



Kiragu Wathuta & Co. Advocates v Kang’ethe (Sued on Her Behalf and as the Legal Representative of the Estate of Samuel Mwatha Kang’ethe); Oriental Commercial Bank (Garnishee) (Miscellaneous Application E207 of 2022) [2024] KEELC 14105 (KLR) (19 December 2024) (Ruling)

Neutral citation: [2024] KEELC 14105 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
MISCELLANEOUS APPLICATION E207 OF 2022
JO MBOYA, J
DECEMBER 19, 2024**

BETWEEN

KIRAGU WATHUTA & CO. ADVOCATES DECREE HOLDER

AND

**MARY KANG’ETHE JUDGMENT DEBTOR
SUED ON HER BEHALF AND AS THE LEGAL REPRESENTATIVE OF THE
ESTATE OF SAMUEL MWATHA KANG’ETHE**

AND

ORIENTAL COMMERCIAL BANK GARNISHEE

RULING

Introduction and Background

1. The Ruling herein relates to two [2] Applications, namely, the Application dated 18th November 2024 filed by the Judgement Debtor/Client and the Application dated 20th November 2024 filed by the Decree Holder/Advocate.
2. Given the diverse reliefs sought at the foot of the various Applications adverted to in paragraph 1 hereinbefore, it is imperative to reproduce the reliefs sought at the foot of each Application. To this end, the reliefs sought at the foot of the Application dated 18th November 2024; are as hereunder:
 - i.spent
 - ii. That there be an order for stay of the hearing of the application to make the garnishee order nisi dated 20th June 2024 absolute pending the hearing and determination of this Application.



- iii. That this Honourable Court be please to set aside the orders of 6th May 2024 adopting the Certificate of Taxation dated 23rd October 2023 as a judgement of the court.
 - iv. That upon granting prayer 3 above, there be an order granting leave to the Respondent/Client to file a reference out of time in respect of the Certificate of Taxation dated 23rd October 2023.
 - v. That this Honourable Court be please to issue any other orders.
 - vi. That the costs of the application be provided for.
3. The instant Application is premised/anchored on various grounds which have been highlighted in the body thereof. In addition, the Application is supported by the Affidavit of Mary Kang'ethe [the Judgement Debtor/Client] sworn on even date.
 4. Upon being served with the Application under reference, the Decree Holder/Advocate filed Grounds of Opposition dated 6th December 2024 and wherein same [Decree Holder/Advocate] has contended inter alia that the Application beforehand is not only prohibited by the doctrine of res judicata, but same also constitutes an abuse of the due process of the court.
 5. The second Application is the one dated 20th November 2024 filed by the Decree Holder/Advocate and in respect of which same [Decree Holder/Advocate] has sought the following reliefs.
 - i.spent
 - ii. That pending the hearing and determination of this Application inter partes, this Honourable Court be pleased to issue a Garnishee Order Nisi against Oriental Bank – the Garnishee herein – attaching all the monies held by the Garnishee in the credit of the Judgement Debtor in account number 0070000789 for the purposes of satisfying the Decree of KShs. 649,326.85 only, being the Aggregate Decretal Sum that is made as follows:
 - a. The unsatisfied part arising from the judgement of this Honourable Court made on 6th May 2024 being KShs. 594,327.00;
 - b. The costs awarded by this Honourable Court in its Ruling that was delivered on 7th November 2024 being KShs. 25,000.00; and
 - c. The costs that were ordered by this Honourable Court on 20th November 2024 being KShs. 30,000.00.
 - iii. That this Honourable Court be pleased to issue a Garnishee Order Absolute compelling the Garnishee to remit to the Decree Holder/Advocate on behalf of the Judgement Debtor/Client a sum of KShs. 649,326.85 being the Aggregate Decretal Sum that is made as follows:
 - d. The unsatisfied part arising from the judgement of this Honourable Court made on 6th May 2024 being KShs. 594,327.00;
 - e. The costs awarded by this Honourable Court in its Ruling that was delivered on 7th November 2024 being KShs. 25,000.00; and
 - f. The costs that were ordered by this Honourable Court on 20th November 2024 being KShs. 30,000.00 only.
 - iv. That the costs of these Garnishee proceedings be certified by this Honourable Court and be added to the amount of the Decree and be retained out of the money recovered by the Decree Holder in priority to the amount of the Decree.



6. The subject Application is premised on the various grounds which have been highlighted [enumerated] in the body thereof. Furthermore, the Application is supported by the Affidavit of one Paul Kiragu Wathuta [Advocate] sworn on 20th November 2024. In addition, the deponent has also annexed various documents including the judgement which was entered by the court upon the adoption of the certificate of Taxation and a copy of the Certificate of taxation.
7. The two Applications [details in terms of the preceding paragraphs] came up for hearing on 11th December 2024, whereupon the advocates for the respective parties covenanted to file and exchange written submissions. In this regard, the court ventured forward and circumscribed the timelines for the filing and exchange of written submissions.
8. The Judgement Debtor filed written submissions dated 16th December 2024; The Decree Holder filed written submissions dated [sic] 17th November 2024 but which essentially should be 17th December 2024. In addition, the Garnishee filed written submissions dated 18th December 2024.
9. For coherence, the three [3] sets of written submissions [which have been highlighted in the preceding paragraphs] form part of the record of the court.

Parties' Submissions

a. Judgement Debtor's Submissions

10. The Judgement Debtor filed written submissions dated 16th December 2024 and wherein same [Judgement Debtor] has adopted the grounds contained at the foot of the Application. In addition, the Judgement Debtor has also reiterated the contents of the Supporting Affidavit sworn on 18th November 2024.
11. Furthermore, learned counsel for the Judgement Debtor has proceeded to and canvassed three [3] salient issues for consideration by the court. Firstly, learned counsel for the Judgement Debtor has submitted that the Judgement Debtor was never served with the Advocate-Client Bill of Costs and the subsequent Application for the adoption of the Certificate of Taxation as a judgement of the court. In this regard, it has been contended that the taxation of the Advocate-Client Bill of Costs and the consequential adoption of the Certificate of Taxation as the judgement of the court were undertaken in contravention of the provisions of article 50 (1) of *the Constitution* of Kenya 2010.
12. Arising from the foregoing, learned counsel for the Judgement Debtor has therefore submitted that the proceedings leading to the entry of judgement and the consequential judgement thereto were therefore illegal, unlawful and void.
13. Secondly, learned counsel for the Judgement Debtor has submitted that the court is seized and possessed of the requisite jurisdiction to set aside and or vacate the judgement which was entered on the basis of the Certificate of Taxation. To this end, learned counsel for the Judgement Debtor has implored the court to set aside the impugned judgement.
14. Thirdly, learned counsel for the Judgement Debtor has submitted that the honourable court is equally seized of jurisdiction to vary, vacate and/or set aside the Order Nisi issued on 20th November 2024.
15. In this respect and for the foregoing reason[s], it has been contended that the decree which underpins the issuance of the Order Nisi herein was irregular, illegal and unlawful.
16. Premised on the foregoing submissions, learned counsel for the Judgement Debtor has therefore invited the court to find and hold that the Application dated 18th November 2024 is meritorious. On



the contrary, learned counsel for the Judgement Debtor has posited that the Application dated 20th November 2024 is not only misconceived but same is equally untenable.

