REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCOMMM CIVIL SUIT NO 385 OF 2018

BEATRICE KWAMANGALA KUTONDO.....PLAINTIFF/APPLICANT

VERSUS

PETER ITUMO PIUS NGOVE.....1ST DEFENDANT/RESPONDENT

STANBIC BANK .....2ND DEFENDANT/RESPONDENT

RULING

Introduction

1. A history of this case, albeit briefly is necessary in order to put the applicant's application dated **25th** January 2021, the subject of this ruling into a proper perspective.

2. Initially, the Plaintiff vide her Plaint dated **3rd** October 2018 filed this suit at the Environment and Land Court being ELC No. **433** of 2018. Her claim is that at all material times relevant to this suit she was lawfully married to the **1st** defendant, and during the subsistence of the marriage they purchased Land Reference No. **4894/396 (Original L. R. No.4894/20/2**) (herein after referred to as the charged property) on which they begun constructing their matrimonial home. She claims that they had agreed with her husband that the property would be registered in their joint names and even executed the required documents.

3. She claims that she contributed to the acquisition of the matrimonial home by helping the **1st** defendant to obtain business from Unilever (K) Ltd where she was working and also taking care of the children and the home generally. Further, she claims that she conducted a search at the Lands Registry on or about **31st** August 2018 and discovered that the **1st** defendant had stealthily and without her knowledge registered the said property in his name and that he charged the property to secure a loan of **Kshs. 30,000,000/=** from the **2nd** defendant despite knowing that the property is matrimonial property.

4. Further, she discovered that the **1st** defendant had sworn a false Statutory Declaration deponing that he was not married when obtaining the loan. She states that the defendants registered an illegal charge over the said property without her knowledge and consent as required under the law, hence the said charge is null and void and created fraudulently. As a consequence of the foregoing, the Plaintiff prays for: -

a. A declaration that the legal charge registered over Land Reference Number 4894/396 (Original L.R. No. 4894/20/2) is illegal, null and void.

b. Am order directing the 1st and 2nd defendants to discharge the suit property forthwith.

c. A permanent injunction do issue restraining the defendants, themselves and through their directors, officers, employees, servants, workmen, disclosed and undisclosed agents or any other persons from selling, charging, mortgaging, sub-dividing or dealing in whatsoever manner or interfering with Land Reference Number 4894/396 (Original L.R. No. 4894/20/2)

d. Costs of this suit and interests.

e. Any other remedy this honourable court deems fit and just to grant.

5. Contemporaneous with the Plaint, the applicant filed a Notice of Motion dated **3rd** October 2018 praying for an injunction restraining the defendants/Respondents whether by themselves, employees, servants and/or agents or otherwise assigns and/or any person whatsoever acting on their behalf and/or under their mandate and/or instructions from alienating, advertising for sale, offering for sale, selling, taking possession of, leasing, transferring, charging or otherwise in any manner whatsoever interfering with Land Reference Number 4894/396(Original L.R Number 4894/20/2) pending the hearing and determination of this suit. She also prayed for costs of the application.

6. The application was founded on the grounds that the ***1st*** *defendant illegally and fraudulently registered a charge over the subject property which is their matrimonial property to secure a loan of* ***Kshs.30,000,000/=*** *from the* ***2nd*** *defendant. She states that* the ***1st*** *defendant* did not obtain her consent as her spouse before charging the property and that the **2nd** defendant failed to undertake due diligence before registering the charge.

7. She claimed that the charge violates section **12** of the Matrimonial Property Act,[1] Section **79** of the Land Act[2] and Section **93** of the Land Registration Act[3] which require spousal consent in any dealings on matrimonial property. She stated that the ***1st*** *defendant gave a false Statutory Declaration to the* ***2nd*** *defendant claiming that he was unmarried yet he was legally married to her. Further, that the absence of her consent vitiates the* ***1st****defendant's capacity to charge the property which renders the charge null and void.* Lastly, she claimed that she will suffer *loss and damage which cannot be compensated by damages if the injunction is refused because herself and the children will be rendered homeless.*

8. On **5th** October 2018, Okong J upon being persuaded that this suit had been filed in the wrong division ordered that the file be transferred to the Commercial Division. On **15th** October 2018, Odero J ordered that the status quo be maintained pending determination of the application.

