



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

JUDICIAL REVIEW CASE NO. 14 OF 2016

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS FOR
MANDAMUS**

AND

**IN THE MATTER OF: THE RESPONDENTS REFUSAL TO INVESTIGATE THE
APPLICANT'S COMPLAINT, CONTAINED IN A REPORT DATED 29TH NOVEMBER, 2014
REGARDING ALLEGED CRIMINAL ACTS COMMITTED BY THE INTERESTED PARTIES**

AND

IN THE MATTER OF: ARTICLE 10, 47 AND 157 OF THE CONSTITUTION OF KENYA, 2010

AND

**IN THE MATTER OF: THE POLICE ACT, NATIONAL POLICE ACT AND DIRECTOR OF
PUBLIC PROSECUTIONS ACT**

AND

IN THE MATTER OF: A JUDICIAL REVIEW APPLICATION BY

BRUCE JOSEPH BOCKLE.....1ST APPLICANT

VERSUS

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

DIRECTOR OF CRIMINAL INVESTIGATIONS.....2ND RESPONDENT

OFFICER COMMANDING POLICE DIVISION,

BAHARI DIVISION, KILIFI.....3RD RESPONDENT

OFFICER COMMANDING STATION,

BAHARI POLICE STATION.....4TH RESPONDENT

AND

COQUERO LIMITED.....1ST INTERESTED PARTY

MINISTRY OF LANDS AND HOUSING.....2ND INTERESTED PARTY

RULING

[EX-PARTE APPLICANT'S NOTICE OF MOTION DATED 18TH AUGUST, 2017]

1. On 4th April, 2017, Chitembwe, J delivered judgement in these judicial review proceedings and issued an order of mandamus directing the 1st to 4th respondents to carry out proper investigations on the *ex-parte* Applicant's complaint within three months and serve the *ex-parte* Applicant with a copy of the investigation report. The *ex-parte* Applicant's prayer to stop his eviction from the suit property namely Plot No. 24/Section IV/Mainland North now known as Plot No. 491 and 492/Section IV/Mainland North was declined by the Judge.

2. On 22nd August, 2017, the *ex-parte* Applicant, Bruce Joseph Bockle filed the Notice of Motion dated 18th August, 2017 seeking orders as follows:

“1. THAT this application be certified as URGENT.

2. THAT pending the hearing and determination of this application existing status quo be maintained so that the Applicant is not evicted by the Respondents from the suit property namely L.R. No. 24/IV/MN allegedly subdivided into plots Nos. 491/IV/MN and 492/IV/MN.

3. THAT pending the hearing of this application inter-parties, the Police and the Respondents or their agents or any other person working under their instructions be refrained from evicting the Applicant from the suit property being L.R. No. 24/IV/MN Kikambala in Kilifi County

4. THAT the Respondents be cited for contempt of court order made on 4th April 2017 and be punished appropriately for such contempt of the court

5. THAT the cost of this application be provided for.”

The application was supported by the grounds on its face and a supporting affidavit sworn by the Applicant.

3. The Applicant appeared before Chepkwony, J on 24th August, 2017 in Mombasa under the recess rules and prayers 1, 2 and 3 were granted *ex-parte* and the matter fixed for *interpartes* before this court.

4. Coquero Limited (Coquero), the 1st Interested Party responded to the application by filing a notice of motion dated 28th September, 2017 seeking among other orders the discharge of the *ex-parte* orders issued on 24th August, 2017. Coquero also opposed the application through a replying affidavit sworn by Franklyn Pereira on 28th September, 2017.

5. The respondents opposed the application through a replying affidavit sworn by Corporal Duncan Mokaya on 9th October, 2017. The 2nd Interested Party, the Ministry of Lands and Housing did not file any reply to the application.

6. A brief history is necessary in order to understand this case. The Applicant was the Defendant in Mombasa HCCC No. 59 of 2006 having been sued by Coquero as a trespasser. In that case, Coquero successfully obtained injunctive orders against the Applicant. The Applicant was aggrieved by the

judgement delivered on 27th February, 2013 and proceeded to the Court of Appeal vide Civil Appeal No. 41 of 2013. The appeal was dismissed. The Applicant was still not satisfied and commenced other proceedings including Constitutional Petition No. 28 of 2014.

