



**Maru v Wafula (Environment & Land Case 103 of 2008)
[2022] KEELC 3193 (KLR) (6 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3193 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 103 OF 2008
FO NYAGAKA, J
JUNE 6, 2022**

BETWEEN

MANSUKHALAL JESANG MARU PLAINTIFF

AND

FRANK WAFULA PLAINTIFF

RULING

(On review and setting aside of a Ruling)

The Application

1. The Applicant filed a Notice of Motion dated 16/03/2022. He brought it under Sections 1A, 1B, 3, 3A, 80 and 63(c) of the *Civil Procedure Act*, Order 45 Rule 1 of the *Civil Procedure Rules* 2010 and Articles 47 (1) and (2), 48, 50(1) and (4) and 159(2) of *the Constitution* and all enabling provisions of the law. By the said Application he sought orders:
 - a. ...spent
 - b. That the Honourable Court be pleased to review and vary or set aside its ruling dated 10th March, 2022 and all the consequential orders.
 - c. That the costs of this application be provided for.
2. The Application was supported on a number of grounds which were basically repeated in the Supporting Affidavit sworn by the Applicant, one Frank Wafula, on 16/03/2022. The main contentions in both the grounds and depositions in the Affidavit were that there were errors apparent on the face of record in the ruling delivered on 10/03/2022. Thus, to him, there was sufficient reason to warrant a review of the said ruling. The Applicant then enumerated in the grounds the specific “errors apparent on the record”. He not only deponed on them but also explained how he believed



they constituted sufficient reason in that regard. I will discuss each of the arguments the sequentially as I determine the instant Application.

3. The Application was opposed strongly through the Replying Affidavit of the Respondent, Mansukhlal Jesang Maru. It was sworn on 22/03/2022. The Respondent stated that the Application was baseless and raised no triable issues. He also deponed that the Application was a delaying tactic and that no order of the Court limited the firm of R.E. Nyamu & Co. Advocates to only hold brief for Ms. Kiarie & Co. Advocates. He also deponed that the complaint by the Applicant that serving two advocates was expensive on him yet he served them electronically was not tenable. Again, he stated that the Applicant was the one expensing himself by filing many applications. He prayed that the application be dismissed.
4. On the 29/03/2022, the Applicant filed a further Affidavit sworn the same date. He deponed that he had genuine grievances. He then deponed further that he discovered that his former Advocates, Ms. Chepkwony & Co. Advocates omitted to raise an objection when the firm of Ms. R.E. Nyamu & Co. Advocates filed a Notice of Appointment of Advocates to act alongside the firm of Ms. Kiarie & Co. Advocates.
5. The Application was disposed of by way of written submissions. The Applicant filed his dated 29/03/2022 on the same date. The record does not show that the Respondents filed theirs.

Analysis and Determination

6. I have considered the Application, the supporting Affidavit together with the grounds in support of the Application and the Further Affidavit thereto. I have also given due consideration of the Replying Affidavit and the submissions by the Applicant.. I have also perused and analyzed the law and case law cited. I find the following issues for consideration:
 - i. Whether the Application is merited
 - ii. What orders to issue and who bears the costs of the Application
7. It is becoming increasingly clear from the conduct of the parties herein that one of them is bent on making application after another in this matter in order to drag and delay it to the greatest extent possible. That will not make the Court not give a hearing to each of the parties as and when the Court is moved. That is the duty of the Court and the constitutional right of the parties: to be given a fair hearing and trial. Therefore, I will straight away discuss the law relating to the orders sought and then analyze the issues at hand. This will enable this court to focus quickly on both the facts and the law, and compare and apply the facts to the law.
8. The Applicant moved this Court for an order for review and setting aside the Ruling made on 10/03/2022 together with all consequential orders. As stated above he brought the Application under Sections 1A, 1B, 3, 3A, 80 and 63(c) of the *Civil Procedure Act*, Order 45 Rule 1 of the Civil Procedure Rules 2010 and Articles 47 (1) and (2), 48, 50(1) and (4) and 159(2) of *the Constitution* and all enabling provisions of the law. For this Court to delve into the relevance of each of these provisions, it would take time and waste the precious resources available to it. It was upon the Applicant to demonstrate the relevance of each. However, it should not be lost sight of the fact that the phrase “all enabling provisions of law” holds not meaning or water in practice since there is no such provision in any legislation or other instrument. In any event, the Applicant should demonstrate what the other provisions of the law are in order to merit the use of the phrase. In that regard, it would be better to specify the provisions of law he refers to in the phrase.



