REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

MISC. APPLICATION NO.253 OF 2016

IN THE MATTER OF THE REGISTERED LAND ACT CAP 300 (REPEALED)

AND

IN THE MATTER OF THE REGISTERED ACT (NO. 3 OF 2012)

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACT

REPUBLIC……....……………………….………………..…………..APPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS…..............….RESPONDENT

EX PARTE:

MERCHANT CAPITAL HOLDINGS LTD

GILBERT KIBICHO

CYPRIAN KANAKEAMBAO

JUDGEMENT

Introduction

1. By a Motion on Notice dated 20th June, 2016, the *ex parte* applicants herein sought the following orders:

> **1) An order of Mandamus do issue to direct and/or compel the respondent to release the green cards for the properties.**

a. Kajiado/Kitengela/31812;

b. Kajiado/Kitengela/31966;

c. Kajiado/Kitengela/39780;

d. Kajiado/Kitengela/39781;

e. Kajiado/Kitengela/39788;

f. Kajiado/Kitengela/39821;

g. Kajiado/Kitengala/4105;

h. Kajiado/Kitengela/42585;

i. Kajiado/Kitengela/50991; and

J. Kajiado/Kitengal/4099

2) The costs of this application be provided for.

The Applicant's Case

2.According to the Applicants, they are the joint vendors of the said parcels of lands and they instructed their advocates to undertake conveyancing in resopect thereof to third parties. Pursuant thereto, between December, 2013 and February, 2014, they handed the transfer documents thereof for transfer. However before the said transactions could be made, the titles and green cards in respect of the said properties were confiscated by the police in Kajiado County I conduct of investigations against the Registrar, Kajiado County for alleged fraudulent dealings in the Registry.

3.It was averred that in February, 2014 there was a newspaper advert by the County Criminal Investigation Office, Kajiado County listing inter alia the suit properties as being the subject of investigations for fraud in respect of transfers without the duty having been paid. According to the applicants, the police have since commenced their investigations against the said Registrar for the alleged fraud and that the County Criminal Investigation Office subsequently released the original titles and transfer documents to the applicants'' advocates but failed to release the green cards to the Registrar. As a result, despite having paid for the requisite stamp duty charges to the collector of stamp duty in order to effectuate the registration of the transfer documents, the same has not been possible. The applicants contended that they have written to the Respondent requesting to the release of the said green cards but have, two years down the line, not received any response.

4.To the applicants as neither the lands in question nor the applicants are the subject of the said investigations. It was therefore their case that the failure to release the said green cards amounts to unfair administrative procedure by the County Criminal Investigation and is grossly unfair and unreasonable. To them the delay in conducting investigation against the Registrar and for the Respondent to hold the green cards for over 2 years is unreasonable hence the orders sought herein.

Respondents' Case

5. In response to the application, the Respondent filed the following grounds of opposition:

1. That the application herein is misconceived, frivolous, vexatious, incompetent, improperly

before court and an open abuse of the court process.

2. That there is no cause of action against the respondents herein as its mandate is clearly spelt out in the Constitution under Article 157 of the constitution of Kenya 2010 thus the application is generalized and the respondent wrongly enjoined in this proceedings.

3. That the orders sought by the applicants are unconstitutional as they seek the respondent to exercise its mandate with undue influence and/or under the direction/authority of individuals/institution contrary to Article 245 of the constitution. The ODPP is a constitutional independent office which does not act arbitrary on mere allegations without substantive evidence.

4. That the application herein is misleading as it insinuates that the said documents in issue are in possession of the respondent so that this honourable to direct and or compel the respondent to release them. In the contrary the applicants have clearly stated that the documents are with the investigators whom they did not see any reason on enjoin them in these proceedings. This is being insincere.

5. That under Article 157(10) of the constitution the DPP does not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of the powers or functions, shall not be under the direction or control of any person or authority.

6. That Section 24 of the National Police Service Act mandates the police to investigate any complaint brought to their attention in order to determine whether an offence has been committed and prefer appropriate charges thereafter.

7. That the orders sought by the applicants seek to interfere with the logical flow and/or mechanism set in terms of conducting investigations as the said documents are in possession of investigators as exhibits. The police carrying out their statutory mandate.

8. That it is in the public interest and in the interest of administration of justice that the investigators conclude their investigations without fear of harassment, intimidation or undue influence. If there is sufficient evidence then the suspects and/or perpetrators of crimes must be prosecuted.

