

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
(CONSTITUTIONAL AND HUMAN RIGHTS DIVISION)

PETITION NO. 442 OF 2016

**IN THE MATTER OF ARTICLES 27, 31, 50 AND 244 OF THE CONSTITUTION OF KENYA
2010**

AND

IN THE MATTER OF THE CRIMINAL PROCEDURE CODE

AND

IN THE MATTER OF THE EVIDENCE ACT

AND

IN THE MATTER OF THE COMPANIES ACT

BETWEEN

SHVJI JADVA PARBAT.....1ST PETITIONER/APPLICANT

PARESH SHIVI JADVA PARBAT.....2ND PETITIONER/APPLICANT

MISTRY JADVA PARBAT & CO. LTD....3RD PETITIONER/APPLICANT

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

THE DIRECTOR OF CID.....3RD RESPONDENT

VINOD LALJI VARSANI.....INTERESTED PARTY

RULING

Background information

The background information necessary for the determination of the application now under consideration is that on 21st October 2016, the applicants herein instituted this petition against the Respondents citing violation of their rights under provisions of the constitution seeking orders *inter alia* that the Respondents be restrained from accessing or interfering with the applicants bank accounts.

The petition was accompanied by a notice of motion seeking conservatory orders restraining the

Respondents from obtaining and or taking possession of documents relating to the third Respondents three bank accounts.

The said application was heard and determined in a ruling rendered on 3rd February 2017, in which Muriithi J declined the reliefs sought in the said application and directed that only certified copies of documents will be obtained by the police and that the Bank will retain the originals and that the documents will only be used for the purposes of the criminal investigations, and that the *status quo* relating to shares and property of the petitioner be maintained pending the hearing and determination of the petition.

Aggrieved by the said ruling, the applicants herein filed an application in the court of appeal dated 9th February 2017 seeking substantially the same reliefs now being sought in the present application. The applicants did not disclose the pendency of the said application in the court of appeal to this court. The only disclosure made was that they intended to appeal against the above ruling.

The existence and pendency of the said application in the court of appeal emerged at the hearing of the application and I directed counsel for the interested party with the consent of all the other advocates to file a further affidavit limited only to attaching copies of the application filed by the applicant in the court of appeal. The further affidavit was filed on 24th March 2017 and even though the court of appeal number for the said application is not clear the documents availed to the court include the index showing contents of all the documents filed in the court of appeal, certificate of urgency, affidavit in support of certificate of urgency, Notice of motion and affidavit in support of the application. It is not disputed that the said application is pending determination in the court of appeal.

Abuse of court process

Given the striking similarity of the reliefs sought in the application pending in the court of appeal and the present application, crucial questions do arise such as whether it is open for the applicants to file two identical applications in two different courts, namely, the court of appeal and this court seeking identical reliefs and whether such conduct amounts to abuse of court process.

In *Agnes Muthoni Nyanjui & 2 Others vs Annah Nyambura Kioi & 3 Others*^[1] I observed that "It is trite law that 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. 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."^[2]

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.^[3] The situations 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:-

(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.

(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.[4]

(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. [5]

Abuse of judicial process is a term generally applied to a proceeding which is wanting in *bona fides* and is frivolous vexations and oppressive.[6] Abuse of process can also mean abuse of legal procedure or improper use of the legal process.[7] Justice Niki Tobi JSC observed that 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.[8]

It's settled law that a litigant has no right to pursue *paripassu* 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 outsmart themselves by dexterity of purpose 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 pursuit of the two processes at the same time constitutes and amount to abuse of court/legal process."[9]

Thus, the multiplicity of actions on the same matter between the same parties even where there exist a right to bring the action is regarded as an abuse.[10] 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 interface with the administration of justice.[11] Turning to this case, I find no difficulty in concluding that the two applications one in the court of appeal and the present application seeking the same reliefs amount to gross abuse of court process and on this ground alone the application before me fails.

The application

Notwithstanding my above finding, I now proceed to determine the merits of the application dated 21st February 2017 in which the applicants moved this court seeking orders that an injunction be issued halting and or stopping the third Respondent or their agents from interfering with the normal operations of the third applicants account pending the determination of this application, and an order halting and or prohibiting the third Respondent from interfering with the normal operations of the third applicants bank account number 200067002 and an alternative prayer that a conservatory order be issued lifting and or setting aside the chief magistrates order issued on 15th February 2017 freezing the third Petitioners aforesaid account.

The application is premised on the grounds that this petition sought to challenge the Respondents actions to unconstitutionally obtain the applicants banking documents and by a ruling of this court delivered on 3rd February 2017, this court dismissed the applicants petition and aggrieved by the said order, the applicant intends to appeal against the same. It is alleged that the third applicant on 15th February 2017 applied and obtained *ex-parte* orders from the magistrates court freezing the third petitioners account

allegedly in violation of this court's orders issued on 3rd February 2017, hence, the application now under consideration.

First and second Respondents Response

The first and second Respondent filed grounds of opposition stating *inter alia* that the freezing orders were obtained lawfully, that the applicant has not challenged the legality of the said order, that the application seeks to stop the Respondents from exercising its statutory mandate, and that the applicant has not demonstrated the nature and extent of alleged violation of constitutional rights.

Third Respondents Response

PC Isaac Ogutu in a replying affidavit filed on 10th March 2017 avers *inter alia* that there are no orders barring the investigation of the accounts in question, that the application has been brought in bad faith and that the Directors of Criminal Investigations and the second Respondent acted within their statutory mandate.

