REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

JR MISC. APPLICATION NO. 17 OF 2015

IN THE MATTER OF: AN APPLICATION BY:

HAMISI TSUMA MWERO, STEVEN MBOGA MBINU, DANIEL JIRA BEKWEKWE, KATENBE JOHN, SALIM MWAMGEDZA, MOHAMED NDEGWA, ABDALLAH TSUMA, CHIMERA NDEGWA, ALI MWANALOMA AND CHARO CHIMERA FOR ORDERS OF CERTIORARI AND PROHBITION DIRECTED AT THE DIRECTOR OF PUBLIC PROSECUTION, SENIOR RESIDENT MAGISTRATE AT KWALE, OCS KINANGO POLICE STATION C/O INSPECTOR GENERAL POLICE

IN THE MATTER OF: KWALE CRIMINAL CASE NO. 92 OF 2015;

REPUBLIC VS. MWANALOMA SITA & ANOTHER, KWALE CRIMINAL CASE NO. 1119 OF 2014; REPUBLIC VS. MOHAMED NDEGWA & TWO OTHERS, KWALE CRIMINAL CASE NO. 159 OF 2015; REPUBLIC VS. DANIEL JIRA BEKWEKWE & 2 OTHERS, KWALE CRIMINALCASE NO. 213 OF 2015; REPUBLIC VS. HAMISI TSUMA MWERO & ANOTHER

IN THE MATTER OF: THE CONSTITUTION OF KENYA, THE PENAL CODE CAP 63 LAWS OF KENYA, THE CRIMINAL PROCEDURE CODE CAP 75 LAWS OF KENYA, THE LAW REFORM ACT, CAP 26 LAWS OF KENYA AND ORDER 53 RULES 1 & 2 OF THE CIVIL PROCEDURE RULES

BETWEEN

1. HAMISI TSUMA MWERO

2. STEVEN MBOGA MBINU

3. DANIEL JIRA BEKWEKWE

4. KATEMBE JOHN

5. SALIM MWAMGEDZA

6. MOHAMED NDEGWA

7. ABDALLA TSUMA

8. CHIMER NDEGWA

9. ALI MWANALOMA

10. CHARO CHIMERA……………………….................................…………………APPLICANTS

VERSUS

1. DIRECTOR OF PUBLIC PROSECUTION

2. THE SENIOR RESIDENT MAGISTRATE'S COURT AT KWALE

3. THE OCS KINANGO THROUGH THE INSPECTOR GENERAL OF POLICE……...RESPONDENTS

COLFAX HOLDINGS LTD…………………..……INTERESTED PARTY

RULING

1. Pursuant to grant of leave made on 14th May, 2015 to commence judicial review proceedings, the ex parte Applicants' counsel filed a substantive Notice of Motion (the Application) dated 28th May, 2015 and sought an order of **certiorari** and **prohibition** as follows -

(1) THAT an order of certiorari be issued to remove into the High Court and quash the proceedings of –

KWALE CRIMINAL CASE NO. 92 OF 2015

REPUBLIC VS. ALI MWANALOMA SITA AND ANOTHER

KWALE CRIMINAL CASE NO. 1119 OF 2014

REPUBLIC VS. MOHAMED NDEGWA AND TWO OTHERS

KWALE CRIMINAL CASE NO. 159 OF 2015

REPUBLIC VS. DANIEL JIRA NEKWEKWE AND 2 OTHERS AND

KWALE CRIMINAL CASE NO. 213 OF 2015

REPUBLIC VS. HAMISI TSUMA MWERO & ANOTHER

(2) THAT an order of prohibition be issued prohibiting the 1st Respondent and/or any other officer acting under his authority from proceeding with the criminal cases:

