REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 428 OF 2014

GOVERNORS BALLOON SAFARIS LIMITED ……..……. PETITIONER

VERSUS

THE ATTORNEY GENERAL…….…….. 1ST RESPONDENT

SKYSHIP COMPANY LIMITED ....…….....……2ND RESPONDENT

THE COUNTY GOVERNMENT OF NAROK…….....…3RD RESPONDENT

IN THE MATTER OF ARTICLE 160 0F THE CONSTITUTION OF KENYA

AND

In the matter of alleged violations or infringement of Constitutional Rights of the person to Wit Articles 3, 159, and 50(1) of the constitution of Kenya.

R U L I N G

Introduction

1. By an amended Notice of Motion dated 29th August, 2014, the Petitioner herein, **Governors Baloon Safaris Limited**, seeks the following orders:

1. **This application be clarified as urgent and be heard *ex parte* in the first instance.**
2. **In view of the urgency herein, service of this Application upon the Respondents in the first instance be dispensed with.**
3. **That pending the interpartes hearing of this application:**
    a. **The Respondent jointly and severally be restrained by themselves, their servants or agents from violating the petitioner's Constitutional rights by seeking to act on, enforce, or execute Warrants of Attachment dated 18th July 2014, which are challenged in the present petition as being unconstitutional, invalid, null and void;**
    b. **That a conservatory order be issued conserving the Petitioner's Constitutional rights not to be subjected to legal obligations to obey and comply with Court orders including the warrants of Attachment dated 18th July 2014 issued by the High Court of Kenya against the petitioner in Nairobi High Court Civil Case No. 461 of 2008, and which are challenged in this petition as being unconstitutional, invalid, null and void;**
4. **Pending the hearing and determination of the petition, the Respondents jointly and severally**

be restrained by themselves, their servants or agents from violating the petitioner's constitutional rights by seeking to act on, enforce, or execute Warrants of Attachment dated 18th July 2014, which are challenged in this petition as being unconstitutional, invalid, null and void.

5. **Pending the hearing and determination of the petition, a conservatory order be issued conserving the petitioner's constitutional rights not to be subjected to obey and comply with Court orders which are challenged as being unconstitutional, null and void, including the warrants of Attachment dated 18th July 2014 issued by the High Court of Kenya against the petitioner in Nairobi High Court Civil Case No. 461 of 2008.**
6. **That the costs of this application be provided for.**

Applicant/Petitioner's Case

2. The application was substantially supported by a verifying affidavit sworn in support of the petition herein on 27th August, 2014 by **Dominic Grammaticas**, the applicant's Managing Director.
3. According to the applicant, the present Constitutional case or reference arises from court proceedings in Nairobi HCCC No. 461 of 2008 which was filed or commenced by the petitioner in the Civil Division of this Court on 14th August 2008, and the parties to the case were the petitioner as the plaintiff and the 3rd Respondent herein as the legal successor to the County Council of Transmara which was abolished upon the repeal of the ***Local Government Act***.
4. The pleadings in the said case closed on 8th December 2008. However, before the close of the pleadings, on 25th November 2008, the petitioner filed an application in the High Court seeking orders to strike out certain pages of the 2nd Defendant's defence which application, initially due for hearing on 11th December 2008, and was then adjourned to 28th April 2009, the applicant believed ought to have been disposed of before the hearing date could be fixed in the said civil case. On 23rd April 2009, the 3rd Respondent's Advocates requested for adjournment of the said application on the ground that he was engaged in the court of Appeal and on 28th April 2009 when the parties appeared before the Court, the hearing of the said application was adjourned in order to accommodate the 3rd Respondent.
5. On 16th April 2010, the 2nd Respondent filed an application that the case be dismissed for want of prosecution notwithstanding the fact that the petitioner's said application to strike out parts of the said defence was pending determination by the Court and the application had last been adjourned at the 3rd Respondent's request on 28th April 2009. The application was supported by the 3rd Respondent despite the fact that the said 3rd Respondent had filed a counter-claim in the suit based on the same facts and which was and is still pending in the same case for determination.
6. The application, it was deposed was initially heard by a judge who ceased to be a Judicial Officer before he could write the ruling and later, another judge took over the conduct of the case and delivered a ruling based on the record of proceedings that were on the file, and the written submissions of the parties and his a ruling delivered by the Court on 22nd November 2013 the petitioner's suit was dismissed for want of prosecution and the 3rd Respondent's counter-claim which also had not been prosecuted at all in the same case was spared and left pending.
7. Pursuant thereto, the 2nd & 3rd Respondents herein taxed their bill of costs and were each awarded awful sums of Kshs. 23,010,674.00 and Kshs. 23,560,164.00 respectively as costs. Being aggrieved, the petitioner then filed a reference to the High Court objecting the said award of costs. However, while the said reference was still pending, on 18th July 2014, Warrants were issued to a court Broker known as Kitiiyu Merchants Nairobi to attach and sell the petitioner's property if the petitioner failed to pay the said sum of Kshs. 23,058,614.00 to the 2nd Respondent herein within the period stated therein. Thereupon, the Petitioner's advocates perused the Court files in order to establish whether the Warrants were genuine.
8. From the Court file it was found that that there was a certificate of taxation on the file dated 11th July 2014; that there was no application by any party for issuance of the said Certificate of Taxation; that there was no receipt on the file to prove that the required court fees were paid

