



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
JUDICIAL REVIEW NO. 671 OF 2017
IN THE MATTER OF AN APPLICATION BY GRACE WAIRIMU SORORA
FOR LEAVE TO LODGE JUDICIAL REVIEW PROCEEDINGS IN
THE NATURE OF CERTIORARI AND PROHIBITION.
AND
IN THE MATTER OF NAIROBI CHIEF MAGISTRATE
CRIMINAL CASE NO. 1825 OF 2017
BETWEEN
GRACE WAIRIMU SORORA.....APPLICANT
VERSUS
CHIEF MAGISTRATE CRIMINAL DIVISION NAIROBI...1ST RESPONDENT
DIRECTOR OF PUBLIC PROSECUTION.....2ND RESPONDENT

RULING ON LEAVE AND STAY

1. By a chamber summons dated 30th November 2017 and filed in court the same day, the exparte applicant **Grace Wairimu Sorora** seeks from this court leave to institute Judicial Review proceedings for the orders of:

- a. Certiorari to bring into the court in order to be quashed the charge sheet dated 1st November 2017 filed in CM's Court Criminal case No. 825 of 2017;
- b. Prohibition to prohibit the CM's Court at Milimani Law Courts or any other magistrate under him or in any other station within Nairobi or throughout the Republic of Kenya from hearing, or mentioning, taking notes or making any orders in Chief Magistrate Criminal Case No. 825 of 2017;
- c. *That leave so granted do operate as a stay of proceedings of Chief Magistrate Criminal Case No.825 of 2017 Republic vs Grace Wairimu Sorora.*

2. The chamber summons is predicated on the grounds on the face of the application, the statutory statement and verifying affidavit sworn by the applicant **Grace Wairimu Sorora** on 30th November 2017.
3. The applicant claims that she is the accused person in Milimani Chief Magistrate Criminal Case No.825/2017 charged with several counts of uttering false documents in a civil dispute being ELC No. 592 of 2010 relating to land parcel No. 209/9749 and another count of perjury in respect of the same matter as shown by copy of the charge sheet marked "GWS1."
4. According to the applicant, the criminal proceedings pending before the Chief Magistrate's Court are not genuine and are a gross abuse of the criminal law process intended to interfere with the pending civil dispute ELC No. 592/2010 and that they are commenced with the purpose of assisting Honourable **David Sudi** the director of **Chaka Ltd** to evict and dispossess her of her land No. 209/9749 where she runs a business known as Zam Zam Bar and Restaurant and a butchery.
5. That although judgment was delivered against her in ELC 592/2010 on 2nd March 2015, she appealed to the Court of Appeal vide CA 64 of 2015 and her appeal was dismissed on 12th May 2017 but that she has filed an application for review of the said judgment of the Court of Appeal because the judge who heard and determined ELC No. 592/2010, being the Honourable Justice Pauline Nyamweya was a High Court Judge and not an ELC judge hence she lacked jurisdiction to hear and determine the matter.
6. The applicant claims that she had so far sought for stay of execution of the judgment in the Environment and Land Court.
7. The applicant avers that the subject dispute has been pending in the civil court between her and the interested party herein Chaka Ltd, Honourable David Sudi and his wife hence the criminal case is meant to intimidate her and to discourage her from pursuing her legal rights in the court of law. It was further alleged that the interested party director Honourable David Dudi and his wife Eunice Chebule did in 2012 cause the applicant to be charged vide criminal case No. 252/12 for alleged forcible detainer of the same land but that the applicant was acquitted on 30th October 2015.
8. Further, that after the interested party failed to secure the applicant's conviction in the aforesaid case, he made an application before Kimaru J in Miscellaneous Criminal Application No. 513/2015 and obtained orders by deception to the effect that the National Police Service be directed to make a forensic examination letter of allotment of 22nd January 1981 and building plans dated 12th March 1998 which were subject to HC ELC No. 592/2010 but that when the Honourable Justice Kimaru discovered the mischief, he set aside the said order.
9. It is further alleged that the said interested parties commenced Judicial Review proceedings in JR No. 256/2016 for orders of mandamus to compel the Director of Public Prosecution to institute criminal proceedings against the applicant but that the application was rejected by the court.
10. That despite the applicant's advocates writing severally to the Director of Public Prosecutions and the Directorate of Criminal Investigations complaining of the police persecution at the behest of the Honourable Sudi and his wife Eunice for ulterior motives other than advancing criminal justice and for purposes of assisting her opponents to take her land, there has been no heeding of the complaint.
11. The 2nd respondent Directorate of Criminal Investigation filed grounds of opposition dated 11th December 2017 contending that the application by the applicant is misconceived, frivolous, vexatious, as there is no demonstration on how the respondent had acted illegally, unreasonably, ultra vires and or contrary to natural justice; that Judicial Review is concerned with the decision making process and not the merits of the decision; That the applicant has not demonstrated that in making the decision to charge her, the Director of Public Prosecution acted ultra vires his powers or contravened/violated constitutional or legal provisions; That the accuracy and correctness of the evidence or facts gathered in

