REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.226 OF 2011

BETWEEN

HASIT SHAH……1ST PETITIONER

RARIM SAYED……..……2ND PETITIONER

TERRA FLEUR…….3RD PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL……..…….1ST RESPONDENT

THE DISTRICT CRIMINAL INVESTIGATIONS OFFICER,

THIKA.
……
…2ND RESPONDENT

AND

SWANI COFFEE STATE LIMITED……INTERESTED PARTY

R U L I N G

1. On perusal of the record herein, there is some confusion as to whether it is the Amended petition dated 12th September 2011 that was to be heard and determined, or it is the Chamber Summons dated 12th September 2011 as amended that was to be determined first. However, for the sake of clarity of proceedings and from the Submissions filed by Advocates for the parties, I shall proceed and determine the Chamber Summons dated and amended on 12th September 2012.

2. That Application by the Petitioners seeks the following Orders;

"(i) That due to the nature of the urgency involved, service of this Application be dispersed with in the first instance and the Application be heard exparte.

(ii) That pending interpartes hearing and determination of this Application, this Court be pleased to grant a temporary prohibitory order barring the 1st Respondent whether by himself, servant, agents or through the 2nd Respondent or any other police station within the republic from doing the following acts or any of them that is to say from arresting, arraigning in Court, prosecuting, preferring any charges and/or detaining the Petitioners in relation to the conveyance of the parcel of land namely L.R. No.304/5 (original No.304/3/1) Thika between the Interested Party and the 3rd Petitioner and between the 3rd Petitioner and Chania Riverbank Estate Limited.

(iii) That pending interpartes hearing and determination of this Application this Honourable Court be pleased to stay any investigations by the 2nd Respondent that may be based on the sale of land transaction relating to parcel of land namely L.R.No.304/5 (original number 304/3/1) Thika between the 3rd Petitioner and the Interested Party and between the 3rd Petitioner and Chania Riverbank Estate Limited.

(iv) That Prayers 2 and 3 above be granted pending hearing and determination of the Petition.

(v) That costs of this Application be borne by the Respondents and the Interested Party".

3. The case for the Applicants is that the 3rd Applicant, Terra Fleur Limited, purchased L.R. No.304/5/Original 304/3/1) at Thika from the Interested Party, Swani Coffee Estates Limited at a consideration of Ksh.27,375,000/- and as a consequence, the property was registered in its favour.

4. A dispute subsequently arose and the Interested Party filed H.C.C.C. No.202/2008 (Nairobi) and claimed *inter alia* that the whole transaction was a nullity for want of a valid Land Control Board consent. It also alleged that certain share transfer documents, forming part of the sale transaction, were forged and its Directors made a complaint to the Police who investigated the matter and found it to be of a civil nature and advised the Interested Party to file a Civil Suit.

5. The land in dispute has since been sold to Chania Riverbank Estate Limited and the Interested Party, dissatisfied, made another complaint to the police and the 2nd Respondent acted by summoning the 1st and 2nd Petitioners to his office for interrogation and also threatened them with arrest and prosecution.

6. It is the Applicants' claim, that all the issues that formed the basis of the complaints to the 2nd Respondent were partly settled in Rulings delivered at the High Court and I deem it appropriate to quote their Submissions on that point which are as follows;

"The Interested Party filed in the Commercial Division of this Court a suit namely High Court Civil Case No.202 of 2008 when it realized that Bank was intending to dispose of the suit property. One of the issues raised was lack of Land Control Board Consent in transferring the land to the 3rd Petitioner by the Interested Party.

The Court in holding that consents were duly obtained held thus;

"As stated earlier it was the duty of the Plaintiff to seek and obtain consents from the relevant Land Control Boards. There is evidence to show that the consents were obtained from Thika Municipality Land Control Board. It is the Plaintiff and the 1st Defendant who made the Application to Thika Land Control Board. Infact the Application for consent to the Land Control Board shows that it was made by the Plaintiff."

The Interested Party moved the Court of Appeal by an Application under Rule 5(2)(b) of the Rules of that Court seeking injunction pending Appeal. The Court of Appeal noted that the same grounds used in the Application in this Court were the same grounds relied up in that Court and held thus;

"Before we wind up this Ruling we wish to comment on the issue of Land Control Board consent. On the assumption that it was not sought or granted, the issue does not prima facie, lie at the instance of the Applicant. The Applicant never charged any property to 2nd Respondent. In the circumstances, irrespective of whether or not such consent was sought and granted prima facie, it is our view that it will have no effect on the outcome"

The Interested Party amended the Pleadings in the High Court to add M/s Chania Riverbank Estate Limited as a party to the suit and sought injunctive orders against transfer and registration of the suit property against it. It alleged that Land Control Board Consent was not obtained prior to transfer to M/s. Chania Riverbank Estate Limited.

The Court vide its Ruling delivered on 28th October 2011 dismissed the Application holding thus;

"It matters not that the Ruling of the High Court of 24th April 2008 and that of the Court of Appeal of 4th December 2009, were made in an Application to stop the then 2nd Defendant Bank (against whom the Plaintiff's claim has since been withdrawn) from exercising a power of sale acquired under a charge over the property. The issues raised in the present Application were raised, considered and determined conclusively before those courts. The same grounds as have been presented herein were raised to support the previous Applications and are therefore res judicata"."

7. They further argue that inspite of the above Rulings, the sale and transfer of the property was lawful and the subsequent transfer to Chania Riverbank Estate Limited was also without legal blemish. They fault the subsequent investigations by the 2nd Respondent and particularly his reliance on a statement by members of the Kakuzi Land Control Board on the invalidity of the Land Control Board Consent and on a document by a Forensic Document Examiner and they add that those disputed matters cannot be the basis for criminal prosecution and parties ought to ventilate their differences in a Civil Court. That the actions of the 2nd Respondent amount to an infringement of the Applicants' fundamental rights and freedoms as enshrined in **Articles 26 to 51** of the **Constitution** and that by dint of **Article 23** of the **Constitution**, this court can issue orders to temporarily stop any breach until the Amended Petition is heard and determined.

8. The case by the 1st and 2nd Respondents is that the Application and the whole case by the Applicants is misguided as no violation of any specific right has been shown. Further, that when the Interested Party lodged a complaint by its letter dated 14th June 2011, the 2nd Respondent launched investigations and obtained a report from a Forensic Document Examiner who confirmed that the documents lodged at the Kakuzi Land Control Board were forged. He then summoned the Applicants to present their case but they failed to turn up and so they cannot now be heard to be complaining that they were unfairly treated.

They rely on the decisions in;

i) *Matiba vs Attorney General (1990) KLR 666*

(ii) *Anarita Karimi vs. Attorney General (1979) KLR 54*

(iii) *William Ruto & Anor vs. Attorney General HCCC No.1192/2005* for the argument that when pleading allege violations of fundamental rights and freedoms, an Applicant must plead with precision, the Section, Sub-section or paragraphs under which he alleges violation.

9. The 1st and 2nd Respondents further argue that under Article 29(a) of the Constitution, the police are lawfully empowered to affect arrests for a just cause and that in the instant case, the 2nd Respondent acted within powers conferred by **Sections 89(1)** and **(2)** of the **Criminal Procedure Code** upon a complaint being lodged by the Interested Party.

10. Regarding the pending Civil Litigation, the argument by the 1st and 2nd Respondents is that they have no bearing on the criminal investigations and the fact of the existence of civil proceedings is not a bar to the preference of criminal charges. Reliance is placed on the decision in Kinamo Kibanya vs. Republic, HCCRA No.3 of 2003 to buttress that proposition.

11. On its part, the Interested Party has urged the point that prohibitory orders as prayed cannot issue against either the Director of Public Prosecution or the 2nd Respondent as they are neither inferior Courts, tribunals or administrative bodies neither are they *quasi-judicial* bodies.

12. The Interested Party has then gone on to argue that under Article 245(4) of the Constitution, the head of the National Police Service has independence in the conduct of investigation. That therefore in conducting investigations into the alleged fraudulent sale transaction, the 2nd Respondent was not acting *ultra vires* his powers and no prohibitory orders should issue against him. In any event, that there is no evidence that the Applicants are in danger of being arrested and their fears are therefore baseless and speculative.

13. That on the whole, the Application viewed against existing facts, police powers and the Law, lacks merit and should be dismissed.

14. I have carefully considered the rival Submissions and I am conscious of the fact that I am being called upon to exercise discretion at the interlocutory stage and without going to the merits of the Amended Petition.

15. In that regard, it is common ground that the Applicants have neither been arrested nor charged but from the response filed by the 2nd Respondent, it is obvious that he has made up his mind to arrest and charge them on the basis, principally of the statements by the Kakuzi Land Control Board Members and the Forensic Document Examiner. It is not the place of this Court to determine whether that evidence is reliable or not. The role of this Court is to see whether, on a *prima facie* level, there is need to stop any action threatened by the Respondents, pending the hearing of the Amended Petition and to balance the interests of all parties concerned.

16. I should at this stage quickly dismiss the proposition that prohibitory orders cannot be issued against the Respondents in this case. The Interested Party quoted from the book, An Outline of Judicial Review in Kenya, 2nd Edition, Page 92 in support of its misguided position. I have read the book and nowhere is there a proposition that either the Director of Public Prosecutions or the Criminal Investigations Department of the Kenya Police Service are not public bodies whose actions are amenable to any order, including prohibition, issued by the High Court in appropriate cases. Lord Diplock in Council of Civil Service Unions vs. Minister for the Civil Service [1985] A.C 374 at 410 stated as follows;

"Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by Judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time and further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognized in the administrate law of several of our fellow members of the European Economic Community."

17. In Constitutional and Administrative Law, 8th Edition by Paul Jackson and Patricia Leopold at page 698 para 31-002, it is stated that the above classification has since been described as ***"a valuable and already classical"*** but certainly not exhaustive analysis of the grounds upon which Courts will embark on the Judicial review of administrative power exercised by a public officer. I agree with that proposition and it is in fact instructive that **Article 22(3)** of the **Constitution** has specifically recognized Judicial review orders as remedies for alleged breaches of a right or fundamental freedom in the Bill of Rights. The Respondents are certainly public offices and officers to whom Judicial Review orders can be directed.

18. **If the orders as prayed can indeed be granted, are the Applicants entitled to the exercise of discretion in their favour?**

19. I have read the decision of Achode, J. in Bagwanyi Parmar & Anor vs. Chief Magistrate Makadara, Misc. Criminal Application No.767 of 2010 and in that case, the Applicants had in fact been already in Court and so all complaints arising could be raised in the trial Court.

20. Similarly in William Ruto *(supra)*, the Court held that the Applicant was already before the Criminal

Court and any defence to the charges could properly be raised in that Court.

21. In Kinaro Kibanya *(supra)* the issue was whether the High Court could quash a charge sheet already read and pleaded to, by the Applicant. The Court declined to do so.

22. In the instant case, I would have otherwise been inclined to agree with the Respondents and allow the 2nd Respondent to proceed and interrogate the Applicants and even arrest and charge them. But two matters have swayed my mind to do the contrary.

23. First, there are Civil proceedings before the High Court and the Court of Appeal and I have elsewhere above reproduced parts of Rulings delivered in both Courts. It is obvious to me that the same issues pending before the two superior Courts are also before the 2nd Respondent. At this stage of proceedings and before the Amended Petition is heard, it would be best to maintain the status quo, have the Amended Petition heard and determined on its merits and should the same be dismissed, there is no limitation or bar to the 2nd Respondent to continue with his intended action. In the Petition, the following Prayers are sought;

"(i) A declaration that the intended arraignment, prosecution and filing of charges against the Petitioners by the police through the 2nd Respondent or otherwise is discriminatory, unlawful, unconstitutional and designed for a purpose other than vindication of Justice.

(ii) A Prohibitory Order barring the 1st and 2nd Respondents or their agents from arresting, arraigning in Court, preferring any charges or detaining the Petitioners.

(iii) An order for stay of any investigations and prosecution by the criminal investigations department of the police arising from the sale of land transaction between the 3rd Petitioner and the Interested Party.

(iv) A declaration that the Petitioners constitutional and fundamental rights have been contravened. Consequently a declaration that any proceedings that may be instituted against them are a nullity.

(v) A declaration that the dispute between the Interested Party and the 3rd Petitioner in relation to the sale and transfer of share stock and the suit property known as L.R. No.304/5 (original number 304/3/1) Thika is a Civil/Commercial dispute which should be adjudicated upon the Civil/Commercial Court without resulting to criminal proceedings.

(vi) Costs of the Petition."

24. **Prayer (v)** is pertinent because should the Court grant it, then the actions by the 2nd Respondent will be forestalled and yet if the orders sought in the Application are not granted, then the whole Amended Petition may be rendered nugatory to the detriment of the Applicants. In any event, as I have stated above, no prejudice would be caused to the 1st and 2nd Respondent. As regards the Interested Party, it can seek protective remedies in the Civil proceedings, if it is minded to do so.

25. Second, unlike the decisions quoted above, the Applicants have come to Court timeously and have sought protection before any arrest and before any charges have been laid against them. It has not been shown that they are a flight risk and yet freedom of the person is a hallmark of our Constitution. It should be protected in certain cases and in this case, the balance of convenience would favour a diligent litigant.

26. In the event, I will grant the following Orders;

"(i) That pending the hearing of the Amended Petition, a temporary prohibitory order is hereby issued barring the 1st Respondent whether by himself, servant, agents or through the 2nd Respondent or any other police station within the republic from doing the following acts or any of them that is to say from arresting, arraigning in Court, prosecuting, preferring any charges and/or detaining the Petitioners in relation to the conveyance of the parcel of land namely L.R. No.304/5 (original No.304/3/1) Thika between the Interested Party and the 3rd Petitioner and between the 3rd Petitioner and Chania Riverbank Estate Limited.

(ii) That pending the hearing and determination of the Amended Petition, an order is hereby issued to stay any investigations by the 2nd Respondent that may be based on the sale of land transaction relating to parcel of land namely L.R.No.304/5 (original number 304/3/1) Thika between the 3rd Petitioner and the Interested Party and between the 3rd Petitioner and Chania Riverbank Estate Limited.

(iii) That costs of this Application shall abide the hearing of the Amended Petition."

27. The Amended Petition should now be fixed for hearing on a priority basis.

28. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 18TH DAY OF MAY, 2012

ISAAC LENAOLA

JUDGE

In the presence of:

LENAOLA – JUDGE

Irene – court clerk

Mr. Kariuki for Applicants

Mr. Okello hold brief for Mrs. Obuo for Respondents

Mr. Maitsi for Interested Party

No Appearance for Respondent

Order

Ruling duly read.

Further Orders

Amended Petition to be heard on 17th July, 2012

Parties to file Submissions.

Copies of the Judgment to be supplied.

ISAAC LENAOLA

JUDGE