REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC OS NUMBER E004 OF 2026

JERIMIAH KABWI ……..…PLAINTIFF/APPLICANT

VERSUS

JOSPHAT KABUNDURU ……DEFENDANT /RESPONDENT

RULING

1. The right of access to justice is intended to ensure that citizens, or such other person[s] who find themselves in Kenya, can partake of justice. The scope of the right of access to justice is captured *vide* **Article 48 of the Constitution, 2010.**

2. Nevertheless, there are instances which bring into question whether the right of access to justice is limitless and bottomless. Put differently, whether one litigant can come to court in various perspectives and be at liberty to file a plethora of suits, touching on and concerning the same subject issue; and Whether such endeavors bode/ portend well with the right of access to justice?

3. Additionally, there is the question as pertains to the intersection of the right of access to justice and the concept of abuse of the due process of the court. In respect of the instant matter, the question of abuse of court process becomes apparent and hence this court will be called upon to discern whether the instant suit constitute[s] an abuse of the due process of the court or otherwise.

4. However, before I venture forward into ascertaining whether the suit constitute[s] an abuse of the due process of the court, it is apposite to discern what the concept of abuse of the due process of court entails. The concept of abuse of the due process was expounded, nay explained in the case of **Kenya Section of the International Commission of Jurists versus Attorney General & 5 others [2012] KESC 4 (KLR).**

5. The apex court stated thus:

> "***The concept of "abuse of the process of the Court" bears no fixed meaning, but has to do with the motives behind the guilty party's actions; and with a perceived attempt to manoeuvre the Court's jurisdiction in a manner incompatible with the goals of justice. The bottom line in a case of abuse of Court process is that, it "appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak to be beyond redemption"***
>
> ***.Beyond that threshold, lies an unlimited range of conduct by a party that may more clearly point to an instance of abuse of Court process.***

6. Back to the issue at hand. The Plaintiff herein filed the Originating Summons dated the 13.02.2026 and wherein same has sought various reliefs. The reliefs touch on and concern acquisition of adverse possession over and in respect of **LR. No. Nyambene/Uringu III/978,** together with the resultant titles arising therefrom.

7. Contemporaneously, the Plaintiff filed a Notice of Motion Application dated the 13.02.2026. The reliefs sought at the foot of the application are:

i. ***That thisAapplication be <u>certified urgent</u> and the same be heard on priority basis.***

ii. ***That this Honourable Court be pleased to issue and order of the inhibition and the same be registered against the parcel of land number L.R. NYAMBENE/URINGU 111/1696, 1697, 1698, 1699 and 1700 to restrict any dealings or transfer of the said parcel of land and the District Land Registrar, Urru be directed to register the inhibition against the parcel of land NYAMBENE/URINGU 111/978 and the resultant sub divisions being NYAMBENE/URINGU 111/1696,1697,1698,1699 and 1700 pending the hearing and determination of this application inter-partes and thereafter until this suit is heard and determined.***

iii. ***That this court be pleased to issue an order of temporary injunction restraining the Defendant whether by himself, servants, agents, purchasers or any person whomsoever from doing any of the following acts interfering with the plaintiff's/applicant's quiet, peaceful, actual and exclusive possession, cultivation, use development and enjoyment of 1 acre on parcel of land No. L R Nyambene/Uringu/111/978 and the resultant sub divisions being Nyambene/Uringu 111/1696, 1697, 1698, 1699 and 1700 pending the hearing and the determination of this application.***

iv. ***That this honorable court be pleased to issue an order of temporary injunction restraining the Defendant whether by himself, servants, agents, purchasers or any person whomsoever from doing any of the following acts that is to say evicting, selling, leasing charging or otherwise doing any of the following acts interfering with the plaintiff's/applicant's quiet, peaceful, actual and exclusive possession, cultivation, use development and enjoyment of 1 acre of land number L.R NYAMBENE/URINGU/111/978 and the resultant sub***

divisions being Nyambene/Uringu 111/1696, 1697, 1698, 1699 and 1700 pending the hearing and the determination of this suit.

v. That costs of this Application be borne by the Defendant /applicant.

8. The Notice of Motion Application is premised on various grounds. The grounds are: The Plaintiff had filed a previous suit before Tigania Chief Magistrate's Court namely; SPMC ELC 81 of 2022; the suit before Tigania Law Courts was heard and determined *vide* judgment delivered on the 29.08.2023; the court found that the suit property was being held on trust for the Plaintiff; the judgment of the lower court was appealed against *vide* Meru ELC Appeal No. E028 of 2023; the appeal in question was heard and disposed of; the Environment and Land Court overturned the judgment of the lower court; and the Plaintiff is now on the verge of being evicted.

9. Furthermore, the Plaintiff has posited that same has been in occupation of the suit property since 1973. To this end, the Plaintiff contends that same has since acquired [sic] adverse possessory rights to and in respect of the suit property and the resultant titles. In this regard, the Plaintiff now seeks to be declared as the lawful owner of the suit property and the resultant titles [sic] on the basis of adverse possession.

10. The Defendant has filed a replying affidavit sworn on the 03.03.2026 and wherein the Defendant has raised various issues. The issues raised by the Defendant are: The Plaintiff had filed a previous suit *vide* Tigania SPMC ELC No. 81 of 2022; the suit was heard and determined; the court granted an order that the suit property is held on trust for the plaintiff; the

Defendant was aggrieved; the Defendant filed an appeal before the Environment and Land Court; the appeal namely MERU ELC Appeal No. E028 of 2023 was heard and disposed of; the appeal was allowed; the judgment of the lower court was set aside; and the plaintiff's suit claiming trust was dismissed.

11. Furthermore, it has been contended that upon the delivery of the judgment *vide* Meru ELC Appel No. E028 of 2023, the Plaintiff herein was aggrieved; the Plaintiff proceeded to and filed a notice of appeal to the Court of Appeal; the notice of appeal is still in existence; the Plaintiff failed to file and serve the record of appeal within the prescribed timelines; the Plaintiff thereafter filed an application before the court of appeal for extension of time to file and serve the record of appeal out of time; and the application was allowed.

12. It has been contended that despite the fact that there is an existing appeal on the question of trust before the court of appeal; the Plaintiff has now filed a fresh suit *vide* Originating Summons seeking adverse possession. The Defendant has posited that the subject suit is prohibited by the doctrine of Res judicata; and same constitutes an abuse of the due process of the court.

13. Additionally, the Defendant has also filed a Notice of Preliminary Objection dated the 02.03.2026. The Preliminary Objection states thus:

> ***'The application and the originating summons are Res judicata pursuant to Section 7 of the Civil Procedure Act, the issues raised herein having been directly and substantially in issue in Tigania***

ELC No. 81 of 2022; and subsequently determined in Meru ELC Appeal No. E028 of 2023'

14. The application dated 13.02.2026 came up for hearing today [10.03.2026], whereupon the advocate for the Defendant intimated to the court that same had filed a notice of preliminary objection. Furthermore, learned counsel posited that the preliminary objection raised a jurisdictional question and thus the court was obligated to adjudicate upon same beforehand. Counsel thereafter sought directions of the court.

15. Insofar as the preliminary objection raised a jurisdictional question and taking into account the dictum in the case of **Owners of Motor Vessel Lilian 'S'** ***versus Caltex [K] Limited [1989] eKLR***, I directed that the preliminary objection be canvassed before the hearing of the application. Further, and in addition, I directed that the preliminary objection be canvassed by way of oral submissions.

16. Learned counsel for the Defendant adopted the contents of the preliminary objection and thereafter highlighted two key issues. The issues highlighted by counsel are: The instant suit is prohibited by the doctrine of *Res judicata* and **Section 7 of the Civil Procedure Act, Chapter 21 laws of Kenya**; and the suit beforehand constitutes an abuse of the due process of the court. The counsel thereafter invited to strike out the suit and to award costs to the Defendant.

17. Learned counsel for the Plaintiff responded to the preliminary objection and canvassed two salient issues. The issues canvassed by the Plaintiff are: The suit is not prohibited by the doctrine of Res Judicata; and the

issue of adverse possession was neither canvassed nor adjudicated upon by the Tigania Law Courts.

18. Additionally, and while responding to questions from the court, learned counsel for the Plaintiff submitted that even though the notice of appeal before the court of appeal has not been withdrawn, the appeal does not exist. Moreover, counsel posited that the Plaintiff has neither filed nor served the record of appeal before the court of appeal. In this regard, the court was implored to find and hold that the appeal before the court of appeal [sic] stands withdrawn.

19. Learned counsel also submitted that the previous suit touched on and concerned trust and yet the current suit concerns a claim of adverse possession. Furthermore, it was submitted that a claim for adverse possession is separate and distinct from trust.

20. It was the further submissions by learned counsel for the Plaintiff that the appeal before the court of appeal [which challenges the determination on trust] can run simultaneously with the claim for adverse possession.

