



**Omar (suing as the administrator of the Estate of the late Ali Omar) v Abdalla & another
(Environment & Land Case 121 of 2014) [2022] KEELC 116 (KLR) (2 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 116 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 121 OF 2014**

LA OMOLLO, J

JUNE 2, 2022

BETWEEN

**MUNIR ALI OMAR (SUING AS THE ADMINISTRATOR OF THE ESTATE OF
THE LATE ALI OMAR) PLAINTIFF**

AND

SAID AZUBEDI ABDALLA 1ST DEFENDANT

NAKURU LAND REGISTRAR 2ND DEFENDANT

RULING

Introduction

1. This ruling is in respect to the 1st Defendant/Applicant's Notice of Motion dated October 3, 2018. The said application is expressed to be brought under Sections 1A, 1B, 3A and 7 of the [Civil Procedure Act](#) and Order 51 Rule 1 of the [Civil Procedure Rules](#).
2. The application seeks the following orders:
 - i. THAT this Honourable Court be pleased to strike out this suit with costs for being res judicata as the issues at hand were in issue in Nakuru Kadhi Petition Number 56 of 2005 involving the same parties as the parties herein and duly determined in the said previous suit.
 - ii. THAT in the alternative, the Honourable Court be pleased to strike out this suit with costs to the defendants for being an abuse of the court process, the issues at hand having been previously determined in Nakuru, Kadhi Petition Number 56 of 2005 involving the same parties as the parties herein.
 - iii. THAT the Plaintiff do bear the cost of this application in any event.



3. The application is based on the grounds on its face and supported by the affidavit sworn on October 4, 2018 by the 1st Defendant.

Factual Background

4. The Plaintiff/Respondent commenced this suit vide a Plaint dated May 8, 2014. In the plaint, he prays for judgment against the Defendants for:
 - a. A permanent injunction restraining the Defendant by himself, his servants, agents and/or employees from trespassing, alienating, disposing off and/or in any manner interfering with the Plaintiff's parcel of land known as Nakuru/Municipality Block 5/126.
 - b. An order compelling the 2nd Defendant to rectify the said register to read the names of its initial owner.
 - c. Costs of the suit and interest thereon at Court rates.
5. The 1st Defendant filed his statement of defence dated 1st August 2014 on the same date wherein he denied the Plaintiff's allegations in the plaint. He averred that the instant case is an abuse of the court process and should be dismissed with costs.

1st Defendant/applicant's Contention

6. The 1st Defendant/Applicant contends that the property known as Nakuru Municipality Block 5/126 was originally jointly registered in the name of the late Taher Omar Ali and the late Ali Omar Ali.
7. He contended that by the agreement dated 19th September, 1992 between the widow of the late Taher Omar Ali and Ali Omar Ali the estate of Taher Omar Ali bid itself to sell the suit property to Ali Omar Ali.
8. The 1st Defendant/Applicant contends further that upon the demise of Ali Omar who was the registered proprietor of the suit land, the same was taken over by his sons Farid Ali Omar, Mohammed Ali Omar, Tuhfaall Omar and the Plaintiff/Respondent herein.
9. It is his contention that in the agreement dated 18th December, 1996, the sons of the late Ali Omar Ali leased the suit premises to him.
10. He contends that vide an agreement dated 28th November, 1997, Mohammed All Omar being one of the sons of Ali Omar (deceased) sold his share to him.
11. He also contends that the then registered proprietor of the suit property was the late Ali Omar Ali and since the 1st Defendant/Applicant and all his sons were Muslims, the suit property was to be distributed in accordance with Islamic law.
12. He further contends that petition for letters of administration in respect of the estate of the late Ali Omar Ali was heard and determined in the Kadhi's Court in Nakuru under Petition No. 56 of 2005.
13. It is his contention that he was enjoined in the said petition as an Interested Party and that the sons of the late Ali Omar Ali including the Plaintiff/Respondent herein submitted to the jurisdiction of the Kadhi's court.
14. He contends further that the petition in respect of the estate of Ali Omar Ali was heard by the Kadhi between the year 2005 and the year 2010 when judgement was delivered.



