



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION MILIMANI

ACEC MISC NO. 8 OF 2019

HC MISC. 644 OF 2018

CHRISTIAN PROJECT GROUP.....APPLICANT

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

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

INSPECTOR GENERAL OF POLICE.....3RD RESPONDENT

DIRECTORATE OF CRIMINAL INVESTIGATION.....4TH RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION.....5TH RESPONDENT

THE NATIONAL LAND COMMISSION.....6TH RESPONDENT

CHIEF LAND REGISTRAR.....7TH RESPONDENT

RULING

1. Christian Project Group a registered self help organisation registered under the Ministry of Labour,, Social Security and Services, moved this court vide a notice of motion dated 9th May 2018 seeking orders as follows:

1. Spent.
2. That pending the hearing and determination of this application, this honourable court be pleased to issue orders that the 2nd respondent prosecutes and/or commences criminal proceedings according to the investigation report presented to it by the 4th respondent dated the 20th July 2015.
3. That pending the hearing and determination of this application, this honourable court be pleased to issue orders compelling the 5th respondent to present the filed report to court for safe custody and keeping.
4. That costs of this application are awarded in favour of the applicants.

2. The application is premised upon grounds stated on the body of the application and affidavit in support sworn on 9th November 2018 by the group Chairman one James Mbote Gicheha.

3. Upon being served, the 2nd, 3rd and 4th respondents filed a joint replying affidavit sworn on 12th March 2019 by Carol Sigei prosecution counsel. The 5th respondent filed a replying affidavit sworn on 19th December 2018 by James Kithinji an investigating officer assigned to investigate the complaint lodged by the applicant which is the subject of this suit. Besides the said replying affidavit, the 5th respondent filed

a preliminary objection of even date arguing that the orders sought are substantive in nature hence can only issue on Judicial Review application and not through a miscellaneous application such as this one.

4. On the other hand, the 6th respondent filed grounds of opposition on 13th December 2018 opposing the application. However, the 1st and 7th respondents did not file any response to the application despite service.

5. When the matter came up for hearing on 21st February 2019, parties agreed to compromise hearing of the preliminary objection in favour of the main application. Subsequently parties further agreed to dispose of the matter by way of written submissions and highlighting of the same fixed for 24th April 2019.

6. Consequently, only the 2nd, 3rd and 4th respondents filed their written submissions on 24th April 2019 while the rest did not. During the hearing, Ms Odipo appearing for the 5th respondent opted to submit orally. Equally Mr. Amany holding brief for Mr. Ayieko for the applicant also submitted orally. There was no appearance for hearing on the part of the 1st, 6th and 7th respondents. Since there was no explanation given for their absence the matter proceeded their absence notwithstanding.

Applicant's Case

7. The applicant's case is anchored on the averments contained in the grounds and affidavit in support of the application. It is the applicant's case that, sometime on 20th April 1998, they did apply to the Ministry of Lands for allotment of a plot No. L.R. 209/1010. In response to their request, their group was allocated the said plot on 22nd June 1998 by the commissioner of Lands vide a letter reference No. 80963.

8. Following the said allotment, the applicant averred that they made the requisite fees payments in preparation for issuance of title deed. They claimed that, at some point, documents relating to their plot was fraudulently tampered with resulting to the loss of the entire file and subsequently some other persons claimed ownership of the said land by producing a title deed which according to the applicant was an act of forgery, fraud and conspiracy to obtain registration of title by false pretences.

9. Aggrieved by these developments, the applicant on 22nd October 2013 lodged a complaint to the 2nd respondent who subsequently directed the 4th respondent to investigate into the matter.

10. They averred that after the 4th respondent recorded statements from various witnesses, they sent a report to the 2nd respondent recommending that one James Cheruiyot Kiptoo Boit and his brother Keneth Kiptoo Boit be charged with the offence of forgery and Rajab Ahmed Karuma and Mohammed Sheikh Hussein alias Rajab Ahmed Karume be charged with the offences of stealing, obtaining registration of title by false pretences, conspiracy to defraud and giving false information to a person employed in public service.

11. That despite receipt of the said recommendation dated 20th July 2015, the 2nd respondent has been adamant and or reluctant to prosecute the culprits involved in the said fraudulent activities. They further stated that, despite the lodgement of their complaint to Parklands Police Station and even the much sought intervention from the head of state, nothing positive has been forthcoming.

12. The applicant expressed displeasure at the 2nd respondent's reference of same complaint to EACC the 5th respondent for further investigation thus jeopardising the investigation report prepared by the 4th respondent. They sought court's intervention to order for surrender for safe custody of the investigation file in court and the prosecution of the suspects as per the 4th respondent's recommendation. In submission, Mr. Amany holding brief for Ayieko for the applicant merely adopted averments in the affidavit.

2nd, 3rd and 4th Respondent's Case

13. In their response to the application, the 2nd, 3rd and 4th respondents relied on the affidavit of Carol Sigei filed in court on 12th March 2019 in which she stated that the 2nd respondent had not, ignored or failed to prosecute suspects as alleged. She admitted receipt of the complaint as claimed in respect of which they directed the 4th respondent to investigate. That due to the complexity of the matter, the DPP felt that the 4th respondent did not do in depth (good) investigation hence referred the file to the 5th respondent on 16th May 2017.

