



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

JUDICIAL REVIEW MISC. APPLICATION NO 20 OF 2016

IN THE MATTER OF: AN APPLICATION BY JOHN OSHUMU AND SHADRACK

LETOIRE FOR JUDICIAL REVIEW ORDERS OF CERTORARI AND

PROHIBITION.

AND

IN THE MATTER OF: ARTICLES 47 & 50 OF THE CONSTITUTION OF KENYA.

2010.

AND

IN THE MATTER OF: THE PENAL CODE, CAP 63 LAWS OF KENYA.

AND

IN THE MATTER OF: THE MAGISTRATE'S COURT, NG'ONG CRIMINAL CASE

NO.116 OF 2016 REPUBLIC VS JOHN OSHUMU & SHADRACK LETOIRE.

BETWEEN

REPUBLIC.....APPLICANT.

VERSUS

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

THE INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT.

THE MAGISTRATE'S COURT AT NGÓNG.....3RD RESPONDENT.

AND

DANIEL MWARIA KINYINGI.....1ST INTERESTED PARTY.

DAVID NGUMO WACHIRA.....2ND INTERESTED PARTY.

MAHORU NJOROGE.....3RD INTERESTED PARTY.

JAMES GITHIGA NJOROGE.....4TH INTERESTED PARTY.

EX PARTE

JOHN OSHUMU.....1ST EX PARTE APPLICANT

SHADRACK LETOIRE.....2ND EX PARTE APPLICANT

RULING

Introduction

1. On the 23rd of January 2017, the Ex Parte Applicants filed a notice of motion, a statutory statement and verifying affidavits sworn by John Oshumu and Shadrack Leitoreon 20th June 2017.
2. The Application sought the substantive orders
 - a) That an order of Certiorari be issued to remove into the high court and quash the 1st Respondents decision to prefer charges against the Ex Parte Applicants as set out in charge sheet dated 4th October 2016 and registered before the 3rd Respondent in Ngong Criminal Case number 116 of 2016, Republic versus John Okumu & another.
 - b) That an order of Prohibition does issue barring the 1st Respondent and its officers from prosecuting or proceeding with the prosecution of the Ex Parte Applicants on the offence of malicious damage to property contrary to section 339/1 of the Penal Code and Forcible Entry contrary to section 90 of the penal code in Ngong Criminal Case number 116 of 2016- Republic vs John Okumu & another or any related charges.
 - c) That an order of Prohibition be issued directed at the 3rd Respondent prohibiting the 3rd Respondent from hearing, proceeding with and from in any way entertaining Ngong Criminal Case number 116 of 2016- Republic v John Oshumu & another against the Ex Parte Applicants until a finding has been reached in Nairobi Environment and Land case number 1061 of 2015.
3. The Application was premised on the grounds on the face of it, as stated in the Statutory Notice and in the affidavits sworn by John Oshumu and Shadrack Leitoreon 20th January 2017.
4. The 1st Respondent filed Grounds of Opposition dated 20th February 2017 in response to the Application dated 20th January 2017.
5. The Interested Parties filed an Affidavit sworn by David Ngumo Macharia on 3rd March 2017.
6. On the 13th day of April 2017, the 1st Respondent filed an affidavit sworn by PC Francis Gitonga on the same date.
7. In response to the 2nd respondent's affidavit sworn on 13th April 2017, the Ex Parte Applicants filed a further affidavit sworn on the 27th day of April 2017 by John Oshumu and filed on the 28th day of April 2017.
8. On the 28th day of May 2017 the 1st Respondent filed a further affidavit sworn on 2nd May 2017 by PC Francis Gitonga.
9. The Ex Parte Applicants filed their submissions dated 5th February 2018 on 6th February 2018
10. The interested parties filed their submissions dated 12th February 2018 on the same day.
11. The respondents filed submissions dated 14th February 2018 on the same day.

The Ex Parte Applicants' case

12. From the affidavits, it can be surmised that the gist of the Ex Parte Applicants' case is that the 1st Respondent instituted criminal proceedings against the Ex Parte Applicants with regards to a dispute of land ownership they had with the Interested Parties. The Ex Parte Applicants aver that they are the registered owners of the said land and the title over the land in the name of David Ngumo Wachira is forged and the same is the subject of a suit at the high court in Nairobi being Nairobi Environment and Land Court Case No. 1061 of 2015. The Ex Parte Applicants further aver that unless the aforesaid suit is heard and disposed of, the criminal proceedings against them at the subordinate court in Ngong amounts to an illegality on the part of the respondents and they therefore seek the protection of the court.
13. The Ex Parte Applicants further state the 1st and 3rd Respondents intend to proceed with the criminal case being in Ngong Criminal Case No. 116 of 2016 notwithstanding what they allege is an irrationality of said proceedings in the pendency of the suit Nairobi Environment and Land Court Case No. 1061 of 2015.
14. The Ex Parte Applicants aver that they would be greatly prejudiced and suffer irreparable damage if the criminal proceedings in Ngong Criminal Case No. 116 of 2016 were to proceed and conclude and an adverse decision is given against the Ex Parte Applicants before conclusion of proceedings in Nairobi Environment and Land Court Case No. 1061 of 2015.

