



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

MISC CIVIL APPLICATION (JR) NO. 2 OF 2018

IN THE MATTER OF: AN APPLICATION BY PERPETUA JOSEPH MUENDO

FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

IN THE MATTER OF: SECTIONS 4 (3) (b), 5 (2) 8 (C), 7 (2) (iii) 9,

11(1) OF THE FAIR ADMINISTRATION ACT NO. 4 OF 2015

IN THE MATTER OF: THE DIRECTOR OF PUBLIC PROSECUTION ACT NO. 2 OF 2013

IN THE MATTER OF: ARTICLES 47, 48 AND 50 OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF: SECTION 91 OF THE PENAL CODE CAP 63 LAWS OF KENYA

IN THE MATTER OF: LAND PARCEL NUMBER LAMU/LAKE KENYATTA 1/2780

SITUATED AT MINI VALLEY AREA IN MPEKETONI

IN THE MATTER OF: MPEKETONI SENIOR RESIDENT MAGISTRATE'S COURT

CRIMINAL CASE NO. 137 OF 2018 REPUBLIC -VS-PERPETUA JOSEPH MUENDO

-VERSUS-

1. DIRECTOR OF PUBLIC PROSECUTION – MPEKETONI

2. THE MPEKETONI SENIOR RESIDENT MAGISTRATE'S COURT

3. THE ATTORNEY GENERAL.....RESPONDENTS

AND

1. MARY A. WANJIKU

2. JAMES NDEGWA KIBAARA.....INTERESTED PARTIES

EX-PARTE

PERPETUA JOSEPH MUENDO.....APPLICANT

Coram: Hon. Justice R. Nyakundi

A.M.Omwancha & Co. Advocates for the Ex-parte Applicant

The Director of Public Prosecution

The Attorney General

Orina & Company Advocates

RULING

This is an Exparte application by the Applicant for an order of prohibition and certiorari against the Respondents more specifically, an inhibitory order of prohibition in respect of Criminal Case No. 137 of 2018 currently on going at Mpeketoni – Magistrate’s Court.

The background to the Petitioner’s application is as follows; -The Petitioner was charged with the offence of forcible detainer contrary to section 91 of the Penal Code as read with section 36 of the Penal Code. The Petitioner according to the facts deponed in the affidavit has lived and occupied Land Parcel No. **LAMU/LAKE KENYATTA/1/2780**. That the said charges were initiated by the 1st Respondent upon a complaint made to the police by one **JAMES NDEGWA KIBAARA** claiming ownership of the said parcel of land. That the Certificate of Title held by **MARY WANJIKU** which became a subject of the conveyance to **JAMES NDEGWA KIBAARA** is averred by the Petitioner to be fraudulent. That for all those years the Petitioner has been pursuing registration of the land in question only to be informed that title had passed to one **JAMES NDEGWA KIBAARA**.

From the perspective of the interested party **JAMES NDEGWA KIBAARA**, in his replying affidavit the land in question is legally and properly registered in his own name. That the land was purchased from one **MARY WANJIKU**, who at the time was the registered proprietor of the parcel of land. Further, the interested party averred that the annexed certificate of title marked as JNK showed it to be a clean title without any restrictions or encumbrances. That on the transfer of land being effected the interested party depones to the effect of being unable to take vacant possession for reason of forcible detainer by the petitioner. The interested party further deposed that the instruments of transfer were effected and registered on 22.7.2009 and discharge of charge on 10.10.2011.

Meanwhile Learned counsel for the petitioner filed written submissions in support of the legal issues involved in the petition for judicial review declarations. The issue herein as submitted by learned counsel is about issuing of a prohibition order for the trial court to have a chance to determine issues as for the sanctity and integrity of the title held by **MR JAMES KIBAARA**.

The suit issue for determination herein is whether the petitioner has satisfied the criteria for grant of orders of prohibition against the initiated criminal proceedings on forcible detainer.

Determination

This is the way I see it. This is a court of law and we do what the law says. We cannot decide cases on sympathy or mercy to any of the disputants. What is being challenged here is the procedure used by the police to investigate the petitioner and subsequent recommendation to the Director of Public Prosecution to initiate and commence criminal charges against the Petitioner. Traditionally, the starting point here it’s ascertainable that the decision make is a public body, and a creature of the constitution. That power as exercised is derived under Article 157 (6) (7) (8) (9) & (10) of the Constitution as further delegated by legislation on the powers and functions of the office. The general rule as stated in **R V Permanent Secretary/Secretary to the cabinet and Head of Public Service Office of the President & 2 Others Exparte Kamanga Nganga[2006]eKLR and R V Judicial Service Commission Misc Civil Application 1025 of 2003**, Courts held as follows;-

“The remedy of Judicial Review is not concerned with reviewing that the merits of the decision in respect of which the application for Judicial Review is made. It is imperative to remember in every case, that the purpose of the remedy of Judicial Review is to ensure that individual is given fair treatment by the authority to which he has been subjected and that it is not part of that purpose to substitute the opinion of the judiciary or the individual judges for that of the authority constituted by law to decide the matter in question.”

It is clear from the judgement in (**Republic V Attorney General and Registrar of Societies Misc Application No. 769 of 2004**), that is the law relating to Judicial review clothes courts with power to interfere with decisions of persons, tribunals, public bodies when their decisions are made and do manifest of an unfair hearing or arbitrariness. It is supervisory rather than appellate jurisdiction. Accordingly, the role of the court is to superintend the exercise of decision making power in order to ensure that it has been exercise lawfully. In considering the threshold grounds for judicial review two comparable land mark cases are of significance **Central Associated Provincial Picture Houses Ltd V Wednesbury Corp [1948] and the Council of Court Service Unions, Minister for the Civil Service[1985] ,in Wednesdaybury Sale Case**. The Court observed the following grinding principles;-Thus

- i. The exercise of discretion must be real and genuine.**
- ii. In exercising a discretion, the decision maker must have regard to relevant matters and must disregard irrelevant matters.**
- iii. A discretion must not be exercised for reasons of bad faith or dishonesty**
- iv. A discretion must be exercised for the purpose for which it was intended**

Whereas in **Council of Civil Service Unions Lord Diplock** outlined that the decisions being impeached by an Exparte applicant or petitioner could be quashed of having been made unreasonably, irrationally or on procedural impropriety.

According to **Lord Greene** a decision is stated

“to be unreasonable if no reasonable authority could ever have come to it.” As regards to irrationality, effecting it means a decision which is outrageous, in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided would have arrived at it.”

Similarly in *Cannock Chase District Council Kelly (1978)AC*. Megwa L J observed:

“Bad faith or as it is sometimes put, lack of good faith, means dishonesty, not necessary for a financial gain or motive. It is that motivation of taking into account matters of law which are irrelevant. Finally, procedural impropriety as a ground acknowledges failure to observe procedural rules laid down in the statute and a failure to observe the rule on natural justice.”

Sir Alfred Denning in 1948 lecture stated;-

“No one can suppose that the executive will never be guilty of the sin’s that are common to all of us. You may be sure that they will sometimes do things which they ought not to do and will not do things that they ought to do. But if and when wrongs are suffered by any of us there is a remedy in judicial review.”

Given the nature of the remedies, the ex-parte applicant must be in the first instance demonstrate he has a case as an arguable case as to title to land. Incidentally, on matters pleaded as of now, the petitioner was yet to be registered as a proprietor of the disputed parcel of land LR Lamu/Lake Kenyatta/1/2780 situated at mini valley area.

In normal circumstances where a person is the registered proprietor of a parcel of land it is admitted prima facie and explicit as such that the holder of title to that interest has a clean title until the contrary is proved. It will be remembered that either in civil or criminal proceedings one of the realistic issue to be dealt with is who between the Exparte applicant and the interested parties has in possession legal title. Unfortunately, unlike the interested parties it is clear that the Exparte applicant admits for having not obtained registration of land to her benefit. The registrable rights to own that parcel of land are yet to be crystallized effectively on any tenure system in Kenya.

In common with other prerogative remedies, a prohibition order is discretionary in nature. Whether or not it is made will depend upon the particular circumstances of the case. It may or may not be made unless the Exparte applicant satisfies the threshold in *Kenya National Examination Council V R Exparte Geoffrey Gathinji – Njoroge & 9 Others [1997]eKLR* in which the Court stated as follows;-

“What does an order of production do and when will it issue” It is an order from the High Court directed to an inferior tribunal or body which forbids the tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not however lie to correct the course, practice, or procedure of an inferior tribunal or a wrong decision on the merits of the proceedings. In the opinion of the Court in *Kuria & Others V AG*;-

“An order of prohibition should be granted where there is an abuse of the process of the court, which will have the effect of stopping the prosecution already commenced. A prerogative order is an order of a serious nature and cannot and should not be granted lightly. There should be concrete grounds that continued prosecution of a criminal case manifests an abuse of the judicial procedure, such that the public interests could be best served by the staying of the prosecution”

So the question is whether the Exparte applicant is right in her characterisation of the claim as a judicial review. In the affidavits filed the Exparte applicant is challenging the initiated criminal proceedings at the behest of the complainant, one **JAMES KIBAARA**. In the replying affidavit both interested parties made a little headway in general terms to demonstrate to the court the genealogy of the root title and subsequent registration in favour of the 2nd interested party herein **JAMES KIBAARA**. The in depth analysis of the nature of the claim as by law required could be laid bare either in the ELC forum or as a defence to be raised in the criminal trial.

From that, it follows that the remedies applied for by the Exparte applicant are not necessary conclusive for this court to grant stay or a writ of prohibition against the decision made by the Director of Public Prosecution to initiate a criminal charge before the Senior Resident Magistrate Court at Mpeketoni. The Exparte applicant merely sought these declarations to avoid her participation in the trial already in motion. I would interpret this submission for the writs of prohibition and certiorari as of no substance to trigger exercise of discretion attendant upon judicial review remedies. There is no evidence of a proceedings commenced against the Exparte applicant as being tainted with illegality of procedure in which a decision was reached by the police and subsequent the Director of Public Prosecution as being defective for reason of impropriety, bad faith, unreasonableness, or irrationality.

It may help to dismiss the application for want of merit that the focus is rather shifted to the appropriate forums to establish that claim conclusively. For the reasons stated none of the prerogative writs are available for the benefit of the Exparte applicant. That case as set out is untenable and in accordance to the law dismissed with no orders as to costs.

DATED SIGNED AND DELIVERED AT GARSEN THIS 5TH DAY OF MAY, 2021

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R NYAKUNDI

JUDGE

In the presence of

1. Mr. Omwancha for the Applicant present

2. Mr. Mwangi for the state

(amomwanchaadvocates@gmail.com)