



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. APPLICATION NO. 32 OF 2011 (JR)

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW BY MIDDLE EAST
BANK KENYA LIMITED**

AND

**IN THE MATTER OF: ORDER MADE IN THE MOMBASA CHIEF MAGISTRATE'S
COURT MISCELLANEOUS CASE NO. 25 OF 2011 PURPORTEDLY PURSUANT TO
SECTIONS 118 AND 121(1) OF THE CRIMINAL PROCEDURE CODE AND SECTION 180 OF
THE EVIDENCE ACT**

BETWEEN

THE REPUBLIC.....APPLICANT

AND

1. THE CHIEF MAGISTRATE'S COURT AT MOMBASA

2. HON. THE ATTORNEY GENERAL.....RESPONDENTS

AND

MIDDLE EAST BANK KENYA LTD.....EXPARTE APPLICANT

AND

AUSTINE SALMON KITOLOLO.....INTERESTED PARTY

RULING

THE APPLICATION

1. The application before court is the Notice of Motion dated 5th June, 2015. It was brought under Certificate of Urgency and seeks orders that the court discharge the orders of stay of proceedings granted on 30th March, 2011 and that the Judicial Review proceedings herein be dismissed for want of prosecution. The application is filed by the Interested Party, Eng. Austine Salmon Kitololo, who by lodging a criminal complaint with the Police against Middle East Bank Kenya Limited, the ex parte applicant herein, prompted the said ex parte applicant to file the Judicial Review application herein.

2. Pursuant to leave granted 30th March, 2011, the ex parte applicant filed a Notice of Motion dated 4th April, 2011 seeking orders:

1. THAT an order of prohibition be issued directed to Kenya Police and in particular the Provincial Criminal Investigation Department – Coast prohibiting it and any officer or servant of the Kenya Police including CPL Ambrose Gichane and CPL Millicent Ouko from enforcing or putting into effect or directing others to enforce or obey a purported Court Order made on 10th February 2011 by the Chief Magistrate's Court in Mombasa in Misc. Case No.25 of 2011 ordering the Applicant to hand over original Title Deeds and other security documents referred to therein original correspondence and all other relevant documents in its possession to the Kenya Police or the said officers;
2. THAT an order of certiorari be issued to remove into this Honourable court and quash the said Court Order and also the decision of the Chief Magistrate's Court at Mombasa made on 10th February, 2011 in Miscellaneous Case No. 25 of 2011.
3. THAT the costs of this application as well as the cost of the application to obtain leave to apply for the aforementioned orders be provided for;
4. THAT all necessary directions be given and further orders made as appropriate.

THE APPLICANT'S CASE

3. On the strength of the application dated 30th March, 2011, the court on the same day granted orders for stay of proceedings in Mombasa Chief Magistrate's Court Miscellaneous Case No. 25 of 2011. It is the Interested Party's case that the net effect of the orders of stay of proceedings is that the Police have been barred from investigating his complaint, touching on the ex parte Applicant and its officers. The Interested Party avers that the ex parte applicant is not keen on prosecuting the judicial review proceedings as exemplified by the facts set out in the Supporting Affidavit of Eng. Austin Salmon Kitololo sworn on 5th June, 2015. He stated that the matter was last in court on 17th February, 2014 and no further steps have been taken by the ex parte Applicant since that date. On 25th September, 2014, the court directed that the ex parte applicant do file and serve written submissions within 21 days, which it was not done. The court on 3rd December, 2013 again directed the ex parte Applicant to file and serve written submissions within 21 days and yet again this was not done. Further, ever since the directions on written submissions were first issued, the matter came up in court on no less than 8 occasions and in all instances, the ex parte applicant failed to tender its written submissions. The Interested Party concludes that this state of affairs is a clear manifestation of the ex parte Applicant's disinterest in prosecuting the judicial review proceedings. He complains of prejudice since his complaint with the Police cannot be investigated. The delay, he adds, is both inordinate and inexcusable, and it is only fair, just and in the interest of justice that the application dated 5th June, 2015 be allowed to enable the Police to conclusively deal with his complaint which relates to various criminal offenses alleged to have been committed by the ex parte applicant and its officers in an attempt to defraud him of his parcels of land.

THE INTERESTED PARTY'S RESPONSE TO THE APPLICATION

4. The application is opposed. The ex parte Applicant filed the affidavit of Dhirendra Rana, the Managing Director of the ex parte applicant sworn on 26th June, 2015 in reply. He stated that the interim order made on 30th March, 2011 merely restrained the Police from removing and carrying away all original security and other related documents including the title deeds held by the ex parte Applicant and which are essential evidence in the ex parte Applicant's current litigation with the Interested Party or in litigation relating to the securities held by the ex parte Applicant over the Interested Party's property. The Police were not prevented from conducting legitimate investigations into any alleged complaint that the Interested Party may have made to the Police regarding the ex parte applicant or its officers. He deponed that the ex parte Applicant was at all times ready to cooperate and was willing to have the Interested Party's counsel or the Police, peruse the charge and related correspondence, stating also that they were willing to produce the documents before court.

