



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT OF KENYA AT KISUMU
CAUSE NO. 378 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

PHILIP OTIENDE ADUNDOCLAIMANT

VERSUS

THE CHAIRPERSON

KISUMU COUNTY ASSEMBLY SERVICE BOARD1ST RESPONDENT

KISUMU COUNTY ASSEMBLY SERVICE BOARD 2ND RESPONDENT

THE COUNTY SECRETARY 3RD RESPONDENT

BENSON OLOO OPIYO 4TH RESPONDENT

COUNTY EXECUTIVE COMMITTEE MEMBER FINANCE

AND PLANNING COUNTY GOVERNMENT OF KISUMU5TH RESPONDENT

THE CHIEF FINANCE OFFICER

COUNTY GOVERNMENT OF KISUMU6TH RESPONDENT

RULING

Before me are two applications for determination. The first is dated 19th December 2016 and is filed under Sections 1A, 3A of Civil Procedure Act, Order 40 Rules 1 & 2 Civil Procedure Rules, Rule 17 of the Employment and Labour Relations Court (Procedure) Rules 2016 and other provisions of the law and seeks the following orders:-

- “1. The Honourable Court be pleased to certify this application as urgent and hear the same ex-parte in the first instance.*

- 2. The Honourable Court be pleased to issue a Temporary Injunction against the first and second respondents jointly and severally, their agents or any other person from purporting to suspend the claimant from his employment with the second respondent or in any way replacing the said claimant from his employment with the second respondent pending hearing and determination of this application inter partes.*

3. *The Honourable Court be pleased to issue a temporary injunction against the third respondent from purporting to, or appointing any person to replace, act, or in any way usurp the office of the clerk of the second respondent pending hearing and determination of this application inter partes.*
4. *The Honourable Court be pleased to issue a temporary injunction against the Forth Respondent from taking over, imposing himself onto the office or in any way occupying the office of the clerk of the second respondent.*
5. *The Honourable Court be pleased to issue a temporary injunction against the Fifth and Sixth respondents from removing or in any other way whatsoever interfering with the claimant's mandate at the second respondent's Bank account KCB No.11142204197 and Central Bank of Kenya Account Number 1000194747 pending inter parties hearing of this application.*
6. *That the Honourable Court be pleased, in the event that the fifth and sixth respondents have caused the removal of the claimant's mandate to the second respondent's bank accounts KCB No.11142204197 and Central Bank of Kenya Account Number 1000194747 forthwith and unconditionally.*
7. *The Honourable court be pleased to issue permanent orders of injunction against the first and second respondents jointly and severally, their agents or any other person from suspending the claimant from his employment with the second respondent or in any way replacing the said claiming from his employment with the second respondent pending the determination of this suit.*
8. *That the Honourable Court be pleased to issue a permanent injunction against the first respondent personally or through her acolytes or in any way whatsoever from occupying, exercising authority or usurping the functions of the office of Chairperson of the Kisumu County Assembly Service Board.*
9. *The costs of this application be borne by the respondents.*

The application is supported by the affidavit of **PHILLIP OTIENDE ADUNDO** the Claimant and on the following grounds:-

- a) *The First and Second respondent's have issued the claimant a letter purporting to suspend the claimant from duty founded on several spurious allegations.*
- b) *The effect of the first and second respondent's act is that the third respondent has purported to appoint the fourth respondent to take over the duties of the claimant at the assembly unprocedurally.*
- c) *The respondents being aware of the decision of the Kisumu County Assembly to safeguard the office of the County Clerk and confirm the claimant as its rightful occupant, has moved to usurp the claimant's office by means of brawn and hectoring.*
- d) *The fifth and sixth respondents, acting on the communication of the first and third respondents, have moved to remove the claimant as a signatory to the second respondent's Bank Account KCB Kisumu Account No.11142204197 and Central Bank of Kenya account Number 1000194747 thereby opening an avenue for the wanton and unrestricted misuse of public funds.*
- e) *The purported removal of the claimant from office by suspension is unprocedural and illegal.*
- f) *The claimant is exposed, and will suffer irreparably should the orders sought in the application are not granted.*

