



REPUBLIC OF KENYA



KENYA LAW
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**Kakyema & another v Itinga & another (Family Appeal
E004 of 2022) [2025] KEHC 9383 (KLR) (16 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 9383 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
FAMILY APPEAL E004 OF 2022
TM MATHEKA, J
JANUARY 16, 2025**

BETWEEN

RUEBEN KIOKO KAKYEMA 1ST APPLICANT

JOYCE WANZA WAMBUA & 1 OTHERS 2ND APPLICANT

AND

KIOKO WAMBUA ITINGA 1ST RESPONDENT

JAMES KYALO WAMBUA 2ND RESPONDENT

RULING

1. What is before me is the application dated 25/03/2024 and is brought under Section 47 of the *Law of Succession Act*, Section 3A of the *Civil Procedure Act*, Order 45 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law. It seeks the following orders;
 - a. Spent.
 - b. The court does set aside, in its entirety, the order issued on 14/03/2024 rejecting the appeal and remitting the matter to the lower court for disposal.
 - c. Upon setting aside the order, the court does reinstate the appeal pending hearing and determination of the ELC proceedings in Makueni ELC No. E011 of 2020.
 - d. The court be pleased to extend the order for stay of execution issued by the Chief Magistrate's Court in the succession proceedings subject of this Appeal on 23/06/2021.
 - e. The costs of the summons to be borne by the respondents.
2. The application was supported by the grounds on its face and the 1st applicant's affidavit sworn on the same day. The applicant deponed that the counsel who appeared on his behalf failed to appraise court on the following material facts;



- a. That the Order of the Chief Magistrate Court made on 23/06/2021 has never been complied with and the entire compensation is still held by the NLC.
- b. That the ELC at Makueni has already determined that the compensation for the developments made by the 1st applicant on the Properties are payable to him with interest at 12% p.a. The ruling was exhibited as RKK1.
- c. That during assessment and valuation, the NLC indicated that the awards for the improvements were payable to him and the decision was enforced by the ELC. The Valuation Reports and awards are exhibited as RKK 2, 3, 4 & 5.
- d. That the ELC is on course to determine the lawful owner of the Properties and hence the rightful beneficiary of the compensation for the land and enforcing the Order of the Chief Magistrate's Court issued on 23/06/2021 will occasion prejudice to him and confuse the course of the ELC proceedings.
- e. That the ELC suit was scheduled for a pre-trial conference on 18th March 2024 and he had fully complied. He was to seek for a hearing date only for the Respondents (Defendants in the ELC) to serve an application seeking to have the ELC suit transferred to the Chief Magistrate's Court and placed before the same judicial officer who heard and is now likely to hear the succession proceedings if the Order of this Hon. Court of 14/03/ 2024 is not vacated. Copies of the e-filing case activities extract and the Notice of Motion (ELC) dated 07/03/2024 are exhibited as RKK 6 & 7 respectively.
- f. That the Respondents' concerted effort to have the ELC and succession matter remitted to the lower court Chief Magistrate demonstrates bad faith and a hidden agenda.
- g. That his Advocates on record have advised him, which advice he verily believes to be true that the compensation for the developments does not form part of the Estate of the Deceased hence is not available for distribution by either this Hon. Court or the Chief Magistrate's Court.
- h. That the Chief Magistrate's Court on 28/04/2021 stood over the cause pending determination of the ELC matter. That his Advocates on record have advised him that remitting the matter to the Chief Magistrate's Court will have no effect because the stay order is still in force until the ELC suit is determined. A copy of the certified proceedings is exhibited as RKK 8.
- i. That in a surprising turn of events, on 23/06/2021, the Chief Magistrate Court, which had stayed proceedings pending determination of the ELC proceedings allowed confirmation of grant and directed the NLC to deposit the entire proceedings in a joint account in the names of the 1st and 2nd Respondents. A copy of the Order is exhibited as RKK 9.
- j. That the Court varied a consent order it had made on 24/10/2018 - that the proceeds be deposited in a joint account in the names of the 3rd Appellant and the Respondents- on its own motion and in the absence of the Appellants. The Consent Order is exhibited as RKK 10.
- k. That the confirmation of grant was made in the absence of the 2nd and 3rd Appellants who are the wife and 1st born son of the Deceased, respectively.
- l. That the Chief Magistrate Court failed to determine the Appellants Summons for Revocation of Grant dated 04/11/2020. That he summarily dismissed the same on 24/03/2021 and directed the parties to file a consent to resolve the matter instead of determining the pertinent issues raised in the Summons including that the 2nd and 3rd Appellants had not consented to



the appointment of the Respondents as administrators of the Deceased Estate as required by law. The Summons for Revocation of Grant is exhibited as RKK 11.

