



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC CRIMINAL APPLICATION NO. 30 OF 2013

REGINA NYOKABI KURIA APPLICANT

VERSUS

NISHITH YOGENDRA PATEL1ST RESPONDENT

REPUBLIC2ND RESPONDENT

RULING

By a Notice of Motion dated 17th and filed on 18th December, 2013 the applicant Regina Nyokabi Kuria moved the court under Criminal Procedure Code Cap 75 Laws of Kenya, the Penal Code Cap 63 Laws of Kenya and the Constitution of Kenya 2010 for orders that the court reviews the decision of the Chief Magistrate made on 11th December, 2013 and order the immediate preservation of title No. Nairobi LR 12442 (grant No. IR 33909) until the finalization of CRMCC NO. 1603/2012 or until further orders of this court. No specific provisions of law have been cited.

The other orders sought relate to an order to the Registrar of Persons to supply the defence counsel in the said Criminal Case with National Identity card details of Nishith Yogendra Patel, and that the Director of Immigration be ordered to supply the defence counsel in the said case with Kenyan Passport details of the said subject. In the alternative, an order is sought to review the Chief Magistrate's case aforesaid and quash or otherwise dismiss the case against the accused who is the applicant herein.

Finally, there is an order sought to direct the OCPD Muthaiga Police Division to ensure that the subject LR No. 12442 is protected and preserved, as a subject matter of this court until further orders. The application is supported by an affidavit sworn by the applicant and the statement of facts set out thereunder.

When the applicant's counsel appeared before this court, on 19th December, 2013, an interim order was issued in terms of prayer No. 6 in the Notice of Motion, which related to the order directing the OCPD Muthaiga Police Division to ensure that the property is protected. This order was issued at the instance of the learned counsel for the applicant and the concurrence of the learned counsel for the Republic. That order was to last up to 23rd January, 2014.

After the issuance of the said order, the 1st respondent Nishith Yogendra Patel moved the court by way of Notice of Motion on 6th January, 2014 for orders that the order issued on 19th December, 2013 be set aside and that the applicant's application dated 17th December, 2013 be struck out. There was also a prayer for costs of the application to be awarded to the 1st respondent. The application was supported by the grounds set out on the face of the Notice of Motion and an affidavit sworn by the 1st respondent

Nishith Yogendra Patel. Subsequently the parties were ordered to file submissions which I have on record.

The application before me was prompted by Regina Nyokabi Kuria and when the 1st respondent filed an application to set aside the order made on 19th December, 2013 he did not become the applicant before me. Any reference to the contrary is misplaced. I believe that the parties know their respective positions in this matter.

One of the grounds raised by the 1st respondent is instructive in that this court is said to have no jurisdiction to determine a matter involving the use, occupation or title to land, in that only the Environment and Lands court can hear this matter. It is incumbent upon me to settle the issue of jurisdiction before I delve into any matter or matters raised by both the applicant and the respondents.

I have read the material placed before me by all the three parties, that is, the applicant and the respondents. It is clear to me that the dispute revolves around a property known as LR No. 12442 situate in Nairobi. That property is a subject of a civil matter namely **Civil Case No. 385 of 2012 Nishith Yogendra Patel and Nilesh Prahladbhai Patel Vs Naiburome East Africa Limited, Claude Lyons (E.A) Company Limited, David Kinyua Mugo, Regina Nyokabi Kuria, The Commissioner of Lands and Chief Land Registrar**. The said piece of land is also at the centre of **Criminal Case No. 1603 of 2012 Republic Vs Regina Nyokabi Kuria**.

The said cases are still ongoing before the respective courts. In a communication by the learned counsel for the applicant to the Deputy Registrar of this Division filed on 18th December, 2013 paragraph 13 reads as follows,

“13. THAT the purpose of this application is to urge the High Court intervention to protect the suit property as the cases in court go on”.

Included in this communication are the following paragraphs,

“17. THAT the applicant is apprehensive that unless the High Court intervenes the applicant may suffer irreparably considering that this is a land matter.

18. THAT the criminal case in the lower court was brought in bad faith as the matters thereat are civil matters in nature but the police in collusion have charged the applicant to forestall her quest for property rights in Nairobi LR No. 12442.

19. The applicant has legitimate claim to Nairobi LR 12442 and has title to the said property and the 1st respondent is an intruder and does not have *locus standi* and his contemptuous actions on the suit property while matter is still before the court are serious signs of impunity”.

The thrust of the applicant’s supporting affidavit is also an indicator as to the nature of the dispute in that it relates to the title and occupation of the land in dispute. The affidavit of the 1st respondent in support of his application also addresses the issue of ownership, title and occupation.

Following the enactment of the Constitution of Kenya and with particular reference to Article 162 (2) (b) there is now in place a court with the status of the High Court to hear and determine disputes relating to **“the environment and the use and occupation of, and title to land”**.

Under Article 165 (5) of the Constitution the High Court shall not have jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated in Article 162 (2) of the Constitution. I have already observed that from the material before me the parties are engaged in a dispute relating to the use, occupation and title to the subject matter herein. If that be the case, then the constitution has ousted the jurisdiction of this court.

In the **Owners of the Motor Vessel “Lilian S” V Caltex Oil (Kenya) Ltd. (1989) KLR 1**, Nyaragi J. said as follows,

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction there will be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

The learned Judge then went on to cite *Words and Phrases Legally defined* Volume III page 113 where the following statement appears,

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance or as to the area of which the jurisdiction shall extend, or it may partake of both this characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must enquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”.

The limits of this court’s authority have been imposed by the Constitution. It is clear to me that I have no jurisdiction to deal with this matter.

The order made on 19th December, 2013 was without the benefit of the 1st Respondent’s submission. It cannot be maintained in view of what I have said herein above. It follows therefore that the application before me is misplaced and incompetent. It must therefore be struck out together with the order of 19th December, 2013 aforesaid.

The applicant shall bear the costs of this application.

Orders accordingly.

Dated and Delivered at Nairobi this 26th Day of February, 2014.

A. MBOGHOLI MSAGHA

JUDGE