



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

JR APPLICATION NO 6 OF 2019

THE REPUBLIC.....APPLICANT

VERSUS

1. SENIOR PRINCIPAL MAGISTRATE SHANZU

2. DIRECTOR PUBLIC PROSECUTION

3. OCS BAMBURI POLICE STATION

4. REGISTRAR OF TITLES MOMBASA

5. CHIEF REGISTRAR

6. NATIONAL LAND COMMISSION.....RESPONDENTS

AND

TWO THIRDS INVESTMENT LIMITED.....INTERESTED PARTY

EX-PARTE APPLICANTS : KALAMA SAID KALAMA & 40 OTHERS

JUDGMENT

1. The ex-parte applicants pursuant to leave granted by this court on 26th March, 2019 filed their substantive motion dated 8th April, 2019 seeking for the orders:

1. THAT Judicial Review Orders of Certiorari do issue, to bring into this court and quash the decision of the 1st Respondent made on 8th March, 2019 in Shanzu Criminal Case No. 1092 of 2016, ordering inter alia, that the Interested Party, Two Thirds Investments Limited be assisted by the 3rd and 4th respondents in evicting the accused persons and their families and/or cohorts and/or agents from the purported interested party's LAND PLOT NOS.MN/II/6212 to 6369 and/or PLOT NO. MN/II/390, the suit premises herein situate at Utange within Bamburi in Mombasa County and that the said respondents to assist in ensuring that the Interested Party obtains vacant possession of the said parcels of land and the orders directing the National and County Government as well as the National Land Commission to issue title deeds to legitimate squatters living on the parcel of land.

2. THAT Judiciary Review orders of prohibition do issue, prohibiting the 3rd to 7th respondents from acting on the decision of the 1st respondent made on 8th March, 2019 in Shanzu Criminal Case No. 1092 of 2016 involving LAND PLOT NOS. MN/II/6212 to 6369 and/or PLOT NO.390/II/MN, the suit premises herein situate at Utange within Bamburi in Mombasa County.

3. THAT costs of this application be provided for.

2. The motion is premised on the grounds set out in the motion and supported by the grounds set out in the statement of facts dated 22nd March 2019, the verifying affidavit sworn by Ali Juma Mwakaneno on 22nd March, 2019 and the documents annexed thereto. It is deposed that on 8th March, 2019, the 1st Respondent, sitting as a criminal court, convicted and sentenced Catherine Abiero, Damaris Kaingu and

Lilian Kimaite to a fine of kshs.50,000.00 and in default to serve 12 months' imprisonment for the offence of forcible detainer contrary to Section 91 of the Penal Code and disobedience of lawful orders contrary to Section 131 of the Penal code in Shanzu Criminal Case No. 1092 of 2016. That other than the said sentences, the 1st respondent proceeded to make orders that are now affecting the ex-parte applicants herein as the 3rd and 4th respondents were ordered to ensure that the Interested Party acquires vacant possession of the suit premises despite the fact that the ex-parte applicants were not parties to the criminal proceedings aforementioned, yet, the ex-parte applicants state, they are in actual and/or physical possession or occupation of the parcels of land, and having a pending suit for adverse possession being ELC No.232 of 2014 (OS), a fact acknowledged by the 1st respondent in her judgment of 1st December, 2017. The ex-parte applicants aver that the 1st respondent further made orders for unspecified family members and/or cohorts and/or agents of the accused persons to be evicted from the suit premises without specification while acknowledging that there were/are legitimate squatters on the said land. It is their contention that the order could be a recipe for a breach of peace and that the 1st respondent was by law required to deal with the accused persons alone.

3. The ex-parte applicants aver that the 1st respondent without jurisdiction further made an order directing the County and National Governments as well as the National Land Commission to issue Title Deeds to purported legitimate squatters on the suit premises, arguing that such powers are vested on the Environment and Land Court. That 1st Respondent acted ultra vires her powers since she was aware of the existence of a suit, Mombasa ELC No. 232 of 2014 (OS) where issues of ownership are competently determined. The ex-parte applicants state that the 1st respondent acted ultra vires when she made adverse orders affecting them without affording them an opportunity to be heard contrary to Articles 47 and 50 of the constitution. It is the ex-parte applicants contention that the 1st respondent's decision was a nullity and/or unlawful and/or illegal and/or unprocedural and/or void ab initio and therefore urged the court to quash the same. The ex-parte applicants aver that in addition, the 1st respondent while sitting as a criminal court did not have powers to issue orders relating to parcels of land described as sub-divisions while the charge sheet mentioned only one parcel of land known as PLOT NO. MN/II/390 which is the subject matter in Mombasa ELC NO. 232 of 2014 (OS) and that similarly, eviction orders should not be directed to third parties and cannot be issued against accused persons in cases involving the offence of forcible detainer under the penal code. That the 1st respondent acted ultra vires by ordering for the eviction of the accused persons from unspecified portions of land on the suit premises. It is the ex-parte applicants' contention that it is imperative and/or justifiable for the orders sought for herein to be granted to meet the ends of justice.