b. Decree Holder's Submissions

17. The Decree Holder filed written submissions dated [sic] 17th November 2024 but which essentially should be 17th December 2024 and wherein the Decree Holder has adopted the grounds highlighted in the body of the Application dated 20th November 2024. Besides, the Decree Holder has also highlighted the contents of the Supporting Affidavit sworn on even date. In addition, the Decree Holder has also reiterated the contents of the Grounds of Opposition dated 6th December 2024.
18. Furthermore, learned counsel for the Decree Holder has isolated, highlighted and canvassed three [3] salient issues for consideration and determination by the court. First and foremost, learned counsel for the Decree Holder has submitted that the Application by the Judgement Debtor is barred and prohibited by the doctrine of res judicata. In this regard, it has been posited that the issues being raised by the judgement debtor were dealt with and disposed of by the court vide the Ruling rendered on 7th November 2024.
19. Arising from the foregoing, learned counsel for the Decree Holder has submitted that the Judgement Debtor cannot now revert to court and seek to regurgitate the issues that have been canvassed and disposed of by the court at the foot of the Application dated 1st July 2024.
20. To this end, learned counsel for the Decree Holder has cited and referenced the provisions of Section 7(4) of the *Civil Procedure Act*, Chapter 21, Laws of Kenya; which underpins the doctrine of constructive res judicata.
21. Secondly, learned counsel for the Decree Holder has submitted that the issues being raised by the Judgement Debtor are issues that were raised and addressed by the court at the foot of the Ruling rendered on 7th November 2024. In any event, it has been contended that the Application beforehand seeks to adopt the reasoning of the court and thereafter to re-invent and agitate the issues afresh.
22. In particular, learned counsel for the Decree Holder has invited the court to take cognisance of the contents of paragraphs 64 to 70 of the Ruling rendered on 7th November 2024. In this regard, it has been submitted that the Application beforehand constitutes and amounts to an abuse of the due process of the court.
23. Thirdly, learned counsel for the Decree Holder has submitted that following the issuance of the Order Absolute at the foot of the previous Application, namely, the Application dated the 12th of June 2024; the Decree Holder only realised the sum of KShs. 603,413.95 only. In this regard, it has been submitted that the balance now due and owing from the Judgment Debtor amounts to KShs. 649,326.85 only, plus the costs and interest.
24. Arising from the foregoing, it has been contended that the Judgement Debtor herein remains indebted to the Decree Holder to the tune of KShs. 649,326.85 only. In any event, learned counsel for the Decree Holder has submitted that the Garnishee herein confirms that same [Garnishee] holds an account on behalf of the Judgement Debtor.
25. Additionally, learned counsel for the Decree Holder has submitted that the account held by the Garnishee holds sufficient funds to liquidate/settle the outstanding decretal sum. To this end, learned counsel for the Decree Holder has invited the court to confirm the Order Nisi and make same and Order Absolute.



c. Garnishee's Submissions

26. The Garnishee herein filed written submissions dated 18th December 2024 and wherein same [Garnishee] has adopted the contents of the Replying Affidavit sworn by James King'au on 5th December 2024. In addition, the Garnishee has ventured forward and highlighted one pertinent issue for consideration by the court.
27. Learned counsel for the Garnishee has submitted that the Garnishee herein holds an account namely, account number 1007005000789 in the names of Mr. and Mrs. Samuel Kang'ethe. Furthermore, learned counsel for the Garnishee has ventured forward and confirmed that the said account holds the sum of KShs. 927,679.87 only. In this regard, it has been posited that the monies held in the said account are sufficient to satisfy/settle the decretal sum claimed by the Decree Holder.
28. Other than the foregoing, learned counsel for the Garnishee has submitted that the Garnishee is ready and willing to release the monies claimed by the Decree Holder subject to an Order of the Court. Nevertheless, learned counsel for the Garnishee has also contended that the Garnishee shall be seeking its costs of KShs. 40,000/- only to be debited from the Judgement Debtor's account.

Issues for Determination

29. Having reviewed the two [2] Applications, namely, the Application dated 18th November 2024 and 20th November 2024, respectively, and the responses thereto and upon consideration of the written submissions filed on behalf of the parties, the following issues crystallise [emerge] and are worthy of determination.
 - i. Whether the Application dated 18th November 2024 is barred by the doctrine of res judicata and by extension Section 7 of the *Civil Procedure Act*.
 - ii. Whether the Application dated 18th November 2024 constitutes and amounts to an abuse of the due process of the court.
 - iii. Whether the Application dated 20th November 2024 is meritorious or otherwise.

Analysis and Determination

Issue No. 1

Whether the Application dated 18th November 2024 is barred by the doctrine of res judicata and by extension Section 7 of the *Civil Procedure Act*.

30. The Judgement Debtor herein had filed a previous Application dated 1st July 2024 and wherein the Judgement Debtor sought various reliefs. For ease of appreciation, the reliefs that were sought by the Judgement Debtor at the foot of the said Application are as hereunder.
 - i. That this Application be certified as urgent
 - ii. That this Honourable Court be pleased to stay the Garnishee Order Nisi granted on 20 June 2024 pending the hearing and determination of this Application.
 - iii. That this Honourable Court be pleased to set aside certificate of Taxation dated 23^o October 2023 and all consequential orders.
 - iv. That this Honourable Court be pleased to issue orders remitting the Bill of Costs back for taxation before the Deputy Registrar other than Hon. Vincent Kiplangat.



