



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

JUDICIAL REVIEW MISC APP NO. 6 OF 2016

IN THE MATTER OF AN APPLICATION BY BENJAMIN KAHINDI

KATANA FOR ORDERS OF CERTIORARI AND

PROHIBITION DIRECTED AT THE DIRECTOR OF

PUBLIC PROSECUTIONS, SENIOR RESIDENT

MAGISTRATE'S COURT AT KILIFI, OCS KILIFI

POLICE STATION C/O INSPECTOR GENERAL OF

POLICE

IN THE MATTER OF KILIFI CRIMINAL CASE NO 113 OF 2015 REPUBLIC

VS BENJAMIN KAHINDI KATANA

IN THE MATTER OF THE CONSTITUTION OF KENYA, THE PENAL CODE

CAP 63 LAWS OF KENYA, THE CRIMINAL

PROCEDURE CODE CAP 75 LAWS OF KENYA, THE

LAW REFORM ACT, CAP 26 LAWS OF KENYA AND

ORDER 53 RULES 1 & 2 OF THE CIVIL PROCEDURE

RULES

BETWEEN

BENJAMIN KAHINDI KATANA.....PETITIONER

VERSUS

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

THE SENIOR RESIDENT MAGISTRATE'S

COURT OF KILIFI.....2ND RESPONDENT

THE OCS KILIFI POLICE STATION THROUGH THE

INSPECTOR GENERAL OF POLICE.....3RD RESPONDENT

AND

MABETE PROPERTIES LTD.....INTERESTED PARTY

JUDGMENT

1. Before me for determination is a Notice of Motion application dated 7th March 2017. The Ex-parte Applicant Benjamin Kahindi Katana prays to be granted the following Orders:-

1. An order of certiorari be issued to remove into the High Court and quash the proceedings in Kilifi Criminal Case No. 113 of 2015; Republic vs Benjamin Kahindi Katana;

2. An Order of prohibition be issued prohibiting the 1st Respondent and/or any other officer acting under his authority from proceeding with Kilifi Criminal Case No. 113 of 2015; Republic vs Benjamin Kahindi Katana;

3. The costs of the application be provided for.

2. The said Motion is premised on a number of grounds stated on the body thereof and which may be summarized as follows:-

(i) That the matter in issue herein is the ownership of all that parcel of land measuring 16 acres being plot Nos. 21 and 22 Group V situated West of Takaungu Township and a case thereon is awaiting hearing and determination in Malindi ELC Case No. 201 of 2015; Benjamin Kahindi Katana & Others –vs- Muutaza Shabbir Tayabali & others;

(ii) That the Criminal Case has been brought by the 3rd Respondent at the institution of Mabete Properties Ltd-the Interested Party herein who are seeking to forcefully evict the Applicant and other residents of the subject parcel of land;

(iii) That this Court has ‘supervisory jurisdiction’ over the 2nd Respondent by dint of Article 165(6) of the constitution of Kenya to ensure that the process before the 2nd Respondent is neither abused nor does it violate fundamental freedoms of individual citizens;. It is therefore fair that an order be issued to ensure the 2nd Respondent is not used as a weapon by the Interested Party in carrying out an agenda of forcefully evicting the Applicant and others from the subject parcel of land;

(iv) That the Criminal case against the Applicant was instituted in bad faith and the same ought to be subjected to further investigation by this Court; and

(v) That there have been complaints against the Interested Party who want to forcefully evict squatters living on the suitland and (it) is now using the 3rd Respondent to file criminal complaints against the Applicants who is viewed as the only one among the squatters willing to lead in the fight for their land.

3. The Office of the Director of Public Prosecutions (ODDP) sued herein as the 1st Respondent has objected to the grant of the orders sought. In a Replying Affidavit sworn by Henry Achochi, a Senior Prosecution Counsel in-charge of its Kilifi Office, the ODPP avers that the Applicant was charged with the offence of Forcible Detainer on 9th March 2015 before the Senior Resident Magistrate at Kilifi and one witness has already testified in support of the Prosecution’s Case.

4. The 1st Respondent asserts that the Criminal Case is before a Court of competent jurisdiction and there would be no need to grant the Orders sought. It is further the ODPP’s case that upon receipt of the investigation file, they considered the facts contained therein and in the exercise of their Constitutional mandate pursuant to Article 157 of the Constitution, determined to prosecute the Applicant.