9. This Court will thus highlight and comment on Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules which are relevant to the instant Application. They provide for review of either judgments or orders of Courts. Section 80 of the Act provides as follows:

“any person who considers himself aggrieved-

- a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is allowed by this Act may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit”.

10. Subsequently, the Rules Committee formulated the current Civil Procedure Rules to give effect to and clearer meaning of the provision. Thus, Order 45 Rule 1(1) of the Rules provides as follows:

1. “any person considering himself aggrieved-

- a. by a decree or order from which an appeal is allowed but 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 a 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 a review of judgment to the court which passed the decree or made the order without unreasonable delay”.

11. It is not in dispute that the two provisions of law provide for a review of a decision of a Court for, among others, the three reasons the Applicant relies on to bring the Application. These are, one, that there is an error apparent on the face of record; two, that there is sufficient reason to so do, and three discovery of new and important matter not possible to produce within with due diligence at the time of the ruling. This Court will now address itself to the meaning and application of these grounds of review.

12. In order for a party to succeed in an application for review and setting aside of a judgment, decree, ruling or order of a Court, besides bringing the Application timeously or without delay, the Applicant must prove that:

- i. There is discovery of a new and important matter or evidence which after the exercise of due diligence was not within his knowledge and which he could not therefore produce at the time the judgment or order was made or,
- ii. Some mistake or error apparent on the face of the record or,
- iii. Any other sufficient reason.

13. These are the reasons which the Applicant in the instant Application argued warranted the filing of the Application. It is pertinent to understand the meaning of each of them. Regarding an error on the face of record, Courts have pronounced themselves on its meaning. Thus, in *Muyodi vs. Industrial and*



Commercial Development Corporation & Another [2006] 1 EA 243, the Court of Appeal considered what constitutes a mistake or error apparent on the face of the record, and stated as follows:

“*In Nyamogo & Nyamogo vs Kogo* [2001] EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the fact of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal.”

14. In *Paul Mwaniki vs. National Hospital Insurance Fund Board of Management* [2020] eKLR, it was said:

“... a review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”

15. The court went on to state:

“37. The term “mistake or error apparent” by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 45 Rule 1 of the Civil Procedure Rules and Section 80 of the Act. Put it differently an order, decision, or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision.

38. The wisdom flowing from jurisprudence on this subject is that no error can be said to be apparent on the face of the record if it is not manifest or self-evident and requires an examination or argument to establish it.”



16. On the next issue, being any other sufficient reason, the Court observed in *Republic vs. Cabinet Secretary for Interior and Co-Ordination of National Government Ex Parte Abulabi Said Salad* [2019] eKLR, in paragraphs 30 and 31, as follows:

“30. A court can review a judgment for any other sufficient reason. In the case of *Sadar Mohamed vs Charan Singh and Another* [19] it was held that any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter. Mulla in the Code of Civil Procedure [20] (writing on Order 47 Rule 1 of the Civil Procedure Code of India), (the equivalent of our Order 45 Rule 1), states that the expression ‘any other sufficient reason’...means a reason sufficiently analogous to those specified in the rule. Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out..., would amount to an abuse of the liberty given to the tribunal under the Act to review its judgement. [21]”

17. I also find useful guidance in *Tokesi Mambili and Others vs Simion Litsanga* [22] where they held as follows: -

- “i. In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.
- ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion.”

18. With regard to delay in seeking a review of a decision, the court, in *Stephen Gathua Kimani vs. Nancy Wanjira Waruingi t/a Providence Auctioneers* [2016] eKLR, stated:

“One thing is clear in this application. The delay of one year has not been explained. Perhaps, it’s important to recall the last sentence of Order 45 Rule 1 (1) (b) which reads “... may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay.”

The logical question that follows is, was the present application made without unreasonable delay? Or is a delay of one year reasonable. The issue for determination is whether or not the applicant has unreasonably delayed in filing the present application. Under normal circumstances it should not take an applicant one year to file an application in court. It would require sufficient explanation to justify a delay of one year. To my mind this is a long period, and indeed an unreasonable delay.

Such a long delay must be sufficiently explained.”

