



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

JUDICIAL REVIEW NO. 14 OF 2016

**IN THE MATTER OF ARTICLES OF APPLICATION FOR JUDICIAL REVIEW ORDERS OF
MANDAMUS**

AND

**IN THE MATTER OF THE RESPONDENT'S REFUSAL TO INVESTIGATE THE
APPLICANT'S COMPLAINT, CONTAINED IN A REPORT DATED 20TH NOVEMBER 2014
REGARDING ALLEGED CRIMINAL ACTS COMMITTED BY THE INTERESTED PARTIES**

AND

IN THE MATTER OF ARTICLE 10, 47 AND 157 THE CONSTITUTION OF KENYA 2010

AND

**IN THE MATTER OF THE POLICE ACT, NATIONAL POLICE ACT, THE OFFICE OF THE
DIRECTOR OF PUBLIC PROSECUTIONS ACTS**

AND

IN THE MATTER OF JUDICIAL REVIEW APPLICATION

BETWEEN

BROCE JOSEPH BOCKLE.....APPLICANT

VERSUS

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

DIRECTOR OF CRIMINAL INVESTIGATIONS.....2ND RESPONDENT

O.C.P.D. KILIFI3RD RESPONDENT

O.C.S. BAHARI POLICE STATION 4TH RESPONDENT

RULING

The Notice of Motion dated 7.11.2017 seeks the following two orders: -

(a) THAT an order of mandamus do issue to compel the respondents to investigate and report to the applicant the outcome of the complaints filed by the applicant relating to the manner in which the parcel of land known as Plot No. 24/Section IV/Mainland North registered in the name of Tima Joseph Bockle (applicant's mother now deceased) but administered by the applicant was subdivided into 4 acres and 21 acres and new title deeds issued to the 1st interested party by the 2nd interested party without the knowledge of the applicant.

(b) THAT the grant of leave to apply for the Judicial Review Orders sought herein do operate as a stay of the eviction of the applicant from the suit property and the alienation of the suit property namely Plot No. 24/Section IV/Mainland North now known as Plot No. 491 and 492 IV/Mainland North pending the determination of this Judicial Review application.

The application is supported by the applicant's three affidavits sworn on different dates. The respondents filed a replying affidavit sworn by Corporal Duncan Mokaya. The interested party filed a replying affidavit sworn by Franklyn Pereira.

Mr. Kongere, counsel for the applicant submit that the applicant has demonstrated why the orders of mandamus should be granted. Both the office of the Director of Public Prosecution and the director of Criminal Investigations are constitutional offices. They are expected to abide by the Constitution. Should they fail to undertake their duties then the court can direct them to do so through an order of mandamus. The applicant made his complaint to the police way back in 2010. No investigation were done until when the current application was filed. The national Police Service has the duty of receiving complaints and investigate them so that a decision as to whether prosecution should be preferred or not can be made. The applicant made follow ups to his complaint but nothing was done.

Counsel for the applicant further submit that Corporal Duncan Mokaya was only instructed on 29.12.2016 to carry out the investigations. For six years since 2010 no investigations were done. The respondents now allege that investigations have been conducted and the respondents have discharged their constitutional duties. It is submitted that the power to investigate must be exercised reasonably. Investigations should be conducted promptly, effectively, properly and in a professional manner. The respondents cannot produce a report to the court which makes serious admissions of crimes having been committed and allege that the investigations have been completed. The police cannot simply state that since some parties have passed on then the file be closed. Investigations should be properly conducted and not done for purposes of pleasing the court.

Mr. Kongere further submit that the applicant is not asking the court to tell the respondents what to do. The applicant is simply the court to ask the respondents to reasonably exercise their powers. The investigations are meant to deal with the issue of ownership of the suit property. The property was acquired illegally and it's the duty of the investigators to find out if any crime was committed. Although the dispute was dealt with through civil litigation, there is an application pending before the Court of Appeal to review its own decision. A request has been made for the constitution of a five-judge bench to hear the application.

Mr. Fedha, prosecution counsel, relied on the replying affidavit of Corporal Duncan Mokaya. Counsel further submit that an order of mandamus cannot be issued simply because the investigations were not conducted as per the applicant's liking. Criminal investigations have no time limit. The applicant would lime the investigators to do what he wants. The applicant has not demonstrated how sham and ineffective the investigations are. The applicants would like to be the investigator and tell the respondents on what to investigate.

Miss Ngige, counsel for the interested party opposed the application and relied on the replying affidavit of Franklyn Pereira. It is submitted that the prayer which affects the third party is the one for stay of execution. The application is an abuse of the court process. It is an advancement of the applicant's frustrations in the civil cases that have been concluded by courts of competent jurisdiction. The courts

have decreed the interested party to be the owner of Plot Number 491. A decision of the High Court was affirmed by the Court of Appeal. Those were proceedings conducted in 2006. The applicant has filed many suits and applications. An application for stay of execution was made before Justice Angote and in June 2016 a Ruling was delivered dismissing the application. Soon thereafter, the current application was filed. The sub-division of the land occurred in 1997. The applicant did not make any report the police until 2010. For six years after the report to the police was made, no similar application has been filed. The application is intended to stop eviction and not to trigger investigation. The applicant did not seek stay of the civil suits pending criminal investigations.