5. The 1st Respondent further avers that they are ready and willing to avail witnesses after which the trial Court will determine whether there is sufficient evidence or not as against the Applicant and therefore the rights of the Applicant to a just and fair trial are properly safeguarded.

6. The Senior Resident Magistrate Kilifi (sued as the 2nd Respondent) and the OCS Kilifi (sued as the 3rd Respondent) neither entered appearance nor filed any documents in opposition to the Application before me.

7. On their part, the Interested Party is like the 1st Respondent opposed to the grant of the Orders sought. In a Replying Affidavit sworn by one Noel Mwatati Mwhahitele who is described therein as the Director thereof, the Interested Party avers that the Applicant was charged in the Criminal Case for threatening to harm the agents of the Interested Party when he trespassed upon the Interested Party’s land.

8. It is the Interested Party’s case that the relevant Courts ought to be left to deal with the matter so that the truth is known and the ownership of the land and the genesis of the problem between the parties can be resolved. It is their case that this case is actuated by bad faith as the Applicant wants to stop the case against himself while on the other hand proceeding with the case he has filed against the Interested Party.

9. I have considered the application and the respective responses thereto. I have equally considered the submissions and authorities placed before me by the Learned Advocates representing the parties herein.

10. I think it is now widely accepted that Judicial Review is concerned with reviewing not the merits of the decision in respect of which the application for Judicial Review is made, but the decision-making process itself.

11. In this regard, Section 9 of the Fair Administrative Action Act, No. 4 of 2015 provides:-

“9(1) Subject to subsection (2) a person who is aggrieved by an administrative action may, without unreasonable delay, apply for Judicial Review of any administrative action to the High Court or to a Subordinate Court upon which original jurisdiction is conferred pursuant to Article 22(3) of the Constitution.

(2) The High Court or a subordinate Court under sub-section (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a Subordinate Court shall, if it is not satisfied that the remedies referred to in sub-section (2) have been exhausted, direct that the applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).”

12. Thus the limitation against approaching the Court for Judicial Review reliefs relates to certain administrative actions. Under Section 2 of the said Fair Administrative Action Act, “administrative action” is defined as including-

i) The powers, functions and duties exercised by authorities or quasi-Judicial tribunals; or

ii) Any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.

13. In the matter before me, the ex-parte Applicant contends that Kilifi Principal Magistrate’s Criminal Case No. 113 of 2015 in which he has been charged with the offence of Forcible Detainer contrary to Section 91 of the Penal Code has been brought by the Officer Commanding Kilifi Police Station (3rd Respondent) at the instigation of the Interested Party and that the same is brought in bad faith and ought to be subjected to further investigations by this Court.

14. In my view, what this Court is being called upon to determine is whether the processes undertaken by the Police and the Director of Public Prosecution (the 1st Respondent) when investigating the complaint lodged with them by the Interested Party in this case were conducted constitutionally and whether they violate the fundamental rights and freedoms of the Ex-parte Applicant.

15. It is the Applicant’s case that the current proceedings instituted in the Principal Magistrates Court in Kilifi were **mala fide** and meant to pressurize the Applicant and other squatters to move out of the suitland. It is further the Applicant’s case that the Interested Party ought to have instituted civil proceedings for eviction of the squatters if their proprietary rights have been determined. I note however that the offence of Forcible Detainer is an offence known under the Penal Code, Chapter 63 of the Laws of Kenya. In regard to this, my view is and has always been that it is now well established that a civil suit in which the matters in issue are substantially in issue in separate criminal proceedings is not a bar to either of the proceedings. In that regard Section 193A of the Criminal Procedure Act provides that;

“Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”

16. Article 243 of the Constitution of Kenya provides that:-

1. “There is established the National Police Service.

2. The National Police Service consists of-

(a) The Kenya Police Service; and

(b) The Administration Police Service.

3. The National Police Service is a national service and shall function throughout Kenya.

4. Parliament shall enact legislation to give full effect to this Article”

17. The legislation contemplated under Article 243 (4) of the Constitution is the National Police Service Act No. 11A of 2011. Section 24 thereof stipulates that the functions of the Kenya Police Service shall be the:-

a) “Provisions of assistance to the public when in need;

b) Maintenance of law and order;

c) Preservation of peace;

d) Protection of life and property;

e) Investigation of crimes;

f) Collection of criminal intelligence;

g) Prevention and detection of crime;

h) Apprehension of offenders;

i) Enforcement of all laws and regulations with which it is charged; and

j) Performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time.

k) Section 49(1) of the National Police Service Act then provides that;

“ (1) Subject to Article 244 of the Constitution and the Bill of Rights, a Police Officer may exercise such powers and shall perform such duties and functions as are by law imposed or conferred on or assigned to a police officer.

