



Owino & 2 others (Suing as the Officials and Members of Yasego Society) v Meron Limited & another (Environment & Land Case E10 of 2024) [2024] KEELC 1728 (KLR) (4 April 2024) (Ruling)

Neutral citation: [2024] KEELC 1728 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E10 OF 2024**

JO MBOYA, J

APRIL 4, 2024

BETWEEN

STEPHENE OTIENO OWINO, JOYCE NYAKERO AND GEORGE KIMUTAI (SUING AS THE OFFICIALS AND MEMBERS OF YASEGO SOCIETY) PLAINTIFF

AND

MERON LIMITED 1ST DEFENDANT

LANGTON INVESTMENTS LIMITED 2ND DEFENDANT

RULING

1. The 2nd Defendant/Applicant herein has approached the Honorable court vide Notice of Motion Application dated the 28th February 2024; brought pursuant to the provisions of Order 2 Rule 15(1) (b), (c) and (d), Order 40 Rule 7, Order 45 Rule 1 of the Civil Procedure Rules, 2010 and in respect of which the 2nd Defendant/Applicant herein has sought for the following reliefs [verbatim]:
 - i.Spent.
 - ii. That the order made by this court on 14th February 2024 be reviewed and set aside Ex-parte pending the hearing and determination of this Application.
 - iii. That the order made by this court on 14th February 2024 be reviewed and set aside.
 - iv. This suit be struck out and costs be awarded to the 2nd Defendant on a full indemnity basis.



- v. The Plaintiff and the 1st Defendant do pay the 2nd Defendant the costs of the Application only.
2. That the instant Application is premised and anchored on a plethora of grounds which have been enumerated in the body thereof. Furthermore, the Application is supported vide several affidavits, namely, the supporting affidavit of David Muchai Kunyiha sworn on the 28th February 2024, affidavit of Erick Nyadimo sworn on the 27th February 2024; further affidavit of David Muchai Kunyiha sworn on the 14th March 2024 and affidavit of Evans Anekea Omulubi sworn on the 14th March 2024, respectively.
3. Upon being served with the instant Application, the Plaintiff filed a Replying affidavit sworn on the 4th March 2024, whereas the 1st Defendant/Respondent has responded to the application vide Replying affidavit sworn on the 11th March 2024.
4. Suffice it to point out that the Application beforehand came up for directions on the 13th March 2024; whereupon the advocates for the respective Parties covenanted to canvass and ventilate the Application by way of written submissions. For clarity, the advocates for the respective Parties also agreed that the previous Application dated the 14th February 2024; be held in abeyance pending the hearing and determination of the instant Application.
5. First forward, the 2nd Defendant/Applicant proceeded to and filed written submissions dated the 14th March 2024, whereas the Plaintiff/Respondent filed written submission dated the 19th March 2024. For good measure, the 1st Defendant/Respondent did not file any written submissions.
6. For coherence, the two [2] sets of written submissions [details in terms of the preceding paragraphs] forms part of the record of the court.

PARTIES' SUBMISSIONS:

SUBPARA a.

APPLICANT'S SUBMISSIONS:

7. The Applicant herein filed written submissions dated the 14th March 2024; and in respect of which same [Applicant] has adopted and reiterated the grounds contained at the foot of the Application beforehand; as well as the averments alluded to in the various affidavits that have been filed in support of the Application.
8. Furthermore, the Applicant herein has thereafter raised, highlighted and canvassed five [5] salient and pertinent issues for due consideration and determination by the Honourable court.
9. Firstly, learned counsel for the Applicant has contended that the orders of status quo which were issued by this court on the 14th February 2024; are contradictory to and at variance with the orders which were issued by Hon. Justice Wabwotto, Judge in ELC No. E139 of 2023, between Langton Investment Ltd vs Meron Ltd, Chief Land Registrar and Director Land Administration.
10. Instructively, learned counsel for the Applicant has submitted that in respect of the said suit [namely ELC No. E139 of 2023], the learned Judge issued and granted an order of injunction restraining the current 1st Defendant from interfering with the suit property or at all.
11. Furthermore, learned counsel for the Applicant has also submitted that subsequently the said Judge, namely, Hon Justice Wabwotto, J issued further orders directing the Officer commanding Kasarani Police Station and Nairobi County Police Commander, respectively to enforce the orders of the court,



