



**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, PROHIBITION AND A DECLARATION**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

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

**THE DIRECTOR OF PUBLIC PROSECUTIONS.....2<sup>ND</sup> RESPONDENT**

**HEZBON OMONDI, HELEN ADHIAMBO OBURU AND NIKITTA AKINYI.....3<sup>RD</sup> RESPONDENTS**

**EX PARTE APPLICANT:.....PATEL RAVJI LALJI**

**RULING NO. 2**

1. This ruling is on the *ex parte* Applicant’s application by way of an Amended Chamber Summons dated 30<sup>th</sup> April 2021, 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 17<sup>th</sup> 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 15<sup>th</sup> 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 an amended statutory statement dated 30<sup>th</sup> April 2021 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 3<sup>rd</sup> 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 3<sup>rd</sup> Respondents in view of the fact that the High Court Judgement delivered on 15<sup>th</sup> 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 3<sup>rd</sup> Respondents filed a Replying Affidavit sworn on 13<sup>th</sup> 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 3<sup>rd</sup> 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 3<sup>rd</sup> 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**

4. I have considered the Amended Chamber Summons application dated 30<sup>th</sup> April 2021, 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.

5. 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 in this regard 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.

6. In the present application, the *ex parte* Applicant has provided copies of the charge sheet brought against them in the criminal case filed in the Chief Magistrate's Court at Milimani Law Courts, the judgment delivered in Nairobi ELC Appeal No. 22 of 2017 on 15<sup>th</sup> July 2017, and various documents on the land dispute that is the subject matter of his criminal prosecution. The *ex parte* Applicant has also averred as to the reasons why his criminal prosecution is unlawful.

7. To this extent I find that the *ex parte* Applicant has met the threshold of an arguable case, and is therefore entitled to the leave sought to commence judicial review proceedings against the Respondents.

8. 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.”**

9. 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.

10. 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 were 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.

11. 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**.

12. In the present application, the charges against the *ex parte* Applicant 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* Applicant's application will also be rendered nugatory if the stay order is not granted. The stay orders are therefore merited to this extent.

### **The Disposition**

13. In light of the foregoing observations and findings, the *ex parte* Applicant's Amended Chamber Summons dated 30<sup>th</sup> April 2021 is found to be merited to the extent of the following orders:

**I. The *ex parte* Applicant is 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 17<sup>th</sup> 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.**

**II. The *ex parte* Applicant is granted leave to apply for an Order of Prohibition restraining the Respondents from prosecuting Criminal Case No. E2308 of 2020 in the Chief Magistrate's Court at Milimani Law Courts .**

III. The *ex parte* Applicant is granted leave to apply for a Declaration 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 15<sup>th</sup> July 2017.

IV. The leave granted herein shall operate as a stay of any further proceedings in of Criminal Case No.2308 of 2020 and of any charges against the *ex parte* Applicant in the said criminal case, pending the hearing and determination of the substantive judicial review application herein or until further orders by this Court.

V. The costs of the *ex parte* Applicants' Chamber Summons dated 30<sup>th</sup> April 2021 shall be in the cause.

VI. The *ex parte* Applicant 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 30<sup>th</sup> April 2021, a copy of this ruling, and a mention notice, within fourteen (14) days from today's date.

VII. 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* Applicant.

VIII. This matter shall be mentioned virtually by videolink on 6<sup>th</sup> July 2021 at 3.pm. for further directions.

IX. 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.

X. 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](mailto:judicialreview48@gmail.com) and [asunachristine51@gmail.com](mailto:asunachristine51@gmail.com).

XI. 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](mailto:judicialreview48@gmail.com) with copies to [asunachristine51@gmail.com](mailto:asunachristine51@gmail.com).

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

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

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

XV. Parties shall be at liberty to apply.

14. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 20<sup>TH</sup> DAY OF MAY 2021

P. NYAMWEYA

JUDGE