



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPLICATION 53 OF 2017

(FORMERLY J.R. MISC APPLICATION NO. 352 OF 2017)

IN THE MATTER OF: ARTICLE 22, 23 AND 47 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015 SECTIONS 7, 8, 9, 10, 11 AND 12

AND

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDER OF PROHIBITION

BETWEEN

BENSON MUNG'ALI MWASYA.....APPLICANT

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE ETHICS AND

ANTI-CORRUPTION COMMISSION.....2ND RESPONDENT

THE NATIONAL LAND COMMISSION.....INTERESTED PARTY

RULING

Introduction

1. By a chamber summons dated 19th June, 2017 the applicant herein sought the following orders:

1. THAT the Application be certified as urgent and the same be heard exparte

2. THAT leave do issue to the Applicant to apply for an order of prohibition directed at the 2nd Respondent to prohibit the 2nd Respondent from proceeding with any investigations over the title to and ownership of parcels of land comprising the block known as MAVOKO BLOCK 88 (KIVAE) until the dispute in Machakos ELC No. 13 of 2017 is heard and fully determined.

3. THAT the leave granted do operate as stay of the investigations commenced by the 2nd Respondent over the title to and ownership of parcels of land comprising the block known as MAVOKO BLOCK 88 (KIVAE).

Applicant's Case

2. In support of this application, Benson Mung'ali Mwasya, the Applicant herein filed a statement of facts together with a verifying affidavit on the 20th June, 2017. He asserts that there has been a long standing dispute over the title and ownership of the land known as MAVOKO BLOCK 88 (KIVAE) (the parcel of land). The dispute is between KIVAE Residents Organization of which the Applicant is the chairman and the now defunct Lukenya Ranching and Farming Co-operative Society.

3. The parcel of land has been the subject of several suits in Court and there is pending before the Environment and Land Court at Machakos an Environment and Land Case No. 13 of 2017 over the ownership of the land. This case in which the Applicant alongside the other members of Kivae Residents Organisation are named as defendants and the Interested party herein as a co-defendant was previously filed as Nairobi ELCC No. 1629 of 2016 before it was transferred to Machakos.

4. The Applicant states that shortly after the case at Machakos was filed, the 2nd Respondent commenced parallel investigations over the ownership and title to the parcel of land. That the investigations amount to harassment and intimidation aimed at hampering the Applicant together with KIVAE Residents from adequately defending the suit filed against them at the Machakos Courts. He has consequently complained to the relevant government authorities concerning the harassment and annexed a bundle of correspondences.

5. The Applicant urges that the 2nd Respondent has failed to reveal to him on whose complaint the investigations were commenced and the intended objective of the investigations. That the 2nd Respondent has instead been summoning the Applicant and members of Kivae Residents Organisation through anonymous calls and private emails.

6. The Applicant asserts that although the 2nd Respondent has the constitutional and legal mandate to investigate matters of alleged corruption, these powers are to be exercised within the parameters of the law. That section 12 of the Ethics and Anti-Corruption Commission Act No. 22 of 2011 requires the 2nd Respondent to observe impartiality and rules of natural justice in the conduct of its affairs. The Applicant further states that the 2nd Respondent is instead acting with an ulterior motive calculated to prejudice his legal rights, an act he states is contrary to the principles enshrined in the Fair Administrative Action Act, no. 4 of 2015.

7. The Applicant contends that it is in the interest of justice and fairness that he be granted leave to apply for judicial review order of prohibition against the 2nd Respondent. That no prejudice shall be visited upon the 2nd Respondent in granting such order since the 2nd Respondent shall have the opportunity of revisiting the investigations if need be once the case at Machakos is determined.

2nd Respondent's Case

8. Ann Murigih, an investigator with the Ethics and Anti-Corruption Commission the 2nd Respondent in this matter, herein after referred to as the Commission appointed as such under section 23 of the **Anti-Corruption and Economic Crimes Act, chapter 65 Laws of Kenya**, (ACECA) swore an affidavit on the 14th February, 2018. This affidavit replaced an affidavit which was previously on record after the court so ordered on an application by the 2nd Respondent. She deponed that she is a member of the team tasked to conduct investigations with respect to the matters raised in the application.

9. It is her statement that the 2nd Respondent is mandated by **Section 3 (1) of the Ethics and Anti-Corruption Commission Act 2011** to investigate corruption and economic crimes. That after such investigations, the 2nd Respondent is mandated to recommend to the Director of Public Prosecutions the prosecution of any acts of corruption or violation of codes of ethics enacted pursuant to Chapter six of the Constitution.

