



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC PETITION NO. 81 OF 2018**

**IN THE MATTER OF ALLEGED VIOLATION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 22 AND 23 OF THE CONSTITUTION, 2010.**

**AND**

**IN THE MATTER OF ARTICLES 40,43, 46(1) AND 47 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF RULE 4 AND 19 OF THE CONSTITUTION OF KENYA( PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)(PRACTICE AND PROCEDURE RULES 2013)**

**AND**

**IN THE MATTER OF THE LAND ACT, 2012**

**AND**

**IN THE MATTER OF ENVIRONMENT AND LAND COURT ACT 2011**

**AND**

**IN THE MATTER OF SECTION 28 OF THE LAND REGISTRATION ACT, 2012.**

**BETWEEN**

**JOACKIM OKESSA MWANDALE.....PETITIONER**

**VERSUS**

**NAIROBI CITY COUNTY.....1<sup>ST</sup> RESPONDENT**

**TABITHI FINANCE COMPANY LTD (IN LIQUIDATION).....2<sup>ND</sup> RESPONDENT**

**WELVIN INVESTMENTS LTD.....3<sup>RD</sup> RESPONDENT**

**1ST CLASS MAGISTRATE COURT.....4<sup>TH</sup> RESPONDENT**

**RULING**

1. The 3<sup>rd</sup> Respondent herein, having been served with the Petition, mounted by and/or on behalf of the Petitioner has since taken out a Notice of Motion Application dated the **10<sup>th</sup> of March 2020** and in respect of which the 3<sup>rd</sup> Respondent /Applicant now seeks the following Reliefs;

- i. *This Honorable Court be pleased to strike out the Petition dated 2<sup>nd</sup> November 2018.*
- ii. *The Petitioner be condemned to pay costs of this Application.*

2. The subject Application is anchored on the basis of grounds contained at the foot thereof and the same is further supported by the Affidavit of one, Njugi B.G, who is the advocate on record for the 3<sup>rd</sup> Respondent Applicant.

3. Upon the filing of the said application, Counsel for the Petitioner proceeded to and filed a Replying Affidavit, in respect of which the Petitioner has responded to the issues contained in the Supporting Affidavit attached to the Notice of Motion.

4. On the other hand, the rest of the Respondents have not filed any responses to the Notice of Motion Application, save that the Counsel for the 2<sup>nd</sup> Respondent, who signaled that same shall be supporting the Notice of Motion Application.

5. On the 20<sup>th</sup> of May 2021, the Application herein came up for mention and on which date the Honorable court ordered and/or directed that the Application be canvassed and/or be disposed of by way of written submissions. In this regard, timelines were granted to both the Applicant and the Petitioner, to file and exchange their written submissions.

### **SUBMISSIONS BY THE PARTIES**

#### **3<sup>rd</sup> Respondent's Submissions**

6. Pursuant to and in line with the directions of the Honorable Court on the filing and exchange of written submissions, the 3<sup>rd</sup> Respondent herein filed his submissions on the 5<sup>th</sup> of July 2021 and in respect of which Counsel highlighted that the subject Petition constitutes and/or otherwise amounts to an abuse of the due process of the Court.

7. It was Counsel's further submission that the Petitioner herein had filed several other suits and that the filing of the subject Petition, is calculated to generate Anarchy, in the sense that the various courts handling the separate and distinct matters, are likely to reach and/or arrive at conflicting decisions.

8. It was also the submission of Counsel for the 3<sup>rd</sup> Respondent that the issues raised in the subject Petition are the same and/or nearly the same as the issues raised in ELC NO. 671 of 2017, and ELC MISC. NO. 138 of 2013, which both concern the same subject Dispute, namely the dispute pertaining to L.R. NO. NAIROBI/BLOCK110/442, herein after referred to as the suit property.

9. Finally, Counsel for the 3<sup>rd</sup> Respondent / Applicant contended that the subject suit/Petition is prohibited by the Doctrine of Res Subjudice. Consequently, Counsel invoked the provisions of Section 6 of the Civil Procedure Act, Chapter 21 Laws of Kenya.

10. In summary, the 3<sup>rd</sup> Respondent / Applicant implored the Honorable Court to proceed and find that the Petition amounts to an abuse of the Due process of the Court and thus the same ought to be struck out.