7. As the Applicant was still engaged with the new matters, Coquero filed an application before the Environment and Land Court seeking among other orders, the eviction of the Applicant. Omollo, J allowed the application on 8th December, 2015 which triggered another appeal vide **Civil Appeal No. 94 of 2016, Bruce Joseph Bockle v Coquero Limited**. In a decision delivered on 21st September, 2017 the Court of Appeal dismissed the appeal holding that:

“18. Looking at the orders issued in the judgment dated 14th March, 2013 and in particular the mandatory injunction, it is clear to us that they required the appellant to give vacant possession of the suit property to the respondent. Enforcement of such an order could only be by way of eviction as stipulated under Order 22 Rule 29 of the Civil Procedure Rules. Therefore, we find that the learned Judge correctly issued an order of eviction of the respondent from the suit property.

19. Last but not least, ideally, police officers ought not to be used in enforcement of civil processes. However, in this case the respondent demonstrated that the appellant had refused to comply with the court orders; he had at one point hindered respondent from erecting a perimeter wall and also that he had put in squatters in the suit property. Taking into account those circumstances, we see nothing wrong with the learned Judge directing the police to maintain law and order during the eviction process. This is a clear case where police involvement and the observance of law and order is necessary. The learned Judge was correct in making such orders.

20. Based on the foregoing, we see no reason to interfere with the learned Judge’s exercise of discretion. In the end, the appeal lacks merit and is hereby dismissed with costs.”

8. As the second appeal was pending before the Court of Appeal, the Applicant approached this Court in November, 2016 through these judicial review proceedings and subsequently obtained the orders already alluded to in this ruling.

9. In the application which is the subject of this ruling, the Applicant’s case is that three months after the issuance of the order of mandamus by Chitembwe, J on 4th April, 2017 the respondents have not carried out any investigations. Premised on that failure, the Applicant brought this application.

10. According to the Applicant, instead of carrying out investigations as directed by the Court, the respondents and Coquero on 26th July, 2017 entered consent in Malindi ELC No. 20 of 2016 to evict him from the suit property.

11. At paragraph 8 of the supporting affidavit the Applicant averred:

“THAT it is important to give some brief background facts relating to this matter to assist the court to appreciate the issues involved. These are:

i. I still hold the original title deed of the Plot No. 24/IV/24 which land measures 24 acres. I annex a copy of the said Certificate of Title which I mark as annexure “BJB-3”.

ii. I reside on the said property and have always resided thereon at all material times. The property has ever been subdivided and there are no beacons subdividing the same.

iii. Notwithstanding that the original Certificate of Title is still held by me and there was no subdivision, the said property was miraculously subdivided and resulted in Plots Nos. 491/IV/MN and 492/IV/MN. Surprising, the acreage set out in the two subdivisions now

amounts to 25 acres as opposed to 24 acres. I annex copies of the said titles and mark them as annexure “BJB-4”.

iv. It is pretty obvious that the process through which the above was achieved amounts to commission of some serious crimes.

v. **THAT** it is as a result of the flaws that this court ordered the Respondents to carry out full investigation within ninety (90) days and hand over the report to me. However, the Respondents have neither interviewed me after the ruling nor sent any officer to the suit property to carry out the investigations.”

According to the Applicant, evicting him would be in contempt of the orders issued by this court since no investigations were carried out by the respondents.

12. Coquero’s position is that the instant application is meant to delay the eviction of the Applicant from the suit property. It is Coquero’s case that the orders issued herein countermanded the orders of Omollo, J and the Court of Appeal. Further, that this court has no jurisdiction to issue such orders. Coquero also asserts that the order of mandamus issued by this court was complied with and investigations had been carried out and the Applicant served with a copy of the investigation report.

13. Coquero faults the Applicant for obtaining the *ex-parte* orders without disclosing material facts. In this regard Franklyn Pereira, a director of Coquero averred at paragraph 4 of his replying affidavit sworn on 28th September, 2017 thus:

“4. THAT I am advised by our advocates on record, which advise I verily believe to be true, that the Applicant obtained the interlocutory orders issued herein on 29th August, 2017 without disclosing the following material facts:

i) That on 4th, 2017, the Hon. Justice S. Chitembwe expressly declined to stop and/or stay the Applicant’s eviction from LR No. 491(Original Number 490/1) Section IV, Mainland North (hereinafter referred to as the “suit property”).

A copy of the Court Order dated 13th April, 2017 is annexed hereto and marked “FP-1”

ii) The above said Court order has never been reviewed, varied and/or set aside.

iii) That the eviction of the Applicant and the order directing the respondents to supervise the enforcement of the eviction order was issued in Mombasa High Court Civil Case No. 59 of 2006 (now ELC No. 20 of 2016) Coquero Limited –v- Bruce Joseph Bockle.