KWALE CRIMINAL CASE NO. 92 OF 2015

REPUBLIC VS. ALI MWANALOMA SITA AND ANOTHER

KWALE CRIMINAL CASE NO. 1119 OF 2014

REPUBLIC VS. MOHAMED NDEGWA AND TWO OTHERS

KWALE CRIMINAL CASE NO. 159 OF 2015

REPUBLIC VS. DANIEL JIRA NEKWEKWE AND 2 OTHERS AND

KWALE CRIMINAL CASE NO. 213 OF 2015

REPUBLIC VS. HAMISI TSUMA MWERO & ANOTHER

(3) THAT an order of prohibition be issued prohibiting the 3rd Respondent, the OFFIER IN CHARGE OF KINANGO POLICE STATION and/or any other officers acting under command from arresting and arbitrarily prosecuting the 17 Plaintiffs in Mombasa HCCC APPLICATION NO. 632 OF 2011 (OS) HAMISI TSUMA MWERO & 17 OTHERS VS. COLFAX HOLDINGS LIMITED & ANOTHER at the instigation of the Interested Party – COLFAX HOLDINGS LIMITED.

(4) that AN ORDER OF PROHIBITION BE ISSUED PROHIBITING THE 2ND Respondent and/or any other officer of the sub-ordinate court from proceeding with the following criminal cases;

KWALE CRIMINAL CASE NO. 92 OF 2015

REPUBLIC VS. ALI MWANALOMA SITA AND ANOTHER

KWALE CRIMINAL CASE NO. 1119 OF 2014

REPUBLIC VS. MOHAMED NDEGWA AND TWO OTHERS

KWALE CRIMINAL CASE NO. 159 OF 2015

REPUBLIC VS. DANIEL JIRA NEKWEKWE AND 2 OTHERS AND

KWALE CRIMINAL CASE NO. 213 OF 2015

REPUBLIC VS. HAMISI TSUMA MWERO & ANOTHER

(5) THAT the costs of the Application be provided for.

2. The Notice of Motion was supported by the Grounds in the Statement attached to the Chamber Summons dated 6th May, 2015 and reiterated in the Notice of Motion itself. The question or issue is whether the Applicants have made a case for the grant of orders of certiorari, and prohibition.

The Applicants' Case

3. The Applicants case briefly put arises out of a dispute between the Applicants and the Interested Party over a parcel of land known as Plot L.R. No. 4526 (Title No. C.R. 8727) ("the suit land") situate at Mwamdudu Kwale District which is subject of litigation in Mombasa HCCC No. 632 of 2011 between the ex parte applicants **HAMISI TSUMA MWERO & OTHERS VS. COLFAX LIMITED (the Interested Party), and COUNTY COUNCIL OF KWALE** (now the Government of the County of Kwale).

4. The ex parte Applicants claim is that the four criminal cases in Kwale have been instituted against them by the Interested Party and have been instituted in bad faith with intent to embarrass the Applicants to ensure that they do not adequately advance the said civil case in the High Court after intimidating them and that all the four cases should be subjected to investigation and orders of certiorari and prohibition issued to procure the forceful settlement of squatters living in the suit land, comprising approximately 314 acres and which the applicants claim is their ancestral land.

5. In opposition to the Application were filed a Relying Affidavit by No. 84283, PC Eric Nyakundi sworn and filed on 1st July, 2015 which the deponents sets out the offences for which the Applicants are

being prosecuted namely –

(1) Threatening violence contrary to Section 95(2)(a) of the Penal Code (Cap 63 Laws of Kenya);

(2) Being a member of Al Shabaab contrary to Section 3(a) as read with Section 4(a) of the Prevention of Organized Crime Act, 2010 (No. 6 of 2010);

(3) Creating a disturbance in a manner likely to cause a breach of the peace contrary to Section 95(1)(b) of the Penal Code;

6. Counsel for the Applicants filed and Respondents also filed written submissions together with attached authorities. The case of **MOHAMMED GULAN HUSSEIN FAZAL KARMALI & HYUNDAI MOTORS KENYA LIMITED [2006] eKLR**, epitomizes the Applicants'' contention. In that case the Applicants had entered into a contract with the Government of Kenya for supply of a certain number of motor vehicle units at a price of US$10 million, plus interest at 7.2% per annum as a credit for 5 ½ years. Though some units were paid for and delivered, there remained 143 units valued at US$2,970,684 which were pending delivery. Government for reasons known only to itself terminated the contract unilaterally but insisted on delivery of some of the units of the motor vehicles.

