



**Kinuthia v Kariuki & 2 others (Environment and Land Case Civil Suit
896 of 2012) [2024] KEELC 1514 (KLR) (7 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1514 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 896 OF 2012**

JO MBOYA, J

MARCH 7, 2024

BETWEEN

STEPHEN WANYOIKE KINUTHIA PLAINTIFF

AND

CECILIA WAMBUI KARIUKI 1ST DEFENDANT

VIRGINIA WANGUI KARIUKI 2ND DEFENDANT

FREDRICK MBURU KARIUKI 3RD DEFENDANT

RULING

Introduction And Background:

1. The Defendants'/Applicants' herein has approached the Honorable court vide Notice of Motion Application dated 17th January 2024; brought pursuant to Section 3A and 20 of the [Civil Procedure Act](#); Order 12 Rule 2 and Order 51 Rules 1 of the Civil Procedure Rules and Section 25 of the [Land Registration Act](#), 2012 and in respect of which same has sought for the following Reliefs;
 - i. That this Honorable court does set aside the Judgment/Ruling delivered on the 28th July, 2022.
 - ii. That this Honorable court does grant leave to the Defendant/Applicant to file their Defense against the suit and other relevant pleadings.
 - iii. That this Honorable court does direct the Plaintiff to serve the Defendants' with all pleadings filed in the suit.
 - iv. That costs of this Application be in the cause.
2. The instant Application is premised and anchored on various grounds, which have been enumerated in the body thereof. Furthermore, the Application is supported by the affidavit of Cecilia Wambui



- Kariuki, who is the 1st Defendant/Applicant. Besides, the Applicants herein thereafter proceeded to and filed Further/ Supplementary Affidavit[s] in support of the Application.
3. Upon being served with the instant Application, the Plaintiff/Respondent filed a Replying affidavit sworn on the 29th January 2024; and in respect of which the Plaintiff/Respondent has contended, inter-alia, that the instant Application has been mounted and or filed by a person without locus standi and in any event, in contravention of the provisions of Order 9 Rule 9 of the Civil Procedure Rules 2010.
 4. Similarly, the Plaintiff/Respondent has averred that the Defendants'/Applicants' herein had hitherto filed and or mounted a previous Application seeking to set aside the interlocutory Judgment that had hitherto been entered against same and which Application was heard and disposed of vide Ruling rendered on the 31st March 2017, whereupon the Honorable court granted the Defendants'/Applicants' the requisite opportunity to enter appearance and file Statement of Defense.
 5. Be that as it may, the instant Application came up for hearing on the 12th February 2024, whereupon the advocates for the respective Parties covenanted to canvass and dispose of the Application by way of written submissions. Consequently and in this regard, the Honorable Court proceeded to and circumscribed timelines for the filing and exchange of written submissions.
 6. For coherence, the Parties herein thereafter proceeded to and indeed filed their respective Written submissions. Instructively, the Defendants'/Applicants filed their written submissions dated the 19th February 2024; whereas the Plaintiff/Respondent filed written submissions dated the 21st February 2024.
 7. Both sets of written submissions are on record.

Parties' Submissions:

A. Applicants' Submissions:

8. The Applicants' herein adopted and reiterated the grounds contained at the foot of the Application, as well as the averments alluded to in the body of the supporting affidavit thereto. Furthermore, the Applicants' thereafter raised and highlighted three [3] salient issues for due consideration and determination by the Honourable court.
9. Firstly, Learned counsel for the Applicants' has submitted that the Applicants' herein were neither served with a Plaint and summons to enter appearance [STEA] either in accordance with the law or at all. In this regard, Learned counsel has contended that in the absence of service of Plaint and summons to enter appearance[STEA], the Applicants' herein therefore could not be expected to enter appearance and filed any statement of defense or at all.
10. To this end, Learned counsel for the Applicants has thereafter invited the Honourable court to take cognizance of the provisions of Order 5 Rule 6, 7, 8 and 15 of the Civil Procedure Rules 2010.
11. Secondly, Learned counsel for the Applicants' has submitted that even though the firm of M/s E. M Wachira & Company Advocates purported to enter appearance and file a Statement of Defense on behalf of the Defendants, the said firm of advocates was neither instructed nor retained by the Defendants to enter appearance and/or file any pleadings on behalf of the Applicants' herein.
12. Arising from the foregoing, Learned counsel for the Applicants has thereafter contended that to the extent that the firm of M/s E. M Wachira & Company Advocates was neither instructed nor retained by the Applicants herein, the pleadings filed by the said law firm as well as their participation in the instant matter were therefore undertaken without the requisite instructions.



