



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW NO. 17 OF 2019

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

AND

IN THE MATTER OF: SECTION 8 & 9 OF THE LAW REFORMS ACT

AND

IN THE MATTER OF: KWALE CHIEF MAGISTRATE'S COURT

BETWEEN

DAVID KANDIE.....EX-PARTE APPLICANT

VS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

THE CHIEF MAGISTRATE KWALE.....2ND RESPONDENT

ALI HAMISI CHANDE.....INTERESTED PARTY

RULING

1. The Application before the Court is dated 25/11/2019. It prays for the following orders:

a) Spent

b) That this honourable Court be pleased to grant an order of stay of proceedings in Kwale Criminal Case No. 206 of 2019 (R v David Kandie) pending the hearing and determination of this Application.

c) That this honourable Court be pleased to grant an order of stay of proceedings in Kwale Criminal Case No. 206 of 2019 (R v David Kandie) pending the hearing and determination of the Appeal.

d) That the cost of this Application be in the cause.

2. The Application is premised on the grounds set out therein and is supported by the Applicant's Affidavit sworn on 25/11/2019. The Applicant avers that he has already filed a Notice of Appeal and has already requested to be supplied with certified typed proceedings to enable him file his Record of Appeal in the Court of Appeal.

3. The Applicant states that the Respondents will not suffer any prejudice if the orders sought are granted. However, the Applicant avers that he will suffer prejudice if Criminal Case No. 206 of 2019 proceeds to hearing, since his appeal will be rendered nugatory.

Response

4. In response to the Application, the 1st Respondent filed a Grounds of Opposition dated 9/6/2020 stating:

- a) *That the orders sought are an abuse of the Court process and frown on the 1st Respondent's constitutional mandate.*
- b) *That the 1st Respondent had already bonded witness for hearing in the Criminal Case pursuant to the judgment of this Court and it will be prejudicial if stay is granted.*
- c) *That the Appellant has not demonstrated that his appeal is with high chances of success and that it will suffer prejudice or damages if the Criminal Case is allowed to proceed.*

5. In response to the Application, the 2nd Respondent filed a Grounds of Opposition dated 4/12/2019 and stated as follows:

- a) *That the Application is an afterthought and an abuse of the process of the Court.*
- b) *That this Court is functus officio having determined substantive Application dated 1/4/2019.*
- c) *That the orders sought are contrary to Article 157(10) of the Constitution and are meant to delay the hearing of Criminal Case 206 of 2019.*

6. In response to the Application, the Interested Party filed a Replying Affidavit sworn 4/12/2019 by himself. The Interested Party avers that the orders sought by the Applicant are in capable of being granted since the Applicant has approached the wrong Court, and the orders sought are not judicial review in nature. Therefore, this Court cannot grant the said orders.

7. The Interested Party avers that there are no orders and/or processes being challenged in the Application that would warrant a judicial review Court intervention. Further, that the Applicant has not demonstrated the prejudice he will suffer from his prosecution. In fact, the Applicant will have an opportunity to defend himself during the Defence hearing.

8. The Interested Party also avers that the Application is an abuse of the Court process since it is meant to stay the Criminal proceedings in Criminal Case 206 of 2019 and not the judgment delivered on 18/11/2019.

Rejoinder

9. In rejoinder, the Applicant filed a Supplementary Affidavit sworn on 28/10/2020. He avers inter alia, that the Environment and Land Court in ELC Petition 11 of 2019 declared him the owner of all parcels of land known as **Title No. Kwale Diani SS/2845, Title Kwale Diani SS2846, Title No. Kwale Diani SS/2847 and Title No. Kwale Diani SS/2848**. However, the Respondents therein sought and were granted an order of stay of execution. Therefore, this Court should extend to the Applicant the same courtesy by granting the orders of stay sought.

10. The Applicant avers that since the Environment and Land Court and this Court have arrived at different findings in a matter involving same subject matter, same facts, and same parties, it is only the Court of Appeal that can put the dispute to rest.

Submissions

11. The Applicant filed submissions on 4/11/2019, while the Interested Party filed his submissions on 16/11/2020. The 1st and 2nd Respondents sought to rely on the Interested Party's submissions. All the Parties relied on their submissions.

12. From the pleadings and submissions filed before this Court by the parties, it is the 2nd Respondent's contention through its Grounds of Opposition that, since the Application dated 1/4/2019 had been concluded, this Court had become *functus officio* as the suit no longer existed. The issue then is whether or not this Court has the jurisdiction to hear this Application.

13. Jurisdiction goes into the heart and soul of any proceedings. In this regard, the question of jurisdiction should not only be raised at the earliest opportunity, but it must be the first issue to be resolved from the outset. In the celebrated Court of Appeal decision in **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR**, Nyarangi JA famously held: -

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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."(Emphasis added).

14. **Mr. Mungai** learned counsel for the Interested Party submitted that the provisions of Order 42 Rule 6 could only be invoked to stay execution of this Court's Judgment and/or decree and not any other proceedings. Therefore, this Court sitting as a Judicial Review Court has no jurisdiction to entertain an Application that ought to have been filed in the trial Court. **Mr. Ondabu** learned counsel for the Applicant submitted that the Applicant has an arguable appeal, having been declared the legal and bona fide owner of the suit properties by the Environment and Land Court.

15. On the issue of jurisdiction of this Court in handling the instant Application, this Court finds and holds that Judicial Review proceedings are special proceedings that are neither criminal nor civil in nature. It follows that Order 42 Rule 6 of the Civil Procedure Rules does not

apply. In *Commissioner of Lands Vs Kunste Hotel Ltd [E&L] 249*, it was held by the Court of Appeal that when dealing with an application for prerogative orders, the court is not exercising a civil jurisdiction.

16. Nevertheless, it is noteworthy that vide Ruling delivered 18/11/2019; this Court dismissed the Applicant's Application dated 1/4/2019. In my view, the dismissal of the Applicant's Application for judicial review orders amounted to a negative order. Therefore, this Court has no jurisdiction to stay any action unless there is a positive order of court for something to be done or enforced. The Court of Appeal in *Oliver Collins Wanyama v Engineers Board of Kenya [2019] eKLR* observed that:

“An order of stay is not available to the applicant if his application for judicial review having been dismissed, giving rise to a negative order that is incapable of being stayed”

17. Similarly, in *Western College of Arts & Applied Sciences v Oranga & Others [1976] KLR 63* the Court declined to grant an order for stay on the basis that there was nothing to stay, the suit having been dismissed. In a unanimous decision the court rendered itself as follows:

“But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit with costs. An execution can only be in respect of costs ...

The High Court has not ordered any of the parties to do anything, or to refrain from doing anything or to pay any sum. There is nothing arising out of the High Court judgment for this Court in any application for stay to enforce or to restrain by injunction.”

18. In the result, it is my finding that the Applicant's application dated 25/11/2019 lacks merit. The same is dismissed with costs.

Orders accordingly

Dated, Signed & Delivered at Mombasa this 29th day April, 2021

E. K. OGOLA

JUDGE

Ruling delivered via MS Teams in the presence of:

Mr. Mungai for Interested Party

Ms. Wanjohi for DPP

No appearance for Applicant

Mr. Mohamed Court Assistant