15. It is the 1st Defendant/Applicant's contention that the Kadhi via the decree dated February 8, 2010 decreed inter alia that part of the suit property sold to him by one of the deceased sons, Mohammed Ali Omar, be considered as that son's share and be handed to him.
16. It was also his contention that upon further application and in an order dated April 14, 2010, the Kadhi ordered the respondents in the said case including the Plaintiff/Respondent herein to deposit the title of the suit property in court.
17. He contended that the Plaintiff/Respondent applied for review of the said decree and they were ordered to refund the purchase price to him.
18. It is his further contention that a further order was issued on January 25, 2012 by the Kadhi which required the Respondents in that matter to refund to him the purchase price of the suit property within 45 days from the date of the said order.
19. The 1st Defendant/Applicant also contends that upon a further application and another order issued on February 28, 2013, the Kadhi ordered the Respondents in that case who included the Plaintiff/Respondent herein to refund him the purchase price of the suit property immediately as per the earlier orders failure to which he would be registered as the proprietor of the suit property to the extent of Mohammed All Omar's succession share.
20. The 1st Defendant/Applicant further contends that the Plaintiff/Respondent failed to comply with the said orders and another order was issued on July 9, 2013 where the Kadhi further ordered the Land Registrar cancel the title in respect of the suit property and issue a fresh title incorporating the 1st Defendant/Applicant herein as one of the proprietors and heir of the estate of Omar Ali (deceased).
21. It is his contention that upon hearing another application, the Kadhi's court ordered the Executive Officer of the Nakuru Law Courts to execute transfer forms and other necessary documents to give effect to the court order dated July 9, 2013.
22. It is also his contention that on the strength of the said court orders, the Land Registrar Nakuru issued a fresh title on 27th February, 2014 incorporating him as one of the proprietors of the suit property and heir of the estate of Ali Omar Ali.
23. It is his further contention that the Registrar gazetted a Notice to dispense with the surrender of the original title as the orders to deposit the original title in court were disobeyed by the Plaintiff/Respondent and the others.
24. He contends that the Kadhi's court had full mandate and jurisdiction to issue the said orders and that the Plaintiff and other heirs of the deceased estate never objected to the jurisdiction of the Kadhi's court.
25. He further contends that the decree by the Kadhi is subject of an appeal being Nakuru HCCA No. 42 of 2010. That the question this court should pose to itself is whether the Plaintiff can appeal against the said decision and at the same time raise the same issues that are subject of appeal by filing a fresh suit.
26. It is also his contention the instant suit is an abuse of the court process. That the Plaintiff/Respondent's continuous abuse of the court process is demonstrated by an application they filed in the High Court which was Nakuru HC Misc. App No. 255 of 2010 that was dismissed on 12th April, 2011.
27. He ends his deposition by stating that the Plaintiff/Respondent acknowledges under paragraph 6 of the Supporting Affidavit that he was their tenant in the suit premises since the year 1997 and that the Plaintiff/Respondent had already sold to him his share of the suit property vide the agreements dated



May 6, 2016 and 1st September, 2016. That the Plaintiff/Respondent's suit should be struck out for being an abuse of the court process.

Respondent's Response

28. In response to the application, the Plaintiff/Respondent filed a replying affidavit sworn on February 9, 2022 where he deposes that the application is bad in law, an abuse of the court process and should be dismissed with costs.
29. He deposes that he has been advised by his advocates on record that the application offends the mandatory provisions of Order 51 rule 13 (2) of the *Civil Procedure Rules*.
30. He further deposes that the application is incompetent by virtue of the demise of Azubedi Abdalla hence the same abated by dint of law.
31. He deposes that the suit being referred to by the Applicant is in a court posed with jurisdiction on ordinary succession as opposed to ownership which this court is mandated to determine.
32. He also deposes that this is the court to entertain the land matters and determine ownership if any.
33. The Plaintiff/Respondent deposes that his father died on November 25, 1996 and he took Letters of Administration on July 16, 2013.
34. He also deposes that they never distributed the estate of the deceased but filed the instant suit to preserve the estate and that he has never been the registered owner of his late father's estate as alleged.
35. He also deposes that his brother sold the suit property to the 1st Defendant/Applicant and yet he had no property to sell which amounts to an illegality as he was neither an administrator nor the registered owner of the said parcel of land.
36. He deposes that it is because of the illegality perpetuated by his sibling that resulted in filing of this suit. That none of the sons of Ali Omar Ali had the locus to pass any property from the estate to the 3rd party.
37. He deposes further that this suit is not res judicata as it was filed to set the record straight and to declare the proprietor's rights in the suit property.
38. He ends his disposition by stating that the instant application is a waste of court's precious time and should be dismissed with costs.

