



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARISSA**

**JUDICIAL REVIEW APPLICATION NO. 1 OF 2020**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW**

**ORDERS OCF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF CONTRAVENTION OF ARTICLES 20(1),**

**(2),21(1), 25(6), 27(1), (2), 47(1),(2), 50, & 165(6)**

**AND**

**IN THE MATTER OF THE FAIR AND ADMINISTRATIVE ACTION ACT (NO. 6 OF 2015)**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTIONS.....1<sup>ST</sup> RESPONDENT**

**PRINCIPAL MAGISTRATE'S COURT WAJI.....2<sup>ND</sup> RESPONDENT**

**IBRAHIM SHEIKH HUSSEIN.....1<sup>ST</sup> INTERESTED PARTY**

**ADAN SHEIKH HUSSEIN.....2<sup>ND</sup> INTERESTED PARTY**

**HABIBA MOHAMED.....EX-PARTE APPLICANT**

**JUDGEMENT**

1. On the 15<sup>th</sup> of July 2020, the *Ex parte* Applicant **Habiba Mohamed** moved the court by way of a Notice of Motion pursuant to Sections 8 & 9 of the Law Reform Act (Cap 26 of the Laws of Kenya) and Order 53 rules 3(1) & (3) of the Civil Procedure Rules having obtained leave of this court on the 1<sup>st</sup> of October 2020 to file and seek for judicial review orders of certiorari and prohibition.

2. The application seeks for orders of certiorari to remove into this Honourable Court and quash the decision, recommendations and/or directions of the Director of Public Prosecutions through the Principal Magistrate's Court at Wajir, to charge the *Ex-parte* Applicant in Criminal Case No.E009 of 2020 and the subsequent proceedings; an order of prohibition directed at the Director of Public Prosecutions prohibiting him from prosecuting or proceeding with the prosecution of the Applicant in Criminal Case No. E009 of 2020 at the Wajir Principal Magistrate's Court; an order prohibiting and directing the Principal Magistrate from proceeding or further proceeding with the hearing of the criminal charges preferred against the *Ex-parte* Applicant in Criminal Case No. E009 of 2020 and costs of the suit.

3. The grounds of the application are that the charges levelled against the *Ex- parte* applicant are as a result of a complaint by the 1<sup>st</sup> and 2<sup>nd</sup> interested parties that the *Ex-parte* Applicant illegally occupies their late father's land yet there is an ownership dispute between the *Ex-parte* Applicant and the interested parties which is subject of a civil suit at the Environmental and Land Court being Case No. 4 of 2020 at the

same court wherein the Interested Parties seek *inter alia* for an eviction order and a permanent injunction restraining the *Ex-parte* Applicant from dealing with the said land and a declaration that she is a trespasser.

And that the action of the 1st Respondent is not genuine and is a gross abuse of the court process.

4. The motion was objected to by the Respondents and the Interested Parties. The 1<sup>st</sup> Respondent filed a replying affidavit that was sworn by one P.C Samuel Kegege of the Kenya Police who is attached to the DCI Office in Wajir East. He informed the court that he is an investigating officer in Wajir Criminal Case No. E009 of 2020 where the 1<sup>st</sup> Interested Party is the complainant and that his investigations revealed that the land subject matter belongs to Sheikh Hussein Ali the father of the Interested Parties and that the *Ex-parte* Applicant was unable to produce any document in support of her claim though she has occupied the premises and erected a perimeter wall therein, further he deponed that the charges against the *Ex-parte* Applicant were approved by the office of the Director of Public prosecution.

5. On its part the 2<sup>nd</sup> Respondent filed grounds of opposition stating that the application is an abuse of court process, intended to curtail the statutory duties of the Respondents; the *Ex-parte* Applicant will have an opportunity to defend herself before the court and/or make explanations' before the 2<sup>nd</sup> Respondent, and that no demonstration of prejudice to be suffered has been placed before court.

6. The 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties filed a replying affidavit dated 25<sup>th</sup> November 2020, as the Administrator of the estate of Sheikh Hussein Ali; their father who they allege was allocated Plot No. R 1199 measuring 50ft x 100ft and located near KPLC Office in Wajir township Got-Ade Location/Ward in 1982 and reviewed on 22<sup>nd</sup> June 2010. Further that they have been paying land rent since 1982 to date.

