



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT CHUKA
IN THE JUDICIAL REVIEW DIVISION
JR .MISC APPLICATION NO. 30 OF 2018
IN THE MATTER OF AN APPLICATION BY PETER MUNGAI KIRERA
FOR LEAVE FOR ORDERS OF CERTIORARI AND PROHIBITION
AND
IN THE MATTER OF THE CONSTITUTION OF KENYA 2010, THE CIVIL
PROCEDURE ACT CAP 21 OF THE LAWS OF KENYA AND THE
FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015
BETWEEN
PETER MUNGAI KIRERA.....1ST APPLICANT
MOSES NDUNGU KIRERA.....2ND APPLICANT
AND
INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT
DIRECTOR OF PUBLIC PROSECUTION.....2ND RESPONDENT
CHIEF MAGISTRATE'S COURT AT CHUKA.....3RD RESPONDENT
AND
PATRICK GITONGA HARUN.....1ST INTERESTED PARTY
MICHAEL NJUE NJOKA.....2ND INTERESTED PARTY
R U L I N G

1. The applicants herein **PETER MUNGAI KIRERA & MOSES NDUNGU KIRERA** have moved this court vide Chamber Summons dated 13th December, 2018 for the following orders namely:

i. That this application be certified urgent (spent)

ii. That the applicants be granted leave to apply for order of certiorari to remove into this court and quash the decision made by Inspector General and Director of Public Prosecution the 1st and 2nd Respondents herein to prosecute the applicants and quash any charge sheet registered against the applicants before the said court and quash any criminal proceedings commenced

pursuant thereto.

iii. That the applicants be granted leave to apply for order of prohibition to prohibit the respondents or any person on their behalf or authorized by them prohibiting them or each of them from initiating and prosecuting any criminal proceedings instituted in Kenya against the applicants in Chuka Chief Magistrate's Court Criminal Case No.291 of 2018.

iv. That the leave granted in terms of prayer 2 and 3 above do operate as a stay of criminal proceedings in Chuka Chief Magistrate's Court Criminal Case No. 291 of 2018 (Republic -vs- Peter Mungai Kirera & Another).

v. Costs be provided for.

2. This application for leave to challenge the Respondent's decision to prosecute the Applicants is grounded on the following grounds namely:-

a) That the recommendation and intended prosecution of the applicants is intended to punish, inconvenience, prejudice and ridicule the applicants for fighting the Interested Parties' claims in the Embu High Court Civil Suit No. 6 of 2018.

b) That the 1st and 2nd Respondent have consequently proceeded to file and register a charge sheet in lower court vide Criminal Case No. 291 of 2018 where the applicants have been charged with various charges related to destroying of crops of cultivated produce contrary to Section 334(a) of Penal Code.

c) That the prosecution is an abuse of legal process contrary to Article 157 (11) of the Constitution.

d) That the prosecution of the Applicant is intended to achieve collateral and extraneous purposes and give advantage to the Interested Parties who lost out in the civil suit.

e) That unless the orders sought are granted the applicants will be subjected to an unlawful process and that it is fair that this court does exercise fair administration of justice.

3. This application is supported by the affidavit of Peter Mungai Kirera sworn on 13th December, 2018 where he has deposed that there is a dispute over that property known as Magumoni/Itugururu/244 which comprises the estate of the late Shadrack Njoka Kirera who died on 18th February 2007. The 1st applicant has further deposed that he is one of the administrators of that estate.

4. The 1st applicant has alleged on oath that Patrick Gitonga Harun the 1st Interested Party entered into a sale agreement with Michael Njoka Njoka the 2nd Interested Party to lease 13 acres of the estate when the estate had not been distributed among the beneficiaries and when the 2nd Interested Party had no capacity.

5. The 1st applicant's claim that the 1st Interested Party has made Kshs.30,000,000/- from what he terms illegal tobacco farming and that the 2nd Interested Party is accountable to the administrator for interfering with the estate.

6. The 1st Applicant further claims that the 1st Interested Party was charged with forcible detainer vide Chuka Chief Magistrate's Court Criminal Case No.1151/2013 after felling trees in the estate and that he got away on a technicality because the estate was still in the name of deceased.