5. He explained that the delay in making written submissions in the Judicial Review matter was due to another pending suit between it and the Interested Party, Mombasa HCCC No. 40 of 2006, A. S. Kitololo vs. Middle East Bank Kenya Limited. It was coming up for the hearing of the ex parte Applicant's application to dismiss the suit, which outcome would have been material to the judicial review application. The application, though filed in 2009 was ruled in July 2014 striking out from the plaint all allegations which challenged the validity of the charge but retained the claim for damages which could be saved by amending the plaint. The ex parte Applicant has been waiting to see what amendments the Interested Party would propose so as to take them into consideration when making submissions herein.

6. Further delay in the matter was caused by various reasons, among them the change in representation from the Office of the Attorney General to the Director of Public Prosecution (DPP) who sought time to familiarize itself with the case, non-attendance by counsel for the DPP and the Interested Party as well as non-availability of Judges in Mombasa.

7. When the matter came up for hearing on 8th July, 2015, this court set aside the ex parte order granted on 30th March, 2011 and set the Notice of Motion dated 5th June, 2015 for hearing on 28th July, 2015.

SUBMISSIONS

8. The ex parte Applicant filed written submissions dated 1st July 2015. It explained that the Interested Party had filed Mombasa HCCC No. 40 of 2000 challenging the Charge dated 28th March, 1999 which he had given to the ex parte Applicant over his properties as security for a loan of Kshs.125 Million. The Interested Party is thereafter said to have obtained an injunction restraining the ex parte Applicant from exercising its statutory power of sale, based on bogus and contradictory claims. The Interested Party claimed that he had never signed the charge, despite having admitted in writing that he had. In 2009, the ex parte Applicant applied to have the plaint struck out on the basis of the admission. The Interested Party's subsequent application to withdraw the admission was dismissed on 23rd June, 2010, after which he made a complaint to the Police in October 2010.

9. The Police made an application on 10th February, 2011 to carry away the original documents including board resolutions and director's guarantees from the ex parte Applicant's premises which application was allowed by the Honourable Magistrate. However, when extracting the order, an addition was made to the order to include the words "title deeds", thus enabling the Police to carry away original title deeds which the ex parte Applicant held as security. It was for this variance that the ex parte Applicant filed the present Judicial Review application, seeking further to quash the order by the learned Magistrate on the basis that it was made **ultra vires** among other procedural irregularities set out in the supporting affidavits of the ex parte Applicant. The ex parte Applicant averred that the facts precedent to exercise of any powers by the learned Magistrate or the Police were absent. The Police were accused of failing in the basic requirement of fairness and due process which is expected of it in lawful exercise of prosecutorial powers.

10. In oral submissions made on 28th July, 2015, Mr. Kabue for the Interested Party submitted that the ex parte Applicant was not interested in prosecuting the application. The conduct of the ex parte Applicant counsel submitted, was said to be a clear abuse of court process, highlighting the delay in the proceedings.

11. Mr. Onyambu for the ex parte Applicant submitted that the ex parte Applicant had not lost interest in the application, referring to the record of appearances to demonstrate the same.

12. Since both parties seek to rely on the record of proceedings to demonstrate the lack of interest or otherwise on the part of the ex parte Applicant to prosecute this application, I find it prudent for the court, on its own, to peruse the court record:

1. 30/3/2011: Chamber Summons dated 24/03/2011 - Leave granted to file JR application within 21 days. Notice of Motion dated 04/04/2011 is fixed for hearing on 4/7/11.

2. 4/7/2011: Muteti (for DPP) seeks time to file a reply. Stood over by consent to 8/9/2011. Respondent to file reply within 7 days.
3. 30/8/2011: Matter taken out of Hearinglist as there will be no Judge sitting in the Civil Division.
4. 28/11/2011: Okong'o for applicant seeks adjournment. Applicant was served with a reply on Friday. Seeks time to respond to the issues raised. The prospective deponent is currently in India.
5. 25/9/2012: Ct:- application to be argued by way of written submissions. Applicant to file and serve submissions within 21 days. Respondent to file reply within 21 days of service.
6. 7/11/2012: Karega for applicant:- Parties have not filed submissions, agree to come back after a month.
7. 13/12/2012: Karega for applicant:- submissions have not been filed. Pray for mention in next term.
8. 21/02/2013: Jami for DPP:- I am not aware of this matter. Seek time to put in papers.
9. 08/03/2013: Dzumo for DPP:- we have been served. Require time to reply.
10. 30/04/2013: Dzumo for DPP present. No appearance for applicant or respondent. Matter taken out.
11. 03/12/2013: Ct:- Parties to file submissions.
12. 17/02/2014: Karega:- we have not served the respondent.
13. 08/07/2015: Ct:- Motion dated 5th June, 2015 be heard on 28th July 2015

