



Shitanda v County Speaker of Kajiado County & 2 others (Constitutional Petition E004 of 2023) [2023] KEHC 17822 (KLR) (15 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17822 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CONSTITUTIONAL PETITION E004 OF 2023**

**FR OLEL, J
MAY 15, 2023**

BETWEEN

HENRY NAMITI SHITANDA PETITIONER

AND

COUNTY SPEAKER OF KAJIADO COUNTY 1ST RESPONDENT

CLERK, COUNTY ASSEMBLY OF KAJIADO 2ND RESPONDENT

COUNTY ASSEMBLY OF KAJIADO 3RD RESPONDENT

RULING

1. For determination before this court is the notice of motion dated 10th March 2023 filed under provisions of Section 1A,1B,3A, 6 & 7 of the [civil procedure Act](#), Order 2rule 15, and Order 51 of the [civil procedure rules](#). The respondents/applicants seeks to have the *ex parte* orders issued on 07/03/2023 to be set aside and/or quashed and further sought that the amended petition dated 7/3/2023 be struck out for being incompetent or otherwise an abuse of the process of court. The application was supported by the grounds on the face of the said application and the supporting affidavit of Josiah Leboo Saisa Yiaro dated 10th March 2022.
2. This application was opposed by the Petitioner/Respondent vide his replying Affidavit dated 23rd March 2023.

Background Facts

3. The applicants averred that the Petitioner/Respondent came to court with unclean hands, through concealment and non-disclosure of material facts, which was that this petition is substantially and strikingly similar to and is a replica and/or copy of (Kajiado Constitutional Petition No.E003 of 2023 *Hon. Isaac Kiserian v the County Assembly Speaker, Kajiado County*). The only difference was that the



- petitioners were different and in this petition, they added the county Assembly and the clerk to the assembly and that amounted to duplicity of suit contrary to Sec 6 and 7 of the *Civil Procedure Act*.
4. The applicant further averred that this suit could not evade the doctrine of Res judicata through cosmetic face lift and therefor the exparte orders issued on 07/03/2023 were illegally and fraudulently obtained through concealment of material facts as the petitioner ought to have notify this court that similar orders had been sought and denied in the “Kajiado Petition”, which was also before a court of similar and concurrent jurisdiction.
 5. This petition sole aim was to indeed vex, annoy, frustrate and harass the Respondents. Further it was aimed at embarrassing the court through issuance of conservatory orders, when the same orders had been sort and denied in the first petition filed in Kajiado. The Respondent’s prayed that the conservatory orders issued on 07/03/2023 be set aside and that this petition be struck out for being misconceived, incompetent, frivolous, vexatious and on the basis that it constituted an abuse of the process of court.
 6. The Petitioner/Respondent denied all the particulars of concealment of facts, and misrepresentation set out against him and averred that the same had not been proved to a standard approaching beyond a reasonable doubt as the applicant had not placed anything before court to show the misrepresentation. He further averred that as at the time of filing this petition he was not aware that another petition had been filed being; Kajiado Constitutional Petition No. E003 of 2022(*Hon. Isaac Kiserian v the county Assembly Speaker, Kajiado County*). The petitioner further denied the allegation that he was forum shopping and the only reason this petition was heard in Machakos was for the simple reason that Hon Lady Judge S. Mutuku was on medical leave and the administrative directive given was that all files under certificate of urgency should be handled by the High court sitting in Machakos.
 7. The Respondent also denied allegations that this petition was res judicata as no decision/ruling had been placed before court to illustrate that the issues in the petition had be subject of judicial deliberation and a decision issued nor was it sub judice as he was not a party in the Kajiado Constitutional Petition No.E003 of 2023. Further the Respondent submitted that if both petitions raised similar issues and /or allegations of serious violation of rights and fundamental freedom, then it would be imperative to seek for consolidation of the matters and not to take draconian step of having the petition dismissed.
 8. The final issue raised by the petitioner/ Respondent was that his counsel had perused the pleadings of Kajiado constitutional Petition No.E003 of 2023 and noted that the orders sought in both petition were different and hence this application should be considered on its merit as no court had rendered any decision regarding the issues raised in this petition. The respondent’s application as filed was thus incompetent and ought to be dismissed with costs.
 9. Both counsels orally submitted in court on 27/4/2023 and largely delved into matters already pleaded and relied on the authorities filed. The applicant’s urged court to set aside the orders issued on 7th March 2023 and strike out this petition in its entirety while the Respondent on the other hand were categorical that they had no knowledge of Kajiado Constitution Petition No.E003 of 2023, the orders sought in both petitions were different and no decision had been rendered by any court of competent jurisdiction on issues raised and therefore there was no basis of set aside the orders issued on 07/3/2023 and/or for striking out this petition.



