



**REPUBLIC OF KENYA**

**IN THE LAND AND ENVIRONMENT COURT**

**AT NAKURU**

**ELC CASE NO. 185 OF 2016**

**TAHIRA BEGUM LUIS (SUING AS THE EXECUTRIX OF**

**VINCENTAGHOSTINO RAPHAEL LUIS) .....PLAINTIFF**

**VERSUS**

**PETER MUCHIRI MWANGI.....1<sup>ST</sup> DEFENDANT**

**HON. ATTORNEY GENERAL OF THE REPUBLIC OF KENYA..2<sup>ND</sup> DEFENDANT**

**THE DISTRICT LAND REGISTRAR NAKURU.....3<sup>RD</sup> DEFENDANT**

**LEGAL OPINION**

1. The 1<sup>st</sup> Defendant herein *vide* a Notice of Motion dated 18<sup>th</sup> June 2021 sought the following orders:

1. *Spent*

2. *Spent*

3. *THAT pending the hearing and determination of this suit, this Honourable Court be pleased to issue an order barring the Plaintiff, their agents, or servants, DCIO from Nairobi and Njoro from summoning him to the DCIO Office, harassment and/ or subjecting him to any criminal charges or investigations in relation to ownership of parcel number 1139 (new no. 1057) Plave settlement scheme. The cost of the application be provided for.*

2. The application was supported by the grounds set out on the face of it and the affidavits of Peter Muchiri Mwangi, (hereinafter 'the Applicant') dated 18<sup>th</sup> June 2021 and 14<sup>th</sup> July 2021, respectively.

3. In this ruling, the Plaintiff shall be referred to as the 1<sup>st</sup> Respondent, while the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants shall be referred to as the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, respectively.

4. The Applicant contended that the Plaintiff had been using the Office of the DCIO to harass him in total disregard of the court order of 24<sup>th</sup> February 2020, ordering both parties to maintain status quo. He says that he had been summoned to the DCIO's office on several occasions even though the matter is pending in court. The Applicant averred that he believed that the reason for the 1<sup>st</sup> Respondent filing the complaint is to scare him so that she could sell the disputed land, which she had already advertised.

5. The 1<sup>st</sup> Respondent filed Grounds of opposition and Replying Affidavit both dated 29<sup>th</sup> June 2021. The gist of the Grounds of Opposition was that a suit before the Environment and Land Court does not bar the DCIO from carrying out investigations.

6. In her Replying Affidavit, the 1<sup>st</sup> Respondent contended that the provisions of Order 40 Rules 1,2 and 4 of the Civil Procedure Rules 2010 cited by the Applicant are not applicable in this case. This is because, the 1<sup>st</sup> Respondent says, first, there is no imminent danger of the property being wasted, damaged, or alienated and secondly that the orders envisaged under the said provisions apply where the court is moved to restrain acts of the Defendant.

7. The 1<sup>st</sup> Respondent also contended that this court had not barred any *bona fide* criminal investigations against any party to the suit and that

it was never the intention of the order to maintain status quo. She contended that she had no authority to influence the functions of the DCIO and she was entitled to lawfully register a complaint.

8. The Respondent also contended that the Applicant was in effect asking this court to interfere with the functions of the DCIO, which this court should not interfere with unless there are cogent reasons for doing so.

9. She contended further that the investigations by the DCIO would unearth material which will form the basis of the decisions to commence or not to commence prosecution against the Applicant. That the Application was speculative since no criminal prosecution had commenced and the mere fact that the Plaintiff had filed the present suit was not ground for halting investigations.

10. That unlike the Applicant who only had title documents, the 1<sup>st</sup> Respondent contended that she and her late husband lived on and cultivated the suit property and obtained a title in 1986. It would therefore be prudent for the DCIO to investigate the circumstances under which the Applicant acquired the title.

11. The 1<sup>st</sup> Respondent cast doubts on how the Applicant came to acquire title and argued that her suspicions are well-founded. That it was only the DCIO that can investigate the matter. She believed that the Applicant will not suffer any prejudice if it was found that there was no fraud on his part.

12. She reiterated that the Applicant's application was speculative since no statement had been recorded from the Applicant for purposes of recommending prosecution. That the DPP would not be bound by recommendations by the DCIO to charge the Applicant, and there was no evidence that the DCIO would carry out illegal investigations and that no material had been placed before the court to demonstrate that the DPP intended to charge the Applicant.

13. She restated that there was no cogent reason for the court to stop the investigation and no order had been issued by the court previously to bar criminal investigations against the Applicant.

14. The 1<sup>st</sup> Respondent further contended that the application was meant to delay the expedient determination of the case. That the pendency of a suit before this court does not bar the DCIO from investigating suspected criminal acts. She cited Section 193A of the Criminal Procedure Code to the effect that the mere pendency of a Civil matter was not sufficient ground to scuttle the institution of prosecution of criminal proceedings against a suspected offender and criminal proceedings instituted concurrently.

15. The 2<sup>nd</sup> Respondent filed a Replying Affidavit sworn by No. 81446 PC Alex Muinde- the Investigating Officer in the complaint that is the subject of the present application.

16. He contended that he commenced investigations upon receiving a complaint from the Principal Secretary Ministry of Land to investigate allegations of fraud by the Applicant in relation to the suit property. That the Directorate of Criminal Investigations also received a complaint from the 1<sup>st</sup> Respondent's Advocates requesting that investigations be conducted into the ownership of the suit property. That investigations commenced on 23<sup>rd</sup> April 2021 when he recorded the 1<sup>st</sup> Respondent's statement.

17. He stated that upon recording the statement, the DCIO sought documents relating to the parcel of land from the Ministry of Lands to aid with the investigations, which upon being analyzed showed the history of the ownership of the suit property.

18. From his investigations, he stated the suit property belonged to the 1<sup>st</sup> Respondent and that although the Applicant owned an adjacent parcel of land, the Applicant had gone ahead to alter and falsify his documents calculated to indicate that he had also been allocated the suit property.

19. From the foregoing, the issues for determination are as follows:

1. Whether the application was brought prematurely?

2. Whether the present suit operates as a bar to investigations by the DCIO and consequently, whether this court can prevent the DCIO from carrying on its statutory duty.

20. On the first issue, the 1<sup>st</sup> Respondent argues that the application is speculative since the Applicant is yet to be charged with any offence. From the Replying affidavit of the Investigating Officer, the DCIO seems to have reached the conclusion that the 1<sup>st</sup> Respondent is the rightful owner of the suit property and that there is culpability on the part of the Applicant. The Affidavit at paragraph 12 states as follows:

*That the Investigation shows that whereas Peter Muchri Mwangi was dully allocated Number NAKURU/PIAVE SETTLEMENT SCHEME/1056 (OLD NUMBER 1140) in 1980, he has gone ahead to alter and falsify his documents calculated to indicate that he was allocated the parcel of land NAKURU/PIAVE SETTLEMENT SCHEME/1057*

21. Whereas the Applicant is yet to be charged, the above is sufficient proof that the present application is not speculative. Additionally, the main suit before the court seeks to establish how both parties possess some form of title over the property and the authenticity of the title allegedly held by each party.

22. In the case of **Lalchand Fulchand Shah v Investments & Mortgages Bank Limited & 5 others [2018] eKLR**, the Court of Appeal held that the court could interfere with criminal investigations that are conducted with the sole purpose of otherwise determining a matter before a

civil court. The court stated as follows:-

**In light of the foregoing, we find that the appellant's act of lodging the complaint that led the 2nd respondent to institute investigations was an afterthought and if allowed to its conclusion, it would in fact infringe the 1st respondent's fair trial and is an abuse of court process as correctly observed by the learned judge. We therefore find no reason to disagree with the reasoning and conclusions of the learned judge. Accordingly, this appeal is hereby dismissed with costs. It is so ordered.**

23. From the above passage, it is my view that there need not exist criminal charges for the Applicant to seek intervention by the court. The sole existence of investigations by the Director of Criminal Investigation is sufficient for the Applicant to seek intervention.

24. On the second issue, the starting point should be that the concurrent investigation of a suspected crime and/ or existence of criminal proceedings is permitted by law under Section 193A of the Criminal Procedure Code. The exception is where the said investigations or proceedings are meant to force the Applicant to submit to the civil claim in which case the institution of the criminal process would have been to secure the outcome of the civil process which is not the legally recognized aim.

25. In the case of *Commissioner of Police & The Director of Criminal Investigation Department & another v Kenya Commercial Bank Limited & 4 others [2013] eKLR* the Court of Appeal found that criminal proceedings conducted with a view of influencing the outcome of civil proceedings were not in the interest of Justice. It was thus stated:

**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 that 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 the administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and a travesty of justice for the police to be involved in the settlement of what is purely a civil dispute being litigated in court.**

26. I must note that there have been prior proceedings between the two parties involving the said parcel of land, which saw the suit property expunged from the Certificate of Confirmation of Grant issued to the Plaintiff in 2015. It is persuasive to note that from the date of the said ruling when the 1<sup>st</sup> Respondent became aware of the contested ownership and existence of an alleged title by the Applicant, it is only in 2020 and four years after filing the present suit that the Plaintiff sought to have the matter investigated by the DCIO.

27. What then is the purpose of the investigation? In my view, it appears that the motivation behind the investigation is to otherwise determine ownership of the property through the criminal process, which is essentially the issue before this court. This court has its own mechanisms of examining the issue and reaching its own conclusion.

28. The upshot is that the application dated 18<sup>th</sup> June 2021 has merit and is hereby allowed. Accordingly, pending the hearing and determination of this suit, the DCIO from Nairobi and Njoro, their agents and servants are hereby barred from summoning the 1<sup>st</sup> Defendant to DCIO Office and/ or subjecting him to any criminal charges or investigations in relation to ownership of parcel number 1139 (new No. 1057) Piave Settlement Scheme pending the hearing and determination of this suit.

29. Costs shall be in the Cause.

**RULING DATES SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 30TH DAY OF SEPTEMBER 2021.**

**J M MUTUNGI**

**JUDGE**