- v. That this Honourable Court be pleased to issue an order for cross examination of Mercy Kemboi, the court process server who swore the Affidavits of service. on a date to be determined by the court.
 - vi. That this Honourable Court be pleased to issue any other orders.
 - vii. That the costs of this application be provided for.
31. By the time the Judgement Debtor filed the Application dated 1st July 2024 and wherein same sought to impeach the Certificate of Taxation, the said Certificate of Taxation had long been adopted and constituted as the judgement of the court. Notably, the Certificate of Taxation was adopted as the judgement of the court vide ruling rendered on 6th May 2024.
 32. Furthermore, when the Judgement Debtor canvassed the Application dated 1st July 2024, various issues arose. In particular, there arose the question as to whether Certificate of Taxation was still in existence or otherwise. Besides, there was also the issue of the judgement which had been entered in terms of the Certificate of Taxation.
 33. Arising from the submissions by and on behalf of the parties, the Court addressed various legal issues. Suffice it to state that the court returned a verdict that the Application dated 1st July 2024 was incompetent and legally untenable, insofar as the Certificate of Taxation that was sought to be impeached had ceased to exist upon adoption of same as the judgement of the court.
 34. Other than the foregoing, the court also found and held that the Application dated 1st July 2024 had not sought to impeach the judgement which was entered on the basis of the certificate of taxation. In this regard, the court posited that to the extent that the judgement had not been impeached, the Application seeking to vary and set aside the Certificate of Taxation was premature and misconceived.
 35. Arising from the ruling of the court rendered on 7th November 2024, the Judgement Debtor has now returned to court and is seeking to impeach the judgement entered on the basis of the Certificate of Taxation. Quite clearly, the Judgement Debtor is seeking to have a second bite on the cherry while deploying the reasoning and findings of the court espoused at the foot of the Ruling delivered on 7th November 2024.
 36. To my mind, the issues that have been highlighted and adverted to at the foot of the current Application are issues that ought to have been canvassed by the Judgement Debtor in the course of canvassing the Application dated 1st July 2024. However, to the extent that the issues were neither captured nor canvassed by the Judgement Debtor, same cannot be canvassed at the foot of the current Application. In particular, the Judgement Debtor cannot be permitted to litigate by instalments. [See Order 3 Rule 4 of the Civil Procedure Rules 2010].
 37. Furthermore, it is not lost on this court that the issues being raised at the foot of the instant Application are constructively res judicata. In particular, they are issues that ought with diligence to have been canvassed at the foot of the previous Application and if same were not canvassed then same are prohibited by dint of Section 7 explanation 4 of the *Civil Procedure Act*.
 38. Without belabouring the foregoing exposition of the law, it suffices to cite and reference the decision in the case of Kenya Commercial Bank Limited v Benjoh Amalgamated Limited [2017] eKLR where the Court of Appeal highlighted and elaborated upon the doctrine of constructive res judicata.



39. For coherence, the court stated thus:

To our mind, there is no better case in which the Court ought to invoke the doctrine of constructive res judicata than in the present appeals. Constructive res judicata is broader and encompasses all the issues in a dispute which, a party employing due diligence ought to have raised for consideration. To allow Benjoh to relitigate, re-agitate and re-canvass any issues, no matter how crafted or the legal ingenuity and sophistry employed and in spite of the plethora of cases already conclusively determined by competent courts on the question of accounts, would be tantamount to throwing mud on the doctrine of res judicata and allow a travesty of justice to be committed to a party. The specific issue the respondent raises of rendering true and proper accounts to a customer's accounts, has been or could have been raised before the High Court in the previous suits.

