



Okwaro v Directorate of Criminal Investigations; Odero (Sued as the Chairman Kenya Secondary Schools Heads Association) (Interested Party) (Environment and Land Miscellaneous Application E038 of 2022) [2024] KEELC 3837 (KLR) (14 May 2024) (Judgment)

Neutral citation: [2024] KEELC 3837 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E038 OF 2022
CA OCHIENG, J
MAY 14, 2024**

BETWEEN

JOSEPH ODUOR OKWARO APPLICANT

AND

THE DIRECTORATE OF CRIMINAL INVESTIGATIONS RESPONDENT

AND

PROFESSOR JOHN PAUL ODERO (SUED AS THE CHAIRMAN KENYA SECONDARY SCHOOLS HEADS ASSOCIATION) INTERESTED PARTY

JUDGMENT

1. What is before Court for determination is the Notice of Motion Application dated the 21st February, 2023, and filed on 24th February, 2023, wherein the *ex parte* Applicant sought for the following orders:-
 - a. That the Honourable Court do issue an order of certiorari removing and quashing the entire charges drafted by the Respondent on or about the 16th August, 2022 in the Charge Sheet thereon purporting to have the Applicant arrested and thereafter charged in a court of law.
 - b. An order of prohibition be issued, prohibiting the Respondent from arresting, arraigning and/or detaining the Applicant in relation to the dispute on LR Nos. Machakos/Mavoko/20157, Machakos/ Mavoko/20158, Machakos/Mavoko/20159, Machakos/Mavoko/ 20160, Machakos/Mavoko/20161, Machakos/Mavoko/20162 and Machakos/Mavoko/20163.
2. The Application is premised on the grounds on the face of it and supported by the Affidavit of one Joseph Oduor Okwaro, the *ex parte* Applicant herein. He explains that he was the registered proprietor of all that land known as LR Nos. Machakos/Mavoko/20157, Machakos/ Mavoko/20158, Machakos/



Mavoko/20159, Machakos/ Mavoko/20160, Machakos/Mavoko/20161, Machakos/ Mavoko/20162 and Machakos/Mavoko/20163 (hereinafter referred to as the suit land), which were registered through his company, Lakeview Investment Limited. He claims that sometimes in the year 2017, the Respondent in the company of administration police officers intruded into the said suit land and threatened him including other occupants with eviction, prompting him to file a case being ELC No 280 of 2017. He avers that on the 16th August, 2022, he received a call from the Respondent, who informed him that, they had a case against him in relation to the suit land and he was required to present himself to be charged. He contends that the issue of ownership of the suit land and any other issue relating to the said land is before a court of competent jurisdiction and therefore should not be entertained. He reiterates that he would be prejudiced should the DCI proceed with their decision to Charge him in the lower court while the High Court is sitting to determine the same issue.

3. The Respondents opposed the instant Application by filing a Replying Affidavit sworn by one Corporal Leonard Siele, of which the court notes that the grounds in the Application for leave and in the substantive Application are similar. He explains that a complaint had been lodged at their office vide a letter dated 4th October, 2019 by one Professor John Paul Odero. He insists that the mandate of the Directorate of Criminal Investigations (DCI) was to investigate when such complaints are made and they forwarded the file to the Director of Public Prosecution who recommended that the *ex parte* Applicant be charged accordingly. He confirms that they had already prepared Charge Sheet and registered case No E807 but the *ex parte* Applicant had gone into hiding to avoid plea taking. He reiterates that the criminal proceedings can only deal with allegations of forgery and fraud but not determine ownership, as there is no such Charge preferred against the Applicant.

The Application was canvassed by way of written submissions.

Submissions by the Applicant

4. The *ex parte* Applicant in his submissions explained that the jurisdiction to determine matters where title is contested lies within the Environment and Land Court as established under Article 262(b) of the [Constitution](#) and the [Environment and Land Court Act](#). He further submitted that the court has judicial review powers to protect against unfairness and bias especially from individuals holding authority and that it would be unfair for the prosecution to proceed with prosecuting him. To support his averments, he relied on the following decisions: [Republic v Chief Magistrate's Court at Mombasa ex parte Ganijee & another](#) [2002] 2 KLR 703.

Submissions by the Respondent

5. The Respondent submitted that this court lacks jurisdiction to hear and determine this Application, as it lacks supervisory authority over the Director of Criminal Investigations as it exercises its mandate under Article 247 as read with Section 28 and 35 of the [National Police Service Act](#) 2011 including Article 147 of the [Constitution](#). He further submitted that supervisory jurisdiction over the DCI and DPP is extensively reserved to the High court exercising its function under Article 165(6) of the [Constitution](#) and the ELC court's supervisory jurisdiction is limited to constitutional issues relating to clean and healthy environment. It was his further submission that the Applicant had not demonstrated that he has an arguable case as he failed to demonstrate any illegality, irrationality and procedural impropriety on the part of the Respondent. He argued that the order of prohibition is a discretionary remedy only tenable where a public body or officials have acted in excess of their powers, which the Applicant has failed to establish. He reiterated that criminal and civil proceedings can run concurrently, in line with Section 193A of the [Criminal Procedure Code](#) as the outcomes of these two suits are independent and unlikely to be contradictory. He contended that the substantive Application for Judicial Review was filed on the 22nd day after the court ordered the filing and service of the same,