21. Finally, learned counsel for the Plaintiff submitted that the suit beforehand does not constitute an abuse of the due process of the court. For the avoidance of doubt, learned counsel invited this court to deem the appeal before the court of appeal as [sic] withdrawn and thereafter find that the suit is properly before the court.

22. Having reviewed the preliminary objection and upon consideration of the oral submissions made by/on behalf of the respective parties, I come to the conclusion that the determination of the subject matter/question, turns on two [2] key issues. The issues are: Whether the instant suit is barred by the doctrine of Res judicata and by extension the Provisions of S**ection 7 of the Civil Procedure Act** or otherwise; and whether the instant suit constitutes an abuse of the due process of the court or otherwise.

23. Regarding the first issue, it is important to recall and reiterate that the doctrine of Res judicata is intended to bar and avert the filing of a multiplicity of suits, touching on and concerning the same issues; causes of actions or matters which were directly and substantially in issue in a previous suit or proceedings. It is a doctrine which protects parties/litigants from being vexed twice over and in respect of the same issue. In addition, the doctrine serves a salutary purpose of ensuring finality in litigation.

24. The import of the doctrine of Res judicata has been the subject of various court decisions. Pertinently, the Court of Appeal highlighted the ingredients underpinning the doctrine [Res Judicata] in the case of **Independent Electoral and Boundaries Commission v Kiai & 5 others [2017] KECA 477 (KLR).**

25. The court stated thus:

> ***73. …Res judicata is a matter properly to be addressed in limine as it does possess jurisdictional consequence because it constitutes a statutory peremptory preclusion of a certain category of suits. That***

much is clear from Section 7 of the Civil Procedure Act, 2010;"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of the claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

74. Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

(a)The suit or issue was directly and substantially in issue in the former suit.

(b)That former suit was between the same parties or parties under whom they or any of them claim

(c)Those parties were litigating under the same title.

(d)The issue was heard and finally determined in the former suit.

(e)The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

75. The learned Judges were fully aware and applied their minds to these elements when, applying this Court's decision in Uhuru Highway Development Ltd v Central Bank of Kenya [1999] eKLR they rendered the elements as;

(a)the former judgment or order must bevidefinal;

(b)the judgment or order must be on merits;

(c)it must have been rendered by a court having jurisdiction over the subject matter and the parties; and(d)there must be between the first and the second action identity of parties, of subject matter and cause of action."

76. The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.

26. The position highlighted and elucidated in the decision [supra] relates to actual Res Judicata. The aspect in question is also known in Law as '*Cause of Action Res Judicata'*. In particular, the scenario above depicts a situation where the issue in question was directly and substantially canvassed *vide* the previous suits. However, there does arise another situation where the issue underpinning the subsequent suit is closely related to or intertwined with the issues that were canvassed in the previous suit. The later situation births the doctrine of constructive Res judicata.
27. Suffice it to state that the latter situation is often referenced as the Íssue *Res Judicata*. It basically refer[s] to issue[s] which ought to have been raised by the concerned Litigant, with the exercise of due diligence.

28. Simply put, each and every party is called upon to bring all his/her claim[s] for trial before the court. A party must not segment the claims and thereafter bring same to court *vide* installments.

29. The party must implead all the claims that are related or inter-related at the same time and thus allow a court of law to adjudicate upon the claims at once.

30. Moreover, where a party fails to implead, canvass or propagate a particular relief or cause of action, which, with due diligence ought to have been impleaded, such a party cannot subsequently seek to canvass the omitted limb of the claim or cause of action. In the event of such a suit being filed, the adverse party is at liberty to canvass the plea of Res judicata.

31. The aspect of the doctrine under reference was illuminated by the Court of Appeal in the case of **Kenya Commercial Bank Ltd v Benjoh Amalgamated Ltd [2017] KECA 98 (KLR).**

32. The Court of Appeal stated as hereunder:

> ***"35. Cognizant of the above principles, the courts called upon to decide suits or issues previously canvassed or which ought to have been raised and canvassed in the previous suits have not shied away from invoking the doctrine as a bar to further suits. As was stated in Henderson v Henderson (1843) 67 ER 313, resjudicata applies not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, 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. In the case of Mburu Kinyua v Gachini Tutu (1978) KLR 69 Madan, J. Quoting with approval Wilgram V.C. in Henderson v Henderson (supra) 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 in special circumstances) permit the same parties to open the same subject of ligation 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 judgment but to every point which properly belonged to the subject of litigation, and which parties exercising reasonable diligence, might have brought forward at the time" (emphasis added).

36. We have no doubt at all that the suits filed by Benjoh and Muiri raised issues that were previously raised or could with reasonable diligence have been raised in the previous suits. This is the basis upon which we will eventually determine whether the judge erred in not upholding KCB and Bidii contention that issues raised in the suit had already been raised and finally determined in the previous suits; that the former suits involved the same parties, and that the courts which handled those previous suits were competent.

33. The Plaintiff herein had filed the previous suit *vide* Tigania SPMC ELC 81 of 2022. The Plaintiff contended that the suit property and the resultant subdivisions were being held by the Defendant on trust. The said suit was heard and determined. Nevertheless, the pertinent aspect that merits consideration is to the effect that the issue of adverse possession was closely related to and intertwined with the claims that were canvassed in the said suit. It behooved the Plaintiff to exercise due diligence and to implead all his claims at the same time. The claim[s], could have been impleaded [sic] in the alternative.

34. To my mind, the Plaintiff herein and his learned counsel ought to have exercised due diligence. Having failed to do so, the Plaintiff cannot revert to court and seek to re-litigate the issue of adverse possession. I am afraid that the question of adverse possession is caught by the doctrine of Constructive Res judicata.

35. Before concluding on this issue, it is apposite to reference the provisions of **Order 3 Rule 4 of the Civil Procedure Rules 2010**. The said provisions stipulate thus:

Suit to include the whole claim [Order 3, rule 4]

> *(1)**Every suit shall include the whole of the claim which the Plaintiff is entitled to make in respect of the cause of action; but a Plaintiff may relinquish any portion of his claim.***
>
> ***(2) Where a Plaintiff omits to sue in respect of or relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion omitted or relinquished.***
>
> ***(3)A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits,***

except with the leave of the court, to sue for all such reliefs he shall not afterwards sue for any relief so omitted.

36. In my humble view, the Plaintiff cannot now seek to approach the court and canvass the issue of adverse possession which had been omitted in the previous proceedings. The failure to implead the claim of adverse possession falls within the purview of the cited provisions.

37. The next issue that falls for consideration is whether the originating summons and the attendant application constitutes an abuse of the due process of the court. I shall address the issue herein in three perspectives.

38. Firstly, it is worthy to recall that the Plaintiff herein had filed a previous suit namely; Tigania PMC ELC No. 81 of 2022. The Plaintiff had contended that the suit property and the resultant titles were being held by the Defendant on trust for him. The claim based on trust was canvassed and thereafter a judgment was rendered. Notably, the lower court returned a finding that the suit property was being held on trust for the plaintiff.

39. Suffice it to state that the Defendant was dissatisfied and same filed an appeal before the Environment and Land court. The appeal was assigned as Meru ELC Appeal No. E028 of 2023. The subject appeal was subsequently heard and determined *vide* judgment rendered on 09.10.2025. For good measure, this court found and held that the suit property and the resultant titles were not being held on trust for the plaintiff. To this end, the judgment of the lower court was set aside and the plaintiff's suit in the lower court was dismissed.

40. Having previously canvassed and propagated the plea of trust and upon failing to procure a favourable decision, the Plaintiff has now changed color and is before this court contending that same has acquired title to or ownership of the suit property; and the resultant titles by adverse possession. Surely, the Plaintiff is playing poker with the due process of the court.

41. I hasten to state that what the Plaintiff is doing is tantamount to what is called trial and error. In Kiswahili, the game is christened thus: ***"bahati nasibu"***. The due process of the court cannot be the subject of excursion. Moreover, due process of the court frowns upon fishing expeditions.

42. To my mind, the Plaintiff tried [rode] his luck on the basis of trust. The Plaintiff failed. The Plaintiff is now back seeking to test the waters and see whether the plea of adverse possession can suffice. Sadly, the Plaintiff cannot be allowed to change colours like a chameleon.

43. Furthermore, the law does countenance the human propensity of keep trying until something gives in. The due process of the law is not a game of chess; or Lottery.

44. In the case of **William Koross v. Hezekiah Kiptoo Komen & 4 Others [2015] eKLR**, the Court of Appeal addressed a similar scenario where a party kept on reverting to court in disguised character.

