



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

MISC. CIVIL APPLICATION NO 205 OF 2017 (JR)

IN THE MATTER OF: AN APPLICATION BY KIRAGU MARVIN MURIITHI FOR LEAVE

TO APPLY FOR JUDICIAL REVIEW ORDER OF PROHIBITION

AND

IN THE MATTER OF: ORDERS 53 OF THE CIVIL PROCEDURE RULES, 2010, LAWS OF KENYA

IN THE MATTER OF ARTICLES 21, 22(1), 23, 27, 28, 29 AND 47(1) THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE THREATENED/INTENDED UNLAWFULLY ARREST AND/OR

PROSECUTION OF KIRAGU MARVIN MURIITHI

BETWEEN

REPUBLIC.....APPLICANT

AND

INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION.....2ND RESPONDENT

AND

KEVIN GITAH.....1ST INTERESTED PARTY

MARY MUTHONI KIRAGU.....2ND INTERESTED PARTY

JUDGMENT

1. By chamber summons dated 22/5/2017, the *ex parte* applicant Kiragu Marvin Muriithi sought leave to commence judicial review proceedings against the 1st and 2nd respondents. Leave was granted by the court (Mulwa J) who also granted stay of the intended criminal proceedings against the applicant. The *ex parte* applicant filed the substantive motion dated 2/6/2017 seeking orders that:-

a) An order of prohibition do issue to prohibit the Respondents by themselves, or their servants jointly and severally from summoning, commencing, or proceeding with any criminal proceedings against the Applicant in any court with respect to the complaint lodged by the 1st Interested Party at Mwariki Police Post on or about 19th May 2017 concerning **L.R NO. Nakuru/Municiplaity Block 26/22 (Ndege)** as the same is subject of litigation in Nakuru Succession Cause No. 163 of 1995 Estate of the late Evanson Kiragu.

b) The costs of the application be provided for.

2. The application is supported by the statement of facts and affidavit in support thereof sworn by Kiragu Marvin Muriithi, the applicant

herein on 2/6/2017.

3. The respondents did not enter appearance or file any responses to the application. There is evidence vide two affidavits of service filed that they were duly served. When the matter came up for hearing on 4/10/2017, the court noted from the affidavit of service sworn by one Elizabeth Wangari Mukira that the 1st Respondent (Inspector General) was served a hearing notice for 4th October 2017 on 25th September 2017 while the 2nd respondent Director of Public Prosecutions was served on 20/9/2017. The latter received process under protest that the notice was too short.

4. In the end both the respondents and the Interested Parties did not comply with the court's directions. However at a subsequent date (29/11/2017) when the matter was due for highlighting of submissions, Mr. Motende for the DPP asked the court to expunge the DPP from the proceedings for reason that the DPP had neither instructed the police to investigate the applicant nor preferred any charges against the applicant. Mr. Kirui for the 1st respondent informed the court that the office of the Inspector General had not brought the matter to the attention of the Attorney General and that therefore they had not filed any responses to the application.

5. From the statement of facts, affidavit in support and the submissions of the ex parte Applicant the only issue in this application is whether or not the order of prohibition is merited.

6. According to the applicant, the genesis of the circumstances leading to his arrest was a tussle between the parties in succession cause No. 163 of 1995, Estate of the late Evanson Kiragu. The Applicant sets out the history of this case as follows: he is the son of the 2nd Interested Party herein who is the registered owner of all that parcel of land known **L.R NO. Nakuru/Municipality Block 26/22, Ndege** who holds the same in trust for herself and her children being the applicant herein, the 1st Interested Party and the sister of the Applicant namely Emily Wambui. The aforesaid parcel of land was acquired vide a Certificate of grant in **Nakuru Succession Cause No. 163 Of 1995 Estate of The Late Evanson Kiragu Muriithi**. He exhibited copies of the **Certificate of Confirmation of Grant dated 19th March, 2001** and a title deed of the aforesaid parcel of land as annexure no. **M.M.K 1 (a) and (b)**. The Applicant stated that the matrimonial home of the 2nd Interested Party stood on the parcel of land and that the 1st Interested Party was residing on and illegally leasing out the undeveloped portion to third parties. He stated that the applicant was currently domiciled in the United States of America.

7. By an application dated 14th March, 2017 in the aforementioned Succession Cause, the 2nd Interested Party *inter alia* applied to be discharged as a trustee of the aforesaid beneficiaries and that **L.R Nakuru/Municipality Block 26/22 (Ndege)** be distributed to the beneficiaries as per the consent of the parties. He annexed a copy of the application as annexure M.M.K II(a) which shows that the 1st Interested Party had been sued as the respondent. The application dated 1st March, 2017 was initially opposed by the 1st Interested Party but later consented to allow the said application in its entirety and the consent was adopted as the order on the court on 3rd May, 2017. The applicant annexed a copy of the said consent order as annexure marked M.M.K II (b).