rendering the instant Application time barred, having been filed outside the twenty-one(21) days, as ordered by the court and without leave, hence incurably defective. To buttress his averments, he relied on the following decisions: *Peter Ngunjiri Maina v Director of Public Prosecutions* [2017] eKLR; *Samson Kimathi & 3 others v Arthur Mathew Raphael Muthuri & another* [2021] eKLR; *Pastoli v Kabale District & others* [2008] 2 EA 300; *Republic v Commissioner of Police & another ex parte Michael Monari & another* [2021] eKLR; *Alfred Lumiti Lusiba v Pethad Ranik Shantilal & 2 others* [2016] eKLR and *Republic v Director of Public Prosecutions & another ex parte Chamanlal Vrajlal Kimani & 2 others* [2015] eKLR.

Analysis and Determination

6. The Ex-parte Applicant is challenging the criminal charges levelled against him on the grounds of existence of the civil suit over the suit land. He has sought for the aforementioned orders, contending that there is a case which is pending before this Court, hence the investigations by the DCI were irregular. The Respondent insists that there is nothing stopping the DCI from arresting and Charging the *ex parte* Applicant. Further, that this Court lacks jurisdiction to handle the matter.
6. The Respondent however has not disputed the fact that there is a civil suit with respect to the suit land which was filed in the year 2017, five years before the alleged complaint was made to them. The Respondent insists that there is already a criminal case against the *ex parte* Applicant being Criminal Case No E807 and the only issue remaining is for the *ex parte* Applicant to take plea. This being a Judicial Review Application, the court's wings can only be spread as far as assessing the procedure adhered to, in bringing the said criminal charges against the Ex-parte Applicant. Further, the court will assess the legality and validity of the process thereof. From the foregoing, the following can be deciphered as the issues for determination:-
 - a. Whether the Notice of Motion Application dated the 21st February, 2023 and filed on 24th February, 2023 is properly before court.
 - b. Whether the Applicant is entitled to the orders as sought.
7. As to whether the Notice of Motion Application dated the 21st February, 2023 and filed on 24th February, 2023 is properly before court.
8. The Respondent claims that the substantive motion on Judicial Review was filed after twenty-two (22) days instead of twenty one (21) days as had been directed by this court. The Respondent contends that the instant application is hence time barred having been filed outside the twenty one (21) days without leave, hence incurably defective. On perusal of the court record, I note this Court granted the *ex parte* Applicant leave of twenty one (21) days to file and serve the substantive motion on Judicial Review, on the 2nd February, 2023. The *ex parte* Applicant proceeded to file the substantive motion on 24th February, 2023, twenty two (22) days later, but never sought for leave to extend time, to file it.
8. On filing of substantive motion on Judicial Review, Order 53(3) (1) of the *Civil Procedure Rules* provides that:-
 - “(1) When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion to the High Court, and there shall, unless the judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein.”



9. In Civil Appeal No 41 of 2013 *Republic v Chairman Amagoro Land Disputes Tribunal & Jacinta Papa ex parte In the matter of Paul Mafwabi Wanyama* [2014] eKLR, the Court of Appeal while dealing with the issue of extension of leave to file Judicial Review Proceedings held that:-

“The Judicial Review proceedings before the Learned Judge, which have given rise to this appeal, were therefore special in nature and the Learned Judge erred in importing provisions of the *Civil Procedure Act* and Rules to proceedings governed by the said provisions of the *Law Reform Act* and Order 53 of the *Civil Procedure Rules*. We agree with the learned counsel for the appellant that the Learned Judge erred in extending time which he had no jurisdiction to do. This appeal is therefore allowed with the consequences that the order extending time for filing Judicial Review proceedings is hereby set aside. The Applicant shall have costs of this appeal and costs of proceedings in the High Court.”

10. See also the case of *Njeru Njagi v Gabriel Njue Joseph & another* [2015] eKLR.
11. In the foregoing while relying on the legal provisions I have cited as well as decisions quoted and applying them to the circumstances at hand, I find that there is no substantive motion before this court as the instant Notice of Motion which was filed on 24th February, 2023 was done without leave hence it is incurably defective. I opine that, it was incumbent upon the *ex parte* Applicant to first seek for extension of time to file the substantive motion, before doing so.
12. In the circumstances, I am unable to determine the second issue and will proceed to strike out the Notice of Motion Application dated the 21st February, 2023 and filed on 24th February, 2023, but make no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 14TH DAY OF MAY, 2024

CHRISTINE OCHIENG

JUDGE

In the presence of

Ms. Lungu for Respondent

Mutunga for Applicant

Court Assistant – Simon/Ashley