45. The court observed thus:

> " ***The philosophy behind the principle of res judicata is that there has to be finality; litigation must come to an end. <u>It is a rule to</u>***

counter the all-too human propensity to keep trying until something gives. It is meant to provide rest and closure, for endless litigation and agitation does little more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go. Speaking for the bench on the principles that underlie res judicata, Y.V. Chandrachud J in the Indian Supreme Court case of Lal Chand v Radha Kishan, AIR 1977 SC 789 stated, and we agree ;"The principle of res judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue." [Underlining Supplied].

46. The second aspect that merits consideration relates to the filing of the subject suit during the pendency of the notice of appeal to the court of appeal and wherein the Plaintiff is challenging the decision of this court which held that the plea of trust did not apply to the suit property and the resultant subdivisions [titles].

47. What the Plaintiff is doing is keeping the claim pertaining to trust alive before the court of appeal, while at the same time canvasing the plea of adverse possession before this court. Surely, the Plaintiff cannot be deploying the process of the court simultaneously as pertains to trust and adverse possession.

48. I wish to state that the appeal before the court of appeal and which is underpinned by the notice of appeal filed on 23.10.2025 remains alive. Moreover, evidence abound that the Plaintiff sought for and obtained leave to file a record of appeal out of time. [**See the ruling of the court of appeal rendered on the 23.01.2026 vide Nyeri Court of Appeal Civil Application Number E178 of 2025].**

49. Even though learned counsel for the Plaintiff contended that no record of appeal has been filed and thus the appeal before the court of appeal stands withdrawn, it is elementary learning that the notice of appeal before the court of appeal remains standing until the same [notice of appeal] is either withdrawn or struck out. Suffice it to state that learned counsel for the Plaintiff conceded that the notice of appeal has neither been withdrawn or struck out.

50. The bottom line is that the appeal before the court of appeal is alive. In this regard, the Plaintiff cannot by side wind, seek to approach this court *vide* the instant suit. Such an endeavor constitutes misuse, nay abuse of the court process.

51. In the case of **Satya Bhama Gandhi v Director of Public Prosecutions & 3 others [2018] KEHC 6100 (KLR)** the court [per Mativo – J as he then was] stated thus:

> ***26. It's settled law that a litigant has no right to purse pari pasua two processes which will have the same effect in two courts either at the same time or at different times 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.

27. It is not open for the applicant herein to institute these Judicial Review proceedings after losing the Petition challenging the same criminal trial. The two processes are in law not available to the applicant. He ought to have appealed against the above mentioned decision if he was dissatisfied. The Applicant cannot lawfully file this Judicial Review proceedings and seek similar reliefs relying on substantially the same grounds as the Petition referred to above. The pursuit of the second process, that is this Judicial Review Application constitutes and amounts to abuse of court/legal process."[17]

28. 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.[18] 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.[19]I find no difficulty in concluding that this Judicial Review Application is based on similar grounds as the Petition referred to above.

29. This obstacle to the efficient administration of justice is not immovable. Courts need not and should not wait for lawyers and litigants to initiate proceedings where there is substantial reason to believe that the processes of the court have been abused. 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 consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the

diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception, fraud and blatant abuse of judicial processes.

30. All courts have an inherent or implied jurisdiction to prevent their processes from being used as an instrument of oppression. Courts are able to modify their procedures to avoid such prejudice and take any steps that are necessary to prevent an abuse of process.[20]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 protect 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.[21]

52. Additionally, the concept of abuse of the due process of the court was also expounded by the court of appeal in the case **of MUCHANGA INVESTMENTS LTD v SAFARIS UNLIMITED (AFRICA) LTD & 2 others [2009] KECA 453 (KLR.**
53. The court of appeal stated thus:

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

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

In the Nigerian Case of KARIBU-WHYTIE J Sc in SARAK v KOTOYE (1992) 9 NWLR 9pt 264) 156 at 188-189 (e) the concept of abuse of judicial process was defined:-

> ***"The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice …"***
>
> ***The same Court went on to give the understated circumstances, as examples or illustrations of the abuse of the judicial process:-***
>
> ***(a) "Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.***
>
> ***(b) Instituting different actions between the same parties simultaneously in different courts even though on different grounds.***
>
> ***(c) Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent's notice.***
>
> ***(d) (sic) meaning not clear)***

e) Where there is no loti of law supporting a Court process or where it is premised on frivolity or recklessness."

We are of the view that the circumstances of the case before us, falls squarely in illustration (e) above, in that there was no valid law supporting the process followed by the respondent.