9. That the applicants have not adduced any evidence to show that the respondents confiscated the said documents as alleged. Further they have not demonstrated that they have an arguable case. Their allegations are merely generalized.

10. That the orders if granted would result to greater injustice in the criminal system and public interest.

11. That the applicants have not demonstrated that they have a prima facie case and this application is an abuse of the court's process.

12. That the office of the director of public prosecutions should be struck off or expunged from the proceedings for mis-joinder.

13. That the application is without merit and should be dismissed with cost.

6. The Respondent also filed a replying affidavit sworn by the investigating Officer in a Criminal Case NO. 218 of 2014 at Kajiado Law Courts where the applicants herein are interested parties in regard to green cards involved in the charges against the accused persons are charged with being in possession of public stores contrary to section 324 as read with section 36 of the ***Penal Code;*** conspiracy to commit a misdemeanor contrary to section 394 of the Penal Code; abuse of office contrary to section 101 of the penal code and false assumption of authority contrary to section 104(c) of the ***penal code***.

7. According to the Respondent, it is apparent from the application herein that the applicants are demanding for the release of the said green card which are exhibits in the said ongoing criminal case. It was however averred that it is the mandate of the DCI and in the public interest that the DCI receive all complaints from the public, carry out investigations and upon reasonable grounds a prosecutions may be instituted.

8. The Respondent disclosed that investigations in this matter began after a tip off from the members of the public about suspicious land transfer deals being conducted outside the lands office which led officers from DVI Kajiado to intercept a private motor vehicle within Kajiado Township occupied by two people who were not Kajiado lands office staff and on conducting a search in the said vehicle several land transfer documents were recovered and among them were the said green cards. The occupants could not however give a satisfactory reason of how they came to the possession of the land transfer documents which were in different stages of completion bearing in mind that the green cards are public stores that can only be found within land registry in binders.

9. It was averred that investigation established that the occupants of the said motor vehicle worked in collaboration with the land registrar Kajiado who is one of the accused persons to execute land transfers outside the lands office for their own gain and bypassed the process of paying statutory government duties and levies and based on this evidence, it was the Respondent's opinion that offences were committed and the file was forwarded to the respondent who recommended that the suspects be charged.

10. The Respondent's position was therefore that the said green cards which the applicants want this Court to compel the respondent to released are exhibits in the said criminal before Kajiado law courts which was scheduled up for submissions on the 11th August, 2016. The Respondent therefore denied that the matter is still under investigations as alleged by the applicants and asserted that the matter has been in court since May 2015 and it is headed to conclusion given that submissions are scheduled as aforesaid.

11. It was therefore the Respondent's position that instead of seeking the release of the said green cards, the applicants are at liberty to seek an order for an early production of the same before the trial court. It was the Respondent's contention that:

a. That under Article 157 (6) of the Constitution of Kenya 2010, the respondent exercises the state powers and functions of prosecution which entails the institution, undertaking, taking over continuance and or termination of criminal proceedings amongst other functions and duties.

b. That the said green cards are not in possession of the respondent as alleged by the applicants.

12. To the Respondent, the applicants have not substantiated their allegations that the respondent's inactions is unfair and or inordinate delay and have failed to demonstrate how the same has gravely prejudiced them. In view of the foregoing, the Court was urged to exercise extreme care and caution not interfere with the constitutional powers of the respondent as the applicants have failed to demonstrate that there was delay to complete conducting investigations against the registrar as alleged.

Determination

13. The scope of the judicial review remedies of *Certiorari*, *Mandamus* and Prohibition was the subject of the Court of Appeal decision in **Kenya National Examinations Council vs. Republic *Ex parte* Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996** in which the said Court held *inter alia* as follows:

> **"Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can**

only prevent the making of a contemplated decision…Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings…The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way…These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done…Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter.”

14. Article 47 of the Constitution provides:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

15. It follows and I so hold that the applicants herein is entitled to the rights enshrined in Article 47 of the Constitution. *Prima facie* an unexplained delay of two years in conducting and concluding investigations amounts to inordinate and unreasonable delay particularly where such delay is prejudicial to the interests of third parties such as the applicants in this case. This Court in **George Joshua Okungu & Another vs. The Chief Magistrate's Court Anti-Corruption Court at Nairobi & Another [2014] eKLR** expressed itself on the issue of delay as hereunder:

"The Petitioners further contend that the said charges are being brought after a long period of time after the investigations thereon had been closed. Under Article 47(1) of the Constitution, "every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair." It is therefore imperative that criminal investigations be conducted expeditiously and a decision made either way as soon as possible. Where prosecution is undertaken long after investigations are concluded, the fairness of the process may be brought into question where the Petitioner proves as was the case in *Githunguri vs. Republic* Case (sic), that as a result of the long delay of (sic)

commencing the prosecution, the Petitioner may not be able to adequately defend himself. Whereas the decision whether or not the action was expeditiously taken must necessarily depend on the circumstances of a particular case, on our part we are not satisfied that the issues forming the subject of the criminal proceedings were so complex that preference of charges arising from the investigations therefrom should take a year after the completion of the investigations. From the charges leveled against the Petitioners, the issues seemed to stem from the failure to follow the laid down regulations and procedures in arriving at the decision to sell the company's idle/surplus non core assets. In our view ordinarily it does not require a year after completion of investigations in such a matter for a decision to prosecute to be made. That notwithstanding, it is not mere delay in preferring the charges that would warrant the halting of the criminal proceedings. Rather, it is the effect of the delay that determines whether or not the proceedings are to be halted. In this case, there is no allegation made by the Petitioners to the effect that the delay has adversely affected their ability to defend themselves. In other words, the Petitioners have to show that the delay has contravened their legitimate expectations to fair trial."

16. It must always be remembered that the delay in decision making process invariably deprives those concerned of their right to the enjoyment of certain rights conferred upon citizens hence there ought not to be an undue delay therein. For the police to sit on a complaint for two years in my view cannot be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors. Such a delay, in the circumstances of this case, would amount to an implied unjustifiable limitation on the fundamental rights and freedoms of a person which would invite this Court's intervention.

17. I associate myself with the position adopted in **Masalu and Others vs. Attorney General [2005] 2 EA 165** that:

"The Constitution has to be given a generous, rather than a legalistic, interpretation aimed at fulfilling the purpose of the guarantee and securing the individual's the full benefit of the instrument. Both the purpose and the effect of the legislation must be given effect to and this is the generous and purpose construction... A Judge has to pass between the Government and the man whom the Government is prosecuting; between the most powerful individual in the community and the poorest and the most unpopular. It is of the last importance, that in the exercise of these duties he should observe the utmost fairness. The judicial department comes home in its effects to every man's side; it passes on his property, his reputation, his life, his all. It is to the last degree important that he should be rendered perfectly and completely independent with nothing to influence or control him but God and his conscience. The greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people, was an ignorant, a corrupt, or a dependent Judiciary."

18. 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 civilised governance, by holding the public authority to the limit defined by the law. Judicial review is therefore an important control, ventilating a host of varied types of problems. The focus of cases may range from matters of grave public concern to those of acute personal interest; from general policy to individualised discretion; from social controversy to commercial self-interest; and anything in between. As a result, judicial review has significantly improved the quality of decision making. It has done this by upholding the values of fairness, reasonableness and objectivity in the conduct of management of public affairs. It has also restrained or curbed arbitrariness, checked abuse of power and has generally enhanced the rule of law in government business and other public entities. Seen from the above standpoint it is a sufficient tool in causing the body in question to remain accountable.

19. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is

being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through the taking into account of an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. See **Reid vs. Secretary of State for Scotland [1999] 2 AC 512.**

20. I appreciate that section 24 of the ***National Police Service Act*** **No 11 A of 2011** sets out functions of the Kenya Police Service as being the—

> ***(a) Provision of assistance to the public when in need;***
>
> ***(b) Maintenance of law and order;***
>
> ***(c) Preservation of peace;***
>
> ***(d) Protection of life and property;***
>
> ***(e) Investigation of crimes;***
>
> ***(f) Collection of criminal intelligence;***
>
> ***(g) Prevention and detection of crime;***
>
> ***(h) Apprehension of offenders;***
>
> ***(i) Enforcement of all laws and regulations with which it is charged; and***
>
> ***(j) Performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time.***

21. However in the exercise of their power the police must not abuse the same. They must carry out their mandate in accordance with the letter and the spirit of the Constitution and in accordance with the dictates of law and relevant policy. As was held in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240**,while citing **Reg vs. Secretary of State for the Environment Ex Parte NottinghamShire Country Council [1986] AC:**

> **"A power which is abused should be treated as a power which has not been lawfully exercised…Thus the courts role cannot be put in a straight jacket. The courts task is not to interfere or impede executive activity or interfere with policy concerns, but to reconcile and keep in balance, in the interest of fairness, the public authorities need to initiate or respond to change with the legitimate interests or expectation of citizens or strangers who have relied, and have been justified in relying on a current policy or an extant promise. As held in *ex parte Unilever Plc* (*supra*) the Court is there to ensure that the power to make and alter policy is not abused by unfairly frustrating legitimate individual expectations. It is no defence for a public body to say that it is in this case rational to change the tariffs so as to enhance public revenue. The change of policy on such an issue must a pass a much higher test than that of rationality from the standpoint of the public body. The unfairness and arbitrariness in the case before me is so clear and patent as to amount to abuse of power which in turn calls upon the courts intervention in judicial review. A public authority must not be allowed by the court to get away with illogical, immoral or an act with conspicuous**

unfairness as has happened in this matter, and in so acting abuse its powers. In this connection Lord Scarman put the need for the courts intervention beyond doubt in the *ex-parte Preston* where he stated the principle of intervention in these terms: "I must make clear my view that the principle of fairness has an important place in the law of judicial review: and that in an appropriate case, it is a ground upon which the court can intervene to quash a decision made by a public officer or authority in purported exercise of a power conferred by law." The same principle was affirmed by the same Judge in the House of Lords in *Reg vs. Inland Revenue Commissioners, ex-parte National Federation of Self Employed and Small Business Ltd [1982] AC 617* that a claim for judicial review may arise where the Commissioners have failed to discharge their statutory duty to an individual or have abused their powers or acted outside them and also that unfairness in the purported exercise of a power can be such that it is an abuse or excess of power. In other words it is unimportant whether the unfairness is analytically within or beyond the power conferred by law: on either view, judicial review must reach it. Lord Templeman reached the same decision in the same case in those helpful words: "Judicial review is available where a decision making authority exceeds its powers, commits an error of law commits a breach of natural justice reaches a decision which no reasonable tribunal could have reached or abuses its powers." Abuse of power includes the use of power for a collateral purpose, as set out in *ex-parte Preston,* reneging without adequate justification on an otherwise lawful decision, on a lawful promise or practice adopted towards a limited number of individuals. I further find as in the case of *R (Bibi) vs. Newham London Borough Council [2001] EWCA 607, [2002] WLR 237*, that failure to consider a legitimate expectation is a failure to consider a relevant consideration and this would in turn call for the courts intervention in assuming jurisdiction and giving the necessary relief."

22. Section 6(4) of the ***Fair Administrative Action Act***, 2015 provides that:

> **"if an administrator fails to furnish the applicant with the reasons for the administrative decision or action, the administrative action or decision shall, in any proceedings for review of such action or decision and in the absence of proof to the contrary, be presumed to have been taken without good reason."**

23. This was the position adopted by **Simpson, J** (as he then was) in **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090** where he held that in the ordinary way and particularly in cases, which affect life, liberty or property, the concerned authority should give reasons and if he gives none the court may infer that he had no good reasons. Similarly where the reason given is not one of the reasons on which the he is lawfully and justifiably entitled to rely, the Court is entitled to intervene since such action would then be based an irrelevant matter.

24. In this case however the Respondent contends that the criminal case is already proceeding and is in fact at the advanced stage of determination. This position was not controverted by the applicants. That being the position to grant the orders sought herein before the said case is determined may well cripple the ongoing criminal proceedings. As stated in ***Halsbury's Laws of England*** **4th Edn. Vol. 1(1) para 12 page 270:**

> **"The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)…are all discretionary. *The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant*. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. *Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question,***

***would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment*. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. *Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow 'contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders.*"** [Emphasis added].

25. This position was reiterated by this Court in **Joccinta Wanjiru Raphael vs. William Nangulu – Divisional Criminal Investigation Officer Makadara & 2 Others [2014] eKLR** where it was held that:

> **"… it must always be remembered that judicial review orders being discretionary are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles...The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders. Since the court exercises a discretionary jurisdiction in granting judicial review orders, it can withhold the gravity of the order where among other reasons there has been delay and where a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realized, even if merited. The would refuse to grant judicial review remedy when it is no longer necessary; or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance."**

26. It is my view that this is a matter in which the ongoing criminal proceedings ought to be allowed to run their course without interference.

27. Accordingly, in the exercise of my discretion I decline to grant the orders sought herein.

Order

28. Consequently, Motion on Notice dated 20th June, 2016 fails and is dismissed but with no order as to costs.

Dated at Nairobi this 21st day of November, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Muthee for the ex parte applicant

Mr Ndege for the Respondent

CA Mwangi