In the supporting affidavit the Claimant depones that he is an employee of the Kisumu County Assembly Service Board, the 2nd Respondent. That the 1st and 2nd Respondents purported to suspend him without

any colour of right or authority by letter dated 1st December 2016 and placed him on half salary without allowances. He states that the letter of suspension required him to return any assets of the 2nd Respondent. He states that although he is the convener of meetings of the 2nd Respondent, the letter of suspension refers to the decision to suspend him having been made at a meeting which he did not convene that was held on 1st December 2016, which according to him was illegal and the resolutions of such meeting of no effect. He further states that such meeting must have been without a chairperson as the 1st Respondent, the Chairperson of Kisumu County Assembly Service Board was by a letter dated 1st December 2016 stopped from chairing any meetings. The Claimant further states that the grounds for his suspension are all outside his mandate and are duties of other officers whom he has named in the affidavit.

The Claimant depones that the 3rd Respondent has illegally and unprocedurally purported to appoint a new Clerk of the 2nd Respondent yet the office is not vacant and further that the appointment is in breach of the principle of Separation of Powers.

He depones that the 4th Respondent has made a move to evict him from office, and that the 2nd Respondent has removed him from being a signatory of its account in KCB Kisumu A/C NO.11142204197 and Central Bank of Kenya Account No.1000194747 and replaced him with the 5th and 6th Respondents.

The Claimant further depones that he is apprehensive of his safety following the deployment of security officers to bar him from accessing his office by the 2nd Respondent, a matter over which he filed a complaint with the Administration Police Commandant Kisumu on 6th December, 2016.

The Claimant states that he is aware of a meeting held by the County Assembly on 13th December 2016 at which the assembly nullified his suspension and restored him to office.

It is on these grounds that the Claimant prays that his application be allowed.

The application which was filed on 21st December 2016, the date on which High Court Christmas vacation commenced, was heard by the Duty Judge in Nairobi on 22nd December 2016 and the following orders granted:-

1. THAT in the interim and pending service upon the Respondent, this Honourable Court do and hereby issues a temporary injunction against the first and second respondents jointly and severally, their agents or any other person from purporting to suspend the Claimant from his employment with the second Respondent pending hearing and determination of this application inter-partes.

2. THAT in the interim and pending service upon the Respondent, this Honourable court do and hereby issues a temporary injunction against the third Respondent from purporting to, or appointing any person to replace, act, or in any other way usurp the office of the clerk of the second Respondent pending hearing and determination of this application inter-partes.

3. THAT in the interim and pending service upon the Respondents, Honourable court do and hereby issues a temporary injunction against the fourth respondent from taking over, imposing himself onto the office or in any other way occupying the office of the clerk of the second respondent.

4. THAT in the interim and pending service upon the Respondents, this honourable court do and hereby issues a temporary injunction against fifth and sixth Respondents from removing or in any other way whatsoever interfering with the claimant's mandate at the second respondent's bank account No.11142204197 and central bank of Kenya account number 1000194747 pending inter-partes hearing of this application.

Upon being served with the said orders the 1st, 2nd and 4th Respondents instructed the firm of Okong'o, Wandago & Company Advocates who filed notice of appointment and a replying affidavit on 5th January

2017. The 3rd, 5th and 6th Respondents instructed Amondi & Company Advocates who filed Memorandum of Appearance on 30th December 2016 and a replying affidavit on 6th January 2017. Both replying affidavits oppose the application by the Claimant.

In the replying affidavit filed on behalf of the 1st, 2nd and 4th Respondents, ANN ATIENO ADUL depones that she is the Speaker of the County Assembly, the 2nd Respondent and by virtue thereof she is also the chairperson of the Kisumu County Assembly Service Board, the 1st Respondent. She states that she has authority of the 1st and 2nd Respondents to swear the affidavit on their behalf and further that she has authority of BENSON OLOO OPIYO, the 4th Respondent, who is the Acting Secretary of the 2nd Respondent.

Ms Adul states that she was served with a Notice of Motion under Certificate of Urgency dated 19th December 2016 with an unsworn and undated affidavit of Phillip Otiende Adundo together with exhibits that have not been endorsed as required by the Oaths and Statutory Declarations Act. She further states that she was on the same date also served with a statement of Claim dated 19th December 2016 filed on 20th December 2016 with an undated and unsworn verifying affidavit of Phillip Otieno Adundo. She states that the suit and application are both fatally defective and incurably incompetent and an outright abuse of the due process of Court. She further states that the 1st Respondent is not a legal person and is wrongly sued, and that the suit against the 1st Respondent is therefore bad for joinder of a non-entity.

Ms. Adul states that the suit is an abuse of court process for the following grounds:-

- (a) The Claimant herein filed an earlier claim being Kisumu ELRC No.367 of 2016 on 9th December 2016 against the Respondents in the same order in which they are cited herein making the same allegations and raising the same issues as raised in the present suit.*
- (b) That simultaneous with the Memorandum of Claim in that cause, the Claimant filed an application for the same interlocutory orders as sought in the current suit.*
- (c) That the Employment and Labour Relations Court in Kisumu declined to issue interim orders in the first instance and instead ordered that the same be served for inter-partes hearing on 15.12.2016.*
- (d) The same order also directed that the applicant to serve the application upon the respondent forthwith.*
- (e) That the claimant did not serve the same order and when the matter came up for hearing on 15.12.2016, he withdrew the application for interlocutory orders leaving the main suit intact. The same was scheduled for mention on 23.01.2017.*
- (f) That the claimant then waited for the judge in Kisumu to go on vacation then filed exactly the same suit, being the current suit, knowing that he would not be heard before a new forum-being the duty court in Nairobi. I verily believe that it is instructive that the Claimant never disclosed the status and fact of the prior existence of a similar suit, raising the same issues involving the same parties.*
- (g) I verily believe that these actions on the part of the Claimant constitute forum shopping which is the most manifest case of abuse of the due process of court.*
- (h) That I have now learnt that the Claimant, for purposes of sanitizing this abuse of the court process, filed a Notice of Withdrawal of claim 367 of 2016 at the Kisumu Employment and Labour Relations Court on 20.12.2016 which was given effect by the Deputy Registrar on 21/12/2016.*
- (i) By the time the Claimant was preparing and dating his pleadings and applications in this cause on 19.12.2016, Claim 367 of 2016 was still pending.*

(j) *By the time the claimant was filing the Memorandum of Claim in this case on 20.12.2016, claim 367 of 2016 was still pending.*

(k) *The Claimant filed and litigated this claim before the duty judge in Nairobi without disclosing to her of the state of the previous court proceedings between the same parties involving the same parties and the same issues in controversy.*

Ms. Adul depones that the orders obtained by the Claimant from the duty Judge in Nairobi are bad in law for the following reasons:-

(a) *The first order purports to injunct the 1st and 2nd Respondents from purporting to suspend the Claimant from his employment with the Respondent when at the time of the said order, the Claimant had already been suspended by the 2nd Respondent for purposes of facilitating investigations into claims of breached of the Public Finance Management Act, among other claims. An injunctive order cannot be issued when what is sought to be arrested has already happened.*

(b) *The second order purported to injunct the 3rd Respondent from appointing any person to replace, act, or in any other way usurp the office of the clerk of the second Respondent pending the hearing and determination of the application inter partes. This was sought and obtained despite the fact that at the time of the application and order, the 4th Respondent had already been appointed and conferred with the privileges to act at the Clerk to the County Assembly of Kisumu and the Secretary to the 2nd Respondent.*

(c) *The 3rd order sought to injunct the 4th Respondent from taking over or in any other way occupying the office of the clerk of the second Respondent. At the time of the application and order, the 4th Respondent had already assumed the functions of the Clerk to the County Assembly of Kisumu and the Secretary of the 2nd Respondent.*