before the said Certificate of Taxation was issued; that there was a warrant of attachment on the file issued on 17th July 2014; that there was no application on the file by any party made to court for the said warrants of attachments to be issued; and that there was no receipt to show or prove that the prescribed Court fees were paid before the said warrants were issued.

9. Upon realizing the said irregularities and illegalities, the petitioner immediately filed an application in the High Court seeking orders to stay execution of the said Warrants of Attachment which application was heard ex-parte, and the court granted a conditional order of stay which stayed the execution of the said warrants for a period of 45 days on condition that the petitioner pays the entire amount specified in the said Warrants of Attachment in the sum of Kshs. 23,058,614.00cts in Court. Despite being served with the application which was fixed for hearing on 23rd September, 2014, the Respondents did not challenge the factual averments on the said irregularities but instead, the 2nd Respondent has opted to respond to the petitioner's application by filing a preliminary objection and grounds of opposition.
10. According to the applicant, there is a Certificate of Taxation on the said Court file dated 11th July 2014 in High Court Civil Case No. 461 of 2008; there is no application by any party for issuance of the said Certificate of Taxation; there is no receipt on the said file to prove that the required and mandatory court fees were paid before the said Certificate of Taxation was issued; there is a warrant of attachment on the said court file issued on 17th July 2014; there is no application by any party made to the court for the said warrants of attachments to be issued; and there is no receipt on the court file to show or prove that the prescribed and mandatory Court fees were paid before the said warrants were issued.
11. It was contended by the applicant that it is a mandatory requirement under the Constitution of Kenya and relevant laws concerning the administration of justice that in civil cases, Court orders including Certificates of Taxation and Warrants of Attachment can only be issued by the court on the application of a party and upon payment of the prescribed court fees and by reason of the above facts, the said Certificate of Taxation and Warrants of Attachment issued in Nairobi High Court Civil Case No. 461 of 2008 are invalid, null and void having been issued without payment of the prescribed court fees.
12. To the applicant, it requires or takes a person who has great influence or authority to direct a court or judicial officer to issue a certificate of taxation and Warrants of Attachment by circumventing the said mandatory legal requirements of an official application for the same and the payment of the prescribed court fees and the person or authority who caused the court to issue the said Certificate of Taxation and the Warrants of Attachment in the said Nairobi HCCC No. 461 of 2008 against the petitioner had strong and overwhelming powers or authority which he or she abused and unduly exerted on the judiciary in order to influence the judicial officers or officer to break the law when administering in the said case. The said unlawful actions, it was contended, have undermined the integrity of the proceedings in the said application dated 16th April 2010 filed by and prosecuted by the 2nd and 3rd Respondents and, perverted the course of justice in the said proceedings and contravened the provisions of the constitution of Kenya in relation to the administration of justice in the said Nairobi HCCC No. 461 of 2008.

2nd Respondent's Case

13. In response to the application, the 2nd Respondent filed a replying affidavit sworn by **Steve Luseno**, the 2nd Respondent's advocate on 1st September, 2014.
14. According to him , there is a decree issued in HCCC No. 461 of 2008 *(Governors Ballon Safaris Limited -vs- Skyship Company Limited & others)* and that the party & party costs were assessed after all the parties were afforded a day before the Deputy Registrar.
15. On the application by the deponent's firm, they obtained a Certificate of Taxation in respect to the 2nd Respondent's costs and after issuing the requisite notification, proceeded with execution thereof. However, before the expiry of the time limited under the Notification of sale, the petitioner moved the High Court and obtained an order staying execution of the Decree in respect of the Costs and by an order issued ex-parte on 28th July 2014, **Justice Gikonyo** stayed the execution of the warrants issued therein on condition that the taxed costs be deposited in court

within 45 days which order the petitioner has derived benefit of for a period of over one month, a clear indication that the petitioner does not intend to comply with the positive obligation placed upon it.

