



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL AND JUDICIAL REVIEW APPLICATION NO. 54 OF 2016

PATRICK KANG'ETHE NJUGUNA

EDWARD NJUGUNA KANG'ETHE

GEORGE JAMES KANG'ETHE

MARGARET WAMBUI KANG'ETHE

GLADYS NJERI KANG'ETHEAPPLICANTS

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

**EXPARTE: GEORGE JAMES KANG'ETHE AND THE OTHERS ABOVE
STATED**

AND

COMMERCIAL BANK OF AFRICA INTERESTED PARTY

RULING

1. The application before me is dated 3rd August, 2016. It has been brought under certificate of urgency during the High Court vacation. On 4th August, 2016 Judge P.J. Otieno certified the application as urgent and ordered for the same to be heard during vacation and on a priority basis on 10th August, 2016, before the duty Judge. Further orders were that the exparte applicants would be served with the said application before the close of business on 4th August, 2016.

2. The application has been brought under article 159(2) (d) of the Constitution, Section 10 of the Judicature Act, Rule 3(1) and (2) of the High Court (Practice and Procedure) Rules and order 51 rule 1 of the Civil Procedure Rules, 2010. It seeks the following orders:-

(i) Spent

(ii) Spent; and

(iii) That this Honourable Court do give an interpretation and settlement of the terms of the orders

granted by the Court (P.J. Otieno, Judge) on 14th July, 2016 and issued on 15th July, 2016.

The application is predicated on the grounds that:-

A. The orders of P.J. Otieno Judge dated 14th July, 2016 in favour of the applicants; the respondents were:-

(i) Prohibited from investigating, arresting and prosecuting the ex parte applicants in relation to matters touching on the legality of Title deeds over properties known as LR No. 209/1817, LR No.209/12513, LR No.209/2489/34 and Dagoretti/Riruta/2289 all belonging to the Companies in which the applicants are directors; and

(ii) At the same time expressly allowed the respondents to investigate the applicants on the legality or otherwise of the title deeds above stated so as to establish if indeed any cognizable offence has been committed.

B. The respondent's interpretation of the said orders is that they are not prohibited from carrying out or continuing with investigations, interrogations, and record (sic) statements from the applicants in relation to the above stated properties so as to establish if indeed any cognizable offence has been committed by the applicants or by any other person.

C. The applicants contend that the said orders do prohibit the respondents from carrying out or continuing with investigations, interrogations and record statements (sic) from the applicants in relation to the above stated properties so as to establish if indeed any cognizable offence has been committed by the applicants.

D. The interpretation given by the applicants is one that prevents the respondent and Inspector General of Police from discharging their Constitutional mandates (sic) of investigations, interrogations and recording of statements from the applicants in relation to the above stated properties so as to establish if indeed any offence has been committed by the applicants.

E. That it is of utmost urgency that an interpretation and settlement of the terms of the orders is granted by this Court so as the respondents do know (sic) clearly whether or not the Court has prohibited the respondents from investigating the applicants in relation to the above stated properties;

F. In view of the conflicting interpretation of the orders by the parties, the interpretation by this court of its orders is necessary and urgent to crystallize and inform all the parties of their rights, legitimate expectations and obligations under the said orders; and

G. It is meet and just that this application be granted.

The application is also supported by the affidavit of Joseph Muthui a Criminal Investigation officer attached to the Directorate of Criminal Investigations Nairobi area, sworn on 3rd August, 2016.

SUBMISSIONS BY COUNSEL

3. Mr. Wamotsa, Learned Senior Prosecution Counsel for the respondent submitted that they are seeking an interpretation of Justice P.J. Otieno's orders granted on 14th July, 2016 and issued on 15th July, 2016 and particularly Order Nos. 2 and 3 thereof. This is for the reason that the Investigating Officer is unable to tell if the said orders stop investigations in this matter, or otherwise. Counsel informed the Court that he perused the Court file and saw that the Judge was clear that the ex parte orders granted were not meant to stop investigations. In his understanding, the orders extracted and issued do not direct police officers to stop investigations in the matter. He sought the court's interpretation of the orders so that the parties

know their rights under the said orders.

4. Ms. Oyier, Learned Counsel for the exparte applicants submitted that she was not opposed to the Court interpreting the orders granted on 14th July, 2016. She added that investigations can be undertaken. She further stated that on 14th July, 2016 they were ordered to serve their substantive application on the respondents which they have done and that the said application is listed for hearing on 19th September, 2016.

ANALYSIS AND DETERMINATION

The issue for determination is if the orders extracted and issued are in tandem with the ones granted on 14th July, 2016.