19. The Applicant herein attempted raise the ground of discovery of a new and important matter not within his knowledge at the time of the delivery of the ruling. He stated in paragraph 4 of the Further Affidavit that he only discovered that the former Advocates, Ms. Chepkwony & Co. Advocates omitted



to object to the filing of the Notice of Appointment of Advocates by Ms. R. E. Nyamu & Co. Advocates to act alongside the firm of Ms. Kiarie & Co. Advocates, and that the Notice was filed without proper consent to be adopted by the Court as required by law.

20. In regard to the issue of discovery of new and important matter or evidence which after the exercise of due diligence was or was not within the Applicant's knowledge, I am guided by the holding in the case of *Republic -v- Advocates Disciplinary Tribunal Exparte Apollo Mboya [2019]* eKLR where the court held that:

“.....for material to qualify to be new and important evidence or matter, it must be of such a nature that could not have been discovered had the applicant exercised due diligence. It must be such evidence or material that was not available to the applicant or the court.”

21. In the instant case, the Applicant did not state when he discovered this. In any event this is not a matter that he, with due diligence, could not have discovered before the time of the delivery of the impugned Ruling. The Applicant has all along raised the issue of the Notice of Appointment being, to him, improperly on record. That is why he has made several applications in relation thereto, including the one he applies to review. Thus, this is not a new and important matter discovered later.
22. Therefore, this Court will restrict its analysis to the reasons he gave. Starting with the point stated in the previous paragraph immediate above, this Court proceeds to consider the period the Applicant took in bringing the Motion herein. The impugned ruling was delivered on 10/03/2022. The Application was filed on 16/03/2022. That was six (6) days after the delivery thereof. The Applicant exercised diligence in moving this Court for review. He need not explain as to delay since there was none.
23. Regarding the issue of sufficient reason, the Applicant deponed that the findings in the Supreme Court of Kenya in Petition No. 39 of 2018 stated that Advocates are obligated to observe rules of professionalism, guided by fundamental values of integrity. He was of the view by that token, the firm of Ms. R. E. Nyamu & Co. Advocates ought to have sought leave of the court before coming on record or “Mr. Kiarie to seek leave of the court” (sic). The Applicant raised this point in pretty much the same way as was in the Application dated 30/09/2021, although he did not at the time rely on the Supreme Court authority he has used this time. This Court pronounced itself on the issue and thus became functus officio on it. The Applicant was not justified to raise the issue again before this Court. If he thought this Court did not reason well on it, he should have moved to the Court of Appeal to seek a further opinion on it. I find the Applicant's behavior an abuse of the process of this Court.
24. I turn to the next issue. What constitutes an error apparent on the record? Such an error is one which the judge makes, in the course of proceedings by an accidental slip of the pen, omission or skipping of material that he/she ought to have included in the decision but due to human error, did not. Such error must be distinguished from an erroneous decision or one which may be said to be wrong.
25. The latter occurs when the judge has applied his/her mind to the facts and the law and arrives at a decision that he/she, falls short of reasoning properly or exercising proper judgment on the material before him/her. In a situation such as that, the judge shall have exercised his/her discretion, mind or faculty and is satisfied that he/she has exhausted his intellectual power, finesse and resources and can therefore do no more than concluding as he/she has done. Where the latter occurs, it does not and can never form a basis for an application for review of the decision by the said judge or a different judge of equal status. To do so would amount to the judge sitting on appeal on his/her own decision. This can never happen in our and indeed in any legal system.
26. Before this Court is an Applicant who wants to split hairs and blow hot air where it is as cold as at zero degrees Kelvin. He argues that the phrase that this Court indicated on page 1 of the Ruling between



the words “Ruling” and “Application” “ought to appear on page 17 and not page 1”. With due respect, this amounts to express and audacious demeaning of the Court. The Applicant seems to have wanted to write the ruling rather than the Court. He wants to substitute his mind with that of the Court. In essence, he implies that he understands the mind of the Court more than it and that his (reasoning) is better. But he departs from that pedestal of reasoning, assuming that is what he intended and had, when he states that the phrase does not reflect what his application was all about yet he argues that the phrase should have been somewhere at page seventeen (17).

