



IN THE HIGH COURT OF KENYA

AT NAKURU

CR. MISC. APPLICATION NO. 29 OF 2013

IN THE MATTER OF: AN APPLICATION FOR PROHIBITION

CERTIORARI & MANDAMUS

IN THE MATTER OF: CRIMINAL PROCEDURE CODE & THE PENAL CODE

REPUBLIC.....APPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

THE MAGISTRATE'S COURT, NAROK.....2ND RESPONDENT

JACKSON TOMPOI OLE SAIKA.....INTERESTED PARTY

EX-PARTEJOSEPHINE KERAMATISHO TEEKA

RULING

Pursuant to leave granted on 18th June, 2013 allowing the *ex-parte* applicant to apply for judicial review orders of certiorari, prohibition and mandamus, the *ex-parte* applicant filed the notice of motion dated 12th July, 2013 seeking-

(a) an order of certiorari to bring to this court and quash the proceedings in Narok Chief Magistrate's Courts Criminal case Nos. 149 of 2012 and 81 of 2013; Republic v. Keramatisho & 5 others and Republic v. Josephine Keramatisho Teeka respectively;

(b) an order of prohibition to prohibit the respondents either acting by themselves or any other person whomsoever from proceeding with and/or further hearing the cases referred to in (a) above.

(c) an order of mandamus to compel the Registrar of Lands Narok County to fix or rectify the disputed boundaries of parcel No. CISMARA/NKOBEN/14 and determine the common boundaries of the adjoining parcels of land known as CISMARA/NKOBEN/14, CISMARA/NKOBEN/169, CISMARA/NKOBEN/170, CISMARA/NKOBEN/171, CISMARA/NKOBEN/172, CISMARA/NKOBEN/175 (hereinafter called "the suit properties" such that ground measures correspond with the maps as per the land allocation or demarcation carried out when the area was declared an adjudication area.

The application is premised on the grounds found in the statement of facts and verifying affidavit both dated 22/7/2013; that on 25/11/2012 the applicant was arrested by the 1st respondent and on 26/11/2012 brought before the 2nd respondent to answer to a charge of trespass to land contrary to Section 3(1) of the Trespass Act, which had been preferred against her by the 1st respondent. On 23/1/2013, the 1st respondent, again, filed in the 2nd respondent's court an indictment containing five counts of forcible detainer contrary to Section 91 of the Penal Code against the applicant, alleging that the applicant with others not before the court without any colour of right held possession of land belonging to the complainants named therein in a manner likely to cause a breach of peace against the said owners. It is contended that the applicant, jointly with her co-wives are the lawfully registered proprietors of the parcel of land known as CISMARA/NKOBEN/14, situated at Nkoban sub-location in Narok South District, Narok County while the complainants are proprietors of the adjacent parcels of land in respect of which there is and there has been a boundary dispute; and that on diverse dates, the applicant sought to have the boundaries fixed or rectified by the Registrar of Lands Narok County to no avail. See letter to District Registrar dated 4/7/2012 (JKT6).

Alleging that the proprietors of the adjacent parcels of land have caused beacons to be destroyed and substantially encroached on her parcel of land with intent to deprive her of her peaceful possession and enjoyment of her property; and contending that under section 19(1) of the Registration of Land Act No.3 of 2012, it is the Registrar of Lands who has the mandate to hear and determine disputes regarding boundaries; the applicant contends that it was improper to commence criminal proceedings against her.

In the verifying affidavit sworn by the applicant, she reiterated the said grounds and added that with intent to defraud her of her land, the Interested Parties made or caused to be made a mutation form to the effect that an easement (road) was to cut across their land when in actual fact the road or easement was caused to cut across her parcel of land and that the complainants moved or caused to be moved the beacons demarcating the boundaries of their land thereby encroaching on her land; that efforts to resolve the boundary dispute have been in vain; that the subject matter of the criminal cases herein is the boundary dispute which can be settled by the Registrar of Lands as opposed to a criminal law court.

Further that, her advocate wrote to the Registrar and requested him to initiate measures aimed at resolving the dispute but the Registrar refused, ignored and/or declined to act on the request. She exhibited a letter dated 4/7/2012 (JKT6) addressed to the District Land Registrar, Narok.

It is contended that had the Director of Public Prosecution been more diligent in his duties, he would not have entertained the criminal charges against her. Terming the proceedings untenable, unreasonable and an abuse of the court process, the applicant contends that to allow the lower court to proceed with the charges preferred against her would be an affront on the criminal justice system.

Claiming that it would be fair and in the interest of justice to issue the orders sought, the applicant has urged this court to grant the application in order to pave way for efficacious and expedient settlement of the dispute.

Even though served, the respondents and the interested party never filed any response to this application. For that reason the application was heard *ex parte*.

In the submissions filed by the applicant's counsel in support of the application, it is submitted that since the issues raised in the application are uncontested they are, in law, deemed to have been admitted.

Reiterating the contentions contained in the statement of facts and verifying affidavit, it is submitted that the charges hereto were orchestrated by the interested party in order to pave way for him to grab the applicant's land through intimidation; and that in order for ends of justice to be met, the matter should be heard and determined by the most appropriate forum (the Registrar of Lands), short of which a greater injustice will be occasioned to the *ex-parte* applicant.

The issues framed for the court's determination are as follows:-

1. **Whether this court has jurisdiction to grant Judicial Review orders;**
2. **From its nature, is the dispute herein criminal or civil in nature?**
3. **Whether the forum seized with the dispute is appropriate to settle the dispute?**
4. **Whether the applicant has made a case for granting of the orders sought?**

1. Whether this court has jurisdiction to entertain these proceedings?

It is submitted that under Article 165(1), (6) of the Constitution of Kenya this court (read the High Court) has supervisory jurisdiction over the subordinate courts; that the jurisdiction is meant to curb abuse of court process. In this regard the applicant has cited a number of authorities, among them, **Mohammed Gulam Hussein Fazal Karmali & Another** vs. **The Chief Magistrate's Court Nairobi Another** (2006) e KLR where Nyamu J. (as he then was) stated:-

“Whilst the power of the High Court to intervene to stop a criminal prosecution must be exercised sparingly, the High Court must always be ready to intervene to prevent any prosecution which is vexatious, oppressive, malafides, frivolous or taken up for other improper purpose such as undue harassment of a party or abuse of the process of court.”

Indeed, this court, in exercise of its supervisory jurisdiction has power to supervise the exercise of power by subordinate courts and any other person, body or authority exercising a judicial or quasi-judicial function if it exercises the power, unreasonably or in excess of jurisdiction or breach of rules of natural justice.

I totally agree with the observation by Nyamu J. in **Mohammed Gulam Hussein Fazal Karmali & Another** vs. **The Chief Magistrate's Court Nairobi & Another** (supra) that in circumstances as enumerated therein the High Court would intervene to prevent the misuse of the criminal justice system and abuse of the court process.

2. Is the dispute hereto civil or criminal in nature?

My view, on this question, is that, depending on the evidence to be adduced at the lower court, the dispute can be criminal and/or Civil. This being the case, and there being no response filed in this application to controvert the allegations leveled against the respondents and the interested party, this court has no proper basis of making a determination on this issue. No doubt, the 1st respondent is mandated by Article 157(1) of the Constitution to direct the General of the National Police Service to investigate any allegation of criminal conduct and under sub Article 6(a) the DPP has power to initiate and undertake criminal proceedings against any person before any court. Under Article 157(10) the DPP does not require the consent of anybody to undertake the said duties' but sub Article (11) imposes checks, that the exercise of that power must have regard to public interest in the administration of justice and need to prevent and avoid abuse of legal process. If the DPP acts contrary to the above stated constitutional principles, this court has the duty to intervene. I am also alive to the fact that it is the criminal court that is in a position to determine the veracity and merit of any evidence to be tendered against the applicant. However, having read and considered the nature of the charges leveled against the applicant, I am persuaded that the charges can properly be determined by way of the Civil process. The complainants could, just like the applicant did, have instituted a civil suit in the lower court alleging that the applicant and her co-accuseds have encroached on their land. If proved, that indeed the applicant and her co-accuseds have violated the interested party's right to ownership and possession of the suit properties, the court would be entitled to issue the appropriate orders, including but not limited to an order for vacant possession and/or payment of damages.

Further if indeed it is a case of trespass or encroachment as alleged the Land Registrar is statutorily mandated under Section 19 of the Registration of Land Act 3 of 2012 to determine the issue of boundaries. The parties should have endeavoured to have the issue resolved by the Land Registrar before

resorting to resolution by any other forum or mechanism. The applicant exhibited the letter dated 4/7/2012 to the District Land Registrar seeking intervention. There is no evidence that he acted as prayed.

It is trite law that if a statute provides a mode of dispute resolution, the parties should endeavour to exhaust that mechanism first. In the **Speaker of the**

National Assembly v The Hon. James Njenga Karume CA NRB 92/1992, the

Court of Appeal said:-

“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that Order 53 of the Civil Procedure Rules cannot out clear constitutional and statutory provisions.”

In my considered view, the boundary dispute must first be dealt with as provided by the law, the Land Registrar. In **R v The District Lands Registrar** ex-parte

Daniel Njogu & Another JR 11/2011, the court said:-

“Where uncertainty or dispute arises as to the position of any boundary, the Registrar, on the application of any interested party, shall, on such evidence as the Registrar considers relevant, determine and indicate the position of the uncertain or disputed boundary.”

In this case there is no evidence that the Land Registrar has ever attempted to

resolve the dispute. The applicant, Josephine Keramatisho Teeka, Veronica Wangoi Teeka and Mary Indoroishi filed CMCC 97/2013, against the Interested Party seeking declarations that the suit land belongs to them. It is filed on 5/7/2013 after these Judicial Review proceedings were filed, a further demonstration that there is a dispute over ownership of land or encroachment to land. The parties would need to adduce evidence to prove their claims. It can not be determined in criminal proceedings.

4. Whether the orders sought can issue.

The applicant, seeks an order of certiorari to quash the decision to prosecute her and an order of prohibition to stop the prosecution. The remedy of Judicial Review is concerned not with private rights or the merits of the impugned decision but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the body to which he has been subjected to (**Rep v Secretary of State for Education and Science ex-parte Avon County Council (1991)1 ALL ER 282**).

An order of *certiorari* lies to quash a decision of a statutory body which is made without jurisdiction or in excess of jurisdiction or where the body has failed to comply with the rules of natural justice, or where the decision is unreasonable. (See CA 266/1999, **Kenya National Examination council v Rep ex-parte Godfrey Githinji**).

In the circumstances of this case, there is no doubt that the 1st respondent under Article 157 of the Constitution has power to prosecute and 2nd respondent has a duty to determine any dispute brought before it but given the peculiar circumstances of this case, I find the decision of the 1st respondent and the interested party of preferring a criminal case over a civil case, in a dispute that was more civil than criminal in nature to have been unreasonable. The test of reasonableness was enunciated in the celebrated case of **Associated Provincial Picture House v Wednesbury Corporation (1948)1 KB 223**, where Lord Green M.R. said:-

“decisions of persons or bodies which perform public duties or functions will be liable to be

quashed or otherwise dealt with by appropriate order of judicial review proceedings where the court concludes that the decision is such that no person or body properly directing itself on the relevant law and acting reasonably could have reached that decision.”

The decision to charge the applicant with trespass to land when there was an undetermined dispute over ownership of the suit properties was, in my view, unreasonable. It is also my view, that the decision to prefer criminal charges against the applicant when the matter can be resolved in the civil case or by the Land Registrar is an abuse of the court process. Abuse of court process has no specific definition but depends on the circumstances of each case. In **Peter George Antony D’Costa v Attorney General and Another**, Pet. 83/2010, the court said this on abuse of court process:-

“The process of the court must be used properly and in good faith and must not be abused. This means that the court will not allow its punitive as a court of law to be misused and will summarily prevent its machinery from being used as a means of vexatious and oppressive in the process of litigation. It follows that where there is an abuse of the court process...it is the duty of the court to stop such an abuse of the court process.”

Again in **Rep. v Commissioner of Police and Another ex parte Michael Monari** 2012 KLR(a) the court defined what abuse of court process is:-

“proceedings taken in bad faith or circumstances yielding an inference that they were upto no good. Criminal law is not to be used oppressively to punish acts which in truth might be technically a breach of Criminal law but which contains 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 (see Floriculture International Ltd HCC 144/1997).”

Applying the above decisions, the decision to charge the appellant when due process provided by statute had not been exhausted is in, in my view, abuse of court process.

That being the case, I am persuaded that in the circumstances of this case, an order of certiorari should issue to quash the impugned decision and proceedings.

An order of prohibition lies to prohibit the body charged with decision making from making a contemplated decision without jurisdiction or in breach of rules of natural justice. In **Kenya National Examination Council** (supra) the court said:-

“What does an order of prohibition do and when will it issue? It 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.”

Having found that an order of certiorari should issue to bring to this court and quash the impugned proceedings, I need not consider the prayer for prohibition, because upon quashing the proceedings, there will be nothing left for the court will proceed to prohibit.

When does an order of mandamus issue? In **Kenya National Examination Council case** (supra) the court said:-

“An order of mandamus compels the performance of a public duty which is imposed on a person or body of persons by 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. It 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.”

In the instant application, the applicant who is a registered owner of one of the suit properties contends that the 3rd respondent is by dint of the provisions of section 19(1) of the Registration of Land Act No.3 of 2012 obligated to hear and determine disputes regarding boundaries.

Section 19(1) aforementioned provides as follows:-

“If the Registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for survey of land, or otherwise to define in the register, the precise position parts thereof or if an interested person has made an application to the Registrar, the Registrar, shall give notice to the owners and occupiers of the land adjoining the boundaries in question of intention to ascertain and fix the boundaries.”

(2). The Registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel.” (emphasis supplied).

Indeed this section of the law imposes an obligation on the Registrar to ascertain and fix boundaries either on his own volition or after having been moved by an interested party. However, the order cannot issue against the Land Registrar because he is not party to these proceedings.

In the end, I grant prayer (a) of the notice of motion and hereby call for the proceedings before the Narok Chief Magistrate’s Court in CRC 149/2012 and 81/2013 for purposes of them being quashed and they are hereby quashed by an order of certiorari. The parties are advised to follow due process by approaching the Land Registrar to determine the boundaries between their portions of land. Each party to bear its own costs. It is so ordered.

DATED and DELIVERED this 28th day of March, 2014.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Kamwaro for the applicant

N/A for the respondents

N/A for the interested party

Lydia – Court Assistant