(d) *The 4th order sought to injunct the 5th and 6th Respondents from removing or in any other way interfering with the claimant's mandate at the second Respondent's bank account no.11142204197 and central bank of Kenya account number 1000194747 pending inter partes hearing of the application. This order was sought and obtained at a time when in fact the said mandates had already been changed at the respective banks.*

Ms Adul further states that the orders obtained in Nairobi are bad in law for having been obtained without disclosure of material facts being that the charges against which the orders were granted had already taken place and were also the subject of **KISUMU ELRC NO. 367 OF 2016** where similar orders had been declined in the first instance, and further that the orders sought are contrary to Labour Laws as they effectively purport to reinstate the Claimant from his suspension ex parte contrary to express statutory provisions.

With respect to the averments in the affidavit of PHILLIP OTIENDE ADUNDO in support of his application, Ms Adul states that the Claimant who was initially seconded to the 2nd Respondent by the Transition Authority under the Transition to Devolved Government Act was irregularly appointed and sworn to the position of Clerk in contravention of a Court Order in **ELRC KISUMU CAUSE NO. 50 OF 2015** which prohibited recruitment of any staff of the County Assembly before rationalization and deployment to determine the vacancies available. The order dated 11th March 2015 is annexed to the affidavit as Exhibit AAA-3. She states that the Claimant was confirmed by an acting Chairman. She denies that the Claimant's suspension was without authority and states that he was suspended by the County Assembly Service Board, his employer, on allegations of serious violations of the Public Finance Management Act which are subject to intended investigations by competent and authorized public investigation agencies. She states that before the suspension the Claimant was given an opportunity to appear before the 2nd Respondent to defend himself but snubbed the summons.

Ms Adul prayed that the orders obtained by the Claimant on 22nd December 2016 be stayed, discharged

or set aside.

In the replying affidavit of **HUMPHREY OKUKU NAKITARI** filed on behalf of the 3rd, 5th and 6th Respondents he states that the orders granted by Mbaru J on 22nd December 2016 are tainted by lack of full and frank disclosure of material facts being that the applicant filed a similar application in **KISUMU ELRC CAUSE NO. 367 OF 2016** involving the same parties and seeking similar orders which the Court declined to grant ex-parte, but which application the applicant withdrew on grounds that parties had reached a compromise. He further depones that the applicant failed to inform the Court that as at 1st December 2016 there was no official communication from the 2nd Respondent, the Kisumu County Assembly Service Board to the County Executive Committee (CEC) suspending HON. ANN ADUL as its chairperson and she chaired the meeting of the 2nd Respondent held on 30th November 2016, and that the meeting was attended by the applicant as confirmed by the minutes attached to the affidavit. He depones that the CEC was informed of the suspension of ANN ADUL by letter dated 6th December, 2016 and that he was aware that the suspension was stayed by a Court Order of 8th December 2016.

Mr. Nakitari depones that following the suspension of the Claimant by the 2nd Respondent pursuant to its disciplinary powers under Section 12(1) and (3) of the Kisumu County Assembly Service Act, 2014 the 1st Respondent requested the 3rd Respondent to second the 4th Respondent in keeping with values of complementarism between the Assembly and the CEC. He further depones that the 3rd Respondent exercises general oversight over the entire executive structure as Head of County Public Service and has authority to deploy County Public Officers pursuant to Sections 44(1) and 72(2) of the County Government Act. He depones that the seconding of the 4th Respondent to act as Clerk to the County Assembly at the request of the 1st Respondent does not offend the doctrine of Separation of Powers in view of the urgency and the need to fill the position in an acting capacity. He depones that in view of the fact that the 3rd, 5th and 6th Respondents only acted on instructions of the 1st and 2nd Respondents, this suit does not lie against them.

He prays that the ex-parte orders of 22nd December 2016 be discharged and/or set aside and that the 3rd, 5th and 6th Respondents be discharged from this suit.

2ND APPLICATION

The 2nd application is filed by the 1st, 2nd and 4th Respondents vide a motion dated 5th January 2017 filed under Certificate of Urgency. The motion which is made under the ***inherent powers of Court*** seeks the following orders -

- 1. That this application be certified as urgent and service thereof be dispensed with in the first instance.***
- 2. That pending the hearing and determination of this application inter partes, the interim orders granted to the Claimant in this case on 22.12.2016 be stayed.***
- 3. That the interim orders granted in this case on 22.12.2016 be discharged, set aside and or vacated.***
- 4. That the costs of this application be borne by the Claimant.***

The application is supported by the affidavit of ANNE ATIENO ADUL sworn on 5th January 2017 and on the following grounds:

- (a) The Claimant on 22.12.2016 obtained interim injunctive orders ex parte against the Respondents.***
- (b) The application pursuant to which the said interim orders were granted was a clear abuse of the court process. The said interim injunctive orders are also patently unlawful, and the same were issued following non disclosure of material facts as particularized below:***

- (i) On 09.12.2016, the Claimant herein filed an earlier claim being Kisumu ELRC No.367 of 2016 against the Respondents herein in the same order in which they are cited herein.
- (ii) That simultaneous with the memorandum of Claim in that cause, the Claimant filed an application for the same interlocutory orders herein.
- (iii) That the Employment and Labour Relations Court in Kisumu declined to issue interim orders in the first instance and instead ordered that the same be served for inter-partes hearing on 15.12.2016.
- (iv) That the same order also directed that the applicant to serve the application upon the respondent forthwith.
- (v) That the claimant did not serve the same order and when the matter came up for hearing on 15.12.2016, he withdrew the application for interlocutory orders leaving the main suit intact.
- (vi) That the claimant then waited for the judge in Kisumu to go on vacation then filed a Notice of Withdrawal of the suit and even before the Deputy Registrar marked that suit as withdrawn filed exactly the same suit in the guise of the current suit, knowing that he would not be heard before a new forum - being the duty court in Nairobi.
- (vii) These actions on the part of the Claimant constitute forum shopping which is the most manifest case of abuse of the due process of court.
- (viii) The Claimant, for purposes of sanitizing this abuse of the court process, filed a Notice of Withdrawal of Claim 367 of 2016 at the Kisumu Employment And Labour Relations Court on 20.12.2016 which was given effect by the Deputy Registrar on 21/12/2016.
- (ix) By the time the Claimant was preparing and dating his pleadings and applications in this cause on 19.12.2016, Claim 367 of 2016 was still pending.
- (x) By the time the claimant was filling the Memorandum of Claim in this case on 20.12.2016, claim 367 of 2016 was still pending.
- (xi) The Claimant filed and litigated this claim before the duty judge in Nairobi without disclosing to her of the state of the previous court proceedings between the same parties involving the same parties and the same issues in controversy.
- (xii) The first order sought and obtained by the Claimant purports to injunct the 1st and 2nd Respondents from purporting to suspend the claimant from his employment with the Respondent when at the time of the said order, the claimant had already been suspended by the 2nd Respondent for purposes of facilitating investigations into claims. An injunctive order cannot be issued when what is sought to be arrested has already happened.
- (xiii) The second order purported to injunct the 3rd Respondent from appointing any person to replace, act, or in any other way usurp the office of the clerk of the second Respondent pending the hearing and determination of the application inter partes. This was sought and obtained despite the fact that at the time of the application and order, the 4th Respondent had already been appointed and conferred with the privileges to act at the Clerk to the County Assembly of Kisumu and the Secretary to the 2nd Respondent.
- (xiv) The 3rd order sought to injunct the 4th Respondent from taking over or in any other way occupying the office of the clerk of the second Respondent. At the time of the application and order, the 4th Respondent had already assumed the functions of the Clerk to the County Assembly of Kisumu and the Secretary of the 2nd Respondent.

(xv) *The 4th order sought to injunct the 5th and 6th Respondents from removing or in any other way interfering with the claimant's mandate at the second Respondent's bank account no.11142204197 and central bank of Kenya account number 1000194747 pending inter partes hearing of the application. This order was sought and obtained at a time when in fact the said mandates had already been changed at the respective banks.*

(xvi) *The interim orders obtained by the Claimant in this cause are further bad for having been obtained without disclosure of material facts that each of the above changes had already been effected and further that there had been previous proceedings before Kisumu ELRC 367 of 2016 where similar orders had been declined in the first instance.*

(xvii) *The interim, orders sought are contrary to labour laws as they effectively purport to reinstate the Claimant from his suspension ex parte within contrary to express statutory provisions.*

(c) *For the foregoing reasons, the interim injunctive orders obtained herein should be discharged and set aside and the application struck out and or dismissed.*

The affidavit of ANN ATIENO ADUL reiterates the grounds in support of the application and her replying affidavit filed in opposition to the 1st Application as elaborated herein above.

The application was first heard ex-parte before the Duty Judge sitting in Nairobi on 10th January 2017. The Judge directed that the application be heard on 22nd January 2017 in Kisumu. This was in view of the fact that Mbaru J had fixed the 1st application for inter-parte hearing in ELRC Court Kisumu on 22nd January 2017.

Since 22nd January 2017 fell on a Sunday, both application were placed for hearing before me on Monday 23rd January 2017. Mr. Siganga and Mr. Oyuko jointly appeared for the Claimant while Mr. Okongo and Mr. Ongoya jointly appeared for the 1st, 2nd and 4th Respondents. Mr. Amondi appeared for the 3rd, 5th and 6th Respondents.

Before the hearing commenced, I gave directions that the two applications will heard simultaneously with the 2nd Application being treated as part of the response to the 1st application. In their submissions the parties reiterated the arguments contained in the applications and affidavits that they filed.

After considering the pleadings and documents and after hearing submissions from the parties, the issues arising for determination are the following:-

- 1. Whether the suit and application are fatally defective for reasons that both the verifying affidavit in support of the statement of claim and the affidavit in support of the application are not attested.*
- 2. Whether the Claimant's case is an abuse of Court process.*
- 3. Whether the Claimant is entitled to the prayers in the application dated 19th December 2016 (1st Application).*
- 4. Whether the 1st, 2nd and 4th Respondents are entitled to orders sought in the application dated 5th January, 2017.*

Determination

1. Is the suit and 1st Application fatally defective due to the unsworn verifying and supporting affidavits?

In their oral submissions none of the parties made any reference to the two unsworn affidavits, on verifying the statement of Claim and the others supporting the application dated 19th December 2016

under consideration.

In the replying affidavit of ANNE ATIENO ADUL she depones that the entire suit herein as well as the application dated 19th December 2016 is fatally defective and incurably incompetent due to the fact that the supporting affidavit of Philip Otiende Adundo is unsworn and undated. She further depones that the exhibits are not endorsed by a stamp of a commissioner for oaths. Ms. Adul further depones that the Statement of Claim is also incurably defective as the verifying affidavit is unsworn.

The position of verifying affidavits is that the Court must be shy to strike out a suit where it is possible to do so by way of amendment. A verifying affidavit that has not been sworn can be cured by the party being allowed to file a supplementary verifying affidavit so that the suit is not fatally defective for that reason only as was discussed elaborately by Ojwang J. (as he then was) in the case of **J. P. Machira T/A Machira & Co. Advocates V. Wachira Waruru & Another [2007]eKLR**.

How about an affidavit in support of an application where the supporting affidavit was unsworn?

The legal position is that an unsworn affidavit is not an affidavit and therefore its content cannot be relied upon to support an application where the only evidence available to the court is contained in the unsworn supporting affidavit. The application would therefore be considered without the affidavit since it is not compulsory for an application to be supported by affidavit.

In the present case however, the affidavit forms the core of the application as without it the application is bare and without the facts and documents that the Court relied upon to grant orders to the applicant on 22nd December 2016. It is my belief that had the fact that the affidavit in support of the application is not commissioned been brought to the attention of the Court the orders sought would not have been granted.

Even without considering the unsworn affidavit has the Claimant made out a case for grant of the orders sought?

In **Giella V. Cassman Brown**, the Court sets the principles for grant of such orders being that the applicant must prove that there is a prima facie case and that he will suffer irreparable loss or injury, and if the Court is in doubt, on a balance of convenience. In the present case the applicant, who is an employee has only was suspended. By the suspension he was required to step aside to allow investigations to be carried out into the allegations leveled against him. He is a holder of a powerful position in a public entity. The Respondents have authority to discipline him. If he is absolved he would be reinstated to his position and paid all monies that are due to him.

It is my opinion that the Applicant has not established a prima facie case with probability of success as the 1st and 2nd Respondents have the legal mandate to discipline him and suspension is part of the disciplinary process. The applicant did not state how his suspension was unprocedural as alleged in his application since the affidavit in support thereof is not valid and cannot be relied upon by the court.

Further, the applicant did not disclose to the court that the orders he sought, that is, temporary injunctive orders, were incapable of being granted as he had been removed from office long before he filed the application. An injunction can only be issued to stop an action that has not yet taken place. Once action has been taken the appropriate orders would be to reverse such action. This means that the orders granted to the applicant were not useful to him as they were incapable of implementation. As deponed in the replying affidavits of both Ms. Adul and Mr. Nakitari, the applicant was suspended from duty on 1st December 2016.

I thus find that the applicant has not established a prima facie case and therefore is not entitled to the orders sought.

Abuse of Court Process

On the issue of abuse of Court's process, the Counsel for the applicant did not deny that the applicant filed

Cause No. 357 of 2016 under which similar orders as those sought herein were sought, or that the pleadings herein were signed on 19th December 2016 during the pendency of that other suit. No valid explanation has been given for filing this suit and seeking orders that had already been declined in this suit. The timing of the filing is also very suspect. The pleadings are signed on 19th December 2016 and filed on 20th December 2016, the same date on which the letter withdrawing Cause No. 367 of 2016 was filed in Court. It means that as of 20th December 2016 the Claimant had subsisting in the same Court two suits seeking similar orders.

It is also not denied, indeed it is apparent from the record, that the Duty Court hearing the application on 22nd December 2016 was never informed of the fact that similar prayers had been declined in another suit involving the same parties on the same facts in a previous suit. This is a clear case of deliberate non-disclosure of material facts. It is my opinion that had these facts been brought to the attention of the Duty Judge the Judge would not have granted the orders. The orders were therefore obtained on the basis of non-disclosure of material facts.

The filing of multiple suits by a litigant before the same court or before different courts on the same facts abuse of the Court process. Litigants cannot to use the Court process to defeat the ends of justice or to bring disrepute to the Court system by filing multiple suits in different courts over the same set of facts or circumstances hoping to get different outcomes from different Courts.

This was an abuse of court process as was held by the court of Appeal in JETLINK EXPRESS LIMITED v EAST AFRICAN SAFARIS AIR EXPRESS LIMITED NAIROBI CIVIL APPEAL NO.281 of 2009 citing with approval the decision in the South African Case of BEINOIS v WIYLEY 1973 S.A. 721 (SCA) where the court as follows -

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

The above case was cited with approval in MAHATKUNO ROBLE & 4 OTHERS v PERMANENT SECRETARY MINISTRY OF DEFENCE & ANOTHER [2016]eKLR.

For the foregoing reasons I find that the application is not merited and dismiss the same. However, since striking out the suit would shut the applicant out of the justice system, I will not do so, but instead, the applicant is directed to apologize to the Court in writing for abusing the Court system before any other action can be taken on the file.

Dated and signed and delivered this 2nd day of February, 2017

MAUREEN ONYANGO

JUDGE