16. In the deponent's view, there is no right violated or threatened to be violated by the Respondents to warrant the issuance of any conservatory orders. To the contrary, it is the petitioner who through a multiplicity of proceedings that is engaged in acts which amount to an abuse of the court process as the application filed herein is a collateral attack on the orders issued by the Commercial &Admiralty Division of the one part and the court of Appeal of the one part. Further, the petitioner as deliberately failed to disclose that an application which had a similar effect as the Chamber Summons dated 27th August 2014 was dismissed by the Court of Appeal.
17. In the deponent's view, the filing of these proceedings is an act of mischief or otherwise an abuse of the process of the Honourable Court hence these proceedings are for dismissal.

3rd Respondent's Case

18. On behalf of the 3rd Respondent, a replying affidavit was filed sworn by **Lenku Kanar Seki**, the interim secretary of Narok County Government on 3rd September, 2014.
19. According to the deponent, the Applicant's application dated 27th August 2014 was precipitated by the impending application for issuance of warrants of attachment in **High Court Civil Case No. 461 of 2008 (Governors Ballons Safaris Limited –vs- Skyship company Limited and County Council Of Transmara)** and subsequent execution hence is a red-herring meant to delay the 3rd Respondent from proceeding to obtain warrants of attachment and sale of the petitioner's assets in execution of the order made by this court on 22nd November 2013.
20. After setting out what the 3rd Respondent deems to be the background precipitating the Applicant's application herein, the deponent concluded that there being no stay orders it was within the Respondents right to commence execution proceeding which the Applicant seeks to halt under the guise of this constitutional petition.
21. On 23rd July 2014, almost 2 months after the ruling on taxation was delivered and the Certificate of Taxation issued the Applicant filed a chamber Summons Application dated 23rd July 2014 in **High Court Civil Case No. 461 of 2008 (Governors Ballons Safaris Limited –vs- Skyship company Limited and County Council Of Transmara)** seeking to reverse the decision of the Taxing officer which Application is scheduled for hearing on 23rd September 2014.
22. Although the Applicant was granted stay orders on condition that the Applicant deposits the entire taxed costs in court the Applicant is yet to comply with the said order.
23. In the deponent's view, the Applicant is using divisionary tactics by failing to address itself to the issue at hand by trying to formulate a constitutional matter where none exists. To him, the Applicants allegation that the certificate of taxation and warrants of attachment were issued by the court in contravention of the provisions of the constitution and that the court was subject to the control or direction of undue influence lacks material particulars and is merely speculative.
24. It was averred the Applicant's application is an afterthought and the same is brought in bad faith and is purely calculated to prevent the 3rd Respondent from enjoying the fruits of the ruling in High Court Civil Case No. 461 of 2008 and that the Applicant has been intentionally wasting the 3rd Respondents time as well as the court's time by indulging in forum shopping in an effort to stall execution against it in matters which have been properly disposed of by this honourable court. To the 3rd Respondent, the Applicant's application filed herein and the entire petition is a feigned cause and this honourable court should not entertain the same.

Applicant's Submissions

25. On behalf of the applicant, **Mr Oyatsi**, learned counsel, submitted that there was a violation of Articles 2, 159 and 160 of the Constitution. While reiterating the averments contained in the supporting affidavit, learned counsel contended that in the absence of a rebuttal that no application for execution was made and no payment made thereof as required under Order 22 rule 7 of the Civil Procedure Rules, based on **Omega Enterprises (K) Ltd vs. Kenya Tourist Development**

Corp & Others Civil Appeal No. 59 of 1993 in which the Court cited the decision in **Macfoy vs. United Africa Co. Ltd [1961] 2 ALL ER 1169 at 1172**, the execution process is a nullity. To learned counsel, to compel the applicant to comply as stated in the conditional stay amount to putting a person in jeopardy for no reason. Further reliance was placed on **Yani Haryanto vs. E D & F Man Civil Appeal No. 122 of 1992** on the issue of payment of fees.

