



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MILIMANI**

**ELC JR 16 OF 2021**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR**

**JUDICIAL REVIEW ORDERS OF PROHIBITION, CERTIORARI & MANDAMUS**

**AND**

**IN THE MATTE ROF ENFORCEMENT OF CONSTITUTIONAL RIGHTS PURSUANT TO ARTICLES 22,**

**12, 24, 25, 40, 48, 157, & 243 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE NATIONAL POLICE ACT**

**AND**

**IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT**

**AND**

**IN THE MATTE ROF THE LAW REFORM ACT, SECTIONS 8 &9 CAP 26 LAWS OF KENYA**

**REPUBLIC.....APPLICANT**

**-VERSUS-**

**INSPECTOR OF GENERAL OF THE NATIONAL POLICE SERVICE.....1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTIONS.....2<sup>ND</sup> RESPONDENT**

(Chamber Summons Application dated 22<sup>nd</sup> September 2021 – being an application for

leave to apply for the Judicial Review orders of Certiorari and Prohibition)

**RULING**

**Background.**

1. The ex-parte Applicants are seeking leave of the Court under the provisions of Order 53 of the Civil Procedure Rules, Sections 8 & 9 of the Law Reform Act and Sections 1A, 3 and 3A of the Civil Procedure Act, to apply for the Judicial Review Orders of Certiorari and Prohibition. They further pray that the leave so granted to operate as a stay of further summoning, interrogation and investigation of the ex-parte Applicants by the Respondents. The Respondents in this matter are the Inspector General of the National Police Service and the Director of Public Prosecutions.

2. The Applicants have an interesting prayer number 5. The Applicants pray that in the alternative, this Honourable Court gives an order directing the Director of Criminal Investigations (DCI) to charge the Applicants in a court of law within 7 days and or terminate the said

investigations.

3. The Application is based on the grounds on the face of the Application enumerated as (a) to (o), the statement of facts, the verifying affidavit and the annexures thereof.

4. The Respondents on their part are represented by the office of the Honourable Attorney General. The Respondents came on record after the Court exercised its discretion under the proviso to rule 1 of Order 53 of the Civil Procedure Rules directing the service of the Application by the ex parte Applicants before the hearing. They oppose the Application wholesomely. They are opposed to both the granting of leave and to the prayer that leave (if granted) to operate as a stay of the investigations against the ex-parte Applicants.

#### **Court's Directions.**

5. The directions by the Court were that the Application be canvassed by way of written submissions. The ex-parte Applicants submissions were filed in court on 30<sup>th</sup> November 2021. The Respondents did not any objection to the application; neither did they file any submissions.

#### **Submissions by the parties.**

6. In their submissions, the ex-parte Applicants invite the Court in considering their application to be guided by the Court of Appeal decision in **Commissioner of Police Vs the Director of Criminal Investigations & Another Vs Kenya Commercial Bank & 4 Others (2013) eKLR** where the court pronounced itself as follows:

**” While the law 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.**

**.....It is not in the public interest or in the interest of the administration of justice to use the 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.”**

7. The ex-parte Applicants aver that the purported investigation against them in respect of their land is a travesty of justice, an abuse of police powers and is not being done in good faith. They argue that it should be stopped by this court. The Ex-parte Applicants have never been shown and explained to in details the nature of the complaints against them. They have also never been told who the complainant against them is.

8. The Applicants make further reference to the above cited Court of Appeal case where the court went further to state that:-

**“We now turn to the crux of this appeal – whether or not the court can prohibit the police from conducting investigations into an alleged crime.**

**.....For the purpose of this appeal, we shall focus on the role of police in the investigation of crime and the extent, if at all, to which the court can interfere with Article 157 (4) and (11) of the Constitution.**

**If it comes to the attention of the court that there has been a serious abuse of power, it should in our view, express its disapproval by stopping it, in order to secure the ends of Justice and restrain abuse of power that may lead to harassment or persecution. It has further been held that an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by law and the decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score settling or vilification. The court has the power to interfere with such investigations or prosecution.”**

9. The Applicants submit that the decision of the police to write to the Registrar of lands to stop further transactions in respect of their land was done with malice and utmost bad faith. Further, the fact that the investigations seems to be indefinite –with no end in sight, can only be defined to be unreasonable and as such the same is amenable to oversight by this Honourable court.

#### **Issues for determination.**

10. In the court's opinion, the issues for determination in this matter are: -

**a. Whether as ex parte applicant should be granted leave to apply for the Judicial Review Order of certiorari to remove into this court and quash the investigations conducted by the 1<sup>st</sup> Respondent against the ex parte Applicants in respect of parcels of land L.R No. 3811/67, 3811/68 and 3811/69 .**

**b. Whether the ex-parte Applicants should be granted leave to apply for the Judicial Review Order of prohibition to prohibit the Respondents from summoning, interrogating and or investigating the ex-parte applicants in respect of L.R No. 3811/67, 3811/68 and 3811/69.**

**c. Whether leave (if granted) should operate as a stay.**

**d. Whether in the alternative, the Court should give an order directing the Director of Criminal Investigations to charge the Applicants in Court.**

**e. Who should bear the costs of the application?**

**Analysis and Determination.**

11. This Court is conscious of its responsibility at this stage of the proceedings. Justice Waki, (as he then was) eloquently explained the role of the Court when considering an application for leave to apply for orders of Judicial review, in the case of **Republic Vs County Council of Kwale & Another Ex-parte Kondo & 57 others (Mombasa HCMCA No.384 of 1996).**

12. The learned Judge stated that the purpose of an application for leave to apply for Judicial review is :-

**i. Firstly, to eliminate at an early stage any applications for judicial review, that are either frivolous, vexatious or hopeless.**

**ii. Secondly, to ensure that the Applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration.**

13. 'Leave may only be granted therefore, 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 of the substantive application for Judicial review. It is an exercise of the Court's discretion, but as always it has to be exercised judiciously.'

14. The gist of it is that the court may grant leave to an Applicant if on the material presented before it, the Court considers without going into the details of the matter that there is an arguable case for granting the relief that the Applicant claims.

15. Leave will not be granted as a matter of course. Where a court is in doubt whether to grant or not, the wise words of Megarry J, in the case of **John Vs Rees (1970) Ch 345 at 402** comes in handy. He stated that, "*in the exercise of the discretion on whether or not to grant, the Court takes into account the needs of good administration.*"

16. I will now proceed to consider the issues in this matter. I will deal with the 1<sup>st</sup> and 2<sup>nd</sup> issues together.

**A. WHETHER THE EX PARTE APPLICANTS SHOULD BE GRANTED LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION.**

17. The ex-parte Applicants are husband and wife. Both are senior citizens. They are the registered owners of parcels of land known as L.R No. 3811/67, 3811/68 and 3811/69 (originally L.R No. 3811/7) at Githurai 45, within Nairobi City County. They bought the property from Barclays Bank of Kenya (now ABSA), 38 years ago. They have peacefully been in occupation of the land for those many years. Indeed, they have even used the title to their land severally as a security to access financial services.

18. Sometimes in 2019, the Applicants made a decision to subdivide their land. That is how the three parcels mentioned above came to be. However, their endeavors to collect the titles for the three portions were unsuccessful for the reason that the office of the Director of Criminal Investigations (DCI) that falls under the 1<sup>st</sup> Respondent had registered a caveat with the Chief Land Registrar. The basis of the caveat was that there was a complaint by an undisclosed person. Neither the nature of the complaint nor the name of the complainant were disclosed to the Applicants. The Applicants were therefore not issued with titles to their parcels of land and have to-date not been issued with the titles.

19. Since then, 2019, the Applicants have been summoned to the offices of the DCI on numerous occasions. They have recorded statements and supplied all the necessary documents and information requested of them. They have dutifully honoured all the summons by the DCI.

20. For three years, the Applicants have not been informed about the nature of the complaint against them.

For three years, the Applicants have not been informed about the particulars of the Complainant who complained against them.

For three years the Applicants have been waiting for their titles.

For three years, two respectable senior citizens who should be enjoying in their retirement from their hard earned investments have been subjected to mental anguish and torture by the office of the DCI.

21. The two Applicants have now come to this Court seeking leave to allow them apply for the Judicial Review Orders of Certiorari and Prohibition.

22. I am convinced that the complaints by the Applicants are neither frivolous nor vexatious. This court will not stand on their way to pursue justice. I, without hesitation grant them leave to apply for the Judicial Review Orders of Certiorari and Prohibition.

**B. WHETHER THE LEAVE SO GRANTED SHOULD OPERATE AS A STAY**

23. The ex-parte Applicants pray that leave so granted do operate as a stay of further summoning, interrogation and investigation of the ex-

parte applicants by the 1<sup>st</sup> Respondent.

24. The Applicants in their verifying affidavit and statement of facts as well as the grounds in support of the application have explained that they have recorded statements, provided all information and documents requested of them by the DCI. They have at all times religiously honoured the summons by the DCI. What then is the purpose of summoning them and interrogating them further? Three years is enough time by any standards to conduct and conclude an investigation.

25. If the Applicants are culpable, then the 1st Respondent should go ahead and recommend to the 2<sup>nd</sup> Respondent to charge them in a Court of law. The continued summoning of the Applicants by the DCI for three years can only be termed as harassment.

26. I grant the ex-parte Applicants' prayer that the leave so granted do operate as a stay of further summoning, interrogations and investigations of the ex parte Applicants by the 1st Respondent.

**C. WHETHER IN THE ALTERNATIVE THE COURT SHOULD GIVE AN ORDER DIRECTING THE DCI TO CHARGE THE APPLICANTS IN COURT.**

27. From the foregoing, having granted the main prayers, the Court would not grant the alternative prayer.

28. However, it is necessary to state at this point that the office of the DCI does not have the authority to charge and prosecute anyone in a Court of law. The mandate of the DCI ends with investigations. The decision whether to prosecute or not solely belongs to the office of the Director of Public Prosecutions in accordance with the provisions of article 157 of the Constitution. So, the court would not in any event grant the 5<sup>th</sup> prayer as couched in the application by the ex parte Applicants.

**D. WHO SHOULD BEAR THE COSTS OF THE APPLICATION**

29. The costs of this application will abide in the outcome of the main Judicial Review Application.

**Conclusion.**

30. In conclusion, the chamber summons application dated 22<sup>nd</sup> September 2021 is allowed in the following terms:-

**a. Leave be and is hereby granted to the ex-parte Applicants to apply for the judicial review order of Certiorari to remove into this court and quash the investigations commenced by the 1<sup>st</sup> Respondent against the Ex-parte Applicants in respect of parcels of land L.R No. 3811/67, 3811/68 & 3811/69 (original L.R No. 3811/7 situate at Githurai.**

**b. Leave be and is hereby granted to the ex parte Applicants to apply for the judicial review order of prohibition to prohibit the Respondents from summoning, interrogating, and or investigating the ex-parte Applicants in respect of LR No.3811/67, 3811/68 and 3811/69 (original LR No. 3811/7) situate at Githurai.**

**c. The leave so granted shall operate as a stay of further summoning, interrogation and investigation of the ex-parte Applicants by the 1<sup>st</sup> Respondent.**

**d. The ex-parte Applicants shall file the main application for Judicial Review within 21 days from the date hereof.**

**e. The Costs of this Application shall abide in the outcome of the main Application.**

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15<sup>TH</sup> DAY OF DECEMBER, 2021**

**M.D. MWANGI**

**JUDGE**

In the Virtual Presence of:-

No Appearance for the Ex Parte Applicants

Ms. Kihara for the Respondents

Court Assistant: Hilda

**M.D. MWANGI**

**JUDGE**