



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYERI

ELC JUDICIAL REVIEW NO. 1 OF 2021

IN THE MATTER OF AN APPLICATION FOR LEAVE

TO APPLY FOR JUDICIAL REVIEW ORDERS OF

CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT LAWS OF KENYA

AND

IN THE MATTER OF THE PUBLIC PROSECUTION ACT

AND

IN THE MATTER OF THE ELC NYERI 36 OF 2016

& MILIMANI CHIEF MAGISTRATE COURT

CRIMINAL FILE NO. E109 OF 2021

AND

IN THE MATTER OF THE LAND REGISTRATION ACT

SECTION 26 AS READ TOGETHER WITH ARTICLE 40

OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF

LR NO. 10422/13 NANYUKI TOWNSHIP

BETWEEN

ANTONY MUTAHI KIMARUAPPLICANT

VERSUS

DIRECTORATE OF CRIMINAL INVESTIGATIONS.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

CHIEF MAGISTRATE COURT CRIMINAL MILIMANI3RD RESPONDENT

FIONA LUICE ANSETT.....INTERESTED PARTY

RULING

A. INTRODUCTION

1. The material on record indicates that some time in January, 2021 the Applicant, Anthony Mutahi Kimaru, was charged with various criminal offences before the Chief Magistrates' court at Milimani in *Milimani Criminal Case No. E109 of 2021 – Republic v Anthony Mutahi Kimaru*. The material on record indicates that the Applicant faced at least the following 4 counts:

(a) *Stealing contrary to Section 268(2) (a) as read with Section 275 of the Penal Code (Cap. 63) for allegedly stealing a title deed for LR No. 10422/13 valued at Kshs.18.5 Million the property of George Odinga Oraro and David Morton Silverstein, the executors of the estate of the late Livia Lepoer Trench (the deceased).*

(b) *Making a false document contrary to Section 347(a) as read with Section 349 of the Penal Code for allegedly making a false agreement for sale for the said property purporting it to be genuine.*

(c) *Uttering a false document contrary to Section 353 of the Penal Code for allegedly uttering a false sale agreement to the Environment and Land Court in Nyeri.*

(d) *Obtaining land registration by false pretence contrary to Section 320 of the Penal Code for allegedly procuring registration of the said property unlawfully with intent to defraud the executors of the estate of the deceased.*

2. It would further appear that at the time the 1st and 2nd Respondents instituted the charges against the Applicant, there was a pending civil suit in which the Applicant was a defendant. The said suit is **Nyeri ELC No. 36 of 2016 – Fiona Ansett (as Plaintiff) v George Odinga Oraro, David Morton Silverstein, Anthony Kimaru Mutahi and the Chief Land Registrar (as Defendants)**.

B. THE APPLICANT'S APPLICATION

3. By a chamber summons dated 26th January, 2021 expressed to be based upon **Order 53 Rule 1 (1), (2) and (4) of the Civil Procedure Rules, 2010 and Sections 8 and 9 of the Law Reform Act (Cap. 26)** the Applicant sought the following orders:

(a) *Spent.*

(b) *That leave be granted to the Applicant to apply for an order of certiorari to move into this honorable court and quash the decision to arrest, to charge, commence criminal proceedings in the Nairobi Chief Magistrates Court at Milimani Law Courts in Criminal Case No. E109 of 2021 pending the hearing and determination of the Environment and Land Court Nyeri Case No. ELC 36 of 2016.*

(c) *That leave be granted to the Applicant to apply for an order of prohibition restraining the Respondents and the Interested Party from proceeding with the prosecution of the ex-parte applicant in case No. E109 of 2021 at the Chief Magistrates Court at Milimani Law Courts pending the hearing and determination of the Environment and Land Court Nyeri Case No. ELC 36 of 2016.*

(d) *The leave so granted to operate as a stay of the decisions, actions, inactions of the Respondents in proceeding, prosecuting the Applicant further in regards to LR 10422/13 Nanyuki in Milimani Chief Magistrates' Court E109 of 2021.*

(e) *The costs of this application be in the cause.*

4. The application was grounded upon the statutory statement, verifying affidavit and supporting affidavit all dated 26th January, 2021 filed with the chamber summons. The Applicant challenged the 1st and 2nd Respondents' actions on, *inter alia*, the following grounds:

