



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW AND CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 443 OF 2013

MILLICENT WAMBUI MUGIH.....APPLICANT

VERSUS

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

NAIROBI CITY COUNCIL.....2ND RESPONDENT

JUDGEMENT

By way of the originating notice of motion dated 5th September, 2014 and brought under Article 165 (6) and (7) of the Constitution and Rules 24 to 30 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of Individual) High Court Practice and Procedure Rules, 2006 the Applicant, Millicent Wambui Mugih prays for orders:

“1. THAT this Honourable Court be pleased to call for the record of the proceedings before Nairobi City Court in City Court Case No. 133A of 2013; Republic v. Owner/Landlord/Occupier-Andrew Hardy Hostels, to determine the legality of the said criminal proceedings and make such orders or give such directions as it considers appropriate to ensure the fair administration of justice.

2. THAT it be declared that the 1st respondent exercises under Article 157 (6) of the Constitution a *quasi judicial* function in determining whether or not criminal proceedings shall be instituted against a person like the applicant.

3. THAT it be declared that the 1st respondent breached his *quasi judicial* duties in instituting against the applicant in City Court Case No. 133A of 2013; Republic v. Owner/Landlord/Occupier-Andrew Hardy Hostels.

4. THAT this Honourable Court be pleased to stay permanently the criminal proceedings in City Court Case No. 133A of 2013; Republic v. Owner/Landlord/Occupier-Andrew Hardy Hostels.

5. THAT this Honourable Court be pleased to stay further proceedings including mentions in the said City Court Case No. 133A of 2013; Republic v. Owner/Landlord/Occupier-Andrew Hardy Hostels until further orders of this Honourable court.

6. THAT the costs of this application be provided for.”

The application is supported by the grounds on its face as follows:

“a. the 1st respondent has abused the process of the criminal court in instituting and maintaining against the applicant proceedings in City Court Case no. 133A of 2013; Republic v. Owner/Landlord/Occupier–Andrew Hardy Hostels;

- b. the said City Court Case no. 133A of 2013; Republic v. Owner/Landlord/Occupier–Andrew Hardy Hostels has been instituted with reference to L.R. No. 2327/172 Twiga Hill, Karen, of which the applicant is the beneficial owner; the legal estate of the same is held by her son, Andrew Ng’ang’a;**
- c. the charge sheet in the said City Court Case no. 133A of 2013; Republic v. Owner/Landlord/Occupier – Andrew Hardy Hostels refers to a public notice issued on 8th November, 2012 under section 119 of the Public Health Act; according to the said public health notice, the applicant’s catering school is a nuisance within the meaning of the Public Health Act;**
- d. the truth is that on the said L.R. No 2327/172 Twiga Hill, Karen stands a catering school with the following facilities:**
 - i. an office block which has classrooms/lecture theatres;**
 - ii. a kitchen;**
 - iii. a multipurpose hall which also served as a dining hall;**
 - iv. dormitories for female and male students;**
 - v. six cottages which also served as dormitories.**
- e. the said facilities were established following the approval of the change of user of the said L.R. No. 2327/172 Twiga Hill, Karen from a nursery school to a catering school;**
- f. since 1996, the facilities referred to in d. above have been used as a catering school;**
- g. the applicant has never been served with the purported notice dated 8th November, 2012 purportedly issued under section 119 of the Public Health Act;**
- h. the said criminal case arise from the said purported Public Health Notice issued on 8th November, 2012 which falsely described the applicant’s catering school a nuisance within the meaning of the Public Health Act;**
- i. the effect of the said purported Public Health Notice was to require the applicant to destroy her developments on her said property which is worth Kshs 160-200 million;**
- j. the applicant declined to destroy her said catering school;**
- k. section 124 of the Public Health Act gives the 2nd respondent power, upon getting sanction of the subordinate court, to enter a citizen’s property and remove nuisance where the citizen declines to remove it;**
- l. the manifest object of the said purported Public Health Notice dated 8th November, 2012 was to require the applicant to destroy her said investment worth between kshs.160-200 million;**
- m. the destruction of the applicant’s property was to be done pursuant to sections 123 and 124 of the Public Health Act;**
- n. on the same day i.e. 19th February, 2013, the 2nd respondent issued an Enforcement Notice under the Physical Planning Act which also has the effect of requiring the applicant herein to destroy illegal developments on her property;**
- o. the 2nd respondent falsely described the applicant’s property as an illegal development within the meaning of the Physical Planning Act;**
- p. Under section 39 of the Physical Planning Act, the 2nd respondent has power to enter the**

- applicant's property and destroy it purportedly as an illegal development;
- q. the proceedings in the said City Court Case no. 133A of 2013; Republic v. Owner/Landlord/Occupier-Andrew Hardy Hostels are an abuse of the process of the criminal court in that the predominant object of the complainant and the 1st respondent is to have demolished the applicant's catering school on LR No. 2327/172 Twiga Hill, Karen regardless of the justification;
 - r. as held by this Honourable Court in Githunguri v Republic (1986) LRC 618 (Githunguri No. 1) Constitutional Administrative Law Reports, the 1st respondent exercises quasi judicial powers in deciding whether or not a person is to be charged with an offence and prohibits him from acting arbitrarily and or capriciously or discriminating against any citizen or person;
 - s. as held by a three-judge bench in Githunguri v Republic (1986) LRC, Constitutional Administrative Law Reports, 618, (Githunguri No.1) which has been approved by the Court of Appeal in Civil Appeal No. 228 of 2003 Joram Mwenda Guantai v The Chief Magistrate's Court, Nairobi, this Honourable Court has power to prevent an abuse of the criminal process by the subordinate court of the First Class Magistrate;
 - t. this Honourable Court has jurisdiction under Article 165 (6) and (7) of the Constitution to supervise proceedings of the lower courts like those now pending in City Court Case no. 133A of 2013; Republic v. Owner/Landlord/Occupier-Andrew Hardy Hostels;
 - u. the fair administration demands that the criminal proceedings pending before City Court Case no. 133A of 2013; Republic v. Owner/Landlord/Occupier-Andrew Hardy Hostels be stayed pending the hearing and determination of this application, thereafter the same be stayed permanently and further that the applicant be awarded general and exemplary damages as compensation for the contraventions by the State of his rights under Articles 28 and 29 of the Constitution."

The application is also supported by the affidavit of the Applicant sworn on 4th September, 2013 plus the annexures thereto.

From the papers filed in Court, it emerges that the Applicant is the beneficial owner of L.R. No. 2327/172 Twiga Hill, Karen which is registered in the name of her son Andrew Nga'ng'a. She is also the attorney of the said Andrew Nga'ng'a. On the said land stands a catering school which has allegedly been operational since 1995. Sometimes in April, 2013 the Applicant was served by an officer of the 2nd Respondent, the City Council of Nairobi with summons to which was annexed a charge sheet. The summons required the Applicant to appear before the Magistrate's Court at City Hall and answer to the charge found in the charge sheet.

It is the Applicant's case that the said criminal proceedings amount to an abuse of power by the 1st Respondent, the Director of Public Prosecutions. It is her case that the criminal trial is a result of her utilization of her aforesaid parcel of land. She asserted that her neighbours are not happy with the use of her plot as a catering school and the dispute concerning the use of her land is the subject of **Nairobi High Court ELC Civil Case No. 214 of 2013, Hardy Residents Association v Andrew Nga'ng'a**. She further avers that she has also filed **Nairobi High Court Judicial Review Misc Application No. 286 of 2013** in which she seeks to quash an Enforcement Notice issued by the 2nd Respondent on 19th February, 2013. It is her view therefore that the respondents are acting in cahoots with Hardy Residents Association with a view to oppressing her and this amounts to abuse of power by the respondents.

The 1st Respondent filed grounds of opposition on 8th May, 2014 and opposed the application on the following grounds:-

"1. The prayers sought by the applicant are unconstitutional as they seek to prevent the Respondents from exercising its mandate. The prayers if granted would result to a greater injustice in the criminal justice system and public interest.

2. The Applicant has not adduced reasonable evidence to show that criminal proceedings are

mounted for an ulterior purpose and have not demonstrated how the 1st Respondent has acted without or in excess of powers conferred upon them by law.

3. The applicant must demonstrate that substantial injustice would otherwise result if the criminal proceedings proceed.

4. The facts raised by the Applicants can be raised at the trial court as the accuracy and correctness of the facts or evidence gathered by the Respondents can only be assessed and tested by the trial court which is best equipped to deal with the quality and sufficiency of evidence gathered in support of the charges. The cases are determined on merit.

5. The applications are without merit, an abuse of court process and should therefore be dismissed with cost to the Respondents.”

The 2nd Respondent opposed the application through an affidavit sworn by its Deputy Director of Legal Affairs Mr. N. M. Mung’ala on 18th September, 2013. In response to the Applicant’s case, Mr. Mung’ala avers in paragraph 3 as follows:

“3. **THAT** the circumstance and facts of this matter have been explained to me by the Director of City Planning and Director of Public Health of the 2nd Respondent and based on the information I have received from the two offices, which information and advice I verily believe to be true, I would like to respond as follows:-

a) **THAT** the Application herein is an abuse of the Court Process as the Applicant have filed multiplicity of suits which are still pending and have not been determined by the Court. One of them being judicial Review No. 286/13. This Judicial Review Suit the Applicant filed is a similar case like the instant one but purportedly under the name of her son Andrew Ng’ang’a but relating to similar cause of action

b) **THAT** the process of issuance of Summons to the Applicant requiring attendance to Court, the Charge Sheet and subsequent prosecution is a lawful process which the law empowers the 2nd Respondent to do. No illegality is committed by the act of issuance of summons and charging the Applicant in a Court of law.

c) **THAT** similarly, the Applicant’s right to defend herself against the Criminal Case No. City Court Case no. 133A of 2013; Republic-vs-Owner/Landlord/Occupier-Andrew Hardy Hostels, have not been curtailed and the Applicant will have the opportunity and resources at her disposal to defend herself as is required by law.

d) **THAT** under the Public Health Act, Cap 242 Laws of Kenya, the 2nd Respondent’s Public Health Officer is allowed by law to issue a Notice to any resident to abate any nuisance within its jurisdiction.

e) **THAT** the 2nd Respondent’s Public Health Officer in accordance with the Law issued a Notice to the Applicant to abate a nuisance upon L.R. No. 2327/172-Twiga Hill Karen, which nuisance infringed, violated and breached the 2nd Respondent’s planning and zoning regulations relating to Hardy Estate.

f) **THAT** to date, the Applicant has not obtained any change of user to convert the subject property to a student’s hostel. None has been produced before this Court. The Applicant made an application to change user, it was deliberated upon by the 2nd Respondent and conditional recommendations made which have not been complied with but the change of user has not been approved.

g) Hardy Estate is zoned as a low density single family residential estate.

h) THAT the Residents of Hardy Estate are entitled to legitimate expectation of enforcement of the 2nd Respondent's by-laws, planning and zoning regulations, which the Applicant desires to violate without taking into consideration the interests of the other residents in the area.

i) THAT the issue being raised by the Applicant that she was not served with a Notice dated 8th November, 2012, the subject of the Criminal Case, is not true. The alleged non-service has never arisen since the criminal case began by taking of plea, charge sheet and subsequent proceedings from 22nd April, 2013.

j) THAT since the Criminal Case began on 22nd April, 2013 and has already proceeded, the Applicant is considered to have submitted to the fair administrative and judicial process and is only raising the matter now as an afterthought and to defeat the cause of justice.”

At the end of the day, this application boils down to the exercise of prosecutorial powers by the 1st Respondent. Article 157 of the Constitution which establishes the 1st Respondent, at sub-Article 6 gives prosecutorial powers to the 1st Respondent as follows:

“(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may

(a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;

(b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and

(c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).”

Article 157 (11) states that:

“(11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.”

It is therefore clear that although the 1st Respondent should exercise prosecutorial power without being directed or controlled by any person or authority, the exercise of that power should be in the public interest, the interests of the administration of justice and should prevent and avoid abuse of the legal process. The power is not absolute.

The law applicable to this Court's supervisory power over the 1st Respondent was recently restated by the Court of Appeal in the **COMMISSIONER OF POLICE & THE DIRECTOR OF CRIMINAL INVESTIGATIONS DEPARTMENT & ANOTHER v. KENYA COMMERCIAL BANK LIMITED & 4 OTHERS [2013] eKLR**. The Court stated that:

“By the same token and in terms of Article 157(11) of the Constitution, quoted above, in exercising powers donated by the law, including the power to direct the Inspector General to investigate an allegation of criminal conduct, the DPP is enjoined, among other considerations, to have regard to the need to prevent and avoid abuse of the legal process. The court on the other hand is required to oversee that the DPP and the Inspector General undertake these functions in accordance and compliance with the law. If it comes to the

attention of the court that there has been a serious abuse of power, it should, in our view, express its disapproval by stopping it, in order to secure the ends of justice, and restrain abuse of power that may lead to harassment or persecution. See Githunguri v. Republic [1985] LLR 3090.

It has further been held that an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification. The court has inherent power to interfere with such investigation or prosecution process. See Ndarua v. R. [2002] 1 EA 205. See also Kuria & 3 Others v. Attorney General [2002] 2KLR 69.”

On the other hand, it is not the business of the court in an application like this one to weigh the evidence of the witnesses to be called at the criminal trial and arrive at the conclusion that the evidence will not result in a conviction. A warning to this effect was given by the Court of Appeal in MEIXNER & ANOTHER v ATTORNEY GENERAL [2005] 2KLR 189 when it stated that:

“Having regard to the law, we agree with the finding of the learned judge that the sufficiency or otherwise of the evidence to support the charge of murder goes to the merits of the decision of the Attorney General and not to the legality of the decision. The other grounds which the appellants claim were ignored ultimately raise the question whether the evidence gathered by the prosecution is sufficient to support the charge.

The criminal trial process is regulated by statutes, particularly, the Criminal Procedure Code and the Evidence Act. There are also constitutional safeguards stipulated in Section 77 of the Constitution to be observed in respect of both criminal prosecutions and during trials. It is the trial court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. Had leave been granted in this case, the appellants would have caused the judicial review court to embark upon an examination and appraisal of the evidence of about 40 witnesses with a view to show their innocence. That is hardly the function of the judicial review court. It would indeed, be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court.”

Turning back to the case before me, I find that the Applicant and members of Hardy Residents Association are engaged in a fight concerning the use of the Applicant’s land. The criminal trial which the Applicant faces arose from this dispute. The Applicant is accused of failing to abate a nuisance. According to the Applicant, what the 2nd Respondent wanted her to do was to demolish the buildings on her land.

The issue as to whether the buildings on the land and the purpose for which they are being used received the blessing of the 2nd Respondent is now an issue before the Court is **Nairobi High Court ELC No 214 of 2013**. That suit was initiated by Hardy Residents Association. The Court, in that case, has already issued an order restraining the Applicant from using the premises as student hostels. The issue before the Court in that matter is whether the Applicant obtained permission from the 2nd Respondent prior to change of user from residential to the current use.

The criminal trial will revolve around the issue of the usage of the land by the Applicant. Although the charge sheet refers to acts allegedly committed on 8th November, 2012, the summons was issued together with the Enforcement Notice on 19th February, 2013. As already stated, the Enforcement Notice is the subject of **Nairobi H.C. JR Misc. Application No. 286 of 2013** which has been heard simultaneously with this petition.

The summons and the Enforcement Notice were issued about two weeks after Hardy Residents Association filed **Nairobi High Court ELC No. 214 of 2013**. The order issued therein means that the

Applicant can no longer use the buildings on her land as student hostels. There is a possibility that at the conclusion of the case, the plaintiff (Hardy Residents Association) may be granted the orders sought. On the other hand, it is possible for the Court to find that the Applicant's use of the land as a hostel is legal. Were the Court to arrive at such a conclusion, then the Applicant will have undergone an unnecessary trial. In my view this is a case where the respondents are abusing their powers and the only reasonable thing to do is to restrain them.

I do not find it necessary to make the declarations sought by the Applicant. I, however, hold the view the criminal trial facing the Applicant amounts to an abuse of the court process. In accordance with Article 23(3)(f) of the Constitution, I will therefore issue an order of certiorari calling into this Court the proceedings in **City Court case No. 133A of 2013 Republic v Owner/Landlord/Occupier–Andrew Hardy Hostels** and quashing those proceedings.

The Applicant did not adduce any evidence to support her claim for compensation and this particular prayer fails. Each party will meet own costs of these proceedings.

Dated, signed and delivered at Nairobi this 30th day of October, 2014

W. KORIR,

JUDGE OF THE HIGH COURT