



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

JUDICIAL REVIEW NO. 11 OF 2020

MICHEAL MWANGEKA.....APPLICANT

VERSUS

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

DIRECTOR OF CRIMINAL INVESTIGATIONS, VOI..... 2ND RESPONDENT

JUDGMENT

1. Pursuant to leave granted by the court on 30th November, 2020, the Ex-parte Applicant herein, Michael Mwangeka filed the Notice of Motion dated 16th December, 2020. The application is brought under Section 8 & 9 of the Law Reform Act, Sections 4 & 5 of the Office of the Director of Public Prosecutions Act, Order 53 of the Civil Procedure Rules and Articles 2, 10, 22, 23, 25, 27(1), 47, 48, 50, 157(11), 159(2) and 165 of the Constitution of Kenya. The Ex-parte Applicant seeks the following orders:-

(a) An order of certiorari to remove into this Honourable court and quash the decision of the 1st Respondent to institute criminal proceedings against the Ex-parte Applicant through criminal case no E094 of 2020-Voi following an investigation by the 2nd Respondent namely an inquiry into an allegation of Commission of offence of forcible detainer contrary to Section 91 of the Penal Code.

(b) An order of prohibition directed against the 1st respondent, by himself, his servants and/or agents or any other officer for the time being seized of hearing or the conduct of Criminal case No. E094-Voi from trying and/or carrying on any further proceedings on the matter pending the full hearing and determination of this application and/or the further orders of this court.

(c) That the cost of this application be provided for.

2. The application is based on the grounds set out in the statutory statement and the verifying affidavit of the Applicant filed herewith and the annexures thereto.

3. None of the Respondents filed any response to the application even though they were duly served with the application.

4. The Ex-parte Applicant averred that criminal proceedings have been commenced by the 1st Respondent on the basis of malice and in the absence of proper factual foundation or basis against the Ex-parte Applicant following an impartial investigation by the 2nd Respondent on the alleged commission of the offence of forcible detainer contrary to section 91 of the Penal Code. The Ex-parte Applicant averred that he is also the plaintiff and the complainant in Criminal case No. E94 of 2020-Voi is the Defendant in a suit for adverse possession that is before the principal magistrate's court in Voi which was filed as ELC Case No. 25 of 2018(OS) and instituted on 12th October, 2018. That in Criminal Case No. 94 of 2020-Voi, the main complainant is one Esther Kemunto who is also the defendant in ELC suit No. 25 of 2018-Voi. The Ex-parte Applicant stated that he has been in actual possession of land parcel number 15031/26 measuring 0.67 hectares situate in Void within Taita Taveta County since February, 2002 and the same is the subject matter of ELC case No. 25 of 2018-Voi that is pending before the Principal Magistrate's court in Voi and in which the complainant in the said Criminal case is the defendant in the civil case. It is contended by the Applicant that the question of ownership of the suit property in ELC case no. 25 of 2018-Voi can only be determined by a court of competent jurisdiction. That the criminal process and the resultant court proceedings are being used to settle what is otherwise a civil dispute between the Ex-parte applicant and the complainant which is still the subject of the pending court case. Further, that the use of the criminal process in the matter is not only an abuse of the court process, but is also malicious and meant to coerce the applicant to withdraw his civil suit.

5. The ex-parte applicant further stated that upon being charged with the offence of forcible detainer, the complainant in that criminal case who is also the defendant in the civil suit showed up with goons and proceeded to destroy several fixtures on the suit property as well as making several threats of actual physical harm to both the ex-parte applicant and his family. That the ex-parte applicant made a report involving vandalism of his property and threat of physical harm to him and his family to the 2nd respondent but that no action was taken by the police. That the failure by the 2nd respondent to take any action to protect the rights of the ex-parte applicant necessitated him to file ELC suit no 25 of 2018-Voi. That the suit came up for hearing on 3rd August, 2019 whereby the ex-parte applicant and his witness testified and was slated for defence hearing on 26th October, 2020. However, on 10th October, 2020, the 2nd respondent moved to arrest the ex-parte applicant as a consequence of a complaint made by Esther Kemunto. It is contended by the ex-parte applicant that the investigating officer in the criminal case did not make any inquiries or investigations as to the reports made and concluded investigations within five days of the making of the complaint. The ex-parte applicant averred that the criminal investigations and the subsequent criminal proceedings instituted by the 1st respondent, if allowed to proceed then the same will have been done impartially, maliciously and against Article 159 of the Constitution with regard to the need to prevent and avoid abuse of the legal process. That the 1st respondent directing the ex-parte applicant to stand trial violated the fundamental principles of justice which underlie the society's senses of fair play and decency. That Articles 25, 50 and 157(11) of the Constitution are being undermined by the 1st respondent charging the ex-parte applicant with the offence of forcible detainer contrary to section 91 of the Penal Code only serves to undermine public interest and administration of justice. That the launching of the said prosecution is an outright abuse of the legal process and invites the court's supervisory jurisdiction to be invoked under article 165 of the constitution of Kenya 2010 to give directions to protect the applicant's fundamental rights and freedom and ensure fair administration of justice. The ex-parte applicant averred that he was discriminated against by the 2nd respondent in recommending his prosecution when the issue of ownership of the suit land is yet to be determined by a court of competent jurisdiction. That the recommendation by the 2nd respondent to prosecute the ex-parte applicant is unreasonable, irrational, premature, unfair and an abuse of the court process. The applicant urged the court to allow the application. The ex-parte applicant has annexed copies of several documents in support of his case. These include the certificate of the title number 69638 being subdivision number 15031/26 in the name of Esther Kemunto Oyaro, pleadings in ELC No. 25 of 2020-Voi, charge sheet in criminal case no 94 of 2020-Voi, summonses, statements, proceedings, letters, photographs among other documents.

6. I have considered the application. The issue that arises for determination is whether the orders sought herein should be granted or not. The ex-parte applicant's case is that he has been in actual possession of the parcel of land number 15031/26 measuring 0.67 hectares situate in Voi since February 2002 and that he filed ELC case No. 25 of 2018-Voi seeking adverse possession which case is part-heard. He further averred that the said case was slated for defence hearing on 26th October 2020. However, the defendant in the civil suit lodged a complaint against the applicant on 5th October, 2020 and the complaint was hurriedly undertaken by the 2nd respondent and within five days, the ex-parte applicant was arrested and arraigned in court on 12th October, 2020 and charged with the offence of forcible detainer of the said land contrary to Section 91 of the Penal Code in Voi PMC Criminal Case No. E094 of 2020. The complainant in the said criminal case is the defendant in the civil suit that has been in court since the year 2018 and is yet to be determined. It is the ex-parte applicant's contention that the criminal case was instituted impartially, and maliciously, and that his prosecution by the 2nd respondent is unreasonable, irrational, premature, unfair and an abuse of court process and designed to coerce the applicant to withdraw his civil suit. In a nutshell, the ex-parte applicant is accusing the respondents of abuse of prosecutorial powers.

7. The principles and circumstances under which the court will grant order prohibiting the commencement or continuation of a criminal trial process are well settled. In this respect, the court ought not to usurp the constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The merits of the case, and particularly whether the criminal proceedings have a likelihood of success, or that the applicant has a good defence is also not a good ground for halting criminal proceedings by way of judicial review. However, if an applicant demonstrates that the criminal proceedings constitute an illegality or abuse of process, this court will not hesitate in putting a halt to such proceedings, as that fall squarely within its mandate as a judicial review court. Further, the concurrent existence of criminal proceedings and civil proceedings would not, *ipso facto*, constitute an abuse of the process of the court as recognized by Section 193A of the Criminal Procedure Code, 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 a collateral purpose other than its legally recognized aim.

8. In **Republic –v- Commissioner of Police and Another ex-parte Michael Monari & Another (2012) eKLR**, it was held 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 only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene”.

9. In **Joram Mwenda Guantai –v- The Chief Magistrate (2007) 2EA 170**, the Court of Appeal explained the applicable principles inter alia, as follows:-

“...Equally so, the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has the inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court.”

10. The Court of Appeal in **Commissioner of Police and Director of Criminal Investigations Department-v- Kenya Commercial Bank and others (2013) eKLR** also held as follows on concurrent criminal and civil proceedings on the same issues:-

“While the law (section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal

proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that the power must be exercised responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings? It is not in the public interest or in the interest of administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and travesty of justice for the police to be involved in the settlement of what is purely dispute litigated in court....”

11. The question that therefore need to be answered by this court is whether the criminal proceedings against the ex-parte applicant were brought in abuse of the respondents’ powers, were unreasonable, or were motivated by improper motives. In this respect it is not disputed that there was a civil case filed by the ex-parte applicant over the subject matter of the prosecution. That civil case is said to be part-heard and was due for defence hearing when the ex-parte applicant was arrested and prosecuted. It is thus proper and justified in the circumstances to conclude that the prosecution of the ex-parte applicant was an abuse of prosecutorial powers and unreasonable. In my view, the prosecution of the ex-parte applicant was undertaken for the improper purpose and ulterior motive of unprocedurally circumventing and the undermining the civil case, but also to coerce him to withdraw that suit.

12. In the result, I find that the Notice of Motion dated 16th December, 2020 is merited and the same is allowed in terms of prayers 1 and 2 thereof. Since the application was not opposed, I make no orders as to costs.

13. Orders accordingly.

DATED, SIGNED and DELIVERED virtually at MOMBASA this 15th day of June, 2021.

HON C. K. YANO

JUDGE

IN THE PRESENCE OF:

Kiwinga, Counsel for the Applicant

Court Assistant: Yumna Hassan.