



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISCELLANEOUS APPLICATION NO. 250 OF 2018

IN THE MATTER OF THE LAW REFORM ACT, CHAPTER 26 LAWS OF KENYA SECTION 8 AND 9

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES (2010)

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND POHIBITION

AND

IN THE MATTER OF ARTICLE 50 (2) & 165 (6) OF THE CONSTITUTION

AND

IN THE MATTER OF CRIMINAL CASE NO. 488 OF 2017 BETWEEN REPUBLIC V. DAVID NZIOKA MWOVE AT THE CHIEF MAGISTRATES COURT AT MACHAKOS LAW COURTS

BETWEEN

REPUBLIC.....APPLICANT

AND

1. THE DIRECTOR OF PUBLIC PROSECUTION

2. THE CHIEF MAGISTRATES COURT, MACHAKOS.....RESPONDENTS

EX PARTE: DAVID NZIOKA MWOVE

RULING

1. The Ex parte Applicant filed a notice of motion application dated 2nd August, 2018. He sought judicial review order of certiorari to remove to this court to quash the decision, recommendation and or directions of the 1st respondent through the 2nd respondent, an order of prohibition directed at the 1st respondent prohibiting him from prosecuting or proceeding with the prosecution of the ex parte applicant in Criminal Case No. 488 of 2017 and an order of prohibition directed at the 2nd respondent prohibiting it from proceeding or further proceeding with the hearing and all proceedings against him on charges preferred in Criminal Case No. 488 of 2017 (*'the criminal case'*).

2. The basis upon which the motion is brought is that the criminal case was brought at the instigation of the ex parte applicant's neighbour and main complainant and the same is a tool to settle a boundary dispute. That the ex parte applicant has had a long standing boundary dispute with the main complainant in the criminal case, Patrick Maithya Munyao, over the boundary between their adjoining parcels of land Iveti/Iveti/1209 and Iveti/Iveti/1302 which are subject to the criminal case. That the complainant is using the criminal case to perpetuate a land grab of the ex parte applicant's land. that on 13th December, 2017, the court in the criminal case ordered a survey to be conducted by the County Surveyor to establish the exact boundary between the parcels and the same was conducted on 23rd February, 2018 and the report produced in court on 29th May, 2018. That the report indicated that the matter was not a boundary issue but a land claim since it involved a large portion of land. That the maxim *cuius est solum, eius est usque ad coelum et ad inferos* stands true in this case and the proceedings in the criminal case would be inviting the 2nd respondent to consider matters not within its jurisdiction. That the criminal proceedings if allowed

to proceed will undermine the ex parte applicant's legitimate expectations to the due process and protection under the law enshrined in the Constitution. That the ex parte applicant is ready and willing to pursue the matter in the Environment and Land Court to finality and is willing to deposit to court any reasonable amount or furnish security pursuant to Order 53 rule 3 of the Civil Procedure Rules. That if the criminal case is not stayed, the ex parte applicant would suffer great expense to defend a claim in a matter which the underlying facts can best be dealt with by the ELC.

3. The 1st respondent filed grounds of opposition in response to the motion. The grounds are that; the application is misconceived, incompetent and amounts to abuse of the court process and should be dismissed; that in exercise of his power as enshrined under Article 157 of the Constitution of Kenya, the 1st respondent 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 of functions shall not be under the direction or control of any person or authority; that in the exercise of judicial authority, the judiciary, as constituted by Article 160(1) shall be subject only to the Constitution and the law and shall not be subject to the control or direction of any person or authority as provided for under Article 160 (1) of the Constitution; that criminal process is guided by the Criminal Procedure Code, the Evidence Act and the Constitution of Kenya in which all this statutes must be read as an integrated whole for mutual sustenance of their provisions such that the applicant's fundamental rights are not violated and that the motion is an abuse of the court process duly meant to delay the conclusion of the criminal case.

4. I have given due consideration to the rival arguments and the authorities cited therein. Among the ex parte applicant's allegations is that the criminal case is the instigation of the ex parte applicant's neighbour and main complainant and the same is a tool to settle a boundary dispute. He essentially contends that the criminal proceedings have been instigated in bad faith or rather with malice to defeat a boundary dispute. The 1st respondent has not rebutted this fact on oath. It has further not been explained what investigations were conducted making it appropriate to file charges against the ex parte applicant. Having failed to rebut the same, an inference is made that the allegations are true. Lack of rebuttal amounts to admissions of facts. In this regard I associate myself with the holding in **Kennedy Otieno Odiyo & 12 Others v. Kenya Electricity Generating Company Limited** [2010] eKLR where it was held as follows:

"The respondents only filed grounds of opposition to the application reproduced elsewhere in this ruling. Grounds of opposition addresses only issues of law and no more. The grounds of opposition aforesaid are basically general averments and in no way respond to the issues raised by the application in its supporting affidavit. Thus what was deposed to was not entered nor rebutted by the Respondents. It must be taken to be true. In the absence of the replying affidavit rebutting the averments in the applicant's supporting affidavit, means that the respondents have no claim against the applicant.

In this regard, the court held in Kipyator Nicholas Kiprono Biwott Vs George Mbuguss and Kalamka Ltd Civil Case No. 2143 of 1999

...From the facts and the law, I have analysed in this case, I do find the Defendants have no defence to this suit...having filed no replying affidavit to rebut the averments in the plaintiff's affidavit in support of the application. I, therefore have no alternative but to strike out paragraphs 3, 4, 5, 6 and 10 of the defence and enter judgment for the plaintiffs on liability..."

5. In view of the foregoing observations, I find merit in the motion and it is hereby allowed. The best recourse in the resolution of the dispute is through the ELC. In the end I make the following orders:-

a) An order of certiorari is hereby granted quashing the decision, recommendation and or directions of the 1st respondent through the 2nd respondent to charge the ex parte applicant in Criminal Case No. 488 of 2017 and all subsequent proceedings arising thereof.

b) An order is hereby granted prohibiting the 1st respondent from prosecuting or proceeding with the prosecution of the ex parte applicant in Criminal Case No. 488 of 2017.

c) An order of prohibition is hereby given directed at the 2nd respondent prohibiting it from proceeding or further proceeding with the hearing and all proceedings against him on charges preferred in Criminal Case No. 488 of 2017.

d) There will be no order as to costs.

Orders accordingly.

Dated and delivered at Machakos this 4th day of October 2018.

D. K. KEMEI

JUDGE

In the presence of:-

Ngotho - for the Applicant

Machogu - for the Respondents

Josephine - Court Assistant