4. The interested party opposed the grant of the orders sought through the replying affidavit filed on 9th July 2019 sworn by J.K. Wanyoike who deposed that he is a director of the interested party. He deposed that the interested party is the owner of parcel known as PLOT NO.MN/II/390 and has exhibited a copy of the title marked "JKW-2". He deposed that the ex-parte applicants have no legal right to PLOT MN/II/390 or any part thereof and that no court has pronounced any right in favour of the ex-parte applicants allowing them to remain on the said land or any part thereof

5. Mr. Wanyoike deposed further that by an application dated 20th July, 2015, filed in Mombasa ELC No. 3 of 2015, the interested party applied for an order to restrain Katana Said Kalama, Juma Kazungu Mweni, Chembe Stephen Charo and Ali Juma Mwakaneno, the defendants in that suit, by themselves, family, proxies, agents, servants, employees and/or otherwise, by way of an injunction from encroaching, trespassing, constructing, fencing, cultivating, grazing, obstructing the applicant's right of ingress and egress into and/or out of all parcel known as PLOT NOS.MN/II/6212 to 6369 (original CR 1222, MN/II/390) pending the hearing and determination of the suit. That by an initial order of the court in that suit, refined through a series of consent orders recorded in court on 3rd March 2015, 13th April 2015 and 27th May 2015, the parties therein settled on the District Surveyor to survey the suit land and thereafter file the resultant survey report in court. That consequently, the District Surveyor carried out his survey and filed his report in court on 1st July 2015 which identified the plots occupied. That the said survey report was never challenged by any of the parties. Mr. Wanyoike deposed further that the respondent commissioned another survey by Mr. Edward Kiguru, who surveyed the said property and prepared his report dated 5th April 2018, and upon arguments, the court delivered a ruling to the notice of motion application dated 20th January 2015 on 6th July 2016. Copies of the survey reports and order have been annexed. That the said order restrains Katana Said Kalama, Ali Juma Mwakaneno and Saumu Mbura Andrea by themselves, family, proxies, agents, servants, employees and/or otherwise by way of an injunction from encroaching, trespassing, constructing, fencing, cultivating, grazing, obstructing the applicants' right of ingress and/or egress into and/or out of all parcel known as PLOT NOS. MN/II/6212 to 6369, pending the hearing and final determination of the suit. That the said order, in accordance with the findings of the survey report agreed by the parties, excluded 30 plots being Nos.6239, 6240, 6245, 6246, 6248, 6253, 6255, 6256, 6272, 6298, 6299, 6330, 6332, 6234, 6263, 6320, 6264, 6270, 6269, 6268, 6262, 6315, 6314, 6273 and 6285 from the injunction as the said plots were found to be in possession of Katana Said Kalama, Ali Juma Mwakaneno and Saumu Mbura Andrea. That the defendants did not appeal from the said ruling. Mr. Wanyoike has deposed that since the issuance of the said order, the interested party by itself or agents has never set foot on the said 30 plots or in any way interfered with the said defendants' quiet possession and enjoyment of them.

6. Regarding the remaining plots protected by the said injunction, it is deposed that upon receiving the formal court order, the interested party lodged a complaint with the officer in charge Bamburi Police Station against certain third parties who during the pendency of the application had been trespassing into the said plots and carrying out illegal activities including construction of illegal structures and harvesting timber and soil. That the said trespassers were also interfering with the plaintiff's occupation and enjoyment of the suit property including blocking the plaintiff's ingress and egress into the said suit property by use of various unsavory means including violence. That following the complaint, the police went to the suit property and arrested several of the trespassers and charged them in court at Shanzu with trespass upon private land. Copies of the charge sheets have been annexed. That the police also removed the illegal structures on the said plots. The interested party avers that at no time did the police and/or the plaintiffs enter into any of the 30 plots excluded by court in the order of 6th July 2016 or touch anything therein or in any way interfere with any of the defendants' possession and enjoyment of the same. The interested party further avers that none of the applicants have obtained approvals from the authorities as required by law for structures constructed on the suit land; that the applicants have filed similar applications being Misc. Application No.34 of 2018 and 80 of 2016, and that the applicants, who are also parties in ELC No. 232 of 2014 consolidated with No. 3 of 2015, seek through present application to review the ruling dated 6th July 2016 and that the ex-parte applicants are not residing on the suit property and if residing are busy bodies who have violated the interested party's constitutional right to own private property.