10. The 2nd Respondent is also empowered by **Section 13(2)(c) of the Ethics and Anti-Corruption Commission Act 2011** to conduct the investigations on its own initiative or on a complaint made by any person. That a report may be made in writing, by email, by telephone, by presenting it personally to the Commission or anonymously.

11. M/s Murigih deponed that in respect of this case, the 2nd Respondent received a complaint of the piece of land known as MAVOKO TOWN BLOCK/88. That the complaint stated that the titles to the land parcel were processed and issued fraudulently, by corrupt officials in the land registry for onward transmission to illegitimate land owners.

12. The 2nd Respondent commenced investigations into the matter upon receipt of the report. That it is the 2nd Respondent's duty to carry out investigations into the matter to establish whether or not an offence has been committed. The investigations involve inviting parties with an interest in the matter, the officials and members of KIVAE Residents Organisation to record statements.

13. The deponent asserts that the Applicant has failed to demonstrate that the 2nd Respondent lacked the mandate to investigate or that the decision to investigate the matter in question was flawed or that the 2nd Respondent did not exercise the rules of natural justice in the cause of its investigations. That for this reasons, the Applicant has failed to demonstrate that he has an arguable case with a likelihood of success for this court to grant leave to institute Judicial Review proceedings.

14. M/s Murigih contends that if the prayers sought by the Applicant are granted, the Commission will be prevented from exercising its constitutional and statutory mandate. That the High Court ought not to interfere with the investigative powers conferred upon the 2nd Respondent unless for cogent reasons which the Applicant has failed to demonstrate in the present circumstances.

Interested Party's Case

15. The Interested party National Land Commission (NLC), through M/s Abigael Mbagaya their Commissioner and Vice Chairperson, filed a replying affidavit dated 20th November 2017. Their case is that the Interested Party received numerous complaints from a group known as KIVAE Residents Organisation which is chaired by the Applicant herein. That they were alleging unlawful dispossession of their land known as LR 339/4 and continued harassment and forced evictions by the police and various government agencies.

16. M/s Mbagaya asserts that **Article 67(1)(e) of the Constitution of Kenya, 2010** gives the Interested Party the mandate to investigate and resolve historical and present land injustices and under **section 5 of the Land Registration Act**, it is required to monitor the registration of

all rights and interests in land. That it is in fulfilling this mandate that the Interested Party directed the implementation of a court order issued in **Chief Magistrates Court Civil Misc. No. 143 of 2006** that the land LR 339/4 revert back to KIVAE Residents Organisation.

17. M/s Mbagaya deposes that it is this directive to comply with a valid court order that has seen several officers of the Interested Party including herself summoned continuously by the 2nd Respondent herein. That the line of questioning by the investigators at the Commission is well scripted and tailored to touch on the issues in the Amended plaint in the civil suit. That the 2nd Respondent is collecting information to enrich the civil suit under the guise of an investigation.

18. M/s Mbagaya avers that the 2nd Respondent has refused to divulge information about who the complainant is, the complaint and the nature of the complaint it is investigating. That such concealment of critical information would only mean that either, the complaint is nonexistent or that the investigations are being conducted with an ulterior motive.

19. There is a pending matter at the Machakos Law Courts in **Machakos ELC 13 of 2016** and M/s Mbagaya avers that the investigations by the 2nd Respondent commenced immediately after the matter was filed. That this shows that the investigations have been crafted to harass and intimidate the poor KIVAE Residents Organisation members in a bid to have them forcefully evicted from the land. That the harassment of KIVAE Resident Organisation is real, historical and well documented.

20. M/s Mbagaya urges that **section 13 of the Environment and Land Court Act** clothes the Court with jurisdiction to competently answer questions of ownership and title to land and it is only legal to allow the Environment and Land Court exercise its mandate.

21. M/s Mbagaya asserts that there was no urgency in the investigations being carried out by the 2nd Respondent and that they can await the conclusion of the **ELC 13 of 2016 at Machakos** since criminal cases have no limitation of time.

Submissions for the Applicant

22. Counsels made brief oral submissions. Mr. Muigai, learned counsel for the Applicant, relied on the grounds on the face of the summons, the statement of facts, the verifying affidavit and the list of authorities filed in court.

23. He urged that at this stage, all the court needs to do is satisfy itself that there is an issue that requires further investigation. He referred the court to the case of **David Mathege Ndirangu V Director Of Public Prosecutions & Others NBI HC JR Misc. Application No. 444 of 2013** pg 19 – 20 in which Odunga, J set out what should be established in the seeking of leave. Odunga J stated that the leave stage is meant to sieve out frivolous applications.

24. Mr. Muigai submitted that the Applicant had laid before the court facts to show that further investigations are required in relation to the land parcel MAVOKO/ BLOCK 88. That ownership of the land parcel is in dispute at the Machakos Environment and Land Court, where the interested party and others are sued as defendants.