7. It is their further assertion that the *Ex-parte* Applicant without any justification trespassed onto the said land having been so allowed by the Town Clerk of Wajir County Council and following the said occupation Aden Sheikh the 2<sup>nd</sup> Interested Party complaint to the PS Ministry of Local Government and the 1<sup>st</sup> Interested Party complaint to the Commission of Administrative Justice "the Office of the Ombudsman" who required the County Secretary of Wajir County to investigate the matter, and which investigations were done confirming allocation to their deceased father. As a result of the said investigations, the said commission advised them to seek eviction of the *Ex-parte* Applicant through a court order. Further the 2<sup>nd</sup> Interested Party lodged a case at the Lands Tribunal Committee in Civil Case No. 5 of 2015 which case was in their favour.

8. Further despite all the above the *Ex-parte* Applicant is in the process of developing the said property, she has brought building materials to the premises all on a bid to defeat justice and they are likely to lose their family property.

9. The hearing of the substantive motion was by way of written submissions that may be summarized as follows; -

#### **EX-PARTE APPLICANTS' SUBMISSIONS**

The *Ex-parte* Applicant is the accused in Criminal Case No. E009 of 2020 at the Principal Magistrate Court in Wajir following a complaint filed by the 1<sup>st</sup> and 2<sup>nd</sup> Interested Party alleging illegal occupation by the *Ex-parte* Applicant of their late father's land.

It is the *Ex-parte* Applicant's case that the property she is in occupation of belonged to her late husband who was allocated the said land in 1982.

Further the 1<sup>st</sup> and 2<sup>nd</sup> Applicants filed a civil suit on the 27<sup>th</sup> of April 2020 being ELC Case No. 4 of 2020 where *inter alia* they sought for eviction orders and a permanent injunction against the *Ex-parte* Applicant and a declaration that she is a trespasser.

The dispute between the *Ex-parte* Applicant and the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties is purely that of ownership of the land subject matter. And at the very initial stage the trial court in the Land and Environmental matter declined to issue a temporary injunction as no prima facie case was established, and therefore, the charge against the *Ex-parte* Applicant is an attempt to criminalize the dispute a demonstration that the 1<sup>st</sup> Respondent is being used to enforce an illegality.

Reliance was made on **Republic vs Inspector General of Police & 2 Others :Patrick Gitonga Harun & Another [2020] eKLR.**

Further it was submitted that the investigating officer failed to interrogate the *Ex-parte* Applicant in the course of investigations in order to obtain information from her. In this regard reference was made to the case of **Philomena Mbete Mwilu vs D.P.P & 3 Others, Stanley Muluvi Kiima & ICJ [2019] eKLR.**

Further counsel submitted that investigations ought to be fair, made in good faith and not intended to achieve an ulterior motive. In support reliance was made on the case of **Republic vs D.P.P. & 2 Others Ex-parte Nyaboga Mariaria [2014] eKLR, Republic vs Chief Magistrate Court at Mombasa Ex-parte Ganjee & Another [2002] eKLR, Vincent Kibiego Saina vs Attorney General HCMisc Application No. 839 of 1999 & Rosemary Wanja Mwagiru & 2 Others vs A.G & 3 Others [2013] eKLR.**

#### **1<sup>ST</sup> RESPONDENT'S SUBMISSIONS**

Investigations done revealed that the property belongs to the father of the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties yet the *Ex-parte* Applicant failed to produce document to support her claim.

That though there are both civil and criminal proceedings relating to the same matter, civil proceedings cannot be a ground for any stay,

prohibition or delay of criminal proceedings as the criminal proceedings were instituted pursuant to Section 193A of the Criminal Procedure Code. Reliance was made to **Republic vs Inspector General of the National Police & Another, Exparte Beatrice Hilda Omunia, Peter Chege & 2 Others [2019] eKLR, Charles Mbugua Njuguna vs D.P.P. & 4 Others [2020] eKLR, Diamond Hasham Lalji & Another vs A.G & 4 Others [2018] eKLR, George Joshua Okungu & Another vs The Chief Magistrate Court, Nairobi & Another [2014] eKLR, Republic vs Monopolies & Mergers Commission Exparte Argyll Group Plc [1986] 763 and Re Birac International SA (Bureau Venters) [2005] 2 EA 43.**

## **1<sup>ST</sup> AND 2<sup>ND</sup> INTERESTED PARTIES SUBMISSIONS**

It was submitted that concurrent civil and criminal proceedings are both permissible under Section 193 of the Criminal Procedure Code. Reference was made to **Republic vs Inspector General of National Police Service & Another Ex-parte Beatrice Hilda Omunia & Another** (Supra) and **Charles Mbugua Njuguna vs D.P.P.** (Supra). Further it was urged that Article 157 of the Constitution & Section 4 of the Office of the Director of Public Prosecution Act

(No. 2 of 2013) places the powers to prefer criminal charges on the Director of Public Prosecution and the case is properly before the court.