9. The **1st** *d*efendant and **2nd** defendant filed Replying Affidavits dated **6th** April 2019 and **29th** March 2019 respectively in opposition to the appli*cation. They also filed their respective defenses to the suit. The Plaintiff filed a supplementary affidavit dated* **19th** August 2019. All the parties filed written submissions and vide a detailed ruling dated **29th** *May 2020, Odero J dismissed the application.*

The instant application

10. Vide an application dated **25th** January 2021, the applicant seeks strikingly similar prayers, word by word as those sought in the earlier application. The application is anchored on strikingly identical grounds as the earlier application. The only new ground added is an allegation that the ***1st*** *defendant has failed to service the loan prompting the* ***2nd*** *defendant to serve the Plaintiff with a* ***40*** *days' Redemption Notice.*

11. Similarly, the affidavit in support of the application is a replica of the affidavit in support of the earlier application. The only addition is an allegation that her husband operated a business which was not making income, that she was dismissed from employment by Unilever Kenya Limited because of conflict of interest arising out of her relationship with Glimmer Media Limited which she helped to get business from her employer. Lastly, she claimed that owing to financial and marital problems in 2018 she separated with her husband and moved with their two children into the suit premises which was still under construction.

The 1st defendant's grounds of opposition

12. The **1st** defendant filed grounds of opposition dated **18th** February 2021 stating that the application is *res judicata* since the issues raised were substantially in issue in the Plaintiff's Notice of Motion dated **3rd** October 2018 which was dismissed vide a ruling on **29th** May 2020. He also stated that the application does not meet the threshold for the grant of an injunction, and, that in the said ruling the court held that the Plaintiff did not have a *prima facie* case and that she would not suffer irreparable harm which could not be compensated by an award of damages. Lastly, he stated that the application is an abuse of court process.

The 2nd Defendant's Replying Affidavit

13. Mr. Elisha Nyikuli**,** a Senior Legal Counsel at the **2nd** defendant herein swore the Replying Affidavit in opposition to the application. He deposed that the application is bad in law, unmerited and an abuse of the court process because similar orders were canvassed in the Plaintiff's earlier application stated above which dismissed on merit. He averred that the court in the said ruling stated: -

> **i. That** the value of the suit property is quantifiable and an award of damages would suffice as adequate compensation in the event the Court decided in favour of the Plaintiff;
>
> **ii. That** the **1st** defendant was the sole registered owner of the Suit Property and that the Plaintiff had no legal claim over the same;
>
> **iii. That** the Plaintiff's claim to right to occupation and the allegations made against the **1st** defendant cannot be determined at an interlocutory stage but at a full trial.

14. Mr. Nyikuli deposed that no appeal was preferred against the said Ruling. Without prejudice to the foregoing, he deposed that the **2nd** defendant has no knowledge or facts relating to the averments contained at paragraphs **2** to **15** of her affidavit, and, that, the **2nd** defendant holds a First Legal Charge dated **4th** May 2017 registered over the property to secure a Loan Facility in the sum of **Kshs. 30,000,000/=** advanced to the **1st** defendant by the **2nd** defendant.

15. He deposed that the Loan Facility was advanced against the letter of offer dated **21st** March 2017 and it was an express term of the Letter of Offer that the **1st** defendant as Chargor would procure, where applicable, all consents required for the creation of the Charge Instrument among them a Spousal Consent in the event that the Chargor was married where the property was part of a matrimonial property.

16. He deposed that the **1st** defendant executed a Statutory Declaration dated **24th** April 2017 deposing on oath that he was not married and that the suit property did not form part of matrimonial property which declaration forms part of the Charge instrument. Mr. Nyikuli deposed that the **1st** defendant deposed on oath that he did not require any spousal consent, family or community in order to charge the suit property.

17. He also deposed that the **1st** defendant also handed over to the **2nd** defendant the original Title document in respect of the property for purposes of creating the Charge to secure the loan Facility and which Title document indicated that the suit Property was registered in the sole name of the **1st** defendant. Further, he deposed that the **2nd** defendant having satisfied itself that the **1st** defendant had complied with all the statutory requirements proceeded to register the Charge and thereafter advanced the loan Facility to the **1st** defendant. He deposed that the diligence contemplated by law to be undertaken by a financial institution when creating a Charge is to obtain a declaration from the Borrower on his marital status and which declaration was duly given by the **1st** defendant.