- whose import was/is to restrain the 1st Defendant from remaining in possession of the suit Property herein.
12. Based on the foregoing, learned counsel for the Applicant has therefore contended that the import and tenor of the orders of status quo is to the effect that the orders of Hon Justice Wabwotto, J can no longer be enforced, executed and/or implemented.
 13. Secondly, learned counsel for the Applicant has submitted that the suit beforehand also constitutes an abuse of the due process of the court insofar as the suit herein touches on and/or concerns the same property, namely, L.R No 28401 [hereinafter referred to as the suit property], which is stated to be the subject of many other suit[s]; namely ELC E139 of 2023; ELC E153 of 2023; ELC E156 of 2023; ELC E474 of 2023 and ELC JR No. 1 of 2024, respectively.
 14. According to learned counsel for the Applicant, all the suits [details in terms of the preceding paragraph] relates to and/or concern the same suit property and hence the filing of the current suit constitutes and/or amounts to an abuse of the due process of the court.
 15. Arising from the foregoing, learned counsel for the Applicant has therefore invited the court to find and hold that the suit beforehand ought to be struck out for being an abuse of the due process of the court.
 16. Thirdly, learned counsel for the Applicant has also submitted that other than being an abuse of the due process of the court, the instant suit, is also frivolous and vexatious insofar as the Plaintiff/Respondent herein have neither been in occupation of the suit property for the requisite duration of 12 years [sic] to warrant a proclamation anchored on adverse possession.
 17. To the contrary, learned counsel for the Applicant has submitted that the Applicant has placed before the Honourable court uncontroverted evidence by Erick Nyadimo, Surveyor and Evans Anakeya Omulubi, respectively, which evidence confirm that the suit property is vacant and uninhabited by any one, let alone the Plaintiff/Respondent herein.
 18. To the extent that the Plaintiff/Respondent herein has neither been in occupation nor possession of the suit property, learned counsel for the 2nd Defendant/Applicant has therefore challenged the contention by and on behalf of the Plaintiff/Respondent pertaining to [sic] occupation of the suit property.
 19. Fourthly, learned counsel for the Applicant has submitted that the suit beforehand is also incompetent and thus ought to be struck out for being in contravention of the provision of Order 37 Rule 7(2) of the Civil Procedure Rules 2010; which underscore the necessity to annex and file before the court a copy of the extract of title and not otherwise.
 20. Nevertheless, learned counsel for the Applicant has submitted that despite the clear and explicit provisions of Order 37 Rule 7 of the Civil Procedure Rules, 2010, the Applicant herein have neither exhibited and/or annexed a copy of the extract of title to the supporting affidavit in respect of the Application beforehand.
 21. In support of the foregoing submissions, namely, the submissions pertaining to want of compliance with the provisions of Order 37 Rule 7 of the Civil Procedure Rules, 2010, learned counsel for the Applicant has cited and relied on inter-alia the holding in the case of George Kamau Machora vs Mary Gathoni Kamau [2014]eKLR, Simon Gatutu & 587 Others vs East African Portland Cement [2011]eKLR, Johnson Kinywa vs Simon Gitura Rumuri [2011]eKLR, John Wambura & Another vs Anakletus Wambura [2017]eKLR and Crescent Construction Company Ltd vs Delphis Bank Ltd [2007]eKLR, respectively.



22. Fifthly, learned counsel for the Applicant has submitted that the entire suit before the court is merely calculated and/or geared towards subjecting the 2nd Defendant/Applicant to unnecessary legal costs yet the suit beforehand is misconceived, legally untenable and bad in law.
23. Arising from the foregoing, learned counsel for the 2nd Defendant/Applicant has therefore submitted that the Application beforehand is meritorious and thus ought to be allowed. Consequently and in this regard, learned counsel for the 2nd Defendant/Applicant has implored the court to strike out the suit and [sic] award costs on indemnity basis.

SUBPARA b.

PLAINTIFF/RESPONDENT'S SUBMISSIONS:

