



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW NO. 17 OF 2019

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI

AND

IN THE MATTER OF: SECTION 8 & 9 OF THE LAW REFORMS ACT

AND

IN THE MATTER OF: KWALE CHIEF MAGISTRATE'S COURT

BETWEEN

THE ACCOUNTING OFFICER

DAVID KANDIE.....EX-PARTE APPLICANT

VS

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

THE CHIEF MAGISTRATE KWALE.....2ND RESPONDENT

ALI HAMISI CHANDE.....INTERESTED PARTY

JUDGMENT

1. Pursuant to the leave granted on the 29th March 2019, the ex-parte Applicant prays for the following orders.

a) That a Writ or order of Prohibition to issue to Prohibit the Chief Magistrate Court at Kwale from taking further proceedings and executing any further orders, decrees, warrants or any other kind of execution in Kwale Criminal Case No. 206 of 2019 (Republic v David Kandie)

b) That a Writ or order of Certiorari do issue to bring this Honourable Court and quash the criminal proceedings in Kwale Criminal Case No. 206 of 2019 (Republic vs. David Kandie)

c) The Honourable Court be pleased to make further or such other orders at it may deem fair and just.

d) That the costs of this Application be in the cause.

2. The Application is supported an affidavit sworn by the ex-parte Applicant on the 1st April 2019.

3. The ex-parte Applicant avers that on the 5th September 2018, he lodged a complaint to the DCI over the missing of his two green cards for **Title No. Kwale Diani SS/2845** and **Title Kwale Diani SS2848**, being subdivision of suit property known as **Title No. Kwale Diani SS/464** and he was advised to seek for injunctive orders form the Environment and Land Court, which he did on the 22nd November 2018.

4. The ex-parte Applicant avers that he was arrested and charged in Court on 28th February 2019 with the offence of intention to defraud in Kwale Criminal Case No. 206 of 2019 and on the same day he took plea, the Interested Party filed an application in Kwale Chief Magistrate ELC 80 of 2018 aimed at influencing the decision pending ruling in Mombasa ELC 273 of 2018.

5. The ex-parte Applicant further avers that it is alleged that he forged the title deed to the subject land on the 12th August 2008 yet he bought the subject land in the year 2013 and that it is clear that the aforementioned criminal case is intended to settle what is a civil dispute pending before the Environment & Land Court.

The 1st Respondent's Case

6. The 1st Respondent opposed the Application via its grounds of opposition dated and filed on the 24th April 2018 and a Replying Affidavit sworn on the 10th June 2019 by **CPL Salome Nzilani**.

7. The deponent avers that the ex-parte Applicant is facing several charges related to the subject property as a result of a complaint made by him on the 5th September 2018 vide OB. NO. 40/05/09/2018. Further, that during investigations, the ex-parte applicant alleged that he bought the subject land from Mr. **John Ogola** but failed to produce any documentation to support his allegations. On further investigations and from the content of certified green card of the subject property from Kwale Land Registry, it was established that the owners of the subject parcels of land were as follows: **SS/2845 Nasra Sherrif Mohammed Noor; SS. /2846, Ali Hamisi Chande; SS/2847 Ali Hamisi Chande and SS/2848 Rutune Limited.**

8. It is averred that on further investigations, it was ascertained the subject property, **Kwale Diani SS/464** was originally owned by **Mwanajuma Hamisi Chande** a sister to the Interested Party who passed on in the year 2005 and that the Interested Party had filed a Succession Cause no. 155 of 2018 at the Kadhi's Court at Kwale and obtained orders to inherit his late sister's properties.

9. The deponent averred that it would be proper and prudent for the criminal case to proceed and the ex-parte Applicant can defend himself in the criminal proceedings.

2nd Respondent's Case

10. The 2nd Respondent opposed the Application via its Grounds of Opposition dated and filed on the 13th June 2019 Wherein it was stated that the Application is misconceived and frivolous as the 1st Respondent by dint of Article 157 of the Constitution is mandated to institute criminal proceedings and the 2nd Respondent is by dint of Article 160 of the Constitution mandated to adjudicate the criminal charges against the ex-parte Applicant.

Interested Party's case

11. The Interested Party in opposition to the application filed a Replying Affidavit sworn on the 5th April 2019 together with a Notice of Preliminary Objection to the application herein dated 5th April 2018.

12. The Interested Party avers that independent investigations were conducted by the Directorate of Criminal Investigations. That the title deed for Kwale/Diani Settlement Scheme/464 was investigated and found to be a forgery. The file was reviewed by the Director of Public Prosecution and it was recommended that the ex-parte Applicant be charged with 5 counts related to forgery and that the Application by the ex-parte Applicant in Mombasa ELC 273 of 2018 was an attempt to avoid the eminent criminal prosecution.

13. The Interested Party further avers that the ex-parte Applicant has filed a Constitutional Petition No. 11 of 2019 and an application No. 155 of 2018 at the Kadhi's Court seeking the same prayers which makes this application an abuse of court process.

14. In the Notice of Preliminary Objection dated 5th April 2019, it is stated that the Application herein offends Article 157(6) of the Constitution as it intends to interfere with the powers of the 1st Respondent. Therefore, the Application is fatally defective for there is no substantive application to be determined and thus it offends the provisions of order 53 rule 2 of the Civil Procedure Rules rendering it void *ab initio*.

Submissions

15. The Applicant's submissions are dated the 24th May 2019. **Mr. Ondabu**, Learned Counsel for the ex-parte Applicant submits that the ex-parte applicant is the registered owner of the subject properties and there is an ownership dispute pending in CMCC ELC 80 of 2018 and the complaint should be dealt with by the Environment and Land Court and not in the Criminal Court. Counsel cited **Republic vs. Grace Wangari Bunyi(Sued as the Administrator of the estate of the late Obadiah Kaira Bunyi)& 7 others Ex-parte Moses & 28 others [2018]eKLR.**

16. For the lack of statutory statement, Mr. Ondabu submitted that its Statutory Statement was filed together with the Application and it was an oversight on the part of the Court registry that the said Statutory Statement was not stamped. Counsel further submitted that no proof of ownership was demanded in Succession 155 of 2018 and the grant of letters of administration in favour of the Interested Party and conferring ownership of the subject properties to him was granted ex-parte and without affording the ex-parte Applicant herein the right to be heard in contravention of Article 47 & 50 of the Constitution. According to counsel the Kadhi's Court lacked jurisdiction under Article 170(5) of the Constitution to cancel the ex-parte applicant title and issue the same to the Interested Party as under Section 5 of the Kadhi's Court's Act, it can only determine a dispute where both parties profess the Muslim religion.

The 1st Respondent's Submission

17. **Mr. Fedha**, learned counsel for the prosecution relied on their Replying Affidavit dated 10 June 2019 and further submitted the D.P.P was not aiding the Interested Party as investigations were commenced on the 5th September 2018 while the civil suit was filed on the 22nd November 2018.

2nd Respondent's submission

18. The 2nd Respondent relied on its submissions filed on the 13th June 2019 and their Grounds of Opposition filed on the same day. **M/S Kiti** Learned Counsel for the 2nd Respondent submitted that it would be a travesty of justice if the 1st Respondent in its constitutional duty failed to prefer charges against the ex-parte Applicant, and that judicial review should not be abused to prevent the ends of justice being met. She cited **Director of Public Prosecution v Martin Maina & 4 other [2017] eKLR** where it was held as follows... **"The power of quashing criminal proceedings has to be exercised very sparingly with circumspection and that too in the rarest of rare cases."** Ms. Kiti submitted that if the ex-parte applicant feels aggrieved, then he should seek redress at the Environment and Land Court to have the issues competently determined as that Court has competent jurisdiction.

Interested Party Submissions

19. The Interested Party submissions are dated the 10th June 2019. **Mr. Mungai**, Learned Counsel for the Interested Party submitted that the criminal investigations begun way before the civil suit was filed. Counsel submitted that the Application was filed contrary to Order 53 Rule 1(2) of Civil Procedure Rules 2010 as it was not supported by a Statutory Statement and neither does it state the Sections of the law it is based on and therefore the same is incompetent and fatally defective. Reliance was placed in the case of **R v Registrar of Societies, ex-parte Joseph Ndemi Wanjiru & 10 others (2017) eKLR** where it was held that the failure to file a statutory statement together with an application for leave renders the application for leave fatally void *ab initio*. Ms. Kiti submitted that the only Title annexed to the application is for **Kwale /Diani Settlement Scheme 2848** which is not the basis for the judicial review application and the pending suit in the Environment and Land Court and that the ex-parte Applicant has not annexed a copy of the Title deed for the said property in the civil suit to confirm indeed he owns the property as the title deed is the conclusive proof of ownership of property and that under Section 107 of the Evidence Act, it is the duty of who asserts to prove.

20. Ms. Kiti submitted further that in any event, the investigations into the forgery was commenced way before the Environment & Land Court suit was filed as the statement from the Land Registrar was obtained on the 3rd October 2018 and the Applicant's suit was filed on the 22nd November 2018 during the finalization of investigations. Counsel further submitted that the ex-parte Applicant has not annexed an order from the Kadhi's Court cancelling his title, and even if he did the same cannot be quashed as the application was filed after 6 months.

Issues for Determination

21. The Application was canvassed by way of written submissions which I have carefully considered. 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.

22. This Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. Secondly, the intention of this Court must not be to test the legality or otherwise of the charge or determine the guilt or innocence of the *ex-parte* Applicant.

23. There is no dispute that the 1st Respondent has mandate to order the inspector general of police to investigate crimes where there is reasonable basis to believe that an offence has been committed. In performance of its duties, the 1st Respondent as an independent institution established under Article 157 is empowered to conduct its duties free from any influence or control by any authority. However, its action must be within the law and in accordance with the Constitution.

24. The law with regard to the circumstances under which a Court can interfere with mandate of the DPP was stated in **Michael Monari and Another vs. Commissioner of Police and 3 Others Miscellaneous Application No. 68 of 2011** as follows:

"the police have a duty to investigate on any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene".

In refusing to stop a prosecution against the applicant in the matter, Warsame J expressed the following view:

"It is not the duty of the Court to go into the merits and demerits of any intended charge to be preferred against any party. It is the function of the court before which the charge shall be placed and which shall conduct the intended trial to determine the veracity and merit of any evidence to be tendered against an accused person. It would be improper for this court to try and/or attempt to determine the intended criminal case which is not before it. There is no evidence to show that the

Respondents exceeded jurisdiction, breached rules of natural justice or considered extraneous matters or were actuated by malice in undertaking the investigations against the applicants. The purpose of criminal proceedings is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and on that account is deserving punishment."

25. In **Republic vs. Chief Magistrate's Court at Mombasa Ex Parte Ganjee & Another [2002] 2 KLR 703**, it was held:

"It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice and no one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, prohibition and/or certiorari will issue and so forth..."

26. It is therefore clear that whereas the discretion given to the 1st Respondent to prosecute criminal offences is not to be lightly interfered with, no one is allowed to use the machinery of justice to cause injustice and no one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, such as with a view to forcing a party to submit to a concession of a civil dispute, the Court will not hesitate to bring such proceedings to a halt.

27. From the facts and documents annexed by the parties, it is easy to decipher that the investigations were commenced by the Directorate of Criminal Investigation on the 5th September 2018 via a letter to the Land Registrar, Kwale. Secondly, on the 3rd October 2018 **Mr. Benedict Nzae Mwanganda (Land Registrar)** was summoned to Director of Criminal investigations office at Diani to record his statement regarding the subject properties and he stated that his signature had been forged. The ex-parte Applicant's civil suit was instituted on the 22nd November 2018 which in the opinion of this Court was after the investigations had been commenced. And on the 14th February 2019, the Senior Principal Prosecution Counsel wrote to the DCIO Msambweni advising him to charge the ex-parte Applicant with the offence of forgery, uttering a false document, making a document without authority, giving false information to a person employed in public service and obtaining registration by false pretense.

28. Looking at the Replying Affidavits of the 1st Respondent and that of the Interested Party, this Court notes that serious issues of forgery have been raised and the same ought to have been controverted by the ex-parte Applicant herein by way of Affidavit evidence. The ex-parte applicant did not file a further affidavit to rebut the allegations in the responses by the Respondents and the Interested Party but opted to respond to allegation via its written submissions dated the 24th May 2019. It is trite law that submissions cannot take the place of evidence and parties are bound by their pleadings. Therefore, the issue of forgery remains uncontroverted and this Court is left with no option but find that on a balance of probabilities the 1st Respondent has established that in making a decision to charge the ex-parte applicant, it was guided by evidence against the ex-parte Applicant and it is not the duty of this Court to go into the merits of the 1st Respondents charge.

29. In **Ashok Kumar Rambhai Patel vs. Director of Public Prosecutions & 3 others [2014] eKLR** it was held as follows:

"In the circumstances of this case, I conclude that discontinuing the criminal proceedings would be tantamount to interfering with the powers and duties of the 1st to 3rd respondent. The investigations were not a reaction to any court order having began before the civil suit. The prosecution carried out their investigations independently and came to the conclusion that the petitioner had committed an offence. The fact that they took too long to prefer the charges is attributable to the fact that the office of the DPP took too long to advise them on how to proceed. In any event the issues raised by the petitioner including several pieces of evidence contained in his affidavit shall be adduced in the criminal proceedings."

30. It is the finding of this Court that the investigations were commenced before the ex-parte Applicant instituted the civil suit on the 22.11.18. Therefore, the investigations were not a reaction to any court order since they begun before the civil suit was instituted. The prosecution carried out their investigations independently and came to the conclusion that the ex-parte Applicant had committed an offence. Although the decision to charge was made after the institution of the civil suit on the 22.11.18, there is no evidence to show that the said decision was *mala fides*.

31. In the premises this Court is not satisfied that this is a proper case in which it ought to bring the criminal proceedings to a halt as there are no exceptional circumstances to warrant interference of the constitutional mandate of an independent body.

32. The House of Lords in **Director of Public Prosecutions vs. Humphreys [1976] 2 All ER 497 at 511** cautioned that:

"A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution. The functions of prosecutors and of judges must not be blurred. If a judge has power to decline to hear a case because he does not think it should be brought, then it soon may be thought that the cases he allows to proceed are cases brought with his consent or approval...If there is a power...to stop a prosecution on indictment in limine, it is in my view a power that should only be exercised in the most exceptional circumstances."

33. Accordingly this Court believes that the *ex-parte* Applicant will be afforded an opportunity to defend himself, cross-examine witnesses and adduce evidence in support of his case in the criminal trial, and it is the proper course to take in the circumstances of this case.

34. Consequently, the Notice of Motion dated 1st April 2019 fails and is dismissed with costs.

Orders accordingly

Dated, Signed & Delivered at Mombasa this 18th day November, 2019

E. K. OGOLA

JUDGE

In the presence of:

Mr. Fedha for DPP

No Appearance for Applicant

Mr. Kaunda Court Assistant