Gathariki v Cheko Plot Owners Association & another (Civil Appeal 116 of 2019) [2025] KECA 313 (KLR) (21 February 2025) (Judgment)

Neutral citation: [2025] KECA 313 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 116 OF 2019

S OLE KANTAI, A ALI-ARONI & JM MATIVO, JJA

FEBRUARY 21, 2025

BETWEEN

JOHN KIMATHI GATHARIKI ..... APPELLANT

AND

CHEKO PLOT OWNERS ASSOCIATION ..... 1ST RESPONDENT

ELIUD W GITHINJI ..... 2ND RESPONDENT

(Being an appeal from the Ruling and Order of the Environment and Land Court of Kenya at Nairobi (E. O. Obaga, J.) on dated 25th January 2018 in Civil Suit No. 120 of 2016)

JUDGMENT

1. By a plaint dated 12th February 2016 filed at the Environment and Land Court (ELC) at Nairobi John Kimathi Gathariki (the appellant) instituted ELC Suit No. 120 of 2016 against Isaac Simeka Okiemeri and Chieko Plot Owners Association/Eliud W. Githinji, also named Kasarani Sub-county Health Manager, Kasarani Senior Chief and The Nairobi County Commissioner as interested parties.

2. In this appeal, the appellant left out some of the parties he had sued in the above case. Notably, in his undated notice of appeal, the appellant left out Isaack Simeka Okiomeri who was the 1st defendant before the Superior Court and the interested parties. It is also important to mention that other than bearing the title "notice of appeal", the said document is framed as an application seeking 7 substantive prayers premised on 7 grounds. Simply put, the said notice of appeal does not comply with the provisions of Rule 77 of the Court of Appeal Rules, 2022. Nevertheless, we note from the record that the said Notice of Appeal was adopted as duly filed by consent of the parties on 20th February 2019 before a single judge (Gatembu, JA). We shall later address our mind on the question whether the appellant's decision to omit the said parties adversely affects his appeal.

3. The appellant's claim as we glean it from paragraph 6 of his plaint was that the said Isaac Simeka Okiemeri was constructing a wall, a roof extension, a toilet and a pit latrine inside his compound. It was

his case that there was a boundary dispute between him and the respondent, and the parties mutually agreed that it would be resolved by surveyors. However, while the boundary dispute subsisted, two public health officers visited his premises and informed him of their intention to prosecute him for discharging waste water to the street through his neighbor's compound. He was granted 30 days to remedy the situation or be prosecuted.

4. It was his case that, he wrote to the National Environmental Management Authority (NEMA) seeking advice on how best to comply with the Kasarani Health Officer's requirement. However, on realizing that NEMA was not keen on his request, in order to avert the prosecution, he filed the suit before the ELC against the said Isaac Simeka Okiemeri seeking: (a) removal of the pit latrine and the roof from his compound; (b) demolition of the wall; (c) damages, and, (c) costs. The appellant's plaint was accompanied by an application of even date seeking a temporary injunction restraining the public health officers from prosecuting him and an order compelling the 1st respondent to survey the plot.

5. In opposing the appellant's suit, Isaac Simeri Okiemri filed a notice of preliminary objection dated 29th March 2016 stating that the appellant's suit was sub-judice since there existed a similar pending suit being CMCC No. 11379 of 2005 between the same parties. Additionally, he filed a supporting affidavit sworn on 8th April 2016 stating that the appellant was insincere because he failed to disclose the existence of the earlier suit and he was abusing court process.

6. The preliminary objection was disposed of by way of written submissions. The appellant's submissions are dated 20th June 2016 while the respondent's submissions are dated 26th April 2016. In the impugned ruling delivered on 25th January 2018, the learned judge after considering the parties' arguments and pleadings held that:

> " The surveyors have been to site and identified the problem but the plaintiff before this court, he is seeking orders to compel surveyors to go to the ground. This is clearly an abuse of the process of court and the court has power to either stay the suit or dismiss it. In the instant case, best order to be given is that of striking out this suit together with the application. The upshot of this is that the preliminary objection by the first defendant is upheld and the plaintiff's suit is hereby struck out with costs to the first defendant. It is so ordered"

7. Aggrieved by the said ruling, the appellant who appeared in person in his memorandum of appeal dated 19th March 2019 cites 24 grounds of appeal which are narrative and akin to submissions or pleadings. The grounds of appeal as crafted offend Rule 88 (1) of the Court of Appeal Rules, 2022 which enjoins litigants to ensure that a memorandum of appeal concisely sets forth under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifying:

   a. the points which are alleged to have been wrongly decided; and

   b. the nature of the order which it is proposed to ask the Court to make.