#### **Petitioner's Submissions**

11. The Petitioner herein filed his submissions on the 6<sup>th</sup> of June 2021, as well as various decisions relied on, in opposition to the Notice of Motion Application.

12. First and foremost, the Petitioner contended that the entire application filed by the 3<sup>rd</sup> Respondent Applicant, is informed by misrepresentations and distortion of actual facts. For clarity, Counsel for the Petitioner contended that the allegations that the Petitioner has filed several suits, pertaining to and/or concerning the suit property, is misleading and constitutes a deliberate falsehood.

13. Counsel for the Petitioner thereafter proceeded to give a breakdown of the various suits that relate to the subject matter and by whom same were filed as hereunder;

*i. ELC NO. 671 of 2017 filed by the 3<sup>rd</sup> Respondent*

*ii. ELC MISC NO. 138 of 2013 (Concluded, was filed by the 3<sup>rd</sup> Respondent)*

*iii. JR NO. 158 of 2018 filed by the Petitioner herein, but same was withdrawn by consent of the parties and cost of Kshs. 20,000 was paid to Counsel for the 3<sup>rd</sup> Respondent.*

*iv. ELC PETITION NO. 81 of 2018 filed by the Petitioner.*

14. It was the Petitioner's further submission that the Petitioner herein previously filed ELC Judicial Review case No. 158 of 2018 but on a second thought, same found that the forum vide Judicial Review would not culminate into the desired outcome and consequently same formed the humble opinion that the said Judicial Review proceedings merited withdrawal.

15. As concerns the subject Petition, Counsel for the Petitioner contended that same was filed after the withdrawal of the Judicial Review proceedings and that the Reliefs sought vide the subject Petition are more expansive and grounded on the provisions of **Articles 22,23,40,43 and 46 of the Constitution, 2010.**

16. The Counsel for the Petitioner has further submitted that by virtue of the infringement and/or violation of the Petitioner's constitutional

and fundamental rights, the claims under the current Petition cannot be ventilated in an ordinary suit.

17. In any event, the Petitioner further averred that the mandate and/or jurisdiction of this Court while entertaining an ordinary suit is not synonymous with the mandate of this very Court while dealing with a Constitutional Petition. For clarity, the Petitioner anchored his submissions on the nature and extent of Reliefs that the Court can grant under Article 23 of the Constitution.

18. In short, the Petitioner contended that the Notice of Motion Application by the 3<sup>rd</sup> Respondent is not merited.

### **2<sup>nd</sup> Respondent's Submissions**

19. The 2<sup>nd</sup> Respondent herein expressed the position that same would be supporting the Application. However, same did not file any submissions at all.

### **1<sup>st</sup> and 4<sup>th</sup> Respondent's Submissions**

20. The said Respondents herein did not file any submissions.

### **ISSUES FOR DETERMINATION**

21. Having reviewed the Notice of Motion Application dated the **10<sup>th</sup> of March 2020**, the Affidavit in support thereof and the written submissions filed by the 3<sup>rd</sup> Respondent, on one hand and the Replying Affidavit, together with the written submissions filed on behalf of the Petitioner herein, I am of the considered opinion that only two issues do arise for determination as hereunder;

- i. *Whether the Petitioner has filed several suits pertaining to and/or concerning the same suit property.*
- ii. *Whether the subject Petition constitutes and amounts to an abuse of the due process of the Court and thus merits being struck out.*

### **ANALYSIS AND DETERMINATION**

#### **ISSUE NUMBER 1**

#### ***Whether the Petitioner has filed several suits pertaining to and/or concerning the same suit property***

22. The 3<sup>rd</sup> Respondent /Applicant has anchored the subject Application on the basis that there are several suits pertaining to and/or concerning the same subject matter. Besides, the same 3<sup>rd</sup> Respondent has adverted to the ground that the issue in the subject Petition is being moved from one court to the other, albeit differently dressed.

23. On the face of it, one would form the impression that the Petitioner herein has filed several suits pertaining to and/or concerning the same subject matter and that the said suits have spread across various courts, in the Republic of Kenya.

