



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. MISC E046 OF 2020

IN THE MATTER OF AN APPLICATION FOR LEAVE FOR JUDICIAL

REVIEW ORDERS OF CERTIORARI AND PROHIBITION

BETWEEN

REPUBLIC

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

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

HEZBON OMONDI, HELEN ADHIAMBO OBURU AND

NIKITTA AKINYI.....3RD RESPONDENTS

PATEL RAVJI LALJI.....APPLICANT

RULING

1. The Applicant herein has filed an application by way of a Chamber Summons dated 30th September 2020, seeking the following orders:

1. That this application is certified urgent and heard ex-parte and service thereto be dispensed with.

2. That the *ex-parte* Applicant be granted leave to apply for an order of Certiorari to move to this Court and quash the seven (7) counts contained in the charge sheet dated 17th August 2020 in which the Applicant has already taken plea on Case No. E2308 of 2020, and the Court do find that ELC Appeal No. 22 of 2017 settled the issue relating to L.R No. 209/8323.

3. That the *ex-parte* Applicant be granted leave to apply for order of prohibition restraining the Respondents from prosecuting Criminal Case No. E2308 of 2020 in the Chief Magistrate's Court at Milimani Law Courts pending hearing and determination of this application.

4. That this Court do find that the Judgment on ELC Appeal No. 22 of 2017 is still in force and the issue touching L.R No. 209/833 was settled on 15th July 2017.

5. That leave be granted herein do operate as a stay of further directions/pre-trial or hearing of the private prosecution of Criminal Case No.2308 of 2020 pending the hearing and determination of the substantive application.

6. That the costs of this application be provided for.

2. The application is supported by a statutory statement dated 30th September 2020 and a verifying affidavit sworn on the same date by the Applicant. The main ground raised by the Applicant is that the impugned criminal proceedings arise from a land dispute in Court between himself and the 3rd Respondents, which has been determined by the rulings in ELC Appeal No. 22 of 2017. He averred that no prejudice shall be occasioned to the Respondents and more particularly to the 3rd Respondents in view of the fact that the High Court Judgement delivered on 15th July, 2019 set aside the purported public auction by Domicile Auctioneer Services which is the root cause of this criminal case facing him.

3. The Applicant explained in their pleadings and submissions dated 9th October 2020, that Electrical Marketing (Wholesale) Limited after it realized that LR No. 209/8323 had exchanged hands severally after it was sold in a public auction, lodged an appeal in in ELC Appeal No. 22 of 2017 in which judgment was delivered on 15th July, 2019 and the Court allowed the appeal and proceeded to set aside the order for the sale of L.R No. 209 /8323 by way of a public auction done on 30th August, 2011, and all other consequential orders after the Certificate of Sale and the Vesting Order was issued in favour of Gopal Harish and Gopal Vekaria relating to the suit property. Further, that the Judgment of the Lower court which gave rise to the Certificate of Sale and Vesting Orders in Civil Suit No. 3 of 2011 and all consequential Orders were set aside.

4. Therefore, that this in effect meant that L.R No. 209/8323 reverted to the original registered owner, being Electrical Marketing (Wholesale) Limited However that the 3rd Respondents have in a calculated scheme lodged complaints with the Regional Investigation Officers at Nairobi Area claiming that the Applicants forged their signatures and appended the same on a Sale Agreement, and Transfer dated 8th March, 2016, which transfer in any event was set aside by the Court in the judgment delivered on 15th July, 2019. Further, that the 3rd Respondents have ignored the contents and findings of the Court in the said judgment, and allege that L.R No. 209/8323 is their property.

5. 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.

6. The 3rd Respondents filed a Replying Affidavit sworn on 13th November, 2020 by Hezbon Omondi, in which they stated that they are aware of the proceedings in the Milimani Criminal Case No. E2308, wherein they are the complainants and the Applicants herein is the Accused. They further stated that contrary to what is alleged by the Applicant, the aforesaid criminal matter does not constitute private prosecution and the same was instituted following complaints the 3rd Respondents made. In addition, that the decision to institute the criminal matter was made by the Office of the Director of Public Prosecutions following comprehensive investigations by the relevant investigating agencies. The 3rd Respondents explained the nature of their complaint, namely that the Applicant forged conveyance instruments including a sale agreement and transfer to claim proprietary interests over L.R No. 209/833.

The Determination

7. I have considered the Chamber Summons application dated 30th 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.

8. 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.**

9. 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.

10. 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) I 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.

11. In the present application, the Applicant has submitted that he 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.”

12. 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.

13. 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.”

14. The Court of Appeal discussed the guiding principles on the question of joinder of a defendant in Civicon Limited Vs Kivuwatt 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.”

15. 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...”

16. 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.

17. In light of the foregoing observations and findings, it is evident that leave cannot be granted to the Applicant to commence judicial proceedings on the basis of the 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”.

18. 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.

The Orders

19. I accordingly order as follows:

I. The Applicant is granted leave to amend the Chamber Summons dated 30th 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 Applicant and Respondents by electronic mail by close of business on Thursday, 29th April 2021.

20. 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