



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

PETITION E005 OF 2021

IN THE MATTER OF ARTICLES 1, 2, 3, 19, 20, 21, 22, 23, 27, 28, 29, 40, 47, 48, 50, 60, 64, 73, 157, 159, 160, 162, 165, 169, 232, 239, AND 258 OF THE CONSTITUTION OF KENYA, 2010.

AND

IN THE MATTER OF SECTION 6 OF THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS ACT, 2013.

AND

IN THE MATTER OF SECTION 2 AND 4, OF THE FAIR ADMINISTRATIVE ACTIONS ACT, No. 4 of 2015.

AND

IN THE MATTER OF SECTION 193A OF THE CRIMINAL PROCEDURE CODE, CAP. 75

AND

IN THE MATTER OF NYAHURURU CHIEF MAGISTRATE’S COURT CRIMINAL CASE NO. E456 OF 2021

AND

IN THE MATTER OF PROSECUTION COMMENCED FOR VEXATIOUS PURPOSES AND/OR PROCEEDINGS

BETWEEN

IBRAHIM MACHARIA MWANGI.....1ST PETITIONER

DAVID MAINA WAIGWA.....2ND PETITIONER

AND

NYAHURURU CHIEF MAGISTRATE’S COURT.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

AND

DANIEL K. CHEMON.....INTERESTED PARTY

RULING

1. By a notice of motion dated 28/05/2021, the Applicants seek orders interim of prayer No. 3 which is to the effect that Nyahururu CM’s E456/021 Republic vs Ibrahim Macharia Mwangi and David Maina Waigwa be stayed hearing and determination of the instant Petition.

2. The same is supported by the grounds on the face of the motion. Which in summary are to the effect that, *Applicants were allocated LR. No. Nyahururu Municipality Block 8/602 jointly vide allotment letter Ref: No. 250IIIXXVII when the said demised parcel of land was unsurveyed and was known and referred to as UNS. RESIDENTIAL PLOT NO. B – NYAHURURU MUNICIPALITY and became*

demised parcel of land after survey was carried out and the Area Registry Map was amended to reflect as much.

3. They complied with the terms and conditions of the allotment letter and/or letter of offer, were registered as proprietors of the demised property and were ultimately issued with a certificate of lease in that regard.
4. As a result of the foregoing, they became registered as the absolute and indefeasible owners of the demised parcel of land subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate of lease and are therefore entitled to protection of the law.
5. Thereafter in or about the month of March, 2020 the Petitioners together with their agents visited the demised parcel of land with a view to commence development by way of fencing the demised property which the interested party appeared with a team of hired goons who threatened violence against the Petitioners/ Applicants and their agents causing to flee the scene for their lives.
6. Thus it is the said events that led to the filing of **NYR CMELC No. 23 OF 2020 Ibrahim Macharia Mwangi & David Maina Waigwa –vs- Daniel Chemon** by the Petitioners/Applicants.
7. They were able to obtain interim court orders of temporary injunction restraining the interested party from interfering with their quiet possession, occupation and use of the demised property.
8. Thereafter, the interested party during the pendency of the said matter proposed an out of court settlement of the said matter and when the parties could not agree on the terms and conditions of the said out of court settlement, the interested party caused the arrest of the Petitioners where the Petitioners were charged in **NYR CMCRC No. E456 OF 2021 Republic –vs- Ibrahim Macharia Mwangi & David Maina Waigwa**
9. The charges ranged from; making a document without authority contrary to **Section 357 (a) of the Penal Code, Forgery** contrary to **Section 349 of the Penal Code and Conspiracy to defraud** contrary to **Section 320 of the Penal Code**.
10. The said criminal case is coming up for hearing on the 21st, day of June, 2021 while the civil land matter is coming up for hearing on the 3rd day of June, 2021.
11. Thus applicants contend that, in any court proceedings, there should be one suit, one decision which is enough, and there should not be many decisions in regard of the same suit, and where a court has decided based on facts, it is final and should not be opened by same parties in subsequent litigation.
12. Further it is averred that the arrest of the Petitioners/Applicants therefore was a gross abuse of the criminal justice system, police powers and functions and public prosecution functions.
13. It is contended that, the criminal justice system in is being used to settle what is otherwise a civil dispute which has been and is subject of **NYR CMELC NO. 23 OF 2020**.
14. Further it is contended that, the continued prosecution of the Petitioners/Applicants is not only vexatious but also oppressive and an abuse of the court process which is also intended to harass the Petitioners/Applicants into either abandoning **NYR CMELC NO. 23 OF 2020** or giving to the interested party's proposal to have them include the interested party in ownership of the subject property.
15. It is argued that this Court has a duty to ensure that its processes are not abused or otherwise used to perpetuate injustice or for improper motives.
16. And further that, the criminal proceedings are an upfront to express provisions of the Constitution of Kenya, 2010 as well as statutes that derive their existence from the said constitution as complained about by the Petitioners/Applicants and if the instant application is not allowed as prayed, then the petition filed herewith will be rendered nugatory and the Petitioners/ Applicants will suffer irreparable injury.
17. The same motion is supported by the affidavit of David Maina Waigwa and the annexures thereto which reiterates the grounds aforesaid.
18. When the matter came for hearing the Applicant's advocate relied on the content of the supporting affidavit, plus annexures thereto and the grounds on the motion.
19. The Respondents via Rugut State Counsel did not file any response but just submitted on a point of law to the effect that there is no law barring the ODPP proceeding with criminal prosecution as civil proceedings proceeds on the same subject matter.
20. She reiterated that there is no demonstration of any negotiation for settlement between the parties in the dispute. Thus she urged the court to reject the application.
21. Mr. Mathea in rejoinder urged court to note that the orders sought if they are not granted the substratum of the pending petition will be destroyed by proceedings of the criminal case while the petition is pending hearing thus prejudicing the Applicants.
22. I have looked at the pleadings, affidavit and annexures plus the rivaling parties advocates brief submissions.

ISSUES, ANALYSIS AND DETERMINATION

23. I find the core issue is, **whether the applicants' application meets the threshold for grant of conservatory orders pending hearing and determination of the pending petition.**

The Law

24. The petitioner would have to satisfy the court that they meet the requirements for grant of the orders sought and in this case are primarily conservatory orders pending the determination of the petition.

25. The circumstances under which conservatory orders may be granted were discussed in **Judicial Service Commission v.**

Speaker of the National Assembly & Another [2013] “Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the Constitution, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in persona. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.”

26. This position was reinforced by the Supreme Court in **Gitirau Peter Munya vs. Dickson Mwenda Kithinji and 2 & Others** (supra) where the Supreme Court held:

“Conservatory orders’ bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as the “prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success’ in the applicant’s case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”

27. Whereas it is true that an application seeking to suspend pending criminal proceedings care must be taken to ensure that no one is condemned unheard. At this stage the first condition the applicant is required to establish is a prima facie case with a likelihood of success. From the evidence on record, there is a petition that has been filed and is yet to be heard.

28. Without preempting the outcome of the petition, the issues which the petitioners intend to canvass at the hearing of the petition are the contention that the respondents are harassing the petitioners and acting in breach of rights as listed in the petition.

29. The duty to be cognizant of whether or not any continued prosecution of the petitioners has demonstrated that during the proceedings, the human rights of the petitioners have been violated to the extent described in their petition. No matter how strong the evidence against them may be, no fair trial can be achieved and any subsequent trials would be a waste of time and an abuse of court process.

31. There is dicta and holdings from cases in the United Kingdom which provide persuasive guidance to this court in determining whether it has power to issue the orders sought and when such an order may be issued.

32. Lord Griffiths in **R vs Horseferry Road Magistrates Ex parte Bennet [1994] 1 A.C. 42** the House of Lords stated:

**“.....the Judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law.
...**

[Authorities in the field of administrative law contend] that it is the function of the High Court to ensure that the executive action is exercised responsibly and as Parliament intended. So also it should be in the field of criminal law and if it comes to

the attention of the court that there has been a serious abuse of power it should, in my view, express its disapproval by refusing to act upon it. ... The Courts, of course, have no power to apply direct discipline to the police or the prosecuting authorities, but they can refuse to allow them to take advantage of abuse of power by regarding their behaviour as an abuse of process and thus preventing a prosecution.”

33. In the same case the House of Lords held that:-

“.....the court, in order to protect its own process from being degraded and misused, must have the power to stay proceedings which have come before it and have only been made possible by acts which offend the court’s conscience as being contrary to the rule of law. Those acts by providing a morally unacceptable foundation for the exercise of the jurisdiction over the suspect taint the proposed trial and, if tolerated, will mean that the Court’s process has been however I view that it is up to the petitioners to satisfy that they fall within the provisions of the law to warrant being granted conservatory orders and I would only be satisfied if I hear them and as such to deny a grant of the orders at this stage would not be fair to them.

34. The applicants have set out their facts in support of their case which respondents have not as of now controverted via any reply, thus

prima facie stand un rebutted to the effect that, they were allocated LR. No. Nyahururu Municipality Block 8/602 jointly vide allotment letter Ref: No. 250IIIXXVII when the said demised parcel of land was unsurveyed and was known and referred to as **UNS. RESIDENTIAL PLOT NO. B – NYAHURURU MUNICIPALITY** and became demised parcel of land after survey was carried out and the Area Registry Map was amended to reflect as much.

35. They complied with the terms and conditions of the allotment letter and/or letter of offer, were registered as proprietors of the demised property and were ultimately issued with a certificate of lease in that regard.

36. As a result of the foregoing, the they are registered as the absolute and indefeasible owners of the demised parcel of land subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate of lease and are therefore entitled to protection of the law.

37. It also averred that in or about the month of March, 2020 the Petitioners together with their agents visited the demised parcel of land with a view to commence development by way of fencing the demised property which the interested party appeared with a team of hired goons who threatened violence against the Petitioners/ Applicants and their agents causing to flee the scene for their lives.

38. Thus it is the said events that led to the filing of **NYR CMELC No. 23 of 2020 Ibrahim Macharia Mwangi & David Maina Waigwa – vs- Daniel Chemon** by the Petitioners/Applicant.

39. The Petitioners/Applicants were able to obtain interim court orders of temporary injunction restraining the interested party from interfering with their quiet possession, occupation and use of the demised property.

40. Meanwhile the interested party during the pendency of the said matter proposed an out of court settlement of the said matter and when the parties could not agree on the terms and conditions of the said out of court settlement, the interested party caused the arrest of the Petitioners where the Petitioners were charged in **NYR CMCRC No. E456 of 2021 Republic –vs- Ibrahim Macharia Mwangi & David Maina Waigwa** with making a document without authority contrary to Section 357 (a) of the Penal Code, Forgery contrary to Section 349 of the Penal Code, Conspiracy to defraud contrary to Section 320 of the Penal Code.

41. The said criminal case is coming up for hearing on the 21st, day of June, 2021 while the civil land matter is coming up for hearing on the 3rd day of June, 2021.

42. It is averred that the arrest of the Petitioners/Applicants therefore was a gross abuse of the criminal justice system, police powers and functions and public prosecution functions.

43. It is contended that, the criminal justice system in is being used to settle what is otherwise a civil dispute which has been and is subject of **NYR CMELC NO. 23 OF 2020.**

44. Further it is contended that, the continued prosecution of the Petitioners/Applicants is not only vexatious but also oppressive and an abuse of the court process which is also intended to harass the Petitioners/Applicants into either abandoning NYR CMELC NO. 23 OF 2020 or giving to the interested party's proposal to have them include the interested party in ownership of the subject property.

45. Thus applicants contend that it would be fair and just to grant a conservatory order pending the determination of the petition. Even though the 2nd Respondent is entitled to mount criminal prosecutions.

46. I find the circumstances of this case warrants a grant of conservatory order so as to preserve the subject of the pending petition. There will be no prejudice suffered by the respondents if the stay is granted as they will continue with the prosecutions once the petition fails to succeed. It is noted that most of the petitions are disposed of by way of written submissions and hence the same can be wrapped up quickly without undue delay. To this end therefore the court will ensure that the matter is canvassed on priority basis.

i. In the result I find the petitioner's application dated 28th May 2021 has merit. Thus make the following orders;

ii. The application dated 28/5/021 is allowed in terms of prayers 3, pending the hearing and determination of the petition.

iii. The parties herein are directed to set down the petition for hearing on priority basis.

iv. The costs hereof shall be in the cause.

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 10TH DAY OF JUNE, 2021.

.....

CHARLES KARIUKI

JUDGE