1st Defendant/Applicant's response to the replying Affidavit

39. The 1st Defendant/Applicant filed a supplementary affidavit in response to the Replying Affidavit sworn on February 24, 2022 by Paul Murimi Kiongo his counsel. He deposes that the application dated October 3, 2018 did not abate after the 1st Defendant's demise as alleged by the Plaintiff/Respondent.
40. He deposes that the court record shows that the 1st Defendant/Applicant filed an application dated 24th October, 2019 on November 13, 2019 which sought to substitute the 1st Defendant with the legal representative of his estate one Feisal Said which was allowed on February 4, 2020 thus the issue of abatement does not arise.
41. He deposes that the Plaintiff/Respondent's replying affidavit does not address the weighty issues addressed in the application and the orders issued in respect of the subject matter.
42. He urged the court to allow the instant application for being uncontested.



Issues for Determination

43. The 1st Defendant/Applicant filed his submissions on February 15, 2022 and submitted on whether this court should strike out the suit for being Res Judicata.
44. The Plaintiff/Respondent on the other hand filed his submissions on March 16, 2022. He submitted that the supplementary affidavit dated February 24, 2022 is incompetent and fatally defective and should be struck out for not being properly commissioned. He also submitted that the suit is not re judicata since no succession proceedings has ever been lodged in respect of the estate of Ali Omar (deceased).
45. After perusal of the Application, Supporting Affidavit, annexures to the affidavit in support of the application, the replying affidavit and the rival Submissions filed in respect of this Application, my considered view is that the following are the issues for determination:
 - a. Whether the suit has abated as against the 1st Defendant.
 - b. The question of Order 51 Rule 13(2) and section 5 of the *Oaths and statutory Declaration Act*.
 - c. Whether this suit is Res judicata.
 - d. Whether this suit is an abuse of the process of this Honourable Court.
 - e. Whether on account of (c) and (d) this suit should be struck out.
 - f. Which party bears the cost of the application?

Analysis and Determination

A. Abatement of the suit as against the 1st defendant,

46. Order 24 Rule 4 provides that;

where one or more Defendants dies and the cause of action does not survive or continue against the surviving Defendant or Defendants alone, or a sole Defendant or sole surviving Defendant dies and the cause of action survives or continues, the court, on application made in that behalf, shall cause the legal representative of the deceased Defendant to be made a party and shall proceed with the suit.
47. In this matter, an application dated October 24, 2019 was filed seeking to substitute the 1st Defendant/Applicant with Feisal Said who is the personal representative of the estate of Said Azubedi Abdalla-deceased. This application was allowed.
48. The 1st Defendant/Applicant has sufficiently responded to this claim in his supplementary affidavit. In effect this claim by the Plaintiff/Respondent is unfounded and ill informed.

B. The question of Order 51 Rule 13(2) and section 5 of the oaths and statutory declaration act.

49. The Plaintiff/Respondent has submitted that the application violates the mandatory provisions of Order 51 rule 13(2) and should be dismissed.
50. Order 51 rule 13(2) provides as follows;



Every application shall bear at the foot the words—

“If any party served does not appear at the time and place above-mentioned such order will be made and proceedings taken as the court may think just and expedient.”

51. While it is true that the application does not bear the words at the foot, I decline to dismiss the application. This is on account of Article 159 that calls upon me to administer justice without undue regard to procedural technicalities. Secondly, the same order 51 Rule 10 (2) provides as follows;

“No application shall be defeated on a technicality or for want of form that does not affect the substance of the application”.

52. In respect of Section 5 of the Oaths and statutory Declaration Act, the Plaintiff/Respondent claims that the supplementary affidavit insinuates that it was sworn in Nakuru and commissioned in Nairobi and that this should form the basis for striking out the application. He has cited the decision in *CMC Motors Group Limited v Bengeria Arap Korir Trading as Marben School and another* [2013] eKLR.

53. I have looked at the supplementary affidavit. It is sworn at Nakuru and bears a stamp of a Commissioner for Oaths. The stamp of the Commissioner for Oaths bears a Nairobi address. I am unable to make a finding that it was commissioned in Nairobi especially considering that rubber stamps are portable. I doubt that a commissioner who has an address in Nairobi is precluded from commissioning a document in Nakuru. Any finding to that effect would be absurd.

54. I find that the omissions complained of by the Plaintiff/ Respondent in respect of the application and supplementary are mere technicalities and arise from want of form. I decline to proceed on technicalities and will deal with the substance of the application.

C. Whether this suit is res judicata.

55. The law relating to Res Judicata is found in section 7 of the *Civil Procedure Act*. The wording of the sections is as follows:

7. Res judicata.

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.

Explanation. — (1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. — (2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. — (3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. — (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.



Explanation. — (5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. — (6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

56. There are numerous decisions that offer useful insights on this legal doctrine. *Independent Electoral and Boundaries Commission v Maina Kiai and 5 others*, Nairobi CA No. 105 of 2017 [2017] eKLR is one of them. This decision sets out the elements that must be satisfied for a bar of Res judicata to be effectively raised and upheld. We are reminded that the elements must be read together. They are:
- a. The issue was directly and substantially in issue in the former suit.
 - b. That former suit was between the same parties or parties under whom they or any of them claim.
 - c. Those parties were litigating under the same title.
 - d. The issue was heard and finally determined in the former suit.
 - e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.
57. The doctrine of Res judicata is intended to lock out from the court system a party who has had his day in a court of competent jurisdiction from re-litigating the same issues against the same opponent.
58. The decision in *Uhuru Highway Development Ltd v Central Bank of Kenya* [1999] eKLR also offers useful guidance on the element of Res judicata. It rendered the elements as;
- (a) The former judgment or order must be final;
 - (b) The judgment or order must be on merits;
 - (c) It must have been rendered by a court having jurisdiction over the subject matter and the parties; and
 - (d) There must be between the first and the second action identity of parties, of subject matter and cause of action.
59. Therefore, in order for a bar of res judicata to be successfully raised, the Defendant/Applicant must meet the criteria set out in section 7 of the *Civil Procedure Act* read together with numerous decisions that have been rendered by the Kenyan courts on this matter.
60. The first element is that matters directly and substantially in issue in the former suit must be directly and substantially in issue in the present suit.
61. The 1st Defendant/Applicant has referred to Nakuru Kadhi's court Petition No. 560 of 2005 as former suit. It is therefore incumbent upon this court to make an inquiry into what matters were directly and substantially in issue in the former suit and what matters are directly and substantially in issue in the present suit.
62. The 1st Defendant/Applicant has attached the decree in Nakuru Kadhi's court Petition No. 560 of 2005. The claim was for



- a. That Mohammed Ali Omar be excluded from benefitting from the estate of Omar Ali namely Nakuru Municipality- Block 5/126
 - b. That the Honourable court be pleased to identify the legal heirs of the late Ali Omar Ali
Interested party
 - a. That the Honourable Court be pleased to join him in the succession of the estate of the late Ali Omar Ali having bought the share of Mr. Mohammed Ali Omar, the 1st Respondent herein who is the heir to the estate of late Ali Omar Ali.
63. The Interested party in the former suit is Said Abdalla Azubedi (The 1st Defendant/applicant herein)
64. The orders sought in this suit are
- a. A permanent Injunction restraining the Defendant by himself, his servants, agents and/or employees from trespassing, alienating, disposing off and/ or in any manner interfering with the Plaintiff's parcel of land known as Nakuru/ Municipality Block 5/126
 - b. An order compelling the 2nd Defendant to rectify the said register and to read the name of its initial owners.
 - c. Costs of the suit and interest thereon at court rates
65. Having set out the orders sought in both suits, it is evident that the orders sought in either suit are substantially orders relating to the suit property i.e Nakuru Municipality/Block 5/126.
66. I have gone through the decree and I reproduce what was decreed in the former suit as follows:
- a. THAT the Petitioner, the 1st Respondent, the 2nd Respondent and the 3rd Respondent and others not before court are all legal heirs of the deceased.
 - b. THAT their respective shares are as per the Holy Quran Chapter four (4) verse 11 and 12.

“God (thus) directs you as regards your children (inheritance): to male portion equal to that of two females” (CHAPTER 4 VERSE 11)

“in what you (men) leave, their share (wives) is a fourth, if you leave no children. But if you leave a child, they get an eight after payment of legacies and debts”
 - c. That in the view that the heirs herein distributed the estate among themselves prior to filing of this case, this was Islamically wrong as they did not consider the Islamic share stated hereinabove.
 - d. That there was neither valuation nor order of this court on the way the heirs distributed the estate.
 - e. That there is evidence on record to support the fact that the 1ST Respondents sold part of the estate, to wit, Nakuru Municipality Block 5/126 to the Interested party and then turned around to ask for more succession shares from the estate.
 - f. That the actions of the 1st Respondent i.e. of selling his allotted succession share was improper yet a direct result of the parties' local arrangements of their alleged distribution.
 - g. That therefore, the part sold be considered as the succession share for the 1st Respondent which is to be handed over to the Interested Part and the Interested Part shall complete the balance



of Kenya Shillings ONE Hundred and Thirty-Five Thousand only. (Ksh. 135,000/=) to the 1st Respondent.

- h. That on this strength the whole estate be valued and each heir be allotted his or her succession share stated hereinabove.
 - i. That once this is done if the portion taken by the 1st Respondent is more than his succession share, he has to refund excess but if he received less than what he ought to have received, he should be paid the balance which will not consider his selling price if he sold that portion less than the actual price of that part of the estate.
 - j. That The 1st Respondent shall bear the costs of this suit to the Interested Party and these are orders of this court.
67. Paragraphs (e), (f) and (g), of the decree are particularly important for purposes of determining whether the first element of res judicata has been met. It is evident that the Kadhi's Court already pronounced itself on the question of the suit property and particularly that Mohamed Ali Omar sold his share in the suit property to the 1st Defendant/Applicant herein. The Plaintiff herein was the 2nd Defendant/Respondent in the former suit (An heir to the estate of Ali Omar Ali).
68. The import of this is to show that matters directly and substantially in issue in the former suit are directly and substantially in issue in the present suit. To this end, the first element to successfully raise a bar of res judicata has been fulfilled.
69. The second element is that the suit must be between the same parties, or between parties under whom they or any of them claim.
- The parties in Nakuru Kadhi's court Petition No. 560 of 2005; in the matter of the Estate of Late Ali Omar Ali (Deceased) are:
- a. Farida Ali Omar (Plaintiff)
 - b. Mohammed Ali Omar (1st Defendant)
 - c. Munir Ali Omar (2nd Defendant)
 - d. Tuhfa Ali Omar (3rd Defendant)
 - e. Saida Abdalla Azubedi (Interested Party).
70. The present suit has the following parties:
- a. Munir Ali Omar (Suing as the Administrator of the Estate of the late Ali Omar)
 - b. Said Azubedi Abdala (1st Defendant)
 - c. Nakuru Land Registrar (2nd Defendant)
71. On this second element, it is evident that this suit and the former suit are between the same parties; save for the 2nd Defendant who is a party herein for purposes of executing the orders sought against the 1st Defendant. The Plaintiff in the present suit is the Administrator of the Estate of the late Ali Omar and was the 2nd Defendant in the former suit. The 1st Defendant herein was the interested party in the former suit and was decreed as having an interest in the suit property i.e Nakuru Municipality / Block 5/126.
72. The third element is that the judgement in the former suit must be final. The finality of the decision in Nakuru Kadhi's court Petition No. 560 of 2005; in the matter of the Estate of Late Ali Omar Ali



(Deceased) is not in doubt. The date of the decree is 8th February, 2010. The only recourse available to the parties is orders of review or Appeal. The 1st Defendant/Applicant states that indeed, the Plaintiff herein sought orders of review and has attached an order dated 2012 which was granted on review. Subsequently, an appeal being HCCA No. 42 of 2010 was filed against the decree issued in Nakuru Kadhi's court Petition No. 560 of 2005.