18. Mr. Nyikuli averred that sometime in February 2020 the **1st** defendant repeatedly defaulted in by failing to pay the monthly installments and falling into arrears as a result of which the the **2nd** defendant commenced the process of realization of the security through issuance of the **90** days' Statutory Notice to the **1st** defendant. He averred that the **1st** defendant's loan account remained in arrears at the expiry of the **90** days' notice as consequence of which the **2nd** defendant was entitled to call in the entire loan and sell the property, and, in accordance with the Law, the **2nd** defendant's Advocates issued a **40** days' redemption notice dated **12th** January 2021 via e-mail and registered mail to the **1st** defendant's last known addresses.

19. Further, he deposed that the **40** days' redemption notice was also served upon any person in possession of the property by way of affixing the notice on the suit Property, receipt whereof is admitted by the Plaintiff at paragraph **21** of the Supporting Affidavit. Also, he deposed that the **2nd** defendant followed the due process towards realization of the security and the Plaintiff who was not a party to the transaction between the **2nd** defendant and the **1st** defendant has no legal basis to interfere with the rights conferred upon the **2nd** defendant by filing the instant application.

20. He also deposed that the **2nd** defendant's conducted due diligence and relied on the Statutory Declaration sworn by the **1st** defendant on **24th** April 2017 confirming that he had no spouse as at the time of executing the Charge. Additionally, he deposed that the **2nd** defendant acted on representations and warranties given by the **1st** defendant and in the circumstances the allegations of an illegality are misdirected and unsubstantiated. Further, he averred that the circumstances under which the securities were given to the **1st** defendant are clear and beyond reproach nor is there a dispute over the amount owing from the Plaintiff which as at **8th** January 2021 stood at **Kshs. 33,526,718.51**. He deposed that the **2nd** defendant has a legal right as Chargee and is entitled to exercise its statutory power of sale unfettered owing to the **1st** defendant's default. Lastly, he deposed that the Plaintiff will not suffer any irreparable loss should the property be sold, hence the application lacks merit.

Determination

21. Upon evaluating the party's pleadings, I find that two preliminary issues arise which warrant early resolution. The issues are: - (a) whether the instant application is *res judicata*; and (b) whether the application is an abuse of court process.

22. On *res judicata*, Mr. Khakula, the Plaintiff's counsel cited the *Black's law Dictionary* definition which is:-

> "An issue that has been definitely settled by judicial decision; An affirmative defense barring the same parties from litigating a second law suit on the same claim, or any other claim arising from the same transaction or series of transaction and that could have been but was not raised in the first suit. The three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties."

and submitted that in the ruling dated **29th** May 2020 the court did not see any danger to warrant the injunction sought because the **1st** defendant was servicing the loan and the same was also confirmed by the **2nd** defendant. He argued that the court dismissed the Plaintiff's application because the applicant had not met the legal threshold required for granting injunctions. Mr. Khakula argued that in the instant application, the Plaintiff is seeking the orders on the basis that the **1st** defendant has defaulted in servicing the loan and the bank has begun the process of exercising its Statutory Power of Sale. To him, *res judicata* does not apply in the instant application because the applicant is now dealing with a new set of facts, namely the 1st defendant's default. He argued that the earlier decision was not based on this new set of facts.

23. Mr. Muriithi, the **1st**defendant's counsel submitted that under Section **7** of the Civil Procedure Act[4] the court is bound not to exercise its jurisdiction where *res judicata* arises. He submitted that a court will not sit on appeal on its own decision and litigation must come to an end. He submitted that i*ssue estoppel* bars a person from re-litigating matters already ruled on by the court and cited *Qayrat Foods Limited v Safiya Ahmed Mohamed & 6 others**[5]*** in which the court cited *James Karanja alias James Kioi (Deceased)**[6]*** which outlined the ingredients of *res judicata* as follows: -

> "For the doctrine of Res Judicata to apply, three basic conditions must be satisfied. The party relying on it must show: - (a)That there was a former suit or proceeding in which the same parties as in the subsequent suit litigated;(b) the matter in issue in the latter suit must have been directly and substantially in issue in the former suit; (c)that a court competent to try it had heard and finally

decided the matters in controversy between the parties."

