



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAHURURU**

**MISC. CIVIL APPLICATION NO. E014 OF 2021**

**IN THE MATTER OF AN APPLICATION BY HARUN CHEMJOR CHEPKEITANY**

**FOR LEAVE TO APPLY FOR AN ORDER OF PROHIBITION & CERTIORARI**

**-AND-**

**IN THE MATTER OF NYAHURURU CHIEF MAGISTRATE'S COURT**

**CRIMINAL CASE NUMBER 1722 OF 2016**

**PIUS MBUGUA NGUGI.....INTENDED INTERESTED PARTY/APPLICANT**

**-AND-**

**HARUN CHEMJOR CHEPKEITANY.....EX-PARTE APPLICANT**

**RULING**

1. By a notice of motion dated 24<sup>th</sup> August, 2021 the Applicant seeks to be enjoined as a party in the High Court Judicial Review Application.
2. The same is based on provisions of *Order 1 Rule 10(2) and Order 51 Rule 1 of the Civil Procedure Rules 2010 and Sections 1(A), 1(B), 3A and 63 Civil Procedure Act Cap 22 Laws of Kenya.*
3. It is supported by grounds on the face of the motion:
  - i. That if the intended Interested Party herein is not enjoined at the earlier, hearing and determination of this Judicial Review claim will be determined without his material contribution as a victim and the State's witness in the criminal trial the subject of the orders sought herein.
  - ii. That the Intended Interested Party herein is the sole legal owner of the suit land L.R. 10762 (IR. NO. 18060) and LR. 8437 (IR. NO. 10710) which is the subject matter in the criminal claim sought to be stopped herein, Nyahururu CMCR No. 1722 of 2016.
  - iii. That the Applicant in the Judicial Review claim was charged with fraudulently causing illegal registrations as against the subject parcels after they were duly registered in the name of the Interested Party and despite subsequent existing court orders in various claim also involving the subject parcel.
  - iv. That the fraudulent acts followed an illegal issuance of a provisional title that is the subject matter of the proceedings in Nyahururu CMCR No. 1722 of 2016, and that the intended Interested Party risks losing the suit land with a value close that is close to a Billion Kenya Shillings.
  - v. That the Intended Interested Party being the victim in the above stated Criminal Case No. 1722 of 2016, has a right to be heard on this matter since it affects his right in the above stated suit.
  - vi. That the Intended Interested Party seeks to bring out information that may be important and relevant to assist this Honorable Court to arrive at a just disposition of this mater and his participation will not occasion any prejudice to any

party herein.

4. The application is also supported by affidavit of Applicant sworn on 24<sup>th</sup> August, 2021 and his further affidavit sworn on 2<sup>nd</sup> November, 2021.
5. The Ex-Parte/Respondent opposes same and has filed a replying affidavit sworn on 4<sup>th</sup> October, 2021.
6. The parties agreed to canvass the application via submissions which they filed and exchanged.
7. The ODPP supported the position taken by Intended Interested Party Applicant and thus did not file submissions.