27. If the Court was in error about the import of the phrase, it defeats logic, intellect, reason and sound judgment why it should appear in any other part of the Ruling. If it does not serve the purpose where it is and his application was not about it, then it would not serve any other elsewhere. If my analysis is correct, then this Court advises the Applicant to draw back his sword and insert it in its sheath and safely hang it on the wall, clean for use on another day.
28. In addition to the above, and in any event but to be clear, the phrase was arrived at after the Court carefully analyzed the application that was before it and its import. In the Application, the Applicant desired or wished documents be expunged from the record. His basis was that the firm of Ms. R. E. Nyamu & Co. Advocates was not properly on record. If he wanted the documents expunged on basis other than that, he did not state so anywhere on the record or in the application. To the extent that he wanted the said law firm to be declared as being improperly on record and thereby expunge all the documents filed through it from the record, he called on the Court to remove the law firm from the record. This Court takes notice of the fact that the Applicant is fond of making frivolous applications and arguments to delay this matter.
29. The Applicant’s greatest height of disrespect to the Court came out when he deponed at paragraph 13 of the Affidavit as follows, “I am giving this Court opportunity to look at the record which would not require any drawn process of reasoning on points where there may be conceivably two opinions.” By this deposition, the Applicant herein seems to be determined to make the Court feel inferior, abused and under his power and guidance.
30. First, it is not known from whom and by what authority the Applicant gives the Court opportunity to look at the record, particularly when the Court has made its decision on merits. As far as I understand the law, this Court exercises its authority under the Constitution of Kenya as granted and flowing from the people of Kenya by way of delegation to the Court. For avoidance of doubt, Article 159(1) of the 2010 Constitution provides as much. I am not sure I will find under any of the Laws of Kenya under whose authority the Applicant is giving this Court authority to act as he wants it to.
31. Second and further, the applicant challenged the Court’s findings by way of a review and stated that it does “... not require any long drawn process of reasoning on...two opinions,”. This is a clear but veiled subtle abuse of the judge and attack on the mind, reason and judgment of the Court. I would say not much in the deeper meaning of the phrase. It is one which even a pupil in elementary school understands to mean indicative of abuse. But it is not open for a party in a matter to abuse a judge or judicial officer or attack the mind of a judicial officer however painful his/her decision might be against that party. The only way plain to the party is preferring an appeal from that decision if he is aggrieved by it, as long as the law permits it to be so.
32. Our country’s jurisdiction is in an adversarial legal system wherein once a decision is made by a Court, except in where a matter is concluded through mediation, conciliation, settlement by consent in whichever manner or by other means wherein parties find happiness with the decision arrived at, there will always be a winning and a losing party. Losing a dispute may be bitter or painful, indeed a bitter pill to swallow, but one has to accept and move on or appeal from it. There are avenues of challenging



it rather than venting anger on the decision maker. The decision maker is only a delegate of power as stated under Article 159(1) of *the Constitution*: a messenger of the people who delegated the authority to him/her. That is why the office of a judge is one of trust; one in which the officer exercises with utmost good faith and honesty. It should never be misused, abused or taken advantage of and neither should the faithful messenger/servant 'be killed' or be castigated.