24. Fortified by the above decisions, Mr. Muriithil submitted that the conditions laid down in the above case have been satisfied in the instant case because the Plaintiff had filled a similar application in this case and that the issues raised in the instant application were substantially in issue in the earlier application. He argued that issue estoppel bars the Plaintiff from relitigating the same issues. He pointed out that the earlier application was dismissed for failure to meet the tests for granting an interlocutory injunction. Also, that the court ruled that whether the property was matrimonial property was an issue for determination at the full hearing.

25. Mr. Muriithi submitted that the introduction of the new evidence in the supporting affidavit in an attempt to prove her contribution to the property amounts to abuse of process since it is akin to seeking a review upon discovery of new evidence.

26. Miss Kariuki, counsel for the **2nd**defendant submitted that the test applicable in determining whether an issue before the court is *res judicata* is provided for under section **7** of the Civil Procedure Act[7]and cited the Supreme Court in *Kenya Commercial Bank Limited v Muiri Cofee Estate Limited & another* which held: -

> "[52] Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights.
>
> [54] The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.
>
> [58] Hence, whenever the question of res judicata is raised, a Court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The Court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a Court of competent jurisdiction
>
> [59] That Courts have to be vigilant against the drafting of pleadings in such manner as to obviate the res judicata principle was judicially remarked in E.T v. Attorney-General & Another, (2012) eKLR, thus: "The Courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the Court. The test is whether the plaintiff in the second suit is trying to bring before the Court in another way and in a form of a new cause of action which has been resolved by a Court of competent jurisdiction."

27. Fortified by the above decision, she submitted that the prayers sought are a word-by-word a replica of the prayers in the earlier which was dismissed with costs on **29th**May 2020 for failing to satisfy the criteria for the grant of Injunctions. He submitted that the said ruling has not been appealed against and cited *Joyce Minayo Keya v Keya Kigaga & 3 others* in which the court found that the Plaintiff was re-litigating on issues already decided by the court and held that the court lacked jurisdiction because the case was *res judicata*.

28. She submitted that *res judicata* is meant to lock out from the court system a party who has had his day in a court of competent jurisdiction from re-litigating the same issues against the same opponent which is a waste the courts' valuable time. She submitted that the instant application is *res judicata* and the Plaintiff cannot invite the court to revisit the same issues.

29. It is elementary law that if any judicial tribunal in the exercise of its jurisdiction delivers a judgment or a ruling which is in its nature final and conclusive, the judgment or ruling is *res judicata*. If in any subsequent proceedings (unless they be of an appellate nature or review) in the same or any other judicial tribunal, any fact or right which was determined by the earlier judgment or ruling is called in question, the defence of *res judicata* can be raised. This means in effect that the judgment or ruling can be pleaded by way of estoppel in the subsequent case.

30. Admittedly, the most lucid exposition of *res judicata* is to be found in the words of Somervell L.J.[8]who stated that *res judicata* covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them. It is basic law that a litigant will not be allowed to litigate a matter all over again once a final determination has been made. Generally, a party will be estopped from raising issues that have been finally determined in previous litigation, even if the cause of action and relief are different. The purpose is obviously to prevent the repetition of lawsuits between the same parties, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions by the different courts on the same issue.[9]

31. The requirements for *res judicata* are that the same cause of action, the same relief involving the same parties was determined by a court previously. In assessing whether the matter raises the same cause of action, the question is whether the previous judgment involved the 'determination of questions that are necessary for the determination of the present case and substantially determine the outcome of the case.

32. Res Judicata is one of the factors limiting the jurisdiction of a court. This doctrine requires that there should be an end to litigation or conclusiveness of judgment where a court has decided and issued judgment then parties should not be allowed to litigate over the same issues again. This doctrine requires that one suit one decision is enough and there should not be many decisions in regard of the same suit. It is based on the need to give finality to judicial decisions. *Res Judicata* can apply in both a question of fact and a question of law. Where the court has decided based on facts it is final and should not be opened by same parties in subsequent litigation.[10]

33. It is useful to mention that a judicial decision made by a court of competent jurisdiction holds as correct and final in a civilized society.