Analysis and Determination

10. I have read through this application as filed, the Replying Affidavit, considered the oral submissions made and the authorities relied on by both parties and will make a determination on two central issues raised.
 - (a). Should the exparte orders issued on 7/3/202 be set aside and/or quashed.
 - (b). Should the amended petition dated 7/3/2023 herein be struck out for being incompetent and/or otherwise constitutes an abuse of the court process.

Issue I: Should the exparte orders issued on 7/3/2023 be set aside

11. The petitioner did move this court by their notice of motion application dated 6th March 2023 wherein they sort conservatory orders seeking to suspend the implementation of the amendment to standing order no.62 of the Kajiado Assembly Standing Orders 2007. The application was heard exparte by this court and the interim prayers sought were issued on 7th March 2023. The Respondents/Applicants averred that the same was procured through willful concealment and non-disclosure of material facts to wit; that this petition is substantially similar and /or is a replica of an earlier petition filed being Kajiado Constitutional Petition No.E003 of 2023 (*Hon. Isaac Kiserian v the County Assembly Speaker, Kajiado county*). The issues raised were similar, the set of facts were similar and it was important to note that the parties in Kajiado constitution Petition No. E003 of 2023 had also sought for similar conservatory orders which were not granted by the Hon Judge sitting in Kajiado High Court.
12. The Petitioner/Respondent denied the allegation made and averred he was not aware of nor was he a party to the initial petition filed. The prayer sought in the amended petition herein too were different and thus there was not basis of setting aside the orders obtained herein. Further, there was no competent court which had made any determination on the issues raised and therefore his application was not res judicata nor was it sub justice. At worst this court was urged to make and order for consolidation of both petitioners and have them determinations on merit.
13. I have read through the petition dated 6th March 2023 filed herein and I have also read through the petition dated 28th February 2023 filed in Kajiado Constitutional Petition No. E003 of 2023 and find as a fact that there is no lota of doubt that apart from the parties and a few amendment made in this petition, the pleading are similar word for word and both related to the same subject matter that is, Amendment of Standing Order No. 62 of the Kajiado County Assembly Standing Orders 2017 and the prayers sought in the interim being issuance of conservatory orders are also pleaded in a similar manner.
14. It is an obvious fact that the petitioner herein did not disclose to court the existence of Kajiado Constitutional Petition No. E003/2023 which he feigned ignorance of. Such pretense cannot hold water and it cannot be a coincidence that after conservatory orders sought Kajiado Constitutional Petition no E003/2023 were denied a similar petition, with similar wording would be filed soon thereafter, the question which then arises is whether the non-disclosure in this case was innocent in the sense that the applicants did not know of the first petition filed or did the petitioner not perceive it as relevant to this case. In my view, the non-disclosure in this case cannot be said to be innocent bearing in mind the striking similarities between the two pleadings filed in both petitions.



15. In *Reg Kensington Income Tax commission, Ex parte princess Edmond de Polignac* (1971)LKB 486, it was stated by Robert Goff LG at page 491(9)

“It is axiomatic that in *ex parte* proceedings there should be full and frank disclosure to the court of facts known to the applicant and that failure to make such disclosure may result in the discharge of any order made upon the *ex parte* application even though the facts were such that with full disclosure, an order would have been justified.”

16. The same principle was also dealt with in the case of *Brinks Mat Ltd v Elcombe* (1988) 3 ALL ER 188 by Ralph Gibson LJ at pages 192(f) where he said

“in considering whether there has been relevant non-disclosure and what consequences the court should attach to any failure to comply with the duty to make full and frank disclosure, the principle’s relevant to the issuances include;

- i. The duty of the applicant is to make a full and fair disclosure of the material facts.
- ii. The material facts are those which it is material for the judge to know in dealing with the application as made; materiality is to be decided by the court and not by assessment of the applicant or his legal advices.
- iii. The applicant must make proper enquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also any additional facts which he would have known if he had made such inquiries.
- iv. The extent of the inquiries which will be held to be proper and therefore necessary, must depend on all the circumstances of the case including
 - a). The nature of the case which the applicant is making when he makes the application.
 - b) The order for which the applicant is made and the probable effect of the order on the defendant, and
 - c) The degree of legitimate urgency and the time available for making of inquiries.
- v. If material nor non-disclosure is established the court will be astute to ensure that the plaintiff who obtains an expert injunction without full disclosure is deprived of any advantage he may have derived by that breach of duty.
- vi. Whether the fact not disclosed is of sufficient materiality justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to issues which were to be decided by the judge on the application. The answer is whether non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reasons of the duty of the appellant to make all proper inquiries and to give a careful consideration to the cases being presented.