13. Thirdly, to the extent that the Applicants herein neither instructed nor retained the firm of M/s E. M Wachira & Co Advocates to act for them, the Defendants'/Applicants' herein were therefore not lawfully represented by the said law firm. In this regard, Learned counsel for the Applicants' has therefore invited the Honourable court to find and hold that the Applicants' have been condemned unheard contrary to and in violation of Article 50(1) of *the Constitution* 2010.
14. Finally, Learned counsel for the Applicants' has submitted that the Applicants' herein have a Defense on merit, which raises and espouses triable issues and thus same ought to be afforded an opportunity to be heard during a plenary hearing.
15. In particular, Learned counsel for the Applicants' has submitted that the suit property was transferred to and registered in the name of Fredrick Mburu Ruhiu, who was to hold same on trust for his siblings, but same [Fredrick Mburu Ruhiu] proceeded to and sold the suit property to and in favor of the Plaintiff/Respondent, albeit without notice to and/or involvement of his siblings, for whom the suit property was held on trust.
16. In a nutshell, Learned counsel for the Applicant has therefore invited the Honourable court to find and hold that the Applicants herein have established and demonstrated sufficient basis to warrant the grant of the subject Application and essentially, to set aside the impugned Judgment and to grant liberty to the Applicants' to file their Statement of Defense in opposition to the suit.

B. Respondent's Submissions:

17. The Respondent herein adopted and reiterated the contents of the Replying affidavit sworn on the 29th January 2024; and thereafter raised, highlighted and canvassed three [3] salient and pertinent issues for consideration by the Honourable court.
18. First and foremost, Learned counsel for the Respondent has submitted that the Defendants' herein duly instructed and retained the firm of M/s E. M Wachira & Co Advocates to act for same in the matter and thereafter the said firm of advocate proceeded to and entered appearance dated the 19th December 2012.
19. Furthermore, Learned counsel for the Respondent has submitted that subsequently the said advocate, namely, M/s E. M Wachira & Co Advocates proceeded to and filed an Application dated the 14th June 2013; and in respect of which same sought to have the default/interlocutory Judgment, which had hitherto been entered against the Defendants'/Applicants', to be set aside.
20. Suffice it to state, that Learned counsel for the Respondent thereafter drew the attention of the court to the Ruling rendered on the 31st March 2017; and wherein the Honorable court [differently constituted] proceeded to set aside the default Judgment and thereafter granted the Defendants'/Applicants' an opportunity to file their Statement of Defense.
21. In any event, Learned counsel for the Respondent has submitted that pursuant to the Ruling of the court rendered on the 31st March 2017; the Defendants' duly filed a Statement of Defense and Counterclaim dated the 15th April 2023, which statement of Defense and Counterclaim remains on record to date.
22. Secondly, Learned counsel for the Respondent has submitted that even though the current advocates representing the Applicants' are privy to and aware of the Judgment which was entered on the 28th July 2022, same (Defendants/Applicants' Advocate), did not seek for and/or obtain Leave of the court to come on record for and on behalf of the Applicants' in accordance with the provisions with Order 9 Rule 9 of the Civil Procedure Rules 2010.



23. Premised on the contention that the current Advocates for the Applicants' neither sought for nor obtain the requisite Leave to come on record, Learned counsel for the Respondent has submitted that the instant Application is incompetent, misconceived and otherwise legally untenable.
24. In support of the foregoing submissions, Learned counsel for the Respondent has cited and relied on the decision on the case of Kazungu Kitsao Kivuma versus George Kuria Muthoni (2021)eKLR, where the court considered the import and tenor of Order 9 Rule 9 of the Civil Procedure Rules 2010.
25. Finally, Learned counsel for the Respondent has submitted that the Applicants' herein were privy to and/or knowledgeable of the existence of the instant suit and therefore, it is misleading for the Applicants herein to contend that same only became aware of the existence of the instant suit when the same [Defendants'/Applicants'] were served with the Notice to show cause on the 9th December 2023.
26. Arising from the foregoing, Learned counsel for the Respondent has submitted that to the extent that the Applicants' herein are seeking to partake of and benefit from the Equitable discretion of the court, then same were called upon to be candid and truthful with the court.
27. Nevertheless, Learned counsel for the Respondent has submitted that the Applicants' herein have neither been candid nor truthful with court and thus same have not approached the seat of Justice with unclean [tainted] hands.
28. In a nutshell, Learned counsel for the Respondent has therefore implored the Honourable court to find and hold that the Application beforehand constitutes an abuse of the Due process of the Court and thus ought to be dismissed with costs.