Copies of the decree dated 25th January 2013 and the order directing the Respondents to supervise the eviction of the Applicant issued on 9th December, 2015 are annexed hereto and marked “FP-2”and “FP-3”

iv) As a result, the order directing the Respondents to supervise the eviction of the Applicant from the suit property pursuant to the above said orders has no correlation, link, nexus and/or is not tied to the order for investigations directed at the Respondents.

v) That there was nothing unlawful and/or irregular with the consent and/or undertaking given by the Respondents in Mombasa High Court Civil Case No. 59 of 2006 (now ELC No. 20 of 2016) Coquero Limited –vs- Bruce Joseph Bockle to the effect that they would comply with a lawful order directing them to supervise the eviction of the Applicant from the suit property.

vi) That as a matter of fact, the Applicant is making a mockery of this honorable court by

misleading this court so as to aid him in his blatant disobedience of the decree directing him to give vacant possession of the suit property.

vii) That the Applicant's remedy lies in citing the Respondents for contempt of court for the alleged failure to carry out investigations within the time ordered; but not in obtaining orders whose effect is to stop the Respondents from complying with a lawful order.

viii) That the Applicant failed to disclose that he has filed an application seeking similar and/or substantially similar orders in Mombasa Judicial review No. 14 of 2017, where he was denied interim orders.

Copies of the Application and Proceedings are annex hereto and marked "FP-4"

14. The replying affidavit filed on behalf of the respondents concentrates on showing that the order of mandamus was complied with. Corporal Mokaya's averment is that he is the assisting investigating officer in this matter. His disposition is that upon receiving the order of mandamus he commenced investigations and later filed a report as directed. Further, that on 28th August, 2017 he proceeded to the home of the Applicant and served a copy of the report on the Applicant. He averred that he also served the office of the Director of Public Prosecutions with a copy of the letter on 30th August, 2017.

15. According to Corporal Mokaya, no new facts were revealed during the fresh investigations and the position still remains that there was no fraud committed during the transfer of the property in question. He further averred that the issue of ownership of the property was determined in favour of Coquero by the Court of Appeal in Civil Appeal No. 41 of 2013. Also that Chitembwe, J had in his judgement declined to stop the eviction of the Applicant. Corporal Mokaya concludes by declaring that he had not willfully disobeyed the orders of the court and had indeed fully complied with the same.

16. Earlier, the Applicant had sworn an affidavit on 4th October, 2017 in response to Coquero's application and affidavit of 28th September, 2017 reiterating the contents of his affidavit and stressing that he had disclosed all the material facts. Further, that investigations had not been carried out as directed by the court. He therefore urged the dismissal of Coquero's application.

17. On 5th September, 2017 I directed that Coquero's application dated 28th September, 2017 be treated as a response to the Applicant's application dated 18th August, 2017.

18. Upon perusal of the pleadings and the submissions herein, it becomes very clear that the issue for the determination of this court is whether the respondents acted in contempt of the order of mandamus issued by Chitembwe, J on 4th April, 2017 and if so, what are the consequences of the respondents' actions or inactions.

19. A question also arises as to whether the stay orders herein ought to have been issued pending the determination of the contempt issue.

20. The fact that the land dispute between the Applicant and Coquero has been determined does not need belabouring. In seeking the order of mandamus, the Applicant was hoping to get information that would enable him reopen that dispute. Using the order of mandamus he moved this court (Chepkwony, J), without disclosing the full facts, to stop the orders of eviction that were issued by Omollo, J and confirmed by the Court of Appeal.

21. Unless the Applicant seeks intervention by the Supreme Court, the decision awarding part of the parcel of land in dispute to Coquero should now be effected. This court has no jurisdiction to issue orders that would countermand the decisions of Omollo, J and the Court of Appeal. This court has no power to overturn or set aside the order issued by Olola, J on 25th July, 2017 directing the respondents to evict the Applicant from the suit premises. If he was aggrieved by the decision of Olola, J, he ought to have moved that Court instead of approaching this court seeking orders that would obviously countermand the

order of a court of coordinate jurisdiction.

22. In short the Applicant's application for stay orders was an abuse of the court process. He was seeking the same orders that were not granted to him by Chitembwe, J.

23. As for the issue of contempt, the evidence placed before the court confirms that the respondents did indeed carry out investigations and served the Applicant with a copy of the investigations report as directed by the court. In view of the fact that the respondents eventually complied with the court order, albeit late, I find no reason to hold that they acted in contempt of the court.

24. In short, the Applicant's application dated 18th August, 2017 has no merit and the same is dismissed with costs to the respondents and the 1st Interested Party.

Dated, signed and delivered at Malindi this 17th day of April, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT