Applicant's Submissions:

5. Learned counsel for the Plaintiff/Applicant raised, highlighted and amplified four salient issues for consideration.

6. First and foremost, counsel for the Plaintiff/Applicant sought for leave of the honourable court to withdraw prayer 3 of the Notice of Motion Application dated the 16th September 2022.

7. For clarity, counsel pointed out that same had realized that an Application for review could not be mounted against an order and or decision which was made by the honourable court pursuant to a previous Application for review.

8. Premised on the application by counsel for the Plaintiff/Applicant to withdraw prayer 3 of the said application and there be no objection by counsel for the 1st Defendant, the honourable court proceeded to and indeed endorsed an order withdrawing prayer 3 of the said Application.

9. Secondly, counsel for the Plaintiff/Applicant submitted that the Plaintiff/Applicant has since gathered and obtained new and important evidence, which same was not able to place before the court at the time of the delivery of the impugned ruling which is sought to be reviewed.

10. For clarity, counsel has added that the new and important evidence that has since been discovered relates to the fact that the purported signature of one Mr. Kariuki Mwaganu, who is purported to have signed the various letters relied upon by the 1st Defendant/Respondent to claim the suit properties, were found to be forgeries.

11. On the other hand, the counsel for the Plaintiff also submitted that the allegation by the 1st Defendant/Respondent that same purchased the suit properties from the widow of the late Marclus Kathuthia Murioki, was equally false and thus fraudulent.

12. Nevertheless, counsel further added that the Plaintiff/Applicant has since discovered and established that the said Lydia Wanjiku Kathutwa, who was contended by the 1st Defendant to have been the widow of Marclus Kathuthwa, was indeed not the widow of the said deceased.

13. Based on the foregoing, counsel has therefore contended that the new evidence which same has alluded to are important and ought to be considered by the court towards determining the dispute beforehand.

14. Thirdly, counsel for the Plaintiff/Applicant has also submitted that the issues of facts which have been alluded to and enumerated at the foot of the supporting affidavit have never been raised, ventilated and canvased before this honourable court or any other court. In this regard, counsel therefore reiterated that the said issues deserve due consideration by the court.

15. Fourthly, counsel for the Plaintiff/Applicant submitted that the honourable court is still vested with the requisite mandate and jurisdiction to entertain and adjudicate upon the subject suit.

16. According to counsel, the fact that a previous application for review had been dismissed, does not divest and deprive this Honourable court of the requisite Jurisdiction to entertain the current Application.

17. In the premises, counsel for the Plaintiff/Applicant has therefore implored the Honourble court to find and hold that the subject application is meritorious and thus ought to be allowed.

b. 1st Defendant's/Respondent's Submissions

18. Counsel for the 1st Defendant relied on the R,eplying affidavit sworn on the 22nd November 2022 and contended that the subject application constitutes and amounts to an abuse of the due process of the court.

19. Further, it was the submissions of counsel for the 1st Defendant that the Plaintiff/Applicant herein had previously filed and mounted an application dated the 26th January 2021, which sought to review the orders of the court rendered on the 22nd December 2017.

20. Be that as it may, counsel added that the said application was duly considered by the court and thereafter same was disposed of vide ruling rendered on the 27th January 2022.

21. Owing to the foregoing, counsel for the 1st Defendant has contended that to the extent that the Plaintiff/Applicant had previously filed an application for review and which application was dismissed, same cannot originate and maintain a similar application for review.

22. Secondly, counsel for the 1st Defendant/Respondent submitted that the issue pertaining to and concerning ownership of the suit property was heard and determined vide a separate suit, namely, Nairobi CMCC 4302 of 2004, wherein the court found and held that the suit properties lawfully and legitimately belonged to the 1st Defendant/Respondent.

23. In any event, counsel added that upon the delivery of the Judgment in respect of Nairobi CMCC No. 4302 of 2004, the Plaintiff/Applicant herein proceeded to and filed an Appeal to the High Court and which appeal was heard and dismissed.

24. Notwithstanding the foregoing, the Plaintiff/Applicant herein, still had the audacity to file and mount the current suit, whereby same sought to circumvent the previous decision of a court of competent jurisdiction.

25. In view of the foregoing, counsel for the 1st Defendant/Respondent has submitted that the current application is therefore Res-judicata and thus ought not to be entertained by the Honourable court.

26. Thirdly, counsel submitted that other than the impugned decision, which is sought to be reviewed, the court has since rendered yet another ruling in the matter and which ruling has neither been challenged, impeached or appealed against.