25. He further submitted that in the 2nd Respondent's affidavit dated 28th June 2017, the 2nd Respondent confirmed that they are investigating issues of corruption having received complaints from the owners and that the matter is pending before the Environment and Land Court. That the 2nd Respondent's actions are aimed at gathering evidence to buttress the case since the Court is yet to pronounce itself on the matter.

26. Mr. Muigai urged the court to grant leave and also order that the leave operate as stay. That the court ought to protect the Applicant from harassment.

Submissions for the 2nd Respondent.

27. M/s Ndungu for the 2nd Respondent opposed the application both for the grant of leave and for the leave so granted to operate as stay. She relied on the replying affidavit of Anne Murigih dated 14th February 2018 and the list of authorities dated 28th June 2017.

28. Counsel submitted on the conditions that the court should consider before granting leave are as outlined under **Order 53 of the Civil Procedure Rules 2010**. Counsel asserted that the Applicant should demonstrate reasonable grounds for believing that there has been failure to perform a public duty by a public body which is the 2nd Respondent in this instance. He submitted that in this instance the Applicant has failed to demonstrate this since all the allegations he has leveled against the 2nd Respondent relate to actions within the confines of the 2nd Respondent's mandate as per **sections 3(1), 11(1)(d) and 13(2)(c) of the Ethics and Anti-Corruption Act** and **Section 13(2)(c) and section 25 of the Anti-Corruption and Economic Crimes Act**.

29. M/s Ndungu contended that the Applicant failed to show that his interest had been affected by a public body or been violated in any way. He relied on the case of **Hassan Noor Hassan v Director of Public Prosecutions & Another [2016] eKLR**. Counsel submitted that the Applicant failed to demonstrate *prima facie* evidence of an arguable case. She relied on the case of **Aga Khan Education Services v Republic Exparte Seif [2004] eKLR**.

30. M/s Ndungu asserted that the Applicant had failed to demonstrate any form of illegality in the decision making process on the part of the 2nd Respondent. She averred that the facts presented by the Applicant demonstrate that the 2nd Respondent's only mistake was summoning the Applicant yet this was done pursuant to the 2nd Respondent's mandate. She relied on the case of **Republic v Chief Magistrate Milimani & Another Exparte Tusker Mattresses Ltd & 3 Others (2013) eKLR**.

31. M/s Ndungu asserted that the Applicant's claims against the 2nd Respondent are baseless and that it is the Applicant who has frustrated the investigative process by his refusal to honour summons to record a statement at the Commission's offices.

Submissions for the Interested Party

32. Mr. Mbutia, learned counsel for the Interested Party supported the Application and relied on the affidavit of Abigai Mbagaya dated 20th November 2017. He stated that the substantive issues are not before this court but before the Environment and Land Court. That the NLC got involved in this matter upon receipt of a complaint in relation to the land parcel.

33. Counsel asserted that several officers of the Interested Party had been summoned before the 2nd Respondent but that to date only the 2nd Respondent had knowledge of the complaint they are investigating and the complainant as per paragraph 10 of Anne Murigih's affidavit.

34. Counsel contended that the 2nd Respondent has declined an offer to be enjoined in the matter filed at the Environment and Land Court and has instead been conducting parallel investigations.

35. Mr. Mbutia submitted that the Applicant had set out a prima facie case for grant of leave. That there was no time limit for criminal investigations and the same could be commenced after the court at Machakos pronounces itself.

Applicant's Rejoinder

36. Mr. Muigai submitted that in as much as the 2nd Respondent has a statutory mandate, it must be exercised within the confines of the constitution and statutes and the rules of natural justice and equity. That the court ought to consider the material before it and determine whether further investigations are necessary.

Determination

37. I have considered the application, the affidavits filed herein and the rival oral submissions. This is not a substantive Notice of motion where the court is required to look into the reasons for judicial review. At this stage, the court only needs to be satisfied that the Applicant has prima facie evidence of an arguable case.

38. Although the parties have raised several issues in their submissions, the question before this court is whether the Applicant has demonstrated an arguable case, to warrant been given a chance to argue it. I will address the prayer seeking leave which is the precursor to the prayer seeking that the leave so granted operate as stay.

39. The general procedure for applying for leave is provided under **Order 53 rule 1(2)** of the **Civil Procedure Rules 2010** which states that:

"an application for such leave as the aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on."

40. An application seeking leave is made ex parte at the initial stage. However, where circumstances so require, the judge may direct that the application be served for hearing inter partes before grant of leave. In this case, the court directed that the matter be set down for inter partes hearing.