### **Analysis and Determination**

10. Having considered the pleadings, and submissions by the parties, the court forms the opinion that the issues for determination are;

**(a) Whether the issue between parties relate to the ownership of property.**

**(b) Whether the matter can reasonably and fairly be subject of both criminal and civil litigation.**

**(c) Whether the issue was investigated fairly , proportionately and whether the action of preferring criminal charges against the Ex-parte Applicant was reasonable and fair.**

11. Both parties in their submissions do allude to the fact that the dispute between them is over ownership of land which both parties claim to have been allocated to them by the local government. The *Ex-parte* Applicant claims the land she is in possession of was allocated to her deceased husband in 1982 whereas the Interested Parties claim that the land was allocated to their father in the same year and they have since been paying yearly rent.

12. This court for now is not charged with the duty of deciding ownership of the land but rather, whether the administrating action of the 1<sup>st</sup> Respondent was fair, just and reasonable.

13. Notable is that both parties have allotment letters.

**(I) That allotment letter of the Ex-parte Applicant refers to Plot No. 1280 measuring 50ft x 100ft in Wajir Got-Adeward/location near KPLC and is dated 8<sup>th</sup> September 2010. It states that the plot was allocated in a meeting of the Town planning Market & Works committee in 1982**

**(II) A letter from the County Government of Wajir dated 3<sup>rd</sup> September 2019 confirms that Plot D26 is in dispute and the office is unable to ascertain the rightful owner of the said plot. The signatory of the letter is County Land Surveyor of Wajir County.**

**(III) The Interested Parties' letter of allotment is dated 22<sup>nd</sup> June 2010 refers to Plot No. 1199 measuring 50ft x 100ft of Wajir township at Got-Ade ward/location and refers to the same committee's allocation in 1983**

**The interested parties have land rent receipts, though the receipts bear the Plot Number the same is not in the body of the receipt and the authenticity of the said number is questionable.**

**(IV) A letter from the County Secretary Wajir County dated 21<sup>st</sup> September 2015 states that investigations indicated the Plot No. 1199 was allocated to Hussein Ali in 1983 and registered in his name.**

**(V) A letter dated 22<sup>nd</sup> August 2019 from the Commission of Administrative Justice seem to state that the Interested Parties allege that the then Town Clerk related to the Ex-parte Applicant gave her the allocation.**

14. The questions that linger in the court's mind is whether Plot No. 1280, Plot No. 1199 and Plot No. D26 are one and the same? whether this is a case of double allocation and how did the *Ex-parte* Applicant gain possession? The said issues/questions are not clear nor answered from the evidence so far placed before court.

15. Clearly, therefore, from the proceedings, averments and documents before the court there is need to investigate this matter further to establish details of the suit premises and the process of allotment before one can ascertain ownership and if there is a criminal element in the issue.

16. It is also not in dispute that **Article 157 of the Constitution** bestows the power to prosecute of criminal matters on the Director of Public Prosecution.

Article 157 (10) of the Constitution states

**“The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.”**

Article 157 (11) further states

**“In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of legal process (emphasize added)”.**

17. In as much as the Director of Public Prosecutions has power without regard to any one control of any authority, the powers are fettered by the same Constitution, It obligates him to have consideration of public interest, interest of the administration of justice and he must prevent abuse of legal process. The power is not absolute!

In the case of Republic vs Inspector General of National Police & 2 Others [2020] eKLR the court stated *inter alia*

**“31. The above means that the powers conferred to prosecute by the Office of the Director of Public Prosecution are not absolute because they must be exercised in the manner provided above. This also means that any person charged with a criminal offence is actually at liberty to challenge the basis of his/her prosecution if he/she has reason to demonstrate that his/her prosecution is not driven by public interest or is in the interest of justice. The exercise of power to prosecute by the Director of Public Prosecutions is therefore amenable to judicial review proceedings or any other redress provided by the Constitution or statute.”**

18. Reference to this court is therefore within the law and the court cannot be said to be interfering with the legal mandate of the Director of Public Prosecutions but checking on the action of the Director of Public Prosecution in accordance with **Article 157(11)**.

19. Indeed, all parties do admit that there is a civil matter in the same Principal Magistrate’s Court. The civil case took precedence. From the documents before court there are outstanding issues that need to be interrogated, the so called investigation appear inconclusive and not balanced.

