



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATION COURT**

**AT NAIROBI**

**PETITION NO. 82 OF 2020**

*(Before Hon. Lady Justice Maureen Onyango)*

**IN THE MATTER OF ARTICLES 2, 19, 20(1-4), 21(1) & 3, 22(1) & (2) (b) & (c), 23(1) & (3), 25(a) & (c), 27, 28, 29(a), (c) & (d), 31, 41(1) & (2)(b), 47, 48, 50(1), 73, 75, 159, 162(2)(a), 165(3)(b), 232, 258(12)(b) & (c) AND 259(1) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF RULE 2, 4, 10, 11, 13 AND 14 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

**AND**

**IN THE MATTER OF SECTIONS 4, 7, N8, 9, 10 & 11 OF THE FAIR ADMINISTRATIVE ACTION ACT**

**AND**

**IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT**

**AND**

**IN THE MATTER OF EMPLOYMENT ACT, 2007**

**AND**

**IN THE MATTER OF CONTRAVENTION OF THE PETITIONER'S FUNDAMENTAL RIGHTS AND FREEDOMS PROTECTED BY ARTICLES 27, 28, 31, 41 AND 47 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF CONTRAVENTION OF NATIONAL VALUES AND PRINCIPLES OF GOVERNANCE UNDER ARTICLE 10, THE PRINCIPLES OF LEADERSHIP AND INTEGRITY UNDER ARTICLE 73 AND THE VALUES AND PRINCIPLES OF PUBLIC SERVICE UNDER ARTICLE 232 OF THE CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**CATHERINE NYAKOBOKE NYANG'AU..... PETITIONER**

**VERSUS**

**DR. EVANGELINE NJOKA.....1<sup>ST</sup> RESPONDENT**

**KENYA NATIONAL COMMISSION FOR UNESCO (KNATCOM).....2<sup>ND</sup> RESPONDENT**

**THE INSPECTOR GENERAL OF THE NATIONAL POLICE SERVICE.....3<sup>RD</sup> RESPONDENT**

## RULING

1. Before me for determination are a preliminary objection dated 29<sup>th</sup> May 2020 filed by the 1<sup>st</sup> Respondent and another preliminary objection dated 26<sup>th</sup> June 2020 filed by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents. Further, there is an application dated 29<sup>th</sup> May 2020 filed by the 2<sup>nd</sup> Respondent.
2. The preliminary objection dated 29<sup>th</sup> May 2020 sets out the following grounds of objection –
  - a. The suit is an abuse of the court process in light of the existing suit filed by the same party being **NRB ELRC PET. 38 of 2020**, and **NRB ELRC JR. NO. 9 OF 2020**
  - b. The entire suit is fundamentally defective.
3. The preliminary objection dated 26<sup>th</sup> June 2020 lists the grounds of objection as follows –
  - a. THAT the Petition and Application is misconceived since they do not disclose a cause of action or dispute against the 3<sup>rd</sup> and 4<sup>th</sup> Respondents within the meaning of Section 12(1) of the Employment and Labour Relations Court Act and the Employment Act No. 11 of 2007.
  - b. THAT the issues raised in the Petition are sub-judice and the subject of pending proceedings in Nairobi ELRC Petition No. 38 of 2020, Catherine Nyakobo Nyangau versus Inspector General of Police in the Employment and Labour Relations Court.
  - c. THAT by virtue of the foregoing, the Petitioners are forum shopping and the Court should guard against abuse of its processes.
  - d. THAT the Petition and Application is grossly incompetent, incurably defective, frivolous, vexatious and an abuse of the Court process and ought to be struck out in limine
  - e. THAT the Court lacks jurisdiction to entertain this Petition and Application and the same ought to be struck out with costs to the Respondents.
4. In the application dated 29<sup>th</sup> May 2020, the Applicant seeks the following orders –
  - i. Spent.
  - ii. Spent.
  - iii. THAT pending inter parties hearing and determination of this Application, this Honourable court be pleased to stay execution of the orders of this Honourable Court given herein on 26<sup>th</sup> May 2020.
  - iv. THAT this Honorable Court be pleased to set aside the orders of this Honourable Court given herein on 26th May 2020 granting an injunction against the Applicant.
  - v. THAT this Honorable Court be pleased to dismiss the Petition herein and all consequential proceedings inter alia on account of being vexatious and an abuse of the court process.
  - vi. THAT the Petitioner be condemned to pay costs.
5. The grounds in support of the application are as follows –
  - a. The Petitioner herein filed the Notice of Motion Application dated 26<sup>th</sup> May 2020 herein seeking various interlocutory orders.
  - b. That on 26<sup>th</sup> May 2020 the court granted an ex parte injunction restraining the Applicant from terminating the Petitioner's services pending inter-parties hearing of her Application aforesaid.
  - c. The Petitioner's suit is riddled with material non-disclosure, deliberate misrepresentation of facts and falsehoods rendering the said Application scandalous, vexatious and an abuse of the court process.
  - d. The Petitioner deliberately failed to disclose and bring to the court's attention that she has instituted two other similar matters in this Honourable Court against the Respondents herein and others based on the same set of facts and seeking similar reliefs being **Nairobi E&LRC Petition No, 38 of 2020; Catherine Nyakobo Nyang'au vs. Kenya National Commission for UNESCO & 6 Others** and **Nairobi E&LRC Judicial Review No. 9 of 2020; Catherine Nyakobo Nyang'au vs. Kenya National Commission for UNESCO & Another.**

