Republic v Director of Public Prosecution & another; Mwangi (Interested Party); M'Mutigah (Exparte) (Application E009 of 2024) [2025] KEHC 8692 (KLR) (12 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8692 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

APPLICATION E009 OF 2024

J NGAAH, J

JUNE 12, 2025

BETWEEN

REPUBLIC ..... APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTION ..... 1ST RESPONDENT

NATIONAL POLICE SERVICE ..... 2ND RESPONDENT

AND

ANTHONY IRUNGU MWANGI ..... INTERESTED PARTY

AND

DAUGLAS KITHINJI M'MUTIGAH ..... EXPARTE

JUDGMENT

1. The application before court is a motion dated May 2, 2024 expressed to be brought under order 53 rule 1(1), (2), (3) and (4) of the Civil Procedure Rules. The applicant prays for an order for prohibition which is couched as follows:

> " 2. An order of prohibition by way of Judicial Review to stay criminal proceedings or prohibit the Respondents from pursuing the criminal charges against the Exparte Applicant Douglas Kithinji on issues related to the ownership or acquisition of plot No. Mombasa/Ziwa la Ngombe/815, which forms the basis of Mombasa Chief Magistrates Land and Environment Case No. 1504 of 2022 Douglas Kithinji -vs- Anthony Irungu Mwangi & 3 others."

2. The application is based on a statutory statement dated May, 2024 and an affidavit verifying the facts relied upon sworn by the applicant on even date. The applicant has sworn that he is an adult male aged

79 and that he is a resident of Ziwa la Ng'ombe Squatter Settlement Scheme at Bombolulu where he was allocated land identified as plot no. 2133 by the department of Land Adjudication and Settlement. He fenced off his plot and has since constructed a residential house on the plot. Since then he has been living on the plot. However, the applicant has alleged that his parcel of land was illegally subdivided into plot nos. 815 and 771.

3. In the year 2021, the applicant was summoned by police officers at Nyali police station to answer to allegations that he had trespassed on to the interested party's land. The applicant was then charged at Shanzu Law Courts.

4. The applicant subsequently filed a civil suit in the Chief Magistrates Court at Mombasa being Civil Case No. E544 of 2022 for the court to determine, among other things, ownership of the land in question. Despite the pendency of the civil case, the applicant is being prosecuted for the offence of forceful detainer. It is against this background that the applicant has filed the instant suit.

5. Although in her submissions, Ms. Anyumba, the learned counsel for the respondent, has referred to a replying affidavit filed in response to the application, I have not been able to locate the affidavit on the case tracking system portal; neither has any hard copy been filed at the registry. That notwithstanding, the applicant still bears the burden of persuading this Honourable Court to exercise its discretion in his favour.

6. A copy of the charge sheet exhibited to the applicant's affidavit shows that the applicant was charged on April 6, 2021 with the offence of forcible detainer contrary to section 91 of the *Penal Code*, cap. 63. The particulars in the charge sheet have been captured as follows:

> "On diverse dates between 16/09/2017 and 15/12/2019 at Bombolulu area in Nyali sub county within Mombasa county being in possession of plot no. Msa/Ziwa la Ngombe Shem 1815 of Antony Irungu without color of right held in possession of the said land in a manner likely to cause a breach of peace or reasonable apprehension of the peace against Antony Irungu who was entitled by law to possession of the said plot."

7. This suit was filed on May 6, 2024, more than three years after the applicant was charged.

8. It is trite that judicial review remedies are discretionary. The court has a discretion whether to grant a remedy at all and, if so, the form of remedy it may grant. In exercising its discretion whether or not to grant a judicial review remedy, the court will take account such factors as the conduct of the party applying, and consider whether it has been such as to disentitle him to relief.

9. Undue delay (see Caswell v Dairy Produce Quota Tribunal for England and Wales [1990] 2 AC 738, [1990] 2 All ER 434, HL.), unreasonable or unmeritorious conduct (R v Crown Court at Knightsbridge, ex p Marcrest Ltd [1983] 1 All ER 1148), acquiescence in the irregularity complained of (R v Secretary of State for Education and Science, ex p Birmingham City Council (1984) 83 LGR 79) or waiver of the right to object (R v Williams, ex p Phillips [1914] 1 KB) may all result in the court declining to grant relief.