In Philomena Mbeti Mwilu vs D.P.P & 3 Others [2019] eKLR the court stated *inter alia*,

**“314. With regard to the process or manner of the conduct of investigations, the court in Josephat Koli Nanok & Another vs Ethics & Anti-Corruption Commission (supra) went on to consider what an investigation process might entail. It stated that the person subject of the investigation would be entitled to fair administrative action, so that before a decision is taken for the prosecution of the suspect, the investigative agency must observe that person’s rights by granting him or her the opportunity to respond to the allegation. It was observed that there would be as a matter of course, a preliminary inquiry, conducted internally, before the formal investigations, and that it should be at the formal investigation stage that the suspect is entitled to be heard.**

**315. ...The principle complaint is that they were not heard in the course of the investigations, if at all any. investigations were conducted, and that the decision to prosecute them was arrived at before they were afforded a fair hearing.....”**

20. This court has earlier alluded to outstanding questions. It appears clearly that the outstanding issues are more of a civil nature as opposed to criminal nature and this does not only point to the fact that investigations were one sided, incomplete, there is also a complaint by the *Ex parte* Applicant that she was not interrogated on the issue.

21. The issue of land ownership is purely a civil question and more so where each party has an allotment letter on the alleged piece of land and from the same authority.

In Republic vs Chief Magistrate at Mombasa Exparte Ganijee & Another [2002] eKLR 703 the court stated

**“So, it is not the purpose of a criminal investigation or a criminal charge or prosecution, to help individuals in the advancement or frustration of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other and ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest.....”**

22. From the facts of this case the interested parties went to the commission on the administrative justice whose preliminary findings favoured them and they were advised to go to a civil court to seek for eviction orders, which they did. They sought for temporary orders of injunction restraining the *Ex-parte* Applicant from developing, interfering or dealing with the property. The court on the 14<sup>th</sup> of September 2020-maintained *status quo* as it held that at the preliminary stage it could not make a determination on ownership.

The *Ex-parte* Applicant was charged with the offence on 9<sup>th</sup> September, 2020.

23. In Rosemary Wanja Mwangiru & 2 Others vs A.G & 3 Others [2013] eKLR the court stated inter alia

**“.....The timing of the criminal cases appears to be putting unlawful pressure on the Applicants to give in to the demands of the Interested Party.”**

**The powers to prosecute the Applicants in the criminal cases were not used responsibly or properly. These powers are being used oppressively. There is disproportionate and excessive litigation over the same thing by essentially the same actors.**

**The ‘Interested Party’ is taking his civil dispute to the police within a pinch of criminality attached to it, acted in bad faith, and this is not a bona fide employment of the law. The prosecution is abusing the process of the court and is undermining the civil process.....”**

In Loyford Kaburu Joseph vs Director of Public Prosecution & 3 Others [2016] eKLR the court stated

**“In my view, the civil litigation process also exists to provide effective remedies to disputants especially on issues of ownership of land and where such process has been initiated by the private person themselves, the police and the Director of Public Prosecutions have no business to interfere and purport to process charges against the offending parties. Such a conduct is what subjects the tax payers to unwarranted costs of paying for damages in malicious prosecution claims and which can be avoided.”**

24. A case may fall under both criminal and civil process and the law as alluded to by the Respondents and the Interested Party permits the same. However, a matter of ownership of land is a purely civil issue. In this instance the matter is already before a civil court yet to be determined. The documents placed before the court are not conclusive meaning that the legal question must be adjudicated upon in the proper forum which is the Environmental & Land Court. Why would the 1<sup>st</sup> Respondent be quick to arrive at a decision? Why would he interfere with a legal process already ongoing? Is the action reasonable and fair? This court thinks not. The powers of the Director of Public Prosecutions in this instance have been used oppressively and disproportionately calling upon this court to check the action by way of judicial review.

25. This court based on the above finding allows the application and grants orders as follows

**a. An order of certiorari be and is hereby issued to quash the decision of the Director of Public Prosecutions through the 2<sup>nd</sup> Respondent to charge the Exparte Applicants in Wajir Principal Magistrate’s Court Case No. E009 of 2020 and the subsequent proceedings.**

**b. An order of prohibition be and is hereby issued at the Director of Public Prosecutions from prosecuting and proceeding with the prosecution of the *Ex parte* Applicant in Wajir Principal Magistrate’s Court Criminal Case No. E009 of 2020.**

**c. An order of prohibition be and is hereby issued prohibiting the Principal Magistrate Court Wajir from proceeding with hearing and determining Criminal Case No. E009 of 2020.**

**d. Costs of the suit to the *Ex-parte* Applicant, the same to be borne by the 1<sup>st</sup> and the 2<sup>nd</sup> Interested Parties.**

DATED, DELIVERED AND SIGNED AT GARISSA THIS 27<sup>th</sup> DAY OF JANUARY 2022.

.....

ALI-ARONI

JUDGE