24. The Plaintiff/Respondent filed written submissions dated the 19th March 2024; and in respect of which same have adopted and reiterated the averments at the foot of the Replying affidavit sworn on the 4th March 2024; and thereafter raised, highlighted and canvassed three [3] salient issues for consideration by the court.
25. First and foremost, learned counsel for the Plaintiff/Respondent has submitted that even though the Applicant herein has cited and relied on the provisions of Order 45 Rule 1 of the Civil Procedure Rules, 2010, pertaining to and concerning review, however, the Applicant herein has neither pleaded nor invoked any of the grounds known for purposes of attracting review.
26. In the absence of any ground known to law for purposes of review, learned counsel for the Plaintiff/Respondent has therefore contended that the Application before the court and which seeks to review the orders of the court made on the 14th February 2024; is premature and misconceived.
27. Further and in any event, learned counsel for the Plaintiff/Respondent has also submitted that it was incumbent upon the 2nd Defendant/Applicant to demonstrate and prove that either ground for review, exists to warrant the orders sought.
28. Be that as it may, learned counsel for the Plaintiff/Respondent has submitted that the Applicant herein has failed to show and demonstrate that the orders which were issued on the 14th February 2024; ought to be reviewed either in the manner sought or at all.
29. In support of the foregoing submissions that the Application beforehand does not espouse any of the grounds known to law for purposes of review, learned counsel for the Plaintiff/Respondent has cited and relied on inter-alia the holding in *Benjoh Amalgamated & Another vs Kenya Commercial Bank Ltd* [2014]eKLR, *Bethwel Omondi Okal vs Board of Trustees Teleposta Pension & 2 Others* [2012]eKLR, *Ferdinant Ndungu Waititu & 4 Others vs Attorney General & 11 Others* (2016)eKLR and *Re- Estate of Kimelo Olekuyoni [deceased]* [2021]eKLR, respectively.
30. Secondly, learned counsel for the Plaintiff/Respondent has also submitted that the orders which were issued by Hon Justice Wabwotto in ELC No E139 of 2023 have no bearing or at all to and in respect of the subject matter. For coherence, learned counsel for the Plaintiff/Respondent has submitted that the Plaintiff[s] herein were not Parties to the suit before Hon Justice Wabwotto and hence the orders therein cannot impact upon same or at all.
31. Additionally, learned counsel for the Plaintiff/Respondent has submitted that the suit in question, namely, ELC No. E139 of 2023 was between the 2nd Defendant herein [as the Plaintiff] and the 1st Defendant [who was the 1st Defendant] in respect of the said suit.



32. Arising from the foregoing, learned counsel for the Plaintiff/Respondent has therefore submitted that the orders which were issued by this Honorable court on the 14th February 2024; cannot therefore conflict with and/or contradict the orders which were issued vide ELC No. E139 of 2023, either as alleged or at all.

c. 1ST DEFENDANT'S SUBMISSIONS:

33. The 1st Defendant herein intimated to court that same will not be filing any written submissions as pertains to the Application beforehand. In any event, learned counsel for the 1st Defendant pointed out that same shall be adopting and relying on the contents of the Replying affidavit sworn on the 11th March 2024.

34. Arising from the foregoing, the only sets of submissions are the ones filed by the 2nd Defendant/Applicant and the Plaintiff/Respondent, respectively.

ISSUES FOR DETERMINATION:

35. Having appraised and reviewed the Application beforehand and the responses thereto; and upon taking into consideration the written submissions filed on behalf of the respective Parties, the following issues do emerge [crystalize] and are thus worthy of determination;

- i. Whether the Applicant herein has impleaded any of the known grounds upon which review can be sought and whether, in any event the Applicant has established a basis to warrant review of the orders issued on the 14th February 2024.
- ii. Whether the instant suit constitutes and/or amounts to an abuse of the Due process of the court.
- iii. Whether the instant suit is frivolous and vexatious or otherwise.
- iv. Whether the Originating Summons beforehand is fatally deficient and/or incompetent for [sic] non-compliance with the provisions of Order 37 Rule 7 (2) of the Civil Procedure Rules, 2010.

DIVISION - ANALYSIS AND DETERMINATION:

ISSUE NUMBER 1

Whether the Applicant herein has impleaded any of the known grounds upon which review can be sought and whether, in any event the Applicant has established a basis to warrant review of the orders issued on the 14th February 2024.

36. The 2nd Defendant/Applicant has contended that the orders of the court which were issued on the 14th of February 2023 conflict with the orders of the court [differently constituted] which were issued vide Milimani ELC No. E139 of 2023 Between Langton Investment Limited vs Meron Limited, The Chief land Registrar and the Director Land Administration.

37. Furthermore, learned counsel for the Applicant has also contended that the orders which were issued on the 14th February 2024, which are essentially orders of status quo, pertaining to and concerning occupation, possession and use of the suit property have made it difficult to enforce the orders which were issued by Hon Justice Wabwotto in ELC No. E139 of 2023.



