



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW NO. 244 OF 2013

**IN THE MATTER OF: AN APPLICATION BY GEORGE GATHUKI NGANGA FOR LEAVE
TO APPLY FOR THE JUDICIAL REVIEW ORDERS OF PROHIBITION**

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE RULES 2010

AND

**IN THE MATTER OF: THE PROPERTY KNOWN AS THIKA MUNICIPALITY BLOCK
6/1062**

BETWEEN

REPUBLIC..... APPLICANT

VERSUS

INSPECTOR GENERAL OF POLICE.....1st RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

AND

GASKI INVESTMENTS LIMITED.....INTERESTED PARTY

***EX-PARTE*: GEORGE GATHUKI NGANGA**

JUDGEMENT

1. By a Notice of Motion dated 18th July, 2013, the applicant herein, **George Gathuki Nganga**, seeks the following orders:

- 1. The Judicial Review writ of prohibition be issued to prohibit the Respondents jointly and/or severally together with their employees, servants, agents and/or representatives from proceeding with any criminal against the Applicant or otherwise prosecuting him on matters**

relating to the property known as Thika Municipality Block 6/1062.

2. Cost of this application be provided.

Ex Parte Applicant's Case

2. The application was supported by a verifying affidavit sworn by the applicant on 18th July, 2013.
3. According to the applicant, he is the lawful registered proprietor and/or lessee of the suit property known as Thika Municipality Block 6/1062, Thika, (hereinafter referred to as the suit property) vide a letter of allotment reference no. 23136/XXXIII/103 dated 10th September 1992 and pursuant to a transfer for valuable consideration from its previous lawful owner, the Government of Kenya 1992 for a period of 99 years.
4. The applicant deposed that on or about 16th November 2012 it came to his attention that the suit property was also allegedly leased to another party, **Gaski Investment Ltd**, on 13th September 2011, a fact the applicant reported at Thika police station.
5. According to the applicant, he applied to be allocated the suit property from the Commissioner of Lands through a letter dated 18th May 1992, and pursuant thereto he proceeded to comply with conditions given by the Commissioner of Lands and subsequently took possession of the same. On the 26th of November 1997, he deposed, he bought a bankers cheque, no. 458737 for Kshs. 181,516.60 at Barclays Bank, Queensway Branch, in favour of the Commissioner of Lands which he presented to the Ministry of lands, Ardhi House, and was presented with a receipt no. 200734, which amount was requisite acceptance fees for the allotment. Subsequently, on 28th July 1999, he received a land rent notice from the said ministry requiring him to pay Kshs. 277,760.00, which he paid vide bankers cheque draft no. 1/725448 issued with an official receipt no. 833874, which covered land rent for eight (8) years.
6. Accordingly, the applicant averred that his name was entered in the register as the registered proprietor of the suit property in the records at the ministry of lands and consequently he had been receiving land rent demands annually and paying for them including the one dated 1st December 2010. According to the applicant, initially the suit property used to be known as residential plot 'A' Thika Municipality as it was so referred to in the letter dated 5th October 2009 as affirmed by a letter dated 10th September 2010 copied to him as well as a letter dated 4th October 2010. Vide a letter dated 11th August 2010, the Ministry of Lands, Department of Survey appointed a surveyor and forwarded allotment letter reference number 231136/XXXIII/103 of 10th September 1992 Usn. Residential Plot 'A' Thika Municipality to confirm whether the allotment letter was authentic which was confirmed vide a letter dated 9th March 2011, from the Commissioner of Lands to the Director of Surveys.
7. The applicant averred that vide a letter dated 11th August 2010 his surveyor, **Geostate Development Service** presented cheques to the Director of Surveys being payments for survey checking fees, an amount of Kshs. 2,300.00. He added that vide a letter dated 10th September 2010, the Commissioner of Lands authorized the Director of Surveys to amend the registry index map (RIM) for the Un-surveyed residential plot no. A, Thika Municipality, from then on to be referred to as Block 6/1062 Thika Municipality and the Director of Surveys vide a letter dated 4th October 2010 addressed to the Commissioner of Lands confirmed that the registry index map had been amended to reflect parcel Block 6/1062 Thika Municipality. Further, the Commissioner of Lands vide a letter dated 31st December 2010 requested the applicant to forward his full official names, backed by a copy of my national identity card, pursuant to the letter of allotment no. 23136/XXXIII/103, and vide a letter dated 4th February 2011, the applicant positively responded. Following the conclusion of all prerequisite legal formalities, the applicant applied for registration of the lease for the suit property on the 29th December 2011 and the same was registered on 3rd January 2012 and he was issued with a certificate of lease. Thereafter, the Commissioner of Lands vide a letter dated 14th November 2011 forwarded the lease document duly

signed and stamped to the Thika District land registry, through the Chief Lands Registrar, which letter was copied to the applicant instructing the applicant to contact the land registrar in Thika to execute and collect his lease. The applicant then lodged the lease document for registration and paid Kshs. 1,100.00 on 29th December 2011 and was issued with a receipt no. 25557577 and Kshs. 2,500.00 on 6th December 2011 and issued with a receipt no. 2549601 for the said registration and proceeded to register the suit property with the Thika Municipality where he had begun paying the required rates, and had already paid Kshs. 20,000.00 being part of the rates for 2012 On 19th November 2012.

8. However, at some point just before the dispute herein arose, his file at the ministry of lands headquarters had gone missing and a temporary one was opened pursuant to the instructions of senior deputy commissioner of lands, one **Mr. Kahoho**. The applicant further averred that the Ministry of Lands via a letter REF NO. 144938 T.C/11 and on a follow up to a letter dated 10th September 1992 asked him to pay additional legal fees of Kshs 1,150/- which he did and was issued with a receipt no. 22700961 while the original legal fees were paid on or before 10th September 1992. To the applicant, he has since been paying land rent for the suit property at annual rates of Kshs. 32,000.00.

9. The applicant therefore averred that he found the decision to later on allocate the suit property to **Gaski Investment Ltd** not only an exercise in futility but also irregular, null and void and that any lease document or any other form of purported ownership of the suit property by anyone other than himself is an illegality. To him, the suit property, having been lawfully allocated to him vide a letter reference number 23136/XXXIII/103 by the Commissioner of Lands, was not available for further/double or subsequent allocation to third parties. According to him, despite my being the holder of a valid lease and the sole rightful proprietor and indefeasible owner of the suit property and having been in possession of the property since the allotment, **Gaski Investments Limited** has fraudulently procured a title over the same property and threatened to take possession of the said property despite the fact that upon registration of the lease, he was the absolute and indefeasible owner of the parcel of land as was provided by section 23 (1) of the **Registration of Titles Act**, chapter 281 laws of Kenya. The Respondents have however, preferred the said criminal proceedings against him in relation to the suit property in criminal case number 1643 of 2013 at the chief magistrates court at Thika alleging that on 10th of April 2013 the applicant obtained registration of the suit property in his favour by false pretences contrary to section 320 of the penal code and that he wilfully obtained a certificate of lease for the suit property in his favour by falsely pretending that he had cleared all land allocation acceptance fees for the said land which allegations the applicant contended were *mala fides* and amounted to harassment and intimidation. To him, the respondents herein are not acting in the interests of justice but in their own interest and that of the said company. Further, the respondents' actions are unlawful, irregular and unwarranted and trample on the applicant's right to freedom and security of the person by acting at the whim of the said **Gaski Investments Ltd** without carrying out proper investigations to ascertain the true owner of the land.

Interested Party's Case

10. In opposition to the application the Interested Party filed a replying affidavit sworn by **Charity Gacheri Kiogora**, its director on 14th October, 2013.

11. Apart from issues of law and other issues which are rather argumentative, conclusions and opinion rather than averments of facts, the deponent averred that her company is a proper holder of certificate of lease number Thika Municipality Block 6/1062 properly, lawfully and legally issued. In her view, there cannot be two green cards on the same land parcel and that is what the police established after their investigations.

12. She disclosed that she also come across a status report of the Commissioner of Lands which doubts the credibility, authenticity, legal and the validity of the applicants documents and terms them as fraudulent hence it was most unfortunate and improper for the applicant to impute wrong motives on the part of the interested party when they were properly applied, allotted, allocated, processed the title and eventually issued.

13. The deponent averred that it was not true for the applicant to assert that they complied with the legal requirements when their allotment was cancelled or terminated for non-compliance hence the applicant's allegations and claims against the interested party ought to be dismissed. In her view, the applicant's application is an afterthought, ill-advised, misconceived and brought in bad faith to defeat the case of justice and fair play.

Applicant's Rejoinder

14. In a rejoinder the applicant filed a supplementary affidavit sworn on 15th October, 2013 in which he reiterated the contents of the verifying affidavit and averred that the office of the senior deputy commissioner of lands is supposed to ensure that two genuine titles of the same piece of land is not issued to two people hence the issuance of two genuine titles is an offence under the laws of the law and the district registrar, Thika together with the senior deputy commissioner of lands should be held accountable. It was therefore deposed that the district land registrar being in charge of all the land transactions within Thika, was negligent in issuing two genuine titles of the same property.

15. Since the letter to the director of survey dated 17/12/97 revoking his allotment was not addressed to him, the applicant averred that he had no way of knowing his allotment had been rejected and no official communication was ever communicated to him in relation to his allotment being rejected. He contended that if his allotment had been rejected, the Ministry of Lands should not have accepted his payment of the sum of Kshs 181, 516.60 including legal fees and land rent of the suit property which he has been paying annually.

Determination

16. I have considered the material presented before the court in the instant application and this is the view I form of this matter.

17. In this case both the *ex parte* applicant and the interested party are claiming the suit parcel of land. There seems to have been double allocation thereof. How this was possible cannot be resolved from the affidavit evidence on record. However, it cannot be the position that both titles were properly acquired since it is not plausible that the two titles were properly issued. It is only after evidence is adduced that the mystery of the two allocations can be resolved.

18. The role of police in criminal process was recognised in **Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR** where it was held:

“the police have a duty to investigate on any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene”.

19. In **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69**, the High Court held:

““It is not enough to simply state that because there is an existence of a civil dispute or suit, the entire criminal proceedings commenced based on the same set of facts are an abuse of the court process. There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution. In absence of concrete grounds for supposing that a criminal prosecution is an “abuse of process”, is a “manipulation”, “amounts to selective prosecution” or such other processes, or even supposing that the applicants might not get affair trial as protected in the Constitution, it is not mechanical enough that the existence of a civil suit precludes the institution of criminal

proceedings based on the same facts. The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence. However, just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is a manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial...In the circumstances of this case it would be in the interest of the applicants, the respondents, the complainants, the litigants and the public at large that the criminal prosecution be heard and determined quickly in order to know where the truth lies and set the issues to rest, giving the applicants the chance to clear their names.”

20. It is therefore clear that whereas the discretion given to the respondents to institute and prosecute criminal offences is not to be lightly interfered with, that discretion must be properly exercised and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence such as with a view to forcing a party to submit to a concession of a civil dispute, the Court will not hesitate to bring such proceedings to a halt. However, it must be emphasised that judicial review applications do not deal with the merits of the case but only with the 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 *bona 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's evidence even if 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.

21. From the evidence on record, it is clear that the process of allocation and issuance of the title documents in respect of the suit land is shrouded in what may well amount to malpractice. It is not for his Court to determine who is responsible for the same. However one cannot state with certainty that the Respondents have no reasonable cause for instituting the criminal proceedings based on the material on record. As to whether the said charges will succeed is another matter altogether which matter can only be resolved by the trial court after hearing and analysing the evidence to be presented before it. The mere fact there is no sufficient evidence to sustain a conviction is no ground for halting or terminating a criminal case. The trial Court is usually in a better position to scrutinise the evidence presented before it in determining whether such evidence prove the accused's guilty beyond reasonable doubt. To paraphrase the decision in **Meixner & Another vs. Attorney General** (supra) to set out on that voyage would have the effect of embarking upon an examination and appraisal of the evidence to be adduced before the trial Court with a view to showing the applicants' innocence yet that is hardly the function of the judicial review court.

22. Whereas the applicant may well prove at the trial that the criminal charges cannot be successfully prosecuted and that he is after all innocent, it is not for this court to consider the strength of the prosecution case vis-à-vis the defence and make a determination as to which one has more weight. As opposed to where the prosecution has no evidence at all, the court will not halt a prosecution simply because the court is of the view that the evidence would not in all probability lead to a conviction. To do that would amount to this court in a judicial review proceedings stepping into the shoes of the trial court and usurping the powers of the trial court.

23. Having considered the issues raised herein I am not satisfied that the case meets the legal threshold for prohibiting the criminal case from either being instituted or proceeding.

Order

24. Consequently, I find the Notice of Motion dated 18th July, 2013 unmerited and I hereby dismiss the same but with no order as to costs.

25. It is so ordered.

Dated at Nairobi this 19th day of February, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Macronald for the Applicant

Miss Kihara for Miss Ngaluika for the 2nd Respondent

Mr Masika for Mr Muruiki for the interested party

Cc Patricia