15. The Ex Parte Applicants' aver that on 4th October 2016 the 1st Respondent charged the Ex Parte Applicants' with the offences of Malicious Damage to Property contrary to Section 339 (1) of the Penal Code and Forcible Entry contrary to Section 90 of the Penal Code in Ngong Criminal Case No. 116 of 2016. It is their further averment that the 1st Respondent had previously, on 21 November 2012, charged the Ex Parte Applicants' with the offence Malicious Damage to Property contrary to Section 339 (1) of the Penal Code in Kibera Criminal Case No. 4969 of 2012. Thereafter, 1st Respondent made an application to terminate the proceedings under section 87(a) of the Criminal Procedure Code to enable the 2nd Respondent investigate alleged forgery in respect of the title documents held by the complainants

16. It is the Ex Parte Applicants' contention that their deceased father was the registered proprietor of all that parcel of land known as title number Kajiado/Kitengela/2603 and the title over the same property in the name of David Ngumo Wachira was acquired through fraud and the same had previously been under investigation by one PC John Getonto and results of the said investigation were never revealed to them.

17. The Ex Parte Applicants' state that despite their best efforts, they were never involved in the fraud under investigation in which the subject property they allege belongs to them. They further state that if indeed any investigations were done, then the same were done contrary to provisions of Article 47 of the Constitution and the provisions of the Fair Administrative Actions Act, 2015.

18. The Ex Parte Applicants' contend that the CID instituted investigations into the matter and on a follow up they were informed that fraud had been committed in acquiring of the land they allegedly own known as Kajiado/ Kitengela/2003 and others by the complainants and others and that they were to be charged in court. They further aver that the investigating officer had supplied the Ex Parte Applicants' with documents used to defraud the land which included the national identity card of one Paulina Syowai Musyoka holder of identity card number 7928425 to purport to belong to that of the Ex Parte Applicants' father Letoire Ole Ntitori identity card number 3428425.

19. The Ex Parte Applicants' dispute the contents of the replying affidavit sworn by PC Francis Gitonga and further make assertions that the investigating officers colluded with the Interested Parties herein to frustrate and the Ex Parte Applicants' and protect the interested parties whom they claim acquired the land fraudulently.

20. Presently, the Ex Parte Applicants' aver that despite fresh proceedings being preferred against them at the subordinate court in Ngong, the results of the investigation which was allegedly commenced in 2012 have never been revealed to them contrary to Articles 35 and 50 of the Constitution.

21. It is the Ex Parte Applicants' assertion that unless the title currently in dispute under Nairobi Environment and Land Court Case No. 1061 of 2015 is found to be genuine by the said court, the 1st Respondent's decision to prefer charges against the Ex Parte Applicants' is irrational, unreasonable and an abuse of the court process and prosecutorial powers.

22. The Ex Parte Applicants' further contend that that the decision to prosecute the Ex Parte Applicants' for the offences of Malicious Damage to Property contrary to Section 339 (1) of the Penal Code and Forcible Entry contrary to Section 90 of the Penal Code has been made maliciously and in bad faith and that the Ex Parte Applicants' stand to be unfairly subjected to an un-procedural and unlawful criminal process before a determination has been made on whether the title held by the Complainant is genuine.

The 1st Respondent's Case

23. In a rejoinder the 1st Respondent's case is based upon the Grounds of Opposition dated 20th February 2017.

24. The gist of the 1st Respondent's grounds of opposition are as follows

a) That the entire Judicial Review Application is incompetent and lacks merit.

b) That the Ex Parte Applicants' herein intends to obstruct and interfere with the Statutory and Constitutional mandate of the 1st and 2nd Respondents

c) That the Ex Parte Applicants' herein intend to obstruct and interfere with the lawful Statutory and Constitutional mandate of the 2nd Respondent and deny David Ngumo Wachira, Daniel Mwaria Kinyingi, Simon Mbugua Gatiba and Mahoru Njoroge loikoora who are victims of the unlawful actions and/or omissions by Ex Parte Applicants' herein the right to fair hearing under Article 159 and Article 50 of the Constitution of Kenya.

25. The 1st Respondent further states that with regards to the Judicial Review Application herein, the 2nd Respondent under Article 238, 239, 243. and 247 of the Constitution of Kenya, 2010 is mandated to enforce the purpose of Article 244 and Article 50 of the Constitution of Kenya, 2010, Section 5 and 9 of the Victim Protection Act, 2014 and the National Police Service Act.