Issues For Determination:

29. Having reviewed the Application beforehand and the Response thereto; and upon taking into consideration the written submissions filed by and on behalf of the Parties, the following issues do emerge [arise] and are thus worthy of determination;
 - i. Whether the Application beforehand contravenes the provisions of Order 9 Rule 9 of the Civil Procedure Rules, 2010, and if so, Whether same ought to be struck out.
 - ii. Whether the Application seeking to set aside the Judgment entered in favor of the Plaintiff/ Respondent and to grant Leave for the Defendants to file statement of Defense is Res-Judicata.
 - iii. Whether the subject Application constitutes and/or amounts to an abuse of the Due process of the Court

Analysis And Determination:

Issue Number 1 - Whether the Application beforehand contravenes the provisions of Order 9 Rule 9 of the Civil Procedure Rules, 2010, and if so, Whether same ought to be struck out.

30. It is common ground that the instant suit was filed vide Plaintiff dated the 5th November 2012; and thereafter the Plaintiff/Respondent herein proceeded to and extracted summons to enter appearance. For coherence, the summons to enter appearance were issued and sealed by the court on the 28th November 2012.
31. Furthermore, it is evident and apparent from the face of record that upon the issuance and/or extraction of the summons to enter appearance, the Plaintiff herein through his nominated process server, namely, James Ng'ang'a Mucheke proceeded to and effected service of the summons to enter



- appearance upon the 1st Defendant herein, who received and acknowledged receipt of the summons to enter appearance on behalf of the rest of the Defendants'. [See the affidavit of service sworn on 13th December 2012 and which was filed in court on 22nd January 2013].
32. Subsequently, the record of the court shows that the firm of M/s E. M Wachira & Co Advocates proceeded to and entered appearance for and on behalf of the Defendants/Applicants' on the 20th December 2012. Instructively, the Memorandum of appearance which was entered filed by the said firm albeit on behalf of the Defendants'/Applicants' remains on record and has not been expunged.
 33. First forward, the firm of M/s E. M Wachira & Co Advocates later on filed an Application dated the 14th June 2013; and in respect of which same sought to set aside the default Judgment which had hitherto been entered against the Defendants'/Applicants'. For good measure, the Application under reference was heard and allowed vide Ruling rendered on the 31st March 2017.
 34. Subsequently, the firm of M/s E. M Wachira & Co Advocates proceeded to and filed a Statement of Defense and Counterclaim for and on behalf of the Defendants herein. Similarly, it suffices to note that the Statement of Defense and Counterclaim dated the 15th April 2013, [which was deemed as duly filed], is still on record.
 35. More importantly, it is not lost on this Honourable court that the subject matter was thereafter listed for hearing and indeed same proceeded for hearing, with the knowledge of the Learned counsel who was duly instructed and/or retained by the Applicants'. For coherence, the said Advocate was constituted as the Recognized agent on behalf of the Defendants.
 36. Moreover, it is worthy to recall and reiterate that on the 28th July 2022, this Honorable court proceeded to and rendered a Judgment whereupon the court found and held, inter-alia, that the suit property lawfully belongs to the Plaintiff/Respondent and thus same [Plaintiff/Respondent] was entitled to vacant possession and occupation thereof.
 37. Notably, the Judgment which was proclaimed by the court on the 28th July 2022; remains on record and has not been set aside, varied and/or rescinded at all. Nonetheless, it is the said Judgment which the Defendants/Applicants' are now seeking to set aside.
 38. To the extent that Judgment had hitherto been entered in respect of the instant matter, it is imperative to underscore that if the Defendants'/Applicants' were keen to change advocate, [effect change of Advocate], then the intending/new advocate, seeking to come on record on behalf of the Defendants'/Applicants' would be obliged to procure and/or obtain Leave of the court before effecting the notice of change.
 39. On the other hand, the incoming advocates would also be at liberty to procure and obtain the consent of the previous/outgoing advocates and thereafter file the said Consent alongside the Notice of change of advocate[s].
 40. Notwithstanding the foregoing, there is no gainsaying that the incoming/current advocates for the Defendants', who has filed the instant Application, neither sought for nor obtained Leave of the court to come on record or at all.
 41. Furthermore, it is also evident and apparent that the current advocates for the Defendants'/Applicants' also did not procure and or obtain the Consent of the previous/outgoing advocate.
 42. In a nutshell, it suffices to underscore that the current advocates for the Defendants'/Applicants', who have filed the impugned application, are neither properly on record nor competent to file and/or mount the instant Application for and on behalf of the Applicants' or at all.



43. In any event, it is worth taking note that every advocate, the current advocate for the Applicant not excepted, who seeks to come on record for and on behalf of a Party, after the rendition of a Judgment [like in the instant case] must comply with the provisions of Order 9 Rule of the Civil Procedure Rules 2010.
44. To my mind, where a firm of advocates comes on record without due regard to the provisions of Order 9 Rule 9 of the Civil Procedure Rules 2010, the pleadings therein and the consequential documents filed by such a firm of advocates, would be invalid and thus legally untenable.
45. Furthermore, it is not lost on this court that the Rules of Procedure, including the provisions of Order 9 Rule 9 of the Civil Procedure Rules 2010, were not crafted to be disregarded with abandon by Parties and their advocates.
46. To the contrary, the provisions of Order 9 Rule 9 of the Civil Procedure Rules, [whose contents are clear and explicit], were meant to be complied with and adhered to by all and sundry, the Applicants' current advocate not excepted.
47. However, where a situation does arise, which renders compliance with the provisions of Order 9 Rule 9 of the Civil Procedure Rules [supra], difficult or impossible [which is not the case] the concerned party is at liberty to explain the difficulty in the affidavit and thereafter the court would be called upon to consider the explanation tendered, [if any].
48. Nevertheless, in respect of the instant matter the advocates for the Applicant[s] have simply disregarded the provisions of Order 9 Rule 9 [supra] and according to same [advocate for the Applicants'] the said Rules of procedure are (sic) irrelevant and thus can be regarded with abandon.
49. In my humble albeit considered view, if Parties and their advocates, the Applicants' herein not excepted, were allowed to chose which Rules and Procedure to comply with; and which ones to disregard, then the Rule of law, which is cardinal Concept in the Administration of Justice, will be thrown outside the window and replaced by the Rule of the jungle, culminating into anarchy and disorder; which must be avoided at all cost.
50. Before departing from the issue herein, it is important to take cognizance of the holding of the Court of Appeal in the case of Kakuta Maimai Hamisi versus Peris Pesi Tobiko & 2 others [2013] eKLR, where the court held thus;

A five judge bench of this Court expressed itself very succinctly but a few days ago on this precise point is the case of Mumo Matemu Vs. Trusted Society Of Human Rights Alliance & 5 Others Civil Appeal No. 290 of 2012 as follows;

“In our view it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle under Section 1A and 1B of the Civil Procedure Act (Cap 21) and Section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases.”
51. Arising from the foregoing analysis, my answer to issue number one [1] is to the effect that the instant Application has been filed by a firm of advocate without the requisite locus standi [Legal Capacity], and in any event, in contravention of the Provisions of Order 9 Rule 9 of the Civil Procedure Rules, 2010.



Issue Number 2: - Whether the Application seeking to set aside the Judgment entered in favor of the Plaintiff/Respondent and to grant Leave for the Defendants to file Statement of Defense is Res-Judicata; and thus barred by the Provisions of Section 7 of the Civil Procedure Act, Cap 21, Laws of Kenya.

52. It is imperative to state and observe that the Defendants' herein through the law firm of M/s E. M Wachira & Co Advocates filed an application dated the 14th June 2013 and wherein same sought for inter-alia an order to set aside the interlocutory judgment, which had hitherto been entered against the Applicants' and thereafter leave to file a Statement of Defense.
53. Subsequently, the Application under reference was heard and disposed of vide Ruling of the court rendered on the 31st March 2017; whereupon the Honorable court proceeded to and inter-alia, granted liberty to the Defendants'/Applicants' to file and serve the requisite statement of defense.
54. Furthermore, it is worthy to observe that pursuant to and upon the delivery of the Ruling by the court, the Defendants' herein indeed proceeded to and filed a statement of defense and counterclaim dated the 15th April 2013. For coherence, the said Statement of Defence and Counterclaim were deemed as duly filed by and on behalf of the said Defendants.
55. Suffice it to point out that the current Application by and on behalf of the Defendants'/Applicants' is seeking similar and/or substantially the same reliefs, as the ones that were hitherto sought at the foot of the Application dated the 14th June 2013.
56. The question that does arise is whether the Defendants' can yet again approach this court with an Application seeking to, inter-alia, file statement of defense and further pleadings over and in respect of the subject suit, yet similar reliefs had hitherto been sought for and were granted.
57. To my mind, a litigant, the Applicants' herein not excepted can only approach the court once for purposes of procuring a specific set of reliefs and once such reliefs are granted or otherwise, then the said litigant cannot re-visit the court seeking to have a second bite on the same issues.
58. Notwithstanding the foregoing, the Applicants' herein have despite having hitherto procured Leave to file statement of defense; are now back again to ask the court to grant similar relief[s].
59. Worse still, it is not lost on this court that the Applicants' are seeking for liberty to file statement of defense in respect of the instant matter, yet the statement of defense and counterclaim dated the 15th April 2013, which had hitherto been filed, [deemed as duly filed] remain in situ.
60. Surely, what the Defendants'/Applicants' is contrary to and in violation of the Doctrine of Re-judicata; which prohibits a Party from approaching the Honourable court with a view to ventilating the same issues, which had previously canvassed and determined by the court.
61. Without belaboring the point, it is appropriate to cite and reiterate the holding in the case of Kenya Commercial Bank Limited v Benjoh Amalgamated Limited [2017] eKLR, where the Court of Appeal highlighted the scope and extent of the Doctrine of Res-Judicata.
62. In a nutshell, the court stated and held thus;

As previously observed, the amount of litigation undertaken by the parties herein has been enormous and unrelenting. A plethora of suits numbering at least 14 have been canvassed in all the courts of record all geared towards resolving the same dispute arising from a single transaction and involving the same parties. In such a scenario, small wonder that issues previously canvassed and determined by other courts have repeatedly found their way before



other courts for determination. Courts called upon to determine such issues have all invoked the doctrine of res judicata. The doctrine is provided for in our jurisprudence by dint of section 7 of the Civil Procedure Act which provides;

“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 them 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.”

The elements of res judicata have been held to be conjunctive rather than disjunctive. As such, the elements reproduced below must all be present before a suit or an issue is deemed res judicata on account of a former suit;

- (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.

See Mulla, Procedure Code Act of 1908 16th Edition.

Expounding on the rationale of the doctrine, the Court of Appeal remarked as follows in the recent appeal; *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* (2017) eKLR,

“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.”

63. In view of the foregoing, it is evident and apparent that the question of filing a Statement of Defense to the instant suit, had hitherto been canvassed and thereafter determined by a court of competent Jurisdiction in terms of the Ruling rendered on the 31st March 2017.
64. Consequently and in this regard, this court cannot be called upon to entertain and/or adjudicate upon a similar issue [Application for setting aside] that had hitherto been addressed and resolved.

Issue Number 3:- Whether the subject Application constitutes and/or amount to an abuse of the Due process of the court

65. As pertains to the issue of abuse of the Due process of the court, it suffices to point out that whereas the Applicants' herein are inter-alia seeking for leave to file a statement of defense, it is imperative to



underscore that there is already a statement of defense and counterclaim dated the 15th April 2013; and which was filed on behalf of the Applicants' herein.

66. Notwithstanding the fact that the said statement of defense and counterclaim is still on record, the same Applicants', are knocking at the door of the court [seat of Justice], to be allowed to file yet another Statement of Defense.
67. To my mind, the law only envisages the filing of one[1] set of statement of defense, unless the concerned Party is seeking liberty to amend the statement of defense on record and not otherwise.
68. Consequently and arising from the foregoing, where one, the Defendants'/Applicants' not excepted, are seeking to file a statement of defense, albeit on the face of an existing statement of defense and counterclaim, such an endeavor cannot be countenanced. Conversely, such an endeavor must be frowned upon.
69. Secondly, though the Defendants' are aware of the existing statement of defense and counterclaim [which same are curiously seeking to disown] same however have neither sought to nor endeavored to expunge the said statement of defense on record.
70. Thirdly, even though the Applicants' have disowned M/s E. M Wachira & Co Advocates, it is not lost on this Honorable court that no Complaint[s], if at all, has ever been lodged and/or mounted against the said advocate for (sic) acting for the Defendants'/Applicants' without instructions.
71. For good measure, one would have expected the Applicants' herein, [if same were genuine], to have lodged and mounted a Complaint before the Advocates Disciplinary Tribunal in accordance with Section 57 of the *Advocates Act*, Chapter 16 Laws of Kenya,
72. Finally, there is the contention by the Applicants' that same were never served with the Plaint and summons to enter appearance over and in respect of the instant matter. Further and in any event, the Defendants'/Applicants' have also contended that same were not aware of the existence of the instant suit/proceedings until the 9th December 2023.
73. Nevertheless, it is worthy to point out and essentially to draw the attention of the Applicants' and their counsel on record, to the contents of the affidavit of service sworn on the 13th December 2012; whose contents have neither been challenged nor controverted, whatsoever. For good measure, where the contents of an affidavit of service are not impeached, same remain valid and credible. [See the decision in Shadrack Arap Baiywo Versus Bodi Bach [1987] EKLR].
74. Having pointed out the foregoing perspective, it is important to state and observe that the Defendants'/Applicants' herein are not being candid and/or honest with the court. To the contrary, the Defendants'/Applicants' are taking the court for granted and by extension abusing the due process of the court.
75. To this end, it suffices to take cognizance of the holding of the Court in the case of Satya Bhamu Gandhi versus Director of Public Prosecutions & 3 others [2018] eKLR, where the court held thus;
 22. The concept of abuse of court/judicial process is imprecise. It involves circumstances and situation of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents.[12]
 23. The situation that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the



detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-

- (a) Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.
- (b) Instituting different actions between the same parties simultaneously in different court even though on different grounds.
- (c) Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and respondent notice.
- (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.[13]
- (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. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent.[14]

25. Justice Niki Tobi JSC observed:-[16]

“that abuse of court process create a factual scenario where appellants are pursuing the same matter by two court process. In other words, the appellants by the two court process were involved in some gamble a game of chance to get the best in the judicial process.”

76. Furthermore, the concept of abuse of the Due process of the court and the circumstances that may culminate into such abuse, were also highlighted by the Court of Appeal in the case of Muchanga Investments Ltd versus Safaris Unlimited (africa) LTD & 2 others [2009] eKLR, where the court held as hereunder;

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.”
77. In the circumstances, my answer to issue number three [3] is twofold. Firstly, the Applicants’ herein have neither been candid nor honest with the court and consequently, the lack of candor disentitles the Applicants’ from the Equitable discretion of the court.
78. Secondly, the conduct displayed and exhibited by the Defendants’/Applicants’ [which has been highlighted in the preceding paragraphs] denote abuse of the Due process of the court.

Final Disposition:

79. From the foregoing exposition, [which have been enumerated in the preceding paragraphs], it is evident and apparent that the Application by and on behalf of the Defendants’/Applicants’, it not only misconceived, but also constitutes an abuse of the Due process of the court.
80. Consequently and in the premises, the Application dated the 17th January 2024; be and is hereby dismissed with costs to the Plaintiff/Respondent, to be assessed on Higher Scale taking into the lack candour on the part of the Defendants/ Applicants.
81. It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF MARCH 2024.

OGUTTU MBOYA

JUDGE.

In the Presence of;

Benson: Court Assistant

Mr. Kiongera for the Defendants’/Applicants’

Mr. King’ara for the Plaintiff/ Respondent.