**APPLICANT'S CAS AND SUBMISSIONS:**

8. The Intended Interested Party has a distinct and verifiable stake in these proceedings by virtue of being the sole legal owner of the parcels of land known as ***L.R. 10762 (IR No. 18060) and L.R. 8437 (IR No. 10710)*** that form the basis of the criminal case that the Ex-Parte Applicant intends to quash through these judicial review proceedings.
9. As it may become apparent to the court, the genesis of the ***Cr. Case No. 1722 of 2016 Republic v Harun Chemjor Chepkeitany*** relates to activities undertaken by the Ex-Parte Applicant between the year 1991 and 2016, and it may be useful to the court to set out these events for the sake of the court understanding the Intended Interested Party's place in this protracted conflict.
10. The suit parcels of land known as ***L.R. 10762 (IR No. 18060) and L.R. 8437 (IR No. 10710)*** were the property of a company known as Ukingoni Farm Limited following a title issued in its name on 10<sup>th</sup> September, 195. Notably, the company had two shareholders namely Joseph Leitmann and Noel Colbert. The suit property was charged by Land and Agricultural Bank of Kenya from the onset that is to say 10<sup>th</sup> September, 1995 and thereafter to Agricultural Finance Corporation and several debentures created thereto. Resultantly, the titles to the suit parcels were largely held by the various financial institutions as lien.
11. In the course of time, the Ex-parte Applicant became an employee of the said Ukingoni Farm Limited. On or about the 31<sup>st</sup> of May, 1991, the Ex-parte Applicant capriciously and fraudulently applied for a provisional certificate of title for the suit property under the guise that he was the secretary of the said company, Ukingoni Farm Limited, and that the titles in question had been lost. Pursuant to the affidavit of the Ex-parte Applicant deposed on 31<sup>st</sup> May, 1991 in support of his application for provisional certificate of title, the Chief Lands Registrar issued provisional titles dated 17<sup>th</sup> August, 1991.
12. On or about the year 1994 vide Civil Case 71 of 1994 Ukingoni Farm Limited instituted a case against another company, Ngendalei Koiyo Farm Limited who at the time were claiming ownership of the suit properties. The matter was ruled in favour of the Ukingoni Farm Limited by Justice Martha Koome on 13<sup>th</sup> October, 2006. The other notable outcome of the case was that the original title of the suit parcels came to the fore.
13. During the subsistence of the hearing of that suit, the Ex-parte Applicant participated in the proceedings as a witness of the Ukingoni Farm Limited. In the course of the proceedings, oral evidence was adduced by one of the shareholders of the Defendant company, Ngendalei Koiyo Farm Limited, one Edward Cherutich Kiptanui on or about April 2006 wherein he produced the original titles to the suit parcels as exhibits in support of their case.
14. The point here is that it suffices to say that from 2006 the Ex-parte Applicant was well aware and privy to the fact that the original titles of the suit parcels, which he falsely deposed were lost back in 1991, were in the custody of the court as they had been produced as exhibits.
15. Having been privy to this new information, then the Ex-parte Applicant ought to have taken remedial measures so that the provisional certificates of title in his possession were cancelled: this was never done.
16. Noteworthy, Joseph Leitmann, one of the shareholders of Ukingoni Farm Limited, had married one Lucy Wanjiku Leitmann back in 1995. Joseph died on 3<sup>rd</sup> August, 2001. Subsequently, the said Lucy Leitmann undertook succession proceedings and ultimately received a certificate of confirmation of grant of 2007.
17. On the strength of this, and also being the director of Ukingoni Farm Limited, she was able to get custody of the original titles of the suit parcels which had been held by the court.
18. The Intended Interested Party came into the picture in 2016 when he purchased the suit parcels from Ukingoni Farm Limited. The transfer of land was executed on 22<sup>nd</sup> April, 2016, and upon completion of the transaction, he received the original titles from the company for purposes of registered the transfer. Upon lodging the transfer in the lands registry, he became aware of the provisional titles that had been issued. He received assurance from the Registrar that the provisional certificates would be cancelled since the original had been presented to the registry.
19. Fast forward to 30<sup>th</sup> October, 2017, the Intended Interested Party realized that his title had been cancelled and reverted back to the Republic of Kenya for conversion and consideration for sub-division.
20. He later came to know that a meeting was convened by the registrar in 19<sup>th</sup> June, 2017 where one of the participants was the Ex-parte Applicant, who purported to be a director of Ukingoni Farm Limited.

21. The result of the meeting was the cancellation of my title. Suffice to say, the Intended Interested Party has strenuously challenged this case in an ongoing case, *Nakuru ELC No. 72 of 2018*, in which the Ex-parte Applicant is a Defendant.

22. The *Nyahururu Criminal Case No. 1172 of 2016* is relevant to the Intended Interested Party because at the heart of it is the issue of the directorship of the vendor company, Ukingoni Farm Limited, which sold the suit parcels to the Intended Interested Party, which titles were later cancelled and the decision is subject to litigation.

23. Particularly, the criminal case will help shed light on whether Mr. Harun Chemjor, the Ex-parte Applicant, has been a genuine official of the vendor company from way back in 1991 when he swore the affidavit for lost titles of the suit parcels.

