



Republic v Chief Magistrates Court Makadara Law Courts & 2 others; Muriithi & another (Exparte Applicants); Kent Estates Limited (Interested Party) (Judicial Review 11 of 2021) [2023] KEELC 17692 (KLR) (25 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17692 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
JUDICIAL REVIEW 11 OF 2021**

EK WABWOTO, J

MAY 25, 2023

IN THE MATTER OF AN APPLICATION SEEKING JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION AGAINST THE RESPONDENTS.-AND-IN THE MATTER OF ARTICLE 23 OF THE CONSTITUTION, SECTION 8 AND 9 OF THE LAW REFORM ACT, ORDERS 53 OF THE CIVIL PROCEDURE ACT, CAP 21 LAWS OF KENYA.

BETWEEN

ADVOCATE APPLICANT

AND

THE CHIEF MAGISTRATES COURT MAKADARA LAW COURTS 1ST RESPONDENT

THE DIRECTORATE OF CRIMINAL INVESTIGATIONS 2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS 3RD RESPONDENT

AND

BENSON RITHO MURIITHI EXPARTE APPLICANT

ZACHARY GATHOGA EXPARTE APPLICANT

AND

KENT ESTATES LIMITED INTERESTED PARTY



JUDGMENT

1. By Notice of Motion dated 28th July 2022 the Exparte Applicants sought the following orders:
 - a. An Order of *Certiorari* bringing up to this court the Criminal proceedings in the Chief Magistrate's Court, Makadara Law Courts, Criminal Case Number 723 of 2021 Republic v Benson Ritho Muriithi & Another and to quash the same.
 - b. An Order of Prohibition to issue prohibiting the Respondents proceedings with the Criminal Prosecution against the ex-parte applicants over the ownership of Land Reference Number 27903/292 and 27903/293 which are subject of determination in ELC Civil Suit No. 7 of 2012, Benson Ritho Muriithi v George Ogalo T/A Geoner Systems & Others in Chief Magistrate Court, Makadara Law Courts, Criminal Case No. 723 of 2021 Republic v Benson Ritho Muriithi & Another.
2. When the matter came up for directions on 26th January 2023, it was directed that the application for judicial review be canvassed through written submissions.

The Exparte Applicants case.

3. The application for Judicial review was based upon the grounds set out in the Notice of Motion dated 28th July 2022, the statutory statement and verifying affidavit sworn by Benson Ritho Muriithi. It was the Applicant's case that on 16th March 2021, the exparte applicants were presented before the Chief Magistrates Court, Makadara Law Courts and charged with the offence of conspiracy to Defraud contrary to the provisions of Section 217 of the [Penal Code](#), forgery contrary to Section 353 of the [Penal Code](#) and forcible detainer contrary to Section 91 of the [Penal code](#) in Makadara Chief Magistrate's Court Criminal Case No. 723 of 2021. The applicants pleaded not guilty and were released on bail terms.
4. The applicants contends that the criminal complaint and by extension all the criminal charges in the said criminal cases are all hinged on the alleged ownership of all that property known as Land Reference No. 27903/292 and 27903/293 the suit premises. Further that the Exparte Applicant is the administrator of the estate of the late Joseph Maingi Muriithi vide grant of letters of administration issued in High Court Succession Cause No. 1212 of 1998. The 1st Applicant instituted proceedings in ELC Civil Suit No 7 of 2012 in Benson Ritho Muriithi v George Ngugi Karungo & Others and among the properties forming subject matter of the said proceedings is Land Reference No. 27903/292 and 27903/293.
5. It was also contended that there is alive contest pending before the ELC Court on ownership of the suit properties forming the subject matter of the present proceedings. In the said suit, the 1st Exparte Applicant herein contends that there is an ownership dispute between the 1st Applicant herein and on entity known as Ecoprime Properties Limited, one of the interested parties in the said suit. The said suit still pending for determination.
6. According to the Exparte Applicants, on or about the 28th February 2013, the Hon. Lady Justice Pauline Nyamweya (as he then was) issued status quo orders preserving the subject matter of the said suit pending the hearing and determination of the matter. It was contended that in a ruling delivered



on 25th February 2013 the Judge prescribed status quo in respect of the properties in contention in the suit including Land Reference No. 27903/292 and 27903/293.

7. It was averred that the essence of the said orders of status quo were express that there shall be no sale, transfer or any alienation whatsoever of the said properties pending the hearing and determination of the suit and that parties who were in possession of any properties were to retain possession of the said properties until the hearing and determination of the suit.
8. It was further contended that despite the pendency of the said suit as well as the preservation orders issued in the said suit, the interested party in these proceedings illegally and unlawfully acquired ownership of the said property vide a transfer allegedly registered at the Land's Office on the 10th October 2019 when the said orders of the court were still subsisting acquiring ownership of the suit property from its predecessors Ecoprime Properties Limited who are equally interested parties in the said suit.
9. It was also stated that acting on the strength of the impugned transfer and/or acquisition of title which is in any event manifestly in violation of the aforesaid orders of the ELC Court, the interested party herein proceeded to lodge Criminal proceedings against the applicants herein which complaints are directly and indirectly hinged on the ownership of the aforementioned properties. As a result, the applicants herein were charged with various offences on the 16th March 2021 as per the charge sheet which was produced as 'Exhibit E' and these were the circumstances that led to the present application and they request the court to intervene and grant the prayers sought.

The Respondents case.

10. The Respondents despite being served failed to file any response or submissions in respect to the application herein.

Issues and determination

11. The court has considered the application for judicial review and the written submissions dated 8th March 2023 filed by M/s Amalemba and Associates on behalf of the Exparte Applicants and is of the view that the following issues arise for determination herein.
 - i. Whether the Exparte Applicants have made out a case for grant of the judicial review orders sought.
 - ii. Who should bear costs of the application.

Issue No. 1

Whether the Exparte Applicant have made out a case for grant of judicial review orders sought.

12. The parameters of judicial review were set out by the Court of Appeal in the case of *Republic v Kenya National Examinations Council Ex parte Gathenji & Others* Civil Appeal No. 266 of 1996 where the court stated as follows:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it



can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...

13. In the Ugandan case of *Pastoli v Kabale District Local Government Council & Others*, (2008) 2 EA, the court gave an in depth analysis of the parameters to be met in order to be successful in a judicial review application as follows:

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See Council of *Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Babikirwe Muntu and others v Kyambogo University*, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).

Illegality is when the decisionmaking authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality....Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph “E”.

Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876).”

14. What resonates from the above case law is that the scope of judicial review proceedings is limited to the decision making process in relation to the decision which is being challenged. The role of the court is therefore supervisory and the court should not attempt to delve into the “forbidden appellate approach.” Thus, the court can neither hear the merits of the dispute nor re-hear the same.
15. As aforesaid, the Applicants are seeking the orders *Certiorari* and Prohibition. The learned authors of [*H. W. Wade and C. F. Forsyth, Administrative Law, 10th Edition, have stated as follows at page 509*](#) on the remedies of *Certiorari* and Prohibition;

“The quashing order and prohibiting order are complementing remedies, based upon common law principles....A quashing order issues to quash a decision which is ultra vires. A prohibiting order issues to forbid some act or decision which will be ultravires. A quashing order looks to the past, a prohibiting order to the future.”

16. In the instant case, it is not disputed that under Article 157 of the [Constitution](#), the DPP has powers to institute and undertake criminal proceedings however the same should be exercised having regard to public interest, the interests of the administration of justice and the need to prevent and avoid abuse



of the legal process. In the applicants' submissions reference was made to the case of *Jirongo v Soy Developers Limited & 9 others* (Petition 38 of 2019) 2021 KESC 32 (KLRo) (16 July 2021) (Judgment) where the Supreme Court held as follows:

“Although the DPP was not bound by any directions, control or recommendations made by any institution or body, being an independent public office, where it was shown that the expectations of Article 157 (11) of the *Constitution* had not been met, then the High Court vide Article 165(3)(d)(ii) of the *Constitution* could properly interrogate any question arising therefrom and make appropriate orders. The guidelines to be considered on when the High Court could review prosecutorial powers were as follows:

1. Where institution/continuance of criminal proceedings against an accused could amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice or
 2. Where it manifestly appeared that there was a legal bar against the institution or continuance of the said proceedings, for example want of sanction or
 3. Where the allegations in the first information report or the complaint taken at their face value and accepted in their entirety did not constitute the alleged offence or
 4. Where the allegations constituted an offence alleged but there was either no legal evidence adduced or evidence adduced clearly or manifestly failed to prove the charge.
17. The evidence on record confirms the existence of interim orders preserving the subject matter of the suit property issued in ELC Civil Suit No. 7 of 2012 which orders were issued on 25th February 2013. The said suit is still pending since it seeks to avail the parties including the applicants on opportunity to address ownership questions regarding the said suit properties.
18. Having perused the affidavits and annexures that were filed herein it is evident that the question of ownership is live issue for determination by the court. The entire of the complaint and the criminal charges seek to enforce its alleged ownership rights in respect to the suit property. In the circumstances, there is no guarantee that the applicants will receive a fair trial as envisaged under Article 50(1) of the *Constitution*. Hence therefore if the Criminal proceedings are allowed to proceed against the applicants prior to the determination of the ownership dispute then the Exparte Applicants will be fundamentally prejudiced as the court will proceed on the presumption that the interested party is indeed the owner of the property despite the pendency question before the ELC.
19. In *Mohammed Gulam Hussein Fazal Karndi & Another v Chief Magistrate's Court Nairobi & Another* (2006) eKLR, Nyamu J examined the policy considerations for halting criminal proceedings which this court has considered. In the instant case, the Respondents have failed to show on what basis they decided to prefer the charges against the applicants. They have not even placed before this court any evidence. Clearly there is no material on the basis of which this court can find that the Respondents have a prosecutable case.
20. In the circumstances and as aptly submitted by the Applicants, the court is satisfied that the Applicant has made out a case for grant of the judicial review orders sought.

Issue No. 2

Who should bear costs of the application.



21. The general rule is that costs follow the event. A successful party should ordinarily be awarded costs of an action unless the court for good reason directs otherwise. In the instant case, I have considered the fact that the motion was not resisted and will direct each party to bear own costs of the proceedings.

Final Orders

22. Accordingly, for the reasons set out above, this court finds that the Exparte Applicants motion is merited and is allowed as follows: -
- i. An order of *certiorari* is hereby issued bringing up to this court the criminal proceedings in the Chief Magistrate's Court, Makadara Law Courts, Criminal Case No. 723 of 2021 Republic v Benson Ritho Muriithi and Zacharia Gathoga Ndungu and quashing the same.
 - ii. An order of prohibition is hereby issued prohibiting the Respondents from proceeding with the criminal prosecution against the Exparte Applicants over the ownership of Land Reference Number 27903/292 and 27903/293 which are subject of determination in ELCC Civil Suit No. 7 of 2012, Benson Ritho Muriithi v George Oner Ogalo T/A Geoner Systems & Others in Chief Magistrate's Court Makadara Law Courts, Criminal Case No. 723 of 2021 Republic v Benson Ritho Muriithi & Another.
 - iii. Each party to bear own costs of this application.

DATES, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF MAY 2023.

E.K. WABWOTO

JUDGE

In the virtual presence of:

Mr. Amalemba for the Exparte Applicants.

N/A for Respondents.

N/A for Interested Party

Court Assistant – Caroline Nafuna.

E.K. WABWOTO

JUDGE