38. Arising from the foregoing, learned counsel for the Applicant has therefore contended that there are two conflicting orders emanating from courts of equal status which would thus lead to an embarrassment of the Judicial process and thereby causing the public to lose faith in the Judicial process.
39. On the other hand, learned counsel for the Plaintiff has contended that the orders which were issued by this Honorable court on the 14th February 2024 are separate and distinct and do not in any way contradict and/or conflict with the orders which were issued vide ELC NO E139 of 2023. For good measure, learned counsel for the Plaintiff/Respondent has submitted that the Plaintiff[s] herein are not Parties in ELC NO E139 of 2023.
40. Having considered the rivaling submissions by and on behalf of the parties pertaining to whether or not the orders issued on the 14th February 2024; conflict with the orders which were issued vide ELC NO E139 of 2023, my position is as hereunder;
41. First and foremost, it is imperative to state and underscore that ELC NO E139 of 2023, which has been alluded to by the 2nd Defendant/Applicant is a dispute between the Defendants herein. For coherence, the Plaintiff in the said matter is the Applicant herein, who has impleaded the 1st Defendant and the Chief Land Registrar and the cause of action therein touches on and/or concerns inter-alia [illegal subdivision of the suit property and [sic] fraudulent issuance of titles to the resultant subdivisions].
42. Notably, the Plaintiff/Respondent herein are not parties to the said suit and to the extent that the Plaintiff[s] are not Parties to the said suit, same [Plaintiff/Respondent] were therefore not heard in the said suit.
43. Secondly, it is also not lost on the court that the Plaintiff/Respondent herein filed the instant suit as against the two Defendants herein and same [Plaintiff/Respondent] is claiming to have acquired the suit property vide prescription [adverse possession].
44. Arising from the contention that the Plaintiff/Respondent has acquired the suit property vide adverse possession, same [Plaintiff/Respondent] approached the court with an application wherein same [Plaintiff/Respondent sought to restrain the Defendants herein from interfering with her [Plaintiff's/ Respondent's] occupation of the suit.
45. Pursuant to and arising from the Application, this court appraised the facts of the matter and thereafter proceeded to and granted an order for the maintenance of status quo as pertains to the occupation, possession and use of the suit property.
46. For coherence, it is the said order for maintenance of status quo which has aggrieved the 2nd Defendant/Applicant and thus the prayer to have the impugned orders reviewed and vacated.
47. Be that as it may, I beg to point out that the orders which were issued on the 14th February 2024 at the instance of the Plaintiff/Respondent herein do not in any way contradict and/or conflict with the orders which were issued vide ELC NO E139 of 2023.
48. Additionally, there is no gainsaying that the Parties at the foot of the two [2] suits herein are separate and distinct and thus each and every Party, has a right to approach the court and partake of the Fundamental Right[s] espoused and entrenched vide Articles 10[2], 48 and 50 of *the Constitution* 2010.
49. Other than the foregoing, I beg to point out that the orders which were made on the 14th February 2024 were made on the basis of the facts as impleaded in respect of the instant matter and hence there is no discernable error and/or mistake apparent on the face of record or at all.



50. On the other hand, it is also instructive to underscore that the Applicant herein has also not demonstrated the discovery of any new and important matter, if at all, that can vitiate and/or negate the legality and or propriety of the orders that were issued on the 14th February 2024.
51. Besides, it is also instructive to point out that the 2nd Defendant/Applicant has also not established the existence of any sufficient cause and/or basis to warrant the review sought. For good measure, it is worth stating that whosoever wishes to partake of review is obligated to implead the requisite grounds for review and thereafter to strictly prove such grounds.
52. To this end, it is appropriate to take cognizance of the ratio of the court in the case of Stephen Gathua Kimani versus Nancy Wanjira Waruingi t/a Providence Auctioneers [2016] eKLR, where the court held as hereunder;

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 the 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.

53. Whilst entertaining an appeal arising from the case of Stephen Gathua Kimani versus Nancy Wanjira Waruingi t/a Providence Auctioneers [2019] eKLR, the court of appeal stated and held thus;

“In the ruling dismissing the appellant’s notice of motion, the learned judge,(Mativo, J) discussed the essence of a review application. In so doing, he considered the enabling provisions of the Civil Procedure Act and the Civil Procedure Rules.

He stated:

“At this juncture, I find it is necessary to examine the provisions of Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules, 2010. In my view, the High Court has a power of review, but such said power must be exercised within the framework of Section 80 Civil Procedure Act and Order 45 Rule 1”.