7. The 1st Applicant also claims that the 1st Interested Party instituted a civil suit vide Embu HCC No.6 of 2016 where he sought judgment against the applicants for malicious prosecution and loss of Kshs.8,666,670/- for loss of tobacco. He contends that the suit was struck out and that the striking of the suit displeased the 1st Interested Party and that it is on that basis that they are being prosecuted.

8. The applicants have submitted that their prosecution is intended to impede their pursuit of their rights. They further contend that at this stage this court is not required to go deep into the allegations made so long as it is satisfied that a prima facie case has been established. They rely on the case of Republic -vs- Communications of Kenya & 2 Others Ex Parte Africa Television Network Ltd where the Court of Appeal held that leave ought to be granted if, on the material available, the court considers, without going into the matter in depth that there is an arguable case for granting leave.

9. The applicants have pointed out that they have come to court in a timely manner and demonstrated that there was intermeddling with the estate of a deceased person.

10. They have urged this court to suspend their trial pending the hearing and determination of the main motion if granted leave and have relied on the decision of Republic- vs- Director of Public Prosecution and 3 others ex parte David Mathenge Ndirangu [2014] eKLR where the court suspended a criminal trial pending an outcome of a case filed in ELC Court.

11. The 1st and 2nd Respondent have opposed this application vide a Replying Affidavit sworn by P.C George Rutere on 15th January 2009. George Rutere has deposed that he is the Investigating Officer in the criminal case No. Chuka Chief Magistrate's Court Criminal Case No.291 /2018. He has termed this application frivolous as the police acted on a report by 1stInterested Party on 12th November, 2013 which indicated that the applicants had destroyed the 1st Interested Party's crops. He claims that the applicants disappeared from the scene and efforts to trace them only bore fruits on 8th March, 2018.

12. The 1st and 2nd Respondents claim that the applicants uprooted 288,889 tobacco crops and that they were charged with the offence of destroying crops or cultivated produce contrary to **Section 334(a)** of the **Penal Code**. He contends that the decision to charge them was arrived at independently and that they were not influenced by the decision in *Embu HCCA No.6 of 2016* as in their view there is no nexus between the two cases.

13. The Respondents have termed the application premature and have insisted that the issues raised herein should be raised at the criminal trial. In their view the applicant's remedy does not lie on Judicial Review orders.

14. The Respondent's have submitted that they do not want to descent into the arena of dispute over ownership of the parcel of land and that their interest is only to establish ownership of the crops destroyed and their investigations revealed that the 1st Interested Party was the owner and that the applicants maliciously destroyed the crops.

15. The Respondents submits that Judicial Review orders are not available when other remedies are available and that the available remedy is to raise the issues as their defence in the criminal case.

They have relied on case of *Lady Justice Khaminwa -vs- JSC [2014] eKLR* in urging this court not to grant leave arguing that the decision to charge the applicants have already been spent as the applicants were charged and now await trial. They further submit that the applicant have not demonstrated what prejudice will be suffered if the criminal trial proceeds to conclusion.

16. The 1st Interested Party has on its part also opposed this application insisting that application is fatally defective as it seeks to stifle a criminal trial vide *Criminal Case No.291/2018* which in his view, has no bearing with the administration of the estate of the late Shadrack Njoka Kirera. He has pointed out that the letters of administration was issued on 5th July 2018 much later after the applicants had been charged. The 1st Interested Party contends that the applicants were aware about his lease and denies that he was intermeddling in the estate. He alleges that he was framed for the charge of forceful detainer and accuses the applicants for malicious prosecution. The 1st Interested Party contends that the applicants frustrated his efforts to have them prosecuted after they destroyed his crops in 2010 and that it took the intervention of the office of Director of Public Prosecution for the charges to pressed against the applicants last year.