27. In view of the foregoing, counsel added that the orders/decisions that is sought to be reviewed is actually none-existent and incapable of being reviewed taking into account the latest decision of the Honourable court rendered on the 27th January 2022.

28. Finally, counsel for the 1st Defendant has submitted that the honourable court is Functus Officio as pertains to the issue of review.

29. In a nutshell, counsel for the 1st Defendant has therefore invited the Honourable court to find and hold that the subject application is not only misconceived, but constitutes an abuse of the due process of the court and hence ought to be dismissed with costs.

c. 2nd and 3rd Defendant's/Respondent's Submissions

30. The 2nd and 3rd Respondents neither filed any responses to the Application nor any written submissions.

31. Consequently, the only submissions on record are the submissions by and on behalf of the Plaintiff/Applicant and the 1st Defendant/Respondent and not otherwise.

Issues for Deetermination:

32. Having reviewed the Application dated the 16th September 2022, together with the supporting affidavit thereto and having considered the Replying affidavit filed in position thereto; and similarly having taken into account the oral submissions canvased on behalf of the respective Parties, the following issues do arise and are worthy of determination;

    i. Whether the subject Application is Res-judicata and barred by dint of Section 7 of the *Civil procedure Act*.

    ii. Whether the Honourable court has Jurisdiction to entertain and adjudicate upon the subjectAapplication.

    iii. Whether the instant Application is a Classic abuse of the Due process of the Honourable court.

Analysis and Determination

Issue Number 1 Whether the subject Application is Res-judicata and barred by dint of Section 7 of the *Civil procedure Act*.

33. Before venturing to address and resolve the issue herein, it is appropriate to state and observe that the subject dispute touches on ownership of two properties namely Plots No. N235 and N235B (surveyed & mapped as Nairobi Block 105 (Embakasi Ranching)/14373 and 105(Embakasi Ranching)/14389 respectively).

34. On the other hand, it is also important to note that the Plaintiff/Applicant herein had previously filed and lodged civil suit number Milimani CMCC No. 1403 0f 2004, whereby the Plaintiff/Applicant had sought various reliefs touching on and concerning ownership of the suit properties.

35. Subsequently, the previous suit, details in terms of the preceding paragraph was heard and determined culminating into the delivery of a Judgment against the Plaintiff/Applicant. For clarity, the court found and held that the suit properties belonged to the 1st Defendants/Respondents.

36. Suffice it to point out that upon the delivery of the impugned decision, the Plaintiff/Applicant herein felt aggrieved and dissatisfied. In this regard, the Plaintiff/Applicant thereafter proceeded to and filed an Appeal challenging the decision of the Subordinate court.

37. Be that as it may, the said Appeal was heard and disposed of. For clarity, same was dismissed.

38. Undeterred by the decision and judgment of the court, the Plaintiff/Applicant came back to court and filed the instant suit and wherein same sought various reliefs, inter-alia declaration that same is the lawful owner and proprietor of the suit property.

39. For coherence, upon the filing of the instant suit, the issue of the previous suit, which had hitherto been heard and determined was raised and canvased before the honourable court.

40. Subsequently, the honourable court considered the issue of Res-judicata and thereafter rendered a ruling which was delivered on the 22nd December 2017. For clarity, the Honourable court found and held that the instant suit was truly Res-judicata.

41. Despite the finding and holding by the court that the instant suit was Res-judicata, the Plaintiff/Applicant returned back to court and filed an application dated the 26th January 2021 and in respect of which same sought inter-alia, review of the orders of the court made on the 22nd December 2017.

42. It is imperative to point out that the said application was indeed heard and disposed of vide ruling of this court rendered on the 27th January 2022. For completeness, the honourable court found and held that the application for review was Bad in law and constituted an abuse of the due process of the court.

43. Notwithstanding the foregoing, the Plaintiff/Applicant has now returned back to court vide yet another application wherein same is seeking review of the orders dated the 22nd December 2017.

44. In this regard, it is worthy to recall that this is the second application seeking review of the said orders.

45. Consequently the question that does arise and is worthy of determination, is whether this honourable court can entertain and adjudicate upon and a second application for review, over and in respect of the same decision.

46. To my mind, once the court handles and adjudicates upon a previous application for review, like the one dated the 26th January 2021, the court is barred and prohibited from entertaining any further and similar application premised on the issue of review.

47. In any event, the filing of a second application for review, challenging the same decision, is ipso facto barred by the doctrine of Res-judicata. In this regard, it is imperative to underscore that the doctrine of Res-judicata frowns upon the mounting of a plethora applications and suits, raising similar issues.