He proceeded to cite Section 80 of the Civil Procedure Act which provides as follows:

“80. Any person who considers himself aggrieved-

- (a) by a decree or an 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 Court, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit”.

The learned judge also placed reliance on Order 45 Rule 1 of the Civil Procedure Rules, 2010 which provides as follows:

“ 45 Rule 1(I) 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 judgment to the court which passed the decree or made the order without unreasonable delay.”

After analysing the enabling provisions, the learned judge rightly so, in our view, found that an application for review is restricted to certain parameters. These are as set out in Orders 45 Rule I of the Civil Procedure Rules, 2010 cited above.[emphasis supplied].

- 54. Notably, any Claimant, the Applicant herein not excepted, is obligated to comply with and/or abide by the strictures stipulated vide the provisions of Order 45 Rule 1 of the Civil Procedure Rules, 2010, as read together with Section 80 of The *Civil Procedure Act*, including impleading the ground[s] upon which review is sought and thereafter endeavoring to prove the designated ground[s] to the requisite standard.
- 55. Be that as it may, it is worth pointing out that the Applicant herein made omnibus averments at the foot of the application beforehand, but same neither distilled nor highlighted any of the grounds envisaged under the provisions of Order 45 Rule 1 of the Civil Procedure Rules, 2010.
- 56. In a nutshell, my answer to issue number one [1] is threefold. Firstly, the Application beforehand seeking for review is fatally deficient and thus vitiated for lack of the requisite pleadings to anchor a plea for review, in accordance with the prescription of the Law.
- 57. Secondly, the orders which were issued on the 14th February 2024 and which are complained of, are not contradictory to and/or in conflict with the orders issued vide ELC NO. E139 of 2023, either as contended or at all.
- 58. Thirdly, that the Plaintiffs herein, who are the beneficiaries of the orders issued on the 14th February 2024 are not parties in ELC NO. E139 of 2023 and hence same [Plaintiff/Respondent] cannot be held hostage on the basis of orders issued in a matter where same are not parties.

ISSUE NUMBER 2

Whether the instant suit constitutes and/or amounts to an abuse of the due process of the court.

- 59. The instant Application by and on behalf of the Applicant also seeks to have the suit beforehand to be struck out on the basis that same constitutes and/or amounts to an abuse of the due process of the court.
- 60. To anchor the contention that the instant suit constitutes an abuse of the due process of the court, the Applicant has contended that there are several suits which have been filed by various parties touching on and concerning the same suit property. In this regard, the Applicant has thereafter ventured forward and itemized the various suits at the foot of paragraph 13 of the submissions dated the 14th March 2024.
- 61. Nevertheless, it is not lost on this court that the various suits, which have been highlighted and amplified by the Applicant do not relate to and/or concern the Plaintiff/Respondent herein.



Furthermore, no evidence has been tendered and/or produced before the court to show that the Plaintiffs herein had authorized the filing of the named suits on her behalf.

62. Additionally, there is no gainsaying that one suit property, like the one beforehand, can be the basis of several suits, where appropriate, provided that each and every claimant has a separate and distinct cause of action. Consequently, the fact that there have been other suits, espousing different causes of action, does not in my humble view bar the Plaintiffs herein from filing their own suit, subject to the provision[s] of the Constitution, 2010; as well as the obtaining Law.
63. Nevertheless, it is imperative to underscore that the filing of a suit per se, does not denote that the claim beforehand has been proven or better still, shall stand the test of the law at the tail end after a plenary hearing.
64. Put differently, any claimant, the Plaintiff/Respondent not excepted shall still be obligated to tender and/or place before the Honourable court plausible and credible evidence to demonstrate their claim to the requisite standard [See Section 107, 108 and 109 of the Evidence Act, Chapter 80 Laws of Kenya].
65. Be that as it may, I am unable to discern and/or decipher any scintilla of evidence to warrant a finding that the suit by the Plaintiffs/Respondents herein constitutes an abuse of the due process of the court.
66. To the contrary, I hold the humble view that the Plaintiffs herein are pursuing their right of access to justice in a bid to have [sic] their claim to the suit property on the basis of adverse possession interrogated and adjudicated upon, one way or the other.
67. To the extent that the Plaintiffs herein are pursuing their constitutional right to be heard, which is underpinned by the provisions of Article 50 of the Constitution, 2010, the pursuit of such a right by the Plaintiffs herein cannot be baptized [without more] as an abuse of the due process of the court.
68. Before departing from the issue herein, it suffices to state that the concept of abuse of the due process of the court is elastic and incapable of an exhaustive definition. Nevertheless, perspectives that may show abuse of the court process have hitherto been , amplified and documented.
69. In the case of Satya Bhamu Gandhi versus Director of Public Prosecutions & 3 others [2018] eKLR, where the court stated and held as hereunder;