17. The 1st Interested Party further contends that the procedure for seeking leave has been flouted by the applicants and that they lack capacity to sue in their own names. It is further contended that **Section 193A** permits the concurrent proceeding of a civil suit and a criminal case. He avers that the Director of Public Prosecution is independent and should be allowed to discharge its duties independently as provided under **Article 157** of the **Constitution**. He has relied on the case of *KCB -vs- Commissioner of Police & Another [2013] eKLR* where the court held that Director of Public Prosecution and Inspector General are independent and courts would not ordinarily interfere with them unless there is violations of Fundamental Rights and Freedoms.

18. The 1st Interested Party has accused the applicants for coming to court with unclean hands for having broken the law and wanting the protection of the same law. He has cited the provisions of **Order 53 Rule 7** of the **Civil Procedure Rule** and contended that failure to annex copy of the order/direction so as to be quashed to the application is fatal. He has further relied on the decision of *Republic - vs- Ruiru District Land Disputes Tribunal Ex parte Lucia Muiruri & Another [2014]eKLR*. He contends that this application should thus be struck out for being incompetent as the court is unable to determine if there is a decision capable of being quashed in the absence of such decision being shown to court.

19. This court has considered this applications and the grounds raised by the applicant. I have also considered the response made by the 1st and 2nd Respondent and the 1st Interested Party. The main issue for determination is whether the application is competent, and whether applicants have established an arguable case sufficient enough to warrant this court exercise its discretion in their favour and whether the leave if granted should operate as a stay.

20. This court has looked at the allegations made by the applicants and noted that the applicants and the Interested Parties obviously have had long running differences from 2013 which has seen them in both criminal and civil courts trying to resolve them albeit without much success. I have no doubt that this present application and the pending Criminal Case No.291 of 2018 at the lower court is part of the same attempts to settle scores between the two warring parties in this suit.

(i) Whether this application is competent

The 1st Interested Party has raised the fact that the application herein is incompetent for two reasons namely:-

a) Want of form

b) That the decision sought to be challenged as provided under **Order 53 Rule 7** of **Civil Procedure Code** has not been exhibited in the application.

It is true that application under Judicial Review is usually brought in the name of the Republic with the applicant being described as ex parte applicant. The underlying reason is traced to the history of how the prerogative remedies evolved in England. A look at the "**Administrative Law**" 9 edition by *H.W.R. Wade & C.F Forsyth* gives an inside into this and explains that the remedies of certiorari, mandamus and prohibition were termed "**prerogative**" because they were originally available only at the instance of the Crown and not the subjects and that the Crown obtained the orders to ensure that public authorities carried out their duties and inferior tribunals kept within their proper jurisdiction. These remedies were necessary to ensure efficiency and maintaining order in the hierarchy of courts, commission and authorities. They were also designed to specifically to control the government powers and duties and their hallmark is that they are granted at the instance of the Crown as the title of every case indicates. This was before the 16th Century in England but by the end of 16th Century

these remedies had transformed to become generally available to ordinary litigants and an applicant could begin such proceedings in the Crown's name without seeking any permission or authority. The Crown so to speak lent its legal prerogatives to its subjects in order that might collaborate to ensure good and lawful government. These remedies over time have been converted into a tool for the protection of the subjects. It is for this reason that you will find Judicial Review applications is headed "**Republic**" as the applicant. The name Republic in our instance simply replaced the name Crown but it signifies one and the same thing. This application in its heading or title has omitted the name of the "**Republic**". However I am not persuaded that the want of form is fatal to the application. The omission in my view has not really made the application lose its character and has not prejudiced the Respondents or the Interested Parties in any way.

21. Secondly on the question of requirement of annexing the decision sought to be quashed on this application as provided for under **Order 53 Rule 7**. It is true that a party seeking to challenge or quash a decision or order must exhibit or order the decision. That legal requirement is necessary to enable a court to both determine whether the decision is amenable to Judicial Review reliefs and whether the challenge is made before the expiry of six months period which is a timeline set by the law (**Order 53 Rule 2 Civil Procedure Rules**)

22. In this application, the applicants are silent on the date of the decision by the Director of Public Prosecution to prefer charges or prosecute them. However that omission in my view is cured by copy of the charge sheet exhibited by the applicants as "**PMK4**". The same in my view suffices because it forms the basis for the grievances expressed and thus the leave sought by the applicant to challenge it. I have also a letter dated 2nd February, 2018 written by Office of the Director of Public Prosecution and exhibited by 1st Interested Parties in his Replying Affidavit and I am satisfied that there is a nexus between that letter and the charge sheet. It is quite apparent from the dates appearing on the said letter and the charge sheet that the applicants are within the prescribed time to seek leave from this court in terms of the reliefs sought herein. This court therefore finds that this application is competent of course there is no denying the fact that the applicants could have done better in their pleadings but that notwithstanding I am not persuaded that the omissions cited by the 1st Interested party renders this application incompetent.

