JWK v IKE (Civil Appeal E056 of 2023)
[2024] KEHC 11647 (KLR) (Family) (12 July 2024) (Ruling)

Neutral citation: [2024] KEHC 11647 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

CIVIL APPEAL E056 OF 2023

PM NYAUNDI, J

JULY 12, 2024

BETWEEN

JWK ..... PETITIONER

AND

IKE ..... RESPONDENT

RULING

1. Before this court for determination is the Preliminary Objection dated 8TH August 2023 by which the Respondents object to the Suit herein on the basis that it is sub judice and or res judicata as

    a. A suit presented as Separation and Maintenance Cause No. 17 of 2013 before the Senior Principal Magistrates Act 2013 was dismissed for want of prosecution.

    b. A suit presented under the Married Women's Property Act as Nairobi H.C. O.S. No. 76 of 2013 is still pending and it seeks similar orders to this present suit

    c. This suit is an abuse of process of this Honourable Court.

2. The Petitioner has filed her replying affidavit in which she concedes that she had initiated the matters and states that the Separation and Maintenance Cause was dismissed for offending Section 12 and 15 of the *Civil Procedure Act*, while H.C. OS No. 76 of 2013 was dismissed for want of prosecution.

3. The Application was canvassed via written submissions. The submissions of the Respondent are dated 9th April 2024 while those of Petitioner are dated 14th March 2024.

4. It is common ground that given the circumstances in which both the prior suits were terminated the doctrines of sub judice and res judicata will not apply, as none of the matters is pending and none was determined on its merits.

5. The issue then for determination is whether the current suit should be struck out for being an abuse of Court process. The Petitioners response to this is that the striking out of the suit 'would also not be in tandem with Article 50(1) of *the Constitution* which provides for fair hearing. The Court must also be alive to the requirements of both Article 159(2)(d) of *the Constitution* and Section 19(1) of the *Environment and Land Court Act* which eschew the determination of disputes on procedural technicalities.'

6. Order 2, rule 15 (1) of the *Civil Procedure Rules*, 2010 provides as follows

> At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that
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> (a) it discloses no reasonable cause of action or defence in law; or
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> (b) it is scandalous, frivolous or vexatious; or
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> (c) it may prejudice, embarrass or delay the fair trial of the action; or
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> (d) it is otherwise an abuse of the process of the court and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

7. As stated above it is not disputed that prior to instituting the current suit the Petitioner raised the same issues in H.C. OS No. 76 of 2013. The same was dismissed for want to prosecution. Allowing a suit to be dismissed for want of jurisdiction is an indictment upon the party as it indicates that the party is not aligned with the Constitutional imperative that Courts dispense justice in an efficient and effective manner which include that justice be dispensed without delay. See the decision of Naikuni J in *Thathini Development Company Limited v Mombasa Water & Sewerage Company & Anor* [2022] eKLR where he stated

> [18.... A suit is dismissed for a want of prosecution, means that the parties therein failed to aid court in meeting its Overriding objective. The party seeking to reverse this order must explain sufficiently to court as to why his application is merited and persuade court to exercise its discretion.

8. The Petitioner casually admits that her Petition in HC OS No. 76 of 2013 was dismissed on 17th May 2018 for want of prosecution. This is 5 years after the suit was instituted. After its dismissal she has waited for 5 years to present the current suit. There is no indication that the Applicant sought to vacate the orders of 17th May 2018, which was the proper thing to do, that is the process that is recognised at law. Instead she goes to sleep and five years later purports to institute the current suit without at the very least indicating that she had initiated two previous suits on the same matter.

9. I find that the filing the current suit by the Petitioner is an abuse of court process and in so doing I associate myself with the decision in *Satya Bhama Gandhi v Director of Public Prosecutions & 3 others* [2018] eKLR where the court observed

> The situation that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations: -
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> a. Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.

b. Instituting different actions between the same parties simultaneously in different court even though on different grounds.

c. Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and respondent notice.

d. Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.

e. Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.

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.

10. The Petitioner seeks to rely on Article 159(2)(d), and urges further that the Preliminary objection be dismissed so as to uphold her right to access justice as provided for under Article 50 of *the Constitution*. It is now well established by judicial precedent that Article 159(2)(d) was never intended to provide cover to parties who 'exhibit scant respect for rules and timelines which make the process of judicial adjudication and determination fair, just, certain and even- handed'. See the decision in *Nicholas Kiptoo Arap Korir Salat vs IEBC & 6 Others* [2013] Eklr.

11. It must be emphasized that Article 50 will safeguard the right of access to justice for both the Petitioner and the Respondent and in this case the scales will tilt in favour of the Respondent who ought to be protected from the Petitioner's action which is tantamount to having him live with the proverbial sword of Damocles hanging over his head.

12. For the foregoing reasons, I will uphold the preliminary objection and strike out the originating summons for being an abuse of Court process.

13. On costs, owing to the nature of the relationship between the parties, each party will bear their own costs.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 12TH DAY OF JULY, 2024.

P. NYAUNDI

JUDGE

In the presence of:

Fardosa Court Assistant

Omuyama for Petitioner h/b for Wachia for Petitioner

Kiarie Njuguna for Respondent