Ababu v Nairobi Aviation College Ltd & 3 others (Environment & Land Case 874 of 2012) [2022] KEELC 13606 (KLR) (3 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13606 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 874 OF 2012

JO MBOYA, J

OCTOBER 3, 2022

BETWEEN

LILIAN M'MBONE ABABU ..... PLAINTIFF

AND

NAIROBI AVIATION COLLEGE LTD ..... 1ST DEFENDANT

MIKE OYOO WAGUNDA ..... 2ND DEFENDANT

CO-OPERATIVE BANK LTD ..... 3RD DEFENDANT

ATTORNEY GENERAL ..... 4TH DEFENDANT

RULING

Background

1. Vide the Notice of Motion Application dated the May 25, 2022, the 1st Defendant/Applicant herein has approached the Honourable Court seeking for the following Reliefs;

    i. Spent.

    ii. Pending the hearing and determination of the instant Application, this Honourable Court be pleased to issue an order of Stay of Proceedings in the instant suit that is scheduled for Mention on the June 28, 2022.

    iii. This Honourable Court be pleased to Re-open the Plaintiffs case for Cross Examination by the Defendants.

    iv. This Honourable Court be pleased to grant an order to Re-open the 1st Defendant's/ Applicant's case and allow the 1st Defendant to testify and tender its Evidence and call its witnesses.

v. Cost of the Application be in cause.

2. The subject application is anchored and premised on the various grounds which have been enumerated at the foot of the Application and same is further supported by the affidavit of one Doreen Karuga sworn on the May 25, 2022.

3. Upon being served with the subject application, the Plaintiff herein responded thereto by filing a Replying affidavit sworn by Godfrey Makuyu Otenyo Advocate. For clarity, the Replying affidavit herein is sworn on the June 3, 2022.

4. Other than the Plaintiff/Respondent, the rest of the Defendants/Respondents neither filed Replying Affidavits nor Grounds of opposition.

Deposition by the Parties:

a. 1st Defendant's/applicant's Case:

5. Vide the Supporting affidavit sworn on the May 25, 2022, one Doreen Karuga, (hereinafter referred to as the deponent), has averred that same was duly retained and instructed to appear for the 1st Defendant in the matter on the May 23, 2022.

6. Further, the deponent has further averred that on the May 23, 2022 same indeed appeared and attended the online platform with a view to participating in the scheduled hearing of the matter.

7. At any rate, the deponent has added that when the subject matter was called out during the call over, that is at 9 am, same was present and heard the court giving time allocation for the hearing of the subject matter. For completeness, the deponent has confirmed that the subject matter was allocated and scheduled for hearing at 11:15 am.

8. Be that as it may, the deponent has proceeded to and averred that despite assigning and allocating time for hearing in respect of the subject matter, the Court however did not give express directions as to whether the matter would proceed for Hearing physically in open court or virtually.

9. Other than the foregoing, the deponent has added that same remained on the online platform and only realized that the court had moved out of the online platform, without giving further indication and or directions pertaining to the mode of the hearing of the subject matter.

10. Premised on the foregoing, the deponent has further averred that same was constrained to and indeed called Learned counsel for the Plaintiff, namely, Mr Moses Sande via his cell phone and that it is upon calling the Plaintiff's counsel that same realized that the matter herein was proceeding for hearing in open court.

11. The deponent has further averred that after calling the Plaintiff's counsel and upon being informed that the subject matter was proceeding for hearing in open court, same proceeded/rushed to court and arrived after the court had concluded the hearing and given formal directions on the filing of written submissions.

12. On the other hand, the deponent has added that despite the lapses that arose and accrued on behalf of the 1st Defendant on the scheduled hearing date, the 1st Defendant herein and her counsel have never failed to attend court in this particular matter.

13. In any event, the deponent has added that the failure to appear and attend court during the scheduled/ allocated timeline, was the very first time that the 1st Defendant and her counsel had failed to attend.