5. A perusal of the proceedings of 14th July, 2016 reveals that Justice P.J. Otieno considered an application filed by the exparte applicants, dated 14th July, 2016. The Judge granted orders in the following terms:-

“I certify the same as urgent and grant it in terms of prayers a on terms that the applicant files and serves the Notice of Motion within 10 days from today. On the prayer for stay, I grant the same only in so far as arrest and detention is concerned but the police shall be at liberty to carry out investigations to establish if indeed any cognizable offence has been committed. Costs of this application is ordered to be in the Cause.”

6. Following the above proceedings, Counsel for the exparte applicants proceeded to extract the orders outlined here below:-

“1. That the application dated 14th July, 2016 be and is hereby certified as urgent.

2. That leave is granted to the applicants herein to apply for an order of Judicial review in the nature of prohibition directed at the respondent staying any further investigations by its officers intended arrest of the applicants or their arraignment or prosecution in Criminal Courts in regard to matters touching on the legality or otherwise of Titles and/or legal charges created over properties known as LR No. 209/1817; LR No. 209/12513; LR No. 209/2489/34; and Dagoretti/Riruta/2289 all belonging to the companies in which the applicants are Directors thereto on terms that the applicant files and serves the Notice of motion within 10 days from today.

*3. That the grant of the leave to apply for the said order of Judicial Review in the nature of prohibition **do operate as a stay of any further criminal investigations by the officers of the respondent**, intended arrest of the applicants’ (sic) or their arraignment or prosecution in Criminal Courts in regard to matters touching on the legality or otherwise of Tittles and/or legal charges created in favour of the interested party over properties known as LR No.209/1817; LR No.209/12513; LR No.209/2489/34 and Dagoreti/Ritruta/2289 all belonging to companies in which the applicants are directors thereto **only in so far as arrest and detention is concerned but the police shall be at liberty to carry out investigations to establish if indeed any cognizable offence has been committed**.(emphasis mine).*

4. That Costs of the application is ordered to be in the Cause.”

7. This court notes that the orders of Justice P.J. Otieno were very clear and unambiguous. They left no room for mistake or lack of clarity of the orders he granted. His orders for 14th July, 2016 did not grant the exparte applicants stay of any further criminal investigations by the officers of the respondent. It is common knowledge that court orders are extracted by the Counsel on record who has moved the Court for grant of orders. In this instance, it is apparent that the Counsel for the exparte applicants failed to act with integrity and professionalism in that he/she extracted confusing orders whose meaning was misinterpreted. This Court frowns upon such conduct as a Counsel is required to act with utmost good

faith, in the discharge of his/her duties as an officer of this court. It is also not lost to me that the Deputy Registrar, Mombasa High Court also failed to ascertain the veracity of the orders that were extracted arising from the application dated 14th July, 2016. Had she done so, she would have noticed that the orders extracted were lacking in clarity. I therefore hold that the orders extracted in so far as paragraph 3 is concerned are ambiguous, mixed up and meant to confuse their recipient.

8. In the case of **Rev. Mudara Evans Okanga Dondo vs Housing Finance Company of Kenya HCCC** No. 262 of 2005, (unreported) Kimaru Judge held thus:-

“The Court will always invoke its inherent jurisdiction to prevent the abuse of the due process of the Court. The jurisdiction of the Court which is comprised within the term “inherent” is that which enables it to fulfil itself properly and effectively, as a Court of law. The overriding feature of the inherent jurisdiction of the Court is that it is part of procedural law, both Civil and Criminal and not part of the substantive law; it is exercisable by summary process, without plenary trial, it may be invoked not only in relation to the parties in pending proceedings but in relation to anyone whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of the court. The inherent jurisdiction of the court enables the court to exercise control over process by regulating its proceedings by preventing abuse of the process and by compelling the observance of process. In sum, it may be said that the inherent jurisdiction of the Court is virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the Court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression.”

9. This Court has already held that the orders extracted were confusing. For the said reason I hereby invoke the inherent powers of this Court and make the following orders:-

- (i) The orders extracted and issued on 15th July, 2016 in this matter are hereby recalled and expunged from the Court record;
- (ii) The ex parte applicants will extract the orders anew so as to reflect the true spirit and purport of the orders granted on 14th July, 2016;
- (iii) The Deputy Registrar Mombasa is ordered to ascertain that the orders so extracted are in consonance with the orders granted on 14th July, 2016;
- (iv) For the avoidance of doubt, the Directorate of Criminal Investigations and any other investigative agency are at liberty to conduct investigations appertaining to the ex parte applicants in relation to matters touching on the legality of Title deeds over properties known as LR No. 209/1817, LR No. 209/12513, LR No. 209/2489/34 and Dagoretti/Riruta/2289 all belonging to the companies in which the applicants are Directors.
- (v) Costs in the cause.

DELIVERED, DATED and SIGNED in open Court on this **10th** day of **August, 2016**.

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Maosa for ex parte applicants

Ms. Ocholla for the respondent

Ms. Rose Echor Court Assistant