26. According to **Mr Oyatsi**, the person who ha directed the Court to issue the warrants of attachment in the face of the foregoing irregularities, must be a person with the power to direct the judiciary to take such actions contrary to the provisions of Article 160 of the Constitution and the law an action which has undermined the independence and impartiality of the judiciary. To support this submission learned counsel cited **Ajay Shah vs. Attorney General & Another Nairobi HCCC No. 1243 of 2001**.
27. It was submitted that the issues raised herein are matters of serious constitutional issues and administration of justice and deserve proper investigations since this is a matter of public interest. In learned counsel's view, this is not an issue of supervision of another High Court but a new matter which matters cannot be determined in the pending suit since the Attorney General is bound to be a party to these proceedings.
28. It was the applicant's position that Articles 22 and 258 of the Constitution empowers the applicant to institute these proceedings since this is an issue of violation of the applicant's rights.

2nd Respondent's Submissions

29. On behalf of the 2nd Respondent, it was submitted by **Mr Amoko**, learned counsel that the allegations made by the applicant of corruption and bribery are an abuse of and contemptuous of the court. According to learned counsel the petition does not allege any violation of the Bill of Rights hence Article 23 of the Constitution is superfluous. What is being sought under the guise of unconstitutionality is the setting aside of warrants. However, the issue is whether the Court can set aside parallel proceedings as well as a decision of the Court of Appeal.
30. It was contended that the issues which form the subject of this petition are the same ones which are the subject of the matter pending in the Commercial and Admiralty Division hence these proceedings are an abuse of the process of the Court. In learned counsel's view, the issue being raised herein can properly be determined in the said Division under section 34 of the ***Civil Procedure Act***.
31. It was further contended that in the absence of the auctioneer from these proceedings, the issue herein cannot be properly adjudicated since it is the auctioneers who obtained the subject warrants. Further if there is any violation, it is a violation of a rule hence does not give rise to constitutional violation as it falls within sections 1A and 1B of the ***Civil Procedure Act*** as well as Article 159 of the Constitution. In support of his submissions **Mr Amoko** relied on **Peter Ng'ang'a Muiruri vs. Credit Bank Limited and 2 Others [2008] eKLR**, **Cut Tobacco (K) Ltd vs. Kenya Revenue Authority and Another [2013] eKLR** and **Greenfield Investments Ltd and Another vs. State of the Republic of Kenya and 3 Others [2013] KLR**.
32. It was further submitted that there is settled law to set out chapter and verse the provisions alleged to be violated. According to the 2nd Respondent, manipulating judicial process is a criminal offence and based on **David Gitahi Suing as the Chairman of Othaya Residents Foundation vs. Attorney General [2014] KLR** as well as the **Ajay Shah's Case** (supra), it was submitted that what the petition is doing is to file a parallel suit with the intention of delaying the Respondents from enjoying the fruits of their judgement. Accordingly, the Court was urged to dismiss the application and in the exercise of the inherent powers strike out the suit on the grounds of abuse of the process of the court, want of jurisdiction and the petition being a collateral attack on pending matters with costs on an indemnity basis.

3rd Respondent's Submissions

33. On behalf of the 3rd Respondent, it was submitted by **Mr Kemboy**, learned counsel that all these issues raised in this petition were placed before the Commercial and Admiralty Division of this Court on the basis of which an ex parte order was granted conditionally.

34. However, these proceedings have been instituted to challenge the very order which the petitioner sought and has enjoyed but does not want to comply with. While the petitioner could have framed its constitutional issue in the said proceedings. To seek a stay of the orders granted by the High Court in these proceedings, it was submitted is an abuse of the process of the Court and an attempt to subvert the overriding objective of the Court as it is intended to mislead the court in granting orders whose effect would be to stay an order issued by a Court of concurrent jurisdiction.
35. It was submitted that the allusion to a powerful person has no basis. The Court was therefore urged not only to close the applicant out, but to issue special sanction to counsel for the applicant since there has never been a more flimsy application and petition hence both the application and the petition ought to be dismissed with costs.

1st Respondent's Submissions

36. On behalf of the 1st Respondent, **Mr. Njoroge**, learned State Counsel submitted that the petition fell short of the particulars that would enable the Court to grant the orders sought. In the absence of the manner of the vilation of the Constitution and the person who has violated the Constitution, it was submitted that the Attorney General ought to be struck out from these proceedings and the applicant should pursue its private claims.
37. It was submitted that the priority of bringing a petition to challenge a judicial act is unknown to this country when there is a procedure provided for doing so.