- vii. Finally, it is not for every omission that the injunction will be automatically discharged. A *locus poenitentiae* (chance of repentance) may sometimes be offered. The court has a discretion notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the *ex parte* order, nevertheless to continue the order or to make a new order on terms.
17. I do find and hold that given the striking similarities of this petition and Kajiado Constitutional Petition No. E003 of 2023, touching on the same subject matter and seeking similar conservatory prayers, and with similar wording the petitioner cannot be said to be an innocent party and obtained the *ex parte* order without full disclosure.
18. The duty of disclosure as stated above applied not only to material facts known to the applicant but also any additional facts which he would have known if he had made such inquiries I do therefore without hesitation set aside and discharge the *ex parte* order issued on 7/13/2023
- Issue II: Should the Amended Petition be struck out for being incompetent and/or otherwise constitution an abuse of the process of court
19. The applicant's further sought to have this petition struck out for being an abuse of the process of court and reiterated that it was similar word for word with Kajiado constitution Petition No. E003 of 2023, save for changing of some parties and change of advocates and that this court ought not to look at the merits for the application but the actions of the applicant in abusing the process of court through forum shopping.
20. The other ground for seeking to have this petition struck out is that
- a. The orders sought are a violation of the express provision's of Article 185 and 191 of the *constitution* of Kenya and section 14 and 40 of the *County Government Act*, hence a nullity , moot and unenforceable.
 - b. This court lacked the original jurisdiction to entertain this petition by virtue of section 15 of the *County Government Act* and standing order No 17 of the kajiado county Assembly
 - c. This application was sub judice and was filed in violation of the provisions of section 6 of the *civil procedure Act* , Cap 21 laws of Kenya in light of the Kajiado petition No E003 of 2023 which is pending and is a replica of the current petition..
 - d. Finally, the applicant submitted that the standing Order No.62 of Kajiado county Assembly is in violation of section 40 of the *County Government Act*. The standing order provided that in case of removal of an executive committee member by the Assembly was to be by 2/3 majority, while section 40 of the *County Government Act* provides for simple majority. In conformity with the *constitution* and the County Government Act standing order 62 had to be amended to be in conformity and thus there was not illegal action to be quashed.
21. The petitioner submitted, that the parties in both petitions were different and order sought too were different. while the Kajiado Constitutional Petition No. E003/23 the prayers were sought are against the speaker. In this petition the prayers sought were as against the government. This matter was not res judicata or sub judice as no determination had been made by any court of competent jurisdiction.
22. Further they submitted that the standing order as amended was bad law and the petitioner had a right to challenge the same. Further the order issued were in public interest. Reliance was placed on *Gatirau Peter Munya v Dickson Mwenda Kitbinji and 2 others* (2014)eKLR and *D.T Dobie & Co. Kenya Ltd vrs*



Joseph Mbaria Muchina(1980) eKLR. The petitioner prayed that the Respondent’s notice of motion be dismissed.

23. Article 165(1) of the constitution of Kenya has vested vast powers in the High court including the power to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated infringed or threatened and has jurisdiction to hear any question with respect to the Interpretation of the constitution. Further Article 22 & 23 (1) of the constitution 2010 also empowers and provided the High Court with jurisdiction to hear and determine application for redress of a denial, violation or infringement of or threat to a right or fundamental freedom in the bill of rights, the said Articles also must be considered with Article 47 which codifies every person right to fair administration action that is expeditious, efficient, lawful reasonable and procedurally fair.
24. While there is striking similarity between the two petitioners filed, the parties are different given that in this petition the applicant has enjoined the County Assembly of Kajiado and Clerk County Assembly of Kajiado. Further in this amended petition dated 07/03/2023, the applicant has added one additional prays to declare any deed or action taken or done by the Respondent’s pursuant to the amended standing order 62 be deemed null and void ab initio.
25. As regards the numerous grounds raised by the applicants for striking out this petition, it is the considered opinion of this court that at this stage it would be premature to make a determination on burning issues raised and the same ought to be argued on merit and a determination made after both parties have addressed the court substantially on the said issues. Be that as it may should this petition be struck out for on the basis that it sub judice and constitutes an abuse of the court process.
26. The sub judice principle is captured in section 6 of the civil procedure Act which provides that;