- m. That while the Chief Magistrate's Court had not discharged the Order of stay of proceedings pending determination of the ELC proceedings, the Court issued Summons to the Director Legal Affairs and Enforcement of the NLC to attend Court and explain why it had failed to comply with the orders of the confirmed grant in proceedings of 03/11/2021. Reference is made is to exhibit marked RKK8 above.
 - n. That while service of the Summons was effected by the 1st Respondent, who is not duly appointed to effect service of court process as advised by his Advocates on record, the Hon. Chief Magistrate, on 01/12/ 2021 issued warrants of arrest against the NLC officer in very determined efforts to ensure that the Order of 23/06/ 2021 is executed. Reference is made is to exhibit marked RKK8 above.
 - o. That having confirmed the grant in the absence of the Appellants, he was advised by his advocate to appeal against the confirmation of grant and issuance of the grant of letters of administration intestate for want of consent of all the legitimate beneficiaries of the Estate. That due to the lapse of statutory time, his advocate applied for extension of time and stay of the lower court proceedings. The proceedings were stayed and the matter was fixed for inter-parties hearing. The order is exhibited as RKK 12.
 - p. That in granting the order, this court directed that the appeal be registered within 30 days and that the Chief Magistrate's Court proceedings would remain stayed during the period. That the stay orders would stand vacated if the appeal was not registered within the 30 days. That the appeal was registered on time hence the stay orders are still in force. A copy of the order issued on 22/07/2022 is exhibited as RKK 13.
 - q. That the Order issued by Hon. Justice Ongu'di sitting on appeal on 27/02/2020 was made long before the ELC proceedings begun and no orders had been issued by the ELC on disbursement of the developments award issued in his favour. That having cognizance of the ELC proceedings, the Hon Justice Dulu found that the ELC was better placed to determine whether or not the compensation for land would be deposited in Court pending determination of the ELC proceedings. Reference is made is to exhibit marked RKK8 above.
3. He deponed that there will be no prejudice occasioned to the Respondents because they have never used the Properties since 2002 when he took possession from their deceased father. That he developed the properties in their presence and no resistance whatsoever was expressed. That the Respondents were aware of the sale between him and their father. That on 04/06/2001, the 1st respondent collected, from the 1st applicant, a loan of kshs.5,000 on behalf of his father. That the agreement was that the deceased would use the money to cater for litigation against a trespasser and after succeeding in the case, he would sell the properties to the 1st applicant and the loan would be deducted from the purchase price. The agreements are exhibited as RKK14, 15 & 16.
 4. Further, he deponed that he will be greatly prejudiced if the funds are released to the Respondents because their accountability cannot be assured. That he continues to be prejudiced by the high costs of litigation and retaining counsel because the Respondents are taking the Courts in circles trying to obtain orders in their favour by misleading the Court and filing unending applications.



The Response

5. The application was opposed through the 1st Respondent's Replying Affidavit sworn on 14/05/2024, his supplementary affidavit sworn on 03/07/2024 and grounds of opposition dated 14/05/2024. He deponed that the transaction relating to land parcels Mavindini/Mavindini 1238 & 1239 did not confer any beneficial right of ownership or otherwise as no formal land control board consent was obtained. That the applicant has raised the issue of the two land parcels in the ELC case which is still pending and therefore he cannot litigate over the same matter in two court divisions simultaneously.
6. He deponed that the pleadings in the alleged appeal are strikingly similar to those of Makueni High Court Succession Appeal No. 34 of 2018 which were concluded by the court on 27/02/2020. The ruling is exhibited as KWI-1.
7. He deponed that there is a valid ruling in his favour and he will be prejudiced if the same is stayed. That the applicant has not demonstrated that a notice of appeal has been formally lodged in order to comply with Rule 5(2) (b) of the Court of Appeal. That there is inordinate delay in bringing the Chamber Summons and the same should be struck out for duplicity and for being frivolous.
8. He deponed that the averment about the applicant's counsel failing to appraise the court about certain matters is an afterthought and cannot form the basis of an application for review. That the law makes it mandatory for litigants to be vigilant and pro active in prosecuting their cases hence 'mistake by counsel' is a scapegoat and tactic employed by the applicant to avoid owning up for lack of due diligence. He deponed that according to advice by his advocate which he verily believes to be true, litigation needs to come to an end hence the application is not merited.
9. He deponed that it is preposterous and fallacious for the applicant to claim that he has obtained conclusive orders determining his right to part of the award by NLC and also state that the matter was slated for pre-trial conference on 18/03/2024. He deponed that they applied to have the ELC matter transferred to the Chief Magistrate's court since it is the lowest court competent to try the matter. That the applicant mischievously filed the suit before the ELC instead of the subordinate court in order to block avenues for revision and limit their right to appeal.
10. He deponed that the application is res judicata because the orders sought are similar to the ones in Makueni High Court Succession Appeal No. 34 of 2018 which has been concluded. That the applicant is forum shopping and hell-bent in ensuring that the real issues are not determined by the ELC and the subordinate court.
11. The grounds of opposition raised are that;
 - a. The application is bad in law and an abuse of the court process.
 - b. The honorable court is not seized of jurisdiction to hear the application on account of the fact that the matter belongs to the Chief Magistrate and the Environment & Land Court.
 - c. That the subject matter leading to the application was concluded on 27/02/2020 in Makueni High Court Succession Appeal No. 34 of 2018
12. The application was canvassed through written submissions.

Applicant's Submissions

13. The applicant identified the issues for determination to be;
 - a. Whether the appeal should be reinstated for determination on merit?



- b. Whether the lower court succession proceedings should be stayed until the ELC proceedings on ownership of the suit properties are determined?
 - c. Who bears the costs of the summons?
14. As to whether the appeal should be reinstated, the applicant submitted that the distribution granted by the lower court cannot stand because the ELC has already determined that part of the compensation belongs to the 1st appellant. That having stood over the succession proceedings on 06/02/ 2019, the lower court should not have proceeded to distribute the estate on 23/06/2021 while the ELC had not issue a determination on the rightful owner of the suit properties. That for good order, it is imperative that the lower court succession proceedings be stayed pending the determination of the ELC proceedings which will dictate how the estate of the deceased should be distributed among the beneficiaries. He contended that these facts were not explained to this court when it issued the orders rejecting the appeal and urged that the same be reinstated for determination on merit. That the counsel had been recently employed into the firm and it appears that she had not fully familiarized herself with the facts as required. They relied on Rupa Savings & Credit Cooperative Society -vs- Violet Shidogo (2022) eKLR which quoted with approval the decision of Court of Appeal in Itute Ingu & Another -vs- Isumael Mwakavi Mwendwa (1994) eKLR as follows;

“What I understood the applicants to be telling me by citing this case is that the error by their advocate should not be a bar to me exercising my discretion in their favor...the discretion of the court is wholly unfettered and I agree with the applicants that a mistake by counsel, particularly where such a mistake is bona fide, can entitle an applicant to the exercise of the court’s discretion in his favor. But before doing so, the court must of necessity examine the nature or quality of the mistake or mistakes.”

15. He also cited Geoffrey Oguna & another -vs- Mohamed Yusuf Osman & 2 others [2022] eKLR where the court stated;

“29. This Court is of the view that in the interest of justice, the mistake of the Advocate who had conduct of the matter in the lower Court should not be visited on the applicants herein. In CFC Stanbic Limited versus John Maina Githaiga & another [2013] eKLR, the Court of Appeal held as follows “On the issue of the mistake of counsel, it is not in dispute that the appellant gave instructions to its advocates in good time once it was served with the pleadings to enter appearance. Therefore, the failure to enter appearance and file a defence is clearly attributable to its advocate who failed to enter appearance and file defence in good time. This being the mistake of counsel, the same ought not to be visited upon the appellant. This Court is guided by the case of LEE G MUTHOGA V HABIB ZURICH FINANCE (K) LTD & ANOTHER, CIVIL APPLICATION NO. NAI 236 OF 2009, where this Court held: “It’s a widely accepted principle of law that a litigant should not suffer because of his advocate’s oversight.” In the instant appeal, we are of the view that the appellant should not suffer because of the mistakes of its counsel.”

30. Having considered the contents of the draft Memorandum of Appeal, I find that it raises substantial grounds for an arguable appeal. It is my finding that no convincing reasons have been advanced by the respondents to demonstrate that they will suffer prejudice or injustice during the pendency of the intended



appeal. I conclude that the applicants have made out a case justifying the grant of leave for the filing of an appeal out of time. I hereby grant the said prayer.”

16. As to whether the lower court proceedings should be stayed, he submitted that the jurisdiction of the ELC and the High Court in succession matters are very different. That while the High Court has the mandate to distribute the estate assets among the beneficiaries of an estate, it can only distribute the assets that belong to the estate. That the determination of the question of ownership is specifically reserved for the ELC. That a determination has already been made that the he (1st appellant) is entitled to compensation for developments but the court is yet to determine ownership. That it is prudent for the ELC to make its determination on ownership and then the succession court will distribute the estate. He relied on *re Estate of Atibu Oronje Asioma (Deceased)* [2022] KEHC where the court stated;

“Section 47 grants the High Court elastic jurisdiction to grant such orders as it pleases.....Section 47 merely states that the High Court has jurisdiction to deal with applications and determine disputes that arise over matters that are governed by the *Law of Succession Act*, and pronounce decrees and make orders as may be expedient, in the context of the provisions of the *Law of Succession Act*. It does not confer jurisdiction to handle disputes and applications that are not provided for under the *Law of Succession Act*.”