8. In addition to the consent on the division, the court further ordered the 1st Interested Party to vacate the said parcel of land within 7 days and to compensate all the lessees who were also ordered to vacate the property within 2 weeks. The 1st Interested Party is said to have handed over the key to the said Matrimonial Home to the 2nd Interested Party's Advocate Elizabeth Mukira (Mrs) of M/S Elizabeth Wangari & Co. Advocates through his advocate, Mr. Amos Andama of M/S Kiplenge Kurgat & Co. Advocates in compliance with the court order on 13th May, 2017.

9. It is also the applicant's evidence that he was arrested on the night of 19th May, 2017 in a social place just a day to the date he was scheduled to travel to Washington DC where he resides and that as a result of the arrest, he was unable to travel on 20th May, 2017 and had to postpone his flight to 26th May, 2017 at a cost. The ex parte applicant averred that despite presenting the aforesaid court order to the agents of the 1st Respondent, they have willfully and deliberately failed and/ or refused to carry out independent investigations before preferring any charges against him.

10. As earlier stated the respondents and the Interested Parties did not file responses. The court must therefore take the *ex parte* applicant's averments stated above and underscored in his counsel's written submissions as stating the correct factual position.

11. In **Republic Vs. Director of Public Prosecutions & Another ex parte Job Kigen Kangogo Misc. Civil Application No. 192 of 2015 (2016) eKLR**, Odunga J stated thus:

“.....Several decisions have been handed down which in my view correctly set out the law relating to circumstances in which the Court would be entitled to prohibit, bring to a halt or quash criminal proceedings. It is however always important to remember that in in these types of proceedings the Court ought to be extremely cautious in its findings so as not to prejudice the intended or pending criminal proceedings. The court ought not to usurp the constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of the Constitution..... However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the court will not hesitate in putting a halt to such proceedings”

12. In the same case, Odunga J cited the court of Appeal decision in **Joram Mwenda Guantai Vs. The Chief Magistrate Nairobi Civil Appeal No. 228 of 2003 (2007) 2 EA 170** which stated thus:-

“If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has the an inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and prevent an abuse of the process of court”

13. In the present case it is clear from the material placed before me by the *ex parte* applicant that the genesis of the criminal matter was an ongoing succession cause. The orders granted by the Court (Ndungu J) on 3/5/2017 clearly discharged Mary Muthoni (2nd Interested Party) as a trustee for Kevin Gitahi (1st Interested Party) Marvin Mureithi (the *ex parte* Applicant) and their sister one Emily Wambui and ordered distribution of **LR No. Nakuru/Municipality Block 26/22 Ndege** to the three beneficiaries. The court further ordered Kevin Gitahi (1st Interested party) to vacate the house on the said property.

14. It appears that the *ex parte* applicant accessed the subject property pursuant to the court order and that the 1st Interested Party then made a report to the police alleging malicious damage to property.

15. The respondents have not filed any responses to demonstrate that when such a report was made, they investigated the true ownership position of the property at the time. It therefore appears to me that the 1st respondent did not give the *ex parte* applicant a chance to explain his side of the conflict. Had they investigated they would have found out that the dispute was purely a succession tussle which was live before the succession court and that the alleged illegal access and malicious damage may have been a smokescreen to defeat the orders granted in the succession cause.

16. It is my finding that the police allowed themselves to be used by the 1st Interested Party to advance his claim in the succession cause. It appears that the arrest of the *ex parte* applicant was clearly outside the goals of justice and should not be allowed to stand. See **Kuria & 3 Others Vs. Attorney General (2002) 2 KLR/69**.

17. In the end I find that an order of prohibition against the 1st respondent is merited. In respect to the 2nd respondent however, it has not been shown to me that they had taken or were planning to take any action against the *ex parte* applicant in breach of any law.

18. In the premises, I allow the notice of motion dated 22/5/2017 in the following terms:-

1) An order of prohibition is issued to prohibit the 1st Respondent by themselves, or their servants from summoning, commencing, or proceeding with any criminal proceedings against the Applicant in any court with respect to the complaint lodged by the 1st Interested Party at Mwariki Police Post on or about 19th May 2017 concerning **L.R NO. Nakuru/Municipality Block 26/22 (Ndege)**

2) The *Ex parte* Applicant shall have costs of the application to be met by the 1st respondent.

Orders accordingly.

Judgment Signed

R. LAGAT KORIR

JUDGE

Judgment Delivered, Dated and Signed at Nakuru this **19th** Day of December, 2018

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JANET MULWA

JUDGE

In the presence of:-

.....Court Assistant

.....For the Petitioner

.....For the 1st Respondent

.....For 2nd Respondent