Applicant's Rejoinder

38. In a rejoinder, **Mr Oyatsi** reiterated his earlier submissions and added that since a petitioner is at liberty to even approach the court informally, it is sufficient to set out the rights which are violated and as such the allegations cannot be said to amount to an abuse of the Court process.
39. While conceding that the same issues were raised before the Judge in the aforesaid case, it was submitted hat the same were not raised in the same context as in these proceedings. According to **Mr Oyatsi** the constitutional issue arose when the petitioner was asked to comply with what the Court of Appeal has held should not be complied with.

Determination

40. I have considered the application the subject of this ruling, the various responses thereto, the submissions made on behalf of the parties hereto and the authorities cited.
41. The first issue for determination is the circumstances under which the Court grants conservatory orders.
42. Article 23(3)(c) of the Constitution provides that in any proceedings brought under Article 22, a court may grant appropriate relief, including a conservatory order.
43. In the Privy Council Case of **Attorney General vs. Sumair Bansraj (1985) 38 WIR 286 Braithwaite J.A**. expressed himself follows:

"Now to the formula. Both remedies of an interim injunction and an Interim declaration order are excluded by the State Liability and Proceedings Act, as applied by Section 14 (2) and (3) of the Constitution and also by high judicial authority. The only judicial remedy is that of what has become to be known as the "Conservatory Order" in the strictest sense of that term. The order would direct both parties to undertake that no action of any kind to enforce their respective right will be taken until the substantive originating motion has been determined; that the status quo of the subject matter will remain intact. The order would not then be in the nature of an injunction, … but on the other hand it would be well within the competence and jurisdiction of the High Court to "give such directions as it may consider appropriate for the purpose of securing the enforcement of … the provisions" of the Constitution…In the exercise of its discretion given under Section 14(2) of the Constitution the High Court would be required to deal expeditiously with the application, inter partes, and not ex parte and to set down the substantive motion for hearing within a week at most of the interim Conservatory Order. The substantive motion must be heard

forthwith and the rights of the parties determined. In the event of an appeal priority must be given to the hearing of the appeal. I have suggested this formula because in my opinion the interpretation of the word in Section 14 (2) "subject to subsection (3) and the enactment of Section 14(3) in the 1976 Constitution must have…the effect without a doubt of taking away from the individual the redress of injunction which was open to him under the 1962 Constitution. On the other hand, however, the state has its rights too…The critical factor in cases of this kind is the exercise of the discretion of the judge who must "hold the scales of justice evenly not only between man and man but also between man and state."

44. The aforesaid principles were adopted by the High Court of the Republic of Trinidad and Tobago in the case of **Steve Furgoson & Another vs. The A.G. & Another Claim No. CV 2008 – 00639 – Trinidad & Tobago**. The **Honourable Justice V. Kokaram** in adopting the reasoning in the case of ***Bansraj*** above stated:

"I have considered the principles of *East Coast Drilling –V- Petroleum Company of Trinidad And Tobago Limited (2000) 58 WIR 351* and I adopt the reasoning of BANSRAJ and consider it appropriate in this case to grant a Conservatory Order against the extradition of the claimants pending the determination of this motion. The Constitutional challenge to the Act made in this case is on its face a serious one. The Defendant has not submitted that the Constitutional claim is unarguable. The Claimants contends that the Act is in breach of our fundamental law and the international obligations undertaken were inconsistent with supreme law. It would be wrong in my view to extradite the claimants while this issue is pending in effect and which will render the matter of the Constitutionality of the legislation academic."

45. Back home, **Musinga, J** (as he then was) in Petition No. 16 of 2011, Nairobi – **Centre For Rights Education and Awareness (CREAW) & 7 Others** stated that:

"...It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory Order in terms of prayer 3 of the Petitioner's Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, *a party seeking a Conservatory Order only requires to demonstrate that he has a prima facie case with a likelihood of success* and that unless the court grants the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution." [Emphasis mone]

46. It is therefore important that the Court makes a finding as to whether the supplicant for conservatory order has made out a prima facie case. A prima facie case however is not necessarily a case which must succeed at the trial. It however must be a case which taking into account all the circumstances of the case, is found to be arguable.
47. In this case, the applicant's case is based on the ground that the respondents applied for and obtained warrants of attachment without either applying for the same or paying for the same. Since the matter is the subject of the pending application in the Commercial and Admiralty Division, I will refrain from making findings whose effect may prejudice the outcome of the said proceedings.
48. It is clear from the foregoing that the applicant's claim to violation of his constitutional rights arises from the execution proceedings in Nairobi HCCC No. 461 of 2008. However, section 34(1) of the Civil Procedure Act provides:

All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.

49. In its application dated 28th July, 2014, it is clear that the grounds upon which the application was brought were inter alia, that the warrants of attachment and sale are invalid, null and void, having

been issued in the absence of an application for execution, and without payment of the prescribed fees. These are substantially the grounds upon which the instant petition is hinged and based thereon, it is contended that there must have been powerful forces behind the irregularities in issuance of the said warrants which the applicant contends were null and void.

50. That brings me to the issue of the distinction between what is a nullity and what amounts to a mere irregularity. Whereas I agree with the decision in **Macfoy Case** (supra) that if an act is void, then it is in law a nullity as it is not only bad but incurably bad and there is no need for an order of the Court to set it aside, though sometimes it is convenient to have the Court declare it to be so. However, if an act is only voidable, then it is not automatically void as is only an irregularity, which may be waived and is not to be avoided unless something is done to avoid it. There must be an order of the Court setting it aside: and the Court has the discretion whether to set it aside or not and it will do so if the justice of the Court demands and not otherwise meanwhile it remains good and a support for all that has been done under it.

51. The law is that the Court should not treat any incorrect act as a nullity with the consequence that everything founded thereon is itself a nullity, unless the incorrect act is of a fundamental nature. In **C K Matemba vs. Mary Matemba [1968] EA 646,** the Court expressed itself as follows:

"Failure to serve the woman named in this case does not make the whole proceedings thereafter a nullity. It is an irregularity, which can be cured by the exercise of the inherent powers of the court. Where proceedings have not been served in accordance with the Matrimonial Causes Rules, such failure is a mere irregularity and the Court has a discretion either to set aside all orders made subsequent to the irregularity or to take steps to correct the irregularity and validate steps taken thereafter, acting under powers conferred by Order 70 rules 1 of the Rules of the Supreme Court. This is so because the irregularity does not make the proceedings void but merely voidable. They are not a mere nullity. To grant the Court a discretion to be judicially exercised in setting aside or correcting proceedings in which errors have occurred is much more likely to do justice than to create hard and fast rules requiring that proceedings be deemed a nullity should any particular lapse occur."

52. From the foregoing, it would seem that what constitutes a nullity is a defect which goes to the root of the proceedings in question and not mere failure to comply with the procedural rules meant to ensure justice is attained. Where there is a failure to strictly adhere to the rules of procedure, it is my view that there are avenues designed for remedying the defect by setting aside the irregular proceedings. Where there are no legal provisions the Court retains the inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

53. Should the failure to strictly adhere to the execution proceedings under Order 22 amount to a nullity in order to elevate the omission to a Constitutional issue? There mere fact that a person's constitutional rights may have been intercepted in my view does not necessarily elevate the matter to the threshold of violation of one's fundamental freedoms and rights. A decision arising from an application for adjournment either way may if overstretched be deemed to infringe on a person's constitutional rights to fair trial by denial of an opportunity to present one's case or by unduly delaying the hearing of a matter depending on one's standpoint. However, rarely do such decisions found their way to this Court in form of Constitutional petitions and for good reasons.

54. In **Kenya Bus Services Ltd & 2 Others vs. Attorney General [2005] 1 KLR 787**, the Court expressed itself as follows:

"Violations of fundamental principles of law is a major consideration by the courts firstly to prevent the abuse of the process under section 84 and also to filter out applications that are patently frivolous, vexatious or legally oppressive and untenable. The Constitutional mandate given to the High Court under section 84 of the Constitution is a serious one and the courts cannot countenance the process being trivialised or abused and applications falling under this category can be challenged and dismissed or struck out. Judgements of competent courts cannot be challenged in a Constitutional court except on grounds of lack of due process or anything that borders on automatic stay... In this case it is quite evident that the grant of the *ex parte* orders paralysed or stopped completely both accrued rights such as the rights to execute decrees

of competent courts and the order was so wide as to purport to stop any future right of the interested parties to enforce their rights by instituting any future litigation against the applicants. The creditors are entitled to have the courts adjudicate on the civil obligations under section 77(9) of the Constitution. Stopping interested parties from using the due process of law to enforce their rights is itself a clear violation of the provisions to secure protection of law under section 77 of the Constitution. Decisions or determinations by way of judgements, decrees or orders are clearly recognised by section 77(9) of the Constitution and failure to recognise court judgements of competent courts is both unconstitutional and an improper invocation of jurisdiction. The Courts must exercise jurisdiction in conformity with the Constitution. In addition execution of decrees is provided for as permissible limitation or restriction on the right not to be deprived of property under section 75 of the Constitution..."