17. He also relied on *Mwaniki & 7 Others -vs- Mukita & 2 Others* (2022) KEHC where the court stated;

“ 57. From these pleadings and proceedings this Court has carried out its mandate under the *Law of Succession Act* , distribute the estate of the deceased to the beneficiaries of the deceased’s estate, no Creditor or other legal beneficial interest claim was made to vitiate the distribution of the estate in 2001. The claim that the suit property Wamunyu/KwaKala/67 was held in trust and not absolute ownership is a claim of land title and /or ownership which squarely belongs before the ELC Court. The substitution of the Applicants/Objectors is not merited herein as they are not creditors to the deceased’s estate or members of the deceased’s family.

58. The Applicants are not left with no remedy in the event this Court declines to substitute them with the deceased Objectors as they can pursue their claim before the Environment and Land Court despite them testifying and closing their case before this Court. The mandate of this Court is limited as it cannot determine issue of ownership and/or title of the property and declaration of trust.

59. The Court’s view is that Section 13 of the *Environment and Land Court Act* provides the appropriate forum for the Applicants to ventilate their claim as stated in the Affidavit in Support for Summons for Revocation of grant of 22nd June 2010, should be dealt with by ELC Court.”

18. With regard to costs, he submitted that the respondents should bear the same as they posed delaying tactics and mislead the court on the facts thus leading to issuance of the impugned order.

Submissions by the Respondents

19. The respondents submitted that this court was right in declining to certify the application urgent and technically dismissing it by reiterating its earlier position on the matter. They relied on *Fortis Tower*



Management Ltd & another -vs- Trendmark Computers Limited [2018] eKLR where the court stated that;

“ This paragraph is important because it introduces another aspect of jurisdiction: a court may have technical or substantive jurisdiction but still refuse to take up a matter out of legitimate prudential or administrative concerns. This is one reason Courts have judicially created the doctrine of forum non conveniens. A Court may have the substantive jurisdiction to take up a matter but refuse to do so because the matter would be most conveniently and fairly be adjudicated elsewhere.....One way to state this is to say that where there is evidence that a party has filed suit in a Court in bad faith or in a manner that signals forum shopping, the prudential doctrine counsels that the Court should decline to take jurisdiction and should, instead request the High Court to transfer the case to the most appropriate Court where the case should be heard. In cases where the court in which the case was filed is a seriously inappropriate forum, and the filing smirks of bad faith, the Court should even dismiss the suit outright.”

20. They identified the issues for determination as follows;
- a. Whether the Summons dated 25th March 2024 is incurably defective for being filed in a vacuum since the court had already downed tools regarding the appeal on grounds of jurisdiction.
 - b. Whether the Applicant has met the threshold for grant of orders sought.
 - c. Who should bear the cost.
21. As to whether the application is incurably defective, they submitted that this court had made its decision on the issues which have been brought again under the guise of review. That this court’s ruling of 14/3/2024 renders this court functus officio since the applicant has not met the threshold with regards to review applications. They relied on Said Baya Mwabaya & another -vs- Suheel Ahmed Nazir & another [2021] eKLR where the court quoted the Supreme Court’s approval in Election Petitions Nos. 3, 4 & 5 Raila Odinga & Others vs. IEBC & Others [2013] eKLR of an excerpt from an article by Daniel Malan Pretorius, in “The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law,” (2005) 122 SALJ 832 as follows;
- “The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”
22. They submitted that this Honorable Court found that it had no jurisdiction to entertain the appeal and as such, it cannot allow the current application. They relied on the case of Yano & another -vs- Mogona (Civil Appeal E020 of 2020) [2024] KEHC 5733 (KLR) (15 May 2024) where it was held
- “On my part, I am persuaded by the logic advanced in the cases cited above and I choose to follow them. I find that matters of jurisdiction are not mere technicalities of procedure but matters of substance since without jurisdiction, a Court cannot be said to be seized of a dispute for determination. Contrary to the Appellants’ submissions, lack of jurisdiction cannot therefore be cured by invoking the principle of the “overriding objective” under



Article 159(2)(d) of *the Constitution* or Sections 1A and/or 1B of the *Civil Procedure Act*. In view thereof, the instant Application cannot succeed and is hereby dismissed.”

23. They submitted that the case belongs to the litigants and not their respective counsel hence the applicant ought not to be permitted to benefit by blaming his counsel for lack of initiative. They relied on John Onger Mariaria & 2 Others -vs- Paul Matundura Civil Application No. Nai. 301 of 2003 [2004] 2 EA 163, cited Teachers Service Commission -vs- Ex-parte Patrick M Njuguna [2013] eKLR where the court opined thus:

“Legal business can no longer be handled in such sloppy and careless manner. Some clients must learn at their costs that the consequences of careless and leisurely approach to work by the advocates must fall on their shoulders..Whenever a solicitor by his inexcusable delay deprives a client of his cause of action, his client can claim damages against him...Whereas it is true that the Court has unfettered discretion, like all judicial discretion, it must be exercised upon reason not capriciously or by sympathy alone...Justice must look both ways as the rules of procedure are meant to regulate administration of justice and they are not meant to assist the indolent”.

24. They also relied on Savings and Loans Limited -vs- Susan Wanjiru Muritu Nairobi (Milimani) HCCS No. 397 of 2002 as quoted with approval in Johnson Ondimu Mogusu -vs- Elkana Moenga Ondieki & 2 others [2020] eKLR where the court stated;

“Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocate’s failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate’s failure to attend court. It is the duty to the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the defendant to be prompted to action by the plaintiff’s determination to execute the decree issued in its favour, is an indictment of the defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgement that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant.”

25. As to whether the applicant has met the threshold for grant of the orders sought, they submitted that the orders sought are for review of this court’s previous rulings but the grounds advanced are not the ones set out under Section 80 of the *Civil Procedure Act* or Order 45 of the Civil Procedure Rules 2010. They relied on Yusuf Athman Hassan & another (Suing as beneficiaries Administrators of the Estate of Athuman Hassan Mwaliphunzo alias Athumani Gunia (Deceased) -vs- District Land Registrar, Kwale & another; Iddi A.M Ganguma & 6 others (Interested Parties) [2020] eKLR where the court stated:-

“I have considered the matter. The suit was properly dismissed for non-attendance since the petitioners and their counsel were absent. In as much as counsel for the petitioners has deposed under oath that the petitioners were present in court, the fact of the matter is that the petitioners were absent. The record indeed reflects that position. It is sad that counsel would depose to a falsehood within the same application that seeks the discretion of the court. This court does not entertain persons lying under oath in order to gain an advantage,



and by that alone, I have every entitlement to dismiss this application for it is not one filed with clean hands. I must admonish counsel for swearing a falsehood under oath and that falsehood makes me doubt every other deposition that counsel has made in her affidavit...”

26. They submitted that the applicant came to court seeking an equitable relief with soiled hands hence does not deserve such reliefs. That reinstatement of a dismissed suit depends on the discretion of the court but the discretion must always be exercised judiciously and based on sound legal principles. They relied on *J.M.A -vs- R.G.O* [2015] eKLR where it was held that;

“The court should be inclined to find that the Appellant has come to a court of equity with unclean hands and therefore is not entitled to the orders sought.”

27. They submitted that paragraphs 10 and 11 of the supplementary affidavit dated 03/07/ 2024 has falsehoods and contradictory statements put forward by the applicant in an effort to mislead the court into granting the orders sought. That paragraph 16 of the said supplementary affidavit is also important as it highlights the assessment this honorable court has made of the applicant’s antics aimed at delaying the conclusion of the cases before the subordinate court. They contended that the application is without merit, a grope in the dark, non-starter, full of falsehoods and the reasons given by the Applicant for reinstatement are false and unsatisfactory.

28. Further, they submitted that the application satisfies the pre-conditions that qualify a litigant to be declared as engaging in abuse of the court process. That he has lodged cases under two different jurisdictions in an attempt to enforce a perceived right and is seeking for reliefs that he could still obtain before either the subordinate court or the Environment and Land Court. That the application is also actuated by malice and filed with the sole purpose of vexing by delaying the expeditious disposal of the succession case before the subordinate court. They relied on *Satya Bhama Gandhi v Director of Public Prosecutions & 3 others* [2018] eKLR where the court stated that:

“The concept of abuse of court/judicial process is imprecise. It involves circumstances and situation of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents. The situations that may give rise to an abuse of court process are indeed inexhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-

- (a) Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action,
- (b) Instituting different actions between the same parties simultaneously in different 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 respondent notice,
- (d) Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below,



- (e) Where there is no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action,
- (f) Where a party has adopted the system of forum-shopping in the enforcement of a conceived right,
- (g) Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal,
- (h) Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent. In the words of Oputa J.SC (as he then was), abuse of judicial process is: - “A term generally applied to a proceeding which is wanting in bona fides and is frivolous vexations and oppressive. In his words abuse of process can also mean abuse of legal procedure or improper use of the legal process.” Justice Niki Tobi JSC observed “that abuse of court process create a factual scenario where appellants are pursuing the same matter by two court process. In other words, the appellants, by the two-court process, were involved in some gamble a game of chance to get the best in the judicial process.”

