



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MILIMANI

JR/ ELC 52 OF 2019

IN THE MATTER OF THE APPLICATIO OF JUDICIAL REVIEW

BY

JAMES GITHINJI

IN THE MATTER OF THE ABUSE OF OFFICE POWERS

AND

IN THE MATTER OF ABUSE OF POLICE SERVICE

AND

IN THE MATTE OF THE KIHIGO VILLAGE WARIDI GARDENS

MANAGEMENT CO.LIMITED

BTWEEN

REPUBLIC.....APPLICANT

VERSUS

INSPECTOR GENERAL OF THE

NATIONAL POLICE SERVICE & 3 OTHERS.....RESPONDENTS

RULING

1. The Ex-parte Applicants filed a Chamber Summons dated 24th October 2019 in which they sought the following orders:-

1. Spent

2. That the Applicant James Ndungu Githinji and Chacha Mabanga be granted Leave to apply for judicial Review for Orders of Certiorari and Prohibition against the Respondents herein.

3. That the Grant of the said leave to operate as stay of all criminal charges in Milimani CMCC 1790 of 2019 and 1191 of 2019 and any investigations by the 1st Respondent until the hearing and determination of the intended application and or ELC No.1225 of 2013 or HCCC No. E 229 of 2019 . The substantive courts hearing the matter complained herein.

4. That cosy of this application be in the cause.

2. The Ex-parte Applicants and the 3rd Respondent have been fighting over the control and management of Kihingo village Waridi Gardens Management Company Limited which manages Kihingo Village Estate in Kitsuru area in Nairobi. This has culminated in the filing of ELC

No.1225 of 2013, E 229 of 2019 and E 105 of 2018. The last case was withdrawn on 14th November 2019.

3. The Ex-parte Applicants have now come to court seeking orders of certiorari which seeks to quash criminal case Nos. 1790 of 2019 and 1791 of 2019 and prohibit the 1st and 2nd Respondents from investigating or charging the Ex-parte Applicants over any action or matters arising from the directorship of **Kihingo Village Waridi Gardens Limited until hearing and determination of ELC No.1225 of 2013 and E 229 of 2019.**

4. The Ex-parte Applicants contend that the police are interfering with the cases already before the court by arresting and charging them over trumped up charges and that the Respondents have resorted to media blackmail in order to dissuade them from being involved in the suit property which is the subject of the management dispute before the court . The Ex-parte Applicants further contend that their complaints to the police have been ignored and that they have been treated in a discriminatory manner.

5. The Ex-parte Applicants argue that the dispute regarding management, control and the general running of the management company is before court and that the police have no business investigating matters touching on the dispute. They argue that the 3rd Respondent has petitioned the court for their arrest and that before the court pronounces itself, on the issue , the police have arrested them and charged them with a view to interfering in the cases before the court.

6. The Ex-parte applicants' application is opposed by the 3rd Respondent through a replying affidavit sworn by the 3rd Respondent's lawyer on 7th November 2019. The 3rd Respondent contends that the application by the Ex-parte Applicants is an abuse of the process of court. The Ex-parte Applicants in the company of hired goons attacked the 4th Respondent causing him bodily harm for which other persons have been charged for assaulting the 4th Respondent and an advocate called prof Wajackoyah . The Ex-parte Applicants have also been charged for the offence of creating disturbance in a manner likely to cause a breach of the peace.

7. Some of the persons accompanying the Ex-parte Applicants are facing charges of malicious damage to property and further that the Ex-parte Applicants are being investigated for forgery and falsification of documents. The 3rd Respondents gives an incident where the Ex-parte applicants were given notice to show cause why the records in the company register should not be expunged when the Ex-parte Applicants failed to respond, the Registrar of companies expunged from the company records, the appointment of the 2nd Ex-parte Applicant as a director of the management company.

8. The 4th Respondent opposed the EX-parte Applicants' application based on a replying affidavit sworn on 11th November 2019. The 4th Respondent contends that he was assaulted by persons who was in the company of the Ex-parte Applicants on 2nd July 2019. He made a complaint and the persons who assaulted him were arrested and charged for assault and malicious damage to property.

9. The Ex-parte Applicants were also charged with creating disturbance when the club house was invaded. Again the Ex-parte Applicants were charged with creating disturbance. Those who had accompanied them were charged for malicious damage to property. Those who assaulted Prof. Wajackyah were also charged for assault. The 4th Respondent therefore argues that the 1st and 2nd Respondents cannot be stopped from discharging their statutory duties through certiorari and prohibition.

10. I have carefully considered the Ex-parte Applicants' application as well as the opposition to the same by the 3rd and 4th Respondents. I have also considered the oral submissions during the hearing of the application. The only issue for determination here is whether the Ex-parte applicants have demonstrated that they deserve leave to commence judicial review proceedings as sought. The idea behind requiring the Ex-parte Applicant to seek leave is for the court to determine whether there is indeed need for the Ex-parte Applicant to be granted leave. This was meant to avoid frivolous applications for leave being filed.

11. In the instant case, it has been demonstrated through the replying affidavits by the Respondents that the Ex-parte Applicants have already been charged before Court in criminal cases. The Ex-parte Applicants have been charged for creating disturbance. The 4th Respondent has sworn an affidavit through his lawyer which affidavit has basically brought forth sworn affidavits of the 4th Respondent in a previous application touching on the subject matter of the dispute.

12. There is no contention that the dispute herein is pitying two brothers who are wrangling over management of a property they both have an interest in. On the face of it , I cannot see any abuse of the powers by either the police or the Director of Public Prosecutions as to warrant grant of leave to commence judicial Reviews proceedings . Article 157 (10) of the Constitution provides as follows:-

- ***The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority***”.

13. The police have a duty to investigate complaints and if they feel that there is sufficient evidence to charge, then they can do so as they are the agents, of the Director of Public Prosecutions who is the final person to sanction any prosecution. The powers of the DPP and the police can only be faulted if it is demonstrated that the prosecution was commenced for ulterior motives or if the prosecution is capricious and brought in bad faith. The Ex-parte applicants herein have already been charged in court. Whether the charges are sustainable or not is not for this court to determine. This is the work of the trial court.

14. In the case of **Vincent Kibiego Saita VS Attorney General , HC Misc. Application No. 839 of 1999** (unreported) at page 20 of 21, Justice Kuloba stated as follows:-

“If a criminal prosecution is seen as amounting to an abuse of the process of the Court, the Court will interfere and stop it.

This power to prevent such prosecution is of great constitutional importance. It has never been doubted. It is jealously preserved. It is readily used, and if there are circumstances of abuse of the process of the court the court will unhesitatingly step in to stop it”

15. In the instant case, there is no prima facie demonstration that the 1st and 2nd Respondents are abusing the court process through instigation by the 3rd and 4th Respondents. In the case of **Miexner & another Vs Attorney General (2005) 1 KLR 189**, the Court held as follows:-

“ It is the trial court which is best equipped to deal with the quantity and sufficiency of the evidence gathered in support of the charge. It would be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of the trial court”.

16. The Ex-parte applicants having failed to demonstrate that prima facie , the actions of the Respondents are without basis, there is no point of granting them leave to commence judicial review proceedings. I therefore decline to grant the leave sought. The upshot of this is that the Ex-parte Applicants application is dismissed with costs to the Respondents.

It is so ordered.

Dated, Signed and delivered at **Nairobi** on this **13th day of February 2020**.

E.O.OBAGA

JUDGE

In the Presence of:-

Mr Kefah for Mr Nyaribo for Ex-parte Applicant and Mr Kabungu for 3rd Respondent

Court Assistant: Hilda

E.O.OBAGA

JUDGE