33. Anyway, in the instant case, this Court will not be moved by and drawn into such side shows by those of the Applicant and will not hold anything against the party. It will remain focused on determining the issues in this matter and doing justice to all, including the Applicant. But it will remind the Applicant that it would be wise to be courteous, calm and dignified even when one loses a battle.
34. Furthermore, the Applicant argued that there was an error apparent on the record. To him, the error was that the court mistakenly concluded that the Applicant had not challenged the presence of Ms. R. E. Nyamu & Co. Advocates yet he had done so on 9/2/2021. This, in my view is not an error apparent on record. The conclusion he challenges as an error was a merit-based one. On this, this Court is mesmerized at the selective reasoning of the Applicant to suit his ultimate intention of delaying this matter. He decided to misread the Ruling and mislead everyone and anyone by painting a wrong impression to them all who will come across his Application that by its Ruling this Court stated (I believe he referred to this Court's finding at Paragraph 42) that he had not challenged the presence of the firm he refers to, yet this Court referred to him not challenging the presence of the law firm of Ms. Kiarie & Co. Advocates. I repeat that the Ruling was clear that all along the Applicant had not raised an issue with the latter law firm - Ms. Kiarie & Co. Advocates - being on record. Misreading and misunderstanding of the findings of the Court do not form an error apparent on the face of record.
35. The Applicant also argued that as a result of his so called the Court's "erroneous and fatal" finding, by which he believed that the Court had not taken into account his challenge of the presence on record of Ms. R. E. Nyamu & Co. Advocates, the Court made an error which then qualifies to be one of the record which should entitle him to a review of the decision of the Court. Further, that if an omission of that nature had been made by Counsel (sic) [this is wrong: the plural of Counsel is Counsel] on record it should not be visited on him. As I have pointed out in the preceding paragraph, this Court did not proceed along the lines the Applicant mistakenly believed it did. Therefore, the Applicant's opinion put forth is itself erroneous and should crumble.
36. The Applicant's further contention was that two letters written by the two Advocates (presumably the law firm of Ms. Kiarie & Co. Advocates and Ms. R. E. Nyamu & Co. Advocates) which the Court treated as proper consent were not genuine. I was taken aback by such a contention because to my mind I did not make a finding anywhere in the impugned Ruling that the two law firms had written letters about their positions on record. As a result of this strange assertion, this Court had to read and search through the Ruling to find out where such an error was and could have arisen from. I did not find any. The Court was saddened that an applicant could be so zealous in trying to make out a case for his arguments that he imported lies into an open case such as this one.
37. Again, the Applicant argued that this Court's impugned Ruling was based on incompetent replying affidavits and concealment of crucial written submissions drawn by the firm of Ms. R.E. Nyamu & Co. Advocates and filed on record on 31/12/2021???" I must state that this contention as it was, did not bring out a clear meaning. But doing the best I could to understand it, I concluded that the Applicant meant that this Court relied on an "incompetent affidavit" - being, to him incompetent because it was sworn by the Plaintiff or law firm's client rather than the law firm itself - and that the submissions filed by the law firm whose presence on the record the Applicant challenged in the Application whose Ruling is impugned, contained evidence. He view in that manner was informed by the mere fact that it was submitted that the said law firm had authority to file documents in the same manner as the initial



law firm. With due respect to the Applicant, I considered deeply his position or argument along this line his posits. His lamentation was that the Court should not have considered documents drawn by the said law firm. But it was and is clear to me that at the right point in the proceedings, I made a finding that to find the law firm of Ms. R. E. Nyamu Advocates not properly on record before hearing what the said firm and the Plaintiff had to say on that issue, would amount to making a pre-determination that the law firm was not properly on record and deny the firm and the Plaintiff the right to be heard. That would have constituted a fundamental constitutional and natural law error. How else would the said law firm or its client put forth their position on this issue?

38. In regard to the submissions stating that the law firm had authority to file documents and no more than that, that did not amount to evidence being concealed or to say 'sneaked in.' In any event, this Court is fully aware that in all cases, submissions cannot and have never amounted to a way of introducing evidence in a case (see the Court of Appeal case of *Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another* [2014] eKLR. Anyway, in my humble view, if the Applicant felt dissatisfied with my finding on that, it did not make it open for him to apply for review of this Court's Ruling.
39. Lastly, his postulation was that the "Court was misled into giving a Ruling under a mistaken belief that the two lawyers had consented." How this contention amounts to an error apparent on the record is a puzzle to this Court. Nevertheless, simply put, this Court finds that the argument does not amount to an error apparent on record. The Court applied properly its mind on this issue and arrived at the said conclusion. The fact that to the Applicant's mind a different Court could have arrived at a different conclusion does not make this to be an error apparent on the face of record.
40. Again, the Applicant seems not to have been satisfied that he had disrespected the Court by directing it to put phrases where he thought they should be and by stating that some issues did not require long-draw out reasoning. He trained his arsenal on the Advocate whose law firm he felt all along that it should not be on record. He stated as follows, "... the Advocate who is properly on record is the one who can engage a senior counsel to lead and not the like of Mr. Nyamu who was a law student at Mr. Kiarie's law firm." With due respect to the Applicant, this is nothing but derogatory, disrespectful and demeaning to counsel. This Court will not, in times, come countenance parties or even counsel using abusive or derogatory language on others and even counsel. The language and behavior of all parties before a Court should be of utmost respect and dignifying. It does not matter how painful an issue may be or how extreme one's view of the other is. That should and must be kept outside the Court room. By this Ruling, this Court therefore cautions the Applicant against engaging in disrespectful conduct henceforth. It will not hesitate to take appropriate action by way of sanctions, and strike out any scandalous and abusive paragraphs and statements if and when they will come up again.
41. Moreover, the Applicant argued that the Ruling of the Court sanctions illegalities of the two law firms acting contemporaneously. He then went on to state that the finding that a Notice of Appointment of Advocate to act alongside another is alien to Civil Procedure Rules hence there is an error on the record. Whilst this may be the view of the Applicant, it does not change the position of the Court on it since once the Court made its finding as it did, it became functus officio on these points. The points he raises are no longer moot before this Court. Only the holding of higher Courts can cause this Court to change the position. Thus, this view of the Applicant cannot found an error apparent on the face of record.
42. The next point of contention was in relation to the manner in which the prayers the Applicant had made in the Application that gave rise to the Ruling impugned were typed. This Court has never come across a party that is so petty that he needs to be reprimanded openly! This is one among the many reasons that I had earlier on, in previous applications made by the Applicant, found that the Applicant is out blazingly to delay this matter and vex the Court. He contended in paragraph 6 of his Affidavit



that there was an error on the record because “...the error on page 2 appears on prayer No. (d) the word thereafter ought to be “therefore” and prayer No. (e) the word court “order” is omitted.” I must point out that these two typing mistakes occurred at the introductory stage of giving a snippet view of what the said Application that gave rise to the Ruling was all about. The question any person would ask himself is, did such typing error affect the outcome of the Ruling? I must say that by the Applicant asking the Court to review the merits of the Ruling over its form and even so, on typos that were only to show the nature of the Application or put differently, at the informal part, he wants to do nothing but to vex the Court. This Court would have wished that the Applicant concentrated on the merits of his main case!

43. The Applicant also swore on the position of the law, as he understood it to be, instead of submitting on it. He stated that this Court made a finding contrary to the constitutional court’s decision in Kakamega High Court Civil Appeal No.97 of 1999. Two things he failed to note were that he misunderstood the decision of the Court in the Civil Appeal he referred to, whose facts were different and distinguishable from those herein. Secondly, the decision was a persuasive one which even if it would have been as he understood it to be, was not binding on this Court.
44. In paragraphs 8 and 9 of the Supporting affidavit, the Applicant deponed that this Court made innocent mistakes thereby failing to exercise discretion judiciously in determining the Application dated 30/9/2021. Thus, he argued that there was sufficient reason to warrant a review of its Ruling to correct an apparent error or omission by the Court. Even if the Applicant’s fallacious argument at paragraph 12 of his Affidavit that this Court’s finding at paragraph 50 of the Ruling about an adverse party taking care of his, rather than the other’s house, being an error apparent on record which runs counter to the duties of an Advocate is wrong. This Court is clear and satisfied in its mind about the findings it made. It did not make mistakes, innocent or otherwise in its findings. The findings, according to him may be wrong, but they do not support the Applicant’s view that the Court did not exercise its discretion judiciously. In my humble view, nothing can be further from the truth than this proposition. This Court did not make any such a mistake, and of emphasis, it exercised its discretion judiciously. And the Applicant knows this well. That explains why he did not want to test his erroneous imagination and argument in another Forum of higher hierarchy. Instead he chose to vex this Court. In essence the Court is of the view that this Application is one of the many that the Applicant has previously designed and employed to abuse the process of the Court.
45. In *Muchanga Investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 Others* Civil Appeal No. 25 of 2002 [2009] KLR 229, the Court of Appeal held 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... 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. Examples or illustrations of the abuse of the judicial process are: -

- i. 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.



- ii. Instituting different actions between the same parties simultaneously in different courts even though on different grounds.
- iii. 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.
- iv. Where there is no iota of law supporting a Court process or where it is premised on frivolity or recklessness.

46. In *Stephen Somek Takwenyi & Another vs. David Mbutia Githare & 2 Others* Nairobi (Milimani) HCCC No. 363 of 2009, Kimaru, J stated with respect to the Court's power to prevent abuse of its process as follows:

“This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilised legal process it is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract *res judicata* rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it”.

47. I cannot say more than the view of the Court in the authority stated above about a vexatious litigant. The upshot is that the Application dated 16/03/2022 is unmerited. It is vexatious and an abuse of the Court process and is hereby dismissed with costs to the Respondents.

48. Since the suit herein was fixed for further hearing today, it should proceed as scheduled.

Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE ORALLY ONLINE AND VIA ELECTRONIC MAIL ON THIS 6TH DAY OF JUNE, 2022.

DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE.