10. Another consideration in deciding whether or not to grant relief is the effect of doing so (R versus Brent Health Authority, ex p Francis [1985] QB 869, [1985] 1 All ER 74,). Factors which may be relevant include whether the grant of the remedy is unnecessary (R v GLC, ex p Blackburn [1976] 3 All ER 184) or futile(R v Secretary of State for Social Services, ex p Association of Metropolitan Authorities [1986] 1 All ER 164), whether practical problems, including administrative chaos and public inconvenience (Chief Constable of the North Wales Police v Evans [1982] 3 All ER 141; R v Paddington Valuation Officer, ex p Peachey Property Corpn Ltd [1964] 3 All ER 200 at 208), would

result, the effect on third parties (R v Panel on Take-overs and Mergers, ex p Datafin plc [1987] QB 815 at 842,), and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment(R versus Peak Park Joint Planning Board (1976) 74 LGR 376 at 380, DC, per Lord Widgery CJ).

11. There are also circumstances when it is necessary that the application for judicial review be filed as soon as the grounds for review arise. It has been held that wherever there is a failure to act promptly in such circumstances there is 'undue delay'. And where there has been undue delay in making an application for judicial review, the court may refuse permission for the application to be brought or may refuse a remedy at the substantive hearing, if it considers that granting the remedy sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration. (See Caswell v Dairy Produce Quota Tribunal for England and Wales (1990) 2 AC 738).

12. In the applicant's case, no reason has been given for what is obviously inordinate delay in seeking judicial review relief of prohibition. To file the suit three years after the event complained of does not only speak of undue delay but also, it may as well connote unreasonable or unmeritorious conduct on the part of the applicant; acquiescence in the irregularity complained, assuming there was any irregularity; and waiver of the right to object.

13. Even then, an order of prohibition, which is the only prayer of judicial review relief the applicant has sought in his application, without quashing the decision to charge the applicant would not be of much help to him.

14. In the absence of any prayer to quash the decision to charge the applicant, it is legitimate to conclude that the applicant has no reason to have the decision to charge him quashed. That being the case, and since there is nothing untoward in the criminal proceedings against the applicant, there would be no reason to stop criminal proceedings arising from the decision that has otherwise been validly made.

15. In any event, the court in which the appellant has been charged and which is now presiding over the prosecution of the applicant has not been joined to this suit. Issuing an order to stop the court from proceeding with the case against the applicant when the court has itself not been joined to this suit is tantamount to condemning it unheard.

16. I note from the statutory statement that the only ground of judicial review upon which the relief for prohibition is sought is that of illegality. However, none of the grounds for judicial review including the ground of illegality has been demonstrated to exist.

17. Turning to the ground of illegality, it is one of the three traditional grounds of judicial review. It has been defined in Council of Civil Service Unions versus Minister for the Civil Service (1985) A.C. 374,410 in the following terms:

> "By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable". (per Lord Diplock).

18. As noted, the applicant has not sought to impeach the decision to charge him by way of an order of certiorari. Thus, whether the decision could be quashed on ground of illegality or on any other ground of judicial review, for that matter, need not even arise.

19. But even if the applicant was to be given the benefit of doubt, on the validity of the decision to charge him, it has not been demonstrated that the decision maker did not understand the law authorising him to charge the applicant correctly. It has neither been demonstrated that he exercised his discretion contrary to the applicable law nor that he did not give effect to it.

20. In the final analysis, I am not satisfied that the applicant's application is merited. There is no basis to prohibit the court in which the applicant is charged from proceeding with criminal trial against the applicant. The applicant's application is, thus, dismissed. I make no order as to costs. It is so ordered.

SIGNED, DATED AND CIRCULATED ON THE CTS ON 12 JUNE 2025

NGAAH JAIRUS

JUDGE