48. As pertains to the import, tenor and scope of the doctrine of Res-judicata, it is appropriate and imperative to take cognizance of Section 7 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya.

49. For convenience, the provisions of Section 7 (supra) provides as hereunder;

    Section 7.

    > "No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

50. Other than the foregoing provisions, it is important to note that the doctrine of Res-judicata has since been discussed and deliberated upon in various albeit numerous decisions of the Supreme Court of Kenya, the Court of Appeal, as well as the High Court and the Courts of Equal status.

51. To this end, I beg to cite and reiterate the holding in the case of *[Kenya Commercial Bank Limited v Benjoh Amalgamated Limited](#)* [2017] eKLR, where the court stated as hereunder:

> " Cognizant of the above principles, the courts called upon to decide suits or issues previously canvassed or which ought to have been raised and canvassed in the previous suits have not shied away from invoking the doctrine as a bar to further suits. As was stated in *Henderson v Henderson* (1843) 67 ER 313, res judicata applies not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. In the case of *Mburu Kinyua v Gachini Tutu* (1978) KLR 69 Madan, J. Quoting with approval Wilgram V.C. in *Henderson v Henderson* (supra) stated:
>
> "Where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case and will not (except in special circumstances) permit the same parties to open the same subject of ligation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have from negligence, inadvertence, or even accident omitted part of their case. The plea of res judicata applies except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment but to every point which properly belonged to the subject of litigation, and which parties exercising reasonable diligence, might have brought forward at the time" (emphasis added).
>
> We have no doubt at all that the suits filed by Benjoh and Muiri raised issues that were previously raised or could with reasonable diligence have been raised in the previous suits. This is the basis upon which we will eventually determine whether the judge erred in not upholding KCB and Bidii contention that issues raised in the suit had already been raised and finally determined in the previous suits; that the former suits involved the same parties, and that the courts which handled those previous suits were competent.

52. Additionally, the doctrine of Res-judicata was also revisited by the Court of Appeal in the case of *Independent Electoral & Boundaries Commission versus Maina Kiai & 5 others* (2017) eKLR, where the court stated:

> " The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice."

53. Duly guided by the holdings in the decisions highlighted in the preceding paragraphs and coupled with the provisions of Section 7 of the *Civil Procedure Act*, I come to the conclusion that the subject application and the issues raised thereunder are indeed Res-judicata.

54. In the circumstances, the Plaintiff/Applicant herein cannot be allowed to come back to court and seek to review the impugned decision for a second time, either in the manner sought or at all.

Issue Number 2 Whether the Honourable court has Jurisdiction to entertain and adjudicate upon the subject Application.

55. Whenever a litigant, the Plaintiff/Applicant not excepted approaches a court of law, it is incumbent upon the litigant to ensure that the court being approached is seized and possessed of the requisite jurisdiction to entertain the subject dispute.

56. In this regard, it is important to state, reiterate and underscore that the jurisdiction of a court is paramount and essential before the court can entertain and adjudicate upon a particular matter.

57. Put differently, without the requisite jurisdiction, a court of law is barred and prohibited from handling, deliberating upon, entertaining and adjudicating upon any dispute.

58. To this end, it is important to recall and reiterate the holding of the court of appeal in the case of *Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd* 1989 KLR 1, held as hereunder;

> " 'Jurisdiction is everything. Without it, a court has no power to take one more step. In the Matter of Advisory Opinions of the Supreme Court under Article 163(3) of the Constitution, Constitutional Application No. 2 of 2011; the Supreme Court noted that The Lillian 'S' case [1989] KLR 1] establishes that "jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity…"

59. Recently, the Court of Appeal added its voice to the centrality and primacy of the issue of Jurisdiction vide the holding in the case of *Phoenix of E.A. Assurance Company Limited versus S. M. Thiga t/a Newspaper Service* [2019] eKLR, where the Court at paragraph 2 held as hereunder;

> " 2. In common English parlance, 'Jurisdiction' denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae.

60. In view of the foregoing observation, there is no gainsaying that where a court is not seized or possessed of jurisdiction, the court must down its tools, at the earliest moment.

61. Being guided by the foregoing established, hackneyed and trite position, the question for consideration is whether this honourable court has jurisdiction to entertain a second application seeking review or at all.

62. To be able to answer the foregoing question, it is appropriate to take cognizance of the provisions of Order 45 Rule 6 of the *Civil Procedure Rules* 2010, which provides as hereunder;

6. Bar of subsequent applications [Order 45, rule 6.]

No application to review an order made on an application for a review of a decree or order passed or made on a review shall be entertained.

63. It is important to note that the Plaintiff/Applicant herein had previously filed an application for review which was considered by this honourable court and same was disposed vide ruling rendered on the 27th January 2022.

64. Pursuant to the ruling rendered on the 27th January 2022, this honourable court found and held that the orders of the Honourable court that were hitherto issued on the 22nd December 2017, were lawful and legitimate.

65. In my humble view, the order and decision of the court which was made on the 22nd December 2017, was subsumed, re-affirmed and reiterated in the latter decision rendered on the 27th January 2022.

66. In the premises, it is not possible for any one, let alone the Plaintiff/Applicant to seek to review the previous orders rendered on the 22nd December 2017, without first and foremost impeaching, challenging and dealing with the latter orders of the court.

67. In the premises, it is my finding and holding that the current application is merely intended to circumvent and defeat the orders of the court rendered on the 22nd January 2022, albeit contrary to the established position of the law.

68. In a nutshell, it is my considered view that this Honourable court is divested and bereft of the requisite Jurisdiction to entertain the subject application.

Issue Number 3 Whether the instant Application is a Classic abuse of the Due process of the Honourable court.

69. It is common ground that the Plaintiff/Applicant herein had previously filed and mounted a civil suit vide Nairobi CMCC No. 4302 of 2004.

70. For clarity, the said suit was heard and determined by a court of competent jurisdiction, whereupon a Judgment was entered in favor of the 1st Defendant/Respondent herein.

71. Other than the foregoing, it is also common knowledge that after the decision was rendered vide CMCC No. 4302 of 2004, the Plaintiff/Applicant herein filed and lodged an Appeal, which was similarly heard and dismissed.

72. Notwithstanding the foregoing, the Plaintiff/Applicant still went ahead and filed the instant suit, seeking to circumvent and defeat the lawful orders that had hitherto been issued in the previous suit.

73. However, the court was able to discern and appreciate the mischief being propagated by the Plaintiff/Applicant and hence the instant suit was terminated on account of Res-judicata.

74. Despite being privy to and knowledgeable of the antecedent fact, the Plaintiff/Applicant filed an application for review and which application was heard and disposed of vide the ruling rendered on the 27th January 2022.

75. Undeterred by the finding and holding of the court contained and expressed vide the ruling rendered on the 27th January 2022, the Plaintiff/Applicant has since reverted back to court with yet another application for review.

76. Clearly, there cannot be a scenario where one litigant keeps reverting to court with various, albeit numerous proceedings, whose purport is to defeat lawful court orders which were issued in his presence.

77. Suffice it to point out that the mounting of the plethora of suits and application herein is actually driven by ulterior motive and calculated to achieve collateral purpose, other than a genuine desire to pursue Justice.

78. To my mind, the Plaintiff/Applicant is not using the court process in a legitimate and lawful manner. Indeed, the conduct of the Plaintiff/Applicant reeks of mala-fides.

79. Simply put, the subject application constitutes and amounts to an abuse of the due process of the court. Consequently, the Plaintiff/Applicant must be stopped in his track, lest the Honourable Court will continuously be engaged in a circus.

80. As concerns what constitutes an abuse of the due process of the court, it is appropriate to take cognizance of the holding of the Court of Appeal vide the case of *Muchanga Investments Ltdversus Safaris Unlimited (africa) Ltd& 2 others* [2009] eKLR, where the Court of appeal observed as hereunder;

> " 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 Beinosiv Wiyley1973 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."
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> 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-whytieJ Sc in *Sarak v Kotoye*(1992) 9 NWLR 9pt 264) 156 at 188-189 (e) the concept of abuse of judicial process was defined:-
>
> "The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice ..."

The same Court went on to give the understated circumstances, as examples or illustrations of the abuse of the judicial process:-

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

(b) Instituting different actions between the same parties simultaneously in different courts even though on different grounds.

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

(d) (sic) meaning not clear))

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

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.

81. Additionally, what constitute abuse of the Due process of the court was also deliberated upon and delineated in the case of *Satya Bhama versus The Director of Public Prosecution & Another* (2018)eKLR, where the court stated as hereunder;

"26. It's settled law that a litigant has no right to purse paripasua two processes which will have the same effect in two courts either at the same time or at different times 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.