13. The parties cited various cases in aid of their respective propositions. In **Teita Estates Limited vs. Mwatate Land Disputes Tribunal (2011) eKLR** Ojwang' J. as he then was, found justification in the explanation by the ex parte Applicant for the delay in prosecuting the judicial review application in that case, and therefore refused to grant the application for dismissal. In the case of **Mwangi S. Kimenyi vs. AG & Anor (2014) eKLR**, F. Gikonyo J., made reference to the case of **Utalii Transport Company Limited & 3 Others vs. NIC Bank & Another (2014) eKLR** where the factors to consider when exercising the discretion by court in an application for dismissal of suit for want of prosecution were enumerated as: **whether there has been inordinate delay on the part of the plaintiffs in prosecuting the case; whether the delay was intentional, contumelious and therefore inexcusable; whether the delay is an abuse of court process; whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the defendant; what prejudice will the dismissal occasion to the plaintiff; whether the plaintiff has offered a reasonable explanation for the delay and even if there has been delay, does the interest of justice dictate lenient exercise of discretion by the court?** The court in that case also cautions that inordinate delay for purposes of dismissal or want of prosecution will differ from case to case depending on the circumstances and should be one which is beyond acceptable limits in the prosecution of cases.

14. Ideally, the applicant ought to have filed its written submissions as early as October, 2012. While the subsequent adjournments were not caused entirely by the applicant, the applicant's conduct has not exhibited due diligence in having the matter concluded. The delay of one year and four months from 17th February, 2014 to 8th June, 2015 when the application for dismissal was filed has not been satisfactorily explained. The connection to the related case of, being, Mombasa HCCC No. 40 of 2000 was not sufficiently made to explain the delay. However, as pointed out by the ex parte Applicant, the documents under inquiry were available for perusal/examination on site. The Interested Party and the Police were for this reason not prejudiced.

15. The ultimate question here is whether the Judicial Review application should be dismissed, If it is dismissed, the ex parte Applicant will be compelled to obey the court order in question, to release the “title deeds” to the Police, which order is said to have been inserted “unilaterally” by the magistrate, and was not part of the original orders sought. If this were to be proved, then obviously, that addition was both “**ultra vires**” the magistrate’s power and procedurally unlawful. A court will not grant a prayer or order not sought unless it falls within the context of the suit and “such order or relief the court may find fit and just to grant.” In the event the court were to find that the ex parte Applicant’s claim has merit or is correct, the ex parte Applicant would be surely prejudiced by letting go the original titles.

16. This view must however be counter-balanced with the ex parte Applicant’s conduct and delay in the prosecution of the Judicial Review application. From the Replying Affidavit of the ex parte’s Applicant’s Managing Director, Dhinendra Rana, the delay in the prosecution of the Judicial Review application was dependent upon the determination of another suit, Mombasa HCCC No. 40 of 2006 between A. S. Kitololo (the Interested Party) and Middle East Bank Limited (the ex parte Applicant). In other words so long as that case was not determined, the Judicial Review application would equally pend.

17. In my view, Judicial Review by its very nature concerns challenges to decisions made by subordinate quasi-judicial bodies or persons entrusted with public duty. The decisions made by such subordinate bodies, when stopped by orders of injunction or conservatory orders, adversely impact upon the operations of such bodies, and the intended beneficiaries of such decisions. there is therefore a primary and urgent duty upon parties granted such temporary orders, to prosecute their applications, within the shortest time possible, and in any event, not more than six months (or 180 days) upon the filing thereof.

18. The Practice Note of 180 days is a late addition by the Hon. Chief Justice to enhance expeditious delivery of justice. The Judicial Review Application herein was filed on 24th March, 2011, some five (5) yeas from the commencement of Mombasa HCCC No. 40 of 2006. The prosecution of the application ought not to have be tied to the determination of that case. The delay in the prosecution of the application was intentional, it was in bad faith, it was prejudicial to the fair hearing of the criminal case, and investigations thereon, and prejudicial to the proper administration of justice. There is no other conclusion, it was abuse of the process of court.

19. There is however one redeeming aspect of the application whether not the orders by the subordinate court were unilaterally amended by the presiding judicial officer. That aspect can only be established if the ex parte Applicant is granted an opportunity to ventilate that complaint, and that can be done within one hour in any morning in the course of this Term.

20. In the circumstances, the ex parte Applicant is granted thirty (30) days, within which to prosecute its application, in default, the Notice of Motion dated 4th April, 2011 shall stand dismissed upon the expiration of that period.

21. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 13th day of October, 2015

M. J. ANYARA EMUKULE

JUDGE

In the presence of:

Mr. Asige for ex parte Applicant

No Appearance for the Interested Party

Mr. Kaunda Court Assistant