7. The Applicants contended that instead of invoking the method of dispute resolution provided for in the agreement the Government invoked the criminal law process with a view to applying pressure, and charged them with obtaining money by false pretences.

8. The Applicants claimed that they had been harassed and oppressively treated by the Respondents through the officials of Government and for this reason the Applicants claimed that the Respondents were using the criminal justice process to unfairly, vexaciously and oppressively and that the Respondents conduct constitute abuse of power and the court process. The Applicants prayed that the court invokes its inherent power to stop the criminal cases by order of prohibition.

9. In agreeing with the Applicants and issuing the orders of certiorari and prohibition the court said **inter alia** -

> **"(1) Proceedings taken in bad faith or circumstances yielding an inference that they were up to no good, the criminal law must not be used oppressively to punish acts which in truth might be technically in breach of the criminal law but which contain no real vice and which can only be best handled under a process other than the criminal process, namely any of the different systems of civil remedies. the existence of other remedies which have already been unsuccessfully sought or which may be open and are less drastic and stigmatic than criminalization of an otherwise civil dispute is indicative of improper and ulterior purpose;**
>
> **(2) It is an abuse of criminal law process for a person to launch criminal proceedings against the other person and the civil dispute cannot be reasonably ventilated and decided with fair finality in the criminal process."**

The Respondents' Case

10. In their submissions dated 10th November, 2015 and filed on 11th November, 2016, the First and Third Respondents disagreed completely with the submissions of the Applicants counsel and contended that the circumstances obtaining in the case of **Gulamhussein and Hyundai Motors (K) Limited (supra)** were very different from the facts in this case.

11. Complaints having been made to the Police of threats to kill, disturbance of public order, by threatening violence, the Police had a duty to investigate such complaints. In **REPUBLIC VS.**

COMMISSIONER OF POLICE & ANOTHER, ex parte Michael Monari, [2015] eKLR, the court said –

> **"The Police have a duty to investigate on any complaint once a complaint is made. Indeed the Police may be failing in their constitutional mandate to detect and prevent crime if they failed to do so. The Police need only to establish reasonable suspicion before preferring charges. The rest is left to the trial court…. As long as the prosecution and those charged with the responsibility of making the decision to charge act in a reasonable manner, the High Court would be reluctant to intervene."**

12. Likewise in **REPUBLIC VS. ATTORNEY-GENERAL, ex parte Arap Ngeny** (High Court Miscellaneous Application No. 406 of 2001) the court said –

> **"The function of any judicial system in civilized nations is to uphold the rule of law. To be able to do that, the system must have power to try and decide cases brought before the courts according to the established law. The process of trial is central to the adjudication of any dispute and it is now a universally accepted principle of law that every person must have his day in court. This means that the judicial system must be available to all…"**

13. This principle is echoed in Article 159(2) (a), (of the Constitution) justice must be done to all, irrespective of status.

14. Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review determines whether the persons affected by the decision makers had jurisdiction, whether the persons affected by the decision were heard, before it was made, and whether in making the decision the decision maker took into account relevant matters or did not take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of fact and in effect urges the court to determine the merits on two or more different versions prescribed by the parties, the court would not have the jurisdiction in a judicial review proceedings to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore judicial review are not the proper forum in which the innocence or otherwise of the Applicant(s) is to be determined and a party ought not to institute judicial review proceedings with having the court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial review process.