(a) *That he was the legitimate owner of L.R. No. 10422/43 Nanyuki Municipality and had a valid title deed for it having purchased the same for value from the trustee of the estate of the deceased.*

(b) *The prosecution was malicious, vexatious and an abuse of the court process since the issue of ownership of the said property was still pending in Nyeri ELC No. 36 of 2016.*

(c) *That the complainant in the criminal case was the Plaintiff in Nyeri ELC No. 36 of 2016 hence she was improperly using the criminal justice system to intimidate him and put pressure on him to concede the civil claim.*

(d) *That criminal charges were preferred without the advice of the Chief Land Registrar being sought and that the 1st and 2nd Respondents had assumed the powers of the land adjudicator.*

(e) That the 1st and 2nd Respondents had acted *ultra vires* their powers.

C. THE RESPONDENTS' RESPONSE

5. The Hon. Attorney General entered appearance for the 1st and 3rd Respondents and filed a notice of preliminary objection dated 23rd February, 2021. The only substantive issue raised in the said preliminary objection was that the application for leave offended the mandatory provisions of **Section 193A of the Criminal**

Procedure Code (Cap. 75).

6. **Section 193A** of the Criminal Procedure Code stipulates as follows:

“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”.

D. THE INTERESTED PARTY'S RESPONSE

7. The Interested Party filed grounds of opposition dated 18th February, 2021 in opposition to the said application. It was contended that the application was frivolous and an abuse of the court process as there was no evidence of illegality, unreasonableness or violation of the law. It was further contended that there was no demonstration that the 1st and 2nd Respondents had acted *ultra vires* or violated the constitution or any other law.

8. The Interested Party contended that judicial review was concerned solely with the decision making process and the question of the credibility and sufficiency of evidence could only be tested and evaluated by the trial court upon receiving the evidence in the course of trial. It was the Interested Party's case that the Applicant had not demonstrated a *prima facie* case to warrant the orders sought being granted.

9. The Interested Party also filed a replying affidavit sworn on 17th February, 2021 in opposition to the application. She stated that the Applicant had obtained registration of the suit property through dubious means during the pendency of Environment and Land Court Case No. 36 of 2016 to which he was party. It was further contended that the Applicant had violated some interim orders issued in the said case on 8th November, 2017 for which he was convicted of contempt of court and fined Khshs.500,000/=.

10. It was further contended that there was no evidence of bad faith or violation of the law on the part of the 1st and 2nd Respondents and that the court ought not to interfere with the execution of their constitutional mandate and functions. It was the Interested Party's case that the Applicant was merely raising his perceived defences prematurely before this court whereas the same should be tendered before the trial court for consideration at the opportune moment. The Interested Party consequently urged the court to dismiss the application since the Applicant had not satisfied the requirements for the grant of such leave.

E. DIRECTIONS ON SUBMISSIONS

11. When the application was initially listed for hearing on 24th February, 2021 it was directed that Attorney General's notice of preliminary objection and the application for leave shall be canvassed together through written submissions. The parties were consequently given timelines within which to file and exchange their respective submissions. The record shows that the Applicant filed his submissions on 12th March, 2021 whereas the Respondents and the Interested Party filed theirs on 19th March, 2021.

F. THE ISSUES FOR DETERMINATION

12. The court has considered the Applicant's chamber summons for leave to apply for judicial review orders, the Respondents' notice of preliminary objection in opposition thereto, the Interested Party's grounds of opposition and replying affidavit in opposition thereto as well as the material on record. The court is of the opinion that the following issues arise for determination:

(a) *Whether the Respondents' notice of preliminary objection is well founded.*

(b) *Whether the Applicant has made out a case for the grant of leave to apply for judicial review.*

(c) *If the answer to (b) is in the affirmative, whether such leave should operate as stay.*

(d) *Who shall bear costs of the application.*

G. ANALYSIS AND DETERMINATION

(a) Whether the Respondent's notice of preliminary objection is well founded

13. The court has considered the material and submissions on record on the issue. The Respondent's objection was based upon **Section**

193A of the Criminal Procedure Code which is to the effect that the mere pendency of a civil matter is not by itself sufficient ground to scuttle the institution or prosecution of criminal proceedings against a suspected offender.

14. So, is the Attorney General's objection a preliminary objection as properly known in law? The court can do no better than refer to the famous case of **Mukisa Biscuits Manufacturing Company Limited v West End Distributors Limited [1969] E.A. 699** whereby Law JA described a preliminary objection as follows:

“... so far as I am aware a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

15. In the same case, **Sir Charles Newbold, P** observed as follows:

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice must stop”.

16. The court is of the opinion that Sir Charles Newbold's admonition aptly applies to the Attorney General in the instant case. The objection by the Attorney General on **Section 193A of the Criminal Procedure Code** can only be argued in opposition to the application for leave in the normal way. This is a matter in which some factual issues are in dispute. This is a matter in which the exercise of judicial discretion is called for. It is also evident from the material on record that the application is not based solely upon the pendency of a civil suit. The Applicant also contends that the 1st and 2nd Respondents acted maliciously, *ultra vires*, in bad faith and in violation of the law. The Applicant further contends that the 1st and 2nd Respondents' action constitute abuse of court process and the criminal justice system.

17. The court is thus of the opinion that the Respondents' notice of preliminary objection dated 23rd February, 2021 is not well founded. The same should have been argued in opposition to the application in the same way grounds of opposition are argued in

opposition to an application. The Respondent's notice of preliminary objection is accordingly overruled even though the court shall be at liberty to consider the cited provision of the law whilst dealing with the issue of leave to apply for judicial review.

(b) Whether the Applicant has made out a case for the grant of leave to apply for judicial review

18. The legal threshold to be met by an applicant for leave to apply for judicial review is fairly well settled in Kenya. In the case of **Republic v County Council of Kwale and Another ex parte Kondo and 57 Others [1998] 1KLR (E&L) 304 Waki J (as he then was)** summarised the threshold as follows:

“Leave may only be granted if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the Applicant the test being whether there is a case fit for further investigation at a full inter partes hearing on the substantive application for judicial review. It is an exercise of the court's discretion but as always has to be exercised judicially...”

19. The court should, therefore, be careful not to delve too deeply into the material evidence and to consider the matter as if it were the substantive application for judicial review. The Applicant is merely required to demonstrate an arguable case worthy of further investigation.

20. The court has considered the material and submissions on record on this issue. The court has noted that the Applicant is seeking leave to apply for judicial review orders to stop or delay criminal proceedings pending the hearing and determination of Nyeri ELC No. 36 of 2016. The Applicant is thus seeking to peg the prosecution of the criminal case against him to the conclusion of the civil case. In other words he wants all aspects of the civil case concluded before 1st and 2nd Respondents could exercise their constitutional and statutory functions.

21. The court is far from satisfied on the basis of the material on record that the Applicant has demonstrated a sound basis for making a criminal investigation by the 1st Respondent and the prosecution by the 2nd Respondent dependent upon the conclusion of a civil case which has been pending in court for about 7 years now. The court is aware that the standard of proof which applies in civil cases is usually lower than the standard applicable to criminal cases. A decision one way or the other in the civil suit may not necessarily determine the course the criminal proceedings may take.

22. The court has duly taken note of the provisions of **Section 193A of the Criminal Procedure Code** which the Attorney General referred to in his notice of preliminary objection. In the case of **Republic v Commissioner of Police and Another ex parte Michael Monari and Another [2012] eKLR Warsame J (as he then was)** declined to stop criminal proceedings against the applicants in the absence of evidence to demonstrate bad faith and abuse of the court process by the Respondents. The court did not find fault with the commencement of criminal proceedings for alleged forgery on an issue which was already the subject of pending civil proceedings. The court held, *inter alia*, that:

“...There is no bar to concurrent criminal and civil jurisdiction and that the evidence available discloses criminal acts and

omissions which must be investigated, prosecuted and determined by a court of competent jurisdiction”.

23. The Applicant also raised additional grounds for impeaching the actions of the 1st and 2nd Respondents. It was contended that the prosecution was malicious, vexatious and an abuse of the court process. It was further contended that these actions were *ultra vires* and that the Interested Party was improperly using the criminal justice system to gain an unfair advantage in the pending civil suit. There is, however, no material on record to demonstrate what kind of influence, if any, the Interested Party has on the 1st and 2nd Respondents. The material on record simply shows that the Interested Party is the Plaintiff in the civil case whereas the Applicant is one of the 4 Defendants. No logical explanation was given as to why the Interested Party would seek to intimidate only one of the 4 Defendants in the suit. There is no indication on record to show that any charges were preferred against the other 3 Defendants.

24. The court has also noted that there is really no material on record from which it may reasonably be concluded that the actions of 1st and 2nd Respondents were malicious or *ultra vires* as alleged. There is no material upon which it may reasonably be concluded that the prosecution is frivolous or vexatious or that it is an abuse of the court process. There is simply no material on record upon which the Appellant may build an arguable case on the various allegations of impropriety he has raised against the Respondents. A court of law would not hesitate to intervene on behalf of an applicant where a criminal prosecution is undertaken without reasonable and probable cause, or where it is undertaken in bad faith or for ulterior motives, or where it would be an abuse of the criminal justice system.

25. In the case of *ex-parte Michael Monari & Another* (*supra*) the court held, *inter alia*, that:

“Under Article 157(4) of the Constitution, the Director shall have power to direct the police to investigate any information or allegation of criminal conduct and it is mandatory for the police to comply with any directions given by the Director of Public Prosecutions. Under Article 157(10) the Director of Public Prosecutions shall not require the consent of any person or authority for commencement of criminal proceedings and shall not be under the directions or control of any person. It is clear in my mind that the police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police need only establish reasonable suspicion before preferring the charges. The rest is for the trial court ...”

26. The court is not satisfied that the Applicant has demonstrated an arguable case so far as the actions of the Respondents are concerned. The court does not agree with the Applicant’s contention that the advice of the Chief Land Registrar (the 4th Defendant in ELC No. 36 of 2016) should have been sought before institution of the criminal charges. No legal authority was cited to back up that submission. On the contrary, **Article 157** creates an independent office of the Director of Public Prosecutions who is not subject to the control or direction of any person or authority, including the Chief Land Registrar. Consequently, the court is not inclined to grant leave merely for the purpose of delaying or scuttling the pending criminal case.

(c) If the answer to (b) is in the affirmative whether such leave should operate as stay

27. The issue of stay was dependent upon leave to apply for judicial review being granted in the first instant. Since the court is not inclined to grant such leave, it would therefore follow that the issue of stay is moot.

(d) Who shall bear costs of the application

28. Although costs of an action or proceeding are at the discretion of the court the general rule is that costs shall follow the event so that the successful party should ordinarily be awarded costs of the action. However, the court is of the opinion that an application to apply for judicial review is usually heard *ex-parte* hence it was not necessary to hear the Respondents and the Interested Party save, perhaps, on the issue of whether or not the leave granted should operate as stay. The court is thus of the opinion that the appropriate order to make is that there shall be no order as to costs.

H. CONCLUSION AND DISPOSAL

29. The upshot of the foregoing is that the court finds no merit in the 1st and 3rd Respondents’ notice of preliminary objection dated 23rd February, 2021 as well as the application for leave to apply for judicial review. The court is not satisfied that the Applicant has demonstrated an arguable case to warrant a further investigation and adjudication of the allegations against the Respondents. Accordingly, the court makes the following orders for disposal of the application and the preliminary objection:

(a) The 1st and 3rd Respondents’ notice of preliminary objection dated 23rd February, 2021 is hereby overruled.

(b) The Applicant’s chamber summons dated 26th January, 2021 for leave to apply for judicial review is hereby dismissed.

(c) There shall be no order as to costs.

30. It is so decided.

Ruling Dated and signed in chambers at **Nyeri** and **delivered** via Microsoft Teams platform this **19th** day of **May 2021**.

In the presence of:

Messrs Odhiambo and Ng’ang’a for the Applicant

Mr. Amalemba for the Interested Party

No appearance for the Respondents

Court assistant – Wario

.....

Y. M. ANGIMA

JUDGE

19.05.2021