23. Whether the applicants have established an arguable case to warrant leave sought.

The purpose for the legal requirement for a party to first seek leave to apply for any of the prerogative order is to sieve and exclude frivolous and vexatious applications and only give chance to prima facie cases that reveal sufficient grounds to warrant further interrogations. On this score, this court is guided by the Court of Appeal decision in the case of **David Mathenge Ndirangu - vs- Director of Public Prosecution & 3 Others [2014] eKLR** where the court held that at this stage, it is not necessary to delve much into the case and that it was sufficient to determine on the face of the evidence presented if an arguable case has been made out.

24. It is quite apparent without delving deeper into the disputes between the applicant and Interested Parties that there are deep and long standing disputes between the Interested Parties on the one hand and the applicants on the other. The attendant battles between the two warring parties has seen them transverse both civil and criminal courts. I have noted from the civil case filed in **Embu High Court Civil Case No.20 of 2013** that the 1st Interested Party had sued the applicants herein over the same destruction of tobacco crops which is now the subject of the criminal trial in **Chuka Chief Magistrate's Criminal Case No. 291/2018**. I am therefore not persuaded by the 1st and 2nd Respondents and 1st Interested Party's contention that there is no nexus between the two cases. The two are obviously related given the pleadings which have been exhibited by the applicants herein.

25. I have also noted that in **Chuka Principal Magistrate's Court Criminal Case No.1151 of 2013**, the 1st Interested Party was the accused and what was he charged with? Forcible detainer over parcel No. Magumoni/Itugururu/244 which is listed as land where tobacco had been planted between 2011 and 2013. A glance at the present charge facing the applicants indicates the offence relates to the same period and it is over destruction of cultivated crop described as tobacco crops. It is apparent therefore that tables somehow turned because where you found the 1st Interested Party being accused in **Chuka Principal Magistrate's Court Criminal Case No. 1151 of 2013** the applicants are listed as complainants and the contrary obtains in **Chuka Chief Magistrate's Court Criminal Case No. 291/2018** because now the 1st Interested Party is the complainant while the applicants are the accused persons. That set of circumstances in my view reveals that the applicant have established a prima facie or arguable case to be granted leave to challenge the decision to charge. It does appear on the face of it in my view that there could be much more than a more prosecution of a criminal case given the circumstances.

26. I am also satisfied given the circumstances of this case that it is in the interest of justice to stay the criminal proceedings in the lower court pending the hearing and determination of the substantive motion. The stay in my view would not prejudice any party and it would be unfair in my view to let the 1st and 2nd Respondents continue with the prosecution of the applicants when they have established an arguable case to challenge not only the charges facing them but the decision to charge them.

In the premises and for the aforesaid reasons, I am persuaded to exercise my discretion under **Order 53 Rule 1(3)** to grant leave in terms of prayer 2 and 3 of the application dated 13th December, 2018. The leave granted shall operate as a stay of further criminal proceedings in **Chuka Chief Magistrate's Court Criminal No. 291/2018** pending the hearing and determination of substantive motion which must be filed within 21 days from the date of this ruling. In default of filing of the substantive motion the stay granted shall automatically lapse. Costs of this application shall be in the main substantive cause.

Dated, signed and delivered at Chuka this 23rd May, 2019.

R.K. LIMO

JUDGE

23/5/2019

Ruling dated, signed and delivered in the open court in presence of Murithi holding brief for Nyakundi for 1st and 2nd Applicants. Momanyi

for 1st and 2nd Respondents and Kimani for Interested Party.

R K. LIMO

JUDGE

23/5/2019