Interested parties Response

Vinodkumar Lalji Kanji Varsani in an affidavit filed of 6th March 2017 avers *inter alia* that he is one of the complainants who lodged the complaint the subject of criminal investigations being objected to by the petitioners.

Determination of issues

I have considered the affidavit evidence and submissions made the respective advocates for the parties and there is no doubt that one key issue that falls for determination is whether or not the application now before me seeks to overturn the ruling made by Muriithi J. A decision of a court (whether wrong or right) remains valid and subsisting until set aside by a court that has the jurisdiction to do so.[\[12\]](#)

The test whether an issue has been finally decided for the purpose of establishing a valid plea of *res judicata* does not necessarily always need to be tied to the question whether or not there has been an adjudication of substantive suit on its merits. Since the question whether or not a court can re-open in a later case, or even at a later stage in the same case, a question it has decided on a previous occasion arises in a variety of circumstances, the test most adequate for all occasions, is whether the court which gave the decision can vary, reopen or set aside the decision. If it cannot, the decision in that context is final.[\[13\]](#) A decision by a court on an issue, which that court cannot revisit, reopen or reconsider is a final decision on that issue. It matters not that the decision is made at the interlocutory stage or at the conclusion of the proceedings or that it does not finally determine the merit of the case or the rights and interest of the parties in the case.[\[14\]](#)

A party dissatisfied with a decision of a court, can only appeal against it to an appellate court that has the jurisdiction to entertain the appeal. Such a party cannot come back to the court that gave the decision, urging it to reconsider the decision because it is contrary to law or wrong for any reason. The court on its part will lack the jurisdiction to judicially re-examine or reconsider its earlier decision on the issue. There is no law allowing this court to sit on appeal on a decision rendered by a judge of equal jurisdiction. It is glaring that the this court lacks the jurisdiction to reopen and reconsider an issue determined by the same court. It become *functus officio* in respect of that issue. It is a well settled and fundamental principal of law that a court on disposing of a cause before it renders itself *functus officio*.[\[15\]](#) It ceases to have jurisdiction in respect of such a case. It cannot assume the status of an appellate court over its own decision, except where there is statutory power to do so such as review or setting aside or stay.

A careful look at the application dismissed by Murrithi J. and in particular the striking similarity between the reliefs sought in the present application and the application now pending before the court of appeal reveal that the present application seeks orders that amount to inviting this court to sit as an appellate court against its own decision. Therefore, in the face of a valid and subsisting decision made by this

court, this court lacks the jurisdiction to entertain the present application.[16]

A Judge will not adopt a method of adjudication, alien to the law or procedural rules of justice[17]even when the court is actuated by the noblest and an impassioned zeal for justice, or, as a justifying Machiavellian principle, that the end justifies the means. A court cannot exercise a jurisdiction it does not have for the purpose of doing substantial justice. The need to do substantial justice is no excuse for the court to exceed its jurisdiction. It cannot do substantial justice when it acts in excess of jurisdiction, because whatever a party secures from that exercise is a nullity.[18]

The second issue for determination is whether there was anything to bar the police from proceeding with investigations or whether the police acted outside their statutory powers. Section 24 of the *National Police Service Act*[19] sets out functions of the Kenya Police Service. In my view, the petitioners have not demonstrated that the investigations in question constitute an abuse of process or police powers, nor has the petitioner proved malice or bad faith. The duty and mandate of the police was appreciated in *Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another*[20] where it was held that **the police have a duty to investigate any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime if they fail to act.**

The other key issue is that the proceedings in the lower court have not been challenged in the petition before the court. It follows that the reliefs sought in the application are not rooted in the petition before the court. The reliefs sought are not hinged on the petition, hence they are hanging in the air and hence cannot be granted. The effect is that this application fails on this ground too.

Determination

I have reviewed the facts and the law and considered the submissions by all counsels in this case and guided by the above enumerated principles, authorities and the law, I am highly persuaded that the application dated 21st February 2017 has no merits in law and substance.

Accordingly, I dismiss the application dated 21st February 2017 with costs to the respondents and the interested party.

Orders accordingly

Signed, Delivered and Dated at Nairobi this 12th day of May 2017

John M. Mativo

Judge

[1] Succ Cause no 920 of 2009

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

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

[4] Jadesimi V Okotie Eboh (1986) 1NWLR (Pt 16) 264

[5] (2007) 16 NWLR (319) 335.

[6] In the words of **Oputa J.SC** (as he then was) in (1998) 4SCNJ 69 at 87.

[7] Ibid

[8] Supra Note 1

[9] Supra note 1

[10] Ibid

[11] Ibid

[12] See Jimoh & ors vs Akande & Anor (2009) 5 NWLR (PT 1135) 549

[13] The Supreme Court of Nigeria in Onyebuchi V. Inec {2002} 4 SC (PT.1) 27

[14] Ibid

[15] As held by the Supreme Court of Nigeria in Sanusi vs. Ayoola & Ors {1992} 11/12 SCNJ 142

[16] See Henry Njagi Muruariua v A.O. Okello, District Commissioner Mbeere District & another [2014] eKLR

[17] As the Supreme Court held of Nigeria in Bakare vs. Apena & Ors (1986) NWLR (PT.33) 1

[18] Ibid

[19] **No 11 A of 2011**

[20] {2012} eKLR