



Republic v Director of Public Prosecutions & 2 others; Mungai (Exparte Applicant); Ndirangu (Interested Party) (Environment and Land Judicial Review Case E1 of 2023) [2023] KEELC 17649 (KLR) (24 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17649 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E1 OF 2023
FM NJOROGE, J
MAY 24, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

OCS LANET POLICE STATION 2ND RESPONDENT

IN-CHARGE NDEGE-NDIMU POLICE POST 3RD RESPONDENT

AND

LUKA NGUGI MUNGAI EXPARTE APPLICANT

AND

CHARLES MUREITHI NDIRANGU INTERESTED PARTY

JUDGMENT

The Plaintiff

1. By the Notice of Motion dated 27/2/2023 and filed on 2/5/2023, the ex-parte applicant seeks the following prayers:
 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 grounds for the application are to be found in the statutory statement filed with the chamber summons for leave on 21/2/2023. They are that the Interested Party in cohorts with the 2nd and 3rd



- respondents intend to abuse and misuse the criminal justice system in illegally trying to address a boundary dispute which is not within their statutory jurisdiction or professional competence, and that the 2nd and 3rd respondents have threatened to lock up the ex parte applicant to perpetuate the illegal act of grabbing a public road and ensuring the ex parte applicant is permanently blocked from accessing his home.
3. The facts relied on are also in the statement. They are that the ex parte applicant owns LR Dundori/ Lanet Block 2/745 and the Interested Party owns Dundori/ Lanet Block 2/579; that between the two parcels is a public road used by members of the public and also by the ex parte applicant to access his home; that on 7/2/2023 the interested party attempted to close the said road such that members of the public could not access a nearby river or the ex parte applicant access his home where he has lived for 8 years. It is alleged that the 2nd and 3rd respondents intend to arrest the ex parte applicant and institute trumped up charges of malicious damage to property to ensure that he does not question the closure of the road so as to perpetuate the illegal act of closure.
 4. Attached to the verifying affidavit of the ex parte applicant filed with the Chamber Summons is a copy of the title deed in his name issued on 30th July 2012 and a miniaturized map supposedly of the area and also building plans. Also attached to the same affidavit is a letter dated 7/2/2023 from the National Land Commission's County Coordinator for Nakuru County to the Assistant County Commissioner (now normally referred to as Deputy County Commissioner) stating that the office has received complaints over the closure of a road which has been regularly used by members of the public and that it is investigating the matter. In brief, bad faith is imputed against the respondents.
 5. Upon the presentation of the Chamber Summons application for stay this court granted a stay of prosecution against the respondents and ordered the substantive motion to be filed and served which was apparently done.
 6. The motion has not gone unopposed. On 11/4/2023 the 3rd respondent herein, in-charge Ndege-Ndimu Police Post, one David Kinyanjui filed a replying affidavit and stated as follows: that on 11/2/2023 he was at the police post and he received a report of malicious damage to property from the interested party and he booked it and proceeded to the site where he found that the complainant's fence had been damaged, and that he took photographs and forwarded them to the scene of crime personnel in Nakuru for production and certification. He then recorded the statements of witnesses and concluded therefrom that the ex parte applicant was liable. However, before he could arrest the ex parte applicant, he was served with the present proceedings and an order of stay. He avers on the basis of advice from his counsel on record that this court lacks jurisdiction to grant the orders sought, and that the police have mandate to conduct investigations on any report made to them and forward the file to the director of public prosecutions for action. He further states that the National Police Service and the DPP have distinct functions.
 7. On 9/3/2023 the ex-parte applicant herein, Luka Ngugi Mungai filed written submissions on the application dated 27/2/2023. The ex parte applicant states that he is the registered and beneficial owner of land parcel No. Dundonri/Lanet Block 2/745 (Ndege); that he has put up a home on the said land and has lived there for over 8 years; that the interested party owns land parcel No. Dundori/Lanet Block 2/745 (Ndege); that there is a public road between his land and that of the interested party which is used by members of the public; that he (ex-parte applicant) uses that same road to access his home; that on 7/2/2023, the interested party acting in cohorts with the 2nd and 3rd respondents attempted to block and close the said public road such that members of the public could not access it or access the nearby river and the ex-parte applicant access his home.



8. The ex parte applicant states that nowadays, public authorities determine how much of social justice and personal freedom can be enjoyed and hence their decisions affect the public collectively and individually, and as such an unlawful decision must be subjected to judicial scrutiny hence the availability of judicial review. It is urged that protection of legality is removed when a public official exceeds his authority or does not use his power in the prescribed manner. He stated that this court needs issue prohibition to restrain the respondents from use of government resources to harass and intimidate him into forfeiting the use of a public road he has been using for the last 8 years and that nothing justifies the closure of the road by the interested party. He states that he has no alternative route to his home and that there is no evidence that the said road was privatized or privately owned by the interested party. He states that no amount of damages can compensate him if he is illegally detained or access to the public road blocked and that the balance of convenience tilts in his favour in the circumstances. He cites Section 2 of the *Public Roads and Roads of Access Act* as defining a road. He relies on the decision of Mbugua J in *Wilfred Limiri Mukuchia & 11 Others v County Government of Meru* 2019 eKLR and the Court of Appeal Case of *Dellian Langata Limited v Symon Thuo Mubia & 4 Others* Nairobi CA NO 144 Of 2014 [2018] eKLR. He alleges threats and extortion by the respondents and abuse of the criminal justice system. He avers that he damaged no property and that the respondents have produced no evidence that they undertook any investigations into the malicious damage claim. He avers that the officers from the Ndimu police station are, without any mandate or complaint made before the Director of Public Prosecutions threatening to arrest him. He alleges that the respondents are pawns for use by the interested party to deprive him and the public of the right to utilize the road.
9. On 11/4/ 2023 the respondents filed written submissions. The respondent further states that the DPP has powers under Article 157 of the *Constitution* to commence criminal proceedings against any person who according to his judgment is liable for an offence and that the police have the mandate to make an arrest without a warrant within the parameters of the law; that the orders sought, if granted, would amount to interference with the workings of institutions whose independence has been entrenched in the Constitution to the extent that even courts are estopped from giving directions in terms of operations to the said institutions. It is stated that courts should act as arbiters and resolve conflicts among the adversarial parties. It is also stated that courts should handle disputes properly before them and not interfere with a process such as that at hand as it may lead to the premature abortion of a justice seeking mission. The case of *Law Society of Kenya v Office of the Attorney General & Another* 2021 KEHC 454 is cited in this regard. It is urged that to stop arrest, anticipatory bail would have been a salutary remedy for the applicant. The respondents also cite Article 47 and Section 9 of the *Fair Administrative Action Act* as enabling an aggrieved person to move to court only when the administrative act complained of is done and not before it is complete.
10. Lastly the respondent averred that the remedy of judicial review would be available to the ex parte applicant only after exhaustion of all the available alternative remedies.
11. The respondents aver that this court lacks jurisdiction. Section 13 of the *ELC Act* is cited for that proposition and the respondent argues that judicial review is not among the remedies mandated to this court by that section.

Determination

Issues for determination

12. The issues that arise for determination in the present case are as follows:
 - i. Does the court have jurisdiction in this matter?



- ii. Is the applicant entitled to the orders sought?
 - iii. Who should bear the costs of the present proceedings?
13. Regarding the first issue it is trite now that this court is possessed of original jurisdiction in all matters that involve use, title to and occupation of land. Article 162(2) (b) mandates this court to deal with those categories of cause of action as follows:
- (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
 - a) employment and labour relations; and
 - b) the environment and the use and occupation of, and title to, land.
14. Section 13 of the *Environment and Land Court Act* 2012 provides as follows:
13. Jurisdiction of the Court
- (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the *Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
 - (2) In exercise of its jurisdiction under Article 162(2)(b) of the *Constitution*, the Court shall have power to hear and determine disputes—
 - (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (b) relating to compulsory acquisition of land;
 - (c) relating to land administration and management;
 - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - (e) any other dispute relating to environment and land.
 - (3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the *Constitution*.
 - (4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.
 - (5) Deleted by Act No. 12 of 2012, Sch.
 - (6) Deleted by Act No. 12 of 2012, Sch.
 - (7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—
 - a) interim or permanent preservation orders including injunctions;



- b) prerogative orders;
- c) award of damages;
- d) compensation;
- e) specific performance;
- f) restitution;
- g) declaration; or
- h) costs.

15. In the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR the court held as follows:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority:

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given”

16. I do not find anything in the provisions of the *Constitution* and statute cited herein before that deprives this court of the mandate to hear and determine judicial review matters. The only condition is that they must be in respect of the use and occupation of, and title to, land.

17. In this particular case the dominant theme is the arrest and incarceration of the ex parte applicant by the respondents. I think that this case leans heavily towards the issues of the fundamental freedoms and rights of the applicant since the respondents are said to be seeking to arrest him on allegations of malicious damage to property. This court can not from these proceedings tell which kind of property was allegedly damaged but it certainly is not claimed to be land. The fact remains that the proximate cause of the applicant’s concerns involves alleged criminal conduct and this court lacks jurisdiction over criminal matters.



18. The respondents aver that alternative remedies had not been exhausted by the ex parte applicant before he invoked the jurisdiction of this court. In this court's view the application for anticipatory bail to stop arrest as suggested by the respondent does seem a good alternative. However, even that remedy would have to be sought in the appropriate court with criminal jurisdiction. It is clear that this court would be usurping a criminal jurisdiction it does not possess if it proceeded to hear and determine the substance of the applicant's complaint herein.
19. For the foregoing reasons, I hereby strike out the notice of motion application dated 27/2/2023 for want of jurisdiction on the part of this court. However, there shall be no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 24TH DAY OF MAY 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