22. The concept of abuse of court/judicial process is imprecise. It involves circumstances and situation 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.[12]

23. The situation 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 for example a cross appeal and respondent notice.
- (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.[13]
- (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. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent.[14]

70. Other than the foregoing decision, the Court of Appeal has also had an occasion to interrogate the import, tenor and scope of the concept of abuse of the due process of the court.
71. For coherence, Court dealt with concept of abuse of court process in the case of MUCHANGA INVESTMENTS LTD versus SAFARIS UNLIMITED (AFRICA) LTD & 2 others [2009] eKLR, where the court held thus;

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

“The person who abuses process is interested only in accomplishing some improper purpose that is collateral to the proper object of the process, and that offends justice.”

In BEINOSI v WIYLEY 1973 SA 721 [SCA] at page 734F-G a South African case heard by the Appeal Court of South Africa, Mohomad CJ, set out the applicable legal principle as follows:-

“What does constitute an abuse of process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of “abuse of process.” It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective.”

Again the Court of Appeal in Abuja, Nigeria in the case of ATTAHIRO v BAGUDO 1998 3 NWLL pt 545 page 656, stated that the term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding



which is wanting in bona fides and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it.

In the Nigerian Case of KARIBU-WHYTIE J Sc in SARAK v KOTOYE (1992) 9 NWLR 9pt 264) 156 at 188-189 (e) the concept of abuse of judicial process was defined:-

“The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice ...”

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

- (a) “Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.
- (b) Instituting different actions between the same parties simultaneously in different courts even though on different grounds.
- (c) Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent’s notice.
- (d) (sic meaning not clear))
- (e) Where there is no loti of law supporting a Court process or where it is premised on frivolity or recklessness.”

72. Taking the cue of the excerpts highlighted [enumerated] in the preceding paragraphs, it is my humble position that the suit beforehand does not constitute and or amount to an abuse of the due process of the court.

ISSUE NUMBER 3

Whether the instant suit is frivolous and vexatious or otherwise.

73. Other than the contention that the suit before hand constitutes and/or amounts to an abuse of the due process of the court, which has been discussed in the preceding paragraphs; the Applicant has also contended that the instant suit is frivolous and vexatious.

74. According to the Applicant, the Plaintiffs suit has no substance and is merely intended to cause the 2nd Defendant/Applicant unnecessary anxiety and expense. Furthermore, the Applicant herein has also contended that the Plaintiffs’ suit is premised on falsehood[s] and deliberate distortion of facts, merely calculated to mislead the court.

75. Additionally, the 2nd Defendant/Applicant has also contended that following the filing of the instant suit, same [2nd Defendant/Applicant] engaged a surveyor, namely, Mr. Erick Nyadimo, who thereafter undertook a survey exercise culminating into the preparation of a survey report which has been annexed to the affidavit of the said surveyor.

76. Arising from the contents of the survey report, which has been annexed to the affidavit of the surveyor sworn on the 27th February 2024, the Applicant herein has invited the court to find and hold that there is uncontroverted evidence that the suit property has never been inhabited by the Plaintiffs.

77. Despite the plea by and on behalf of the Applicant herein, it is instructive to point out that whilst dealing with an interlocutory application like the one beforehand, the court is not called upon to



undertake precipitate review of the evidence with a view to forming a substantive and final conclusion on the veracity thereof.

78. Notwithstanding the foregoing, what the Applicants seems to be inviting the court to do is to degenerate into the arena of endeavoring to evaluate the evidence presented by the two parties and thereafter to make a firm and substantive conclusion. However, I must underscore that the evaluation of the evidence on record and the formation of a substantive conclusion is the preserve of trial court after a plenary hearing conducted in a conventional manner.
79. Put differently, this court whilst engaging in an interlocutory application is devoid and bereft of Jurisdiction to interrogate the factual controversy and to arrive at a final conclusion, either in the manner contended by the Applicant or at all.
80. In any event, there is also no gainsaying that whilst dealing with an application for striking out of a suit, the court is not called upon to undertake minute of examination of the evidence with a view to forming an opinion.
81. To buttress the foregoing exposition of the law, it suffices to take cognizance of the erudite position espoused by the Court of Appeal in the case of Industrial and Commercial Development Corporation versus Daber Enterprises Limited [2000] eKLR, where the court held thus;

“Unless the matter is plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial where, if necessary, there has been discovery and oral evidence subject to cross-examination - see the case of *Wenlock v. Moloney and Others*, [1965] 1 W.L.R. 1238. The purpose of the proceedings in an application for summary judgment is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claim.