14. In view of the foregoing, the deponent has deposed that the failure that occurred on the May 23, 2022, was neither intentional nor deliberate, on the part of the 1st Defendant. For clarity, the deponent has added that the failure was not calculated to frustrate the court process or to achieve an adjournment.

15. Notwithstanding the foregoing, the deponent has also averred that the substratum of the suit touches on and concerns ownership of land, namely LR No 209/10498/55, which belongs to the 1st Defendant. In this regard, the deponent has thus contended that the subject suit touches on the 1st Defendant's Constitutional right to own Property.

16. At any rate, the deponent has added that Land is an Emotive issue and hence suits touching on and concerning ownership of land ought to be heard and determined on merits, after all the affected parties, have been afforded an opportunity to tender and adduce their evidence in court.

17. Finally, the deponent has averred that the 1st Defendant herein has a legitimate right to a Fair Hearing in line with Article 50(1) of the *Constitution* 2010, as well as the Doctrine of Natural Justice.

18. In the premises, the deponent has thus contended that this is a suitable and appropriate application to warrant the grant of the orders sought.

b. Response by the Plaintiff/respondent

19. On behalf of the Plaintiff/Respondent, a Replying affidavit was sworn by one Godfrey Makuyu Otenyo, who is an advocate of the High Court of Kenya and who was retained on behalf of the Plaintiff/Respondent.

20. According to the deponent herein, same has averred that the subject matter was indeed called out during the online call over, on the May 23, 2022. In this regard, the deponent has added that when the matter was called out same indicated to the court that he was ready to proceed with the scheduled hearing.

21. On the other hand, the deponent has added that counsel for the 1st Defendant however indicated that same was not ready to proceed with scheduled hearing. For clarity, the deponent has averred that counsel for the 1st Defendant had contended that same could not proceed with the hearing because according to the counsel their record shows that the matter was fixed for mention and not for hearing.

22. Other than counsel for the 1st Defendant who indicated that same was not ready, the deponent has also added that the 2nd Defendant also sought for an adjournment on the basis that the 2nd Defendant was indisposed.

23. Be that as it may, the deponent has clarified that the application for adjournment by and/or on behalf of counsel for the 1st and 2nd Defendants were heard and dismissed by the court.

24. Further, the deponent has gone ahead and averred that after the dismissal of the application for adjournment, the court ordered and directed that the hearing shall proceed in open court at 11:15 am.

25. Pursuant to the directions of the court, the deponent herein has added that after the call over, same made the requisite arrangements and came to open court together with his client, namely the Plaintiff herein.

26. On the other hand, the deponent has further proceeded and stated that whilst in open court, same was joined by counsel for the 2nd Defendant.

27. Be that as it may, the deponent has added that whilst same was in open court alongside the advocate for the 2nd Defendant, same were informed that the open court session would commence at 11:40 am and not at 11:15 am, has hitherto scheduled.

28. On the other hand, the deponent has averred that the court session duly commenced at 11:40 am and that the matter herein was called out and same proceeded for hearing, albeit in the absence of counsel for the 1st and 3rd Defendant, who were duly knowledgeable and aware of the scheduled time and place of the hearing.

29. In any event, the deponent has averred that counsel for the 1st Defendant herein did not herself appear in court either at 12:25 or at all. For clarity, the deponent has added that the subject application is a ploy and a calculated attempt by the 1st Defendant to procure an adjournment through the backdoor and defeat the orders of the court which were made at 9:00 am on the May 23, 2022.

30. Premised on the foregoing, the deponent has therefore invited the court to find and hold that the subject Application has been made and mounted with unclean hands and hence same constitutes a Gross abuse of the Due process of the court.

c. Response By The 2nd and 3rd Defendants/respondents

31. The 2nd and 3rd Defendants neither filed any Replying affidavit nor Grounds of opposition. Consequently the contestation herein is between the 1st Defendant/Applicant and the Plaintiff/ Respondent.