55. Having considered the grounds upon which the instant application are based I am not satisfied that the applicant has made out a prima facie case to warrant the grant of the conservatory orders sought herein.
56. The Respondents have, however gone further and urged the Court to strike out the application and the petition as being an abuse of the process of the Court. A simple meaning of the word "abuse" is an exercise or committal of an action, right or power either wrongfully or for purpose not akin to that right or power. It does not have to be the sole purpose as long as it is the predominant purpose. See **John Muritu Kigwe & Another vs. The Attorney General Nairobi HCCC No. 223 of 2000.**
57. In his rejoinder **Mr Oyatsi** conceded that the grounds upon which the application in Nairobi HCCC No. 461 of 2008 was based are the same as the grounds in the instant proceedings. He however contended that it was the order directing the applicant to deposit the sum in question in Court which provoked these proceedings. However, in imposing conditions for the grant of the stay sought the Court was no doubt exercising its jurisdiction under the principle of overriding objective. It is now well recognised that in exercising its discretion under the Civil Procedure Act the Court is enjoined to consider what has become known as the principle of proportionality under the overriding objective which objective the Court is enjoined to give effect to in the exercise of its powers under the Act or the interpretation of any of its provisions. As was aptly put by **Ojwang, AJ** (as he then was) in **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589** it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice.
58. In other words, what triggered these proceedings was an order for conditional stay made by a Court of concurrent jurisdiction. The applicant's posture that the conditions imposed for the grant of the stay by the court amounted to placing the applicant in jeopardy for no reason is reminiscent of what **Kuloba, J** in **Lakesteel Supplies vs. Dr. Badia and Anor Kisumu HCCC No. 191 of 1994** described in his usual style as:

    "The applicant unleashed a vicious attack on the terms of the stay granted, now nicknaming them as "onerous and impossible to comply with", propounding argumentatively in affidavit supposed to be statements of facts, *dicta* that the term of the stay requiring the applicants to deposit amounts to a refusal to stay; and in academy of law-like dictum, he asserted imperiously in a style of an appellant authority, "this court ought not to give the applicants terms which are incapable of performance".

59. It does not require much intelligence to conclude that what in effect the applicant intends to achieve by these proceedings is to either stay or at worst to reverse the decision made by this Court without either an appeal or a review but by a collateral attack of the said proceedings in these proceedings. In **Hunter vs. Chief Constable of West Midlands & Another [1981] 3 ALL ER 727,** it was held that the initiation of proceedings in a Court of justice for the purposes of mounting a collateral attack on a final decision adverse to the intending plaintiff reached by a Court of competent jurisdiction in previous proceedings in which the plaintiff had full opportunity of contesting the matter was, as a matter of public policy, an abuse of the process of the Court. Similarly, in **Kamlesh Mansuklal Damji Pattni & Another vs. R. Nairobi HCMA No. 322 of 1999**, a three judge bench of this Court held that:

"...no recognised human right or fundamental freedom is contravened by a Judgement or order that is wrong and liable to set aside on appeal for an error of fact or substantive law where the error has resulted in a person serving a sentence of imprisonment. The remedy for errors of this kind is to appeal to a higher court and where there are no higher courts to appeal to, then none can say that there was an error. The fundamental right is not a legal system that is infallible but one that is fair. It is only errors of procedure that are capable of constituting infringement to the rights protection and no mere irregularity in procedure is enough, even though it goes to jurisdiction; the error must amount to failure to observe one of the fundamental rules of natural justice... An applicant should not bring multiple applications one after another, concerning the same subject matter, as they will be considered as abuse of the Court."