And where the defendant's only suggested defence is a point of law and the court can see at once that the point is misconceived or, if arguable, can be shown shortly to be plainly unsustainable, the plaintiff will be entitled to judgment. The summary nature of the proceedings should not, however, be allowed to become a means for obtaining, in effect, an immediate trial of the action, for it is only if an arguable question of law or construction is short and depends on few documents that the procedure is suitable - see the cases of *Home and Overseas Insurance Co. Ltd. v. Mentor Insurance Co. (U.K.) Ltd. (In Liquidation)*, [1990] 1 W.L.R. 153, 158 and *Balli Trading v. Afalona Shipping, The Coral*, [1993] 1 Lloyd's Rep. 1, C.A. A defendant who can show by affidavit that there is a bona fide triable issue is to be allowed to defend that issue without condition - see the case of *Jacobs v. Booth's Distillery Co.*, (1901) L.T. 262 H.L.

82. Other than the foregoing decision, it is also imperative to recall the words of wisdom that flow from the decision in the case of *D.T. Dobie & Company (Kenya) Limited versus Joseph Mbaria Muchina & another*[1980] eKLR, where the court stated and held thus;

'It is well settled that a statement of claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unarguable. Accordingly it is necessary to consider whether or not this plaintiff has an arguable case. That is the only question that arises on this appeal." per Salmon, L.J., ibi at p. 651.

"It is not the practice in Civil administration of our courts to have preliminary hearing as it is in crime.... If it involves the parties in the trial of the action by affidavit's is not a plain and obvious case on its face."



"per Sellers, L.J. in *Wedlock Maloney and Others* (1965) 1 W.L.R. 1238 at pp. 1242.

"This summary jurisdiction of the court was never intended to be exercised by a minute and a protracted examination of documents and the facts of the case in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power." per Danckwerts L.J. *ibi* at p. 1244.

"The power to strike out any pleading or any part of a pleading under this rule is not mandatory, but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading." *Rayer Carl Zeiss Stiftung v. Keeler Ltd. and Others* (No. 3) (1970) Ch. D. 506.

83. From the foregoing, I am not minded to undertake minute examination and interrogation of the documentary evidence tendered and/or placed before the court, inter-alia, the Survey report, with a view to arriving at a precipitate and conclusive factual position. Notably, such an endeavor would be a crime.
84. Simply put, such evidence shall be interrogated at the opportune time [plenary Hearing stage] when the deponent shall be subjected to cross examination in the usual/conventional manner.

ISSUE NUMBER 4

Whether the Originating Summons beforehand is fatally deficient and/or incompetent for [sic] non-compliance with the provisions of Order 37 Rule 7 (2) of the Civil Procedure Rules, 2010.

85. In respect of the issue herein, learned counsel for the Applicant has submitted that the Originating summons beforehand has neither exhibited nor annexed a Certified extract of the title in accordance with the provisions of Order 37 Rule 7(2) of the Civil Procedure Rules, 2010.
86. To the contrary, learned counsel for the Applicant has contended that what has been exhibited is a copy of title which the Plaintiffs/Respondents procured from one of the suits which had been filed by and on behalf of the 1st Defendant herein. However, learned counsel for the Applicant has contended that the copy of title which has been annexed does not suffice insofar as same is not synonymous with the extract of title, which is envisaged by dint of Order 37 Rule 7(2) of the Civil Procedure Rules, 2010.
87. Premised on the contention that the Plaintiffs/Respondents herein have neither annexed nor brought before the court a certified extract of title, learned counsel for the Applicant has therefore invited the court to find and hold that the absence of such certified extract of title is fatal and thus invalidate[s] the Plaintiffs' suit.
88. Consequently and in the premises, learned counsel for the Applicant has invited the court to proceed and strike out the Plaintiffs' suit on account of breach and/or violation of the provisions of Order 37 Rule 7(2) of the Civil Procedure Rules, 2010.
89. To anchor the contention that lack of a certified extract of title would invalidate the Originating Summons for adverse possession [like the one beforehand], learned counsel for the Applicant has cited a number of persuasive decisions, namely, *George Kamau Machora vs Mary Gathoni Kamau* [2014]eKLR, *Symon Gatutu & 587 Others vs East African Portland Cement* [2011]eKLR, *John Wambura & Another vs Ankletus Wambura* [2017]eKLR and *Peter Whitton and Kathrine S. B Whitton vs Kenya Educational Trust Ltd Nakuru Civil Case No 56 and 57 of 2005* [UR], respectively.



