



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CONSTITUTIONAL, JUDICIAL REVIEW DIVISION
JUDICIAL REVIEW NO.53 OF 2018
IN THE MATTER OF: COUNTY GOVERNMENT OF MOMBASA TO
APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION
AND
IN THE MATTER OF: PROCEEDINGS IN RESIDENT
MAGISTRATE'S COURT CRIMINAL CASE NO.1319 OF 2018
BETWEEN
FRANCIS THOYA1ST APPLICANT
COUNTY GOVERNMENT OF MOMBASA.....2ND APPLICANT
VERSUS
NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....1ST RESPONDENT
RESIDENT MAGISTRATE MOMBASA.....2ND RESPONDENT

R U L I N G

The Application

1. The Notice of Motion application before the court is dated 20th August, 2018 prays for the following orders:

1. That the Honourable Court be pleased to direct that the leave granted on 17th August 2018 operate as a stay of the proceedings in **RMCC NO. 1319 of 2018 Republic =versus= Francis Thoya** pending hearing and determination of this application.
2. An order of **CERTIORARI** to remove into this Honourable Court for purposes of being quashed the proceedings in **RMCC No. 1319 of 2018 Republic =versus= Francis Thoya** and the Restoration Order issued by the 1st Respondent on 22/6/2018.
3. An order of Prohibition to forbid the 2nd Respondent from charging and proceeding with the hearing and determination of the case against the 1st Ex-parte Applicant for any offence based on the same fact.
4. Costs of the application.

2. The application is supported by affidavit of Jimmy Waliaula sworn on 16th August 2018 in support of the Chamber Summons application filed herein on 16th August 2018 seeking for leave to commence these proceedings. It is also supported by the verifying affidavit of Francis Thoya sworn on 16th August 2018 in support of the said Chamber Summons.

3. The Ex-parte Applicant's case is that he is the County Secretary of the County government of Mombasa and that a so claimed restoration order was served upon his office by the 1st respondent on 22nd June 2018. The Ex-parte applicant states that he was not given an opportunity to make representations before such an order or any other actions by the 1st respondent was made to prosecute him. The Applicant states that on 3rd August 2018 he was issued with Summons to appear before the Resident Magistrate's Court to take a plea on 9th August 2018 in Criminal Case No. 1319 of 2018. The Applicant attended the said court and the plea taking was deferred to 21st August 2018. The Applicant's case is that by Virtue of Section 133 of the County Governments Act he enjoys immunity from personal liability for the acts or omissions done on behalf of the 2nd Ex-parte Applicant in good faith. That the alleged order issued under section 137(b) of the Environmental Coordination Act is un-procedural, irrational and illegal for requiring the alleged restoration be done within 72 hours of its receipt by the 2nd Ex-parte Applicant which is impossible. Hence the decision by the 1st respondent to prosecute and issue him with a so claimed Restoration order without considering relevant factors including the capacity of the 2nd applicant to ideally meet the requirements of the alleged restoration order and the waste and garbage management needs of the whole county and the efforts presently being made by the 2nd applicants to correct the situation is malicious. The Applicant states that the intended prosecution is contrary to public policy as it pits a government agency against another in criminal proceedings. Further the Applicant avers that the contents of the so claimed restoration order is inconsistent with Section 109 of the Environmental Management and Coordination Act, and is malicious, irrational and unreasonable considering the terms set out in the said defective restoration order thus making it unenforceable.

4. The application is opposed by the 1st Respondent vide a Replying Affidavit sworn by Stephen K. Wambua on 25th March 2018. The 1st Respondent's case is that the application is misconceived, made in bad faith and in ignorance of the law and particularly the statutory mandate of the NEMA. To stop the prosecution initiated by a competent prosecution agency that has been authorized by the Director of Public Prosecutions, is tantamount to curbing the powers of both the Director of Public Prosecutions and the NEMA. The Respondent states that the *ex parte* applicants are not being prosecuted in vain but pursuant to the provisions of the Environmental Management and Coordination Act (EMCA) where they have committed offences known in law and for which only an acquittal or discharge can vindicate them.

5. **Submission**

With the leave of court parties filed submissions which I have considered. The issues I raise for determination are:

(a) Whether this court has the jurisdiction to deal with this matter.

6. It is now trite law that a court which has no jurisdiction must down its tools in any legal proceedings. The Ex-parte Applicants came to this court to stop a restoration order issued by the Respondent herein for them to restore the Makupa dumpsite. Mr. Thoya, sued in his capacity as the County Secretary of the County Government of Mombasa was subsequently charged with criminal offence for failure to comply with that restoration order.

7. Before Mr. Thoya could take plea in that criminal case, he moved this court under its judicial review jurisdiction with a prayer for an order stopping taking of plea and has so far succeed courtesy of interim orders herein.

8. However, in my view, the better court to approach would have been the Environment and Land Court which also has the jurisdiction to issue prerogative orders under section 13 of the Act 19 of 2011. This is so because the substratum of the proceedings before this court relate to matters environment and there is legislative reason as to why the ELC has the greater jurisdiction in this matter.

9. Further, the Respondent herein – NEMA - is arguably partly the reason why the ELC was established. Occasionally the High Court and ELC would be having concurrent jurisdiction. However, in the matters which are very clearly environmental, or Land in nature, the High Court must shy from jurisdiction. Although the Respondent has not objected to the jurisdiction of this Court, this Court on its own motion is obligated to do the right thing and hereby restates that the proper jurisdiction in this matter is the ELC. For that reason this matter is herewith dismissed for want of jurisdiction.

10. In the exercise of the inherent jurisdiction of this Court I hereby order that the Ex-parte Applicant Mr. Francis Thoya, shall not take plea in Criminal case No.1319 of 2018 until after 30 days from 22. 01. 2019. This is so that the Ex-parte Applicant may be able to approach the ELC for a consideration of conservatory orders.

Each party shall bear own costs of the application

Dated, Signed and Delivered in Mombasa this 22nd day of January, 2019

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. E. K. Gitonga for Respondent

N/A for Applicant

Mr. Kaunda Court Clerk