26. The 1st Respondent further avers that the Judicial Review Application is misplaced and the issues raised in the application would be best disposed of in the trial court of the criminal proceedings, i.e at the Magistrates Court in Ngong.

27. The 1st Respondent contends that the Respondents have not acted ultra vires or infringed the rights of the Ex Parte Applicants' in the mandate of their Constitutional and Statutory obligations and further that the Judicial Review Application is vexatious, incompetent and otherwise an abuse of the Court Process aimed at defeating justice and is made in bad faith.

28. The 1st Respondent further filed an affidavit sworn by PC Francis Gitonga where he provides a chronology of events surrounding the suit

property which gave rise to both the criminal and civil proceedings currently under adjudication at the various courts.

29. The 1st Respondent states that the Interested Parties herein made a complaint to Rongai Police Station via OE 50/31/10/2012 and the said matter was initially investigated and the Ex Parte Applicants' were arraigned before the Kibera Chief Magistrates Court on 21st November, 2012 wherein they were charged with the offense of Malicious damage to property contrary to section 339 of the Penal Code Cap 63 in Criminal Case No. 4969 of 2012.

30. Further assertions are made by the 1st Respondent that several attempts at investigating and resolving the conflict now before this court was quashed by the Ex Parte Applicants' herein after they failed to heed several summons and co-operate with the Directorate of Criminal Investigations and also failed to avail any supporting documents to confirm their allegations.

31. The 1st Respondent asserts that in the course of their investigation, they visited the Lands Registry at Kajiado whereby they investigated the authenticity of the supporting documents availed by the Interested Parties herein and obtained from the Kajiado Land Registry certified copies of the greencards, which tallied with the supporting documents provided by the Interested Parties herein.

32. PC Francis Gitonga father deponed that they contracted the services of the Kajiado County Land Surveyor who made a report that all the beacons were intact and further that the suit property actually belonged to the Interested Parties herein.

33. PC Francis Gitonga went on to state that after investigations were concluded and the file forwarded to the DPP, directions were given from the office of the DPP on the 2nd day of December 2015 that the Ex Parte Applicants' herein be rearrested and charged.

34. Further to the investigations that commenced in 2012, the 1st Respondent states that additional investigations were carried out in it was discovered that the National Identity Card number 3928425 issued to Ex Parte Applicants' father was issued by National Registration Bureau erroneously on 16th June 1983 which he used the same to transact the sale and the anomaly corrected and now holding Identity card number 3428425 with effect from 31st October 1996.

35. PC Francis Gitonga further deponed that he was a stranger to the claims that the National Identity Card number 7928425 belonging to one PAULINA MUSYOKA was used to commit fraud since the said National Identity Card number is neither the number of the Identity Card erroneously issued to the ex parte Ex Parte Applicants' father or the replacement thereof and further that the said PAULINA MUSYOKA's National Identity Card number 07928425 was issued on 14th November 1997 but investigations established that the transactions to sell the subject parcel of land took place from the year 1987 and there is no way a National Identity Card that had not been issued could have been used to commit a fraud.

36. The 1st Respondent denied that there were or are other investigations over the same suit property by one John Getonto as alleged by the Ex Parte Applicants' in their pleadings.

37. The 1st Respondent contends that the Respondents have not acted ultra vires or infringed the rights of the Ex parte Ex Parte Applicants' in the mandate of their Constitutional and Statutory obligations and further that the Judicial Review Application is vexatious, incompetent and otherwise an abuse of the Court Process aimed at defeating justice and is made in bad faith.

The Interested Parties Case

38. The Interested Parties aver that through their application which is the subject of these proceedings, the Ex Parte Applicants' want to frustrate their prosecution in the criminal case filed against them at Ngong Law Courts by citing the existence of Nairobi Environment and Land Court Case No. 1061 of 2015 as one of the reasons as to why the criminal proceedings should be halted and the ex parte Ex Parte Applicants' are not parties to the Environment and Land Court at Nairobi Case No. 1061 of 2015 and the reliefs sought in that case are civil in nature.

39. The Interested Parties also aver that notwithstanding the dispute over the suit property, the Ex Parte Applicants' had no right to destroy property belonging to the Interested Parties herein, an offence to which they now seek reprieve from in this court.

40. The Interested Parties aver that despite having filed Nairobi E.L.C No. 1061 of 2015, the Plaintiff therein Mr. Leitore Ole Ntirori never served either of the Interested Parties with the summons to enter appearance or the pleadings therein but went ahead to cause a false affidavit to be sworn by one Wycliffe Shikuku M'Mada to the effect that the Interested Parties had been duly served with summons to enter appearance in that suit and efforts to trace the said file at Milimani Law Courts have proved futile.

41. The interested parties remain puzzled by the Ex Parte Applicants' desire to be involved in the investigations which were being carried out by the 1st Respondent and further state that in any case, their appearance before the 3rd Respondent will have their rights as accused persons secured and the 1st Respondent is duty bound to supply the Ex Parte Applicants' with any relevant documents resulting from the investigations.

42. The Interested Parties further state that even if the Interested parties herein were illegally in possession of any other person's land there are elaborate provisions in the Land Act as well as other pieces of legislation as to how evictions should be handled and illegal use of force for such an undertaking is not an option.

43. In reference to the Nairobi E.L.C No. 1061 of 2015, the Interested parties aver that the Ex Parte Applicants' herein are not parties to the said matter and its existence should have no effect on the criminal proceedings against the Ex Parte Applicants'. The Interested Parties also

state that the Ex Parte Applicants' herein have not in their application denied culpability in the criminal case against them implying that they are using this application as an attempt to shield themselves from adverse decision against them arising from the criminal proceedings before the 3rd Respondent.

44. The Interested Parties further aver that the land subject of Nairobi E.L.C No. 1061 of 2015 was legally purchased from the Plaintiff Mr. Leitore Ole Ntitori and whereby the Interested Parties acquired 43 acres (17A Ha) which was transferred to one Mr. Njoroge Mbugua Gatiba (deceased) and who subsequently transferred the land to the Interested Parties. The said parcel of land was known as KAJIADO/KITENGELA/2603.

45. The interested parties contend that land parcel number KAJIADO/KITENGELA/2603 was subsequently subdivided into five parcels of land which bore the following numbers 4101, 4102, 4103, 4104 and 4105 and following the subdivision of land parcel number KAJIADO/KITENGELA/2603 the Interested Parties were issued with title deeds for the specific subdivisions of parcel number 2603.

46. It is the Interested Parties' assertions that the investigating officers have conducted investigations and determined the ownership of the parcel of land subject of Nairobi ELC No. 1061 of 2015 and whether any offence was committed by the ex parte Ex Parte Applicants' and the ex parte Ex Parte Applicants' would be in position to prove allegations of fraud on the part of the Interested Parties before the criminal court.

Ex Parte Applicants' Submissions

47. The Applicants stated their issues for determination as:

- a. Whether the criminal case number 4969 of 2012 at Kibera court was withdrawn to investigate the alleged fraudulent land transfer**
- b. Whether the applicants were accorded a fair hearing in the course of investigations**
- c. Whether the ex-parte applicants were lawfully arraigned in the Chief Magistrate's Court at Ngong law courts.**
- d. Whether the ex-parte applicants' constitutional rights and law were violated**
- e. Whether the ex-parte applicants are entitled to the prayers and orders they have sought herein.**

48. On the first issue learned counsel submitted that the answer to the same is to the affirmative. After the applicants' arraignment in court their father one Letoire Ole Ntitori, the legal owner of land known as KJD/Kitengela//2603, to which the applicants are the beneficial owners, complained to the then OCPD Ongata Rongai Division on the fraudulent transfer of his land the fraudulent ownership which was used to harass and arrest the applicants who later charged in court. Upon consideration of the complaint, the said OCPD, SSP Simon Kiragu directed that the case be withdrawn and the fraudulent transfer of the land be investigated. The case was withdrawn and the ex-parte applicants were discharged under section 87 (a) of the criminal procedure code.

49. Counsel submitted that the letter of withdrawal of the said case is very clear that ownership of the parcel of land in question is yet to be determined.

50. Learned counsel submitted that the second part of this first issue is whether the fraudulent land transfer was ever investigated. Counsel submitted that what was done was question whether the documents owned by the interested parties are the ones held in the lands registry and nothing else.

51. Counsel submitted that the court ordered report dated 30th October 2017, which was produced by the principal land registrar before this court, confirmed that the fraudulent land transfer was being investigated by No. 47233 Cpl John Getonto of CID Ongata Rongai. The Land Registrar further confirmed that the original title deed to that land known as Kajiado/Kitengela/2603 was collected by the said Cpl John Getonto and was not returned, the same with the transfer documents that were taken for forensic examination.

52. It was submitted that on cross-examination the Land Registrar confirmed that there is variance in the national identity cards used to register and transfer land known as Kajiado/Kitengela/2603. Further the Land Registrar also confirmed that three major land transactions, that is removal of registered caution, transfer of land and issuance of a title deed could not have taken place in a single day as evidenced in the land transaction in question.

53. According to counsel the above state of facts prove that after the withdrawal of criminal case number 4960 of 2012 against the applicants was to investigate a fraudulent land transfer, but the same was midway hijacked and configured in bad faith to deny the ex-parte applicants justice.

