



**Republic & 5 others v Director of Public Prosecution & 2 others;
Somo (Interested Party) (Judicial Review Miscellaneous Application
E011 of 2023) [2023] KEELC 22199 (KLR) (14 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22199 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

JUDICIAL REVIEW MISCELLANEOUS APPLICATION E011 OF 2023

FM NJOROGE, J

DECEMBER 14, 2023

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL
REVIEW ORDERS OF MANDAMUS, PROHIBITION AND CERTIORARI**

AND

**IN THE MATTER OF BENJAMIN CHAI NGUMBAO, THOMAS
SIRYA MAITHA, NAHSHON CHOME, AGNESS CHARO
KARISA, AND KEA KALU MWAMBALI ALIAS NYATI**

AND

**IN THE MATTER OF ARTICLE 1, 2(5), 2(6), 10, 22, 23, 27, 28, 29 (A), 47, 48 AND
258 THE CONSTITUTION OF KENYA 2010, THE FAIR ADMINISTRATION
AND ACTION ACT NO.4 OF 2015 AND THE NATIONAL POLICE ACT.**

AND

**IN THE MATTER OF THE CRIMINAL PROC
EDURE ACT CAP 75 LAWS OF LAWS OF KENYA**

AND

IN THE MATTER OF THE PENAL CODE CAP 63 LAWS OF KENYA

AND

**IN THE MATTER OF CRIMINAL CASE NUMBER
E428 OF 2023 AND CRIMINAL NO. E741 OF 2023**

BETWEEN

REPUBLIC APPLICANT

AND

BENJAMIN CHAI NGUMBAO 1ST EXPARTE APPLICANT



THOMAS SIRYA MAITHA 2ND EXPARTE APPLICANT
NAHSHON CHOME 3RD EXPARTE APPLICANT
AGNESS CHARO KARISA 4TH EXPARTE APPLICANT
KEA KALU MWAMBALU 5TH EXPARTE APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTION 1ST RESPONDENT
SUB-COUNTY CRIMINAL INVESTIGATION DEPARTMENT MAGARINI
OFFICE 2ND RESPONDENT
THE CHIEF MAGISTRATE MALINDI LAW COURTS 3RD RESPONDENT

AND

SALAT SOMO INTERESTED PARTY

RULING

1. By way of a Chamber Summons dated 16/10/2023 brought under Section 8(2) of the *Law Reform Act* Cap 26 and Order 53 of the *Civil Procedure Rules*, 2010 and Part III of the *Fair Administrative Act* No. 4 of 2015, the ex parte applicants moved this court seeking the following orders: -
 1. Spent;
 2. That leave be granted to the ex-parte applicants to commence judicial review proceedings for an order or certiorari to move to the High Court for purposes of quashing the decision of the 1st and 2nd Respondents contained in charge sheets dated 8/6/2023 & 19/9/2023 being Malindi Criminal Case Number E428 of 2023 and Number E741 of 2023 at the Chief Magistrates Court at Malindi respectively;
 3. That leave be granted to the ex-parte applicants to apply for orders of prohibition directed at the Respondents prohibiting them from proceeding with Malindi Criminal Case Number E428 of 2023 and Number E741 of 2023, and to further prohibit them from instituting any further charges against the applicants or their relatives in respect of Plot Numbers 1402, 1403, 3839, 4172, 4173, 4174, 4175, 4176, 4178, 1290, 1345, 1879, 1968, 3856, 3858, 4462 and 1186 within the Adu Kamale Adjudication Section until finalization of the adjudication process and issuance of titles.
 4. That leave be granted to the ex-parte applicants to apply for orders of mandamus directed at Officer In Charge Directorate Of Criminal Investigation Department Marereni Police Station or any other competent office to compel them to undertake investigations on complaints raised by the ex-parte applicants and other residents as per OB NO. 5/17/4/2023, OB No. 2/17/04/2023, OB No. 6/17/04/2023, OB No. 03/19/04/2023 and OB No. 07/17/04/2023 and any other complaints as may be raised in relation to the ex-parte applicants and the interested party or his agents and or servants.
 5. That leave granted to operate as stay of proceedings in both Malindi Criminal Case Number E428 of 2023 and Criminal Case Number E741 of 2023.



6. That the leave granted do operate as a stay of further arrest and charging of the ex-parte applicants or any other persons regarding the dispute over parcels of land known as Plot Numbers 1402, 1403, 3839, 4172, 4173, 4174, 4175, 4176, 4178, 1290, 1345, 1879, 1968, 3856, 3858, 4462 and 1186 within the Adu Kamale Adjudication Section whose adjudication is ongoing pending hearing and determination of this judicial review application.
7. That costs be provided for.
2. The application is premised on the grounds appearing on the face of the application, the annexed affidavit sworn by the 1st applicant and on the statutory statement. In a nutshell, it is the applicants' case that they were at all material times residents of Adu-Kamale Adjudication Section, Magarini Sub-county having been relocated from Salt Belt area sometime in the year 2001 by the then County Council of Malindi; that later, in the year 2015, the said area was declared an adjudication area by the government through the Malindi-Magarini Land Adjudication and Settlement Officer. Upon identification of the beneficiaries, the applicants were allocated the aforementioned portions, which they occupied until sometime in 2017 when some unknown persons on bulldozers entered thereon to carve out roads. Upon enquiry, they learned that some 9 companies were claiming ownership having allegedly purchased the portions from certain families. The said companies claimed an area measuring approximately 1200 acres. The applicants alleged that the said companies were at some point allotted land within the disputed area and upon intervention and enquiries by the former Kilifi County governor as to how a limited liability company could be allocated land in an adjudication area, the said portions were said to have been then allocated to the Interested Party herein and members of his family, to the exclusion of other residents.
3. The applicants added that their attempts to protest have since been met with arrests and trumped up charges filed against them. The applicants averred that the dispute has also seen their crops and properties destroyed thus rendering them homeless. To the applicants, the 2nd Respondent's and the interested party's actions are only meant to harass and intimidate them to vacate the disputed area. It is stated that in any event, the criminal cases against them are premature by virtue of Sections 29 and 30 of the *Land Adjudication Act*.
4. On 17th October 2023, directions were given that the application be served upon all parties who also filed their respective responses.
5. For the 1st and 2nd Respondent, 2 Replying Affidavits were filed on 3rd November 2023 by the Attorney General's Office, sworn by Chief Inspector Maria Mueni Mbai and Justin Furaha Karisa, Kamale sub-location Assistant Chief respectively. According to the Chief Inspector Mueni, the Interested Party filed a complaint on 5th April 2023 regarding forcible detainer on the allegations that the applicants had invaded his parcels of land situated at Gashira area in Adu-Kamale sub location. She averred that during their investigations, she established that there were no houses on the aforementioned portions of land but only makeshift structures and crops. She also established that the Interested Party bought the said portions from Guyo Barufa Guyo and Abadhadha Hiribae upon confirmation from the Assistant Chief that they were the owners. The outcome of the investigations then prompted the 1st Respondent to charge the applicants with the offence of forcible detainer.
6. On his part, the Assistant Chief deposed that the disputed area has never had any residential houses and that it has always been family-owned by the Watha people. He added that in the year 2018, the 1st Applicant entered the disputed land while encouraging others to join him, claiming that the government had instructed them to settle therein. On 18th June 2017, he called for a meeting where he informed the residents that the area was declared an adjudication section to be allocated to the



original owners. He stated that the applicants were neither resident at Kamale sub-location nor the larger Fundisa location. The Assistant Chief added that his only interaction with the interested party was when he wrote a letter seeking to confirm ownership of the said land.

7. In his replying affidavit sworn on 2nd November 2023, the Interested Party opposed the application. He deposed that the subject matter in the two criminal cases was his land, he having purchased the same from one Abadhadha Hiribae and Guyo Barufa Guyo. He annexed a copy of a sale agreement dated 28th July 2017 to that effect. He narrated that prior to the purchase he conducted a ground visit accompanied by the Village Headman and Assistant Chief. He engaged the services of a surveyor who prepared a ground cover report, which he annexed therein. The interested party averred that on both occasions, the land was vacant and free of any human existence. He then proceeded to develop a section of the land and allowed the neighboring communities to utilize the remainder by grazing and fetching firewood. He admitted that in the year 2017, officers from the Land Settlement and Adjudication office visited the subject land for survey purposes.
8. The interested party further deposed that sometime in 2019, he learned that some people had invaded the land. He filed a report at Marereni Police Station which caused the 5th applicant and one Nyamawi Karisa Boki to be arrested. The said persons were however released with a warning to vacate the land. Later in 2020, the said individuals returned to the land together with others. Again, he filed another report when the 2nd, and the 5th applicants and others were arrested.
9. He engaged the services of a surveyor once again who prepared a ground report dated 11/10/2023. He also engaged the National Land Commission where the alleged invaders and himself agreed to settle the dispute amicably. Ultimately, he donated 200 acres being Plot No. 4161 for their settlement and the dispute was marked settled. On 5/4/2023, he learned that the applicants had started constructing structures outside the donated section and at some point, caused destruction to his properties. This prompted him to file another complaint when the applicants were arrested and charged in court for the offence of forcible detainer. The Interested Party deposed that the allegations pleaded by the applicants were false and misleading. He urged the court to dismiss the application.
10. The application was canvassed by way of written submissions.
11. I have considered the application and affidavits herein and further perused through the annexures thereto as well as the parties' written submissions. It is my considered view that the main issue for determination is whether the application is merited.
12. It is pertinent to note that the function of a judicial review court is to ensure that individual's rights to fair administrative action are not infringed. In so doing, the courts review the impugned decision of a tribunal, authority, person or entity on the lawfulness of the decision-making process. It is not up to the court to concern itself with the merits of the decision.
13. In the case of *Republic -v- Commission of Customs Services Ex-parte Imperial Bank Ltd* 2015 eKLR the court held that:

" The grounds upon which the court grants judicial review orders are now fairly well settled through the unknown grounds have been recognized not to be exhaustive. The purpose of judicial review proceedings as opposed to the normal Civil proceedings is to ensure that the individual is given fair treatment by the authority to which he has been subjected rather than the merits of the decision in question. It is therefore concerned not with private rights or the merits of the decision being challenged but with the decision-making process and its purpose is to ensure that the individual is given fair treatment by the authority to which he



has been subjected.” (See also *Republic v Secretary of State for Education and Science Ex parte Avon County Council* 1991/ALLER 282.)

The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to uplift the quality of public decision making and thereby ensure for the citizen civilized governance by holding the public authority to the limit defined by the law...”

14. Under Order 53 Rule 1 of the *Civil Procedure Rules*, it is mandatory that an applicant in such an application first seeks leave before filing the substantive application.
15. The reasons for such leave were explained by Waki J. (as he then was) in *Republic v County Council of Kwale & another ex parte Kondo & 57 others* (1998) 1 KLR (E&L) as follows: -

“ The purpose of the application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration. As was pointed out by Lord Diplock in *Republic -vs- Inland Revenue Commissioners ex p National Federation of Self Employed and Small Businesses Ltd* [1982] AC 617, the requirement that leave must be obtained before making an application for judicial review is designed to: “Prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.”

Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full inter partes hearing of the substantive application for judicial review. It is an exercise of the courts discretion but as always it has to be exercised judicially.” (emphasis mine)

16. The application is made by the applicants who claim that the land in dispute is currently under adjudication hence the ownership details are yet to be determined; that the criminal proceedings instituted against the applicants are premature and in contravention of Section 30 of the *Land Adjudication Act*. The applicants claim that the criminal proceedings are being misused to achieve a civil result. The applicants further claim that they have lived within the disputed land since 2001 when the government moved squatters from an area they referred to as the Salt Belt.
17. A cursory perusal of the notice to vacate they attached as BCN-1 reveals that the said squatters on the salt manufacturing farms and nearby areas were to be allocated land under the Marereni/Msumarini Adjudication Scheme measuring approximately 190,000 acres. The land in dispute is said to be within Adu-Kamale adjudication section, Magarini sub-county. Nothing was said or adduced to suggest that the suit land is a section within the Marereni/Msumarini Adjudication Scheme . Without going into the depth of the issues, I am therefore not convinced that the applicants have demonstrated an arguable case to warrant leave. I say so because in my view, the basis of their claim is the alleged government’s directive to resettle them. As already established, they were to be settled in Marereni/Msumarini Adjudication Scheme and not where the interested party claims ownership or the land subject of the criminal cases.



18. The upshot is that the application dated 16/10/2023 fails for the reasons set out herein above and it is hereby dismissed with costs. The matter shall be mentioned on 20/11/2024.

DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 14TH DAY OF DECEMBER 2023.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