Submissions by the Parties:

a. 1st Defendant's/applicant's Submission:

32. The 1st Defendant/Applicant herein filed written submissions dated the July 27, 2022 and wherein same has raised three pertinent issues for determination.

33. First, Learned Counsel for the 1st Defendant/Applicant has submitted that this court is vested and bestowed with the requisite discretion to recall the Plaintiff/Respondent for cross examination and also to re-open the 1st Defendants/Applicants case, with a view to affording the 1st Defendant/Applicant an opportunity to tender evidence and essentially, to be heard.

34. In support of the foregoing submissions, counsel for the 1st Defendant has cited and relied on various decisions including *Josephine Thirindi versus Elias Kubai (2020)eKLR*, *James Wambua Kimila versus Sinohydro Cooporation & Another (2021)eKLR* and *Safaricom ltd versus Josenga Company Ltd & 4 Others (2021)eKLR*, to underscore the fact that the court has the requisite discretion to grant the orders sought.

35. Secondly, Counsel for the 1st Defendant/Applicant has submitted that a right to be heard is a Constitutional Right, duly enshrined vide Article 50(1) of the *Constitution* 2010.

36. Premised on the fact that a right to be heard is constitutionally underscored, counsel for the 1st Defendant/Applicant has therefore submitted that it is critical and essential for this court to afford the 1st Defendant an opportunity to be heard in the subject matter.

37. Further, counsel for the 1st Defendant/Applicant has added that to deny the 1st Defendant an opportunity to be heard, would be tantamount to condemning the 1st Defendant unheard, which is contrary to and in contravention of the Rule of Natural Justice.

38. In support of the foregoing submissions, counsel has cited and relied in the Decisions in the case of *David Oloo Onyango versus The Attorney General (1997)eKLR*, *Mbaki & Others versus Macharia & Another (2005)eKLR* and *Francis Rafael Ambeko versus Angeline Moraa Amokoe (2018)eKLR*.

39. Thirdly, counsel for the 1st Defendant/Applicant has submitted that the suit herein touches on and or concerns ownership of land, which is an Emotive matter and therefore same ought to be heard and disposed of on merits, after the parties have been afforded the requisite opportunity to tender and adduce their respective evidence.

40. Indeed, Learned counsel for the 1st Defendant/Applicant has invited the court to take cognizance of the provisions of , inter alia, Article 40 of the *Constitution*, 2010.

41. Finally, counsel for the 1st Defendant/Applicant has submitted that the Plaintiff/Respondent herein and the rest of the Parties, shall not suffer any prejudice and detriment, if the orders sought are granted.

42. At any rate, counsel for the 1st Defendant/Applicant has added that whatever prejudice that may occurr and/or arise, can be atoned for by payment of costs, which amounts to Kes 20, 000/= only.

43. In view of the foregoing, the 1st Defendant/Applicant has contended that the application is meritorious and ought to be allowed.

b. Plaintiff's/Respondent's Submission:

44. The Plaintiff/Respondent herein filed written submissions dated the July 18, 2022 and same has raised two issues for determination.

45. First, Learned Counsel for the Plaintiff/Respondent has contended that the 1st Defendant/Applicant is not being truthful and honest with the court, by contending that the court did not give clear and explicit directions pertaining to the mode and place of the hearing of the matter.

46. For coherence, counsel for the Plaintiff/Respondent has submitted that shortly after the court had heard, entertained and dismissed the application for adjournment mounted by the 1st and 2nd Defendants, the court gave clear directions pertaining to the physical hearing of the matter.

47. Counsel has further added that pursuant to the clear and unequivocal direction of the court, himself and his client (the Plaintiff/Respondent) duly made the requisite arrangements and came to open court at 11:15 am, in readiness for the scheduled physical hearing.

48. In any event, counsel for the Plaintiff/Respondent has added that if it were not for the clear and explicit directions by the court in terms of the manner and place of hearing, himself and the Plaintiff/Respondent would not have made their way to open court.