24. Of course, if the court in *Nyahururu Cr. Case No. 1172 of 2016* finds that the Ex-parte Applicant acted fraudulently in swearing the affidavit, purportedly for the company when he had no capacity to do so, then equally, the meeting convened by the Land Registrar on 19<sup>th</sup> June, 2017 in which the Ex-parte Applicant posed as a director of the company and caused the cancellation of the Intended Interested Party's purity of title over the suit parcels depends on the outcome of the criminal case. In this way, the Intended Interested Party has a personal interest in the judicial review proceedings so far as they aim at quashing the *Nyahururu Criminal Case No. 1172 of 2016*.

#### **RESPONDENT/EX-PARTE APPLICANT'S CASE:**

25. The current proceedings were instituted with the intention of prohibiting taking of further proceedings in *Nyahururu CMC Cr. 1722 of 2016*. The charge sheet in the said criminal case is annexed as Ex-parte Applicant's annexure **HCC/14'**.

26. It is evident from the said charge sheet that the Ex-parte Applicant is facing charges of conspiracy to defraud Ukingoni Farm Ltd by falsely pretending to be director of the company and thus obtained provisional certificate of titles for *L.R. 10762 I.R. 18060 and L.R. 8437 I.R. 10710* by purporting the original titles were stolen, a fact he knew to be false. The Ex-parte Applicant is also facing a charge of obtaining registration by willfully procuring for Ukingoni Farm Ltd a provisional certificate of title for *L.R. 10762 I.R. 18060 and L.R. 8437 I.R. 10710*. The 5<sup>th</sup> count is for making document in that he unlawfully and without authority or excuse made annual returns for Ukingoni Farm Ltd purporting to be genuine document prepared and signed by African Registrars a fact he knew to be false.

27. The above offences are alleged to have occurred on 17<sup>th</sup> September, 1991 for Count I to IV and on 8<sup>th</sup> September, 1992 for Count V. It is evident from the said charges that the Complainant is either Ukingoni Farm Limited or African Registrars. The charge sheet has also listed the possible witnesses to be called as prosecution witnesses, and it is evident that the Applicant is not one of them.

28. The Applicant has not demonstrated his possible participation in the said proceedings. It is the Applicant's case that he purchased the said two parcels of land in the year 2016. By the time of the said committed. The charges that the Ex-parte Applicant is facing date back to the 1990s. The Applicant has not demonstrated the interests he had over the two properties on 17<sup>th</sup> September, 1991 and 8<sup>th</sup> September, 1992 when the alleged offences were committed.

#### **EXPARTE APPLICANT /RESPONDENT SUBMISSIONS:**

29. It is submitted that, the issue is whether the Applicant has met the well settled principles that would qualify him to be an Interested Party in the current proceedings.

30. The first handle that the Applicant should demonstrate is whether he has a stake or identifiable interest in the current proceedings. It is upon the Applicant to demonstrate the identifiable stake that he had over the two parcels of land when the alleged offences that are subject of the current judicial review were committed. The Ex-parte Applicant has not been charged with any offences committed after the Applicant purportedly acquired interest over the said two parcels of land.

31. The Applicant was neither a director nor a member of Ukingoni Farm Ltd when the alleged offences were committed, and that explains the reason why he has not been lined up as a witness in *Nyahururu CMC Cr. 1722 of 2016*.

32. In view of the foregoing, it is evident that the only interest that the Applicant can perceive to have acquired came into existence after he allegedly purchased the said parcels of land in 2016. The Applicant thus lacks the locus to comment on any issues that might have occurred prior to his perceived purchase.

33. It is contended that, the main issues in the current proceedings and by extension the *Nyahururu CMC Cr. 1722 of 2016*, concern incidents that happened before the Applicant came into the picture. He thus has no input to either the current proceedings or the *Nyahururu CMC Cr. 1722 of 2016*.

34. The Applicant does not have anything relevant to add in the current proceedings. In addition, the issues that the Applicant has raised are a replica of what the Respondents in the current suit has relied on their reply to the Ex-parte Applicant's two pending application, that is, the leave Application and the substantive application.

35. Respondent seeks reliance on case of *Raila Odinga & Another v I.E.B.C & Others & Michael Wainaina Mwaura [2017] eKLR*, where the Supreme Court held:

**“Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before court.”**

36. It is submitted that, the drafters of the charge sheet in Nyahururu CMC Cr. 1722 of 2016 have specifically given the identity of the Complainants, that is, Ukingoni Farm Ltd and African Registrars. The Applicant herein has not been listed as a Complainant owing to the fact that when the alleged offences were committed, he did not have any stake or interests over the said parcels of land. He thus has no knowledge of what happened on the alleged dates.