7. The ex-parte applicants submitted inter alia, that the 1st respondent was ultra vires her powers and that her judgment seem to restrict the jurisdiction of the Environment and Land Court as regards the originating summons in which adverse possession is sought in ELC Case No. 232 of 2014 (OS). It is their submission that only the High Court through the Environment and Land Court which is clothed with jurisdiction

to order that a legal owner of a parcel of land has been legitimately dispossessed of his/her parcel of land by limitation of action under the doctrine of adverse possession. Counsel for the ex-parte applicants relied on the case of **Republic –v- Grace Wangari Bunyi & Others Ex-parte Moses Kirruti & 28 Others (2018)eKLR**. It is their submission that they were not party to the criminal proceedings, and therefore were condemned unheard.

8. The interested party submitted that this court does not have supervisory jurisdiction over a subordinate court exercising its criminal jurisdiction. Counsel for the interested party referred this court to the provisions of Article 162 (2) (b) and Section 13 of the Environment and Land Court Act which deals with the jurisdiction of this court, and submitted that the power to supervise subordinate courts exercising their criminal jurisdiction rests with the High Court, irrespective of whether the matter touched on land. They relied on the case of **Republic –v- Karisa Chengo & 2 Others (2017)eKLR and Samuel Kamau Macharia & Another –v- Kenya Commercial Bank Limited & 2 Others (2012)eKLR**. It was further submitted that under Sections 174, 175, 177 and 178 of the Criminal Procedure Code, Cap 75 Laws of Kenya, the 1st Respondent had broad powers to issue orders of restitution and compensation. It is also the interested party's submission that granting the orders sought herein would be to review the court's order of 6th July 2015 in Mombasa ELC No. 3 of 2015 consolidated with No. 232 of 2014 (OS). The interested party further submitted that the applicants have not demonstrated locus standi or sufficient interest and or authority to bring the suit.

9. Having analyzed the pleadings and the submissions filed, I pose the following questions for my determination:

i. Whether this court is clothed with jurisdiction to hear and determine these proceedings. If yes;

ii. Whether or not the 1st respondent acted in excess of her jurisdiction in Shanzu SRMC Criminal Case No. 1092 of 2016

iii. What orders commends themselves to be given.

10. The interested party has raised in their submissions that this court lacks jurisdiction to hear and determine the judicial review proceedings in so far as the provisions of Article 162 (2) (b) of the Constitution of Kenya and Section 13 of the Environment and Land Court Act No. 19 of 2011.

11. In the Judicial Review Application, the prayers sought are orders of certiorari to issue and bring into this court and quash the decision of the 1st Respondent made on 8th March, 2019 in Shanzu SRMCC Criminal Case No. 1092 of 2016 and orders of prohibition, prohibiting the 3rd to 7th respondents from acting on that decision.

12. The Environment and Land Court is a creation of Article 162(2) (b) of the constitution which mandated parliament to establish courts with the status of the High Court “ to hear and determine disputes relating to the environment and the use and occupation of and title to land.” Under sub-article 3, Parliament was mandated to legislate on the jurisdiction and functions of courts contemplated in Clause 2. Parliament indeed enacted the requisite legislation which spelt out the jurisdiction of this court titled the Environment and Land Act No. 19 of 2011. The Environment and Land Court's jurisdiction is highlighted in Section 13 of Act No. 19 which states that the court shall have original and appellate jurisdiction to hear and determine disputes in accordance with Article 162 (2) (b) of the Constitution and with the provisions of that Act or any other law relating to environment and land.

13. This court being in equal status to the High Court is subject to the provisions of Article 165 (b) of the Constitution which states thus:

“The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function but not over superior court.”

14. In the case of **Republic –v- Karisa Chengo & 2 Others (2017)eKLR**, the Supreme Court stated as follows:

51. Flowing from the above, it is obvious to us that status and jurisdiction are different concepts. Status denotes hierarchy while jurisdiction covers the sphere of the court's operation. Courts can therefore be of the same status, but exercise different jurisdictions.....

