



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. MISC E043 OF 2020

IN THE MATTER OF AN APPLICATION FOR LEAVE FOR

JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

BETWEEN

1. PATEL RAVJI LALJI

2. DEVRAJ RAVJI LALJI.....APPLICANTS

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

TOM ODHIAMBO OWINY AND AMSA JEROTICH KEITANY.....3RD RESPONDENTS

RULING

1. The Applicants herein have filed an application by way of a Chamber Summons dated 25th September 2020, seeking the following orders:

1. THAT the Applicants be granted leave to apply for an Order of Prohibition directed against the Honourable Attorney General of the Republic of Kenya barring him from further prosecution preferring and prosecuting all counts or any variation hereof or any charge or charges in substitution thereof akin to the same in Criminal Case Numbers E2928 of 2020 and E1953 of 2020, Republic vs. Patel Ravji Lalji and Devraj Ravji Lalji against the applicants.

2. THAT the Applicants be granted leave to apply for an Order of Prohibition directed to the Chief Magistrate, Chief Magistrate's Court Nairobi or any other Magistrate from hearing or continuing to hear or further or determining all counts against the Applicants or any variation thereof or any charge or charges in substitution thereof or akin to the same in Criminal Case Numbers E2928 of 2020 and E1953 of 2020, Republic vs. Patel Ravji Lalji and Devraj Ravji Lalji.

3. THAT leave granted herein operates as a stay of any further mentions, hearing of private prosecution of Criminal Case Numbers E2928 of 2020 and E1953 of 2020 pending the determination of this application.

4. THAT the costs of this application be provided for.

2. The application is supported by a statutory statement dated 25th September 2020, a verifying affidavit sworn on the same date, and a supplementary affidavit sworn on 28th October, 2020 by the 1st Applicant. The main ground raised by the Applicants is that the impugned criminal proceedings arise from a land dispute in Court between them and the 3rd Respondents, which has been the subject of rulings in ELC JR No. 28 of 2012 and ELC 114 of 2019. The Applicants made reference to the pleadings filed, and ruling delivered in the said cases.

3. The 3rd Respondents filed a replying affidavit sworn on 21st October, 2020 by Amsa Jerotich Keitany in opposition to the Applicant's Chamber Summons Application dated 25th September, 2020. They averred that they are the complainants in Criminal Case Number E1953 of 2020, and are not complainants in Criminal Case Number E2928 of 2020, whose proceedings are intended to be prohibited by the application herein.

4. The 3rd Respondents case is that they lodged a complaint at the Nairobi Regional Criminal Investigations office that the Applicants had forged their signatures and the signature of Hesbon Omondi; and that the forged signatures were used and uttered in proceedings in Nairobi ELC Case Number 114 of 2019 to falsely represent that the Applicants had paid the full purchase price for L.R. No. 209/11309 to the 3rd Respondents. The 3rd Respondents annexed a copy of the said complaint dated 22nd May, 2020, correspondence thereon, and pleadings filed in Nairobi ELC Case Number 114 of 2019 in support of their case.

The Determination

5. The Applicants filed submissions dated 5th October 2020, wherein they contended that the judgment on ELC JR No. 28 of 2017 was delivered in their favour, in which the subject matter was L.R No. 209/11309, and which cleared any doubt on how the sale was conducted. In addition, that the 3rd Respondents, who are the complainants in criminal case numbers E1953 of 2020 and E2829 of 2020, joined ELC JR No. 28 of 2017 as 1st and 2nd Interested Parties and swore an affidavit therein in support of the Applicants. However, that sometimes in 2019, the 3rd Respondents trespassed on the Applicants' property L.R No. 209/11309, after the sale of the same was completed, which prompted the Applicants to move to Court and file ELC No. 114 of 2019 against the 3rd Respondents.

6. The Applicants contend that the 3rd Respondents did not raise any issue as regard forgeries in ELC JR 28 of 2017 and ELC No. 114 of 2019, and that they confirmed in both cases that, they properly, legally, procedurally and without duress sold L.R No. 209/11309 to the Applicants, and if there was any issue, by then, it was the balance of the purchase price but not forgery of signatures as insinuated.

7. Lastly, on the Court's observation that the Chief Magistrate Court is not a party herein, the Applicants submitted that the reason was that the Judiciary's e-filing portal does not give the office of the Chief Magistrate Court as an option and they replaced it with the Attorney General, Therefore, that the office was not left out by mistake but because of this technical hitch.

8. The 3rd Respondents filed skeletal submissions dated 21st October, 2020 and reiterated that they are not the complainants in Criminal Case Number E2928 and that the complainants in that matter have not been enjoined in these proceedings. They averred that the Court's leave to institute judicial review proceedings is meant for the purposes of identifying, filtering out at an early stage, frivolous and vexatious complaints and ensuring or establishing that the applicant has in his/her application for leave has established a *prima facie* case. They cited the cases of **Agutu Wycliff Nelly vs office of the Registrar Academic Affairs, Dedan Kimathi University of Technology (2016) eKLR; Republic vs County Council of Kwale and another ex-parte Kondo and 57 others, Mombasa HC Misc No. 384 of 1996; Meixner and Another vs AG (2005) 1 KLR 189** and **Republic vs Diamond Lalji and another (2014) e KLR** for this submission, and contended that the Applicants have in their application herein, failed to establish a prima facie case that 2nd Respondent's decision-making process towards preferring the criminal charges was illegal, not fair, irrational and not proportionate in the circumstances.

9. Lastly, the 3rd Respondents averred that under Article 157 of the Constitution and section 5 of the Director of Prosecutions Act, the 2nd Respondent has powers to prefer charges and prosecute the same against any person before court in respect of any offence alleged to have been committed. Therefore, that the process engaged towards bringing the criminal charges was with legal authority and done in accordance with the law.

10. I have considered the Chamber Summons application dated 25th September 2020 and the applicable law for leave to commence judicial review proceedings, namely *Order 53 Rule 1* of the Civil Procedure Rules. The main reason for the leave as explained by Waki J. (as he then was), in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996**, is to ensure that an applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration.

11. While in most cases it is self-evident that the matter should proceed to judicial review, there are a number of preliminary factors that a Court considers and addresses at the leave stage. These factors have been enumerated in **Judicial Review: Principles and Procedure** by Jonathan Auburn *et al* at paragraph 26.05 as follows:

- (1) whether the enactment, action, decision, or failure to act that is being challenged is amenable to judicial review;
- (2) whether the claimant has capacity to bring a claim for judicial review;
- (3) whether the claimant has a sufficient interest to bring a claim for judicial review;
- (4) whether the particular challenge brought by the claimant is one that may be brought by the judicial review procedure, and whether it is appropriate to bring it by that procedure;
- (5) whether the claim is otherwise an abuse of process;
- (6) whether all or some of the grounds of challenge relied upon by the claimant are sufficiently meritorious to justify the grant of permission;

(7) whether the claim has been brought promptly;

(8) whether there are any discretionary grounds that justify the refusal of permission in the exercise of the court's discretion.

12. It therefore follows that the case must in the first place be one that is amenable to or appropriate for judicial review, and one that does not weigh against the exercise of the Court's discretion. This is for the reason that in judicial review, the Court is being asked to review the lawfulness of an enactment, decision, action or failure to act in the exercise of a public function. Therefore, judicial review concerns the exercise of public duties and not private duties. Some of the grounds that may influence the exercise of the Court's discretion in this regard are the availability of an adequate alternative remedy, prematurity of a claim, delay, and where the claim would cause great prejudice and hardship to third parties or the public interest. Lastly, the extent and limits of this Court's judicial review jurisdiction as set out in Article 165(6) of the Constitution must also be borne in mind.

13. Once a case is found to be amenable to and appropriate for the exercise of the Court's discretion to grant leave, it is trite that the Court then ought not to delve deeply into the arguments of the parties, but should make cursory perusal of the evidence before it and make the decision as to whether an applicant's case is sufficiently meritorious to justify leave. It was explained by Lord Bingham in **Sharma vs Brown Antoine (2007) 1 WLR 780**, that a ground of challenge is arguable if its capable of being the subject of sensible argument in court, in the sense of having a realistic prospect of success.

14. In the present application, the Applicants have submitted that they have sued the Attorney General in place of the Chief Magistrates Court, since they were not able to locate the Chief Magistrate Court in the Judiciary e-filing system for purposes of serving it with documents. It is notable in this respect that the duties of the Attorney General are set out under Article 156 (4) of the Constitution as follows:

“(4) The Attorney-General—

(a) is the principal legal adviser to the Government;

(b) shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings; and

(c) shall perform any other functions conferred on the office by an Act of Parliament or by the President.”

15. The Attorney General is therefore the legal representative of the Chief Magistrate's Court in court proceedings, it cannot be sued in the place of the principal party against whom specific orders are being sought. The effect of non-joinder of the Chief Magistrate's Court in this suit is that a party against whom orders are sought will not participate in these proceedings, which is against the rules on fair administrative action. The Attorney General is usually added as a party, in addition to the principal party it represents, for purposes of notification of civil proceedings affecting the national government, and for purposes of the mechanics of service of pleadings and court documents in this regard. However, this does not obviate the need to join the principal party in national government against whom specific orders are sought in a suit.

16. Order 1 Rule 3 of the Civil Procedure Rules in this regard provides as follows as who is may be joined in a suit as a defendant or respondent:

“All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”

17. The Court of Appeal discussed the guiding principles on the question of joinder of a defendant in **Civicon Limited Vs Kivu watt Limited & 2 Others [2015] eKLR** as follows:-

“ The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined.....

From the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order 1 Rule 10(2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed.”

18. Specifically, with respect to judicial review proceedings, a party may be joined to proceedings under Order 53 rules (4) of the Civil Procedure Rules if it is demonstrated that he or she is a necessary party to, or is directly affected by the proceedings. Order 53 Rule 4 provides as follows:

“ If on the hearing of the motion the High Court is of the opinion that any person who ought to have been served therewith has not been served, whether or not he is a person who ought to have been served under the foregoing provisions of this rule, the High Court may adjourn the hearing, in order that the notice may be served on that person, upon such terms (if any) as the court may direct..”

19. The present proceedings are therefore incompetent to the extent that a necessary party, namely the relevant Chief Magistrates Court in which the impugned criminal prosecution has been filed and are being undertaken, has not been joined herein.

20. In light of the foregoing observations and findings, it is evident that leave cannot be granted to the Applicants to commence judicial proceedings on the basis of their current pleadings as filed. This notwithstanding, the legal effect of misjoinder or non-joinder of a party was addressed by the Court of Appeal in **Republic Ex Parte the Minister for Finance & The Commissioner of Insurance as Licensing and Regulating Officers vs. Charles Lutta Kasamani T/A Kasamani & Co. Advocate & Another Civil Appeal (Application) No. Nai. 281 of 2005** as follows:

“Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment...Is the form of title to the appeal as adopted by the Attorney General in this matter defective or irregular? We think not, as we find that it substantially complies with the guidelines set out by this Court”.

21. This was also the position adopted in **Consolata Kihara & 21 Others vs. The Director of Kenya Trypanosomiasis Research Institute Nairobi [2003] KLR 582**, where it was held that issues of joinder and misjoinder of parties are not of significance where no miscarriage of justice or any form of injustice is alleged as a result of the choosing of parties to the litigation.

22. Finally on this issue, the 3rd Respondents have also challenged the propriety of their joinder, as they allege not to be the complainants in the criminal prosecution being challenged. The Applicants have however explained the reasons for the 3rd Respondents’ joinder. In any event, if it is eventually found that the 3rd Respondents were improperly joined, any prejudice caused can be adequately remedied by costs.

The Orders

23. I accordingly order as follows:

I. The Applicants are granted leave to amend the Chamber Summons dated 25th September 2020 to join the relevant Chief Magistrates Court and any other necessary party in this suit, and shall file and serve the Amended Chamber Summons on all Respondents within fourteen (14) days of today’s date.

II. The Amended Chamber Summons shall be heard by email on 20th May 2021, and the Deputy Registrar the Judicial Review Division shall put this matter on the Division’s causelist for hearing on that date.

III. The Deputy Registrar of the Judicial Review Division shall send a copy of this ruling to the Applicants and Respondents by electronic mail by close of business on Thursday, 29th April 2021.

24. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 28th DAY OF APRIL 2021

P. NYAMWEYA

JUDGE

FURTHER ORDERS ON THE MODE OF DELIVERY OF THIS RULING

Pursuant to the Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, Other Court Users and the General Public from Risks Associated with the Global Corona Virus Pandemic dated 17th March 2020 and published 17th April 2020 in Kenya Gazette Notice No. 3137 by the Honourable Chief Justice, this ruling was delivered electronically by transmission to the email addresses of the Applicants’ and Respondents’ Advocates on record.

P. NYAMWEYA

JUDGE