



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

JUDICIAL REVIEW CASE NO. 210 OF 2013

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW PROCEEDINGS

FOR AN ORDER OF CERTIORARI & PROHIBITION

AND

IN THE MATTER OF MAVOKO RM CRIMINAL CASE NO.746 OF 2012

(PREVIOUSLY MACHAKOS CRIMINAL CASE NO. 1546 OF 2010)

AND

**IN THE MATTER OF LAND DISPUTE CONCERNING L.R.NO.10425 (ORIGINAL NO.2856/20)
ATHI RIVER PENDING IN MACHAKOS HC MISC CIVIL APPLICATION NO.217 OF 2011**

JAMES MUIRURI GICHANGO.....1ST APPLICANT

PETER MUTHEU KIHUTU.....2ND APPLICANT

PETER KIOKO NDIKU.....3RD APPLICANT

MARGARET MUTHONI NDEGWA.....4TH APPLICANT

JOHN KARIUKI MAINA.....5TH APPLICANT

PATRICK NDAMBUKI MUTUNGI.....6TH APPLICANT

JAMES WAINAINA NDUNGU.....7TH APPLICANT

JOHN MUTUNGA MWANGI.....8TH APPLICANT

VERSUS

PRINCIPAL RESIDENT MAGISTRATE, MAVOKO LAW COURTS.....RESPONDENT

EAST AFRICAN PORTLAND CEMENT COMPANY LTD...FIRST INTERESTED PARTY

SETTLE VILLAGERS SCHEME.....SECOND INTERESTED PARTY

RULING OF THE COURT

The Application

1. The Notice of Motion Application before the court is dated **16th September, 2013** filed by the applicants Pursuant to **Order 53 Rule 1 of the Civil Procedure Rules and Law Reform Act**. The application prays for the following orders:

a. **This matter be certified urgent and be heard ex parte in the first instance.**

b. That this court do issue an order of certiorari to bring up to the High Court in order to quashed the proceeding in Mavoko RM Criminal Case No. 746 of 2012 previously Machakos Criminal Case No. 1546 of 2010.

c. That this court do issue an order of prohibition to prohibit the Principal Resident Magistrate Mavoko Law Courts Athi River by himself or any other magistrate acting through or under him from hearing , trying or taking down any evidence whatsoever involving Mavoko RM Criminal Case No. 746 of 2012 previously Machakos Criminal Case No. 1546 of 2010.

d. Costs of this application be provided for.

2. The application is premised on the grounds set out herein and is supported by a Statutory Statement dated 13th August, 2013 and Supporting Affidavit of the 8th Applicant John Mutunga Mwangi sworn on 13th August, 2013 on his own behalf and on the behalf of his co-applicants.

3. The Applicants' case is that they are the persons accused in Mavoko RM Criminal Case No. 746 of 2012 which was previously Machakos Criminal Case No 1546 of 2010. The accused persons were formerly accused in Machakos Law Court but the proceedings were transferred to Mavoko Law Courts. The Applicants herein are charged with one single count of Forcible Entry Contrary to Section 90 of the Penal Code in which they are alleged to have entered in Land Parcel No. 10425 in a violent manner alleged to be land belonging to the First Interested Party. The Applicants herein are all members of Settle Villagers Scheme the second interested party herein, a society with over 10,000 members who occupy, reside and are settled in Land Parcel No. 10425 which they claim to be their land. The Second Interested Party has a title deed to the said land while the first interested party has a provisional certificate to the said land. The question involving the ownership of the land parcel no 10425 between the First and Second Interested Parties and validity of the two titles held by each is the subject matter of Machakos H.C Constitutional Application No. 217 of 2011 which is still pending before this Court and has not been concluded. The Second Interested Party through its Vice Chairman Patrick Maingi Nguku has further filed a Private Prosecution Criminal Case against the officials of the First Interested Party Kephah Tande, Daniel Ole Osoi and Frank J Mutai in Machakos Criminal Case No. 25 of 2012 on one count of Forcible Entry contrary to Section 90 of the Penal Code, a count of malicious damage to property contrary to section 339(1) of the Penal Code and an alternative charge of counseling or procuring the commission of an offence contrary to section 20(1)(d) of the Penal Code read together with section 339(1) aforementioned. The case is also pending before the Chief Magistrates Court.