18. Article 157 of the Constitution in similar fashion creates the Office of the Director of Public Prosecution who is clothed with state powers of prosecution and who is mandated to undertake criminal proceedings against any person before any Court (other than a Court Martial) in respect of any offence alleged to have been committed.

19. As **Leonala J** (as he then was) stated in **Luke Angaiya Lubwayo & Another –vs- Gerald Otieno Kajwang & Another Pet. No. 120 of 2013(unreported):-**

“...I am alive (as stated above) to the fact that this Court under Article 165(3) (a), cannot enter into matters reserved for another body established by statute. I am also aware that this Court, under Article 165(3) (d) (i) and (ii) of the Constitution can exercise its jurisdiction to determine whether any law or anything done under the authority of the Constitution is inconsistent with the Constitution. Article 165(3) (a) of the Constitution states that the High Court can, “hear any question relating to the interpretation of this Constitution including the determination of the question whether anything said to be done under the authority of the Constitution or any law is inconsistent with or in contravention of the Constitution.”

20. Arising from the foregoing, it follows that this Court can only interfere with and interrogate the acts of other Constitutional bodies if there is sufficient evidence that they have acted in contravention of the Constitution. From the definition of administrative action at Section 2 of the Fair Administrative Actions Act aforesaid, the processes undertaken by a Subordinate Court in a trial in my view do not fall under those that are amenable to review under Section 9 of the Act.

23. Under the Constitution of Kenya, 2010 an arrested and /or accused person has rights as provided for under Articles 49, 50 and 51 thereof. In the event that a person is aggrieved by that process, he also has recourse to institute proceedings under Article 22 and seek appropriate reliefs as provided for by Article 23 of the Constitution. Besides, the Subordinate Court before whom the accused is charged may offer a ray of reliefs including provision of bail and/or bond.

24. From the material placed before me, it is evident that the ex- parte Applicant’s allegations that the Interested Party is using the Police to cause his arrest and have him charged in Court are all based on beliefs, thoughts and apprehensions which at the very least remain unsubstantiated.

25. As was stated in **Peter George Anthony D’ Costa –vs- Attorney General and Another, Nairobi Petition No. 83 of 2010 (unreported)** and cited by Leonala J and with approval, in **Paul Ng’ang’a Nyaga & 20 Others –vs- Attorney General & 3 Others(2013) eKLR;**

“The process of this Court must be used properly, honestly and in good faith, and must not be abused. This means that the Court will not allow its functions as a Court of law to be misused and will summarily prevent its machinery from being used as a means of vexation or oppression in the process of litigation.”

26. As it were, there is a clear public interest in ensuring that crime is prosecuted and that a wrongdoer is convicted and punished. The Applicant has sought the protection of this Court after he has been arrested and charged. In the circumstances of this case, this Court declines the invitation to prevent the Police and the DPP from carrying out their Constitutional and statutory mandate if they have reasonable suspicion that an offence has been committed. The two agencies have a Constitutional duty, nay obligation, to maintain law and order, initiate and conclude investigations and also apprehend and prosecute offenders.

27. As Warsame J. stated in **Michael Monani & Another –vs- The Commissioner of Police & 3 Others (Unreported):-**

“It is not the duty of the Court to go into the merits and demerits of any intended charge to be preferred against any party. It is the function of the Court before which the charges shall be placed and which shall conduct the intended trial to determine the veracity and merits of any evidence to be tendered against an accused person. It would be improper for this Court to try and/or attempt to determine the intended criminal case which is not before it. There is no evidence to show that the Respondents exceeded jurisdiction, breached rules of natural justice or considered extraneous matters or were actuated by malice in undertaking the investigations against the applicants. The purpose of criminal proceedings is to hear and determine finally whether the accused has engaged in

conduct which amounts to an offence and on that account is deserving punishment.

28. I need not say more. I find no merit in the application before me. The same is dismissed.

29. Each party shall bear their own costs.

Dated, signed and delivered at Malindi this 19th day of April, 2018.

J.O. OLOLA

JUDGE