90. Nevertheless, I beg to point out that my attention had been drawn to the decision of the Court of Appeal in the case of David Muturi Migwe vs Sally Jemeli Korir & Another, Civil Appeal No. 47 of 2015 [Unreported] , where the court stated and held thus;

“The learned judge dismissed the claim on two grounds namely, firstly, that the originating summons was not supported by an affidavit and secondly, that an extract of the title of the land claimed by the appellant was not annexed...We would agree with the appellant’s submission that failure to annex a certified extract of title to the affidavit is a procedural irregularity which could be cured by providing the extract of title at any stage of the proceedings. We also agree that in the circumstances of this case, failure to file a comprehensive affidavit to support the claim to land by adverse possession was not fatal to the claim since oral evidence was tendered at the trial to support the claim. However, this is not a case where the appellant merely failed to produce a certified abstract of title. Rather, this is a case where the deceased did not have a registered title to the land and none existed at the time of trial. By Section 41 of the Act, Government land cannot be acquired by adverse possession.”

91. Notwithstanding the foregoing, it is also instructive to take cognizance of the ratio in the case of Moses Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others [2016] eKLR, where the court held thus;

(65) This Court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.

(66) Yet procedure, in general terms, is not an end in itself. In certain cases, insistence on a strict observance of a rule of procedure, could undermine the cause of justice. Hence the pertinence of Article 159 (2) (d) of *the Constitution*, which proclaims that, “... courts and tribunals shall be guided by...[the principle that] justice shall be administered without undue regard to procedural technicalities”. This provision, however, is not a panacea for all situations befitting judicial intervention; and inevitably, a significant scope for discretion devolves to the Courts.

(67) As an instance, there are times when the disregard of Rule 33 of the Supreme Court Rules clearly undermines the Court’s ability to deliver justice to all the parties in a dispute. (This is concerned with the mode of instituting appeals). In such a situation, the shield of Article 159 (2) (d) will not be deployed by the Court in aid of the offending litigant. Such is, however, not the case in the instant appeal. Notwithstanding the failure to adhere to all the requirements of the Rule at the initial stages, by the appellants herein, their subsequent actions did ensure that the Court was not without all the requisite documentation, for undertaking a consideration of the matter.

92. To my mind, the failure to annex and/or produce a certified extract of the title in respect of the suit property is a procedural lapse which in any event, is curable. For good measure, the Plaintiffs herein



can very well be able, subject to leave, to procure and avail same vide a supplementary affidavit, prior to the issuance of directions by dint of the provisions of Order 37 Rules 16 and 17 of the Civil Procedure Rules 2010.

93. Consequently and in view of the foregoing, it is my finding and holding that lack of a certified extract of title [in terms of Order 37 Rule 7[2] of the Civil Procedure Rules, 2010], is not fatal and hence cannot invalidate the originating summons beforehand either in the manner contended by the Applicant or at all.

FINAL DISPOSITION

94. Having considered the thematic issues, [which were enumerated in the body of the ruling], it must have become crystal clear that the Application beforehand is not only premature and misconceived, but same is legally untenable and bad in law.
95. In any event, it is not lost on the court that vide the instant Application, the 2nd Defendant/Applicant was attempting to put the wagon before the horse and to procure a substantive determination of factual [evidentiary] issues, albeit on the basis of interlocutory Application.
96. Simply put, such an endeavor is inimical to the established and hackneyed position of the law, which requires evidential analysis and interrogation to be undertaken during a plenary hearing and not otherwise.
97. In a nutshell, the Application dated the 28th February 2024, be and is hereby dismissed with costs to the Plaintiffs/Respondents and the 1st Defendant/Respondent, respectively.
98. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4TH DAY OF APRIL, 2024.

OGUTTU MBOYA,

JUDGE.

In the presence of:

Benson – Court Assistant

Mr. Kiragu Kimani SC and Mr. Stephen Njiru for the 2nd Defendant/Applicant.

Mr. Odiwuor Kenyatta for the Plaintiffs/Respondents.

Mr. Justus Mutunga for the 1st Defendant/Respondent.

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