



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISCELLANEOUS APPLICATION NO. 1 OF 2017 (JR)

BETWEEN

WILFRED GISEBE GISEBE.....PETITIONER/APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

OFFICER COMMANDING KILGORIS POLICE STATION..2ND RESPONDENT

KILGORIS MAGISTRATE'S COURT.....3RD RESPONDENT

AND

OLORIEN GROUP RANCH.....INTERESTED PARTY

JUDGMENT

1. The Applicant filed the Notice of Motion dated 18th September 2017 pursuant to leave granted on 21st September 2017. The Application was brought under **Order 53 Rule 1 and 2 Civil Procedure Rules** and **Section 8 and 9 of the Law Reform Act Cap 26 Laws of Kenya** and all enabling provisions of the law. The Applicant sought the following orders:

a) THAT the Honorable Court be pleased to an order of **Certiorari** to remove into this court and quash the entire decision of the 1st and 2nd Respondents to charge and prosecute the Ex-parte Applicant before the 3rd Respondent in Kilgoris Principal Magistrates Court Criminal Case No. 1615 of 2017 (**R versus Wilfred Gisebe & 2 Others**).

b) THAT the Honorable Court be pleased to an order of **Prohibition** directed at the 1st and 2nd Respondents, their officers and/ or agents prohibiting and/or restraining them from arresting, re-arresting prosecution and/or continued prosecution of the Applicant in Kilgoris Principal Magistrates Court Criminal Case No. 1615 of 2017 (**R versus Wilfred Gisebe Gisebe & 2 Others**).

c) THAT the Honorable Court be pleased to an order of **Prohibition** directed at the 3rd Respondent and/or any other magistrate to restrain and/prohibit him/her its officers and/or agents from hearing and/or further hearing and/or determining proceedings and/or further prosecution Kilgoris Principal Magistrates Court Criminal Case No. 1615 of 2017 (**R versus Wilfred Gisebe Gisebe & 2 Others**).

2. The Application is supported by the grounds in the Statutory Statement and the Affidavit of Wilfred Gisebe Gisebe. The Applicant deposed that he is the proprietor of Title Number TRANS-MARA/OLERIEN/20(Plot No. 20) following an adjudication carried out on 3rd January 1984. He deposed that on 2nd July 2013 he sought to divide the Plot No. 20 into various portions to facilitate ease of use of the property. He therefore legitimately acquired consent from the Land Control Board for the sub-division of Plot No. 20. He further sought services of the District Surveyor from Trans-Mara Sub-County who effected the required subdivision and the applicant presented mutation forms before the Land Registrar Trans-Mara Sub-County who declined to accept the forms for registration without furnishing the applicant with reasons for its refusal. The applicant also attached a charge sheet in which he is charged with the offence of making a false document contrary to Section 357 (a) of the Penal Code.

3. The applicant deposed that he filed a **Petition No. 10 of 2014** before the High Court and was enjoined in **ELC No. 319 of 2017 (JR)** as an interested party before the Land and Environment Court at Narok. On 3rd February 2017 the Commanding Officer Station Kisii Police Station contacted the Kilgoris Police Station to have the applicant arrested. The applicant spent 2 days in the holding cell and was released after paying cash bail of Kshs 50,000/-. He contends that his right to fair trial under **Article 50 of the Constitution** was infringed as there were pending civil matters before the court. It was his case that the decision to pursue the criminal matter was bad in law and should be

stopped.

4. The interested party filed its replying affidavit dated 29th October 2018 on 13th November 2018. Julius Ole Mokita, the secretary of the interested party deposed that the arrest of the applicant was justified and that the applicant is trying to use the court process to shield him from his illegal activities. It was the interested party's case that it did not dispute the fact that the applicant was the registered owner of Plot No. 20, however it pointed out that there exists a discrepancy in respect of the acreage on the title document and the actual size of the land on the ground. The interested party contend that the Plot No. 20 measures 14.49 Hectares on the ground and that the area index map also reflects that it measures 14.19 Hectares. However, the acreage on the title document reflect that the property measures 141.49 Hectares. They explained the applicant elicited the assistance of the Sub-county Surveyor Allan Iniungu Mweresa who fraudulently prepared the mutation which purport to divide 141.49 Hectares. The consent obtained from the Land Control Board was on the presumption by the Board that the sub-division was innocent. The interested party contend that the mutation forms were rejected by the land registrar because of the above discrepancies.

5. The interested party further averred that in the **Constitutional Petition No. 10 of 2015** filed by the applicant, the Land Registrar in a report/letter dated 3rd April 2014 explained the reasons for refusal of registration of the intended mutations. The interested party alleged that during the pendency of the said Constitutional Petition, the applicant and surveyor forged signatures of the Land Registrar on the mutation forms, while Tairaya Ole Ngusu posed as the owner of Parcel No. Trans-Mara/Oloirien/1 which is owned by the interested party, and signed the mutation sanctioning the expansion of the ground size of Plot No. 20. As a result 100 Hectares was obtained from parcel No. Trans-Mara/Oloirien/1, the interested party upon the discovery of the fraud and mischief filed **Kisii ELC Miscellaneous Application No. 4 of 2016 (JR) (Now Narok ELC 319 of 2017)**. The office of the Director of Survey and the Regional Survey Office intervened and expunged the illegal amendment.

6. When the matter came up for hearing the parties agreed that the hearing proceed by way of written submissions. The applicant in his submissions identified the following issues;

- i. Whether the Petitioner's land Parcel no. Trans-Mara Olorien/20 measures 141.49 Hectares or 14.10 Hectares?*
- ii. Whether the Land Registrar abused powers conferred upon his office in not registering the Mutation as presented by the Petitioner.*
- iii. Whether the Petitioner was involved in any form of forgery in acquiring land Parcel No. L.R No. Trans-Mara Olorien/20.*
- iv. Whether the 1st and 2nd Respondents abused their powers in arresting the Petitioner.*

7. The applicant contend that the interested party does not have any proprietary interest in the suit property. He advanced that the evidence on record reveal that he adhered to all the legal procedures in acquiring Plot No. 20 and that the Land Registrar's decision not to register the mutation forms without affording him a fair hearing was ultra vires. He contends that the procedures of registration, acquisition and utilization of land are within the mandate of the Ministry of Land and the applicant cannot be associated at any point with fraud in this matter.

8. The interested party filed its submissions on 1st February 2019 and raised the following key issues;

- i. Whether both criminal and civil matters can be heard concurrently.*
- ii. Whether the 1st and 2nd respondents properly exercised their mandate.*
- iii. Whether there are sufficient grounds for the orders of Certiorari and Prohibition to issue.*

9. The interested party submitted that under **Section 193A** of the **Criminal Procedure Code Cap 75 Laws of Kenya** there can be concurrent proceedings of civil and criminal matters. He relied on the cases of **Republic vs Director of Public Prosecutions & 2 Others Ex Parte Francis Maina & Another [2015]** and **Commissioner of Police & The Department of Criminal Investigation Department & Another vs Kenya Commercial Bank Limited & 4 Others[2013] eKLR** to advance its position.

10. The interested party further urged the court that the 1st and 2nd Respondents exercised their mandate as per **Article 157** and **243** of the **Constitution of Kenya**. While relying on the case of **Kuria & 3 others vs Attorney General [2002] 2 KLR 69** it advanced that there should be concrete grounds where a party alleges that the continued prosecution of a criminal case manifests an abuse of the judicial procedure. The interested party called upon this court to find that the criminal charges pressed against the Ex parte applicant neither infringes on his constitutional rights to fair hearing and are not calculated to deter the applicant from owning property as he alleges.

DETERMINATION

11. There are several issues that have been raised by the parties. The first question for determination is whether this court has the jurisdiction determine some of the issues raised. **Article 162 (2) (b)** of the **Constitution** provides that Parliament shall establish courts with equal status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to land. **Section 13 (1)** and **(2)** of the **Environment and Land Court Act** confers jurisdiction to the Environment and Land Court to adjudicate all disputes relating to land. It provides thus:

- 1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)**

(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

2) In exercise of its jurisdiction under Article 162(2 b) of the Constitution, the Court shall have power to hear and determine disputes-

- a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources.
- b) relating to compulsory acquisition of land;
- c) relating to land administration and management;
- d) relating to public, private and community land and contracts, chooses in action or other instruments granting any enforceable interest in land; and
- e) any other dispute relating to environment and land.

12. In this regard any issues relating to the dispute in acquisition, acreage and registration of Plot No. 20 cannot be handled by this court and can only be determined by the Land and Environment Court. Therefore the only issue for consideration by this Court is whether the rights of the applicant will be infringed by the concurrent proceedings of the civil and criminal matters.

13. The Court of Appeal in Commissioner of Police and Director of Criminal Investigations Department vs. Kenya Commercial Bank and Others Nairobi Civil Appeal No. 56 of 2012 [2013] eKLR noted that:

“While the law (section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that the power must be exercised responsibly, in accordance with the laws of the land and in good faith.”

14. The independence of the Director of Public Prosecution is protected by the **Article 157(10)** of the **Constitution** which provides that;

The Director of Public Prosecution 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.

15. In Kenya Commercial Bank Limited & 2 Others v Commissioner of Police and Another, Nairobi Petition No. 218 of 2011 [2013]eKLR, the court held that:

The office of the Director of Public Prosecutions and Inspector General of the National Police Service are independent and this court would not ordinarily interfere in the running of their offices and exercise of their discretion within the limits provided for by the law. But these offices are subject to the Constitution and the Bill of Rights contained therein and in every case, the High Court as the custodian of the Bill of Rights is entitled to intervene where the facts disclose a violation of the rights and fundamental freedoms guaranteed under the Constitution.

16. However the independence of the Director of Public Prosecution is limited by **Article 157 (11)** of the **Constitution** which provides that 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. In the case of Republic v Chief Magistrate Criminal Division & another Ex-parte Mildred Mbuya Joel [2014] eKLR it was held that *the concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognized aim.*

17. The applicant has not presented any evidence to show that the charges preferred by the 1st respondent or that the investigation by the police were initiated out of malice, excess of authority or harassment. No evidence was presented to show to support the applicant’s assertion that he might not get a fair trial as provided under Article 50 of the Constitution. The applicant merely stated that the criminal proceedings ought to be halted because there are pending civil proceedings touching on the same subject matter and having them heard concurrently would be bad in law.

18. Having considered the evidence placed before the court I find that the applicant has not demonstrated malice or any of the limitation outlined by **Article 157 (11)** of the **Constitution** and I am satisfied that the orders for stay of the criminal proceedings would not have been merited. The ex-parte applicant has not made out a case to warrant the orders sought in the Notice of Motion dated 18th September 2017 and I hereby dismiss the application with costs.

Dated, Signed and Delivered at Kisii this 28th day of June 2019.

R.E. OUGO

JUDGE

In the presence of:

Petitioner In person

1st, 2nd & 3rd Respondent Absent

Mr. Omwoto For the Interested Party

Rael Court clerk