See also **Maharaj vs. A.G. Trinidad and Tobago (1978) 2 WLR 902** at **912.**

60. It is clear that the applicant herein approached the Commercial Division of this Court for redress which it obtained though the redress may not have been to its satisfaction. Before the said matter could be heard to its conclusion, the applicant has invoked this Court's jurisdiction without even bothering to withdraw the proceedings in the said Division. In my view the applicant is with due respect playing lottery with the judicial process. In **Charles Mugunda Gacheru vs. The Senior Resident Magistrate, Principal Magistrate's Court Nyeri & Others Nyeri HCMA No. 24 of 2005,** this Court held that a party who having filed a case in court, refers the matter to arbitration, goes to another court while the arbitration proceedings are pending and obtains an order therefrom without disclosing the existence of the earlier case, abandons the latter case and files another case without disclosing the existence, pendency and connection with the first case, is abusing the process of the Court**.**
61. I am therefore of the view that not only this application but the whole petition is an abuse of the process of the Court. To make matters worse the applicant has made serious allegations against the Court which allegations are on the face of it unsubstantiated as they lack essential particulars are in my view based on conjectures and speculation.
62. It has been held time and again that it is an abuse of the court process to institute several proceedings in order to challenge the same action and the Court has inherent jurisdiction to prevent such abuse. One only needs to refer to the cases of **Billy Ngongah vs. Khan & Associates Civil Appeal No. 104 of 2001; Richard Saidi vs. Sembi Motors Civil Appeal No. 9 of 1991** and **Arbuthnot Export Services Ltd. vs. Manchester Outfitters Nairobi HCCC No. 2252 of 1989.**
63. **The Court of Appeal in Commercial Exchange Limited And Another vs. Barclays Bank of Kenya Ltd. Civil Appeal No. 136 of 1996** had this to say:

"It became crystal clear that as the appellants were unable to pay the sum of Shs 3,500,000 a legal ingenuity was employed and this was discontinuance of the former suit and filing the fresh suit. The discontinuance of a suit does not affect consent orders already made in that suit…Whatever the financial predicament the appellants were in, they used the process of court wrongfully in attempting to seek yet again orders similar to those sought in the earlier case after recording the aforementioned consent orders. As the judge was minded to dismiss the application, he was simply being kind to the applicants… It does not augur well for an applicant to say that he is yet again before the court after discontinuing his case but without disclosing the reasons for such discontinuance and without informing the court, at least at an *ex parte* stage, that certain far-reaching consent orders were made in the previous suit… The appellants wanted to buy time, it appears, and they have managed to buy some time. Yet, they have made no payments towards reduction of the debt. The world of business cannot survive if such frivolous applications are allowed."

64. This position was affirmed by the Court of Appeal in **Apondi vs. Canuald Metal Packaging [2005] 1 EA 12,** where it was held that a party is at liberty to choose a forum which has the jurisdiction to adjudicate his claim, or choose to forego part of his claim and he cannot be heard to complain about that choice after the event and it would be otherwise oppressive and prejudicial to other parties and an abuse of the Court process to allow litigation by instalments.

65. What then is the recourse available to the Court where the Court is satisfied that the proceedings in question amount to an abuse of its process? In dealing with the issue of abuse of the process of the Court **Kimaru, J** in **Stephen Somek Takwenyi & Another vs. David Mbuthia Githare & 2 Others Nairobi (Milimani) HCCC No. 363 of 2009** expressed himself as follows:

"This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilised legal process it is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract *res judicata* rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it".

66. This was the position adopted by **Warsame, J** (as he then was) in **Standard Chartered Bank Ltd vs. Jenipher Atieno Odok Kisumu HCCC No. 120 of 2003** where he held that:

"It is not within the rights of parties to engage in a multiplicity of suits as the multiplicity of suits is meant to obstruct the due process of law and when a party shows design to abuse the powers of the Court, such actions must be stopped to avoid unnecessary costs and waste of judicial time…If a party has a legitimate cause of action he/she must present it before the Court with jurisdiction and resolve the same in that court."

67. Being satisfied that this petition was instituted some ulterior motive or some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process i.e. to avoid complying with the conditions given by the Commercial and Admiralty Division of this Court, it is my duty and obligation to bring a stop to these proceedings. In the premises, the petition herein including the application for conservatory orders is hereby struck out with costs to the Respondents.
68. The striking out of these proceedings does not leave the applicant with no remedy since the Commercial and Admiralty Division of this Court being a High Court is a Constitutional Court and is empowered to hear and determine any Constitutional issues which may arise in the course of the proceedings pending before it.

Dated at Nairobi this 9th day of September, 2014

G V ODUNGA

JUDGE

Delivered in the presence of: