



Ayora v Directorate of Criminal Investigations & another; Odhiambo (Interested Party) (Petition E029 of 2023) [2024] KEELC 4391 (KLR) (30 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4391 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

PETITION E029 OF 2023

EK WABWOTO, J

MAY 30, 2024

IN THE MATTER OF: ARTICLES 2, 10, 19, 20, 21, 23, 34, 27, 37, 40, 47, 50, 165(3) (D), 232 (1), 258 AND 260 OF THE CONSTITUTION

AND

IN THE MATTER OF: CONTRAVENTION OF THE RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 27, 40, 47 AND 50 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF: THE NATIONAL POLICE SERVICE ACT, 2015

BETWEEN

ALFRED JUMA AYORA PETITIONER

AND

THE DIRECTORATE OF CRIMINAL INVESTIGATIONS 1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

AND

TERESIAH ADHIAMBO ODHIAMBO INTERESTED PARTY

RULING

1. This Ruling is in respect to the Petitioner’s application dated 19th June, 2023 wherein the Petitioner seeks conservatory orders staying any interference, trespass by Police, prosecution and or continued prosecution of the Petitioner and or any of his employees, agents, licenses, staff or any other person



- in relation to the parcel of land, Nairobi/Block 99/142 pending the hearing and determination of the Petition.
2. The application is premised on the grounds on the face of it and the Petitioner's affidavit sworn on 19th June, 2023 and a supplementary affidavit sworn on 26th February, 2024.
 3. The application was opposed by the Respondents and the Interested Party. The Respondents filed a Replying Affidavit sworn by No. 75685 CPL Joshua Oburu on 17th November, 2023 while the Interested Party filed a Replying Affidavit sworn on 14th December 2023 by Teresiah Adhiambo Odhiambo.
 4. The Petitioner deponed that the Interested Party is the registered proprietor of the suit property and that he is the current beneficial owner of the suit property on account of the statute of limitation having resided in the suit property for two (2) decades. He also averred that he has been in exclusive, continuous, peaceful and uninterrupted possession and use of the suit property since 2001.
 5. The Petitioner averred that his peaceful possession of the suit property was interrupted in February 2023 when individuals purporting to be acting on the instructions of the Interested Party made attempts to illegally and violently evict him. This prompted him to report the incident at Runda Police Station and he also instituted proceedings in Nairobi ELC No. E012 of 2023 (OS) Alfred Juma Ayora versus Teresiab Adhiambo Odhiambo and The Chief Land Registrar claiming ownership of the suit property by dint of the doctrine of adverse possession and seeking temporary injunction against the illegal act of invasion and the intended eviction. The Court in the Civil Suit on 3rd March, 2023 issued an Order restraining the Interested party and her agents from evicting him and his agents or interfering with his peaceful occupation and/or in any manner whatsoever dealing with the suit property. The Order of 17th April 2023 was extracted and duly served but despite service, the Respondents at the instigation of the Interested Party invaded the suit property on 16th June 2023 and arrested the Petitioner's employee and licensee namely Leanford Shihachi and Harrison Muyela who were detained for a period of three days by the 1st Respondent at Muthaiga Police Station before being released without any formal charges.
 6. It was contended that the arrest of his agents by the 1st Respondent at the instigation of the Interested Party was unlawful, malicious and unconstitutional. The Petitioner urged the court to grant him the Conservatory Orders sought.
 7. The Respondents opposed the application vide a Replying Affidavit sworn by No. 75685 CPL Joshua Oburu on 17th November, 2023. It was averred that this matter was reported at DCI Headquarters by the Interested Party and her statement was recorded on 20th May, 2023. It was also averred that a statement of one Hussein Hassan Giro who was staying in the property from 2013 to 2023 was also recorded on 20th May, 2023. A further statement from Peter Odhiambo Opondo who stated that he took over from Hussein Giro on 17th January, 2023 was also recorded.
 8. It also averred that on 25th May, 2023, the Chief Land Registrar provided the 1st Respondent with Certified copies of ownership records including Transfer of lease between NHC and Samuel Njuguna Kimani, Transfer of lease between Samuel Njuguna Kimani and Teresia Adhiambo Odhiambo, consent to Transfer Nairobi/block 99/142 and Land Register for Nairobi/block 99/142 which indicated at entry No. 6 and 7 that the land was transferred to Teresia Adhiambo Odhiambo on 14th March, 2000.
 9. The 1st Respondent stated that from their investigation and the records obtained from the various Government department and agencies including the County Government of Nairobi they established



- that the Interested Party had constructed a two-bedroom house on the suit premises after getting all the necessary approvals and moved into the year 2009. He urged the court to dismiss the application.
10. The Interested party filed a Replying Affidavit sworn on 14th December 2023. It was averred that she is the registered owner and proprietor of the suit property having acquired the same on 14th March, 2000.
 11. She also averred that upon purchase she took possession and commenced payment of the applicable rates and that from time to time there has been attempts by various persons including the Petitioner and his agents to interfere with her lawful ownership and possession of the property upon which she had made reports to the police.
 12. It was also averred that both the Petitioner and one Alex Apoko claim ownership of the suit property however, the Petitioner vide his Supplementary Affidavit dated 26th February, 2024 at paragraph 29 deposes that he doesn't know Mr. Alex Apoko despite being allegedly in possession of the suit property. It was averred that both of them are in cahoots to frustrate and illegally dispossess the Interested Party of her legal right to the suit property. She urged the court to dismiss the application filed by the Petitioner.
 13. The application was canvassed by way of written submissions. The Petitioner filed written submissions dated 26th February, 2024 while the Interested Party's submissions were dated 4th April, 2024. No written submissions were filed by the Respondent.
 14. Counsel for the Petitioner submitted that the Petitioner has met the threshold for grant of the reliefs sought and he placed reliance on the provisions of Articles 22(1) and 23(3) of *the Constitution*.
 15. Citing the cases of *Gitirau Peter Menya vs Dickson Mwenda Kithinji and Centre for Rights and Awareness (CREAW) & Another versus Speaker of the National Assembly* [2017] eKLR. It was submitted that the Petitioner has a prima facie case to warrant the grant of the reliefs sought. It was also submitted that the Petitioner has demonstrated that the Interested Party has employed the criminal process to initiate the arrest of the Petitioner and his agents by the 1st Respondent with a view of dispossessing him the suit land contrary to a subsisting injunctive order.
 16. Counsel submitted that the Petitioner has filed these proceedings on the basis that the 1st Respondent is abusing its powers to investigate suspected crime contrary to the National values and Principles under Articles 10 and 232 of *the Constitution*.
 17. It was submitted that the Petitioner is complaining that the 1st Respondent is harassing and threatening him and his witnesses as it happened on 27th April, 2023 contrary to the terms of a substituting Order issued on 17th April, 2023 therefore raising facie issues that point to blatant abuse of constitutional and Statutory Powers.
 18. It was contended that the Petitioner will suffer irreparable harm and the Petition if successful will be rendered nugatory. It was argued that the Interested Party is using the 1st and 2nd Respondents to advance her cause in the Originating Summons and in the process the Respondents have infringed upon the Petitioner's constitutional rights to among other fair hearing, equal protection and benefit of the law, right to acquire and own property and fair administration action under *the Constitution*. It was submitted that allowing the Respondent a free hand to continue with the harassment and meddling with the subject matter in the Civil Case will occasion prejudice to the Petitioner that cannot be compensated by an award of damages. It was argued that unless the court grants Conservatory Orders the Petitioner's continued occupation of the suit property or meddling in the subject matter in the Civil Case he shall suffer irreparable harm.
 19. It was further submitted that the balance of convenience tilts in favour of the Petitioner and in the Public interest. It was contended that the material on record show that the 1st Respondent at the



instigation of the Interested Party is using the Criminal Justice System and its power to investigate crime to advance her cause in the pending civil dispute. The cases of *Alfred N. Mutua versus Ethics and Anti-Corruption Commission (EACC) & 4 Others* (2016)eKLR, *Commissioner of Police & Director of Criminal Investigations Department & Another versus Kenya Commercial Bank Limited & 4 Others* (2013) eKLR and *Board of Management of Uhuru Secondary School versus City County Director of Education and 2 Others* [2015] eKLR were cited in support of Petitioner's case.

20. The Respondents never filed any written submissions for consideration by this court despite being granted an opportunity to do so.
21. The Interested Party filed written submissions dated 4th April, 2024. The Interested Party submitted on the following issues; whether the Petitioner has a legal right which is in danger of violation, whether the Petitioner claim is founded on an illegality, whether the orders sought are tenable, whether the Petitioner is entitled to the reliefs sought and what order should issue as to costs.
22. The Interested Party argued that the Petitioner has no cause of action because he has no right that is being violated or threatened with infringement or violation in three ways; the Petitioner has no evidence of adverse possession, claim and in the absence of a vesting order, the Petitioner's claim remains unproven and thus no right has accrued that warrants protection, the adverse possession suit being ELC Cause No. E012 of 2023 pending the determination cannot be affected by the actions of the Respondents because its disposal is based on notorious possession prior to filing of the adverse possession suit and not what happened during the proceedings; contrary to the alleged interference with fair hearing of the suit and the proceeding alleged to have been arrested are neither parties to this proceedings nor the adverse possession suit, they are not linked to (or agents) of the Petitioner, and they are equally not witnesses in either suit hence the Petitioner's application should fail.
23. It was contended that the Interested party has been and continues to be in lawful occupation of the suit property and is enjoying temporary injunction orders issued on 27th June, 2023 in ELC Cause No. E135 of 2023.
24. It was submitted that the Petitioner has failed to disclose any evidence of the alleged adverse possession. There is evidence showing the Interested party seeking development permissions, constructing and leasing out the property to a third party and hence the Petitioner's allegation that he has been in the property for over 12 years in continuous occupation since 2001 is confounded.
25. It was also submitted that the Petitioner has failed to show what right he enjoyed and how such has been violated by the Respondents such that the Respondents are liable for the violation. The case of *Edams Salim Husein & 6 Others versus Shariffa Binti Salim & 3 Others* [2022]eKLR was cited in support of this position.
26. On whether the Petitioner's claim is founded on an illegality, it was submitted that it is the Interested Party's position that the Petitioner is an agent of Alex Apoko and is being used as a conduit to commit fraud, to wreak havoc and frustrate the Interested Party from enjoyment of her property and in the circumstances no cause of action should be funded on illegal or immoral conduct and or that the Petitioner will be unable to pursue legal remedy if it arises in connection with his own illegal act and or that no right of action can have its origin in fraud. No Court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. The case of the *Attorney General versus Law Society of Kenya & Another* (2017) eKLR was cited in support.
27. On whether the orders sought are tenable, it was submitted that the orders sought are not tenable because the Petitioner has no right whatsoever to prohibit public authorities from performing their duties and further that the Court ought not to interfere with the execution of the Respondents'



Constitutional mandates and functions. Reliance was placed on Section 193A of the *Criminal Procedure Code* (Cap 75 of the Laws of Kenya) and the case of *Republic versus Commissioner of Police & Another Ex parte Michael Monari & Another* [2012] eKLR and *Republic versus Director of Public Prosecutions & 2 Others* [2023] KEHC 228 (eKLR).

28. Counsel for the Interested Party concluded his submissions by urging the court to dismiss the application with costs since according to her, the Petitioner has brought this case in an attempt to prevent the investigation and subsequent prosecution of his co-conspirators to defraud the Interested Party of the suit property.
29. The Court has considered the application, the affidavits and written submissions filed by the parties. The issue that commands this court for determination is whether the Petitioner has made a case for grant of the reliefs sought in his application.
30. The Petitioner seeks conservatory orders staying any interference, trespass by police, and orders suspending any arrest, changing prosecution and or continued prosecution of the Petitioner and or any of his employees or any other person in relation to the suit property pending the hearing and determination of the petition.
31. Conservatory orders in constitutional petitions are in the context of public law as they are applied in the public's interest. The Supreme Court in *Gatirau Peter Munya vs Dickson Mwenda Kithinji* (*supra*) articulated this position as follows:

“Conservatory orders bear a more decided public-law connotation; for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory stay orders therefore are not, unlike interlocutory injunctions, linked to such private party issues as “the prospects of irreparable harm’ occurring during the pendency of a case; or ‘high probability of success’ in the Applicant’s case for orders of stay. Conservatory orders consequently should be granted on the inherent merit of a case bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”

32. The conditions for consideration by the court in granting conservatory orders were persuasively set out in *Board of Management of Uburu Secondary School vs City County Director of Education and 2 Others* (2015) eKLR as follows:

a) First, an Applicant must demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he/she is likely to suffer prejudice.

b) The second principle is whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.

c) Thirdly, the Court should consider whether, if an interim conservatory orders is not granted, the Petition or its substratum will be rendered nugatory.

d) The final principle for consideration is whether the public interest will be served or prejudiced by the decision to exercise discretion to grant or deny a conservatory order.”

33. The Petitioner contends that he has established a prima facie case and that he is the correct beneficial owner of the suit property having been in continuous, exclusive, peaceful and uninterrupted possession since 2001, that he has also filed *Nairobi ELC E012 of 2023* (OS) *Alfred Juma versus Teresiab Adhiambo Odhiambo Chief Land Registrar* which has injunction Orders and that the



Respondents are keen to investigate his arrest at the instigation of the Interested Party without which action remains, unlawful and malicious.

34. The Respondents and Interested Party averred that no prima facie case has been established to warrant the grant of the reliefs sought and that the Interested party has been in occupation of the suit property and has equally filed ELC Cause No. E135 of 2023 which the Interested Party enjoys some injunction orders. It was submitted that no rights have been violated and the Respondents should not be barred from discharging their mandate.

35. Courts have held that there are indeed certain instances where a superior court could interfere with criminal proceedings, provided that such power is exercised with due caution. The Court of Appeal in *Lalchand Fulchand Shah vs Investments & Mortgages Bank Limited & 5 Others* [2018] eKLR, quoted with approval the Supreme Court of India in the case of State of *Maharashtra & Others vs Arun Gulab & Others*, Criminal Appeal No. 590 of 2007, where it stated:

“The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and that too in the rarest of rare cases and the Court cannot be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of allegations made in the F.I.R./Complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction to the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at an uncalled for stage nor can it soft-pedal the course of justice at a crucial stage of investigation/proceedings. The provisions of Articles 226, 227 of the *Constitution* of India and Section 482 of the *Code of Criminal Procedure, 1973* (hereinafter called as “*Cr.P.C.*”) are a device to advance justice and not to frustrate it. The power of judicial review is discretionary, however, it must be exercised to prevent the miscarriage of justice and for correcting some grave errors and to ensure that esteem of administration of justice remains clean and pure. However, there are no limits of power of the Court, but the more the power, the more due care and caution is to be exercised in invoking these powers.”

36. In *Chris Ochieng & 3 Others vs Director of Public Prosecutions & another; Jude Anyiko (Interested party)* [2021] eKLR the court outlined a comprehensive list of instances where a Court ought to exercise its discretion and stop a prosecution. These instances are where it is demonstrated that: -

- “(i)Where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court;
- (ii)Where the quashing of the impugned proceedings would secure the ends of justice;
- (iii)Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, e.g. want of sanction;
- (iv)Where the allegations in the First Information Report or the complaint taken at their face value and accepted in their entirety, do not constitute the offence alleged;
- (v)Where the allegations constitute an offence alleged but there is either no legal evidence adduced or evidence adduced clearly or manifestly fails to prove the charge.
- (vi)The prosecution is not in public interest;
- (vii)The prosecution is not in the interests of the administration of justice;
- (viii)The prosecution is oppressive, vexatious and an abuse of the court process;



- (ix) The prosecution amounts to a breach of rights and fundamental freedoms;
- (x) The investigation and prosecution amounts to abuse of power and discretion and is aimed at achieving an ulterior or improper motive;
- (xi) The investigation and the prosecution are tainted with illegality, irrationality and procedural impropriety;
- (xii) The investigation and prosecution is in gross contravention of *the Constitution* and the law.”

36. The Petitioner together with the Respondents and Interested party herein have confirmed the existence of various civil suits relating to the suit property. The Petitioner has also maintained that he is currently residing in the suit property a fact which according to him has not been disputed. From the evidence adduced herein, it was evident that the Petitioner’s agents were arrested on 17th June, 2023 during the pendency of orders issued on 17th April 2023 in respect to the suit property.

The said action in itself was a violation of the orders issued by the court. The arrest despite the existence of the earlier orders issued by the court separately on 17th April, 2023 appears to have been irrational and procedurally improper.

36. The purpose of criminal law is to punish a suspect whom the Court finally convicts of the offences he/ she is charged with. By the time a complainant elects to go the criminal jurisdiction way he or she is convinced fully, as they say “one hundred percent” that the offence has been committed by the suspect. That is why the standard of proof is that of beyond reasonable doubt. Therefore, when he is not sure about the prosecution obtaining a conviction on the matter he may sue in the civil jurisdiction. But when he is not sure about the offence having been committed and resorts to the civil jurisdiction to obtain a declaration or finding about the issue, which in the humble opinion of this Court falls under Section 44(2) of the *Evidence Act, Chapter 80* of the Laws of Kenya, it is not open for him to run a parallel process simultaneously. He is by law duty-bound to await the finding of the civil jurisdiction, unless he withdraws the matter before that Court. He or she has to hold his horses with regard to pushing for punishment by way of a criminal trial.

37. The court notes that the said arrest was undertaken after the filing of a civil suit by the Petitioner and subsequent issuance of the orders. The timing of the arrest itself amounted to an abuse of the Respondents powers and on that basis, this court is satisfied that the Petitioner has established a prima facie case and that if the orders sought are not granted, his right to a fair hearing will be infringed.

38. It is also clear that if the conservatory orders are not granted, the Petitioner will suffer prejudice and the Petition will undoubtedly be rendered nugatory.

39. In view of the foregoing, the Petitioner’s application dated 19th June, 2023 is hereby allowed as follows: -

a. A conservatory order is hereby issued staying any interference, trespass, arresting, charging and or prosecuting the Petitioner, his agents and any other person acting on his behalf and including Mr. Leanford Shihachi and Mr. Harrison Muyela by the Police and the Respondents in relation to Nairobi/ Block 99/142 pending the hearing and determination of this Petition.

b. Costs of this application to be in the cause.

Signed, Dated and Delivered virtually at Nairobi this 30th day of May, 2024.

E.K. WABWOTO

JUDGE



In the Presence of

Mr. Odunga h/b for Mr. Rapando for the Petitioner.

N/A for the Respondents.

Mr. Ajak Jok h/b for Mr. Mbaluto the Interested Party.

Court Assistant: Caroline Nafuna.

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