- e. That the Petitioner filed a Notice of Motion Application dated 5<sup>th</sup> March 2020 in Nairobi **E&LRC Petition No. 38 of 2020**; under certificate of urgency seeking similar orders as those sought herein through the firm of I. N. Nyaribo & Co. Advocates.
- f. That the Court certified the Notice of Motion Application dated 5<sup>th</sup> March 2020 aforesaid as urgent and fixed it for hearing on 11<sup>th</sup> March 2020. The said Application was again fixed for hearing on 30<sup>th</sup> March 2020 however due to the Covid-19 Pandemic and precautionary measures taken by the judiciary the hearing did not proceed.
- g. While the said Application in **Nairobi E&LRC Petition No. 38 of 2020**; was pending determination and instead of fixing the said Application for hearing the Petitioner herein filed the second suit being **Nairobi E&LRC Judicial Review No. 9 of 2020; Catherine Nyakobo Nyang'au vs. Kenya National Commission for UNESCO & Another** aforesaid on 25<sup>th</sup> March 2020 seeking similar orders through the firm of Cheboi Chelimo Advocates.
- h. That the said **Nairobi E&LRC Judicial Review No. 9 of 2020** was filed under certificate of urgency whereupon the same was certified urgent but the Court declined to grant the stay orders sought. The matter was subsequently fixed for hearing on 20<sup>th</sup> May 2020 before Honourable Justice Onesmus Makau, however since the said Honourable Judge was on leave the matter was fixed for hearing before Honourable Justice Byram Ongaya. At the hearing before Honourable Justice Byram Ong'aya the Applicant herein insistently urged the court to grant the stay orders sought on the basis of the same issues now raised in this Petition but the court declined stating that the Petitioner herein ought to make a formal application and argue the same before Honourable Onesmus Makau who declined to grant the stay order previously. The court subsequently directed that the Deputy Registrar fixes the matter for Mention before Honourable Justice Onesmus Makau for directions on the stay orders sought and inter parties hearing.
- i. On 26<sup>th</sup> May 2020 the parties in **Nairobi E&LRC Judicial Review No. 9 of 2020** appeared before the Deputy Registrar aforesaid when the matter was fixed for mention for directions on the stay orders and inter parties hearing before Honourable Justice Makau on 17<sup>th</sup> June 2020.
- j. That having repeatedly failed to obtain the desperately sought stay orders in **Nairobi E&LRC Judicial Review No. 9 of 2020** on 20<sup>th</sup> May 2020 aforesaid, and in a bid to forum shop and mislead this Honourable Court the Petitioner has now chosen to institute the present suit in utter abuse of the court process.
- k. The Petitioner has wilfully failed to disclose to this Honourable Court the existence of the above similar matters in a clear case of forum shopping, attempting to steal a march and in blatant abuse of the court process.
- l. It is therefore the interest of justice and fairness that this Honourable Court certifies this Application urgent and proceeds to set aside the orders issued on 26<sup>th</sup> May 2020 and dismiss the suit forthwith to safeguard the dignity and integrity of the judicial process.
- m. The Applicant is reasonably apprehensive that unless this matter is certified urgent, heard ex-parte in the first instance, the orders of 26<sup>th</sup> May 2020 set aside and the proceedings herein dismissed the Petitioner shall continue to abuse the court process, waste precious judicial time, vex and scandalize the Respondents and cause unnecessary embarrassment to the court
- n. It is therefore the interest of justice and fairness that this Honourable Court certifies the matter urgent and proceeds to set aside the orders issued on 26<sup>th</sup> May 2020 and the suit forthwith.
- o. It is in the interest of justice that this Application is heard and the prayers sought granted forthwith.