14. She further stated that the DPP wrote to Mr. Thumbi Kariuki (applicant's Chair) vide a letter dated 16th August 2017 notifying him of the complexity of the matter as the land in question had four claimants hence advised them to be patient and possibly pursue a civil remedy. It is the 2nd respondent's averment that under Article 157 (6), the Director of Public Prosecutions is an independent office with clear mandate and cannot be directed on what to do by anybody or authority or cannot interfere with the authority conferred upon the 5th respondent being an independent body.

15. In their submissions, M/s Kimiri holding brief for M/s Sigei reiterated contents contained in their replying affidavit and written submissions filed on 24th April 2019. Basically Mrs. Kimiri urged the court to find that as an independent office the Director of Public Prosecutions had executed his rightful mandate without bias, influence or any malice in accordance with Article 157 (6) and (10) of the Constitution. She opined that the Director of Public Prosecution cannot be subject to control, direction or influence when making decisions.

16. To buttress this point, counsel relied on the decision in the case of **Francis Anyango Juma vs Director of Public Prosecutions and Another (2017) eKLR** where the court stated that:

“The intention under the Constitution was to enable the Director of Public Prosecutions to carry out his constitutional

mandate without interference from any party. This court cannot direct or interfere with the exercise of his powers under the Constitution or direct him on the way he should conduct his constitutional mandate unless there was clear evidence of violation of a party's rights from anything other than a road traffic accident"

5th Respondent's Case

17. As stated herein above, the 5th respondent filed a notice of preliminary objection filed on 20th December 2018 arguing that the prayers sought can only issue on Judicial Review proceedings or a constitutional reference and not through a miscellaneous application such as this one. Further, she relied on the replying affidavit sworn by James Githinji filed on 19th December 2018 in which the 5th respondent admitted receiving the applicant's complaint's file from the Director of Public Prosecutions (2nd respondent) for in-depth investigation.

18. That due to the intricate nature, amount of documents involved and complexity of the case where there are 3 title deeds issued to the applicant, one P.K. Boit and Rajab Karume in respect of one plot, it requires sufficient time to do and complete good investigations.

19. It was further contended that the orders sought are substantive in nature hence cannot issue through a miscellaneous application. The respondent further asserted that the orders requiring the court to take custody of investigation file cannot apply as there is no proof of violation of any constitutional right or that the 5th respondent has tampered with the file.

20. In submission, Mrs. Odipo adopted the averments stated in their replying affidavit and their Preliminary Objection. Basically, she urged the court to find that the 6th respondent had not committed any wrong and that the applicant was only expressing unjustified impatience at the rate at which investigations are going. She urged the court to find that EACC is an independent body which cannot be directed on what to do.

6th Respondent's Case

21. The 6th respondent responded by filing 8 grounds of opposition enumerated as follows:

- 1. That the 6th respondent has been wrongfully enjoined in these proceedings since there are no allegations made as against them.**
- 2. That the application does not mention any type of remedy that is directly adverse against the 6th respondent.**
- 3. That apart from being included as one of the respondents; applicant has not shown any acts or omissions committed by the 6th respondent.**
- 4. That the 6th respondent is not concerned with the custody of files at the Ministry of Lands and Physical Planning which rather falls within the exclusive mandate of the 7th respondent.**
- 5. That the 6th respondent is not mandated to compel the 2nd respondent to prosecute cases before it.**
- 6. That the orders sought by the applicant are not enforceable as against the 6th respondent.**
- 7. That the application as against the 6th respondent is therefore frivolous, vexatious, scandalous and an abuse of the courts process.**
- 8. That the 6th respondent should therefore be disjoined from the proceedings as the suit has no merit.**

22. However, the 6th respondent did not file any written submissions or appear for hearing of the application.

Issues for Determination

23. Having considered the application herein, supporting affidavit, annexures thereof and respondents' respective responses, this court is of the view that the only issue that crystallize for determination is whether this court can grant the orders sought under this application.

Determination

24. The application herein seeks four prayers. Prayer one regarding certification of the application as urgent is spent. The second prayer is for an order directing the 2nd respondent to prosecute and or commence criminal proceedings according to the investigations and recommendations of the 4th respondent dated 20th July 2015.

25. Before I deal with this second prayer, I would like to dispose of prayer 3 which is seeking this court to order the 5th respondent to submit and present to the court for safe custody the investigation file (report). To answer this prayer, I would like to state that, besides court files and or files produced in court by various litigants or actors in court proceedings and exhibits, courts have no mandate to or do not keep files for other agencies or organisations.

26. Therefore, there is no basis for demanding that the court does order the surrender and custody of the 5th respondent's investigation file for safe custody in court. There was no evidence of tampering with the annexures contained in the investigation file. The applicant's apprehension is therefore without basis hence not justified.

27. In any event, every organisation or institution has internal structures or systems to ensure safe custody of government stores, documents or sensitive files such as the one in question. For a court to allow such a move it will be akin to interfering with the mandate, organisation and operation of other offices and worse still an independent office such as the 5th respondent. For those reasons, the prayer against the 5th respondent regarding submission of the investigation file is dismissed.

28. I will now turn to the main prayer which is the order directing the 2nd respondent to prosecute or commence prosecutions as per the recommendation of the 4th respondent. To start with, there is no prayer directed or sought against the 1st, 3rd, 4th, 6th and 7th respondents. One would wonder why they were enjoined in the first place. To that extent the application against the 1st, 3rd, 4th, 6th and 7th respondents is dismissed.

29. There is no dispute that the 4th respondent did receive a complaint from the applicants regarding fraudulent activities and forgery of documents at the lands office touching on a plot No. 209/10210 which they had been allocated by the Commissioner of Lands but changed hand fraudulently to 3rd parties. In their recommendations vide their letter dated 20th July 2015 addressed to the Attorney General(DPP), the DCI's office recommended prosecution of James Cheruiyot Boit and his brother Keneth Kiptoo Boit and Rajab Ahmed Karume with various offences varying from forgery, obtaining money through false pretences and stealing, conspiracy to defraud and obtaining title by false pretences (See annexure JM-6).

30. The 2nd respondent responded that, after perusing the file recommendation report from the 4th respondent, they were able to point out serious gaps and instead referred the file to EACC for in-depth investigation to get into the root of what they identified as glaring anomalies and concerns as to how triple allocation of the land in dispute to P.K. Boit who provided a letter of allotment of the same plot on 15th February 1982, and after his death his legal representatives sold the same to insurance training and education trust on 4th November 1994, Rajab Ahmed Karume who also provided an allotment letter dated 1st October 1998 and rates payments dated 20th February and lastly the applicants occurred.

31. According to the 2nd respondent, the 5th respondent had the capacity to investigate the intricate issues surrounding issuance of three title deeds against one plot. They stated that there was no delay in prosecuting the culprits as the referral of the investigation to the 5th respondent which was not a directive was done on 16th May 2017.

32. The 5th respondent further acknowledged receipt of the file from the Director of Public Prosecutions and that investigations are ongoing hence no delay. Both offices claimed autonomy in executing their mandate hence cannot be directed on what to do.

33. The constitutional and statutory mandate of the 2nd respondent is underpinned under Article 157 (10) of the Constitution which provides that the Director of Public Prosecutions shall not require the consent of any person or authority for commencement of criminal proceedings and in the exercise of his or her powers or functions shall not be under the directives or control of any person.

34. However, there is a qualification of those powers which are not absolute under Article 157 (11) which puts exercise of the Director of Public Prosecutions' autonomy under scrutiny by providing that, "in exercise of its powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process".

35. For this court to intervene in the manner sought, it must be clear to the court that in the discharge of its constitutional mandate, the Director of Public Prosecutions did or failed to do that that he or she is authorized to do by violating or threatening to violate the right of a party. It is not enough to state that a constitutional office holder has failed to act or has acted contrary to the law without proof that such action or inactivity is contrary to one's constitutional rights and in breach of the Fair Administrative Actions Act provisions.

36. In the case of **Paul Ng'ang'a Nganga and 2 others vs A.G and three others (2013) eKLR** the court had this to say:

“Having said so, I maintain therefore that this court can only interfere with and interrogate the acts of other constitutional bodies if there is sufficient evidence that they were acted in contravention of the Constitution”.

37. Similar position was held in the case of **Francis Anyango Juma vs Director of public prosecutions and another (supra).**

38. The orders sought herein are by their very nature applicable in Judicial Review proceedings in which this court is duty bound if proved to grant or issue mandamus orders directing the Director of Public Prosecutions office as a statutory body or organ to do that that he or she is constitutionally or statutorily mandated to do but has failed to. This kind of prayer cannot be granted in the manner and style in which it is sought under this application. Secondly, a prayer for violation of a constitutional provision or right can only be granted through a declaratory order in a constitutional reference or Judicial Review proceedings but not a miscellaneous application as filed in this case.

39. I am therefore in agreement with the respondents submission that the application herein and the prayers sought which are substantive in nature cannot apply in the manner sought.

40. In any event, this court cannot interfere with the Director of Public Prosecutions or the 5th respondent's mandate while investigations are going on and the explanation that they are complex has been offered.

41. Lastly, the applicant should be a little bit patient to await the outcome of the 5th respondent's investigations which the 5th respondent is duty bound to expeditiously deliver without undue delay. While awaiting the outcome of the investigations, the applicant has several other options which include institution of civil proceedings which can run concurrently with criminal proceedings, institution of private criminal proceedings before a Magistrate's court or file a proper suit before a proper court for the appropriate orders.

42. For the above stated reasons, the application herein is dismissed for lack of merit. With regard to costs, the same shall follow the event with orders that costs herein are awarded to the respondents.

DATED, DELIVERED AND SIGNED AT NAIROBI ON THIS 3RD DAY OF JUNE, 2019.

J.N. ONYIEGO

JUDGE