Res judicata halts the jurisdiction of the court. That is why it is one of the factors affecting jurisdiction of the court. The effect of this is that the court is prevented from trying the case *in limine* i.e. from the beginning.[11] The rule of *res judicata* presumes conclusively the truth of the decision in the former suit.[12]

34. Res judicata, also known in the US as claim preclusion, is a Latin term meaning "a matter judged." This doctrine prevents a party from re-litigating any claim or defence already litigated. The doctrine is meant to ensure the finality of judgments and conserve judicial resources by protecting litigants from multiple litigation involving the same claims or issues.

***35. Res judicata* is provided for in Section 7 of the Civil Procedure Act.**[13] **Its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgement between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. The scheme of Section 7 contemplates five conditions which, when co-existent, will bar a subsequent suit. The conditions are:- (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; (ii) the former suit must have been between the same parties or privies claiming under them; (iii) the parties must have litigated under the same title in the former suit; (iv) the court which decided the former suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit.**[14]

36. The former East African Court of Appeal in ***Gurbachan Singh Kalsi v Yowani Ekori*[15]**stated:

> **"Where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time…No more actions than one can be brought for the same cause of action and the principle is that where there is but one cause of action, damages must be assessed once and for all…A cause of action is every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."**

37. The mere addition of parties in a subsequent suit or omission of a party or party's or introduction of a new ground or new facts as has happened in this suit does not necessarily render the doctrine of *res judicata* inapplicable. A party cannot evade the wrath of *res judicata* by simply undertaking a cosmetic surgery to his pleadings or introducing new grounds or facts to persuade the court to grant orders which had been refused earlier. If the added parties or new set of facts are meant peg the claim on the same core grounds or issues which have been determined, *res judicata* will still be invoked since the addition of a party or new grounds or facts would in that case be for the sole purpose of decoration and dressing and nothing else.[16]

38. The applicant's counsel in an effort to evade the doctrine of *res judicata* claimed that the **1st** defendant's default in servicing the loan and the bank's decision to exercise its Statutory Power of Sale are "new facts" which were not in existence when the earlier application was determined. It was the applicant's counsel's view that *res judicata* does not apply in the instant application because the instant application is dealing with new set of facts. This argument is legally frail, untenable and an affront to the doctrine of *res judicata*. I need not repeat the principles governing *res judicata* enumerated earlier. It will suffice to refer to the averments in the Plaint and the earlier application, the grounds cited and the prayers sought. The instant application is a replica of the earlier application. The alleged new facts do not alter the pith and substance of the earlier application. The nub of the two applications remains the same. To suggest otherwise is an affront to logic.

39. I have in numerous decisions stated that the civil justice system depends on the willingness of both litigants and lawyers to try in good faith to comply with the rules established for the fair and efficient administration of justice. When those rules are manipulated or violated for purposes of delay, harassment, or unfair advantage, the system breaks down and, in contravention of the fundamental goal of the Civil Procedure Rules, the determination of civil actions becomes unjust, delayed, and expensive. The issues raised in the instant application are the same issues which were heard and determined in the earlier application. The applicant's application offends the doctrine of *res judicata*. On this ground alone, the applicant's application collapses and the same is fit for dismissal.

40. Despite my finding above, I now transit to the second issue, namely, whether, the application before me is a clear abuse of court process. The court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused. 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. 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". [17]

41. The concept of abuse of court/judicial process is imprecise. It involves circumstances and situations 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.[18]

42. In several decisions of this court, citing jurisprudence from various jurisdictions, I have stated that the situations that may give rise to an abuse of court process are indeed in exhaustive. They involve situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. Examples include: -

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.**[19]**

f. Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.

g. Where an appellant file 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.**[20]**

43. 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 the words of Oputa JSC, abuse of process can also mean abuse of legal procedure or improper use of the legal process. [21] As Justice Niki Tobi JSC [22]observed, abuse of court process creates a factual scenario where a party is pursuing the same matter by two court process. In other words, a party by the two-court process is involved in some gamble, a game of chance to get the best in the judicial process. [23]

44. A litigant has no right to purse *paripasua* more than once processes which will have the same effect at the same time or at different times with a view of obtaining victory in one of the process or in both. I have in previous decisions stated that litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. Litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks.