> **"The court in judicial review proceedings is mainly concerned with the question of fairness to the applicant in the institution and continuation of the criminal proceedings and once the court is satisfied that the same are bone fides and that the same are being conducted in a fair manner, the High Court ought not to usurp the jurisdiction of the trial court and trespass onto the arena of trial by determining the sufficiency or otherwise of the evidence to be presented against the applicant. Where, however, it is clear that there is no evidence at all or that the prosecution evidence even if it were to be correct would not disclose any offence known to law, to allow the criminal proceedings to continue would amount to the court abetting abuse of the court process by the prosecution."**

15. I entirely agree with above the view of Hon. G. V. Odunga in **REPUBLIC VS. ATTORNEY-GENERAL, THE DIRECTOR OF PUBLIC PROSECUTIONS, ETHICS AND ANTI-CORRUPTON OMMISSION, ex parte Diamond Hashim Lalji and Ahmed Hashim Lalji**.

16. In this claim the Replying Affidavit of PC Eric Nyakundi shows that the Police, upon receipt of complaints from the ex parte Applicants, carried out investigations and established that offences known to the law had been committed; a breach of the peace contrary to Section 95(1)(b) of the Penal Code, threatening to kill contrary to Section 223(1) of the Penal Code, and threatening violence contrary to Section 95(2)(a) of the Penal Code.

17. Investigations carried out included statements from the complainants, and the Applicants were given an opportunity to give their side of the story, and on the basis of which the Respondent commenced prosecution of the Applicants.

18. The existence of Mombasa HCC No. 632 of 2011 (OS) between the Applicants and the Interested Party is basically a contestation on ownership of the suit land part of which the Applicants occupy, but the Interested Party is the registered owner. Attempts in the civil suit to injunct the Interested Party from developing part of the suit land was declined by Hon. Mukunya J.

19. The substratum of the Applicants' case is that they should not have been charged with the offences, because of the existence of the civil suit and the prosecution was commenced in bad faith to force the Applicants to abandon their claim of adverse possession against the Interested Party. However, under Section 193A of the Criminal Procedure Code {Cap 75, Laws of Kenya) the existence of a civil suit is not a bar to criminal proceedings based on the same set of facts or arising from the same matter. What is both critical and relevant is the existence of evidence of commission of an offence by any one of the parties to the suit or some other person not a party to the suit. This provision insulates the criminal justice system against persons who may commit crimes and use the existence of civil proceedings to shield themselves from criminal prosecution. Indeed as the court held in **Republic vs. Attorney-General & 3 others, ex parte Diamon Hashim Lalji [2014] eKLR** paragraph 124 –

> **"… in any case the concurrent existence of the criminal proceedings and the civil proceedings even if <u>any matter in issue</u> in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings would not <u>ipso facto</u>, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognized aim."**

20. Dealing with same issue in **KURIA & OTHERS VS. ATTORNEY-GENERAL [2002] 2 KLR 69,** the court held –

> **"The court has power to and indeed the duty to prohibit the continuation of the criminal prosecution of extraneous matters divorced from the goals of justice that guide their institution. It is the duty of the court to ensure that the process does not degenerate into tools for personal score setting or vilification on issues not pertaining to that which the system was even formed to perform…**
>
> **A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious. The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives the judicial review is invariably invoked so as to zealously guard its (the courts) independence and impartiality (as per Section 77(1) of the Kenya Constitution in relation to criminal proceedings and Section 79(9) for the civil process. The invocation of the law, by whichever party in unsuitable circumstances or for the wrong ends must be stopped as in these instances, the goals for their utilization is far from that which the courts, indeed the entire system is constitutionally mandated to administer …"**

21. In the same case, the court continued –

> **"It would be a travesty of justice, a sad day for justice should the process of court be allowed to be manipulated, abused and/or misused, all in the name that the court has no say in the matter because the decision to so utilize the procedures has been made. It**

