



Republic v Director of Public Investigations & 2 others; Irungu (Exparte Applicant); Mwoliot (Interested Party) (Environment and Land Judicial Review Case 4 of 2022) [2023] KEELC 16646 (KLR) (29 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16646 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 4 OF 2022
FM NJOROGE, J
MARCH 29, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

THE DIRECTOR OF PUBLIC INVESTIGATIONS 1ST RESPONDENT

THE DIRECTORATE OF CRIMINAL INVESTIGATIONS NAKURU 2ND RESPONDENT

THE DIRECTORATE OF CRIMINAL INVESTIGATIONS 3RD RESPONDENT

AND

RAPHAEL MAINA IRUNGU EXPARTE APPLICANT

AND

HARON KIBOIWO MWOLIOT INTERESTED PARTY

JUDGMENT

1. The *ex parte* applicant filed a Notice of Motion dated 24/11/2022 filed on 28/12/2022 seeking the following orders:
 1. That an order of prohibition do issue restraining the respondents from instituting criminal proceedings against the *ex parte* applicant herein.
 2. That the costs herein be borne by the respondents.
2. The application is supported by the affidavit sworn by Raphael Maina Irungu the *ex parte* applicant herein where he deposed that on 13/03/2007 the interested party offered one Rosemary Muthoni



Kimakia title for land parcel No. Miti Mingi/Mbaruk Block 3/662 (Barut) the suit property as security for an advance of Kshs.98,000; that the interested party executed the transfer documents and it was agreed that the said advance was payable by 28/06/2007; that in the event of default by the interested party the suit property was deemed as forfeited and transferrable to any third party in recovery of the loan; that the interested party defaulted and Rosemary Muthoni Kimakia opted to sell and transfer the suit property to him; that on 26/11/2007 he bought the suit property from her at a consideration of Kshs.280,000; that he then took possession of the suit property and has since enjoyed quiet possession for the last 15 years; that he has since subdivided the suit property into 44 plots and disposed them off to third parties who have since settled and conducted permanent developments; that unable to recover the suit land, the interested party in cohorts with the Respondents has intimidated and harassed him threatening to arrest him on an alleged offence of fraud; that the intended arrest and prosecution is illegal, null and void as they are abusing the criminal justice system with an aim of forcing him to surrender his land through illegal means; that he is entitled to legal protection and unless the urgent orders are issued, he may be arrested any time.

Response

3. The interested party filed his replying affidavit dated 23/02/2023 on the same day sworn by Harun Kiboiwo Mwoliot the interested party herein. He deposed that as advised by his advocates which information he believed to be true that the application lacks merit as the same was brought in bad faith. He further deposed that he is the registered owner of the suit property and that he has never sold nor transferred the property to the ex parte applicant.
4. He also deposed that in the year 2020 the ex parte applicant and other fraudsters forged documents relating to the suit property and upon receipt of this information he reported the matter to the Directorate of Criminal Investigations. That they did their investigations and established that the ex parte applicant managed to transfer the suit property to his name without ever involving him in the sale.
5. The interested party deposed that the DCI Nakuru office has summoned the Ex parte Applicant several times in order for him to shed light on the matter but he has since been evasive. He added that the ex parte applicant has not demonstrated what loss he stands to suffer should the CID be allowed to proceed with their investigations in the matter. He also deposed that as advised by his advocates the court ought not usurp the constitutional mandate of the respondents to investigate any matter. He cited the case of *Republic v Chief Magistrate Milimani & another ex parte Tusker Mattresses Ltd & 3 others* [2013] eKLR.
6. The respondents did not file any response to the application.

Submissions

7. The ex parte applicant filed his submissions dated 7/03/2023 on 8/03/2023 where he gave a background of the case and identified one issue for determination: whether the ex parte applicant has demonstrated sufficient cause to warrant a grant of orders sought. He relied on the case of *Republic v Principal Kadhi, Mombasa ex parties Alibabi Adamali Dar & 2 others; Murtaza Turabali Patel (Interested Party)* [2022] eKLR. He urged this court to issue an order of prohibition against the respondents to save him from what is evidently a scheme to use government resources to harass and intimidate him into forfeiting his land.
8. He submitted that no evidence has been produced by the Respondents to show that they undertook any investigations or followed the laid down procedure. He added that he has never been charged with any offence and this court granting the said orders would subject the respondents to judicial scrutiny.