24. Indeed, if the Petitioner herein had filed various numerous suits, touching on and/or concerning the same subject matter, the Honorable Court will be constrained to strike down the subsequent suit filed by and/or on behalf of the Petitioner.

25. However, after reviewing the Replying Affidavit filed by the Petitioner, it becomes apparent and/or evident, that the allegation being peddled by the 3<sup>rd</sup> Respondent that the Petitioner has filed several suits though differently dressed, is an alarmist statement, but devoid of any evidential basis.

26. At any rate, one would have expected the Counsel for the 3<sup>rd</sup> Respondent to enumerate the various suits, if any, filed by the Petitioner and thereafter proceed to tender evidence of the existence of such suits. However, I must state that the Supporting Affidavit filed by the 3<sup>rd</sup> Respondent's Counsel and which no doubt, would have contained such evidence, does not exhibit any such evidence.

27. Nevertheless, the Court was constrained to gather the evidence from the totality of the documents filed and surprisingly the Honorable Court found that the only previous suit, which had been filed by the Petitioner herein was ELC JR NO. 158 of 2018, which was subsequently withdrawn and cost of the withdrawal were duly paid out to and in favor of the Counsel for the 3<sup>rd</sup> Respondent.

28. In any event, the Petitioner has duly explained the reason why he deemed the Judicial Review proceedings inappropriate and thus chose to withdraw same, to pave way for the filing of an all-encompassing Petition, namely the subject one.

29. Notwithstanding the foregoing, I must also point out that the only other existing suit that touches on the subject matter is ELC NO. 671 of 2017, which was filed by the 3<sup>rd</sup> Respondent himself and in respect of which same is seeking to procure registration of the suit property in her name.

30. However, the said suit does not involve all the parties, who have been impleaded and/or sued in the Petition herein. Consequently, it cannot be argued that the Petition herein is a duplicate of the existing suit, the some of the Parties who have been sued herein are not Parties

in the other ordinary Suit.

31. On the other hand, I must also point out that the Reliefs sought vide the subject Petition, are also not similar to the ones, contained in ELC NO. 671 of 2017, which was filed by the 3<sup>rd</sup> Respondent.

32. Perhaps, I may add that the extent of the jurisdiction of the Environment and Land Court while dealing with a Constitutional Petition, as opposed to an ordinary suit, is more expansive. In this regard, it cannot be argued that the Reliefs that the Petitioner has sought for, could be obtained via a Counter-claim in the only existing suit, namely ELC 671 of 2017.

33. To underscore the extent of the mandate of this Honorable Court while dealing with a Constitutional Petition, it is imperative to take cognizance of the provisions of **Section 13(3) of the Environment and Land Court Act 2011**, which provides as hereunder;

*“(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.”*

34. On the other hand, I am also constrained to take cognizance of the provisions of Article 23(3) of the Constitution, 2010, which provides the scope, nature and extent of the Reliefs that a Court while exercising Constitutional mandate can grant. For clarity, the said provision provides as hereunder;

*“(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including--*

*(a) a declaration of rights;*

*(b) an injunction;*

*(c) a conservatory order;*

*(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;*

*(e) an order for compensation; and*

*(f) an order of judicial review.”*

35. Taking into account the foregoing provisions, I must say that the reliefs that the Petitioner herein, could pursue and obtain vide a Counter-claim in the existing suit, filed by the 3<sup>rd</sup> Respondent, could not measure up to what is available vide a Petition. Consequently, the Petitioner herein cannot be faulted for having chosen the avenue of a Constitutional Petition.

36. Be that as it may, I must now proceed to answer issue number one in the negative. Simply put, the Petitioner has not filed various and/or many suits, with a view to defraud the cause of justice.

## **ISSUE NUMBER TWO**

### **Whether the subject Petition constitutes and amounts to an abuse of the due process of the Court and thus merits being struck out.**

37. As concerns whether the subject Petition, amounts to an abuse of the Due process of the Court, it is first and foremost important to understand what the terminology ‘*abuse of the due process of the Court*’ entails.