54. Counsel submitted that Police constable Francis Gitonga has both in his testimony and replying affidavits, deliberately misled this court that he had no knowledge of the investigations that were being carried out by corporal John Getonto of Ongata Rongai CID. The land Registrar's report and testimony has put the record straight to the state affairs pertaining to this application.

55. Counsel submitted that the land Registrar's had no evidence that PC. Francis Gitonga investigated the fraudulent land transfer. Conversely the report is clear that CPL. John Getonto investigated the matter and to date he has the ownership documents in respect of land known as Kajiado/Kitengela/2603. The concealment of correct material facts by the respondent is a clear proof of bad faith consequence of which, the applicants herein were maliciously charged at the Ngong Chief Magistrate's Court.

56. On the second issue counsel submitted that his clients were not granted a fair hearing. They were initially informed by the investigation officer one Cpl John Getonto that investigations on the fraudulent land transfer were going on and suspects and witness had recorded statements. It all diminished and what followed was, police harassments. The applicants complained to various and relevant offices of authority but were later charged afresh.

57. According to counsel, the respondents claim that they summoned the applicants but they failed to attend to their offices. The summons were in the nature of summoning suspects and not stake holders to the dispute. The irregular summons to the applicants are intimidatory and geared at charging the applicants with forceful detainer. The police had already made up their mind to charge the applicants. The applicants ought to have been asked to avail documents of ownership of the land. They should have been informed what happened to the investigations that were being carried out by Cpl. John Getonto.

58. If at all the Respondents were to adhere to the law and constitution as regards to fair hearing, they should have furnished the applicants with an investigation report.

59. On the issue as to whether the ex parte applicants were properly arraigned at the Chief Magistrate's court in Ngong, counsel submitted that they were not. The evidence adduced by Cpl John Getonto before this Honourable Court that proves that the ex-parte applicants should have been complainants and not accused persons as in the current criminal case number 116 of 2016 at Ngong Chief Magistrate's Court was not taken into consideration.

60. In conclusion, counsel for the Applicants submitted that the Respondents by law have power and constitutional mandate to prosecute. However, the said mandate has to be exercised legally, constitution and in good faith as provided for under articles 25(c) and 47, which is absent in this matter and the right to information under article 35 of said constitution.

Interested Parties' Submissions

61. Advocate for the Interested parties raised the following issues for determination

- a. Was the decision by the 1st Respondent to charge the Applicants at Ngong Law Courts irregular and or unlawful?**
- b. Can the powers of the 1st Respondent be curtailed in view of the provisions of Article 157(6) and 10 of the Constitution?**
- c. Is the trial court capable of making a determination as to the legality or otherwise of the investigations carried out by the 2nd Respondent?**
- d. Have the Applicants denied the acts which led to the charges at Ngong Law Courts being preferred?**
- e. Have the Applicants established a legal claim in the subject property and if so what is the effect of the existence of Nairobi ELC No. 1061 of 2015?**

62. As to whether the decision by the Respondent to charge the Applicants herein is irregular and or unlawful, it was submitted that the answer lies both in the facts subsisting when the decision was made as well as the law. It is not in doubt that the Applicants had been charged before the Kibera Chief Magistrate's Court being criminal case No. 4969 of 2012. The charges from Kibera Law Courts were withdrawn under section 87(a) of the Criminal Procedure Code. The Applicants herein agreed that the decision to withdraw the charges was to enable the investigating agencies establish the truth about the ownership of the land.

63. Counsel urged the court to consider that Section 87(a) of the Criminal Procedure Code provides that where charges are withdrawn before an accused person is put on his defence then such discharge shall not operate as a bar to subsequent proceedings against such an accused person on account of the same facts. The assertion that the Applicants had previously been charged at Kibera Law Courts cannot bar subsequent prosecution if the investigators were able to unearth relevant evidence which may lead to conviction.

64. Counsel went on to submit that it had not been demonstrated by the Applicants that the DPP arrived at the decision to prosecute based on no evidence or any ill motive or that proper steps were not taken before instituting the criminal proceedings against the accused persons. As per Article 157, the DPPs powers to prosecute are wide and unfettered.

65. With regard to issue number 3, it was submitted that the Applicants have not demonstrated that the trial court is likely to render an unfair decision in the criminal matter. The subordinate court which the Applicants are charged is a duly gazetted court of law and it is bound to make determination based on the evidence presented before it and the law as established.

66. Counsel further submitted that Article 50 of the Constitution is very elaborate on what constitutes a fair hearing. The accused persons have not demonstrated that they have been denied representation by counsel or the evidence that the prosecution would be relying on. In the event that the investigations were poorly carried out, then that would work in favour of the Applicants and the trial court is better placed to hear and make a proper determination.