41. This principally being an application seeking leave to commence Judicial Review proceedings, it is of importance to examine the purpose and the principles which guide the court in exercise of its discretion in deciding whether or not to grant the leave sought. In **Aga Khan Education Service v Republic ex parte Seif (2004)** the Court of Appeal observed that the principles of law applicable in these matters are that in order to enable a judge grant leave under Order 53, there must be prima facie evidence of an arguable case.

42. The threshold for grant of leave is a low one. An applicant only needs to show that his interests have been affected or threatened by the actions of the public body. The Applicant in this instance therefore ought to have specified the manner in which the 2nd Respondent infringed their right. He also ought to have particularized the infringed rights.

43. It has also not been demonstrated that the 2nd Respondent acted outside its mandate as defined by statute. **Section 11** of the **Ethics and Anti-Corruption Commission Act** provides inter alia that the 2nd Respondent has the power to investigate any acts of corruption while **section 13(2)(c)** provides that the 2nd Respondent has power to conduct investigations on its own initiative or on a complaint made by any person.

44. If an offence is suspected to have been committed and even if the subject matter is of a civil nature, nothing stops the 2nd Respondent (Commission) from investigating the crime allegedly committed if it relates to corruption, or it is an economic crime. The burden of showing that the 2nd Respondent acted outside its mandate was upon the Applicant who failed to clearly demonstrate this to this court.

45. In an attempt to advance an arguable case, the Applicant argued that there was a matter pending over the same parcel of land at the Environment and Land Court at Machakos. That by investigating the title to and ownership of the parcel land the 2nd Respondent was buttressing the civil case and ought to be stayed. It is important to note that **Section 193A of the Criminal Procedure Code** permits concurrent proceedings of both a criminal and civil nature. For avoidance of doubt, this provision states:

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

46. While I hold the view that concurrent civil and criminal proceedings should not proceed where there is likelihood that they might decide a fact in issue in opposite directions, this is a matter that the Applicant ought to bring to the attention of the Environment and Land Court at Machakos. I agree with **Odunga J**, in **Judicial Review Application 449 of 2015, Sylvana Mpabwanayo Ntaryamira v Allen Waiyaki Gichuhi & Another** where in disallowing an application for leave, the learned judge put it thus:

“Judicial review it ought to be remembered is a remedy of last resort and ought not to be applied for where there exist appropriate remedies to redress the grievance complained of.”

47. The High Court’s supervisory jurisdiction by dint of **Article 165(6)** of the **Constitution (2010)** does not extend to the Environment and Land Court. Under the circumstances, this court cannot therefore purport to dictate the manner in which a matter filed in the Environment and Land Court ought to proceed. At this point this court cannot determine that the 2nd Respondent’s investigations will influence the outcome of the land case at Machakos. In any event the Environment and Land Court is of equal status to the High Court as provided under **Article 162(2)** of the **Constitution**.

48. The grant of leave to institute Judicial Review proceedings is discretionary. The court must however be satisfied that there is a reasonable basis to justify grant of the leave sought.

49. In order for a judge to grant leave under Order 53, there must be prima facie evidence of an arguable case. In **The Matter of an Application by Samuel Muchiri Wanjuguna & 6 Others** and in **The Matter of the Minister for Agriculture and the Tea Act, Civil Appeal No. 144 of 2000**, the Court approved and applied the principles found in the English case of **R v Secretary of State exp. Herbage (1978) 1 ALL ER 324** where it was stated thus:

“It cannot be denied that leave should 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”

50. The next question would then be whether the Applicant has established an arguable case. In **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK)**, the court stated:

“There should be an arguable case which without delving into the details could succeed and an arguable case is not ascertained by the court by tossing a coin or waving a magic wand or raising a green flag, the ascertainment of an arguable case is an intellectual exercise in this fast growing area of the law and one has to consider without making any findings, the scope of the judicial review remedy sought, the grounds and the possible principles of administrative law involved and not forget the ever expanding frontiers of judicial review and perhaps give an applicant his day in court instead of denying him...Although leave should not be granted as a matter of routine.”

51. From the foregoing, the Applicant has failed to satisfy the threshold for this court to grant the leave sought by his failure to advance an arguable case. The next issue, namely whether leave should operate as stay collapses by dint of this conclusion.

52. Accordingly, I find that the application dated 19th June 2016 lacks merit and is therefore dismissed with no orders as to costs.

DATED, SEALED and DELIVERED at NAIROBI this 20th day of March 2018.

L. A. ACHODE

JUDGE

In the presence of: ...for the Applicant

In the presence of: ...for the 1st Respondent

In the presence of: ...for the 2nd Respondent

In the presence of: ...for the Interested Party