4. The applicants' case is that the charges brought against the applicants involving Land Parcel No. 10425 are calculated to resort to the resolution of the dispute over the ownership of the said land through criminal proceedings instead of the dispute being handled by the High Court in the pending Constitutional Case No. 217 of 2011 or through the National Land Commission which is now operational. The applicants' case is that the criminal proceedings are extremely prejudicial to the applicants and Settle Villagers Scheme as the Magistrate will have to determine the ownership of the Land Parcel No. 10425 and the validity of the titles held by each party which matter is already in dispute in the High Court. The applicants state that Article 162(2) of the Constitutional of Kenya grants exclusive jurisdiction to the Environment and Land Court over all matters relating to the environment and the use of title to land. Further, Parliament has already established the Environment and Land Court through the Environment and Land Court Act No. 19 of 2011 and the Court is now fully operational. Section 150 of the Land Act

No 6 of 2012 vests exclusive jurisdiction on the Environment and Land Court all disputes concerning land. The applicants' case is that a Magistrate sitting in a criminal court has no jurisdiction to determine a matter involving occupation, use and title to land which is what the current charge is geared towards.

The Response

5. The application is opposed by the 1st interested Party, whose case is that the application before the court is for Judicial Review seeking orders of prohibition against the respondent and are a total abuse of the process of this court and ought to be struck out and or dismissed with costs. The respondent's case is that the applicants before the court are guilty of material non-disclosure and misrepresentation. The application for judicial review before the court does not state that the Applicants had made a similar application in Judicial Review Misc. Application No. 186 of 2010 seeking to stay the same criminal proceedings in 1546/2010 which Judicial Review Application the court dismissed with costs to the Respondents. The Applicants herein came to this Court ex parte to get orders sought without disclosing this fact to the Court. The respondent cited the case of Kenya National Federation of Co-operatives Limited and Others (2004) 2 EA (CAK), where the court had this to say:

“The rule of the Court requiring Uberimae Fides on the part of the applicant for an ex parte injunction applies equally to the case of an application for a writ of prohibition... The court must insist on strict compliance with the rules pertaining to non-disclosure in order to afford protection to the absent parties at the ex-parte stage”.

6. Party filed submissions which I have considered.

7. The issues I raise for determination are as follows;

- a. Whether the application is res-judicata.
- b. Whether there is material non-disclosure.
- c. Whether this court should not interfere with the ongoing criminal proceedings.

8. As to whether or not the application is res judicata, I have looked at the record and there is evidence that a similar application for Judicial Review was brought in the Application No. 186 of 2010 seeking to stay these same criminal proceedings. That application was filed in court on 14th July, 2011. That application was finally dismissed. The applicant did not bring to the attention of this court the facts of that application, which, if it is true as I have established would fringe the law on res judicata principle.

9. It is the finding of this court that since the judicial review aforesaid was premised on the same grounds and same parties and the applicants had sought to stop the same criminal proceedings, then the matter before this court is res judicata. The law on res judicata states that:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”.

10. For the doctrine of res judicata to apply, the matter must be ‘directly and substantially’ in issue in the previous and in the former suit and the parties must be the same or parties under whom any of them claim, litigating under the same title; and the matter must have been finally decided in the previous suit (See Uhuru Highway Development Ltd –v- central bank & 2 Others-Civil Appeal No. 36 of 1996.

11. It is the finding of this court that the current application is res judicata and is also an abuse of the process of this court.

12. Further, even if the said application was not res judicata, still, this court must exercise restraint in interfering with lawful activities of lower courts. This is so because in criminal proceedings suspects are still entitled to justice pursuant to a fair hearing. There is no justification for the High Court to interfere with the ongoing criminal process.

13. Arising from the foregoing the application before the court is not merited and is dismissed with costs to the Respondents.

Orders accordingly.

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E.K.O. OGOLA

JUDGE

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 7TH DAY OF FEBRUARY, 2017

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DAVID KEMEI

JUDGE

In the presence of:

Luila – for Interested Party