67. Learned counsel submitted that the Applicants face five counts before in Ngong Criminal Case No. 116 of 2016. There was no evidence tendered to the effect that those charges are trumped up. In fact, one Corporal John Getonto informed the court that the Applicants destroyed the Interested Parties property while defending their land. There appears to be an admission that illegal actions were carried out but the accused persons do not want to have the issues determined through the duly set out procedures. It is only fair that the Applicants answer for their indiscretions.

68. On whether the Applicants have established any legal claim on the subject land, learned counsel submitted that at the close of the Respondents' case, the court directed the Land Registrar at Kajiado to prepare a report on the subject parcel of land. The said Registrar prepared the report as instructed which report is dated 30 October 2017 and it was presented in court on 29 January 2018. The report by the Land Registrar gives a clear chronology as to how the Interested Parties' acquired the subject parcel of land and how they have dealt with the same for over 20 years. It was submitted that it is evident that the Applicants father sold a parcel of land but they have found excuses to deny the Interested Parties their right to property as enshrined in the Constitution.

69. Regarding the Applicants position that because of the existence of Nairobi ELC NO. 1061 of 2015 the charges against them should be quashed, it was submitted that the Applicants are not parties to that suit. Further that the 1st Applicant was not able to explain at what stage the said civil suit had reached.

70. The position of counsel was that with the Land Registrar's report, the outcome of the civil suit appears almost obvious. Even if the Applicant have a genuine claim over the subject land, that cannot be an excuse for criminal activities to take place. He cited Section 193 A of the Criminal Procedure Code *"Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings will not be a ground for any stay, prohibition or delay of the criminal proceedings"*.

71. On the submission that the existence of a civil suit should not bar the institution of and prosecution of criminal suits, the learned counsel cited with approval the cases of **Machakos JR Misc. Application No. 218 of 2015 Wilfreah Manda & Another vs Patrick MukuaMuthani & 2 Others; Nairobi Misc. Application No. 151 of 2013 Republic vs The Hon. The Attorney General & 4 others and Nairobi Misc. Judicial Review No. 68 of 2011 Michael Monari & Another vs The Commissioner of Police and Others**

72. In closing, it was submitted that it is evident that the Applicants have not made out a case to justify the orders being granted. The Notice of Motion Application dated 20th January 2017 should therefore be dismissed with costs and consequently the interim orders barring proceedings in Ngong Criminal Case No. 116 of 2016 should be discharged.

Respondents submissions

73. Akula for Respondents submitted that the Applicants failed to demonstrate that the deceased Letoire Ole Ntirori was their father and that they have brought this application on behalf of the estate of the deceased.

74. Counsel then submitted that the interested parties have availed title deeds that have been corroborated by the Kajiado Chief Lands Registrar as being authentic and thus they are the registered and legitimate owners of the suit properties. In this regard he cited the case **John Kamau Kenneth I Mpapale v City Council of Nairobi & 7 others (2014) KLR**.

75. Next, counsel submitted that the land title Kajiado/Kitengela/2603 is non-existent and in any event, the applicants have no locus to prosecute and lay any claim over the same as the said land did not belong to the said Applicants herein and they do not have any legal authority. For this position, Counsel referred the court to the reasoning in the case **Joseph Kabugi Karanja v Benson MugoMukunya & 2 others (2015) eKLR**.

76. Akula proceeded to make the point that the Petitioner has not demonstrated that his fundamental rights have been breached by the Respondents. The Petitioner has been charged with five (5) offences as per the face of the charge sheet that is Malicious damage to property contrary to section 339(1) of the Penal Code, Cap 63 Laws of Kenya. These charges are valid in law and are criminal in nature. Nothing in law prohibits the criminal case from proceeding whether or not the Applicant has commenced civil proceedings against the Interested Parties.

77. In the view of Prosecution Counsel, the Applicants herein have not denied that they damaged the property as per the charge sheet but are only claiming that the said damaged property was on their land. As such, it was Counsels assertion that the charges remain uncontroverted or challenged by the Applicants herein.

78. It was then submitted that the applicant was given an opportunity to be heard and to adduce evidence during the investigations but they chose to ignore and declined to attend the summons by the investigating officer and the site visit organized by the land registrar and the land survey department.

79. Counsel asserted that the Applicants have not denied that they were invited by the Directorate of Criminal investigations Ongata Rongai for an interview which they declined to attend. It is upon this refusal of the Applicants to attend summons and cooperate with the police during the re-investigations that the 2nd Respondent forwarded the file to the 1st Respondent who recommend the prosecution of the Applicants.

80. Akula Advocate submitted that the decision to prosecute the Applicants was arrived at based on the availability of sufficient evidence that established a prima facie case which supports the charges against the Applicants in the best interest of justice and for public interest.

81. In conclusion, it was submitted that the 1st Respondent in directing the prosecution of the Applicant has not violated any rights of the Applicants or violated the provisions of the Constitution.

82. It was further submitted that the Applicants had failed to discharge the burden of proofing the allegations made against the respondents that they had acted in violation of their mandate. In the eyes of the prosecution counsel, the police had established not only reasonable suspicion but also a prima facie case against the Applicants.

83. For the preceding lines of argument, Counsel asked the court to consider the decisions in the cases of **Republic v DPP & Three Others Ex parte Bedan Mwangi Nduati Another (2015) EKLK**; **Davi Ndolo Ngali & 2 others v Directorate of Criminal Investigations & 4 others (2015) EKLK**; **Erick Kibiwott & 2 others v DPP & 2 others Judicial Review Civil Application No.89 of 2010; Kipoki Ore Tasur v Inspector General of Police & 5 Others (2014) KLR** and **Republic v Chief Magistrate's Court Nairobi 73 Others Ex-parte Stephen Oyugi Okero 2015 eKLK**.

84. As a last word, counsel urged the Applicants to consider trial court as in his opinion this was the best arena to canvass and challenge the evidence obtained by the Respondents in order to accord all parties a fair trial.

Analysis and Determinations

85. After putting much thought into the positions advanced by the respective parties in this matter through their pleadings as well as their Counsels' submissions, I am convinced that what is before me to determine boils down to two substantive issues:

a. Have the Ex Parte Applicants had their constitutional rights and freedoms violated as a result of the conduct of the Respondents?

b. Are the Ex parte Applicants entitled to the prayers they seek?

86. The Ex Parte Applicants are convinced that their rights as guaranteed under Articles 47 and 50 have been and threaten to be violated by the Respondents. It is for this reason that they approach the court in exercise of their Rights as guaranteed by Article 22(1) of the Constitution. Let us examine this proposition.

87. It is trite law that the burden of proving violation or threat of violation is upon the Petitioners as was established in **Anarita Karimi Njeru Vs- Republic (1976 – 80) I KLR 1272**. Further to this, it is also settled that the ex parte Applicants must patently express the manner in which the Respondents have violated their rights as established in **Matiba v Attorney General [1990] KLR 666**.

88. Article 50 provides for the Right to a fair hearing. From the submissions on record, I find no evidence that this right has been contravened. The Applicants were duly informed of the charges they were facing by the respondent. They were given ample opportunity to attend the respondent's offices and adduce evidence. Their claim that this was done only to intimidate them as the Respondents were harassing them and had already made up their mind to charge them is not supported by any evidence. It is not convincing.

89. In my view, the Respondents have accorded the Ex Parte applicants every opportunity for a fair hearing, it is the Applicants that seem to have squandered this opportunity.

90. I am in agreement with the position taken by the court in **Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998**:

“Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it.”

91. The next question is whether the Respondents have conducted themselves procedurally and within their mandate in the manner in which they have handled the Ex parte Applicants, that is, the conduct of investigations as well as the Ex parte Applicants arraignment in court.

92. I stand guided by Article 157(10) which states:

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

93. The Ex parte Applicants assert that they were not arraigned properly in court. Their reasoning is that based on the evidence by one Cpl Getonto, who was not a witness in these proceedings, they should have been the complainants rather than the accused in the Criminal Matter No. 116 of 2016. To this assertion, my answer was well formulated by **Odunga J in Republic v Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji [2014] eKLK**. The honourable judge had this to say:

“Judicial review applications do not deal with the merits of the case but only with the process. In other words, judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore judicial review proceedings are not the proper

forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant in the institution and continuation of the criminal proceedings and once the Court is satisfied that the same are bona fides and that the same are being conducted in a fair manner, the High Court ought not to usurp the jurisdiction of the trial Court and trespass onto the arena of trial by determining the sufficiency or otherwise of the evidence to be presented against the applicant. Where, however, it is clear that there is no evidence at all or that the prosecution's evidence even if were to be correct would not disclose any offence known to law, to allow the criminal proceedings to continue would amount to the Court abetting abuse of the Court process by the prosecution."

94. My position is that the Respondents acted well within their authority in conducting investigations and making the decision to proffer charges. There is no illegality in their actions. I therefore cannot allow myself to question a body exercising its constitutional mandate as it should.

95. I am in agreement with the position taken by the court in **Kenneth Kanyarati & 2 others v Inspector General of Police Director of Criminal Investigations Department & 2 others [2015] eKLR** where it was stated:

"It is evident consequently that investigation of crime has a constitutional underpinning with proper statutory structures. It is to ensure that persons are not simply dragged to court and charged with offences only to turn out that there was no basis for the prosecution in the first place. The mere fact therefore of an investigation being undertaken by the 1st Respondent would not itself be unconstitutional and a party must prove much more than the investigation process alone. As was stated by Ngugi J in Peter Ngaki Njagi Vs. Officer Commanding Station (OCS) Kasarani Police Station, and others NBI HCCC No. 169 of 2012 [2013] eKLR

"(12).....an investigation into alleged commission of an offence does not amount to violation of a constitutional right. Indeed, neither does arrest and prosecution, for those are all part of the criminal justice system which is sanctioned by the Constitution."