an investigation can only be assessed and tested by the trial court which is best equipped to deal with the quality and sufficiency of evidence gathered and properly adduced in support of the charges; that no prima facie case has been demonstrated and neither has been shown that the charges are an abuse of the court process to warrant leave to apply and that the application for leave lacks merit hence it should be dismissed with costs.

12. The interested party Chaka Ltd who are also the complainants in the criminal proceedings pending in the lower court filed a replying affidavit sworn by its director Honourable David Kiprono Sudi on 11th December 2017.

13. In his depositions, the interested party contends that he is the Director of the interested party company Chaka Ltd and that the chamber summons for leave is mischievous and grounded on misrepresentation of facts, is full of falsehoods and aimed solely at misleading this court at the expense of delaying justice. That he is the registered owner of LR No. 209/9749 which fact was pronounced by the Environment and Land Court and the Court of Appeal as shown by copy of title deed annexed and the judgment of Lady Justice Nyamweya was to the effect that the applicant vacates the suit land but instead she has engaged him in court battles with the intention of illegally remaining on his land even after the Court of Appeal dismissed her appeal, that is why she had initially left out the interested party from these proceedings so that he continues to suffer injustice.

14. It is deposed that even the National Land Commission had recommended removal of the applicant from the suit land and that it was after she resisted to vacate even after the court in HCC 723/2008 found that the documents of ownership in her possession were forgeries that the Director of Public Prosecution recommended that she be investigated and be charged with forgery.

15. Further, that on 31st October 2017 the exparte applicant was arrested at JKIA while trying to escape from the country and that is when she was arraigned in court. That she is charged before a court of law which is independent, impartial and competent where she can defend herself and demonstrate her innocence. That the purpose of these Judicial Review proceedings is to frustrate the interested party and continue to occupy its land.

16. It was deposed that the applicant is just a vexatious litigant who should not be entertained by the court. The interested party prayed for dismissal of the application for leave and stay as the applicant is before this court with unclean hands.

17. The application for leave and stay was argued orally before me on 14th December 2017 with Mr Boniface Njiru advocate arguing on behalf of the exparte applicant whereas Miss Spira represented the respondent and Mr Getuma submitted on behalf of the interested party(holding brief for Mr Morara). The submissions mirrored the pleadings and affidavit in reply as filed.

18. Mr Njiru highlighted that the alleged offences took place in 2010, 2011 and 2009 and that the charges are based on evidence in the civil proceedings which are subject of challenge before the Court of Appeal vide CA 64/2015 seeking review of the judgment delivered on 12thMay2017 following Environment and Land Court No. 564/2010 which was heard by a High Court judge instead of an Environment and Land Court judge/court.

19. It was submitted that there were other pending civil cases before the Environment and Land Court hence the criminal cases are intended to harass the applicant and to assist the complainant Chaka Limited to evict the applicant from the suit land through the criminal process. It was submitted that criminal proceedings which are initiated to achieve civil objectives have no foundation and that they amount to abuse of the criminal process. Counsel for the applicant urged the court to grant leave and stay to avoid parallel proceedings.

20. In opposition to the application by the applicant, Miss Spira on behalf of the Director of Public Prosecutions submitted relying on the grounds of opposition in their entirety and reiterated that Judicial Review is never concerned with merits but process. That it had not been demonstrated that the Director

of Public Prosecutions did not act independently but that after the Director of Public Prosecutions reviewed the investigations file, he directed that the applicants be charged. It was submitted that there was no ulterior motive demonstrated and that it was within the mandate of the Director of Public Prosecutions to determine if offences are committed.

21. Counsel submitted that the *ex parte* applicant had not established a *prima facie* arguable case to warrant leave and further added that even if this court was to grant leave, such leave should not operate as stay because there is no prejudice to the applicant. It was urged that 6 witnesses had been listed to testify in the criminal case hence this court should dismiss the application for leave and stay.

22. On the part of interested party, Mr Morara submitted in opposition associating himself with submissions by Miss Spira and adding that the application for Judicial Review seeks to challenge the merits of the decision and not the process of decision making.

23. Further, that investigations into alleged forgeries were instituted after Honourable Nyamweya J determined the Environment and Land Court case which judgment was upheld by the Court of Appeal.

24. That the documents relied on by the applicant herein in the Environment and Land Court case to lay claim of title to the disputed land were disowned by the purported makers and so the court correctly deemed them to be forgeries and that Chaka Ltd was found to be the lawful owner of the suit land.

25. It was further submitted that these proceedings are mischievous and based on misrepresentations of facts and intended to deny justice to the interested party herein since there is an eviction order issued against her and that the Directorate of Criminal Investigations and Director of Public Prosecutions have acted independently in investigating the alleged forgeries and instituting criminal proceedings against the *ex parte* applicant.

26. It was submitted in contention that no prejudice will be occasioned to the applicant as she will have a chance to put forward her defence before the trial court. The interested party also took issue with their initial omission as parties to these proceedings which they contend was deliberate so that the applicant could continue occupying the suit land despite the eviction orders which are in place. It was therefore submitted that the application is an afterthought and should be dismissed for being vexatious and intended to deny justice to the interested party.

27. In a brief rejoinder, Mr Bonface Njiru submitted that Order 53 Rule 3(2) of the Civil Procedure Rules is clear that the applicant is challenging jurisdiction of Nyamweya J in handling an Environment and Land Court judge and that the proceedings before the Court of Appeal are ongoing. Further, that there is stay to eviction obtained from Judge Okongo of the Environment and Land Court. Counsel maintained that there is abuse of criminal process and that therefore his client has demonstrated a *prima facie* case to warrant grant of leave sought.

DETERMINATION

28. I have considered all the foregoing and in my view, the main issue for determination is whether the prayers sought are merited. Commencing with the prayer for leave to apply for Judicial Review orders of certiorari and prohibition, the *ex parte* applicant alleges that the criminal proceedings initiated against her relate to offences allegedly committed in 2012, 2011, and 2009 and that the charges are meant to harass her by assisting the interested party to evict her from the suit land yet there are pending civil suits over the same and that Honourable Okongo J has even granted stay of her eviction from the suit land, awaiting a review of the Court of Appeal judgment which application for review seeks to challenge the jurisdiction of Nyamweya J a High Court judge who presided over the Environment and Land Court case and rendered a judgment which was upheld by the Court of Appeal. The *ex parte* applicant therefore believes that these proceedings are intended to achieve the civil proceedings which are pending over the subject land.

29. On the other hand, the respondent and the interested party contend that the application is mischievous as the investigations leading to the charges facing the applicant were conducted independently and that the applicant is using these Judicial Review proceedings to unlawfully occupy the land which she was found to have forged documents of ownership.

30. Further, that the land belongs to the interested party and that the Court of Appeal has confirmed the said ownership. It is further contended that the applicant has not demonstrated a prima facie arguable case and that no prejudice has been shown if the criminal proceedings continue as she will have a chance to defend herself before the trial court.

31. The yardstick for grant of leave to institute Judicial Review proceedings was set and is now settled vide several judicial decisions including **Republic vs County Council of Kwale & Another Ex parte Kondo & 57 Others HCC Miscellaneous Application No. 384 of 1996 and Polycarp Wathuta Kanyugo & 2 others vs The County Government of Kirinyaga [2014] e KLR** where it was held inter alia that leave to institute Judicial Review proceedings is not granted as a matter of course or as a mere formality, and that although at the leave stage the applicant is not expected to go into the depths of the intended application for Judicial Review, the applicant must nonetheless satisfy the court that they have an arguable prima facie case which merits further investigation by the court.

