



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW NO. 10 OF 2018

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI

AND

IN THE MATTER OF: THE LAW REFORMS ACT

AND

IN THE MATTER OF: THE RESIDENT MAGISTRATE'S COURT AT MOMBASA

BETWEEN

1. JOSEPH OBURA NYANGAGA

2. HUDSON KARIUKI NGUURO

3. ANWAR ALI ISLAM.....APPLICANTS

AND

1. THE RESIDENT MAGISTRATE, MOMBASA

2. DIRECTOR OF PUBLIC PROSECUTIONS....RESPONDENTS

AND

AMIRALI HASSANALI MOHAMED.....INTERESTED PARTY

RULING

The Application

1. By the Notice of Motion dated 1st March, 2018 the Ex parte Applicant prays for the following orders:

(a) An order of certiorari do issue to remove to the High Court and quash the proceedings and orders of the Magistrate's Court in Criminal Case No. 1350 of 2017. Republic vs. Joseph Obura Nyangaga, Hudson Kariuki Nguuro and Anwar Ali Islam.

(b) An order of prohibition do hereby issue to prohibit the Respondent from proceeding with the hearing of the criminal case referred to herein above.

(c) That costs of this suit application be provided for.

2. The application is premised on the grounds set out therein. It is also supported by statement filed herein on 16th February, 2018. It is also supported by the Verifying Affidavit sworn by the Applicant on 14th February, 2018.

3. The Ex parte Applicant's case is that sometime in 2008 he bought a parcel of land at Likoni on which he has constructed a four storey building. That the Interested Party and his wife, who has since died filed HCCC NO. 265 of 2008 against the Ex parte Applicant and Judgment was delivered in November, 2017. The suit was in respect of ownership of the suit property being the aforesaid parcel of land in Likoni. The Ex parte Applicant then lodged an appeal against the said Judgment, and sought stay of execution pending appeal.

4. Unhappy with these developments, the Ex parte Applicant states that the Interested Party lodged a complaint with the Police and the Ex parte Applicant and others were charged in Criminal Case No. 1350 OF 2017. The offences range from conspiracy, to forgery of title. The Interested Party and the 2nd Respondent are both aware of the pendency of the appeal which is yet to be determined by the Court of Appeal since the record of appeal is yet to be prepared and served.

5. The Ex parte Applicant avers that the complaint by the 1st Interested Party and his being prosecuted by the Respondent is aimed at coercing him to vacate the portion of land on which he has constructed the 4 storey building. The Ex parte Applicant states that the Interested Party and 2nd the Respondent should await the outcome of the appeal instead of misusing the criminal process. The Ex parte Applicant's case is that the criminal charges are meant to intimidate him to surrender his property to the Interested Party. This is an abuse of the criminal process. The Ex parte Applicant states that the ownership of the said title is a determination to be made by the Environment and Land Court and the Court of Appeal, and not in the criminal case. The Ex parte Applicant's case is that the Interested Party has influenced the said criminal proceedings, and looks to a pre-determined outcome in order to aide his case in the Environment and Land Court.

6. The Ex parte Applicant states that unless this Court intervenes by staying the proceedings of the Court in Criminal No. 1350 of 2017 he stands to be prejudiced and suffer in that there is a likelihood of him being punished by the Court by either committing him to jail or giving him a fine to pay yet the Interested Party and the Ex parte Applicant have a land case in Court.

The Response

7. The application is opposed by the Interested Party on the grounds that The Application is an abuse of court process because it is asking the court to interfere with the decision of the 2nd Respondent which is an independent body established under Article 157 of the Constitution. The Interested Party states that the orders sought cannot be issued in judicial review proceedings because:

- a) Judicial Review proceedings are concerned with the processes of making the decision and not the merits.
- b) The Ex parte Applicants herein are challenging the decision of the 2nd Respondent to charge them with the offence of forcible detainer contrary to section 91 as read with section 36 of the penal code.

8. The Interested Party states that it is not alleged that the 2nd Respondent acted *ultra vires* instituting the criminal proceedings against the Ex-parte Applicants. The allegations that the Applicants cannot be charged with the offences stipulated in the charge sheet while an appeal in the civil suit is pending is misconceived because:

- a) The Civil Proceedings are based on trespass to private property.
- b) The Criminal Proceedings are based on forgery and forcible detainer.
- c) Accordingly, the outcome in Civil Proceedings will not in any way effect criminal trial.
- d) In any event the criminal proceedings were instituted on 7/9/2017 before the judgment in ELC Civil Suit No. 265 of 2008 which was delivered on 1/11/2017 or the purported appeal against the Ruling.

9. The Interested Party states that the Application is premised on a wrong assumption that criminal proceeding cannot run parallel to civil proceeding over the same facts against the same persons. The Interested Party avers that there are enough statutory safeguards in the Constitution and the Criminal Procedure Code to protect the rights of the Ex-parte Applicants.

10. The Interested Party filed further grounds of objection on 13th June, 2018 whose import is that the 1st Applicant's co-accused were joined to these proceedings without their knowledge. The said co-accused **Hudson Kariuki Nguuro** and **Anwar Ali Islam** also filed affidavits to show that they are not willing to be party to these proceedings. In those affidavits they also allege that they have settled the criminal case against them and that indeed they were in illegal occupation of the Interested Party's land. The effect is that the 2nd and 3rd nominal Ex parte Applicants herein have disowned these proceedings leaving only the 1st nominal Applicant in the suit. These withdrawal affidavits were filed by M/S Ndegwa & Sitonik Advocates for the Interested Party. This fact may also mean that the alleged withdrawal by these two Applicants may have been as a consequence of talks or negotiations between them and the Interested Party. On those grounds, the Interested Party's case is that this application is an abuse of the process of the Court and should be dismissed.

11. On their part the 1st Respondent opposed the application vide Grounds of Opposition filed on 14th marc, 2019. The 1st Respondent's case is that the application is misconceived, frivolous, vexatious and an abuse of the court process. That Article 157 (10) of the constitution is clear and this Court cannot injunct an institution from carrying out a mandate granted to it by the constitution. The 1st Respondent states that the police are merely carrying out their obligation based on reports made to them and are not in any way acting maliciously. That the application offends Article 160 (5) of the Constitution of Kenya.

12. The 2nd Respondent, the Director of Public Prosecutions, also opposed the application, stating that their investigations and findings established that some titles were forged, and that is why they charged the accused persons. They state that under Section 193 of the Criminal Procedure Code, nothing stops the Director of Public Prosecutions from initiating a criminal process even when a civil process is ongoing.

Submissions

13. Parties made oral submission on the application. I have carefully considered both the application and opposition to it, together with the submissions. The issue that I raise for determination is whether there are good grounds for this Court to stop the proceedings in Mombasa Criminal Case No. 1350 of 2017.

Determination

14. The starting point is the law. Articles 157 (10) of the constitution mandates the Director of Public Prosecutions to carry out his mandate without any interference only subject to Sub-Article (11) which demands that the execution of that mandate should not be against public policy or an abuse of power.

“157. Director of Public Prosecutions

- (1) There is established the office of Director of Public Prosecutions.**
- (2) The Director of Public Prosecutions shall be nominated and, with the approval of the National Assembly, appointed by the President.**
- (3) The qualifications for appointment as Director of Public Prosecutions are the same as for the appointment as a judge of the High Court.**
- (4) The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.**
- (5) The Director of Public Prosecutions shall hold office for a term of eight years and shall not be eligible for re-appointment.**
- (6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—**
 - (a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;**
 - (b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and**
 - (c) subject to clauses (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).**
- (7) If the discontinuance of any proceedings under clause (6)(c) takes place after the close of the prosecution’s case, the defendant shall be acquitted.**
- (8) The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.**
- (9) The powers of the Director of Public Prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions.**
- (10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.**
- (11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.**
- (12) Parliament may enact legislation conferring powers of prosecution on authorities other than the Director of Public Prosecutions.”**

15. Also, Section 193 of the Criminal Procedure Code allows criminal proceedings to run parallel to civil proceedings. The Section states:

Concurrent criminal and civil proceedings Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.

16. The issue here therefore is whether the Director of Public Prosecutions has misused or abused his powers by charging the 1st nominal Applicant herein, and whether or not this is a matter in which Section 193 CPC does not apply.

17. In this case, the primary matter is Mombasa ELC No. 265 of 2008 in which the Interested Party sued the nominal Applicants over the ownership of land **parcel No. Msa/Block V/Mainland South/133**. That is the plot over which the Applicants herein have been charged with illegal occupation, in the above said criminal case. The ELC No. 265 of 2008 was decided in favour of the Interested Party vide decision delivered on 1st November, 2017. The suit premises was given to the Interested Party and the vacant possession of the suit property given to the Interested Party.

18. However, the Applicants appealed the said Judgment, and in the process, secured a stay of execution pending the appeal. This means that the order of eviction given by the Court cannot be executed until the appeal is heard and determined. The appeal is on the ownership of the suit property. Yet the charge in the said Criminal Case No. 1350 of 2017 also seeks to determine the ownership of the same suit property by purporting that the Applicants herein forged title to the suit property and are in illegal occupation thereof.

19. The inconsistency and the unfairness of these proceedings is clear. In the ELC and in the intended appeal, there is equality of arms. Each party is given free chance to prove ownership to the suit property. However, in the criminal proceedings, that equality of arms has disappeared, and the Applicants are charged with illegal occupation and forgery of title. In essence, both the Court of Appeal and the criminal process are aimed at determining the ownership of the suit property. However, while the stay of execution of the ELC orders are effective, and the Applicants cannot vacate the suit property until the appeal is determined, the effect of the criminal charges are that the Applicants are in illegal occupation and should be evicted.

20. The irony is clear. In my view this is a situation where Section 193 CPC cannot apply because such application will be to deny the Applicants the benefits of fair hearing provided for under Article 50 of the constitution. Since the Applicants have stay of execution of order of vacant possession in ELC No. 265 of 2008, those orders cannot be rendered nugatory by the continuation of the criminal charges. The said criminal charges must be stopped forthwith to await the finalization of the appeal which will determine once for all the ownership of the sit property. After that determination, the Director of Public Prosecutions will still be able to proceed with the said criminal case should it be necessary.

21. Before I conclude, it is important to comment on the Director of Public Prosecution's powers under Article 157 of the constitution. Granted that the Director of Public Prosecutions has powers to initiate and terminate any proceedings, the Director of Public Prosecutions must do that in a way which is seen to be fair to all the parties in a matter.

22. A look at these proceedings does not reveal an impartial hand of the Director of Public Prosecutions. It is clear that the Interested Party is determined not only to proceed with the civil case, but to make complaints to the Director of Public Prosecutions to initiate or proceed with the criminal process. The intervention of the Interested Party is more clearly seen when he appears to manipulate the 2nd and 3rd nominal Applicants to withdraw their consent to this application, and when, through the advocate of the Interested Party, they file affidavits which appear contrary to the application. In the said affidavit they state that they had already settled the criminal case with the Interested Party. The clear interference in the said criminal process by the Interested Party is likely to raise the question whether or not the 1st Applicant herein will get fair hearing in the said criminal case. Also to be noted is that the Environment and Land Court matter concerns ownership of a plot in which the 1st nominal applicant herein has built a four storey house. It is alleged in the criminal proceedings that the plot on which the building stand belongs to the Interested Party. Clearly, the nominal applicant has made massive investment in the property, and he could only have done that in an honest belief that the title was his. The criminal process, if allowed to stand, will appear to paint the Applicant as a criminal, and not as a person who has also made serious investment in the property. As the Court of Appeal determines the issue of the said ownership, the Interested Party cannot be allowed to run the show by appearing to influence the criminal process. The fact that he has so far clearly influenced the 2nd and 3rd Applicants to withdraw from this case is a show of how far he is prepared to go to nail the 1st Applicant herein. There will be no equality or arms in the criminal process, and it is the finding of this Court that the 2nd Respondent herein, the DPP, has not applied his powers under Article 157 judiciously.

23. From the foregoing it is the finding of this Court that the application dated 1st March, 2018 is merited and orders granted as follows:

(a) The proceedings in the **Criminal Case No. 1350 of 2017 Republic vs. Joseph Obura Nyanganga and 2 others** are hereby terminated forthwith.

(b) The said proceedings mentioned in (a) above may be commenced afresh, if need be, upon the determination of the appeal arising from the aforesaid Environment and Land Court matter whose Judgment was delivered on 1st November, 2017.

(c) Costs shall be borne by parties.

Dated, Signed and Delivered in Mombasa this 23rd day of May, 2019.

E. K. OGOLA

JUDGE

In the presence of:

Mr. Ooko Okongo holding brief Odhiambo for Ex parte Applicant

Ms. Ovesi holding brief Sitonic for Interested Party

Ms. Kiti for 1st Respondent

Mr. Kaunda Court Assistant