45. Multiplicity of actions on the same matter between the same parties even where there exists a right to bring the action is regarded as an abuse.[24] The abuse lies in the multiplicity and manner of the exercise of the right rather than exercise of right *per se*. The abuse consists in the intention, purpose and aim of person exercising the right, to harass, irritate, and annoy the adversary and interfere with the administration of justice.[25]

46. Abuse of court process is an obstacle to the efficient administration of justice. Tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which such abuse cannot complacently be tolerated consistent with the good order of society.

47. The concept of abuse of process extends to the use of the court's processes in a way that is inconsistent with two fundamental requirements arising in court proceedings. These are, *first*, that the court protects its ability to function as a court of law by ensuring that its processes are used fairly by State and citizen alike. The *second* is that unless the court protects its ability to function in that way, its failure will lead to an erosion of public confidence. The court's processes will be seen as lending themselves to oppression and injustice. [26]The concept of abuse of process overlaps with the obligation of a court to provide a fair trial. How can a fair trial be guaranteed when parties drag each other to court over issues which have been litigated and determined between the same parties? By now it's evident that the instant application fits the description of an abuse of court process as delineated in the decided cases discussed above. On this ground, the instant application is fit for dismissal.

48. The applicant having failed to surmount the two issues discussed above, it is my strong position that it would be waste of judicial time, ink and paper to attempt to delve into the merits of the application. More so, when the determination involves wasting time resolving issues which were eloquently determined by Odero J in the ruling dated **29th** May 2020. The Infinite judicial resources should be deployed elsewhere in deserving cases. Consequently, I dismiss the applicant's application dated **25th**January 2021 with costs on the higher scale to the **1st** and **2nd** defendants to be paid before this suit is fixed for hearing.

49. To move the case forward, I direct the parties to file their Witness Statements and Bundle of Documents within **30** days from today. The matter shall be mentioned on **4th** May 2021 to confirm compliance and to fix the main suit for hearing.

Orders accordingly

SIGNED AND DATED AT NAIROBI THIS 7TH DAY OF APRIL, 2021

JOHN M. MATIVO

JUDGE

Delivered electronically via e-mail

[1] Act No. 49 of 2013.

[2] Act No. 6 of 2012.

[3] Act No. 3 of 2012.

[4] Cap 21, Laws of Kenya.

[5] {2020} e KLR.

[6] {2014} e KLR.

[7] Cap 21, Laws of Kenya.

[8] In *Greenhalgh vs Mallard* (1) (1947) 2 All ER 257.

[9] *Caeserstone Sdot-Yam Ltd vs World of Marble and Granite 2000 CC and others* 2013 (6) SA 499 (SCA) paras 20-21.

[10]http://www.kenyalawresourcecenter.org/2011/07/res-judicata.html -Accessed on 16 December 2017.

[11] Ibid.

[12] Ibid.

[13] Cap 21, Laws of Kenya.

[14] See **Lotta v Tanaki {2003} 2 EA 556.**

[15] **Civil Appeal No. 62 of 1958.**

[16] *Republic vs Registrar of Societies - Kenya & 2 Others Ex-Parte Moses Kirima & 2 others* [2017] eKLR.

[17]Black Law Dictionary, Sixth Edition Black, Henry Campbell, Black Law Dictionary Sixth Edition, Continental Edition 1891- 1991 P 990 P 10-11.

[18] *Public Drug Co V Breyerke cream Co*, 347, Pa 346, 32A 2d 413, 415.

[19] *Jadesimi vs. Okotie Eboh* (1986) 1NWLR (Pt 16) 264.

[20] (2007) 16 NWLR (319) 335.

[21] In the Nigerian case of *Amaefule & other Vs The State.*

[22] *Agwusin vs Ojichie*

[23] Ibid.

[24]Ibid.

[25] Ibid.

[26] *Clark vs R* {2016} VSCA 96 at [14].