



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW MISC APP NO. 41 OF 2018

IN THE MATTER OF: THE CONSTITUTION OF KENYA ARTICLE 10, 47, 50

AND

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO FILE A JUDICIAL REVIEW PROCEEDINGS AGAINST THE RESPONDENT

AND

IN THE MATTER OF: THE LAND ACT AND LAND REGISTRATION ACT

AND

IN THE MATTER OF: THE SECTION 91 OF THE PENAL

BETWEEN

1. ALEX GWADE MASA
2. RODGERS MUKERI KAVIMBA
3. MACLEAN MWATEMO MWAZOMBO.....APPLICANTS

VERSUS

1. THE HON. THE ATTORNEY GENERAL
 2. THE INSPECTOR GENERAL OF POLICE
 3. THE DIRECTOR OF CID
 4. THE OFFICER COMMANDING STATION BAMBURI
 5. THE SENIOR RESIDENT MAGISTRATE SHANZU
 6. DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENTS
1. MAHMOOD KASSAM
 2. JAFFER KASSAM
 3. ESMAIL KASSAM
 4. ESSAK KASAM.....EX PARTE APPLICANTS

JUDGMENT

1. Pursuant to leave granted on the 6.7.18 the ex-parte applicant herein filed the Notice of motion 23rd July 2018 and seeks the following orders:

a) an order of certiorari be and is hereby issued, directed to the 1st, 2nd, 3rd, 4th, 5th and 6th Respondents, by themselves, their servants and/or agents or any other officer acting under their authority to bring to the Court for the purpose of being quashed the decision by them made on or about 4th June 2018 to institute and/or commence criminal proceedings against the Applicants.

b) That the Honourable Court be pleaded to issue an order of prohibition directed against the Respondents, by themselves, their servants and/or Agents or any other judicial officer for the time being seized of hearing or conduct of Criminal Case 803 of 2018: R v Rodgers Kavimba & two others from trying and/or carrying on any further proceedings on the matter pending the full hearing and determination of this application.

c) That the Honourable Court be pleased to issue an order of prohibition directed against the Respondent, by themselves, their servants and/or agents or any other judicial officer from instituting any criminal proceedings against other members of Mwakirunge Self-Help in relation to plot No. 324/III/MN pending hearing and determination of this Application.

d) That the Honourable Court be pleased to issue conservatory orders staying any proceedings in the matter as the same is an abuse of the Court process, arbitrary, capricious and brought mala fides by the Respondents in abuse of due process of the Court and have occasioned the subject great prejudice pending hearing and determination of this Application.

e) Costs of the Application be provided for.

Applicants' case

2. The Applicants' case may be gathered from the Notice of Motion dated 23rd July 2018, as well as the Affidavit sworn in support of the Application sworn by **Alex Gwade Masa** who is authorized by co-Applicants and other Mwakirunge residents to swear the said affidavit on his and their behalf.

3. The Applicants aver that they are the duly elected officials of Mwakirunge Self Help Group and that they were born and brought up on the subject suit property (plot no. 324/III/MN CR.NO.345) without interruption as from the early 1970's . Accordingly, they filed ELC.NO. 133 of 2015 seeking to be declared and registered in common as the owners of the said property.

4. It is averred that upon service of pleadings in **ELC. NO. 133 of 2015** to the Respondents, there was no response within the statutory allowed time and the suit proceeded by way of formal proof and judgment was made directing the District Land Registrar Mombasa to register the subject property to be owned in common. Pursuant to the orders therein a survey process commenced with the intention of the subject land being owned in common, begun but before it could be concluded, the Respondents served the counsel on record for the Applicants with an order restraining the registration process temporarily pending hearing and determination of their application dated 10th April 2018. The said application is yet to be determined.

5. The Applicants aver that in compliance with the said order, registration of the subject property was halted and they were shocked when they were ambushed by Police officers from Bamburi Police Station on the 2.6.18, who arrested 26. Three of them were singled out as leaders of the group and subsequently charged with forceful detainer contrary to Section 90 of the penal code. A copy of the said charge sheet was annexed.

6. It is averred that a few days later, the 4th Respondent instructed his officers to harass the residents by demolishing their houses for the sole purpose of driving them out of their homes that stand on the disputed subject property.

7. The Applicants State that the process of making the decision to charge the ex-parte Applicants was flawed as relevant factors were not taken into account and that if the Respondents would have involved them, then the 6th Respondent would not have arrived at the decision to charge the ex-parte applicants.

8. The Applicants contend that the institution of criminal proceeding against 3 of their members is meant to force them to submit to the civil claim and that the said proceedings are oppressive, vexatious and an abuse of the Court process and it would be a travesty of justice for the Court process to be manipulated and misused.

9. The applicants aver that the decision to charge them was unconstitutional as the same violated their right to fair administrative action guaranteed under Article 47 of the Constitution.

The Respondents case

10. 1st - 6th Respondents filed grounds of opposition dated the 8th October 2018 and 17th June 2019 respectively. The Respondents' case is *That the application is an abuse of the Court process as it seeks to curtail proper actions by independent office as mandated by Article 157 of Constitution and elaborated under Section 5 of the ODPP Act No.2 of 2013; That the criminal case no. 803 of 2018 was properly investigated and a decision to charge the accused was made under the powers derived from the Constitution; That the applicant cannot purport to own land without producing any single document to exhibit ownership or entitlement; that the orders sought by the applicant are against public order and intended to promote impunity among members of the society that anybody can invade any land and forcibly detain*

it without caring who legally owns it; that the dispute pending before ELC No. 133 of 2015 if at all and orders sought therein do not in any manner interfere with the criminal process.

Submissions

11. **Mr. Ochieng**, Learned Counsel for the Applicant's submitted that there being no replying affidavit and/or grounds of opposition tendered by the 1st -5th Respondents, this Court should construe that the said averments are not controverted and therefore the same are admitted. Reliance was placed on Section 107 and 108 of the Evidence Act.

12. **Mr. Ochieng** further submitted that the 6th Respondent is indeed an independent constitutional office pursuant to Article 157 of the Constitution but in deciding whether to charge or not, proper due diligence before charging an individual should be done.

13. On whether the charges instituted in Criminal case no. 803 of 2018 should be allowed to proceed, **Mr. Ochieng** submitted that the respondents have no case against the Applicant as they acquired their rights to the subject property via adverse possession in ELC. NO. 133 of 2015 and the Act of arresting them is unconstitutional. Reliance was placed in the case of **Benard Mwikya Mulinge v Director of Public Prosecutions & 3 others [2019] and Kuria & Others vs. Attorney General [2002]2KLR**.

14. **Mr. Makuto** Learned Counsel for the Attorney General relied on the pleadings filed by the 6th Respondent.

15. **Mr. Fedha** learned Counsel for the 6th Respondent submitted that an order of prohibition cannot issue in the circumstances of the current application as the decision to charge was made way back in 2018 and the applicants already took plea and that the complainant has fundamental right under Article 25, 26, 29 and 40 of the Constitution and the state has a duty to give protection. Counsel further submitted that the applicants were charged with an offence of a personal nature and therefore they cannot hide under the guise of collective criminal responsibility. See. **Kenya National Examination Council vs. Republic (ex-parte) Geoffrey Gathenji, Njoroge 79 others [1999] eKLR**

The Determination

16. I have considered the parties' pleadings and submissions, and two issues arise for determination.

a. Whether the 1st and 2nd Respondents' decisions to investigate and prosecute the Applicant was in abuse of their powers, and/or motivated by extraneous considerations.

b. Whether the Applicant is entitled to the relief sought.

17. It is clear that the factual basis of the ex-parte Applicants' case is not controverted in light of the fact that the Respondents only filed grounds of opposition and thereby opting not to challenge the Applicants' case by way of evidence yet allegations had been directed at them.

18. The purpose and reach of the remedy of judicial review is to ensure that an individual is given fair treatment by the authority to which he or she has been subjected, both in civil or criminal proceedings. The Court of Appeal in the case of **Municipal Council of Mombasa vs. Republic & Umoja Consultants Limited, Nairobi Civil Appeal No. 185 of 2001, [2002] eKLR** stated as follows:

"The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review."

19. It was also emphasized by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) KLR** as follows...

"while Article 47 of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act reveals an implicit shift of judicial review to include aspects of merit review of administrative action, , the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act."

20. The issue now is whether the Applicant has established grounds for judicial review. The Applicants in this case have impugned the exercise of authority by the Director of Public Prosecution to prefer criminal charges against some of them as being vexatious and an abuse of the court process. It was also the applicant's contention that in making the decision the 6th Respondent was influenced by ulterior and extraneous considerations to institute criminal proceedings. The contentions were never responded to by the Respondents.

21. Mativo J in **Republic vs. Director of Public Prosecutions & 2 others; Evanson Muriuki Kariuki (Interested Party); Ex parte James M. Kahumbura [2019] eKLR** observed:

"Criminal proceedings commenced to advance other gains other than promotion of public good are in my view vexatious and ought not to be allowed to stand. The word "vexatious" means "harassment by the process of law," "lacking

justification” or with “intention to harass.” It signifies an action not having sufficient grounds, and which therefore, only seeks to annoy the adversary. The hallmark of a vexatious proceeding is that it has no basis in law (or at least no discernible basis); and that whatever the intention of the proceeding may be, its only effect is to subject the other party to inconvenience, harassment and expense, which is so great, that it is disproportionate to any gain likely to accrue to the claimant; and that it involves an abuse of process of the court.”

22. From the annexed evidence provided by the applicants in the Notice of motion I note that the **ELC 133 of 2015** was instituted way back in 2015 and the criminal complaint was made under **O.B NO. 20/2/06/2018 (2nd June 2018)**.

23. Looking at exhibit marked F annexed by the Applicants, I note that there is a ruling issued on the 26th April 2018 wherein the Applicants herein were restraint from entering the suit property (**LR.NO. 819/II/MN**) pending ruling on 17/7/18 and the said ruling was delivered on the 17th July 2018. The Applicants have referred to a Judgment giving them the legal basis to be on the suit land but no order has been produce to that effect and the only Court Order in the exhibits is the one stopping the Applicants from interfering with the suit property.

24. It is therefore the finding on this Court that there being a temporary injunction restraining the applicants from entering, constructing or in any way interfering with the suit property, and the OCPD /Officer in charge having been directed by the Court to enforce the said orders of the Court, the arrest of some of the Applicants on the 2nd June 2018 and their subsequent prosecution in CR. NO. 803 of 2018 was procedural and lawful as it was within the validity of Court orders stopping the interference with the suit property.

25. The *ex-parte* Applicants have not presented any material to demonstrate that there was no sufficient evidence or factual basis to justify a prosecution. It is not the function of this Court to weigh the veracity of the evidence. In my view, a prosecution should be instituted or continued if there is admissible, substantial and reliable evidence that a criminal offence known to the law has been committed by the accused. It has not been established that the facts presented in this case do not disclose an offence known to law.

26. The Constitutional provision in Article **157 (10) and (11)** ensures that the DPP has complete independence in his decision-making processes, which is vital to protect the integrity of the criminal justice system because it guarantees that any decision to prosecute a person is made free of any external influences. This court respects this Constitutional imperative and will hesitate to interfere with the functions of the DPP unless there is clear evidence of breach of the Constitution or abuse of discretion to prosecute.

Article 157

(10) 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.

(11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

27. Applying the legal tests above to the facts and circumstances of this case, this Court finds that there is nothing to show that the prosecution of some of the Applicants is unfair or is an abuse of court process or abuse of police powers or judicial process. There is no material before this Court to demonstrate that the prosecution has no proper factual foundation

28. For the foregoing reasons, the Notice of Motion dated 23/7/2018 seeking orders of certiorari and prohibition against the Respondents fails. Accordingly, the same is hereby dismissed with no orders as to costs.

Dated, Signed and Delivered in Mombasa this day of 18th day of November, 2019.

E. K. OGOLA

JUDGE

In the presence of:

Mr. Fedha for DPP

Mr. Fedha holding brief Makuto for Attorney General

Mr. Kaunda Court Assistant