6. The preliminary objections and application were disposed of together by way of written submissions.

7. The issue for determination is whether the suit herein is an abuse of Court process and secondly, whether the same should be struck out and whether the issues in this suit are *sub judice* and or *res judicata*.

8. It is common ground that the Petitioner herein filed **Nairobi ELRC Petition No. 38 of 2020; Catherine Nyaboke Nyanga'u v Kenya National Commission for UNVESCO and 6 Others**.

9. It is further common ground that the Petitioner also filed **Nairobi ELRC Judicial Review No. 9 of 2020; Catherine Nyakobo Nyang'au v Kenya National Commission for UNESCO & Another**.

10. The suit herein being **Petition No. 82 of 2020** is against **Dr. Evangeline Njoka, Kenya National Commission for UNESCO, The Inspector General of the National Police Service and the Attorney General**. It is the third suit filed by the Petitioner

#### **Sub Judice and Res Judicata**

11. Sub judice is provided for in **Section 4** while *res judicata* is provided for in **Section 7 of the Civil Procedure Act** as follows –

#### **6. Stay of suit**

**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 pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.**

**Explanation.** — The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court.

## 7. Res judicata

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.

**Explanation.** — (1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

**Explanation.** — (2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

**Explanation.** — (3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

**Explanation.** — (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

**Explanation.** — (5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

**Explanation.** — (6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

12. The 1<sup>st</sup> Respondent submits that the suit herein is *sub judice* and *res judicata*. That the suit herein and the other two suits being **NAIROBI ELRC Petition No. 38 of 2020** and **Nairobi ELRC JR No. 9 of 2020** are similar in nature in that the parties are the same and the issue in dispute is directly and substantially the same and relate to the same cause of action and which similar relief is sought by the Petitioner.

13. That when parties appeared before Court on 11<sup>th</sup> June, 2020 Counsel for the Petitioner did not deny the existence of the two suits. He casually stated that they had been withdrawn. He even went ahead to insinuate that he had communicated this to the Respondents. That the purported withdrawal of the two suits (which the 1<sup>st</sup> Respondent totally denied and disputed) came after the court herein issued orders on 27<sup>th</sup> May, 2020.