54. The last aspect that I wish to address relates to the intersection between the plea of trust and the claim based on adverse possession. It is common ground that the Plaintiff herein propagated the plea of trust up to and including the 09.10.2025. Moreover, it is not lost on me that the Plaintiff is still before the court of appeal on the question of trust.

55. Suffice it to state that for as long as the Plaintiff contends that the suit property is registered in the name of the Defendant to hold on trust, then the Plaintiff cannot raise and canvass the plea of adverse possession. In any event, it is imperative to underscore that trust destroys the plea of adverse possession.

56. Simply put, a person who is claiming beneficial rights on the basis of trust, cannot at the same time claim/propagate adverse possession. The cause[s] of action are mutually exclusive; and inconsistent.

57. In the case of **Catherine Koriko & 3 others v Evaline Rosa [2020] KECA 534 (KLR**) the Court of Appeal explained the position. The court opined that the claim of trust and beneficial rights are mutually exclusive to; inconsistent with; or antithetical to the plea of adverse possession.

58. For coherence the court stated thus:

In ***Haro Yonda Juaje –v- Sadaka Dzengo Mbauro & Kenya Commercial* Bank (2014) eKLR *it was stated:***

[29] One cannot succeed in a claim for adverse possession before conceding that indeed the registered proprietor of the land is the true owner of the said land. It does not lie in the mouth of a claimant to aver that the title held by the registered proprietor was fraudulently acquired and then claim the same parcel of land under the doctrine of adverse possession. If the Plaintiff's averment is that the title which was issued to the Defendant was fraudulently acquired, then his cause of action would be for the rectification of title by cancellation pursuant to the provisions of Section 143 of the Registered Land Act and not adverse possession. He cannot use the doctrine of adverse possession to go around the decision of the Minister.

In the application, the appellants sought to lay claim to the suit property on the basis of adverse possession. A claim for adverse possession is inconsistent with the claim for being a beneficiary of the estate of a deceased person. In the original suit, the appellants did not concede that indeed the respondent was the true owner of the suit property. [emphasis added]

59. The Plaintiff herein cannot approbate and reprobate at the same time. The Plaintiff must live to the reality that when he makes his bed, then same must be prepared to lie on it. It is immaterial whether the bed made by the Plaintiff has thorns.

60. In humble view, the conduct of approbating and reprobating [blowing hot and cold] constitutes abuse of the due process. The concept under reference was highlighted in the case of **Banque de Moscou- vs – Kindersley [1950]2 All ER 549,** where Sir Evershed stated thus;-

"This is an attitude of which I cannot approve, nor do I think in law the defendants are entitled to adopt it. They are, as the Scottish lawyers (frame it) approbating and reprobating, or in the more homely English phrase blowing hot and cold."

61. Moreover, and in any event, a question does arise as to when the time for adverse possession commenced. I am aware that such time can only be reckoned from when the plea of trust [sic] ceases to exist. However, there is a debate as to whether the plea of adverse possession is legally tenable in the obtaining circumstances.
62. Be that as it may, that debate will await the opportune time. Not today. Not now.

Conclusion

63. The Plaintiff has filed the subject suit claiming that same has acquired title to or ownership of the suit property by way of adverse possession. However, the Plaintiff is alive to an existing appeal which challenges a finding that the suit property is not being held on trust for him. The two suits/processes are being prosecuted simultaneously.

64. The question that I have had to address is whether the due process of law fathoms the deployment of the processes at the same time. The answer is however, to the negative. Moreover, there is no gainsaying that the deployment of the processes contemporaneously amounts to and constitute[s] abuse of the due process of the court.

Final orders:

65. Flowing from the foregoing discussion, it must have become apparent that the preliminary objection dated the 02.03.2026 is meritorious. In the premises, the final of the court are:

   i. ***The Preliminary objection be and is hereby <u>allowed.</u>***

   ii. ***The Plaintiff's suit vide originating summons be and is hereby <u>struck out.</u>***

   iii. ***The Application dated 13.02.2026 be and is hereby <u>struck out.</u>***

   iv. ***Costs of the suit and the application be and hereby granted to the Defendant.***

   v. ***Costs in terms of clause[iv] above shall be agreed upon and in default be assessed in the conventional manner.***

66. It is so ordered.

DATED, SIGNED AND DELIVER AT MERU THIS 10Th DAY OF MARCH, 2026.

OGUTTU MBOYA, FCIArb; CPM [MTI-EA]

JUDGE

In the presence of

Naserian: court assistant

Ms. Abubakar for the Defendant.

Ms. Murugi for the Plaintiff