49. Based on the foregoing, counsel for the Plaintiff/Respondent has submitted that the allegations being made by and/or on behalf of the 1st Defendant/Applicant are concocted, distorted and wholly calculated to defraud the Cause of justice.

50. In support of the foregoing submissions, counsel for the Plaintiff/Respondent has cited and relied on the decision in the case of *Parliamentary Service Commission versus Martine Nyaga Wambora & Others, Supreme Court Application No 8 of 2017 (2017)eKLR* and *Odoyo Osodo versus Rael Obara Ojok (2017)eKLR* and *Samuel Kiti Lewa versus Housing Finance Company of Kenya Ltd & Another (2015)eKLR*, to underscore the fact that it behooves the Applicants and their respective advocates to exhibit candour and honesty in pursuit of justice.

51. Secondly, Learned Counsel for the Plaintiff/Respondent has submitted that the current Application by the 1st Defendant/Applicant constitute an abuse of the due process of the court and that same is prejudicial and embarrassing.

52. For the avoidance of doubt, counsel for the Plaintiff/Respondent has submitted that the 1st Defendant/Applicant herein was well aware of the directions of the court, but same chose to manipulate the situation, with a view to creating a basis for attracting an adjournment or better still, obstructing and defeating the Due process of the court.

53. In view of the foregoing, Learned Counsel for the Plaintiff/Respondent has submitted that the conduct of the 1st Defendant and that of her counsel, is one that was calculated to frustrate, obstruct and defeat the scheduled hearing of the subject matter and thereby defeat the due process of the court.

54. Consequently, it has been submitted that any orders that would allow the subject application would be calculated to reward the Malfeasance on the part of the 1st Defendant. In this regard, the Plaintiff/Respondent has implored the court to dismiss the application.

c. Submissions by the 2nd, 3rd and 4th Defendants

55. Similarly, the 2nd, 3rd and 4th Defendants did not file any written submissions in respect of the impugned application. For clarity, counsel for the 2nd, 4th Defendants pointed out that same would leave the issue of the application to the court for determination.

Issues for Determination:

56. Having reviewed the Application dated the May 25, 2022, the Supporting affidavit as well as the Replying affidavit filed by the Plaintiff/Respondent: and having similarly considered the written submissions filed on behalf of the Parties, the following issues do arise and are thus germane for determination;

    i. Whether the 1st Defendant/Applicant has placed before the Honourable Court a plausible explanation and or sufficient cause to warrant the recall of the Plaintiff and re-opening of the 1st Defendant's case.

    ii. Whether the subject Application is an abuse of the Due process of the Court.

Analysis and Determination

Issue Number 1 - Whether the 1st Defendant/Applicant has placed before the Honourable Court a plausible explanation and or sufficient cause to warrant the recall of the Plaintiff and re-opening of the 1st Defendants case.

57. Given the allegations enumerated in grounds in support of the application, as well as the supporting affidavit, it is appropriate to provide the backgrounds pertaining to and or concerning the events of May 23, 2022.

58. To this end, it is imperative to note that the subject matter first came up on the February 14, 2022, on which date Learned counsel Ms Owino held brief for Mr Otieno for the 1st Defendant, whilst Mr Obado held brief for Mr Mosi for the 2nd Defendant. For completeness, Counsel for Mr Otenyo and Ms Koli appeared for the Plaintiff and the 3rd Defendant, respectively.

59. On the other hand, there was no representation on behalf of the 4th Defendant herein.

60. Be that as it may, when the matter was called out, all the advocates in attendance confirmed that same had complied with the requisite pre-trial directions and in particular, that same had filed and exchanged their respective trial bundles. For clarity, the advocates for the parties underlined that the matter was ready for hearing.

61. Informed by the submissions/representations by the advocates for the Parties, the court proceeded to and fixed the matter for hearing on the May 23, 2022. For clarity, the court directed the Plaintiff to extract and serve a hearing notice on the 4th Defendant.

62. Come the May 23, 2022, the subject matter was called out during the call over and upon the matter being called out counsel Ms Karuga holding brief for Mr Otieno for the 1st Defendant informed the court that same was not ready to proceed with the hearing of the matter.

63. At any rate, Learned Counsel for the 1st Defendant contended that according to her, the matter was scheduled for mention and because the matter was scheduled for mention, same did not prepare for hearing.

64. Premised on the foregoing, counsel for the 1st Defendant sought for an adjournment and pleaded with the court to adjourn the matter and give a date for hearing.

65. On the other hand, counsel for the 2nd Defendant also sought for an adjournment, albeit on a different ground. For clarity, counsel for the 2nd Defendant stated that the 2nd Defendant was reported to be indisposed and hence same was unable to attend court for the hearing.

66. Suffice it to point out that the application(s) for adjournment on behalf of the 1st and 2nd Defendants, were vehemently opposed by counsel for the Plaintiff and the 3rd Defendant, both of whom reiterated that the hearing date had been fixed by consent and in the presence of counsel for the Parties, with the exception of counsel for the 4th Defendant.

67. Having listened to the submissions by the respective advocates, this court rendered a ruling in respect of the application for adjournment, whereupon the court declined to adjourn the matter. For coherence, the court pointed out that the hearing date was fixed and taken by consent and in the presence of the counsel for the Parties, with the exception of counsel of the 4th Defendant.

68. Following the rendition of the ruling, the court thereafter proceeded to and directed that the hearing shall proceed in open court at 11:15 am. For clarity, the record reflects that the hearing was to proceed in Court Room number 25 at Milimani Law Court and all the advocates and the respective parties were directed to make suitable arrangements to attend court.

69. Notwithstanding the foregoing, the 1st Defendant/Applicant herein now contends that same failed to attend court for purposes of the scheduled open court hearing, because according to her no directions were given pertaining to and concerning the mode, manner and place of the hearing.

70. On the basis of the allegation that the court neither gave clear directions as to whether the hearing was to proceed physically or otherwise, the 1st Defendant now seeks that the court be pleased to exercise her discretion in favor and thereby reverse the proceedings and the orders that were made, essentially the ones relating to the hearing of the matter.

71. It is imperative to state and underline that the court has a discretion to set aside, vary, rescind and or vacate any orders, that were made/taken in the absence of a party. However, prior to and or before exercising such discretion, the Applicant is obliged to place before the court credible and plausible reasons/explanation to show why the proceedings were allowed to proceed ex-parte or in the absence of the Applicant.

72. In any event, in an endeavor to show sufficient cause or plausible explanation, the Applicant is called upon to display and exhibit honesty and candour, appropriate to invoke and persuade the court to exercise discretion. In this regard, it is paramount to point out that Discretion is predicated on reason.

73. On the other hand, an Applicant seeking to invite the court to exercise discretion, must also show that the conduct or inaction, which led to the proceedings being taken in the absence of the Applicant was not calculated to obstruct, delay or better still, to defeat the Due process of the court.

74. The bottom line of the foregoing observation is that an Applicant who seeks to partake of or benefit from Equity and Equitable Jurisdiction of the court must hm/herself come to court with clean hands and not otherwise. For clarity, such an Applicant, must not distort, misrepresent and or manipulate obvious facts, merely to hoodwink the Honourable court.

75. Better still, such an Applicant must not swear to conscious and deliberate falsehoods, including insinuations, that are tantamount to committing perjury.

76. Sadly, the 1st Defendant herein and her counsel have taken upon themselves to distort, manipulate and or misrepresent the true facts that transpired during the call over on the May 23, 2022.

77. It is appropriate to recall that despite the 1st Defendant/Applicant seeking for an adjournment on the basis of a manipulated and doctored basis, the entire supporting affidavit on behalf of the 1st Defendant/Applicant has not alluded to that particular fact.

78. Secondly, the Learned Counsel for the 1st Defendant purports and/or contends that the court did not give directions as to the place and mode of hearing and because of such failure by the court, same was unable to make appropriate arrangements and attend the scheduled hearing.

79. Assuming even for a minute that counsel for the Defendant/Applicant, is saying the Truth, (which is not the case), how then did counsel for the Plaintiff and the 2nd Defendant discern and get to know that indeed the hearing was going to be physical and in open court at Milimani.

80. Surely, the court spoke once and the direction were clear and devoid of any ambiguity. If anything, none of the advocates, including the advocate for the 1st Defendant, sought for any clarification, whatsoever.

81. In my humble view, time is ripe for advocates and the Parties that they represent to play by the Rules and the Law. Particularly, it is not open for any advocate, let alone Ms Karuga, counsel for the 1st Defendant to engage and indulge in perjury, merely to cover her back for a deliberate and conscious inaction, whose obvious purpose was to defeat the scheduled hearing after an application for adjournment was declined.

82. At any rate, I also wish to add that counsel and their clients cannot create a situation and/or scenario, whose effect is to obstruct the Due process of the court and thereafter chose to rely on self-made situation, to leverage their cases. Simply put, a Party cannot be allowed to benefit from a self-inflicted wrong.

83. To my mind, the situation before hand is geared towards enabling the 1st Defendant and her advocate to take advantage of a deliberate, well intentioned and pre-meditated act, which reared her ugly head right from the commencement of the call over, when Learned counsel chose to manipulate her address and to distort the purpose why the matter was coming up.

84. Respectfully, the dictum in the case of *Nabro Properties Ltd versus Sky Scrapers Ltd & 2 others [2002] eKLR*, is appropriate and paramount. For coherence, the court per Gicheru J A, observed as hereunder;

> ' It is a maxim of law, recognised and established, that no man shall take advantage of his own wrong; and this maxim which is based on elementary principles, is fully recognised in courts of law and of equity, and, indeed, admits of illustration from every branch of legal procedure. The reasonableness of the rule being manifest, we may observe that a man shall not take advantage of his own wrong to gain the favourable interpretation of the law.'
>
> It 'has been applied to promote justice, in various and dissimilar circumstances and applies also with peculiar force to that extensive class of cases in which fraud has been committed by one party to a transaction, and is relied upon as a defence by the other we may state the principle upon which (the court of equity) invariably acted, namely - that the author of wrong who has to put a person in a position in which he has no right to put him, shall not take advantage of his own illegal act, or, in other words, shall not avail himself of his own wrong.'

85. Other than the foregoing position, it is also appropriate to state that sufficient cause and envisages a situation and scenario where the Applicant is not guilty of any negligence, deliberate inaction or wanting in bona fides. Clearly, where there is evidence of flagrant negligence, obvious inaction or want of bona fides, such an Applicant cannot purport to have espoused sufficient cause or basis.

86. To this end, it is imperative to take cognizance of the holding of the Court of Appeal in the case of *Johnson Home Gichuhi & George Muriuki Gichuhi (suing as managers of the Estate of Margret Wanjiru Gichui) versus Isaac Gathangu Wanjohi & 5 Others, Civil Appeal No 335 of 2017 – Court of Appeal Nairobi (unreported*), where the Court observed at paragraph 42 as hereunder;

> ' In a nutshell, Article 159 2(d) of the *Constitution* cannot save this appeal. The Appellants have the obligation to comply with the rules to facilitate substantive justice. The learned judge cannot be faulted for rejecting the reasons given by the Appellants as the reasons given only reflects indolence on their part. We are in agreement with the decision in Registered Trustees of Archdiocese of Dar res Salaam v The Chairman Bunju Village Government & Others from the Tanzanian Court of Appeal followed by Mativo J in Stephen Gathu Kimani versus Nancy Wanjira Waruinge T/a Providence Auctioneers (2016)eKLR, that a Party can only talk of substantial justice where no negligence, or inaction or want of bona fides can be imputed upon him.'

87. As pertains to the subject matter, there is no gainsaying that Learned Counsel for the 1st Defendant/Applicant and by extension the 1st Defendant/Applicant had hatched a plot to ensure that the subject matter does not take of on the scheduled date and same started with a pretense that the matter had been scheduled for mention, even though the hearing date was fixed in the presence of counsel for the 1st Defendant/Applicant.

88. Notwithstanding the foregoing, it is also imperative to underscore that it behooves counsel and the Parties to engage in such conduct and activities, that would help the court to achieve and realize its core mandate of dispensing Justice without undue delay. See Article 159 2(d) of the *Constitution* 2010.

89. In any event, conducts and or behaviors that are calculated to defeat and or delay the Due process of the court must now be looked at from a Constitutional spectacle. For clarity, the courts must be prepared to sieve and filter the reasons and to ensure that not every reasons, some of which are deliberate and perjurous, are allowed to frustrate the expeditious disposal of matters before the court.

90. To this end, it is imperative to recall the words of wisdom contained and underlined in the decision in the case of *Said Sweilem Gheithan Saanum v Commissioner Of Lands (being sued through Attorney General) & 5 others [2015] eKLR*, where the Court of Appeal observed as hereunder;

> ' Justice shall not be delayed' is no longer a mere legal maxim in Kenya but a constitutional principle that emphasizes the duty of the advocates, litigants and other court users to assist the court to ensure the timely and efficient disposal of cases. The principles which are reiterated by sections 1A and 1B of the *Civil Procedure Act* are intended to facilitate the just, expeditious, proportionate and affordable resolution of disputes. The principle cannot therefore be a panacea which heals every sore in litigation, neither is it a licence to parties to ignore or contravene the law and rules of procedure. We agree, with respect, with the learned Judge's conclusion that the suit in the High Court was not properly handled by the appellant's advocate. The court cannot be invited to turn a blind eye in the face of such inordinate delay and in the absence of sufficient explanation. Likewise it cannot be fashionable for parties to blame their advocate and disclaim that the mistakes made by their advocates, who they have themselves appointed cannot be visited upon them.

91. Finally, the 1st Defendant/Applicant herein has contended that the subject suit touches on and or concerns land and hence it is appropriate and desirable that same be heard and determined on merits.

92. Further, counsel for the 1st Defendant/Applicant has added that indeed land is an Emotive issue and therefore issues pertaining to land ought not to be dealt with before and or prior to both parties giving evidence.

93. My short answer to the foregoing submissions; is that if both Learned Counsel for the 1st Defendant and the said 1st Defendant/Applicant appreciated the importance of the subject suit, then it behooved same to exhibit and display the diligence and seriousness that was necessary in the prosecution/defense of the matter.

94. In any event, the emotive nature of land and ownership to land, does not by itself constitute a basis upon which a Party can leverage on to delay, obstruct and defeat the Cause of justice.

95. If anything, the persons who understand the seriousness and the importance of the substratum of the matter, are called upon to show some degree of care, diligence and dispatch. Clearly, none was shown in respect of the subject matter.

96. Maybe, it is appropriate to invite the attention of the Parties and particularly that of Learned Counsel for the 1st Defendant/Applicant to the dictum in the case of *Ketterman v Hansel Properties Ltd (1988) 4 All ER 769*, that;

> ' Legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of lawyers to fall on their heads.'

97. Having considered the various perspectives to the subject application, and having replayed the events of the May 23, 2022, I come to the conclusion that the 1st Defendant/Applicant herein has not only been dishonest with the court but same has also failed to establish a sufficient basis to warrant the intervention sought.

98. Consequently, my answer to issue number one is in the negative.

Issue Number 2 - Whether the subject Application is a Gross abuse of the Due process of the court.

99. Before delving and venturing to consider whether or not the subject application amounts to an abuse of the due process of the court, it is appropriate to discern the meaning, tenor and scope of what constitutes an abuse of the due process of the court.

100. To this end, I can do no better than to quote and rely on the holding of the Court of Appeal in the case of *Muchanga Investment Ltd v Safaris Africa Unlimited Limited (2009)eKLR* where the court observed as hereunder;

> ' What does constitute an abuse of process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of 'abuse of process.' It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective.'
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> Again the Court of Appeal in Abuja, Nigeria in the case of ATTAHIRO v BAGUDO 1998 3 NWLL pt 545 page 656, stated that the term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it.
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> 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:-
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> > '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.'

101. Having been duly nourished and suitably educated in terms of the meaning and import of what constitutes an abuse of the due process of the court, this court is now able to venture and address the obtaining circumstances.

102. Firstly, it is not lost on this court that during the call over of the May 23, 2022, counsel for the 1st Defendant/Applicant doctored, distorted and manipulated her address to the court with a view to misleading the court on the basis as to why the matter was coming up.

103. However, being a court of record, the court was able to dis-abuse the Learned Counsel of the attempt to hijack the court process and to accrue an adjournment on the basis of falsehood and perjury.

104. Having been caught in her tracks, counsel for the 1st Defendant/Applicant chose consciously, deliberately and intentionally to withhold attending court and participate in the schedule hearing, apparently under the mistaken belief that such absence will abort the scheduled hearing.

105. Be that as it may, now that the premeditated and well-designed endeavors did not succeed and bear fruit, Learned Counsel for the 1st Defendant/Applicant has now approached the court to recall the Plaintiff/Respondent for cross examination and to re-open (sic) the 1st Defendants case and allow same to tender evidence.

106. To my mind, the bottom line of the application that has been made by the 1st Defendant is to roll back the time to the May 23, 2022, defeat the order refusing the adjournment and by sidewind achieve an adjournment, which the court had declined.

107. Essentially, what the 1st Defendant/Applicant is seeking is to tell the court that even though you declined to grant an adjournment, we can nevertheless get it vide the subject application and thereby force the court to hear our case at our own pleasure and timeline.

108. Unfortunately, the court process does not work in the manner envisaged or envisioned by the 1st Defendant/Applicant.

109. If that were to be the case, then the court business would be caught up in a circus/merry-go-round. Consequently, the Constitutional dictates enshrined vide Article 159 2(b) would thus be a mirage.

110. Simply put, the application by the 1st Defendant/Applicant herein is colored and or informed by utter mala fides and hence same falls within the four corners of what constitutes abuse of the Due process of the court.

111. Premised on the foregoing, I would answer the second issue in the affirmative.

Final Disposition:

112. From the foregoing analysis, it must have become apparent and evident that the 1st Defendant/Applicant has not met the established threshold to warrant the exercise of Equitable discretion in her favor.

113. Contrarily, the conduct and behavior that was exhibited, Demonstrated and displayed by the 1st Defendant/Applicant and her advocate is one that espouses a clear and calculated efforts to delay, obstruct and otherwise defeat the due process of the court.

114. Consequently such a conduct cannot be dignified with exercise of Equitable Discretion. See Mbogo v Shah (1968) E A, at page 93.

115. In a nutshell, the Application dated the May 25, 2022 be and is hereby Dismissed with cost to the Plaintiff/Respondent, 2nd, 3rd and 4th Defendants.

116. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF OCTOBER 2022.

OGUTTU MBOYA

JUDGE

In the Presence of;

Kevin Court Assistant

Ms. Owino h/b for Mr. Otieno for 1st Defendant/Applicant

Mr. Otenyo for the Plaintiff/Respondent

Mr. Obado h/b for Mosi for the 2nd Defendant

Ms. Koli for the 3rd Defendant