96. The court in the **Kanyarati (supra)** case went on further to state:

*I am satisfied that it is not the business of the court to identify the points of investigation. Neither is it the business of this court to wander into the merits and demerits of any intended or prospective prosecution. As was stated in **R Vs. Commissioner of Police and Another Ex parte Michael Monari & Another (2012) eKLR***

"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."

97. The foregoing discourse cements my finding that the Respondents acted well within their mandate and have no in the course of their actions violated the rights of the ex parte applicants as alleged.

98. In answer to the Ex parte Applicants prayer that the Criminal Proceedings in Case 116 of 2016 be stayed pending the outcome of the ELC suit number 1061 of 2015, I refer to **Republic v Director of Public Prosecutions & 2 others Ex-parte Joseph Gathuku Kamuiru & another [2014] eKLR** where it was stated that:

"Whether a prosecution will be quashed or prohibited will therefore depend on the facts of each case. The existence of civil proceedings arising out of the same set of facts is, however, not in itself a bar to commencement or continuation of criminal proceedings. Section 193A of the Criminal Procedure Code, Cap 75 is clear on this."

99. I will now comment on the status of the suit property with regard to the ex-parte Applicants case. As the evidence on record shows, the court ordered report dated 30th October 2017 and produced in this court by the Lands Registrar Kajiado on the 29th January 2018 provides clarity with respect to the ownership of the impugned property at the center of this dispute. It confirms that the interested parties acquired their interests in the land in a lawful and procedural manner. The consequence of this is that, the Ex Parte Applicants, whether or not they are entitled to the property in question, had no excuse to act in the manner that they did. The Report lends further credence to the decision of the Respondents to proffer the charges currently facing the Ex Parte Applicants at the Magistrate's Court in Ng'ong.

100. I associate myself with the position in **John Kamau Kenneth I Mpapale v City Council of Nairobi & 7 others (2014) KLR**.

*"Suffice to say, however, that one cannot claim to be deprived of that which he does not have rights over – See **Veronica Njeri Waweru & 4 others v City Council of Nairobi & 2 others [2012] eKLR** where the Court observed:*

"The petitioners have readily conceded that they have been occupying public property, a road reserve, for the last ten years. They have licenses to operate businesses, but have no proprietary interest in the land. Clearly, therefore, their claim that their rights under Article 40 have been violated has no basis. They do not own the land, and they therefore cannot be deprived of that which they have no rights over. I therefore find and hold that there has been no violation of the petitioner's right to property under Article 40."

101. On the final issue of whether or not the Applicants are entitled to the prayers they seek, this court has to pronounce itself in the negative. I have put much thought into this decision. On the basis of the preceding pronouncements on the first substantive issue however, I am afraid this Court cannot side with the Applicants. Even so, I urge the Applicants to articulate their grievances in a more appropriate forum; the Environment and Land Court. In the upshot, all that is left is for me to make final orders as I hereunder proceed to do.

Disposition

102. The prayer that an Order of Certiorari does issue to remove from this court and quash the 1st Respondents decision to prefer charges against the Applicants which decision is set out in the charge sheet dated the 4th of October 2016 and registered before the 3rd Respondent in **Ngong Criminal Case No. 116 of 2016-Republic v John Oshum& Another** or any other related charges is hereby disallowed.

103. The prayer for an Order of Prohibition does issue directly at the 1st Respondent, its officers and any other authority acting on its instructions from prosecuting or proceeding with the prosecution of the Applicants on offences of malicious damage to property contrary to Section 339(1) of the Penal Code in **Ngong Criminal Case No. 116 of 2016- Republic v John Oshum& Another** or any other related charges is hereby disallowed.

104. The prayer that an Order of Prohibition does issue directed at the 3rd Respondent, prohibiting the 3rd Respondent from hearing, proceeding with or entertaining **Ngong Criminal Case No. 116 of 2016- Republic v John Oshum& Another** against the Applicants until a finding has been reached in **Nairobi ELC Court Case No 1061 of 2015** is equally disallowed.

105. Each party shall bear their own costs.

106. The Application dated 20th January 2017 consequently stands dismissed.

DATED, DELIVERED AND SIGNED AT KAJIADO THIS 6THDAY OF APRIL 2018

.....

REUBEN NYAKUNDI

JUDGE

IN THE PRESENCE OF

MR. OCHAKO FOR THE APPLICANT

MR. AKULA FOR THE RESPONDENT

MR. KAMWARO FOR THE INTERESTED PARTY

MR. MATELI – COURT ASSISTANT