



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW NO. 17 OF 2018

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

FOR ORDERS OF CERTIORARI AND PROHIBITION UNDER SECTIONS 8 AND 9

OF THE LAW REFORMS ACT CHAPTER 26 OF THE LAWS OF KENYA

AND ORDER 53 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF: FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

AND

IN THE MATTER OF: THE THREATENED/UNLAWFUL ARREST OF ABRAHAM NGUGI NJOROGE

BETWEEN

ABRAHAM NGUGI NJOROGE.....EX PARTE APPLICANT

AND

1. DIRECTOR OF PUBLIC PROSECUTION

2. THE HON. ATTORNEY GENERAL

3. DIRECTOR OF CRIMINAL INVESTIGATIONS.....RESPONDENTS

AND

IDHA MBARAK ALI.....INTERESTED PARTY

RULING

1. By the Notice of Motion herein dated 20/3/2018 the Ex parte Applicant prays for the following orders:

(a) An order of certiorari moving this Honourable Court to quash decisions made by the 1st and 3rd Respondents in preferring charges, arresting, directing, commencing and or sustaining the prosecution of the Applicant in the Chief Magistrate's Court at Kwale or any other court over any criminal charges and or complaint made by IDHA MBARAK ALI regarding any dealing on KWALE/DIANI COMPLEX/235 and or any other complaint.

(b) An order of prohibition directed at the Respondents restraining them either by themselves, agents, servants or otherwise howsoever from commencing, sustaining or proceeding with any criminal proceedings against the Applicant in the Chief

Magistrate's Court at Kwale or any other court within the Republic of Kenya.

(c) That the costs of this application be provided for.

2. The motion is based on the grounds that the Applicant who is a Land Registrar in Kwale was arrested by the 3rd Respondent on 19/2/2018 and given Police bond requiring him to appear in Court on 22/2/2018 to take plea on charges of Conspiracy to defraud, which was later deferred to 26/2/2018; that prior to the arrest the Applicant had neither been summoned nor requested to record a statement regarding the complaint made against him both in his capacity as the registrar of lands and in his personal capacity; that the manner he was hurriedly arrested, required to appear in court to face charges is not only a violation of his right to fair trial and against the tenets of natural justice but, demonstrates malice on the part of the 1st and 3rd Respondents and or undue influence and pressure against the two Respondents from IDHA MBARAK ALI the Interested Party herein; that despite the Applicant requesting to be given an opportunity to be heard and avail all the required material to the 1st Respondent so that they can make a more informed decision upon hearing all the parties affected, the same has been rejected outrightly and that the decision of the 1st and 3rd Respondents was made unprocedurally, irregularly and not in conformity with the law.

3. The motion is also supported by Statutory Statement dated 28/2/2018, and a Verifying Affidavit of the Ex parte Applicant sworn on 28/2/2018, and a Further Affidavit sworn on 11/8/2020.

The Response

4. The 1st Respondent opposed the motion through Grounds of Opposition filed in court on 22/11/2018. The 1st Respondent states that the application has been brought in bad faith, is bad in law, vexatious, frivolous and malicious as it is designed to usurp powers of independent constitutional offices in order to curtail their proper legal actions as managed by relevant laws; the application contravenes Article 157 of the constitution in terms of exclusive mandate granted to the Director of Public Prosecutions on the decision to charge on proper interrogation and consideration of facts of each individual case; the application is an intended tactical delay of the already initiated criminal proceedings facing the Applicant in the lower court; the criminal case facing the Applicant before the Chief Magistrate in Kwale is properly before court and should be allowed to proceed as the Applicant herein has the opportunity to prepare and adduce his defence if any, and that the criminal case facing the Applicant is of public interest because many individuals and companies have lost massive investments through double land allocations, allocations of non-existent land and issuance of fake and/or unauthenticated titles by land officials, including the Applicant herein.

The Interested Party

5. Through a Chamber Summons application dated 29/10/2019, the Interested Party herein Idha Mbaruk Ali successfully applied to be joined to these proceedings as Interested Party vide an order made herein on 16/1/2020. Pursuant to that joinder the Interested Party replied to the motion through a Replying Affidavit sworn on 6/8/2020. The Interested Party's case is that he is the complainant in Kwale Criminal Case Number 561 of 2017 which involves his piece of land KWALE/DIANI Complex/235. The Interested Party states that the application herein does not raise any triable issues and the Applicant is only using the court to buy time. The Interested Party states that the application is a desperate attempt to evade justice and that investigations were properly carried out within the law. Further, the Interested Party states that the police cannot be controlled on how they should carry out their investigations, and that the grounds forming the basis of the Applicant's application can only be his defence in a criminal trial. The Interested Party avers that he continues to be denied quiet possession and enjoyment of his property against the constitution, and that the complainant's accomplices in the Criminal Case Number 561 of 2017 (Kwale Law Courts) have already been charged and are even willing to plea bargain with the DPP. The Interested Party avers that it is discriminative for the Applicant's accomplices to be charged when the Applicant is using these proceedings to evade justice. The Interested Party denies influencing the office of the DPP to charge the Applicant, and prays that the application be dismissed with costs.

6. The 2nd Respondent did not file a response. Their Counsel, Mr. Makuto stated that they would not be filing a response.

Submissions

7. The application was canvassed through submissions. The 1st and 3rd Respondents filed submissions on 20/11/2020; the Interested Party filed submissions on 28/10/2020; while the Ex parte Applicant filed submissions on 9/10/2020.

8. I have carefully considered the motion and the submissions. In my view, there is only one issue to be determined by this Court, and that is whether the 1st Respondent, the DPP, has carried out competent and thorough investigations to enable it charge the Ex parte Applicant in the Chief Magistrates Court in Kwale over Title No. Kwale/Diani Complex/235.

9. The main thrust of the Ex parte Applicant's motion is that the procedure and the manner in which the investigations were done were flawed, and that the Ex parte Applicant was not afforded an opportunity to be heard and to assist the police with any information. This alleged lacuna led to lopsided, uninformed, ill motivated and biased investigations which will lead to prejudice against the Ex parte Applicant if the intended prosecution is carried out, and that this is against principles of natural justice and infringed on his constitutional right to a fair trial, and that this Court has the jurisdiction to quash the intended charges.

10. The basis of the Application is that the Ex-parte Applicant who was by then a Land Registrar at Kwale District Land Registry was arrested by the 3rd Respondent on 19/2/2018 and released on a Police bond requiring him to appear in Court on 22/2/2018 to take plea. The arrest and subsequent arraignment of the Applicant in Court is alleged to have been unprocedural, irregular in bad faith, malicious and in violation of the Applicants' rights for fair administrative action and contrary to the rules of fair hearing, right to be heard and principles of natural Justice. It is alleged that the Applicant was never summoned to Diani Police Station to record a statement in respect of the transactions he had earlier handled in his capacity as the Land Registrar. The Ex-Parte Applicant was to be arraigned and charged as a result

of existence of two title deeds in respect of all that Parcel of Land registered as KWALE/DIANI COMPLEX/235. One was registered in the names of the Interested Party and the other one in the names of Ramadhan Juma Mwarizo both issued on 19th September 2007 by Land Registrar called Mr. Kalama.

11. The thrust of the Ex parte Applicant's case is that at the said time of the issuance of the two title deeds, the Ex-parte Applicant was neither a land registrar nor was he based in Kwale District Land Registry. One of the registered owners' that is, Juma Ramadhan Mwarizo transferred the said property to Joseph Gichuki Wambugu who later subdivided the same to Land Reference No. KWALE/DIANI COMPLEX/1647 & KWALE/DIANI COMPLEX/1648. Before the transfer of the mother title by Ramadhan Juma Mwarizo to Joseph Gichuki Wambugu, the Applicant states that he had perused the Land Register and confirmed the land was registered in the names of the said Ramadhan Juma Mwarizo and being satisfied, effected the transfer in favour of the Purchaser, Joseph Gichuki Wambugu. The Applicant avers that his actions of transferring the said parcel of land based on the records available at the land registry were done in good faith, and in exercise of due care and reasonable skill that the applicant was expected to exercise. There were no records in favour of the Interested Party herein at the Land Registry hence the reason the said transfer was effected between the aforesaid parties. It is alleged that the 3rd Respondent did not investigate which of the two title deeds was authentic and or record the statement of the Land Registrar who signed and issued the two title deeds so as to confirm which of the two title deeds was issued by him. Instead, the 3rd Respondent relied on the complaint by the Interested Party without conducting investigations.

12. From the record, the 1st Respondent requested for the investigation file from the 3rd Respondent for perusal and directions after the Ex-parte Applicant lodged a complaint in the manner in which investigations were conducted. The 1st Respondent, vide letters dated 31/5/2018 and 29/11/2019, acknowledged there were huge gaps in the investigations, and that there was need for further thorough investigations. (refer to page 4 paragraph 3 and 5 of annexure ANN1 of the Applicants Further Replying Affidavit 11/8/2020 and annexure ANN 1 (a) and ANN 1 (b) to Applicants Replying Affidavit dated 9/12/2019)

13. The 1st Respondent further stated that the issues raised in the Judicial Review ought to have been thoroughly investigated before charging the Applicant herein. The 1st Respondent further directed the 3rd Respondent that the criminal charges against the Ex-parte Applicant and the other two co-accused persons be withdrawn under Section 87(a) of the Criminal Procedure Code Cap 75, to pave way for proper and thorough investigations and further stated "*We shall proceed to inform Court of our directions by copy of this letter*" (refer to page 5 paragraph 1 of annexure ANN1 aforesaid).

14. Based on the above analysis of the investigation file and directions by the 1st Respondent, it is apparent that the 3rd Respondent acted pre-maturely in this matter. A criminal process has the potential to violate individual rights, and should only be resorted to after complete and thorough investigations. Article 25 (b) of the Constitution provides that the right to fair trial shall not be limited. Further Article 47 of the Constitution provides for fair administrative action.

Article 47 (1) provides that:

"Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair"

Section 4 (3) of the Fair Administrative Action (No. 4 of 2015) provides that:

"Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision to be heard and make representations in that regard"

15. The acts of the Respondents in arresting and charging the Applicant based on the shoddy and incomplete investigations was an infringement of the Applicants' right to fair trial and the actions were unlawful, unreasonable and procedurally unfair and contrary to the Constitution.

16. Article 157 (4) of the Constitution provides *inter alia* that the Director of Public Prosecutions shall have power to direct the Inspector General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector General shall comply with any such directions. Further Article 157 (11) provides that:

"In exercising the powers conferred by this Article the Director of Public Prosecutions shall have regards to public interest, the interest of administration of Justice and the need to prevent and abuse of the legal process"

Section 26(2) of the Director of Public Prosecutions Act provides that:

"The Inspector General or any other investigative agency shall conduct thorough investigations..."

17. In my view there was no thorough investigations that were undertaken by the 3rd Respondent as admitted by the 1st Respondent.

In **Bitange Ndemo v Director of Public Prosecutions and 4 others 2016 e KLR** the facts and circumstance of this authority are similar to the instance case where the investigative agencies had closed the inquiry file against the Applicant for lack of evidence and was later arraigned in Court to face criminal charges. It was held:

"I find the Director of Public Prosecutions is also in breach of the duty to act fairly he has failed to exercise statutory discretion reasonably, has acted in a manner to frustrate the purpose of the constitution and the act directing the power... he has failed to

exercise discretion and has acted irrationally and unreasonably”

The Court further held that:

“The public good and the public interest for which criminal prosecutions are initiated will be lost. It is an abuse of Court process to knowingly, maliciously and oppressively prosecute an individual and with the intention of vilifying or disparaging him ... this is an abuse of the legal process which this Court and any Court of law which is ordained to be a temple of Justice must intervene to stop in order to promote and present the inherent integrity of the Applicant...”

18. In **Roland Leposo Musengi v Director of Public Prosecutions & 3 others 2015 e KLR** court stated:

“it does not require forensic evidence for one to see that the subject of that letter is the subject of the criminal Proceedings being challenged in this Proceedings. No attempts has been made by the Respondents to explain what led to the change of view and the decision to change the Petitioner whose subject the prosecution submits now wearing substantially the same has a bit with a different colour, found untenable”

The Court further held:

“In my view where the Prosecutor has given and assurance that based on the evidence presented before him, no prosecutable case is disclosed, the Court will be entitled to presume existence of extraneous purpose if such a decision was arbitrarily overturned particularly by the same person without any explanation or change of heart”

19. It must be emphasized that a criminal case belongs to the prosecutor, and where the prosecutor himself is doubting the veracity, authenticity or correctness of his own case, the case cannot proceed. However, for the constitutional court, the case cannot proceed because the court cannot allow a criminal case, which has no basis, to proceed. The court cannot put on trial a character for the sole basis of character assassination. Criminal prosecutions have lasting effect. When on the face of it the prosecution’s case is shaky, the court must stop the proceedings, so that the accused is seen to have a fair trial. It is not enough, as has been suggested here by the Respondents, that the effect of the aforesaid letters from the 1st Respondent be left to the trial court. When this Court has seen a violation of constitutional right, this Court cannot let that violation to continue, and be stopped, if at all, in a subordinate court. It is the constitutional duty of this Court to stop such violation. In this case, the prosecution itself has stated on record that they wish to withdraw the criminal case because of shoddy investigations. Yet, they are not withdrawing it. It is the finding hereof that the intended prosecution of the Ex parte Applicant is based on unfinished investigations. The same is herewith quashed. That prosecution may proceed in future upon proper foundation being laid.

20. The upshot is that the motion before the court is allowed as prayed, with costs to the Ex parte Applicant.

Dated, Signed and Delivered in Mombasa this 28th day of January, 2021.

E. K. O. OGOLA

JUDGE

Ruling delivered via MS Teams in the presence of:

Mr. Mungai for Applicant

Mr. Makuto for 2nd and 3rd Respondents

Mr. Fedha for DPP

Ms. Peris Court Assistant