52.we therefore entirely concur with court of Appeal's decisions that such parity of hierarchical stature does not imply that either ELC or ELRC is the High Court or vice versa. The three are different and autonomous courts and exercise different and distinct jurisdictions. As Article 165 (5) precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court.....

80. In this case, it therefore follows that Angote J, appointed as a judge of the Environment and Lands Court, and not of the High Court, had no jurisdiction to determine criminal appeals.....”

15. In the case of owners of Motor Vessel “Lilian

S’ –v- Caltex Oil Kenya Limited (1989) KLR 1653 (CA), the court of appeal stated as follows:

“Jurisdiction is everything without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceeding pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

16. In the case of **John Kipng'eno Koech & 2 Others –v- Nakuru County Assembly & 5 Others (2013)eKLR**, Emukule, J haD this to say on jurisdiction:

“Jurisdiction is the practical authority granted to a formally constituted legal body to deal with and make pronouncements on legal matters and by implication to administer justice within a defined area of responsibility.”

17. It has been stated that a court’s jurisdiction flows from either the constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the constitution or other written law.

18. As already stated, Section 13 (1) of the Environment and Land Court Act gives the court original and appellate jurisdiction to hear and determine all disputes relating to environment and land. (emphasis mine). Such disputes are provided in Section 13 (2) of the ELC Act and what is set out thereon are not conclusive and therefore the court can hear any other dispute relating to the environment and land.

19. What then is a “dispute”? According to the Black’s Law Dictionary, Seventh Edition, a dispute is “a conflict or controversy, especially one that has given rise to a particular lawsuit.”

20. There is no denial that in the instant case, the proceedings complained of were undertaken in a criminal court. The dispute however, is over land plot Nos. MN/II/390 situate at Utange area within Mombasa County. Section 13 (7)(b) provides that this court shall have power to make any order and grant any relief as the court deems fit and just, including prerogative orders. The matter herein being an application for judicial Review orders arising from a dispute over land in my view, falls within the purview of Article 162(2)(b) of the constitution and the Environment and Land Court Act. In my view, it is irrelevant that the matter arose in a criminal court. As long as the dispute touches on land and environment, the court no doubt has the power to hear and determine the matter. I note that the constitution and the Environment and Land Court Act did not exclude the court’s jurisdiction where the dispute relates to the environment and land. I therefore find that the judicial review application herein is properly before this court and the court has jurisdiction to determine the matter.

21. The next issue to consider is whether or not the 1st respondent acted in excess of her jurisdiction in Shanzu SRMC Criminal Case No. 1092 of 2016. In the said criminal case, it is not in dispute that there were three accused persons, namely, Catherine Abiero, Damaris Kaingu and Lilian Kimaite. It is also not in dispute that other than convicting and sentencing the said three accused persons, the 1st respondent proceeded to make orders affecting other parties, including the ex-parte applicants herein who were not parties to the criminal proceedings. It is also apparent that there is a pending case being Mombasa ELC No. 232 of 2014 (O.S) over the suit properties, yet the 1st respondent made orders touching on those properties, including ordering the 3rd and 4th respondents to ensure the interested party acquires vacant possession of the suit properties and even directing the County Government, the National Government and the National Land Commission to issue title deeds over the suit properties.

22. In the case of **Municipal Council of Mombasa –v- Republic & Umoja Consultant Ltd, Civil Appeal No. 185 of 2001**, it was held:

“ Judicial review proceedings is concerned with the decision making process, not with the merits of the decision itself: the court would concern itself with such issues as to whether the decision maker 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....The court should not act as court of appeal over the decider which would involve going into the merits of the decision itself such as whether there was or there was no sufficient evidence to support the decision. ”

23. It was also held in **Republic-v- Kenya Revenue Authority ex-parte Yaya Towers Limited (2008)eKLR**, that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. The purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is not part of that purpose to substitute the opinion of the a judiciary or of the individual judge for that of the authority constituted by law to decide the matter in question. Accordingly, this court will only concern itself with the process followed by the 1st respondent in arriving at the impugned decision and therefore will not dwell on whether the decision was right or wrong.

24. The ex-parte applicants case is that they were not parties to the criminal proceedings in Shanzu Criminal Case No. 1092 of 2016 yet adverse orders were made against them. All courts have been consistent on the importance of the rule of natural justice and in particular hearing a person who is likely to be affected by a decision before the decision is made.

