



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 PROHIBITION

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

CHIEF MAGISTRATE’S COURT AT MILIMANI LAW COURTS.....1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS2ND RESPONDENT

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

EX PARTE APPLICANTS:

1. PATEL RAVJI LALJI

2. DEVRAJ RAVJI LALJI

RULING NO. 2

1. The Applicants herein have filed an application by way of an Amended Chamber Summons dated 30th April 2021, 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 an amended statutory statement dated 30th April 2021, and verifying affidavits sworn on the same date 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 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.

6. It is also 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 this regard 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.

7. In the present application, the *ex parte* Applicants have provided copies of the charge sheets brought against them in the criminal cases filed in the Chief Magistrate's Court at Milimani Law Courts, the judgment and ruling delivered in Nairobi ELC JR Case No. 28 of 2017 of 2019 and Nairobi ELC Case No. 114 of 2019 on 27th March 2019 and 18th May 2020 respectively, and various documents on the land dispute that is the subject matter of their prosecution. They have also averred as to the reasons why their criminal prosecution is unlawful.

8. To this extent I find that the *ex parte* Applicants have met the threshold of an arguable case, and are therefore entitled to the leave sought to commence judicial review proceedings against the Respondents.

9. On the question of whether the said leave can operate as a stay of the impugned report, the applicable principle is that the grant of such leave is discretionary, but the Court should exercise such discretion judiciously. Order 53 Rule 1(4) of the Civil Procedure Rules provides as follows in this respect:

“The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise.”

10. I am guided by the exposition on the purpose of a stay in **R (H.) vs Ashworth Special Hospital Authority (2003) 1 WLR 127**, where it was held that such a stay halts or suspends proceedings that are challenged by a claim for judicial review, and the purpose of a stay is to preserve the *status quo* pending the final determination of the claim for judicial review, and to ensure that a party who is eventually successful in his or her challenge is not denied the full benefit of the success.

11. The circumstances under which a Court may grant a direction that the grant of leave do operate as a stay of proceedings or of a decision, and the factors to be taken into account by the Courts in this regard were laid down in the said decision, and in various decisions by Kenyan Courts. It has in this regard been held that where the action or decision is yet to be implemented, a stay order can normally be granted in such circumstances. Where the action or decision is implemented, then the Court needs to consider the completeness or continuing nature of such implementation. If it is a continuing nature, then it is still possible to suspend the implementation.

12. These positions were also explained in the decisions in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006**, **Jared Benson Kangwana vs. Attorney General, Nairobi HCCC No. 446 of 1995**, **Republic vs Cabinet Secretary for Transport & Infrastructure & 4 Others ex parte Kenya Country Bus Owners Association and 8 Others (2014) e KLR** and **James Opiyo Wandayi vs Kenya National Assembly & 2 Others, (2016) eKLR**.

13. In the present application, the charges against the *ex parte* Applicants require certain actions of a continuing nature to be taken by the Respondents in relation to their prosecution, and the said charges are therefore amenable to stay. In addition, the *ex parte* Applicants' application will also be rendered nugatory if the stay order is not granted. The stay orders are therefore merited to this extent.

The Disposition

14. In light of the foregoing observations and findings, the *ex parte* Applicants' Amended Chamber Summons dated 30th April 2021 is found to be merited to the extent of the following orders:

I. The *ex parte* Applicants are 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.

II. The *ex parte* Applicants are 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 *ex parte* 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.

III. The leave granted herein shall operate as a stay of any further proceedings in of Criminal Case Numbers E2928 of 2020 and E1953 of 2020 and of any charges against the *ex parte* Applicants in the said criminal cases pending the hearing and determination of the substantive judicial review application herein or until further orders by this Court.

IV. The costs of the *ex parte* Applicants' Chamber Summons dated 30th April 2021 shall be in the cause.

V. The *ex parte* Applicants shall file and serve the Respondents with the substantive Notice of Motion and submissions thereon, and shall also serve the Respondents with the Amended Chamber Summons dated 30th April 2021, a copy of this ruling, and a mention notice, within fourteen (14) days from today's date.

VI. Upon being served with the said pleadings and documents, the Respondents shall be required to file their responses to the substantive Notice of Motion and submissions thereon within fourteen (14) days from the date of service by the *ex parte* Applicants.

VII. This matter shall be mentioned virtually by videolink on 6th July 2021 at 3.pm. for further directions.

VIII. In view of the Ministry of Health directives on the safeguards to be observed to stem the spread of the current COVID-19 pandemic, this Court shall hear and determine the *ex parte* Applicant's substantive Notice of Motion on the basis of the electronic copies of the pleadings and the written submissions filed by the parties.

IX. All the parties shall file their pleadings electronically, by filing them with the Judiciary e-filing system, and send copies by electronic mail to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com and asunachristine51@gmail.com.

X. The service of pleadings and documents directed by the Court shall be by way of personal service and electronic mail, and in the case of service by way of electronic mail, the parties shall also email a copy of the documents so served to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com with copies to asunachristine51@gmail.com.

XI. The parties shall also be required to file their respective affidavits evidencing service in the Judiciary's e-filing system.

XII. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for virtual hearing on 6th July 2021 at 3.pm., and shall avail to the parties the electronic link for the hearing.

XIII. The Deputy Registrar of the Judicial Review Division shall send a copy of this ruling to the *ex parte* Applicants and Respondents by electronic mail by close of business on Friday, 21st May 2021.

XIV. Parties shall be at liberty to apply.

15. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 20TH DAY OF MAY 2021

P. NYAMWEYA

JUDGE