38. In this regard, I can do no better than to take guidance from the decision in the case of **Muchanga Investment Ltd vs Safaris Unlimited (Africa) Limited & 2 others [2009]** where the Court addressed the meaning and import of abuse of due process of the Court as hereunder;

*“To re-inforce the point, abuse of process has been defined in WIKIPEDIA, the free encyclopedia:*

*“The person who abuses process is interested only in accomplishing some improper purpose that is collateral to the proper object of the process, and that offends justice.”*

*In BEINOSI v WIJLEY 1973 SA 721 [SCA] at page 734F-G a South African case heard by the Appeal Court of South Africa, Mohomad CJ, set out the applicable legal principle as follows:-*

*“What does constitute an abuse of process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of “abuse of process.” It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective.”*

Again, the Court of Appeal in Abuja, Nigeria in the case of **ATTAHIRO v BAGUDO 1998 3 NWLL pt 545 page 656**, stated that the term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it.

In the Nigerian Case of **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: -

**“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.”**

39. My reading of the foregoing excerpt, shows that the list of what amounts to and/or constitutes an abuse of the Due process of the Court, is infinite and that the instances alluded to in the preceding paragraph are not by any means, exhaustive.

40. On the other hand, I also discern from the foregoing excerpt that the determination of what amounts to an abuse of the court process is to be ascertained and/or determined on a case by case basis, albeit taking guidance from the laid down criteria, which has been enumerated herein before.

41. Having taken into account the foregoing position, can it now be said that the filing of the subject Petition, in respect of which the Petitioner seeks to protect his Constitutional rights, has envisaged vide Articles 22 and 258 of the Constitution, 2010, amounts to an abuse of the Court process.

42. I am afraid, the pursuit of the Petitioner’s constitutional and fundamental rights, which are well anchored in the Bill of Rights, cannot by any stretch of imagination and without more, be said to amount to an abuse of the Court process.

43. As concerns the subject matter, it appears that the 3<sup>rd</sup> Respondent, is not comfortable with the expansive nature and more embracing Reliefs that the Petitioner is seeking and hence the attempt to avert the plenary hearing of the Petition.

44. Unfortunately, I am of the considered view that the Petition filed herein if ventilated, would one way or the other bring to a close all the aspects of the dispute pertaining to and/or concerning the processes involved in the sale, alienation and/or disposition of the suit property in favor of the 3<sup>rd</sup> Respondent and also confirm, whether the relevant and applicable laws were complied with in the processes sought to be impeached.

45. Notwithstanding the foregoing, it must also be noted that the 3<sup>rd</sup> Respondent herein is inviting the Honorable Court to exercise summary procedure and thereby drive out the Petitioner from the seat of justice, without being afforded a plenary hearing.

46. Be that as it may, it is well established that though the Honorable Court has a mandate to mete out summary procedure, either by striking out or entering summary judgment, such a process must be taken with necessary caution and circumspection.

47. On the other hand, it is also trite law that where a particular suit exhibits some semblance of a cause of action, no matter how weak the cause of action may be, such a suit ought to be heard in the normal manner as opposed to being terminated vide a summary procedure.

48. In support of the foregoing position, what readily comes to mind is the ageless decision in the case of **DT Dobie Limited vs Muchina [1980] Eklr** where the Court held as hereunder;

**“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”**

**FINAL DISPOSITION**

49. The Notice of Motion Application by the 3<sup>rd</sup> Respondent, was intended to achieve a summary process and in particular, to drive away the Petitioner from the seat of justice. For this to happen, it was incumbent upon the 3<sup>rd</sup> Respondent to satisfy the requisite threshold that underlined the grant of such orders.

50. Unfortunately, the 3<sup>rd</sup> Respondent has failed so to do and in my humble view it is the subject Notice of Motion, which amounts to an abuse of the due process of the Court.

51. Consequently, I find and hold that the Notice of Motion is devoid of merit and same is hereby Dismissed.

52. In my humble view, the Notice of Motion Application herein ,was unnecessary and thus the 3<sup>rd</sup> Respondent shall pay costs to the Petitioner.

53. As the rest of the Parties ,namely, other Respondents did not oppose, and / or did not file any responses to the subject Application, no costs are due and/or payable unto them.

54. It is so Ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF OCTOBER 2021.**

**HON. JUSTICE OGUTTU MBOYA,**

**JUDGE,**

**ENVIROMENT AND LAND COURT,**

**MILIMANI.**

**IN THE PRESENCE OF;**

**JUNE COURT ASSISTANT**