40. Other than the foregoing, the tenor and legal implications of the doctrine of res judicata was also elaborated by the Supreme Court of Kenya in the case of John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment) where the court stated as hereunder:

59. That courts have to be vigilant against the drafting of pleadings in such manner as to obviate the res judicata principle was judicially remarked in *ET v Attorney-General & another*, [2012] eKLR, thus: The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of *Omondi v National Bank of Kenya Limited and others*, [2001] EA 177 the court held that, 'parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.' In that case the court quoted Kuloba J, in the case of *Njangu v Wambugu and another Nairobi HCCC No 2340 of 1991* (unreported) where he stated, 'If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face-lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.....'

41. Arising from the foregoing, my answer to issue number one (1) is twofold. Firstly, the issues/matters that are being agitated by the Judgement Debtor at the foot of the current Application are issues which ought to have been canvassed and addressed at the foot of the previous Application. Indeed, the issues beforehand belonged to that Application, if only Applicant had exercised due diligence.

42. Secondly, having failed to raise and agitate the issues beforehand in the previous Application, the issues cannot now be canvassed at this juncture. To this end, it suffices to underscore that the issues beforehand are caught up by the doctrine of constructive res judicata. [See section 7 of the [Civil Procedure Act](#), Chapter 21, Laws of Kenya].

Issue No. 2

Whether the Application dated 18th November 2024 constitutes and amounts to an abuse of the due process of the court.

43. Arising from the Application dated 1st July 2024, the court was called upon to craft and render a ruling. Indeed, the court crafted a ruling and wherein the court made several observations. For coherence, the pertinent observations which are relevant to issue beforehand are captured/highlighted



vide paragraphs 60-70 of the ruling rendered on 7th November 2024. For ease of appreciation, it suffices to reproduce the named paragraphs.

44. Same are reproduced as hereunder:

60. Nevertheless, it is not lost on this court that upon the issuance of the impugned certificate of taxation, the Respondent/Advocate proceeded to and filed an application seeking for the adoption of the certificate of taxation as judgment of the court. Instructively, the application for adoption of the certificate of costs as judgment was underpinned by the provisions of Section 51[2] of the *Advocates Act*, Chapter 16 Laws of Kenya.
61. Subsequently, the court proceeded to and rendered a ruling whereupon the certificate of taxation was adopted and constituted as a judgment of the court on the 6th May 2024. To this end, it then means that the certificate of taxation ceased to exist as an-independent item.
62. To my mind, the moment the certificate of taxation was adopted as a judgment of the court, same [certificate of taxation] was submerged in the judgment. In this regard, one can no longer talk about a certificate of taxation issued on the 23rd October 2023.
63. To underscore the foregoing exposition of the law, it suffices to cite and reference the holding in the case of *Vincent Chokaa t/a V. Chokaa & Co. Advocates v Local Authorities Provident Fund Board (Lapfund) (Miscellaneous Civil Application 36 of 2017)* [2020] KEHC 4908 (KLR) (11 March 2020) (Ruling), where the court found and held as hereunder;

It is at this point that the Client filed an application dated 15th May 2019 seeking inter alia to set aside the Certificate of Taxation dated 25th January 2019 and have the bill of costs taxed afresh. In a ruling dated 15th August 2019, Majanja J. made the following observations on that application;

“6. ... it is clear that the Client does not refer to or indeed challenge the judgment of this court entered against it on 18th February 2019. It appears both parties and indeed the court proceeded with the matter without regard to the judgment. A judgment constitutes a merger of all the issues in the proceedings and unless it is set aside, the court cannot permit a collateral attack on that judgment which is lawful and regular. I therefore find and hold that the application dated 15th May 2019 is incompetent and is therefore struck out.

Since both parties proceeded on a misapprehension of the proceedings, I make no order as to costs. I however direct the Client to file an application to set aside the judgment within twenty one (21) days from the date hereof ...

64. Other than the foregoing, I beg to underscore that the application beforehand has not seek to impugned and/or challenge the resultant judgment. Suffice it to point out that the judgment was entered in terms of Section 51[2] of the *Advocates Act*.
65. Furthermore, it is also not lost on this court that the entry of judgment in terms of the certificate of taxation concludes and terminates all issues pertaining to the question of costs. In any event, there is no provision under the *Advocates Act* which allows for the impeachment of the judgment entered in accordance with the certificate of taxation.



66. Be that as it may, it suffices to point out that the application beforehand has not touched on the judgment of the court. In this regard, no argument can therefore be entertained as pertains to the judgment.
 67. Arising from the foregoing, what becomes clear and apparent is that the Applicant is seeking to impugn and/or set aside a certificate of taxation which is non-existent in the eyes of the law. In this regard, the court is being treated to a charade.
 68. Quite clearly, upon the adoption of the certificate of taxation as judgment of the court, same [certificate of taxation can no longer be extricated from the judgment and thereafter be dealt with as an independent item.
 69. In my humble view, the application by and on behalf of the Applicant is tantamount to asking for one to extricate baking flour which has already been submerged in hot water and thereafter baked into a loaf of bread. Surely, it is not legally tenable.
 70. In view of the foregoing, my answer to issue number two is to the effect is that the application by the Applicant is not only misconceived and incompetent, but same is legally untenable. Instructively, the application seems to be asking the court to issue orders in vanity.
45. From the contents of the paragraphs [which have been reproduced hereinbefore], it is evident that the court engaged with and addressed pertinent issues including the fact that the Judgement Debtor had not sought to impeach the judgement entered on the basis of the Certificate of Taxation. In this regard, the court posited that the limb of the Application that sought to impugn the Certificate of Taxation was in vain.
 46. Additionally, it is also apparent that the court also addressed the perspective pertaining to and concerning whether a judgement entered pursuant to Section 51 (2) of the *Advocates Act* lends itself to review and/or variation ex post facto. Instructively, the court held that once such judgement is entered there is no provision that clothes the court with jurisdiction to revisit such a judgement.
 47. Be that as it may, the Judgement Debtor has now gathered intelligence, knowledge and wisdom from the various findings by the court and thereafter sought to return to court to have a second bite on the same issues. Quite clearly, the Judgement Debtor is seeking to use the findings of the court in an endeavour to better and escalate her case.
 48. To my mind, the endeavours by the Judgment Debtor [details highlighted elsewhere hereinbefore] constitute and amounts to an abuse of the due process of the court. Such endeavours must not be allowed to take root. On the contrary, the court ought to frown upon such conduct and to avert same.
 49. To underscore the import and tenor of what constitutes abuse of the due process of the court, it suffices to cite and reference the decision in the case of *Satya Bhama Gandhi v Director of Public Prosecutions & 3 others* [2018] eKLR where the court stated as hereunder:
 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]

24. In the words of Oputa J.SC (as he then was)[15] abuse of judicial process is:-

“A term generally applied to a proceeding which is wanting in bona fides and is frivolous vexations and oppressive. In his words abuse of process can also mean abuse of legal procedure or improper use of the legal process.”

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.”

26. It's settled law that a litigant has no right to pursue paripassu two processes which will have the same effect in two courts either at the same time or at different times with a view of obtaining victory in one of the process or in both. Litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks.

50. Furthermore, the court ventured forward and stated thus:



28. Multiplicity of actions on the same matter between the same parties even where there exist a right to bring the action is regarded as an abuse.[18] The abuse lies in the multiplicity and manner of the exercise of the right rather than exercise of right per se. The abuse consists in the intention, purpose and aim of person exercising the right, to harass, irritate, and annoy the adversary and interfere with the administration of justice.[19]I find no difficulty in concluding that this Judicial Review Application is based on similar grounds as the Petition referred to above.
51. The concept of abuse of the due process of the court was also espoused and elaborated by the Supreme Court of Kenya in the case of Rutongot Farm Ltd v Kenya Forest Service & 3 others (Petition 2 of 2016) [2018] KESC 27 (KLR) (19 September 2018) (Ruling) where the court stated as hereunder.
27. In Kenya Section of the International Commission of Jurists v Attorney General & 2 Others Criminal Appeal No. 1 of 2012; [2012]eKLR, this Court, on the issue of abuse of the process of the Court, held inter alia:“The concept of “abuse of the process of the Court” bears no fixed meaning, but has to do with the motives behind the guilty party’s actions; and with a perceived attempt to manoeuvre the Court’s jurisdiction in a manner incompatible with the goals of justice. The bottom line in a case of abuse of Court process is that, it “appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak to be beyond redemption...”Beyond that threshold, lies an unlimited range of conduct by a party that may more clearly point to an instance of abuse of Court process.”
52. In my humble view, the conduct of the Judgement Debtor in filing the instant Application after the previous Application was dismissed and in seeking to deploy the findings of the court vide the ruling rendered on 7th November 2024 constitutes an abuse of the due process of the court. [See also the holding in Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 others [2009] eKLR].

Issue No. 3

Whether the Application dated 20th November 2024 is meritorious or otherwise.

53. Other than the Application filed by the Judgement Debtor, it is imperative to state that the Decree Holder has also filed an application. For coherence the Application filed by the Decree Holder seeks an Order Absolute as pertains to the monies or such portion of the monies held by the Garnishee on account of the Judgement Debtor.
54. Suffice it to state that following the filing and service of the Garnishee proceedings, the Garnishee filed a Replying Affidavit sworn by one James King’au and wherein the deponent has confirmed that the account in question has sufficient funds to settle/liquidate the decretal sum [See paragraphs 5, 6 and 7 of the Replying Affidavit].
55. Additionally, the deponent of the Replying affidavit has ventured forward and clarified that the monies held in the account under reference are not subject to lien or privilege. In any event, the deponent has averred that the Garnishee is ready and willing to release such sums as the court may order and/or direct.
56. What I hear the Garnishee to be stating is to the effect that same [Garnishee] is ready and willing to comply with the orders/directions of the court towards disbursing the sum of KShs. 649,326.85 only being the amount claimed at the foot of the Garnishee Application.
57. To my mind, the Application by and on behalf of the Decree Holder is meritorious. Pertinently, the Decree Holder has been able to establish and demonstrate that the named account belongs to



the Judgement Debtor. Furthermore, it has also been shown that the account under reference holds sufficient funds to settle/liquidate the balance of the decretal sum.

58. Arising from the foregoing, I find no difficulty in confirming the Order Nisi. Consequently, the Order Nisi be and is hereby made absolute. To this end, the Garnishee be and is hereby ordered to release to an in favour of the Decree Holder the sum of KShs, 649,326.85 only plus the costs incurred in respect of the Application beforehand.

Final Disposition:

59. Flowing from the analysis [details highlighted in the body of the Ruling], it must have become crystal clear that the Judgement Debtor has not placed before the court any plausible and cogent reason to warrant the grant of the Application dated 18th November 2024.
60. On the contrary, the Decree Holder has demonstrated the requisite ingredients to warrant the grant of the Application dated 20th November 2024. In short, the Application by the Decree Holder is meritorious.
61. In the premises, the final orders of the court are as hereunder:
- i. The Application dated 18th November 2024; be and is hereby dismissed with costs.
 - ii. The costs in terms of clause (i) hereof are assessed and certified in the sum of KShs. 20,000/- Only.
 - iii. The costs in terms of clause (ii) herein are awarded to the Decree Holder only and shall be borne by the Judgement Debtor.
 - iv. The Application dated 20th November 2024 be and is hereby allowed.
 - v. There be and is hereby granted a Garnishee Order Absolute directed to and compelling the Garnishee [Oriental Commercial Bank] to remit to the Decree Holder/Advocate the sum of KShs. 649,326.85/- only towards settlement of the decretal sum.
 - vi. The costs of the Garnishee proceedings shall be borne by the Judgement Debtor.
 - vii. The costs of the Garnishee proceedings in favour of the Decree Holder are assessed and certified in the sum of KShs. 30,000/- only.
 - viii. The costs of the Garnishee proceedings in favour of the Garnishee are assessed and certified in the sum of KShs. 30,000/- only.
 - ix. The costs of the Applications [details in terms of the preceding paragraphs] shall be debited from the Judgement Debtor's account held with the Garnishee.
62. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF DECEMBER 2024

OGUTTU MBOYA,

JUDGE.

In the presence of:

Hilda – court Assistant.

Mr. Kiragu Wathuta for the Decree Holder/Advocate.



Miss. Kariuki holding brief for Mr. Gitonga for the Judgement Debtor/Client.

Mr. Mogire holding brief for Mr. Konosi for the Garnishee.