9. The ex parte applicant relied on section 7 of the *Limitation of Actions Act* and submitted that the suit is statute barred since 15 years have lapsed from the time the sale agreement was executed. He relied on article 157 (4) of the *Constitution* and submitted that the respondents without any mandate or complaint have continuously summoned, locked up and extorted him without a formal charge. He added that he fears for his life and liberty.
10. He cited the Supreme Court of Canada case in *Republic v Dakes* [1986] 1SCR and that of *Keroche Industries Ltd v Kenya Revenue Authority and 5 others* [2007] KLR 240 and submitted that arrests, detainment or investigations must be carried out within constitutionally permissible parameters.
11. He further cited the cases of *Kenya National Examination Council v Republic ex parte Geoffrey Gathenji Njoroge & 9 others* [1997] eKLR and *Director of Public Prosecutions v Martin Maina & 4 others* [2017] eKLR and urged this court to grant him the said order.

Analysis And Determination

12. This court has considered the Application, and the main issue for determination is whether the application is merited.
13. In the case of *Republic v national Land Commission & another ex-parte Farmers Choice Limited* (2020) eKLR the court held as follows:

“It is trite that judicial review is more concerned with the manner in which a decision is made than the merits of the decision. The court is concerned with the lawfulness of the process by which the decision is made. The grounds upon which an order of judicial review can issue include where the decision complained of is tainted with illegality, irrationality and procedural impropriety (where there is failure to act fairly on the part of the decision-making authority in the process of taking a decision) or where the rules of natural justice are not complied with. It may also be issued where the decision is made without or in excess of jurisdiction.” [Emphasis mine]
14. Further, in the Court of Appeal case of *Municipal Council of Mombasa v Republic & another* [2002] eKLR the court held as follows:

“Judicial review is concerned with the decision-making process, not with merits of the decision itself... The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision-maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself - such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review.”
15. The ex parte applicant in this matter is seeking for an order of prohibition restraining the respondents from instituting any criminal proceedings against him. He contends that he has been harassed and threatened by the Respondents who intend to arrest him on allegations of fraud. He further contends that in the event the said order is not granted he would be arrested anytime.



16. The interested party on the other hand stated that the DCI conducted their investigations and established that the ex parte applicant had managed to transfer the suit property to his name without ever involving him in the sale. He added that the ex parte applicant failed to demonstrate the loss he stands to suffer should the CID be allowed to proceed with their investigations in the matter.
17. The elementary principle of law is that he who alleges must prove the allegations. This is stipulated in section 107(1)(2) of the Evidence Act that provides that:
 - “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
18. Section 112 of the Evidence Act further provides that:

“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”
19. The court has perused the court record and it is a fact that there is no evidence of any decision from the DCI indicating that there has been any investigations being conducted touching on the ex parte applicant or the suit property.
20. This court cannot make a determination based on speculation but only where there is clear evidence a decision made or a process leading to the said decision in this case DCI, Nakuru. In the instant case, there is no evidence of any summons from the said office to demonstrate that they are investigating the applicant or that the 1st respondent intends to commence. I also find no evidence of any of the threats alleged by the applicant.
21. Having established that the ex parte applicant purely based the instant application on speculations, I find the entire application to have been brought prematurely and without such substance as would invite this Court to issue an order of prohibition.
22. In the upshot, I, therefore, find that the ex parte applicant has failed to demonstrate an arguable case to warrant a grant of the order of prohibition to restrain the respondents from instituting criminal proceedings against him.
23. In view of the foregoing the application dated 24/11/2022 is hereby dismissed.
24. Each party shall bear its own costs.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 29TH DAY OF MARCH 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