73. The fourth element is that the judgment or order must be on merits. The Judgement in Nakuru Kadhi's court Petition No. 560 of 2005 was delivered on February 8, 2010. A reading of the decree attached to the affidavit in support of the application herein indicates that the former suit came up for hearing on November 2, 2009, November 20, 2009 and November 26, 2009 before Honourable M.H Mshali, Kadhi South Rift Region and that the hearing was in the presence of the petitioner, and her counsel, the 1st and 2nd Respondent and in the presence of the Interested Party and his counsel. The decree also shows that oral testimonies of the interested party and the petitioner and his witnesses were heard.

To this end, the fourth element for successfully raising a bar of res judicata has been met.

74. The fifth element is that the judgement must have been rendered by a court having jurisdiction over the subject matter and the parties. Judgment in the former suit was rendered by the Kadhi's court. *The constitution of Kenya 2010*, Article 170 (5) and Section 5 of the *Kadhi's Court Act* set out the jurisdiction of the Kadhi's court as follows;

Article 170 (5)

The jurisdiction of a Kadhis' court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's courts.

Section A Kadhi's court shall have and exercise the following jurisdiction, namely
5 the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion; but nothing in this section shall limit the jurisdiction of the High Court or of any subordinate court in any proceeding which comes before it.

75. The Kadhi's court exercised its Jurisdiction in inheritance proceedings relating to the estate of the late Ali Omar Ali; the suit property formed part of the said estate. Importantly, the parties submitted to the jurisdiction of the said court and the court rendered its decision.
76. In the decision of *The Independent and Boundaries Commission -- Maina Kiai & 5 others* [2017] eKLR, The Court explained the role of the doctrine of Res judicata and 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 commonsensical 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 or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice...”

77. For the reasons set out in the foregoing paragraphs, I find that this suit is Res judicata. Litigation must come to an end. The 1st Defendant/Applicant herein has shuffled the corridors of justice since the year 2005. This is far too long. In all these years it has been in relation to the suit property; Nakuru Municipality Block 5/126. It is unjust to keep this suit looming over his head.

D. Whether this suit is an abuse of the process of this Honourable Court.

78. In *Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 Others* [2009] eKLR, the Learned Judges of Appeal quite eloquently and elaborately discussed the question of abuse of process of the court while citing decisions from South Africa, Nigeria, from the and they say;

“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 Wyley* 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 *Sarak V Kotoye* (1992) 9 NWLR 9pt 264) 156 at 188-189 (e), the concept of abuse of judicial process was defined by Karibu-whytie J Sc :

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

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

- (a) “Instituting multiplicity of 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."

- 79. The circumstances in this case are on all fours with concept of abuse of the court process as set out in (a) and (b) in the Nigerian case of *Sarak v Kotoye* [1992] 9 NWLR 9pt 264) 156 at 188-189 by Karibu-Whytie J Sc and relied upon by the Court of Appeal in Muchanga Investment Ltd Case (Supra).
- 80. I find that this suit is an abuse of the court process.

E. Whether this suit should be struck out.

- 81. On account of my finding on (C) and (D) above, there is no doubt in my mind that this suit should be struck out.

F. Which party bears the cost of the application?

- 82. On the question of costs of the application, the general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise.

Disposition

- 83. The Upshot of the foregoing is that the court finds that this suit is Res judicata and an abuse of the process of this Honourable Court. Consequently, this suit is struck out with costs to the 1st Defendant.
- 84. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 2ND DAY OF JUNE, 2022.

L. A. OMOLLO

JUDGE.

In the presence of:

Miss Chelule for Murimi for the 1st Defendant/Applicant.

No appearance for the Plaintiff/Respondent.

Court Assistant; Ms. Jeniffer Chepkorir.

