



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

JUDICIAL REVIEW NO. 3 OF 2019

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

THE CHIEF MAGISTRATE'S COURT BUSIA.....2ND RESPONDENT

AND

RICHARD ONYANGO ADIEDO.....EX-PARTE APPLICANT

RULING

1. The ex-parte applicant moved the court by way of Notice of motion dated 15th April, 2019 under sections 7 & 8 of the Law Reform Act and Order 53 Rule 3 of the Civil Procedure Rules. He is seeking the following orders:

- a) To remove into the High Court for purposes of quashing the decision by the Director of :Public Prosecutions to institute and undertake criminal proceedings against him at the Chief Magistrate Court, Busia Law Courts in Criminal Case Number 2259 of 2018 or such other Court within the jurisdiction of this Honourable Court for a charges relating to the acquisition of all that property known formerly known Land Reference Number Bukhayo/Bugengi/5106;
- b) Certiorari to remove into the High Court for purposes of quashing the entire proceedings in Chief Magistrate Court, Busia Law Courts in Criminal Case Number 2259 of 2018;
- c) Prohibition directed at the Director of Public Prosecutions the 1st Respondent its agents, servants and/or employees and the Chief Magistrate's Court Busia the 2nd Respondent or such other Court restraining them from continuing sustaining or proceedings with proceedings including but not limited to Chief Magistrate Court Busia Law Courts in Criminal Case Number 2259 of 2018 with respect to any dealing related to all that property known formerly known Land Reference Number Bukhayo/Bugengi/5106;
- d) THAT the costs of this application be provided for.

2. The application was premised on grounds that can be summarized as follows:

- a) That the applicant was not the purchaser nor vendor in the sale agreement made between Said Ahmed Ali and Adiedo Nyawanga Obiero both of whom are now deceased and hence cannot in law be called upon to question on the terms thereof;
- b) That the decision to charge the ex-parte applicant was made in violation of the Constitution, 2010 and the statutes insofar as the 1st respondent has and is not acting independently but under the undue pressure and influence of an advocate acting for the administrators of the Said Ahmed (deceased);
- c) That both the High Court and the Chief Magistrate's Court have expressed themselves on matters respecting all that property known formerly known Land Reference Number Bukhayo/Bugengi/5106;
- d) That the criminal proceedings against the ex-parte applicant are being sustained for ulterior motives and are otherwise a collateral attack on the proceedings pending in the Civil Courts;

- e) That the decision to charge has been undertaken without affording the ex-parte applicant a fair opportunity and without independent and just inquiries being undertaken as to the complaint and the timing of lodging of the same;
- f) That the prosecution was fraught with impropriety and malice calculated to embarrass vex and humiliate the ex-parte applicant; and
- g) That there can be no legal criminal proceedings to warrant the exercise of the jurisdiction under section 6 of the Magistrate Act, 2015 when the offence and particulars thereof are non-existent or solely aimed at attacking processes being pursued in Courts with competent jurisdiction elsewhere.

3. The application was opposed on the following grounds:

- a) That a complaint was received by the police from Ilham Abdallah Mohammed that some people had fraudulently subdivided Land Parcel Bukhayo/Bugengi/5106 registered in the name of Said Ahmed Ali, now deceased.
- b) That the complainant is the widow to Ali and further that the subdivision was undertaken without her knowledge, consent or authority.
- c) That investigations revealed that the widow had applied for letters of administration of the estate of Said Ahmed Ali but the Court had not confirmed the grant.
- d) That further investigations revealed that the applicant Richard Onyango Adiedo had applied to the Land Control Board, Busia on the 15th day of March 2012 seeking consent to transfer LR Bukhayo/Bugengi/5106.
- e) That Land Control Board consent was granted in respect of the parcel of land being subdivided into 25 parcels, namely Bukhayo/Bugengi/9820 to 9844.
- f) That on 15th December 2018 the applicant was interviewed over the transactions and was given an opportunity to present his side of the story to which he made his statement purporting to have purchased the parcel of land through his father Adiedo Nyawanga Obiero.
- g) That further investigations into the purported sale of land agreement dated 12th January 2002 annexed to the applicants supporting affidavit established that witnesses to the said agreement were fictitious persons.

4. I have perused the affidavit of the ex-parte applicant and the replying affidavit of Samuel Agutu superintendent of police and the attached documents. These are my findings:

- a) That before the ex-parte applicant was charged in Busia Chief Magistrate's court Criminal case number 2259 of 2018, investigations were conducted.
- b) That am satisfied that there was no abuse of the court process.
- c) That what the ex-parte applicant has averred in his affidavit amounts to a defence.

5. In the case of **Stephen Muregi Chege vs. Inspector-General of Police & 3 others [2017] eKLR** Lenaola J. (as he then was) while dismissing the petition said at paragraphs 31 and 34 and which the Court of Appeal agreed with:

“31. It seems to me therefore that, I am being asked to evaluate the evidence on record to determine whether the 3rd Respondent was justified in instituting any criminal charge against the Petitioner. This would necessarily necessitate my probing into the veracity of the allegations made by all the parties. Unfortunately my powers in that regard are very limited because I cannot make a determination as to that justiciability of criminal proceedings which have already commenced without delving into the merit of the case.”

“34. It is only the trial Magistrate in the Court where the Petitioner is facing criminal charge, who is properly seized of the matter, who has the power to assess and determine the probity of the evidence presented. No matter how aggrieved the Petitioner is, therefore this is not the appropriate time or indeed the forum to prove his innocence. It is in fact in his best interest that the wheels of justice are quickly set rolling so that he can have his day in the Chief Magistrate's Court.”

This decision was confirmed by the Court of appeal in the case of **Stephen Muregi Chege v Inspector General of Police & 3 others [2018] eKLR**. In the instant case, I agree with the learned judge that this is not the forum in which the petitioner can prove his innocence.

6. The ex-parte application lacks merit and I accordingly dismiss it. The trial in the Busia Chief Magistrate's court Criminal case number 2259 of 2018, ought to resume and be heard on a priority basis.

DELIVERED and SIGNED at BUSIA this 12th day of February, 2020

KIARIE WAWERU KIARIE

JUDGE