



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**MISC. NO.1 OF 2019**

**KENYA WOOL INVESTMENTS.....APPLICANT**

**VERSUS**

**1. THE CHIEF LAND REGISTRAR.....1<sup>ST</sup> RESPONDENT**

**2. THE NATIONAL LAND COMMISSION.....2<sup>ND</sup> RESPONDENT**

**3. CABINET SECRETARY TREASURY .....3<sup>RD</sup> RESPONDENT**

**4. THE ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**AND**

**DOPP INVESTMENTS.....INTERESTED PARTY**

**RULING**

1. Pursuant to leave granted on 3<sup>rd</sup> January 2019 under Order 53 rule 1 (1)(2) and (4) of the Civil Procedure Rules and Sections 8 and 9 of the Law Reform Act Cap 26, the Applicant, Kenya Wool Investment Limited instituted this suit by way of Notice of Motion dated 31<sup>st</sup> January 2019 and filed in court on 4<sup>th</sup> February 2019 seeking the following judicial review orders.

**1. An order of mandamus do issue to direct the 1<sup>st</sup> Respondent to revoke all title documents held by the Interested Party in respect of the parcel of land LR No.1040/2 Mazeras as directed by the 2<sup>nd</sup> Respondent in the Kenya Gazette No.6862 dated 17<sup>th</sup> July, 2017.**

**2. An order of prohibition to prohibit the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents by themselves, agents or otherwise whatsoever howsoever from paying out in compensation the amount of Kenya Shillings Six Hundred and Sixty Seven Million, Nine Hundred and Thirty Thousand, Eight Hundred and Eighty Seven (kshs.667, 930,887.00) to any other person/entity other than the ex-parte Applicant.**

**3. An order of Mandamus do issue compelling the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to make the payment of Kenya Shillings Six Hundred and Sixty Seven Million, Nine Hundred and Thirty Thousand, Eight Hundred and Eighty Seven (667,930, 837.00) being the compensation award due to the ex-parte Applicant Kenya Wool Investments consequent to the acquisition of the portion of 13.8 hectares of its parcel of land Reference Number 1040/2 Mazeras by the 2<sup>nd</sup> Respondent's on behalf of Kenya Railways Corporation.**

**4. Costs of the suit.**

2. Before the Notice of Motion above dated 31<sup>st</sup> January 2019 could be heard, the Interested Party on 8<sup>th</sup> March 2019 filed an application to strike out the Applicant's Suit for being either *Sub-Judice*, *res judicata* and an abuse of the court process.

3. Further, and before the Notice of Motion dated 31<sup>st</sup> January 2019 could be heard, the 2<sup>nd</sup> Respondent on 3<sup>rd</sup> April 2019 filed a Notice of Preliminary Objection against the entire suit on the following grounds, that:

**1. The instant suit is sub-judice and ought to be dismissed since it is pending before court in:**

**a. Mombasa ELC Suit No.258 of 2016 between Martin Muthama and others versus Kenya Wool Investment, National Land Commission and Attorney General.**

**b. Mombasa ELC Petition No. 18 of 2016 between Hamisi Tsuma Mwero versus National Land Commission, Kenya Railways Corporation, Chief Land Registrar, Attorney General and DOPP Investment Limited**

**2. The instant suit is an abuse of the court process and an attempt to relitigate matters that have already been dismissed by the Courts in:**

**a. Kiambu CMCC No.424 of 2017 between Kenya Wool Investment Company Limited –v- Dr. Muhammed A. Swazuri, National Land Commission**

**b. Mombasa Judicial Review Misc. Application NO. 56 of 2017 between Kenya Wool Investment Co. Limited (Ex-Parte Applicant)-v- Chief Land Registrar & 4 Others.**

4. This ruling therefore is in respect to the 2<sup>nd</sup> Respondent's Notice of Preliminary Objection. Mr. Mbuthia, counsel for the 2<sup>nd</sup> Respondent only urged the second ground of the said Preliminary Objection. This is because ground one of the preliminary objection at the time of hearing had been overtaken by event, since ELC Suit No. 258 of 2016 was struck out by this court on 3<sup>rd</sup> May 2018 while Petition No.18 of 2016 was dismissed on 11<sup>th</sup> March 2019 by Omollo, J.

5. Relying on the case of **Muchanga Investments Ltd –v- Safaris Unlimited (Africa) Ltd & 2 Others (2009) eKLR**, Mr. Mbuthia submitted that the suit herein is an abuse of the court process and pointed out the Applicant herein is guilty of instituting multiplicity of actions on the same subject matter against the same opponents on same issues or multiplicity of actions on same parties, in different courts. He submitted that the cases that have been dismissed or struck out relate to the same subject matter, same parties and same issues. Counsel submitted that the Applicant herein has been seeking compensation owing and due to the Interested Party, DOPP Investment Limited, and the amount of compensation is the same, that is, Kshs.667,930, 887.00. In ELC Suit No.258 of 2016, the same was filed by Martin Muthama who described himself as director of Kenya Wool Investments, with the other parties being DOPP Investment Ltd, the Attorney General and the National Land Commission. The orders sought in that case were to stop compensation of Kshs.667,930, 887.00 and claim of ownership of the suit land, plot No.1040/2/ CR 21749 situate in Mazaras.