32. In addition, leave is supposed to exclude frivolous and vexatious applications which prima facie appear to be abuse of the process of the court or are statute barred.

33. Where there is an effective alternative remedy or internal review or appeal mechanisms for settling the dispute, the court may also decline to grant leave.

In this case, it is alleged that there are pending cases before the Environment and Land Court and the Court of Appeal seeking to resolve the civil dispute between the applicant and interested party herein and that therefore these criminal proceedings are intended to harass the applicant to be evicted from the land when she has a stay of eviction orders granted by the Environment and Land Court while she seeks to review the judgment of the Court of Appeal on account of jurisdiction.

35. Without delving into the merits of the pending cases as that is beyond the scope of this court, I have no doubt in my mind that prima facie, the applicant's claim is not frivolous or vexatious and warrants a further in-depth investigation at a later stage.

36. For that reason, I find the application for leave merited. I grant her leave to institute the Judicial Review proceedings as sought in the chamber summons dated 30th November 2017 in terms of prayers 2 and 3 thereof. The main motion to be filed and served within 10 days from to date.

37. On the prayer No. 4 for an order that the leave so granted do operate as stay of the criminal proceedings, although an applicant may demonstrate that they deserve leave, stay is not automatic either. They have to show that unless stay of the impugned proceedings is granted the intended application, if successful, will be rendered nugatory and therefore the applicant will be rendered a pious explorer in the judicial process.

38. In this case, albeit the applicant claims that the offences with which she was charged were allegedly committed in 2012, 2011 and 2009. It is worth noting that the charges were preferred after investigations by the police and following the court's determination that the documents that the applicant had relied on in the Environment and Land Court cases Nos. 592/2010 consolidated with ELC 29/2010, 340 and 504/2010 were forgeries.

39. Investigating a forgery claim after a court's determination in a civil suit takes time and therefore this court does not buy in the idea that the criminal proceedings are in an afterthought or a witch hunt of the ex parte applicant at this stage.

40. The law does not bar criminal process to continue side by side with civil proceedings. Each of the

processes are intended to achieve justice for all the parties. Where there is prima facie evidence of a criminal offence having been committed the police have the power to investigate and charge the suspect for prosecution by the DPP.

41. In my humble view, the applicant has not demonstrated to this court that the pending criminal proceedings which she is allowed to challenge have absolutely no foundation. And as the criminal case is not shown to be intended to cause her eviction from the suit land since the civil court is handling the issue of eviction, where she has even obtained stay of eviction proceedings before the ELR Court, I see no merit in the prayer that the criminal case is intended to harass the applicant and cause her eviction. The criminal proceedings cannot evict her. It is a civil court that would issue an eviction order since there is no charge on forceful detainer facing the applicant.

42. The applicant has not demonstrated that the pendency of or proceeding with the criminal case will in any way prejudice her as the civil court has already made a finding on its own accord that the documents she relied on were forgeries.

43. Further, challenging jurisdiction of Honourable Nyamweya J to hear an Environment and Land Court matter does not change the position that documents relied on by the applicant to prove her case were forgeries, especially where the police have carried out their own independent investigations in the matter. The police have the power to carry out independent investigations to determine whether the said documents were indeed forgeries as per the court decision. It is for the trial court to then assess the evidence placed before it to determine whether the allegations by the prosecution are proved beyond reasonable doubt.

44. I see no outright malice in the charges framed. I would in the premises decline to interfere with the pending criminal charges facing the applicant and dismiss the prayer for stay.

45. As this matter has proceeded inter partes, it can be fast tracked for hearing and determination. The respondents and interested party to file and serve their responses within 7 days from date of service of the substantive notice of motion once filed. The applicant will have 5 days to file a further affidavit if need be, together with brief written submissions.

46. The respondents and interested party will have 5 days after service of submissions to file and serve their submissions. Mention on 13th February 2018 to confirm compliance.

Dated, signed and delivered in open court at Nairobi this 5th day of January, 2018.

R.E. ABURILI

JUDGE

In the presence of:

Mr Boniface Njiru advocate for the exparte applicant

Mr Gituma for the 2nd Respondent

And h/b for Morara for the interested party

CA: Georg