27. It is not open for the applicant herein to institute these Judicial Review proceedings after losing the Petition challenging the same criminal trial. The two processes are in law not available to the applicant. He ought to have appealed against the above mentioned decision if he was dissatisfied. The Applicant cannot lawfully file this Judicial Review proceedings and seek similar reliefs relying on substantially the same grounds as the Petition referred to above. The pursuit of the second process, that is this Judicial Review Application constitutes and amounts to abuse of court/legal process."[17]

28. 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.[18] 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 interface with the administration of justice.[19]I find no difficulty in concluding that this Judicial Review Application is based on similar grounds as the Petition referred to above.

29. This obstacle to the efficient administration of justice is not immovable. Courts need not and should not wait for lawyers and litigants to initiate

proceedings where there is substantial reason to believe that the processes of the court have been abused. Tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which such abuse cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception, fraud and blatant abuse of judicial processes.

30. All courts have an inherent or implied jurisdiction to prevent their processes from being used as an instrument of oppression. Courts are able to modify their procedures to avoid such prejudice and take any steps that are necessary to prevent an abuse of process.[20]The concept of abuse of process extends to the use of the court's processes in a way that is inconsistent with two fundamental requirements arising in Court proceedings. These are, first, that the Court protect its ability to function as a Court of law by ensuring that its processes are used fairly by State and citizen alike. The second is that unless the Court protects its ability to function in that way, its failure will lead to an erosion of public confidence. The court's processes will be seen as lending themselves to oppression and injustice.[21]

31. The concept of abuse of process overlaps with the obligation of a Court to provide a fair trial. The content of these obligations cannot, however, be stated exhaustively or analytically. These obligations rely on intuitive judgments formed by experience.[22]The obligation on a court is to provide a fair trial in accordance with law. The due administration of justice is a continuous process. Courts must be vigilant to ensure that public confidence in the administration of justice is maintained.[23]"

82. In short, I come to the inescapable conclusion that the Plaintiff/Applicant is merely intent on playing lottery and the game of chess, with the Due process of the court.

83. Consequently, such conduct must be frowned upon and deprecate by all and sundry, not less, by this Honourable Court.

Final Disposition:

84. Having analyzed and considered the various issues that were isolated and identified in the body of the Ruling herein, it is evident that the Plaintiff/Applicant and by extension his advocates on record, are actually hellbent on abusing the due process of the court.

85. Clearly, the Plaintiff and his advocates are privy and knowledgeable of the Ruling of this court rendered on the 27th January 2022, where this court held and observed that the previous application inter-alia, constituted a gross abuse of the due process of the court.

86. Despite being aware of the said holding and decision of the Honourable court, the Plaintiff/Applicant and his counsel still have the audacity to approach the court and seek a similar relief which the court had pronounced itself on.

87. Surely, this is the height of abuse of the due process of the court. For clarity, an advocate of the High court of Kenya, who remains an officer of the court ought not to inspire, facilitate and aid any process that is meant to defeat and defraud the cause of justice.

88. Nevertheless, the Plaintiff's advocates appears to have forgotten or better still disregarded his mandate and obligation to the court. See Section 1A and 1B of the *Civil Procedure Act*, Chapter 21, Laws of Kenya.

89. To be able to understand that the Plaintiff/Applicant's Advocate is duty bound to assist and aid the court in the exercise and discharge of the duty to dispense justice expeditiously and in accordance of the constitution, it is imperative to reproduce the provisions of the said Section.

90. For convenience, the provisions of Section 1A of the *Civil Procedure Act*, Chapter 21 Laws of Kenya are reproduced as hereunder;

1A. Objective of Act

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

(2) The Court shall, in the 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.

91. In view of the nature of the issues that have been discussed herein, it would be appropriate and in the interests of justice that the Plaintiffs advocate be personally penalized to bear the costs of the impugned application.

92. Consequently and in the premises, I am constrained to and Do hereby make the following orders;

i. The Application dated the 16th September 2022 be and is hereby Dismissed for being a Classic abuse of the Due process of the Honourable court.

ii. The Costs of the Application be and is hereby assessed and certified in the sum of Kshs.30, 000/= Only, and same to be borne personally by the Plaintiff's advocate and same be payable within 30 days.

iii. In default to comply with clause (ii) the 1st Defendant/Respondent shall be at liberty to execute for the said costs.

93. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF DECEMBER 2022.

OGUTTU MBOYA

JUDGE

In the Presence of;

Benson - Court Assistant.

Mr. Ng'ang'a for the Plaintiff/Applicant

Mr. Maina Makome for the 1st Defendant/Respondent

N/A for the 2nd and 3rd Defendant