The dispute herein dates way back in the 1990s. The dispute involves original Plot Number MN/IV/24. The plot was sub-divided into two plots namely MN/IV/491 and MN/IV/490. Plot Number 491 was transferred to the interested parties sometimes in 1997. Several suits were filed. The original plot was registered in the names of TIMA JOSEPH BOCKLE (deceased). TIMA filed two civil suits in Nairobi as per the applicant's statement to the police recorded on 5.12.2016. there were Nairobi HCCC 3742 of 1992 and Nairobi Miscellaneous Civil Application Number 959 of 1991. The late Abdalla Zubedi filed Mombasa HCCC No. 3 of 1994. The matter was also dealt with by the Kilifi District Land Control Board as well as the coast Province appeals Board.

The litigation ended before the Court of Appeal. Both the High Court and the Court of Appeal have dealt with the issue of ownership of the land. Have not been able to see the various Rulings and Judgements in all the cases between the parties as they were not annexed in the affidavits. Only the Ruling of Justice Angote of 22.9.2016 was annexed in the affidavit of Franklyn Pereira. The applicant contends that even if the Court of Appeal held in favour of the 1st interested party, an application for a five-judge bench to review the court's decision is pending in that court.

The application is grounded on the contention that the applicant made a report to the police to investigate the process through which the 1st interested party acquired the property. The complaint was made in 2010 but nothing was done until December 2016 when Corporal Duncan Mokaya was instructed to carry out investigations. According to the applicant, an investigation report was quickly done dated 20.1.2016 so as to satisfy the court that investigations have been done. The applicant is seeking an order of mandamus to compel the respondents to carry out proper investigations. According to the investigation report, Tina Bockle and Abdalla Zubedi are now deceased. The 1st interested party bought the land from Abdalla Zubedi. The officer recommends that the file be closed.

In the case of **KENYA NATIONAL EXAMINATION V THE REPUBLIC, EX-PARTE GEOFFREY GATHENJI NJOROGE & 9 OTHERS, Civil Appeal No. 266 of 1996 [1997] eKLR**, an order of mandamus was explained in the following terms: -

- i. Can only command the making of a decision; it cannot issue in respect of a decision already made;**
- ii. Commands the performance of an act which a public body is bound to perform;**
- iii. Cannot command the performance of an act in a specific way where a statute imposing a duty leaves discretion to a public body as to the mode of performing the duty.**

According to the respondents, investigations have already been conducted. The applicant would like the investigations to come up with a specific conclusion. I have read the report of Corporal Duncan Mokaya. I do agree that the report did not cover several aspects of the complaint. I expected the investigator to go through the various files in court and extract the relevant documents. It is true that Abdalla Zubedi is deceased. However, when Abdalla Zubedi filed his case to evict Tima, he must have annexed documents in support of his case. Such documents could have been annexed in the report. Similarly, when Tima filed her case in Nairobi, she must have annexed some documents in support of her case. There is the aspect of the Kilifi Land Control Board and the Coast Province Appeals Board. Minutes of those two bodies could have been retrieved. The surveyor who sub-divided the land could have provided his sub-division drawings. It appears that the consent to subdivide the land was given by the Coast Province

Appeals Board. Similarly, it seems the late Tima was not willing to part with her original title deed and someone must have authorized the issuance of another title deed. All these aspects of the dispute need to be covered. The applicant correctly pointed out that he is not asking the court to tell the respondents what to do. However, criminal investigations must be carried out objectively, carefully, in detail and cover all aspects of the problem such that when a recommendation is made as to whether the file should be closed or not, the issue would have been covered exhaustively.

Given the report by the respondents, I do find that the investigations were hurriedly done so as to inform the court that investigations are complete. What was not done for six years was simply done in two weeks. That cannot be held to be a conclusive investigation report.

The next issue involves the second prayer of the application. It is clear to me that both the High Court and the Court of appeal have dealt with the issue of ownership. As of now, the 1st interested party has been decreed to be the owner of Plot Number 491. An eviction order was granted by Justice Anne Omollo in Mombasa. An application for stay of execution was disallowed by Justice Angote in his ruling of September, 2016. The current application was filed on 9.11.2016.

In view of the fact that both the High Court and the court of appeal has dealt with the issue and have made final determinations, it would be improper for this court to grant an order of stay of execution as prayed. Granting the order would be tantamount to varying or setting aside the Ruling of Justice Angote on the issue of stay as well as staying the decision of the Court of appeal. The Court of Appeal determined the issue of ownership. This court cannot be seen to be staying the execution of the decision of the Court of Appeal. The investigations can be carried out but that should not be the reason for granting the prayer for stay of execution.

In the end, the application herein partly succeeds. An order of mandamus shall issue against the respondents directing them to carry out proper investigations on the applicant's complaint. The investigations should be done within three (3) months. There shall be no need to file the report before this court. The applicant should be issued with a copy of the investigation report.

With respect to the second prayer of the application, I do find that the same cannot be granted by this court. The application for stay of execution is hereby disallowed.

In view of the fact that the application has elements of pursuit of constitutional rights, I do order that parties shall meet their own costs.

Dated, signed and delivered in Malindi this 4th day of April, 2017.

S.J. CHITEMBWE

JUDGE