



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

MISCELLANEOUS CIVIL APPLICATION NO. 30 OF 2018

IN THE MATTER OF: AN APPLICATION FOR LEAVE FOR JUDICIAL REVIEW

ORDER IN THE NATURE OF PROHIBITION AND CERTIORARI

AND

IN THE MATTER OF: AN APPLICATION UNDER ARTICLE 27(4) AND (5)

AND ARTICLE 40, 47, 48 AND 50 OF THE CONSTITUTION OF THE

REPUBLIC OF KENYA 2010 FOR THE ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOM.

AND

IN THE MATTER OF: THE CONSTITUTION OF THE REPUBLIC OF KENYA 2010 ARTICLE 27,40, 47, 48, 50 AND 259.

AND

IN THE MATTER OF: THE CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS OF

JAPHETH M. TSUMA, FREDRICK TSUMA, JOSEPH TSUMA, SAMWEL TSUMA AND WILSON TSUMA

AND A DECISION TO PROSECUTE THEM IN SHANZU LAW COURT WITH THE OFFENCE OF FORCIBLE

DETAINER CONTRARY TO SECTION 91 AS READ WITH SECTION 36 OF THE PENAL CODE.

BETWEEN

1. JAPHET M. TSUMA

2. FREDRICK TSUMA

3. JOSEPH TSUMA

4. SAMWEL TSUMA

5. WILSON TSUMA.....EX-PARTE APPLICANTS

AND

1. THE HON. PRINCIPAL MAGISTRATE SHANZU LAW COURT....1ST RESPONDENT

2. THE DIRECTOR OF PUBLIC PROSECUTION.....2ND RESPONDENT

AND

JULIUS KARISA DECHE.....INTERESTED PARTY

RULING

Introduction

1. The Applicants instituted this suit by way of ex parte Chamber Summons dated 30th April, 2018, brought pursuant to the Provisions of Order 53 Rule 1 and (2) of the Civil Procedure Rules. The Ex-parte Applicants through that application sought the leave of court to commence Judicial Review proceedings of Prohibition and Certiorari. The leave was granted pursuant to which the ex-parte applicants filed the substantive motion on 21st May, 2018 praying for the following orders :-

a) An order of Prohibition do issue to prohibit the 1st and 2nd Respondents herein the honourable principal magistrate Shanzu law court and the deputy public prosecutor from prosecuting, and delivering a judgment against the ex-parte applicants for an offence of forcible detainer contrary to Section 91 as read with section 36 of the Penal Code in shanzu law court.

b) That an order of certiorari do issue against the 1st and 2nd Respondents herein the honourable principal magistrate Shanzu law court and the deputy public prosecutor to compel them to deliver or avail their decision to prosecute and deliver a judgment against the ex-parte applicants for an offence of forcible detainer contrary to Section 91 as read with Section 36 of the Penal Code in Shanzu law court for quashing.

c) That the costs be provided.

2. Before the Notice of Motion could be heard the Interested Party filed a Notice of Motion dated 8th June, 2018 seeking to be enjoined and/or impleaded in these proceedings as an interested party. The Application was allowed by consent of the parties on 13th June, 2018. Subsequently and as a response to the exparte-applicants' Application and on behalf of the Respondents and Interested Party, a Replying Affidavit was sworn by one **PC KIPTOO KISSORIO** on 13th July, 2018.

Ex-parte Applicants Case

3. The Applicants' case as summarized from the Verifying Affidavit sworn by one **FREDRICK Tsuma** on 30th April, 2018 on his own behalf and on the behalf of the other 4 Applicants, is that the suit property in question is the only place they have known to be home together with their parents. On 3rd May, 2016 they were arrested by Police officers from Mtwapa police station and later arraigned at Shanzu law courts for offences they knew nothing about, and a Criminal Case No. 452 of 2016 commenced against them.

4. The Applicants state that they were never aware that the Interested Party had applied and obtained a title deed and further that the ownership of suit property was being contested by the Interested Party and one **YASSIR ALI SHEIKH**

5. The Applicants further state that during the hearing of the criminal case 452 of 2016 they were not served with statements and copies of exhibits and that when the 1st Respondent was served with the Court Order from the ELC NO. 98 OF 2016 the court noted that the Orders were temporary and that the 1st Respondent has sufficient evidence indicating that the suit property belongs to the Applicants yet the Court is determined to jail the Applicants on the criminal charges.

6. The Applicants are apprehensive that they will be jailed pursuant to the Criminal Case aforesaid, and are now seeking orders of this Court to stop the Criminal proceedings.

Respondent's Case.

7. It is the Respondent's/Interested Party's Case that the issues raised in the application are matters for defense which ought to be raised at trial and not as a Judicial Review. The Respondent's state that there is no basis laid by the Applicants to challenge the decision by the 2nd Respondent in charging them and prayed this court to dismiss the application in toto for being frivolous, vexatious and an abuse of the court process.

Submissions

8. Parties made oral submissions in court. Mr. Gekonde Learned Counsel for the Applicants submitted that the Applicants have been in the suit property since 1960's with their parents and that the Interested Party obtained the title deed in 2003 without informing the Ministry of Lands that there were people living on the land. Counsel submitted that the Applicants have no title deed to the land but have always lived in the land and that the move to file criminal proceedings against the Applicants is meant to intimidate them as they have a matter at the ELC Court claiming adverse possession. Counsel further submitted that if the Judgment in the Criminal Case is pronounced before the outcome of the ELC Case then freedom of the Applicant will be interfered with.

9. The Interested Party filed written submission on 18th September, 2018 and through his Counsel, Mr. Nandi submitted that this Court not being an ELC Court lacks jurisdiction to hear and determine this Application as the motion is premised on issues arising out of the use and ownership of land.

The Determination

10. I have considered the Application before court, the Response as well as Submissions by all parties. The issue that the court is called upon to decide is whether it has the jurisdiction to handle the Application before court.

11. On the issue of Jurisdiction, I will refer to the famous case of **OWNERS OF THE MOTOR VESSEL LILLIAN "S" V CALTEX OIL (KENYA) LTD 1989 KLR 1 at page 14**, that was also relied on by the Interested Party. In that case the Court of Appeal stated thus:

“Without jurisdiction a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings, pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

12. Also in **Samuel Kamau Macharia & Another v. Kenya commercial Bank & 2 Others**, Application No. 2 of 2011 [2012] eKLR, the Supreme Court pronounced itself on jurisdiction thus [paragraph 68]:

“(68) A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.” (Emphasis provided).

13. I have considered the fact that there are pending cases before the Mombasa Environment and Land Court being **Mombasa ELC No. 98 of 2016** between the Applicants and the Interested Part herein. The issue of who owns the title to the said land will be determined by the ELC.

14. It is my opinion that the orders sought in the current application would have been sought and addressed in the ELC. Multiplicity of proceedings obscures issues. If there are proceedings going on in the ELC then the Applicants should move the ELC for orders stopping the Criminal Case aforesaid.

15. For these reasons the Application before this court is dismissed.

16. Parties shall bear own costs of the Application.

17. Orders Accordingly.

Dated, Signed and Delivered in Mombasa this 6th day of May 2019.

E. OGOLA

JUDGE

In the presence of:

M/s Oyier h/b Njuguna for Interested Party

Mr. Mkok for the 1st Respondent

Mr. Isaboke for the 2nd Respondent

Mr. Kaunda- Court Assistant