“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceedings between the same parties or between parties under whom they or any of them claim litigating under the same title.
27. The basic principle which underlines this provision is that the objective of the sub judice rule is to prevent the courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigation in respect of the same cause of action, same subject matter and the same or similar relief. This will act to pin down the parties to one litigation so as to avoid the possibility of contradictory verdicts by two courts in respect of the same relief and is aimed at preventing multiplicity of suits.
28. In Supreme court of Kenya in the case of Kenya National Human rights v Attorney General; independent electoral and boundaries commission & 16 others (interested parties) (2020) eKLR, the court pronounced it self on the issue of sub judice ;

“The term sub judice is defined in the black’s law dictionary 9th Edition as “Before the court or judge for determination”. The purpose of sub judice rule is to stop the filing of multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process and diminish the chances of the courts, with competent jurisdiction issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before the courts with jurisdiction the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit filed. A party that seeks to invoke the doctrine of res sub judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; both suits



are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”

29. Having compared the pleadings herein and the pleadings in Kajiado Petition No E003/23 , I do find that the issues raised in both petitions are similar ; the prayers sought in the application for conservatory orders and the petition are similar, the “Kajiado petition” was filed first in a court of competent jurisdiction and is still pending for determination and though the petitioners are different the respondents are the same in that the 2nd petition other representatives of the county Assembly of Kajiado are added thereto. I do also hold that both petitioners are claiming under and/or for the same parties affected by the amended standing order No 62 of the Kajiado county Assembly for obvious reasons.
30. The other issue to be considered relates to abuse of court process. The term “abuse of court process” is a term generally applies to a process which is wanting in bona fides, is frivolous, vexatious and oppressive. It also connotes abuse of legal procedure and improper use of the legal process.
31. The *black's law dictionary* defines abuse as “everything which is contrary to good order established by usage that is a complete departure from reasonable use. An abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use. The situation that may give rise to a abuse of court process are indeed exhaustive. It involves situations where the process of court has not been or resorted to fairly, properly, honesty, properly 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 action 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 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.
 - 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 basis of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconveniences and inequalities 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 application 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.
32. As rightly observed by Justice John M Mativo (as he was then) in *Joyce Cherop Kaspandon and 609 others v Kenya Power & Lighting Company Limited* Nairobi HCCJR No.202 of 2017 (unreported)

“It is settled law that a litigant has no right to pursue peripasu two processes, which will have the same effect in two courts at the same time with a view of obtaining victory in one of



the process or in both. Litigation is not a game of chess where players outsmarts themselves by dexterity of purposes and traps on the contrary litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks. In my humble view the two processes are in law not available simultaneously. The pursuant of the two processes at the same time constitutes and amounts to abuse of court/legal process.

Thus, the multiplicity of actions on the same matter between the same parties even where there exists a right to bring action is regarded as an abuse. The abuse lies in the multiplicity and manner of the exercise of the right rather than exercise of right peruse. The abuse consists of intention, purpose and aim of the person exercising the right to harass, irritate and annoy the adversary and interfere with the administration justice.

33. Also in the case of *Muchanga investments limited v Safari unlimited {Africa} ltd & 2 others*. Civil Appeal No 25 of 2002(2009) eKLR the court of Appeal stated as follows

“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 frivolous or oppressive.”

34. While it is true that the petitioner has a right under Article 22 and 23 of the *constitution* of Kenya 2010 to file this petition and while the general principle in law is to sustain rather than strike out suits/petition in clear cut case such as the present petition the court will be reluctant to exercise that discretion in favour of the petitioner. The pleadings filed herein when compared to pleading filed in Kajiado Constitution Petition E003 of 2023 is the smoking gun which shows the clear nexus between the two petitions. It cannot be a coincident that apart form a few changes with respect to the parties the petitions are similar word for word and prayer sought too at exparte stage and in the main petition are similar.
35. It clearly shows the petitioner’s in both petitions are working in cohort (even if remotely) and are pursuing two similar court processes to exercise the same right. Even if the court is wrong on that score the petitioner knew or ought to have known that in law he ought to have made proper enquiries before making this application. The duty of disclosure applies not only to material facts known to the applicant but also any additional facts which he would have known if he had made such inquiries

Disposition

36. This petition therefor cannot be stayed pending hearing of the first petition filed as it lacks bonafides. To sustain it would be an abuse of the process of court and though draconian this court has no option but to jealously guard the judicial process and protect it from abuse. I do strike out this entire petition with costs to the respondents.
37. The costs of this petition are hereby assessed at Ksh.150,000/- all inclusive.
38. Right of appeal/ leave to appeal granted within 14 days.
39. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 15TH DAY OF MAY 2023.

RAYOLA FRANCIS



JUDGE

Delivered on the virtual platform, Teams this 15th day of May, 2023.

In the presence of;

.....for Appellant

.....for Respondent

.....Court Assistant