29. They submitted that a litigant has no right to pursue pari pasu two processes which will have the same effect in two courts either at the same time or at different times with a view of obtaining victory in one of the process or in both. That litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. That it is a contest by judicial process where the parties place on the table of justice their different positions clearly, plainly and without tricks. They urged the court to dismiss the application with costs to them.
30. The history of this matter is important in order to get perspective.
31. The respondents and 3rd appellant are children of the deceased and the 2nd appellant is their mother. The 1st appellant/applicant claims to have purchased the estate property from the deceased prior to his demise. The estate property is comprised of land parcels Mavindini/Mavindini 1238 and 1239 (herein after the property).
32. In the year 2016, the National Land Commission (NLC) commenced compulsory acquisition of land which was situated on the site identified for construction of Thwake Multipurpose Dam and the property was in the list of compulsory acquisition.
33. The awards from NLC dated 26/05/2016 indicate; Mavindini/1238
 Pay NLC for land kshs 4,398,874/= pending succession
 Pay Reuben Kioko Kakyema kshs 3,162, 435/= for improvements
 Mavindini/1239
 Pay NLC for land kshs 468,000/= pending succession
 Pay Reuben Kioko Kakyema kshs 108,000/= for improvements



34. On 12/08/2016, the appellants filed Succession Cause 139 of 2016 in the Chief Magistrate's Court at Makueni where they petitioned for Special Limited Grant ad Colligenda Bona Defuncti. The petitioner was Mboya Wambua Itinga (3rd appellant) and he indicated that the purpose of the grant was for 'collecting the award of compensation arising out of compulsory acquisition of the deceased's parcels of land being Mavindini/Mavindini 1238 & 1239 by the National Land Commission for construction of Thwake Multi-purpose Dam Project.'
35. In the said petition, the petitioner indicated that the property had been sold to Reuben Kioko Kakyema (1st Appellant/Applicant) but transfer had not been done. He also indicated that the deceased was survived by him (3rd appellant) and Joyce Wanza Wambua -wife (2nd appellant) only. A grant was subsequently issued on 19/10/2016 and confirmed on 04/11/2016.
36. Upon learning about the succession case, the respondents filed an application for revocation of grant on 15/01/2018 on the ground of concealment of material facts i.e, that the petitioner concealed material facts by stating that the 2nd and 3rd appellants were the only beneficiaries of the deceased.
37. On 24/10/2018, the parties recorded a consent in the following terms;
 - a. The entire proceeds of compensation in respect of compulsory acquisition of land parcels number Mavindini/Mavindini 1239 and 1238 be released to Mboya Wambua Itinga, Kioko Wambua and James Kyalo Wambua.
 - b. The money be deposited into a joint account in the names of Mboya Wambua Itinga, Kioko Wambua and James Kyalo Wambua.
 - c. The parties to apply for a full grant within 30 days from today.
 - d. Mention on 5th day of December 2018.
38. Aggrieved by that consent, the 1st Appellant/Applicant applied to have it set aside on the ground that he had been left out yet he was a beneficial owner of the property. On 29/11/2018, the trial court ordered as follows;

“The money directed to be deposited in the joint account in the names of Mboya Wambua Itinga, Kioko Wambua Itinga and James Kyalo Wambua should not be utilized in any way pending the hearing of the application interpartes.”
39. The 1st Appellant/Applicant was still dissatisfied with the above development and he filed an appeal to this court to wit Makueni High Court Succession Appeal No. 34 of 2018. One of his grounds of appeal was that the trial Magistrate erred by failing to recognize that he is the actual and beneficial owner of the property.
40. Together with the appeal, the 1st Appellant/Applicant filed an application to restrain the respondents from receiving the compensation in their joint names. When the application came up for hearing on 17/01/2019, the court (Kariuki J) recorded the following consent;
 - a. That, by consent of the advocates for the parties, the orders of 24/10/2018 in Succ. No. 139/2016 be and are hereby stayed until further orders of this court.
 - b. That, the amount Kshs.8,137,309/= subject matter herein and in Makueni SPM Succ. 139/2016 to be deposited in court by the National Land Commission as compensation for Mavindini/Mavindini/1238 and Mavindini/Mavindini/1239 until further orders of the court.
 - c. That, the money shall not be withdrawn or utilized without court orders.



- d. That, parties to expedite matter on entitlement of the same monies.
- e. That, mention on 28/03/2019.
41. The respondents herein filed an application in the said appeal seeking; “THAT the court be pleased to set aside the orders issued on 17th January 2019 and reinstate the orders of 24/10/2018 in Succession No. 139 of 2016.”
42. In a ruling delivered on 27/02/2020; this court (Ong’udi J) stated that;
- “ 30. Even without delving into whether the application and appeal were served, it is clear from the record that the Applicants were absent on 17/01/2019 when the consent was recorded by counsel for the Appellant and 1st Respondent. The Applicants were directly affected by the order in that it stopped the compensation from being deposited in their joint account. On that ground alone, my considered view is that the consent is incompetent.
43. Secondly, the Appellant is behaving as if ownership has already been determined yet the properties are still in the deceased’s name and the alleged sale agreement is highly contested. Actually, after looking at the orders issued by the trial court and the grounds in the memorandum of appeal, I am of the firm view that this appeal is premature, unnecessary and is derailing the determination of the real issues.
44. Contrary to the Appellant’s submissions, the order of 29/11/2018 was an addition to the orders of 24/10/2018 and not a review. Reading the two together has the effect of preserving the compensation award pending the determination of the rightful heirs. The trial court had already directed the parties to apply for a full grant within 30 days from 24/10/2018 and that is the forum where the Appellant should canvass his case of being a creditor of the deceased’s estate.
45. Upon consideration of the facts placed before me I find that the lower court should be given an opportunity to hear and determine the matter before it. The money from the National Lands Commission is safely protected by the order issued on 24th October 2018 which order MUST be complied with by the concerned parties.
46. The order made by this court on 17th January 2019 was made without the participation of the Applicants and cannot be said to be a consent order involving ALL parties herein.
47. I therefore find no sufficient ground for interfering with the order appealed against and summarily reject the appeal under section 79B of the *Civil Procedure Act* with costs to the 2nd, 3rd and 4th Respondents. That automatically vacates the orders of 17th January, 2019. The matter Makueni SPM succession cause No. 139 of 2016 should resume for hearing and determination as soon as possible.”
48. After the determination by the High Court, the respondents returned to the trial Court and petitioned for a full grant and through an application dated 23/10/2020, they applied for confirmation of grant. The application stalled as the parties could not agree on the mode of distribution. The trial court was also informed that the 1st Appellant /Applicant had filed the ELC suit.
49. On 23/06/2021, the respondents returned to the trial Court and informed the court that their brother had declined to have the joint account opened and that the NLC had told them that the money would be returned to the National Government at the end of the financial year on 30/06/2021. They were



also told that the funds account which had been opened to compensate farmers over Thwake Dam would be closed. Consequently, the trial Magistrate ordered that;

“I know the history of the case. Confirmation of grant can be made. However, and in the best interests of justice, the consent made on 24/10/2018 is varied to have the proceeds released into account in the joint names of the applicants Kioko Wambua Itinga and James Kyalo Wambua. The applicants not to utilize the money unless otherwise directed by court.”

50. As the deceased’s family tried to have the grant confirmed in the trial court, the 1st Appellant/Applicant moved to the ELC Makueni and sought orders for the release of kshs 3,270, 435/= being the assessed compensation for developments on the property. In a ruling delivered on 02/09/2021, the court ordered as follows;

- a. An order is granted directing the National Land Commission to pay to the Plaintiff/Applicant Kenya Shillings Three Million Two Hundred and Seventy Thousand Four Hundred and Thirty Five Only (Kshs. 3,270,435) being the assessed compensation awarded to the Plaintiff/Applicant for the immovable assets and extensive developments on the properties known as Mavindini/Mavindini/1238 and Mavindini/Mavindini/1239 (the “suit properties”) for compulsory acquisition of the suit properties for development of the Thwake Multi-purpose dam project pending the hearing and determination of the suit.
- b. That costs of this application be borne by the Respondents jointly and severally.”

51. Aggrieved by the trial court ruling of 23/06/2021 the appellants herein returned to this court via Makueni High Court Misc Appln No. E002 of 2021 seeking inter alia for extension of time to appeal, setting aside of the trial court order of 23/06/2021 and stay of the trial court proceedings pending the determination of the ELC case. In a ruling delivered on 22/07/2022, this court (Dulu J) issued the following orders;

- a. I grant extension of time for the applicants to file an appeal from the succession proceedings herein. The appeal will be filed within 30 days from today.
- b. I grant stay of any further proceedings in Makueni Chief Magistrates Succession Cause No. 139 of 2016 pending determination of the intended appeal herein. If the appeal is not filed within 30 days, the stay orders granted herein will automatically lapse.
- c. I decline to grant orders for deposit in court of land compensation money, which in my view, can be pursued in the pending ELC proceedings.
- d. I award the costs of the present application to the respondents, as no formal appeal has been filed yet.

52. Pursuant to the above orders, the Appellants filed the current Appeal which this court (Matheka J) summarily rejected on 14/03/2024. The applicant now wants this court to set aside the said orders and to reinstate the appeal for hearing.

53. Meanwhile, the respondents applied to have the ELC matter transferred to the subordinate court and the application is awaiting determination.



Analysis and determination.

54. The only issue for determination is whether the application has any merit.
55. The application is brought inter alia under Order 45 of the Civil Procedure Rules, 2010 seeking the review of the orders of this court of 14th March 2024 by setting the same aside.
- Order 45 states Application for review of decree or order [Order 45, rule 1.]
1. Any person considering himself aggrieved—
 - a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred;
 - or
 - b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.
 2. A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review
56. Rule 3 states that the court may only grant the prayer if there is sufficient ground. Provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation.
57. I have set above all the facts of the case, including the whole history of the matter in an effort to understand what the matters are that the applicant's counsel is alleged to have failed to place before me that would have made me decide otherwise.
58. It is evident from the foregoing that the applicant has been engaged in countless applications clearly aimed at stalling or stopping, in the interim, the full hearing and determination of the matter before the subordinate court, yet in my view that court is seized with the jurisdiction to determine the issues before it.
59. The applicant has placed his issues for determination are whether he is the owner of the two properties Mavindini/Mavindini/1238 and 1239, and whether he is entitled to the whole of the compensation by NLC on their compulsory acquisition of the said properties before the ELC Court.
60. The respondents issue is that the said properties are the subject of the succession cause that is before the CM's court, and their ownership is contested.
61. What came before me was whether or not the applicant could appeal against the CM's court order for the preservation of the compensation award, and issue that had been dealt with by my sister Hon Ong'udi J.
62. I did not see any reason to depart from her decision and proceeded to dismiss that application.



63. In the succession cause the only asset available for distribution is the compensation from NLC which has been categorized into two i.e compensation for the land and compensation for the developments. The total amount is kshs 8,137,309/=.
64. Having looked at the litigation history of this matter, it is clear that all this back and forth is about where the compensation money should be kept pending the outcome of the ELC case.
65. The ELC has already pronounced itself on the compensation for developments and the 1st Applicant/Appellant should return to that forum for enforcement.
66. On the issue of stay of proceedings, the value of the subject matter is well within the pecuniary jurisdiction of the Chief Magistrate's court and should be canvassed in that court. In any case, the 1st Applicant/Appellant has admitted that there is a subsisting order of stay in the trial court pending the determination of the ELC matter, that is an issue that does not require the attention of this court.
67. The 1st Applicant/Appellant's complaint against the respondents' application to have the ELC matter transferred to the same Chief Magistrate's court which is handling the succession matter is untenable. It is the legal position that cases should be instituted in the lowest forum which is competent to handle the matter in order to give room for any appellate process that may ensue. This is supported by Section 11 as read with section 18(1)(a) of the *Civil Procedure Act* which provide that a suit shall be instituted in the Court of the lowest grade to try it empowers the High Court, on application of the parties or on its own motion, "(a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same".
68. It is noteworthy that while the first prayer in this appeal is that the trial court order of 23/06/2021 be set aside in its entirety, prayer (d) of this application seeks that the stay order issued by the trial court on 23/06/2021 be extended supporting the respondents that the 1st Applicant/Appellant is a vexatious litigant. He has accused the respondents of taking the Courts in circles trying to obtain orders in their favour by misleading the Court and filing unending applications. Looking at the litigation history however, this description aptly applies to the 1st Applicant/Appellant.
69. The 1st Applicant/Appellant has argued for reinstatement of this appeal on the ground that the distribution ordered by the trial court cannot stand because the ELC has already determined that part of the compensation belongs to him. However, the matter is still pending before the ELC and the option of revocation is still available to the applicant in the trial court.
70. Is there anything new as required by Order 45 of the CPR that would have persuaded me to rule otherwise? All the listed material facts were on the record when I determined the issues that were before me vide the ruling of 14/03/2024 and they each one of them contributed to that outcome. With great respect, my consideration of the same facts lead to me to the same outcome, the same that was drawn by Ong'udi J, that for reasons drawn from the summary drawn above this appeal is for rejection.
71. Is it in the interests of justice as per s. 3A of the CPA? Or 47 of the LOSA?
72. It is noteworthy again that the applicant here is unable to draw the line between the jurisdiction of the ELC Court and the P&A Court. They are not the same. For instance he submits That for good order, it is imperative that the lower court succession proceedings be stayed pending the determination of the ELC proceedings which will dictate how the estate of the deceased should be distributed among the beneficiaries. The ELC Court cannot dictate to the P&A court how the estate of the deceased will be distributed. Those are two different jurisdictions that cannot be mixed, they can be complementary but one cannot dictate to the other.



73. Even on that limb, I am of the view that it is only fair and just that the subordinate court be allowed to deal with the matter before it in accordance with the law. The applicant has the audience to put his case with respect to the issues he has brought in the impugned ruling there.

73. In that event the application is without merit. It is dismissed with costs to the respondents. Dated, signed and delivered vis CTS this 16th February 2024

MUMBUA T MATHEKA

JUDGE

CA Nelima/Chris Applicant's Counsel

B.M Musau & Co. Advocates info@bmmusau.co.ke

Respondents' Advocates Thomas Maosa & Co. Advocates thomasmaosa2017@gmail.com

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA

