



Okwaro v Directorate of Criminal Investigations; Odero (Sued as the Chairman Kenya Secondary Schools Heads Association) (Interested Party) (Environment and Land Miscellaneous Application E038 of 2022) [2023] KEELC 398 (KLR) (2 February 2023) (Ruling)

Neutral citation: [2023] KEELC 398 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E038 OF 2022

CA OCHIENG, J

FEBRUARY 2, 2023

IN THE MATTER OF: APPLICATION FOR ORDERS OF JUDICIAL REVIEW

AND

IN THE MATTER OF AN APPLICATION SEEKING JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION AGAINST THE RESPONDENTS

AND

IN THE MATTER OF: ARTICLE 23 OF THE CONSTITUTION, SECTIONS 8 AND 9 OF THE LAW REFORM ACT, ORDER 53 OF THE CIVIL PROCEDURE ACT CAP 21, LAWS OF KENYA

BETWEEN

JOSEPH ODUOR OKWARO APPLICANT

AND

DIRECTORATE OF CRIMINAL INVESTIGATIONS RESPONDENT

AND

JOHN PAUL ODERO (SUED AS THE CHAIRMAN KENYA SECONDARY SCHOOLS HEADS ASSOCIATION) INTERESTED PARTY

RULING

1. What is before Court for determination is the Applicant's ex parte Chamber Summons application dated the August 17, 2022 seeking the following orders;
 1. Spent
 2. That the ex parte Applicant be granted leave to institute Judicial Review Proceedings seeking:-



- a. An Order Of Certiorari to issue bringing into this Honourable Court the decision to chase the Applicant in a criminal case for purposes of being quashed.
 - b. An Order Of Prohibition prohibiting the 1st Respondents from conducting any further proceedings, summoning the Applicant or Arresting the Applicant in relation to any issue arising from Land Reference numbers Machakos/ Mavoko/ 20157, Machakos/ Mavoko/ 20158, Machakos/ Mavoko/ 20159, Machakos/ Mavoko/ 20160, Machakos/ Mavoko/ 20161, Machakos/ Mavoko/ 20162, Machakos/ Mavoko/ 20163.
 - c. That grant of such leave operate as stay of any further criminal proceedings, arrest against the Applicant by the 1st Respondent.
 - d. Costs of this Application to abide by the main cause.
2. The application is premised on the grounds on the face of it, Statutory Statement and Verifying Affidavit of Joseph Oduor Okwaro. He avers that on the June 23, 2002 Lakeview Investment Limited in which he is one of the directors purchased land reference numbers Machakos/ Mavoko/ 20157, Machakos/ Mavoko/ 20158, Machakos/ Mavoko/ 20159, Machakos/ Mavoko/ 20160, Machakos/ Mavoko/ 20161, Machakos/ Mavoko/ 20162 and Machakos/ Mavoko/ 20163, hereinafter referred to as the ‘suit lands’, from Janifer Waithera for Kshs 8,000,000/=. He confirms that Lakeview Investment Limited subdivided the said suit lands into smaller portions measuring an eighth of an acre and sold them to other people who have since constructed as well as developed the said plots. He claims on June 23, 2017, the Interested Party in company of Administration Police intruded on the suit lands and threatened occupants with eviction. Further, Lakeview Investment Limited instituted Machakos ELC 280 of 2017 for a declaratory order that the suit lands belonged to it. He states that on August 16, 2022, the Respondent through its Machakos Office summoned him and informed him that he should present himself for possible charges and arraignment in a court of law for criminal charges. Further, he felt aggrieved that the said summons amounted to misuse of powers by the Respondent and convulsion of an already ongoing case in a court with competent jurisdiction. He reiterates that there are competing ownership claims in regard to the suit lands which is the subject matter in ELC 280 of 2017 and in the claims made by the Respondent which are already before the ELC Court.
3. The application was opposed by the Respondent who filed a replying affidavit sworn by an officer CPI Leonard Siele where he deposes that a complaint was lodged at their office vide a letter dated October 4, 2019 by one Professor John Paul Odero on behalf of Nairobi Secondary School Teachers (1992) Housing Project. He explains that according to the complaint, the teachers (Interested Party) were allocated land parcel number LR 20154 – 20163 which plots were later amalgamated to LR No 24561. Further, the Interested Party (teachers) subdivided the said amalgamated parcel into 134 parcels around March 7, 1998 and individual owners occupied their plots. He contends that according to the complaint, the Applicant and/or his company Lakeview Investment Ltd forged Deed Plans and has illegally used them to claim the teachers’ land. Further, that the Applicant has on several occasions destroyed their property. He confirms that they have already prepared charge sheets and registered E 807 of 2022 in Milimani Law Courts but the Applicant has gone into hiding. Further, that the Court has issued warrants of arrest against him. He reiterates that the instant application is mischievous and based on misrepresentations of facts because the DCI and DPP have acted independently in investigating the alleged forgeries including fraud and instituted criminal proceedings against the Applicant. He reaffirms that the Applicant has not established a prima facie case to warrant leave and even if the court grants leave, such leave ought not to operate as a stay. He insists that there is no merit



in the allegation that the criminal process is intended to harass the Applicant and determine ownership of the suit land in ELC 280 of 2017.

Analysis and Determination

4. Upon consideration of the instant Chamber Summons application including the Statement of Facts, respective affidavits and annexures, the only issue for determination is whether the Applicant is entitled to leave to institute judicial review proceedings of Certiorari and Prohibition against the decision by the Respondent to institute criminal proceedings against him vide E 807 of 2022 in Milimani Law Courts and if the leave granted should operate as a stay of the impugned decision.
5. Both the Applicant and Respondent admit the fulcrum of the dispute being the suit lands in ELC 280 of 2017 and this suit are similar. The Respondent further admits that he has proceeded to charge the Applicant in E 807 of 2022 in Milimani Law Courts in respect to allegation of fraud over the suit lands. Further, the Respondent insists the criminal case will not interfere with ELC 280 of 2017 which also revolves around dispute over ownership of the suit lands. I have perused the annexed documents which include the charge sheets in the criminal proceedings in E 807 of 2022 in Milimani Law Courts and I note it also deals with ownership of the suit lands. The said criminal process is what culminated in the institution of these proceedings seeking orders of judicial review. Order 53 Rule 1 makes provisions on institution of judicial review proceedings and stipulates thus: ' (1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule. (2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on. (3) The judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit including cash deposit, bank guarantee or insurance bond from a reputable institution. (4) The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise: Provided that where the circumstances so require, the judge may direct that the application be served for hearing inter partes before grant of leave. Provided further that where the circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days.'
6. The Court in the case of *Kingdom Kenya 01 Limited versus the District Land Registrar, Narok & Fifteen (15) others [2018] eKLR* described judicial review as follows: 'Judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. See *The Commissioner of Lands –versus Hotel Kunste [1997] eKLR*. The purpose of JR is to ensure that the individual is given fair treatment by the Authority to which he has been subjected. JR as a remedy is available, in appropriate cases, even where there are alternative legal or equitable remedies. See *David Mugo t/a Manyatta Auctioneers –versus Republic – Civil Appeal No 265 of 1997 (UR)*. JR being a discretionary remedy, it demands that whoever seeks to avail itself/himself/herself of this remedy has to act with candour or virtue and temperance. See *Zakayo Michubu Kibwange –versus Lydia Kagina Japheth and 2 others [2014] eKLR*. JR as a remedy may also be invoked where the issues in controversy as between the parties are contested. See *Zakayo Michubu Kibwange case (Supra)*. The remedy of judicial review is only available where an issue of a public law nature is involved. Further, that a person seeking mandamus must show that he has a legal right to the performance of a legal duty by a party against whom the mandamus order is sought or alternatively, that he has a substantially personal interest and that the duty must not be permissive but imperative and must be of a public nature rather than of a private nature.'



7. Judicial review challenges the administrative action of a person in position of authority and whether it accorded an individual seeking a remedy, a fair administrative action. In this instance, the Applicant is seeking to challenge the process the Respondent adhered to, in instituting criminal proceedings being E 807 of 2022 in Milimani Law Courts against him yet ELC 280 of 2017 which is also dealing with the dispute over the suit lands is still pending in this court. The Respondent has vehemently opposed the granting of leave and insists the criminal proceedings will not interfere with the civil case.
8. At this juncture, as a Court I will not analyze the merits or demerits of the impugned decision of the Respondent to charge the Applicant but only whether the Applicant has raised pertinent issues in the instant application. In the Supreme Court case of *Judges and Magistrates Vetting Board v Centre for Human Rights and Democracy [2014] eKLR* it was held that: ‘When Courts conduct judicial review, they are in essence ensuring that the decisions made by the relevant bodies are lawful. Consequently, should they find that the decision made is unlawful, Courts can set aside that decision. Judicial review, therefore, can be said to safeguard the rule of law, and individual rights; and ensures that decision makers are not above the law, but have taken responsibility for making lawful decisions, in the knowledge that they are reviewable.’
9. Further, in the case of *Catherine Nyambura Muraria v Director of Public Prosecutions & another; Isaac Gathungu Wanjohi (Interested Party) [2019] eKLR*, Justice Mwita while dealing with a dispute with facts almost similar to the circumstances at hand, held that:

’ It is not in dispute that the petitioner and the interested parties are involved in litigation over the ownership of the same parcel of land. That matter is live in court and each side claims to own the land and has what they say are valid ownership documents. Both sides claim to have purchased the land from the owner and paid the purchase price. That is a matter to be decided by the ELC. It is on that basis that the petitioner argues that the criminal case is intended to give advantage to her adversaries.

61. The court will ordinarily be reluctant to interfere with the mandate of the 1st respondent to prosecute, except where it is shown that he is using his powers in an improper manner. That this the caveat placed by Article 157(11).

62. In *Republic v Attorney General & another ex parte Hussein Mudobe (High Court Misc Application No 898 of 2003)*, the Court observed that:

’ The constitutional court should not usurp the duties of the prosecutor or the jurisdiction of the trial court. The power of the court to halt criminal proceedings involves a delicate balance of the power of the state to prosecute and the right of the individual to liberty and freedom from malafide and oppressive prosecution.’

63. The Court of Appeal reiterated the same position regarding the powers of the Attorney General under the repealed Constitution, in *Meixner & Another vs Attorney General [2005] 2 KLR 189*, thus;

’ The Attorney General is not subject to the control of any other person or authority in exercising that discretion (section 26(8) of the Constitution). Indeed, the High Court cannot interfere with the exercise of the discretion if the Attorney General, in exercising his discretion is acting lawfully. The High Court can, however, interfere with the exercise of the discretion if the Attorney General,



in prosecuting the appellants, is contravening their fundamental rights and freedoms enshrined in the *Constitution*.'

64. The rights and fundamental freedoms referred to in the above decision must include the right to fair hearing enshrined in Article 50(1) to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or another independent and impartial tribunal or body. In that regard, the decisions referred to above, are clear that the court will interfere with the 1st respondent's discretion if it is shown that the impugned prosecution is intended to achieve a collateral purpose rather than the course of justice and will not result into a fair hearing.
65. The petitioner has argued that the decision to charge and prosecute her is meant to bring pressure to bear on her in order to force a certain outcome in the ELC suit. To back this up, it has been submitted that investigations and the subsequent decision to charge her were shrouded in secrecy so that it could catch her unaware. The respondents and interested parties have denied, though that this is the case.
66. The core issue here is about the land claimed by both the petitioner and the interested parties. It is a dispute that has had its way to Court in ELC No 641 of 2017. That suit is live in Court, and was instituted by the interested parties. The petitioner is one of the defendants in that suit. The others are; the Land Registrar Kajiado, Susan Wanjiru Mbugua and the Attorney General. It is also a fact that whereas the ELC case was initiated by the interested parties in 2017, the criminal proceedings were initiated in 2018 during the pendency of that suit.
67. So was the criminal prosecution intended to achieve criminal justice or some other purpose? According to the petitioner, which is supported by the record, investigations were conducted between 2012 and 2016. There are on record correspondences from officers of both the respondents to that effect. Some of the correspondences confirm that 1st respondent's office advised that investigations be closed and that the petitioner was at liberty to deal with the property as she wished. It was after that decision that the interested parties instituted the civil suit in 2017 against the petitioner and other persons who are not a party to this petition. The correspondences relied on by the respondents though referring to the same investigations, advised otherwise as already explained in this judgment.
68. As already pointed out, where the 1st respondent is not conducting prosecutions in accordance with his constitutional mandate and it is shown that the prosecution is for an improper purpose the court will intervene. See *Fredrick Okeyo Otieno v Director of Public Prosecutions & 4 others [2017] eKLR*. Similarly, in *Republic v Director of Public Prosecution & 2 others Ex parte Francis Njakwe Maina & another [2015] eKLR*, the Court observed that if the applicant demonstrates that the criminal proceedings constitute an abuse of process, the Court will not hesitate in putting a halt to them.
69. The respondents have not explained why the criminal proceedings have been instituted after the interested parties filed a civil suit in the ELC over the



ownership of the same property against the same person who is the defendant in the suit. The respondents have argued that the law allows concurrent civil and criminal proceedings and existence of the civil suit should not be a basis for halting the criminal case. They rely on section 193(A) of the *Criminal Procedure Code* to advance their argument.

70. Section 193(A) provides that:

' Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.'

71. It is correct to say that section 193(A) permits concurrent criminal and civil proceedings and the court should not halt criminal proceedings merely because there are civil proceedings arising from the same facts. However, where circumstances show that the desire to mount prosecution is motivated by extraneous matters, the court will stop criminal proceedings section 193(A) notwithstanding.

72. In other words, the court must bear in mind the circumstances of each case in making a decision on whether or not to terminate criminal proceedings. In my view, it is not the mere fact of there being concurrent criminal and civil proceedings. Rather it is the purpose for which the criminal proceedings have been commenced that the court should interrogate. The purpose should be attainment of criminal justice and nothing else. If its initiation is for an improper purpose, the court will intervene.

73. It was in that regard that the court observed in *Republic v Director of Public Prosecution & 2 others Ex parte Francis Njakwe Maina & another* (supra) that:

' [T]he concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim.'

72. It will be considered an abuse of the Court process to mount a criminal prosecution for extraneous purposes such as to secure settlement of a civil debt or to settle personal differences. In that respect, it will not matter whether or not the complainant has a prima facie case. In deciding whether to commence or pursue criminal prosecution the 1st respondent must consider the interests of the public and ask himself whether the prosecution will enhance public confidence or whether the case can be easily resolved by civil process without putting an individual's liberty at risk. (See *R v Attorney General Ex parte Kipngeno Arap Ngeny High Court Civil Application No 406 of 2001*)



73. In the present case, the 1st respondent does not seem to have taken into account the possibility that the dispute being over ownership of land, it could easily be resolved through the civil process, given that the interested parties had already filed a suit against the petitioner over the ownership of the same parcel of land. To a keen observer, the criminal process may not have been geared towards achieving the cause of justice when all the circumstances of this case are taken into account, including the fact that the decision to prosecute was shrouded in mystery and secrecy.
74. Where it is clear to the court that institution of the criminal process is guided by extraneous matters divorced from the goals of justice, it has a duty to prohibit the continuation of the criminal prosecution to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to the cause of justice, public interest and fair play. (*Kuria & 3 Others vs Attorney General* [2002] 2 KLR 69).
75. I have carefully considered this matter and perused the record. There is no doubt that even though the respondents and the interested parties have denied it, the criminal proceedings were not initiated against the petitioner in good faith. Whereas at one point the 1st respondent's office advised on closure of the investigations, it sanctioned the petitioner's prosecution a week later without offering any explanation at all. There is also no evidence that the petitioner was called upon to say something before her prosecution. Criminal proceedings against her were instituted in 2018 after investigations had been closed. If on the other hand it is the respondents' case that recommendation for the petitioner's prosecution was made in 2016, no explanation has been given why she was not charged between then and 2017 when the interested parties file the civil suit.⁷
10. Based on the facts as presented while relying on the legal provisions I have cited as well as associating myself with the quoted decisions, it is my considered view that this court has jurisdiction to challenge the decision of Respondent, noting that there is already a pending civil case in respect to dispute over the suit lands. I hence beg to disagree with the Respondent that the criminal process can proceed concurrently with the civil one. I opine that the Applicant is indeed entitled to leave to commence an application for Certiorari and Prohibition challenging the Respondent's decision on charging him with fraud in respect to suit lands which they both claim with the Interested Party. On whether leave should operate as a stay of the Respondent's order to charge the Applicant. I will refer to the case of *Mrao Limited Vs First American Bank of Kenya Limited & 2 others* (2003) KLR 125 where the Court of Appeal while defining a prima facie case stated that it is a case in which on the materials presented to the court or tribunal, it will conclude there is an apparent infringement of the Applicant's rights. See also the decision in *Taib A Taib V Minister For Local Government & 3 Others* [2006] eKLR.
11. From a perusal of the annexed Charge Sheets and noting that the matter is already in court, I opine that since the Respondent proceeded to charge the Applicant while disregarding the existence of the civil case which was dealing with the same dispute, it was indeed an apparent infringement of the Applicant's rights which requires the Court's interrogation before making a determination on the same. In the circumstances, I will associate myself with the decisions I have cited and order that the leave granted herein, indeed operates as a stay of the criminal proceedings in E 807 of 2022 in Milimani Law Courts.



12. It is against the foregoing that I find the Chamber Summons application dated August 17, 2022 merited and will allow it. I grant the Applicant leave of 21 days to file and serve the substantive motion on Judicial Review for orders of Certiorari and Prohibition.

13. Costs will be in the cause.

DATED SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 2ND DAY OF FEBRUARY, 2023

CHRISTINE OCHIENG

JUDGE