14. The 1<sup>st</sup> Respondent relied on the case **Fernandoh Wangechi Muriuki v Family Bank Limited & Another [2019] eKLR**, where the 1<sup>st</sup> defendant filed a Preliminary Objection that there was in existence another suit filed by the plaintiff against the Bank, being HCC Misc No. 257 of 2018 (hereinafter referred to as the other suit) hence an abuse of the court process and an attempt by the plaintiff to forum shop because the other suit is still pending determination by this court. The court held as follows;

“... Further, Angote J. came to a similar conclusion in the **Chairman District Alcoholic Drinks Regulation Committee case** (also supra) when he detailed at paragraphs 38 and 39 thereof:

“38. A party who wishes to file a suit which is similar to an existing suit must withdraw the first suit first. This court cannot allow parties to be filing a multiplicity of suits on the basis that they have found that the previous suit(s) wanting either in content or form. The court must and should invoke its inherent jurisdiction to stop such abuse of the court process.

39. Abuse of court process includes a situation where a party improperly uses judicial process to the irritation, harassment and annoyance of his opponent and to interfere with the administration of justice.

In this case the plaintiff did not withdraw the other suit. Despite the existence of the other suit the plaintiff proceeded and filed this suit. That is, as I have stated before, an abuse of the court process contrary to Order 2 Rule 15 (d) of the Civil Procedure Rules. Having found that the plaintiff has abused the court’s process in filing this case there is but one order that I should issue. This suit will be struck out with costs to the Bank.

This suit is hereby struck out for being an abuse of the Court process with costs to the 1<sup>st</sup> Defendant ...”

15. The 1<sup>st</sup> Respondent also relied on the case of **Paul Makokha Okoiti v Kenya Revenue Authority [2021] eKLR**, where the court upheld the Respondent’s preliminary objection and held as follows:

“The upshot is that the application and Petition by the Petitioner against the Respondent is Res-judicata, sub-judice and an abuse of the Court process and the same is accordingly dismissed with costs.”

16. The 1<sup>st</sup> Respondent prays that its preliminary objection be allowed.

17. The 2<sup>nd</sup> Respondent submits that the Petitioner deliberately failed to disclose and bring to the court's attention that she had instituted two other similar matters in this Honourable Court against the Respondents herein and others based on the same set of facts and seeking similar reliefs being **Nairobi E&LRC Petition No. 38 of 2020; Catherine Nyakoboke Nyang'au v Kenya National Commission for UNESCO & 6 Others and Nairobi E&LRC Judicial Review No. 9 of 2020; Catherine Nyakoboke Nyang'au v Kenya National Commission for UNESCO & Another.**

18. That the Petitioner filed a Notice of Motion Application dated 5<sup>th</sup> March, 2020 in **Nairobi E&LRC Petition No. 38 of 2020;** under certificate of urgency seeking similar orders as those sought herein through the firm of I. N. Nyaribo & Co. Advocates.

19. The Court certified the Notice of Motion Application dated 5<sup>th</sup> March, 2020 aforesaid as urgent and fixed it for hearing on 11<sup>th</sup> March, 2020. The said Application was again fixed for hearing on 30<sup>th</sup> March, 2020 however due to the Covid-19 Pandemic and precautionary measures taken by the judiciary the hearing did not proceed.

20. That while the said Application in **Nairobi E&LRC Petition No. 38 of 2020;** was pending determination and instead of fixing the said Application for hearing the Petitioner herein filed the second suit being **Nairobi E&LRC Judicial Review No. 9 of 2020; Catherine Nyakoboke Nyang'au v Kenya National Commission for UNESCO & Another** aforesaid on 25<sup>th</sup> March 2020 seeking similar orders through the firm of **Cheboi Chelimo Advocates.**

21. That the said **Nairobi E&LRC Judicial Review No. 9 of 2020** was filed under certificate of urgency whereupon the same was certified urgent but the Court declined to grant the stay orders sought. The matter was subsequently fixed for hearing on 20<sup>th</sup> May 2020 before Makau J. However since the Judge was on leave the matter was fixed for hearing before Ongaya J. At the hearing before Ong'aya J. the Applicant herein insistently urged the court to grant the stay orders sought on the basis of the same issues now raised in this Petition but the court declined stating that the Petitioner herein ought to make a formal application and argue the same before Makau J. who declined to grant the stay order previously. The court subsequently directed that the Deputy Registrar fixes the matter for mention before Makau J. for directions on the stay orders sought and inter parties hearing.

22. On 26<sup>th</sup> May 2020 the parties in **Nairobi E & LRC Judicial Review No. 9 of 2020** appeared before the Deputy Registrar aforesaid when the matter was fixed for mention for directions on the stay orders and inter parties hearing before Makau J. on 17<sup>th</sup> June 2020.

23. It is the 2<sup>nd</sup> Respondent's submissions that having repeatedly failed to obtain the desperately sought stay orders in **Nairobi E & LRC Judicial Review No. 9 of 2020** on 20<sup>th</sup> May 2020 aforesaid, and in a bid to forum shop and mislead this Court the Petitioner again chose to institute the present suit in utter abuse of the court process through the firm of **Otwal & Manwa Advocates LLP.**

24. It submits that the Petitioner wilfully failed to disclose to this Court the existence of the above similar matters in a clear case of forum shopping, attempting to steal a march and in blatant abuse of the court process.

25. That in this case, the Petitioner failed to disclose to this Court that she has instituted two other similar matters against the Respondents herein and others based on the same set of facts and seeking similar reliefs being **Nairobi E&LRC Petition No. 38 of 2020; Catherine Nyakoboke Nyang'au v Kenya National Commission for UNESCO & 6 Others and Nairobi E&LRC Judicial Review No. 9 of 2020; Catherine Nyakoboke Nyang'au v Kenya National Commission for UNESCO & Another.**

26. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents did not file submissions.

27. For the Petitioner it is submitted that on 3<sup>rd</sup> of June, 2020 an application for withdrawal of **ELRC Petition No. 38 of 2020** was made before Ongaya J. The court proceeded to grant the said withdrawal as evidenced in paragraphs 6 and 7 of the Petitioner's Replying Affidavit sworn on 17<sup>th</sup> May 2021. That further on the 19<sup>th</sup> of June, 2020, an Application for withdrawal of JR No. 9 of 2020 was made before Makau J. and in the presence of the Advocates for the Respondents.

28. The Petitioner submits that the matters having been withdrawn in the presence of the Respondents' advocates on record, there exists no other pending matters touching on the same subject and between the same parties.

29. The petition herein is dated 26<sup>th</sup> May 2020. As submitted by the Petitioner, she withdrew JR No. 9 of 2020 on 19<sup>th</sup> June 2020. This was after this suit was filed.

30. Petition No. 38 of 2020 was withdrawn on 3<sup>rd</sup> June 2020 also after the filing of the instant suit on 26<sup>th</sup> May 2020.

31. The prayers in **Petition No. 38 of 2020** were as follows –

1. A Declaration that the Petitioners fundamental rights to fair administrative action was abused by the Respondents jointly and severally.

2. A Declaration that the Petitioners fundamental rights and freedoms under articles 19, 20, 21, 22, 23, 25, 27, 28, 29, 31, 47 and 48 of the Constitution have been violated.

3. An order to reinstate the Petitioner back to her position of employment under the initial terms of the contract of employment.
4. An order to be directed at the 4th Respondent and any other media platform to retract and pull down the social media posts adversely mentioning the Petitioner.
5. General damages for the Constitutional violation of the Petitioner's fundamental rights.
6. Cost of the Petition.
7. Interest on prayer (5) and (6) above at court rates.

32. The prayers in **ELRC Nairobi Judicial Review No. 9 of 2020** are as follows –

- a. An order of MANDAMUS be issued by this Honourable Court directing the Respondents to immediately recall the Applicant to work on account of the 2<sup>nd</sup> Respondent's Ad Hoc Committee findings and recommendations for her recall pending the conclusion of proper investigations on the allegations subject of her sending on compulsory leave.
- b. An order of PROHIBITION be issued by this Honorable Court to prevent the Respondents from taking any adverse action against the Applicant either themselves, through their agents or third parties on account of the same allegations for which the ad hoc committee formed by the 2<sup>nd</sup> Respondent recommended her recall to work pending conclusion of proper investigations by the EACC.
- c. Grant of leave to act as stay of any adverse decision the Respondents may take either themselves, through their agents or third parties against the Applicant on account of the allegations subject of which she was sent on compulsory leave pending the conclusion of proper investigations by the EACC.
- d. The costs of the judicial review application.

33. The prayers in the instant petition are as follows –

- i. A declaration be and is hereby issued that the action of the 2<sup>nd</sup> Respondent's officials, through their powers, were in excess, a violation of human rights and fundamental freedoms of the Petitioners and an abuse of the fair labour practices.
- ii. An order be and is hereby issued restraining the 3<sup>rd</sup> Respondent's Police officers from harassing and interfering with privacy and dignity of the Petitioner.
- iii. An order of prohibition do and is hereby issued restraining the Respondents from conducting any further investigations on the Petitioner.
- iv. An order of certiorari be and is hereby issued removing into this court and quashing the decision of the 2<sup>nd</sup> Respondent dated 23<sup>rd</sup> September 2019 placing the Petitioner on a compulsory leave without justifiable reasons contrary to the fair labour practices.
- v. An Order of mandamus be and is hereby issued compelling the respondents to stop any investigation, harassment and/or intimidation to the Petitioner.
- vi. An order of Mandamus be and is hereby issued directing the respondents to recall the Petitioner to work on the recommendations of the Ad Hoc Committee of the 2<sup>nd</sup> Respondent pending the conclusion of proper investigation on by the EACC.
- vii. A declaration be and is hereby issued that the fundamental rights and freedoms of the Petitioners under Article 27, 28, 31, 41 and 47 of the Constitution have been violated by the Respondents.

34. From the foregoing it is evident that the issues in dispute in all the three suits relate to the same subject matter. This suit was filed before Petition No. 38 of 2020 and JR. No. 9 of 2020 were withdrawn and therefore was *sub judice*.

35. It was however not *res judicata* as the issues in Petition No. 38 of 2020 and JR. No. 9 of 2020 were never finally adjudicated. For a party to prove the plea of *res judicata* it must demonstrate that the previous suits were finally determined by a court of competent jurisdiction as explain in Section 7 of the Civil Procedure Act.

#### **Whether the suit is an abuse of court process**

36. Abuse of court process was defined in **Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 Others Civil Appeal No. 25 of 2002 [2009] KLR 229**, the Court of Appeal held 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...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. Examples of the abuse of the judicial process are:-

- i. 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.
- ii. Instituting different actions between the same parties simultaneously in different courts even though on different *grounds*.
- iii. 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.
- iv. Where there is no iota of law supporting a Court process or where it is premised on frivolity or recklessness.

37. In **Stephen Somek Takwenyi & Another v David Mbutia Githare & 2 Others Nairobi (Milimani) HCCC No. 363 of 2009, Kimaru, J.** stated with respect to the court's power to prevent abuse of its process as follows:

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

38. Mwitia J. in **Godfrey Paul Okutoyi (suing on his own behalf and on behalf of and representing and for the benefit of all past and present customers of banking institutions in Kenya) v Habil Olaka - Executive Director (Secretary) of the Kenya Bankers Association Being sued on behalf of Kenya Bankers Association) & another [2018] eKLR** posited that:

"In the case of **Beinosi v Wivley [1973] SA 721 SCA** the South African Court of Appeal stated with regard to abuse of process that in general terms, 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. The Supreme Court of Nigeria observed in the case of **African Continental Bank PLC v Damian Ikechukwu Mwaigwe 82 Others SC 35 of 2001 (14<sup>th</sup> January 2011)** that abuse of court process arises where two or more similar processes are issued by a party against the same party/parties in respect of the exercise of the same right and same subject matter or where the process of the court has not been used *bon fide* and properly. In **Muchanqi Industries Limited v Safaris unlimited (Africa) Limited and 2 others** the Court of Appeal stated that the person who abuses process is interested only in accomplishing some improper purposes that is collateral to the proper object of the process and that offends justice. And in **Governors Balloon Safaris Limited vs Attorney General & 2 others (supra)** the Court stated that "It is an abuse of the court process to institute several proceedings in order to challenge the same action and the court has inherent jurisdiction to prevent such abuse. Bearing in mind the above jurisprudence, it is not in doubt that the Petitioner filed this petition after he failed in his quest to in **HCC No. 433 of 2003** and wanted to try his luck in this Court...This is clearly an abuse of the court process that should never be tolerated."

39. The Applicant has not denied that she did not obtain the orders sought in **Petition No. 38 of 2020** where the Court on 6<sup>th</sup> March 2020 at Ex Parte stage made the following orders:

- i. Spent
- ii. **Hearing of the notice of motion on 11<sup>th</sup> March 2020 before any Judge of this Court.**

40. In **JR 9 of 2020** the Court made the following orders upon hearing the Applicant ex parte on 26<sup>th</sup> March 2020:

- i. Spent
- ii. **THAT Leave is hereby granted to the Applicant to apply for Judicial Review by way of an order of Mandamus to remove to this court and direct the respondents to immediately recall the Applicant to work on account of the 2<sup>nd</sup> Respondent's ad hoc committee report recommending her recall to work pending conclusion of proper investigations by the EACC.**
- iii. **THAT Leave is hereby granted to the Applicant to apply for Judicial Review by way of an order of PROHIBITION be issued by this Honourable court to prevent the respondents from taking any adverse actions against the Applicant either themselves, through their agents or third parties on account of the same allegations for which the ad hoc committee formed by the 2<sup>nd</sup> Respondent has recommended her recall to work until proper investigations are concluded by the EACC.**
- iv. **The issue of stay to be argued inter partes on a date to be fixed upon the Court operations resume.**

[Emphasis added]

41. The orders in the instant suit of 26<sup>th</sup> May 2020 are as follows–

**“I have considered the application dated 29<sup>th</sup> May 2020 filed on 2<sup>nd</sup> June 2020 under certificate of urgency. The application is fixed for hearing on 10<sup>th</sup> June 2020 together with the application dated 5<sup>th</sup> March 2020 or as directed by the Deputy Registrar.”**

42. From the foregoing, it is clear that the Petitioner withdrew both **Petition No. 38 of 2020** and **JR 9 of 2020** on 3<sup>rd</sup> and 19<sup>th</sup> June 2020 after obtaining orders in the suit herein, which she had earlier failed to get in the two suits

43. At the time the orders in this suit were obtained on 26<sup>th</sup> May 2020 both **Petition No. 38 of 2020** and **JR 9 of 2020** were pending before the Court.

44. I find that the suit herein was at the time of institution both res judicata and an abuse of Court process. The Petitioner first filed Petition 38 of 2020 where no orders were granted. While it was pending she filed JR 9 of 2020 where she again failed to obtain favourable orders.

45. Thereafter she filed the instant suit where she obtained orders on 26<sup>th</sup> May 2020. It is after obtaining these orders that she withdrew the other two suits. This is a classic case of forum shopping and waste of judicial time and resources. It is also a case of a litigant who set out to vex the Respondents.

46. For the foregoing reasons, I strike out the suit herein with costs for being *sub judice* at the time it was filed and for being an abuse of Court process.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 19<sup>TH</sup> DAY OF NOVEMBER, 2021**

**MAUREEN ONYANGO**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**