8. In Nasri Ibrahim vs. IEBC & 2 Others [2018] eKLR this Court stated:

> " We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in any way enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs."

9. As the trial court's finding reproduced at paragraph *7* above shows, the orders appealed against were issued in favour of Isaac Simeri Okiemri, who was the first defendant before the trial court and who is

not a party in this appeal and not against the respondents in this appeal. Can this Court properly issue orders which may potentially affect a person who was a party before the trial court and who has not been enjoined in this appeal. We do not think so. The Supreme Court of India put it succinctly in J.S. Yadav vs. State of U.P. & Another [2011] 6 SCC 570 as follows:

> "No order can be passed behind the back of a person adversely affecting him and such an order if passed, is liable to be ignored being not binding on such a party as the same has been passed in violation of the principles of natural justice...impleadment of a necessary party is mandatory and in case of non- joinder of necessary party, the petitioner-plaintiff may not be entitled for the relief sought by him. The litigant has to ensure that the necessary party is before the court, be it a plaintiff or a defendant, otherwise the proceedings will have to fail..."

10. The above judicial pronouncements are graphically clear that a Court ought not to decide a case without the persons who would be vitally affected by its judgment being before it as parties. It is also important to mention that Article 50 of *the Constitution* imposes a duty to the Court to accord a person a hearing before a decision is made that affects his rights. Generally speaking, before an order is made which will deprive a person of some right(s), he is entitled to know the case sought to be made against him and be given an opportunity of replying to it. Our courts have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made. On this ground alone, even if we were to be persuaded that this appeal has merits, it would be inappropriate for us to issue orders that would adversely affect necessary parties who were not enjoined in this appeal.

11. Notwithstanding our above finding, we have considered the appellant's grounds of appeal and his submissions. The germane issue here is whether ELC No. 120 of 2016 was substantially similar to CMCC No. 11379 of 2005, and therefore sub-judice. At the hearing of the appeal on 27th May 2024, the appellant highlighted his submissions dated 22nd November 2019. The respondent did not participate in this appeal despite being served nor did he file submissions.

12. The appellant's submissions in support of this appeal were basically on the merits of his suit before the trial court which was dismissed on the basis that the same was sub-judice and an abuse of the court process. We decline the invitation to consider the merits of the said suit because what is before us is an appeal against the ruling dated 25th January 2018 which found the appellant's suit to be sub-judice and an abuse of the court process because it was similar to CMCC No. 11379 of 2005 which involves the same parties. The appellant maintained that the reason he filed ELC Case No. 120 of 2016 is because CMCC No. 11379 of 2005 had abated since the court file had been stolen and almost 10 years had lapsed without any action. He cited the High Court holding in Mbaya Nzulwa vs. Kenya Power & Lighting Co. Ltd [2018] eKLR that an abated suit is a non-existent prior to it being revived.

13. On sub-judice, the appellant submitted that the suit before the Chief Magistrate's Court was a boundary dispute while the dispute before the ELC was on discharge of waste to the street. Therefore, it was a misdirection on the part of the learned judge of the ELC to have turned down an expressly requested leave to amend the 2016 suit so as to consolidate it with the 2005 suit.

14. Section 5 of the *Civil Procedure Act* provides that any court shall, subject to the provisions in the Act, have jurisdiction to try all suits of a civil nature excepting suits of which its cognizance is either expressly or impliedly barred. Section 6 of the *Civil Procedure Act* provides that no court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

15. The underlying object of Section 6 is to prevent the courts from simultaneously entertaining and adjudicating upon two parallel litigations in respect of same cause of action, same subject matter and the same relief. The aim is to pin down the parties to one litigation so as to avoid the possibility of contradictory verdicts by two courts in respect of the same relief and is aimed to prevent multiplicity of proceedings. Therefore, Section 6 would apply only if there is identity of the matter in issue in both the suits, meaning thereby, that the whole of the subject- matter in both the proceedings is identical.

16. Therefore, for the doctrine of sub-judice to apply, the following principles ought to be present:- (a) There must exist two or more suits filed consecutively; (b) The matter in issue in the suits or proceedings must be directly and substantially the same, the parties in the suits or proceedings must be the same or must be parties under whom they or any of them claim and they must be litigating under the same title, the suits must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed. It is not the form in which the suit is framed that determines whether it is sub-judice, rather it is the substance of the suit, and, there can be no justification in having the two cases being heard parallel to each other.

17. The Supreme Court in Kenya National Commission on Human Rights vs. Attorney General; Independent Electoral & Boundaries Commission & 16 Others (Interested Parties [2020] eKLR held that:

> "(67) The term 'sub-judice' is defined in Black's Law Dictionary 9th Edition as: "Before the Court or Judge for determination." The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction; and, lastly, that the suits are between the same parties or their representatives."

18. Our reading of the record leaves us with no doubt that the two suits involve the same parties, the matters in controversy in the two suits are substantially similar. In CMCC No. 11379 of 2005, the appellant cited alleged trespass and encroachment into his property by the respondent. He prayed for a permanent injunction barring the respondent from erecting a fence on his plot and an order that respondent's toilet on his plot be demolished and an open cess-pit be covered.

19. In Nairobi ELC No 120 of 2016, the matters in controversy were emission of sewage water allegedly attributed to the respondent's act of directing his toilet water through the appellant's compound. There was also a boundary dispute between their common boundary and the plea that the same be surveyed. The prayers sought were: the respondent to remove the sock pit located in the appellant's compound and spilling sewage; demolition of the toilet extension built on the appellant's compound and removal of the standing wall structure built inside the appellant's plot.

20. Clearly, the issues in controversy in the two suits and the reliefs sought not only arise from the same subject matter, but they are directly and substantially similar. The germane issue in the two suits relates

to a boundary dispute, alleged construction of a wall on the appellant's land, alleged sewer flowing into the appellant's land and a pit latrine allegedly build on the appellant's land. As the learned judge noted in the impugned ruling, pursuant to an order issued in the previous suit, surveyors went to site and identified the problem but the appellant in the application filed before the trial court was still seeking orders to compel surveyors to go to the ground. These being the facts, we find no reason to fault the trial court's finding that the suit was sub-judice.

21. Even though Section 6 of the *Civil Procedure Act* provides for stay of subsequent suits, the learned judge dismissed the suit for being an abuse of court process. The question is whether the learned judge erred in so finding. We do not think so. The practice of litigants filing parallel proceedings seeking similar or substantially similar orders arising from the same set of facts and circumstances should be abhorred for obvious reasons. One consequence of the said practice is that it amounts to abuse of court process. As was held by the High Court in Graham Rioba Sagwe & Others vs. Fina Bank Limited & 3 Others, [2017] eKLR, the Court has inherent jurisdiction to protect itself from abuse or to see that its process is not abused. The black's law dictionary, Tenth Edition defines abuse of process as inter alia a wrongful process of law. The situations that may give rise to abuse of court process are in exhaustive. It involves situations where the process of Court has not been or resorted to fairly, properly, honestly to the detriment of the other party. The High Court in Graham Rioba Sagwe & 2 Others vs. Fina Bank Limited & 5 Others (Supra) provided the following examples which constitute abuse of Court process:

    a. Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.

    b. Instituting different actions between the same parties simultaneously in different court even though on different grounds.

    c. Where two similar processes are used in respect of the exercise of the same right.

    d. Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.

    e. Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.

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

    g. Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.

    h. Where two actions are commenced, the second asking for a relief which may have been obtained in the first.

22. Abuse of Court process creates a scenario where a party is pursuing the same matter in two-court process. A litigant has no right to purse pari pasua two processes, which will have the same effect in two courts at the same time with a view of obtaining victory in one of the process or in both. In the above High Court decision, it was stated that 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. Pursuing two processes at the same time constitutes and amounts to abuse of court/legal process.

23. Thus, the multiplicity of actions on the same matter between the same parties even where there exists a right to bring the action is regarded as an abuse. 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 exercising the right to harass, irritate, and annoy the adversary and interface with the administration of justice. In our view, the learned judge correctly termed the filing of two substantially identical suits as an abuse of court process.

24. The upshot of our above findings is that this appeal is devoid of merit. Accordingly, we dismiss it with no orders as to costs since the respondent did not participate in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF FEBRUARY, 2025.

S. ole KANTAI

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JUDGE OF APPEAL

ALI-ARONI

.....

JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

I certify that this a true copy of the original.

Signed.

DEPUTY REGISTRAR.