25. In the case of **Onyango –v- Attorney General (1986-1989) EA 456**, Nyarangi, JA at page 459-460 stated:

“I would say that the principle of natural justice applies where ordinary people who would reasonably expect those making decisions which will affect others to act fairly...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right if the principle of natural justice is violated, it matters not that the same decision would have been arrived at”

26. It has also been held by the courts that the right of a person to defend himself/herself in the face of a decision potentially affecting his/her rights or interests necessarily; implies that the person must receive prior notice of the facts on which the decision will be based so that a party may respond to it and defend himself. Failure to give prior and proper notice and failure to disclose the allegations to enable a party who may be affected have opportunity to defend himself is itself a denial of natural justice and fairness.

27. In the present case, the 1st respondent made a decision that no doubt affected the ex-parte applicants without complying with the principles of natural justice. Having analyzed the facts of this case, it is clear that the ex-parte applicants who were not parties to the

proceedings in Shanzu Criminal Case NO. 1092 of 2016 were condemned unheard, yet their rights were bound to be affected by the decision or the orders made by the 1st respondent. It is my finding that the 1st respondent violated the rules of natural justice by failing to accord the ex-parte applicants an opportunity to be heard before the orders that would affect them were made. This clearly violated the provisions of Article 50 of the constitution. A decision given without observing the principles of natural justice is void.

28. The ex-parte applicants have also submitted that the 1st respondent acted ultra vires her powers when she heard and entertained a claim over land whose ownership is subject of Mombasa ELC No. 232 of 2014 (O.S.) when she ordered inter alia, that title deeds be issued regarding the suit premises and also declaring proprietary rights over the suit properties. The ex-parte applicants submitted that the 1st respondent, as a criminal court was not clothed with jurisdiction to adjudicate on the ownership or legal proprietary rights over a parcel of land which had a dispute in a competent court, being the Environment and Land Court. It is therefore the ex-parte applicants submission that the 1st respondent was ultra vires.

29. In **Nyeri Civil Appeal No. 310 of 1997 Karanja –v- The Attorney General** the Court of Appeal stated:

“Any order made without jurisdiction is a nullity and no amount of legal ingenuity can turn that into a valid order. What is a nullity remains a nullity. We say so now and it has been said so before..... ”

30. As already stated hereinabove, the jurisdiction of this court is given in Article 162 (2)(b) of the constitution and Section 13 of the Environment and Land Court Act. Some magistrates in the subordinate courts have also been empowered by law to hear disputes relating to the environment and land where the matters fall within their pecuniary jurisdiction. However, in the instant case, it is clear that the 1st respondent while making the impugned orders was sitting as a criminal court and not a subordinate court dealing with environment and land disputes. In my view, the orders purportedly made by the 1st respondent who was exercising her criminal jurisdiction should have been left for the Environment and Land Court. I have perused the judgment in Shanzu Criminal Case No.1092 of 2016. In the said judgment, the 1st respondent acknowledged that there was a dispute pending before this court. I therefore agree with the ex-parte applicants submission that the 1st respondent acted in excess of her jurisdiction in making those orders, especially with regard to persons who were not parties to the criminal case and especially when the dispute was pending before this court.

31. In the result, I am persuaded that the applicants have demonstrated sound grounds for the court to grant the reliefs sought. Consequently, I grant the following orders:

- 1. An order of certiorari be and is hereby issued to remove into the court and quash the decision of the 1st respondent made on 8th March 2019 in Shanzu Criminal Case No. 1092 of 2016 ordering the interested party to be assisted by the 3rd and 4th respondents in evicting the ex-parte applicants, other than the three named accused persons from the suit premises being PLOT NOS. MN/II/6212 to 6369 and PLOT NO. MN/II/390.**
- 2. An order of prohibition be and is hereby issued forbidding the 3rd to 7th respondents from acting on the decision of the 1st respondent in respect of the suit properties with regard to the ex-parte applicants other than the three accused persons.**
- 3. For avoidance of doubt, the judicial review orders granted in paragraph 1 and 2 herein are specific to the ex-parte applicants herein and do not apply to the three named accused persons in Shanzu Criminal Case No. 1092 of 2016.**
- 4. Each party to bear their own costs.**

Dated, signed and delivered electronically by email due to COVID-19 Pandemic at Mombasa this 30th day of July 2020

C.K.YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE