



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISC CIVIL APPLICATION CASE NO. 5 OF 2016 (JR)

**IN THE MATTER OF: AN APPLICATION BY PAUL MUTRIN NAYIOMA FOR JUDICIAL
REVIEW (MANDAMUS)**

AND

IN THE MATTER OF: CREATING DISTURBANCE AND THREATENING TO KILL

AND

**IN THE MATTER OF: FAILURE AND/OR REFUSAL TO CONCLUDE AND/OR COMPLETE
INVESTIGATIONS**

AND

IN THE MATTER OF: INTENDED ARREST AND/OR PROSECUTION OF THE CULPRIT

AND

IN THE MATTER OF: DAVID MUIGAI MOBOSHI

AND

IN THE MATTER OF: OCCURANCE BOOK NUMBER 14/14/5/2016

AND

**IN THE MATTER : ARTICLES 1 (1), (2), 2 (2), 10 (1), (B), 20 (1), 21 (1), 22 (1), 27 (1), 28, 73, 165
& 245 OF THE CONSTITUTION, 2010**

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE DISTRICT CRIMINAL INVESTIGATIONS

OFFICER, TRANS-MARA

THE O.C.S, KILGORIS POLICE STATION.....RESPONDENTS

THE DIRECTOR OF CRIMINAL INVESTIGATIONS

THE INSPECTOR GENERAL

JUDGMENT

Introduction

1. The ex parte applicant herein is a male adult of sound mind and a resident of Mapashi Sub-location, Enoosaen Location, within Keyian Division in Transmara West District, Narok County.
2. The interested party herein is the Assistant Chief of Mapashi Sub location and a neighbor to the ex-parte applicant with whom they have had a long standing land dispute.
3. On 27th September, 2016 the ex-parte applicant herein sought and obtained leave under **Order 53 of Civil Procedure Rules**, to institute judicial review proceedings against the respondent herein.

Application

4. Through a notice of motion application dated 28th September 2016, the ex-parte applicant seeks orders of mandamus to issue against the respondents to compel them to proceed to complete and/or conclude criminal investigations relating to and/or concerning the complaint lodged by the said ex-parte applicant vide OB No. 14/14/5/2016 against the interested party. The ex-parte applicant also seeks orders that this court sets the timeline within which the respondent should carry out or conclude the criminal investigations relating to the said complaint that he had lodged. He also prays for the costs of the application.
5. The application is supported by the statement of facts and the ex-parte applicant's verifying affidavit dated 26th September 2016. The Ex-parte applicant states that on 14th May 2016, he was lawfully working on his parcel of land No. Transmara/Enoosaen/378 when the interested party trespassed on to his said land and threatened him thereby causing a breach of peace. The ex-parte applicant then made a report of the said threats to Kilgoris Police Station which report was booked as OB NO. 14/14/5/2016 after which the ex-parte applicant and his witnesses recorded statements.
6. He avers that despite having availed all the evidence to the police, the respondents have refused to conclude the investigation or arrest the interested party so as to commence criminal proceedings against him thereby leaving him with no choice but to institute the instant application for judicial review.
7. The respondents opposed the application through the replying affidavit of Charles Mwangi Wanjohi, the 1st respondent herein, dated 16th November 2016 in which he acknowledges the fact the ex-parte applicant lodged a complaint at Kilgoris Police Station regarding allegations that the interested party caused a disturbance by threatening to kill him (ex-parte applicant) and that the report was booked as OB 14/14/5/2016 by one P.C. Kamanda.
8. He avers that witness statements were then recorded and investigations conducted as shown in a copy of the OB dated 20th July 2016 attached to the replying affidavit as CMW-3. The witness statements were also produced marked as MW2 (a) - 2 (g).
9. He states that at the close of the investigations the investigating officer made a summary of the case and recommended that it be closed as there was no further police action but that before the file could be forwarded to the office of the Director of Public Prosecutions for further action, the ex-parte applicant served the respondents with the instant application. A copy of the summary and recommendation was attached to the affidavit and marked as "CMW4".
10. He deposes that on 17th October, 2016, he forwarded the file to the office of Director of Public

Prosecutions for further advice and that on 11th November 2016, the prosecution counsel advised him that no charges were to be preferred against the interested party and recommended that the file be closed with no further police action.

11. He avers that investigations revealed there was a long standing land dispute between the ex-parte applicant and the interested party which the ex-parte applicant wanted to settle through the 1st respondent's office by prosecuting the interested party.

12. According to 1st respondent, there was no disproportionate delay in conducting the investigations which he insists, were carried out within reasonable timelines and that the mere lodgment of a complaint and recording of statements does not necessarily lead to the immediate arrest of the suspect since the interested party had also similarly lodged a complaint against the ex-parte applicant in Enoosean Police Station vide OB NO. 4/14/5/16 yet the ex-parte applicant had not been arrested.

13. It is the 1st respondent's case that the instant application lacks merit and the orders sought already overtaken by events since the investigations had been conducted and concluded long before these proceedings were instituted.

14. The interested party, David Muigai Mobosh, also opposed the application through his replying affidavit dated 14th November 2016. He takes issue with the procedure adopted by the ex-parte applicant in filing this case which he opines ought to have been brought under the Fair Administrative Act 2015.

15. He contends that the ex-parte applicant had not demonstrated that the respondents had failed to discharge their duties with due diligence and without unreasonable delay.

16. He deposes that the ex-parte applicant did not disclose that he (interested party) had made a report at ENOOSEAN Police Patrol base vide OB NO. 4/14/5/2016 at 11.30 a.m. before he (ex-parte applicant) went to a far off police station at Kilgoris with a similar report with the intention of misleading the police officers to conduct another investigation. He attached copies of statements that he recorded at Enoosean police which he marked as "DMM-01".

17. He avers that he has had long standing family differences with the ex-parte applicant's family and therefore the applicant was looking for a way of fixing or framing him up in order to settle old scores. He denies having threatened the ex-parte applicant or caused a breach of peace and states that the complaint lodged against him was false and malicious.

18. When the matter came up for hearing before me on 13th December 2016, the parties agreed to canvass their arguments by way of written submissions.

Ex-parte applicant's submissions

19. Through his advocates M/s Oguttu Mboya & Co. Advocates, the exparte applicant argued that upon making a report to the police against the interested party the respondents were under a duty to carry out investigations, arrest the interested party and institute Criminal Proceedings against him. He contends that the respondents were also obliged to forward their findings to the office of the Director of Public Prosecutions which they failed to do. The ex-parte applicant also contended that the respondents failed to convey to him the outcome of the investigations and thereby deprived him of justice.

20. He contends that the duty and/or task of this court is to secure the fundamental rights of every citizen including the right to acquire and own property under Article 40 of the Constitution. He further submits that the court is also obliged to secure fair treatment in favour of the citizens. He relied on the case of **Githunguri Vs Republic Nairobi HCCR APPLICATION NO. 271 OF 1985** in which it was held that:

"The High Court has inherent powers to exercise jurisdiction over tribunals and individuals acting on administrative or quasi judicial capacity".

21. He also cited the decision in **Macharia & Another vs the Attorney General and Another Nairobi Misc. Applic 56/2000** wherein the court said that:

“the Attorney General’s discretion to arraigning a person in court should be exercised in a quasi – judicial way.”

22. The ex-parte applicant’s case is that the actions and/or omissions of the respondents complained of were fraught with error and were calculated to defeat the ex-parte applicant’s constitutional and fundamental rights to fair administrative action as envisaged under Article 47 of the constitution.

Respondent’s submissions

23. Miss Winny Ochwal, Litigation Counsel for the respondents submitted that the 2 issues for determination were:

a) Whether investigations were carried out.

b) Whether the court can give orders to the respondents, especially the 4th respondent, on matters touching on investigation of offences and enforcement of the law.

24. On the first issue of whether or not investigations into the ex-parte applicant’s complaint to the police was carried out, the respondents submitted that the 1st respondent’s replying affidavit filed in this matter is very clear on the steps the 1st respondent took in investigating the case, by entering the complaint in the occurrence Book, recording witness statement and making a summary of the case before finally giving the recommendations. According to the respondents, the police investigating a case in conjunction with the office of the director of prosecutions have the discretion, upon finalising their investigations, to decide on whether or not to institute criminal charges against an accused person.

25. In the instant case, the respondent’s submit that at the conclusion of the investigations, they noted that the ex-parte applicant merely intended to use their office to settle old personal scores that he had with the interested party over a long standing boundary dispute.

26. It was the respondents’ case that they conducted thorough and expeditious investigation of the ex-parte applicant’s complaint and therefore, the ex-parte applicant’s prayer that they be compelled to complete/conclude the investigations relating to his complaint against the interested party is unmerited.

27. On the second issue regarding court orders to the 4th respondent on matters relating to investigations and enforcement of the law, the respondents cited the provisions of Article 245 of Constitution and submitted that police service is an independent institution whose independence is guaranteed by the constitution and is therefore not subject to the command or direction of the court in carrying out its investigations and law enforcement functions. They cited the case of **Titus Barasa Makhanu vs Police Constable Simon Kinuthia Gitau & 3 Others [2016] eKLR** wherein it was held:

“The Chief Justice May however not direct the command of the National Police Service as headed by the Inspector General. The independence of the Police Service in the investigations of any particular offence or in the enforcement of the law is enshrined in the constitution under Article 245 (4)”.

28. The respondents argued that they had not contravened any provisions of the constitution in the performance of their duties and that the ex-parte applicant had failed to prove that he was entitled to any of the orders sought.

Interested party’s submissions

29. M/s G.M. Nyambati, advocate for the interested party, reiterated the provisions of Article 245 of the

constitution and argued that the respondents had the discretion to decide whether or not to charge a suspect in court after conducting their investigations. He argued that the respondents had duly performed their duties of investigating the ex-parte applicant's complaint before arriving at a decision to close their investigations without any further police action and therefore, it would be foolhardy to expect the court to compel the respondents to perform functions which they had already undertaken.

30. The interested party took issue with the procedure adopted by the ex-parte applicant in filing these proceedings under Judicial Review instead of invoking the Leadership and Integrity Act under the provisions of Fair Administrative Act 2015 to redress his complaint.

31. The interested party argued that he had no powers to control the respondents in the exercise of their functions and therefore he had wrongly been enjoined in the suit.

Analysis and Determination

32. After considering the pleadings herein and the parties respective submissions, I come to the conclusion that the core issue for determination is whether this court can grant orders of Judicial Review in the nature of mandamus against the respondents to compel them to proceed and conclude criminal investigation concerning a complaint lodge by the ex-parte applicant against the interested party vide OB NO. 14/4/5/2016 and further, whether this court can set a timeline and/or duration within which the respondents should carry out the said investigations. There is also the issue of whether the respondents should shoulder the costs of this application.

33. I have anxiously considered this case and I note that there are certain uncontested facts which require highlighting and which will assist the court to arrive at its considered decision.

34. Firstly, it was not disputed that the ex-parte applicant and the interested party are neighbours who have had long standing family disputes especially in respect to a boundary dispute that eventually gave rise to the complaint filed by the ex-parte applicant to the police at Kilgoris vide OB NO. 14/4/5/2016. It was also not disputed that the interested party also lodged a complaint to the Enoosaen Police over the same altercations that he had with the ex-parte applicant vide OB NO. 4/14/5/16.

35. It is therefore clear to me that the disputing parties were in a race with each other over the filing of complaints with various police stations and this confirms to this court the claim that there existed bad blood between the said parties over a boundary dispute which, in my view, they ought to resolve through a civil suit and not by engaging in a cat and mouse game by filing various reports with the police. The above position was restated by the court in **Republic vs Chief Magistrates Court at Mombasa Exparte Ganijee & Another [2002] 2 KLR 703.**

“It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purposes is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice and no one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, prohibition and/or certiorari will issue and go forth...when a remedy is elsewhere provide and available to person to enforce an order of a civil court in his favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement. For in a criminal case a person is put in jeopardy and his personal liberty is involved. If the object of the appellant is to over-awe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court...In this matter the interested party is more actuated by a desire to

punish the applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose is to further that ulterior motive and that is when the High Court steps in...

36. The issues before this court however, is not who between the 2 warring parties had a stronger claim against the other, but rather, as has been claimed by the ex-parte applicant, whether the respondents should not only be compelled to complete the said investigations but also be given timelines within which to conclude the said investigations.

37. **Article 245 (4) of the Constitution** stipulates as follows:

“(4) The Cabinet secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector-General with respect to—

(a) the investigation of any particular offence or offences;

(b) the enforcement of the law against any particular person or persons; or

(c) the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service.”

38. I find that the provisions of the above article of the constitution is very clear on the independence of the 4th respondent herein when dealing with investigations of a certain offence or in the enforcement of the law.

39. The in independence granted to the 4th respondent by the constitution is akin to the independence granted to the 3rd respondent under **Article 157 (10) of the constitution** which stipulates that;

“157 (10) The Director of Public Prosecutions 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.”

40. Having regard to the above provisions of the constitution, I am of the view that this court is precluded, by the said provisions, from making the orders sought by the ex-parte applicant.

41. However, even assuming for arguments sake, that the court had powers to direct the respondents in the performance of their investigative functions. The facts, which have not been disputed by the ex-parte applicant, clearly show that the said investigations were properly carried out, concluded and recommendations made as shown in the 1st respondent’s replying affidavit and the attachments thereto. In effect therefore, the orders sought by the ex-parte applicant have already been overtaken by events in view of the fact that the investigations that he seeks orders to compel the respondents to conduct have already been concluded.

42. Having found that this court has no powers to direct the respondents in the performance of their investigative functions and having found that the orders sought by the ex-parte applicant have long been overtaken by events, the order that commends itself to me is the order to dismiss the application dated 28th September 2016.

43. Having regard to the nature of this case and taking into account the fact that the interested party and the ex-parte applicant are neighbours, I direct that each party bears his own costs of the application

Dated, signed and delivered in open court this 27th day of June, 2017

HON. W. A OKWANY

JUDGE

In the presence of:

Mr. Bosire for Oguttu for the Applicant

Mr. Nyachiro for the Interested Party

Omwoyo: Court Clerk