6. Mr. Mbuthia further submitted that constitutional Petition No. 18 of 2016 comprised all the parties before this court and the subject matter and issues were the same as in the present suit. That petition was dismissed on 11<sup>th</sup> March, 2019. He submitted that after the court declined to grant injunctive and conservatory orders, the applicant herein filed another suit in the subordinate court at Kiambu being CMCC No.424 of 2017. Again the Applicant in Kiambu CMCC No.424 of 2017 was seeking to stop compensation of and for that court to declare the suit land as belonging to the Applicant herein. The after the case in Kiambu court was dismissed, the Applicant filed Mombasa High Court Judicial Review No.56 of 2017 between Kenya Wool Investment Ltd as the Applicant and The Chief Land Registrar, the National Land Commission, The Cabinet Secretary Treasury, The Attorney General and DOPP Investments Limited as Respondents. The JR. No.56 of 2017 was dismissed by Ogolla J on 10<sup>th</sup> December, 2018. Mr. Mbuthia submitted that there was common trend that every time the Applicant fails to obtain orders favourable to it it resorts to filing other cases in other court which amounts to forum shopping, instead of appealing against the orders dismissing the earlier suits. He submitted that this was a clear case of abuse of the court process. Mr. Mbuthia further submitted that the merits of the issue was determined by the National Land Commission on 12/2/2106 and the Applicant has never appealed against that decision. That it is late in the day for the Applicant to challenge that decision three years down the line, hence their claim and motion is time barred. He therefore urged the court to dismiss the suit.

7. Ms. Oyeir, learned counsel for the Applicant submitted that the two suits, Kiambu CMCC No. 424 of 2017 and Mombasa HC JR NO. 56 of 2017 were dismissed on grounds of lack of jurisdiction by those courts. It was her submission that the fact that a matter was dismissed for lack of jurisdiction does not preclude a party from filing the same matter in the right forum as the Applicant has done in this suit. Relying on the case of Michael Mwaura Kamau –v- EACC & 4 Others, Ms. Oyier submitted that the National Land Commission is not properly constituted and cannot issue instructions and therefore urged the court to dismiss the preliminary objection. Counsel submitted that Kiambu CMCC No. 424 of 2017 was filed by one Martin Muthama and Kenya Wool was a defendant. Counsel urged the court to dismiss the preliminary objection and allow the suit to be heard.

8. Ms. Kiti, learned counsel for the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents reiterated the submissions by the Applicant and submitted that the other two cases were dismissed on jurisdiction and the substantive issues have not been determined to conclusion. She relied on the case of Mombasa Cement Ltd –v- The Ministry of Lands & Physical Planning & 4 Others, Mombasa Petition No.17 of 2018 (unreported).

9. Ms. Rajani, learned counsel for the Interested Party supported the objection and submitted that the Applicant has been forum shopping. That in ELC Suit No.258 of 2016, the Applicant had a chance to raise all relevant issues instead of filing fresh suits in different courts.

10. In brief reply, Mr. Mbuthia reiterated that he has moved the court under the abuse of the Court process and has not argued under the sub-judice or res judicata principles. On the issue of the capacity of the National Land Commission, he submitted that every commission had a secretariat which did not require a policy on how to raise a preliminary objection or to defend a suit. He distinguished the authorities relied on by the Applicant and the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents, arguing that the same are not relevant in the present case.

11. I have considered the issues raised by the 2<sup>nd</sup> Respondent. The applicant has attacked the capacity of the 2<sup>nd</sup> Respondent to raise the preliminary objection. In my view, this issue is ironical in that it is the Applicant that has brought the suit against the 2<sup>nd</sup> Respondent. In my view, the 2<sup>nd</sup> Respondent through its secretariat has the capacity to defend the suit and even raise issues of law such as the present

preliminary objection.

12. The question then for determination is whether Applicant in the current suit had abused the court process. In the case of **Yaya Limited – v- Trade Bank Limited (in liquidation) (2000)eKLR**, the Court of Appeal expressed itself as follows:

**“A plaintiff is entitled to pursue a claim in our courts however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the Plaintiff’s claim is bound to fail or is otherwise objectionable as an abuse of the process of court, it must be allowed to proceed to trial....it cannot be doubted that the court has inherent jurisdiction to dismiss that which is an abuse of the process of the court....”**

13. In the case of **G. B. M.Kariuki –v- Nation Media Group Ltd & 4 Other Others (2012)eKLR Odunga J** had this to say:

**“The power to strike out pleadings must be sparingly exercised and it can only be exercised in clearest of cases. If a pleading raises a triable issue even if at the end of the day it may not succeed then the suit ought to go to trial. However where a suit is without substance or groundless or fanciful and is brought or instituted with some ulterior motive or for some collateral one or to gain some collateral advantage which the law does not recognize as legitimate use of the process, the court will not allow its process to be used as a forum for such ventures. To do this would amount to opening a front for parties to ventilate vexatious litigation which lack bona fides with the sole intention of causing the opposite party unnecessary anxiety, trouble and expense at the expense of deserving cases contrary to the spirit of the overriding objective which requires the court to allot appropriate share of the courts resources while taking into account the need to allot resources to other cases. ”**

14. The court of Appeal also considered the issue of abuse of process of court in the case of **Muchanga Investments Limited –v- Safaris Unlimited (Africa)Ltd & 2 Others (2009)eKLR** and stated:

**“To reinforce the point, abuse of process has been defined in Wikipedia, the free encyclopedia.**

**“The person who abuses process is interested only in accomplishing some improper purpose that is collateral to the proper object of the process, and that offends justice.” In *Beinosi –v- Wivley 1973 SA (SCA)* at page 734 F.G a south African case heard by the Appeal Court of South Africa, Mohamad CJ, set out the applicable legal principle as follows:**

**“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 the 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 NWLLPT 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 used the judicial process to the irritation and annoyance of his opponent and the efficient and effective administrative 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 JSC 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. It’s 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. ””**

15. Being guided by the above authorities I am of the view that the circumstances of the case before me falls squarely in illustrative (a) and (b) above, in that it is clear that the Applicant has instituted multiplicity of actions on the same subject matter against the same opponents on the same issues. The applicant has also instituted different actions between the same parties in different courts even when some of those suits have been dismissed. Examples of these cases are **Mombasa ELC No.258 of 2016 Martin Muthama & 2 Others –v- Kenya Wool Investment Co. Ltd, National Land Commission, the Attorney General and DOPP Investment**. It has not been denied the said suit has since been struck out by this court for failing to raise any triable issues. There was also constitutional petition No.18 of 2018 seeking to stop payment of the sum of Kshs.667,903 887.00 to DOPP Investments Limited. The same has also been dismissed. The Applicant herein also filed another case being **Kiambu CMCC No.424 of 2017** which was also dismissed. As if that was not enough, the Applicant filed **Mombasa HC Misc. Application No. 56 of 2017 (JR)** over the same land, LR. No. 1040/2 Mazeras and the same compensation of Kshs.667,930,887.00 not to be paid to the Interested Party herein. That suit was also dismissed. The applicant has now brought this current suit against the same parties, over the same subject matter and raising the same issues as in those other suits. Counsel for the Applicant

submitted that **Kiambu CMCC No.424 of 2017** was filed by one Martin Muthama and not the Applicant herein. I have perused the pleadings in **Kiambu CMCC No.424 of 2017** which are annexed to the Interested Party's Application dated 7<sup>th</sup> March, 2019. In that case, the parties were Kenya Wool Investment Co. Ltd as Plaintiff against Dr. Swazuri A. Muhammed and the National Land Commission. Contrary to the submissions by the counsel for the Applicant, the Applicant herein was the plaintiff in the Kiambu case. Indeed the Applicant has been a party in all the cases mentioned hereinabove, either in its own name or through its directors.

16. The issue of abuse of court process is a serious one, and once raised by any party, it behoves the court to make a determination thereon at the earliest opportune time. In the case of **Chairman Co-operative Tribunal & 8 Others Ex -Parte Management Committee Konza Ranching & Farming Cooperative Society Ltd (2014)eKLR**, Odunga J referred to the words of Kimaru, J in the precedent setting case of **Stephen Somek Takwenyi & Another -v-David Mbuthia Githare & 2 Others**,

Where it was stated:

**“.....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 abuse of the process of the court. In the civilized 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 directed from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantages, which the law does not recognize 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.”**

17. Guided by the decisions of the Court of Appeal and of this court that I have referred to hereinabove, I fully concur with the 2<sup>nd</sup> defendant's submission that this suit is a gross abuse of the court process. By instituting multiplicity of actions in different courts on the same subject matter against the same opponents on the same issues is no doubt a gross abuse of the court's process.

18. I am aware that striking out is a draconian measure and that the power to strike out should be exercised sparingly, and can only be exercised in clearest of cases. In my view, the Applicants suit is clearly an abuse of the court process. I think it is a plain and obvious case and I have no hesitation in striking it out.

19. In the result, the preliminary objection dated 31<sup>st</sup> January 2019 is merited and the same is upheld. The Applicant's suit herein is dismissed with costs to the 2<sup>nd</sup> Defendant and the Interested Party.

**DATED, SIGNED and DELIVERED at MOMBASA this 30<sup>th</sup> day of July 2019.**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Ms. Ombati holding brief for Agimba for Interested Party

Mbuthia for 2<sup>nd</sup> Respondent

No appearance for 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents

No appearance for Applicant

Esther Court Assistant

**C.K. YANO**

**JUDGE**