> **has never been argued that because a decision has already been made to charge the accused persons, the court should simply as at were fold its arms and stare at the squabbling litigants/disputants parade themselves before every dispute resolution framework one after another at every available opportunity until the determination of the one of them because there is nothing in terms of the decision to prohibit…**
>
> **The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law. In this instance, where the prosecution is an abuse of the process of court, as is alleged in this case, there is no greater duty for the court than to ensure that justice is not only done but is seen to be done by staying and/or prohibiting prosecutions brought to bear for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court, as well as its process and therefore the use of the court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposed, the duty of the court.**
>
> **It therefore matters not whether a decision has been made or not, what matters is the objective for which the court proceedings are being utilized. Because the nature of judicial review proceedings are concerned with the manner and not the merits of any decision-making process, which process affects the rights of the citizens, it is apt for circumstances such as this where the prosecution and/or continued prosecution besmirches the judicial process with irregularities and ulterior motives. Where such a point is reached that the process is an abuse, it matters not whether it has commenced or whether there has been an acquiescence by all the parties. The duty of the court in such instances is to purge itself of such proceedings. Thus where the court cannot order that the prosecution be not commenced, because already it has, it can still order that the continued implementation of that decision be stayed…There is nothing which can stop the court from prohibiting whether hearings and/or prosecution of a criminal case, where the decision to charge and/or admit the charges as they have already been made…"**

22. Ultimately judicial review orders are discretionary and will not be granted except in the clearest of cases. For the Applicants to avail themselves of the remedy of prohibition and other judicial review remedies sought, there has to be clear, cogent and convincing evidence of bias or ulterior motive in preferring charges. It is not enough to allege bias. There has to be evidence of bias.

23. But even where bias or criminal proceedings have been commenced for ulterior motive which is not the case in this matter, the motive of institution of criminal proceedings is only relevant where the **predominant purpose** is to further other ulterior purpose other than the vindication of a criminal offence. Indeed, malice or ulterior motive ought to be the driving force and not just one of the factors in preferring criminal prosecutions for the court to interfere with the Respondents constitutional and statutory mandate prosecute.

24. Finally, in **REPUBLIC VS. ATTORNEY-GENERAL & 4 OTHERS ex parte Kenneth Kariuki Githii [2014] eKLR**, the court held –

> **"… the High Court, in Judicial Review proceedings, ought not to lightly interfere with the constitutional mandate given to the Director of Public Prosecutions especially, if, on the evidence in his possession, if true, a prosecution can be sustained. It is upto an Applicant to discharge the burden of proof to show he will not receive a fair trial and judicial review proceedings are simply concerned with the process rather than the merits of the decision or proceedings being challenged."**

25. I reiterate, the substratum of this case is the dispute between the Applicants and the ex parte Applicant over the suit property. It would be in the interest of both the ex parte Applicants and the Interested Party to have that dispute resolved in the civil action that is to say, Mombasa HCC No. 632 of

2015. Neither the ex parte Applicants nor the Interested Party will be allowed to use diversionary tactics through Judicial Review Applications. Once the Director of Public Prosecutions has established from the evidence in his possession that an offence known to the law has been committed, and in the absence of any ulterior motive on his or on the part of the complainant (Interested Party) or extraneous circumstances to use the criminal justice for oppressive purposes such as to perform a contract such as the **Hyundai case** (above), the Judicial Review court would be abdicating its duty by entering into the merits of the case. That is the role of the trial court. Indeed I would be as bold as G. V. Odunga J. in **Republic vs. Attorney-General & 4 others (supra)**, at paragraph 91 –

> **"the High Court ought not to usurp the jurisdiction of the trial court and trespass onto the arena of trial by determining the sufficiency or otherwise of the evidence to be presented against the Applicant."**

26. In this case, I am satisfied that there is no evidence at all, that the prosecution of the Applicants is motivated by bias, malice or other ulterior motives.

27. For those reasons, the ex parte Applicants' Notice of Motion dated 23rd May, 2015 and filed on 3rd June, 2015 has no merit at all, and is dismissed with costs to Interested Party.

28. It is so ordered.

Dated, Signed and Delivered in Mombasa this 15th day of March, 2016.

M. J. ANYARA EMUKULE, MBS

JUDGE

In the presence of:

Mr. Tindi for Applicants

Mr. Ondego holding brief for Mr. Khagram for Interested Party

Mr. Ngari holding brief Mr. Wamotsa for Respondents

Mr. Silas Kaunda Court Assistant