37. It is further submitted that Counts I to IV place Ukingoni Farm Ltd as the Complainant. It is not within the scope of the proceedings in Nyahururu CMC Cr. 1722 of 2016 for the trial court to determine the issue of identity of the directors of Ukingoni Farm Ltd at the material time of the alleged offences.

38. The Ex-parte Applicant is not facing any specific charge of him having presented himself as the director of Ukingoni Farm Ltd. The Ex-parte Applicant is answering charges of him having procured provisional certificates of titles when he knew that the original certificates of titles were not lost.

39. The key issue for determination before the criminal court is whether there was justification on the part of the Ex-parte Applicant to obtain provisional certificates of titles. It will not be within the scope of the said criminal proceedings for the court to make a determination as to whether the Ex-parte Applicant was a director or not.

40. It is contended that, the current status on ownership of the said parcels of land is that the Applicant was deregistered as the proprietor. Unless the said deregistration is reversed, the legal position is that the Applicant does not have any interest over the two parcels of land.

41. The said deregistration of the Applicant reverted the said parcels of land to Ukingoni Farm Ltd, which later surrendered the two titles for sub division and eventually new title deeds were issued to the members of the company.

42. Thus it is argued that, the person who can claim to have interests over the said parcels of land is Ukingoni Farm Ltd and the current registered proprietors of the sub-divisions that came out of the sub-division of the said two parcels of land.

43. The Applicant does not fall under any of the two categories, and as such he does not have any basis in agitating a cause with regard to the two parcels of land.

44. The relief sought by the prosecution in the criminal proceedings is conviction of the Ex-parte Applicant for the various counts that he is facing. It is thus evident that the Applicant will not in any way be affected by such a determination. Reliance is made on the case of Raila Odinga & Another v I.E.B.C. & 2 Others & Michael Wainaina Mwaura [2017] eKLR. Also cited is the case of Habiba W. Ramadhan & 7 Others v Mary Njeri Gitiba [2017] eKLR.

#### **ISSUES, ANALYSIS AND DETERMINATION:**

45. After going through the application, affidavits in support and opposition plus parties' submissions, I find the issues are ***whether the threshold of joinder has been demonstrated? What is the order as to costs?***

46. The core issue is whether the Applicant has met the threshold of well settled principles that would qualify him to be an Interested Party in the current proceedings.

47. In Habiba W. Ramadhan & 7 Others v Mary Njeri Gitiba [2017] eKLR, the Court held:

**“Further in the case of Housing Finance Company of Kenya Ltd v Faith Kimelia & Another, Civil Appeal No. 214 of 1996 the held that:**

**“Order 1 rule 10 of the Civil Procedure Rules provide for the addition of a party to a suit so that his presence before the court may enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit to enable the court to determine the real matters in dispute.”**

48. Thus first the Applicant should demonstrate whether he has a stake or identifiable interest in the current proceedings.

49. The current proceedings were instituted with the intention of prohibiting taking of further proceedings in Nyahururu CMC Cr. 1722 of 2016.

50. It is evident from the charge sheet in above criminal case that the Ex-parte Applicant is facing charges of conspiracy to defraud Ukingoni Farm Ltd by falsely pretending to be director of the company and thus obtained provisional certificate of titles for L.R. 10762 I.R. 18060 and L.R. 8437 I.R. 10710 by purporting the original titles were stolen, a fact he knew to be false.

51. The Ex-parte Applicant is also facing a charge of obtaining registration by willfully procuring for Ukingoni Farm Ltd a provisional certificate of title for L.R. 10762 I.R. 18060 and L.R. 8437 I.R. 10710. The 5<sup>th</sup> count is for making document in that he unlawfully and without authority or excuse made annual returns for Ukingoni Farm Ltd purporting to be genuine document prepared and signed by African Registrars a fact he knew to be false.

52. The above offences are alleged to have occurred on 17<sup>th</sup> September, 1991 for Count I to IV and on 8<sup>th</sup> September, 1992 for Count V. it is evident from the said charges that the Complainant is either Ukingoni Farm Limited or African Registrars. The charge sheet has also listed

the possible witnesses to be called as prosecution witnesses, and it is evident that the Applicant is not one of them.

53. The Applicant has not demonstrated his possible participation in the said proceedings. It is the Applicant's case that he purchased the said two parcels of land in the year 2016. By the time of the said committed. The charges that the Ex-parte Applicant is facing date back to the 1990s. The Applicant has not demonstrated the interests he had over the two properties on 17<sup>th</sup> September, 1991 and 8<sup>th</sup> September, 1992 when the alleged offences were committed.

54. It is upon the Applicant to demonstrate the identifiable stake that he had over the two parcels of land when the alleged offences that are subject of the current judicial review were committed. The Ex-parte Applicant has not been charged with any offences committed after the Applicant purportedly acquired interest over the said two parcels of land.

55. The Applicant was neither a director nor a member of Ukingoni Farm Ltd when the alleged offences were committed, and that explains the reason why he has not been lined up as a witness in *Nyahururu CMC Cr. 1722 of 2016*.

56. In view of the foregoing, it is evident that the only interest that the Applicant can perceive to have acquired came into existence after he allegedly purchased the said parcels of land in 2016. The Applicant thus lacks the locus to comment on any issues that might have occurred prior to his perceived purchase.

57. The main issues in the current proceedings and by extension the *Nyahururu CMC Cr. 1722 of 2016*, concern incidents that happened before the Applicant came into the picture. He thus has no input to either the current proceedings or the *Nyahururu CMC Cr. 1722 of 2016*.

58. The Applicant does not have anything relevant to add in the current proceedings. In addition, I have gone through the record and the pleadings and I note that the issues that the Applicant has raised are a replica of what the Respondents in the current suit has relied on their reply to the Ex-parte Applicant's two pending application, that is, the leave Application and the substantive application.

59. In *Raila Odinga & Another v I.E.B.C & Others & Michael Wainaina Mwaura [2017] eKLR*, (*supra*) the Supreme Court held:

**“Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before court.”**

60. The drafters of the charge sheet in *Nyahururu CMC Cr. 1722 of 2016* have specifically given the identity of the Complainants, that is, Ukingoni Farm Ltd and African Registrars. The Applicant herein has not been listed as a Complainant owing to the fact that when the alleged offences were committed, he did not have any stake or interests over the said parcels of land. He thus has no knowledge of what happened on the alleged dates.

61. The Ex-parte Applicant is not facing any specific charge of him having presented himself as the director of Ukingoni Farm Ltd. The Applicant is answering charges of him having procured provisional certificates of titles when he knew that the original certificates of titles were not lost.

62. The key issue for determination before the criminal court is whether there was justification on the part of the Ex-parte Applicant to obtain provisional certificates of titles. It will not be within the scope of the said criminal proceedings for the court to make a determination as to whether the Ex-parte Applicant was a director or not.

63. The court has also noted that the current status on ownership of the said parcels of land is that the Applicant was deregistered as the proprietor. Unless the said deregistration is reversed, the legal position is that the Applicant does not have any interest over the two parcels of land.

64. The said deregistration of the Applicant reverted the said parcels of land to Ukingoni Farm Ltd, which later surrendered the two titles for sub division and eventually new title deeds were issued to the members of the company.

65. In view of the foregoing, the person who can claim to have interests over the said parcels of land is Ukingoni Farm Ltd and the current registered proprietors of the sub-divisions that came out of the sub-division of the said two parcels of land.

66. The Applicant does not fall under any of the two categories, and as such he does not have any basis in agitating a cause with regard to the two parcels of land in criminal proceedings in issue.

67. The relief sought by the prosecution in the criminal proceedings is conviction of the Ex-parte Applicant for the various counts that he is facing. It is thus evident that the Applicant will not in any way be affected by such as determination.

68. In *Raila Odinga & Another v I.E.B.C. & 2 Others & Michael Wainaina Mwaura [2017] eKLR*, the Supreme Court held:

**“The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the court. It must also be clearly outlined and not something remote.”**

69. Thus the court finds no merit in the application and thus makes the orders that;

**i. The application is dismissed with costs to the respondents.**

**DATED AND SIGNED AT NYAHURURU THIS 17<sup>TH</sup> DAY OF FEBRUARY, 2022**

.....

**CHARLES KARIUKI**

**JUDGE**