



Kere & 2 others (Suing as the Administrators of the Estate of John Abongo Kere - Deceased) v John Locia, The Officer Commanding Station, Pap Onditi Police Station (Environment and Land Case Judicial Review Application E008 of 2024) [2024] KEELC 5594 (KLR) (31 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5594 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE JUDICIAL REVIEW APPLICATION E008 OF 2024
SO OKONG'O, J
JULY 31, 2024
IN THE MATTER OF: AN APPLICATION FOR LEAVE TO
APPLY FOR A JUDICIAL REVIEW ORDER OF PROHIBITION**

BETWEEN

**HANNAH KERE 1ST APPLICANT
ESTHER ANYANGO KERE 2ND APPLICANT
KENNEDY NDONGA KERE 3RD APPLICANT
SUING AS THE ADMINISTRATORS OF THE ESTATE OF JOHN ABONGO
KERE - DECEASED**

AND

**JOHN LOCIA, THE OFFICER COMMANDING STATION, PAP ONDITI
POLICE STATION RESPONDENT**

RULING

1. What I have before me is a Chamber Summons application dated 22nd July 2024 brought by Hannah Kere, Esther Anyango Kere, and Kennedy Ndonga Kere as the administrators of the estate of John Abongo Kere, deceased (hereinafter referred to only as “the applicants”) seeking the following orders;
 - a. That the applicants be granted leave to apply for an order of judicial review in the nature of a prohibition to restrain the respondent from blocking the applicants from accessing all that parcel of land known as Kisumu/Kamnwa Keyo/Ogoro/59 (hereinafter referred to only as “the suit property”).



- b. That the leave sought if granted does operate as a stay of the decision of the respondent to block the applicants from accessing the suit property.
2. The application was brought on the grounds set out in the statutory statement and a verifying affidavit of Esther Anyango Kere both dated 22nd July 2024. The applicants contended that John Abongo Kere, deceased (hereinafter referred to only as “the deceased”) was the registered owner of the suit property. The applicants averred that the deceased before his death was in occupation of the suit property and had settled the applicants who were his children thereon. The applicants averred that they had occupied and used the suit property continuously for commercial farming. The applicants averred that on 12th April 2024, the respondent blocked entry into the suit property. The applicants averred that they were threatened by the respondent that they would be arrested if they removed the blockade placed at the entrance of the suit property by the respondent.
3. The applicants averred that neither the respondent nor the Government of Kenya had any interest in the suit property. The applicants annexed to their verifying affidavit a photograph of a gate/barrier which they claimed had been placed by the respondent at the entrance of the suit property to prevent them from accessing the same. The applicants averred that before the incident complained of, they had raised issues with the respondent in the manner he was handling security issues in the area. The applicants averred that the acts complained of were attempts by the respondent to revenge against the applicants for the said complaints against him. The applicants averred that they had planted grass on the suit property which they were using to feed their cattle which were facing starvation due to the blockade of their access to the suit property by the respondent. The applicants averred that the acts of the respondents complained of amounted to abuse of office and a violation of the applicants’ right to property. The applicants also termed the action by the respondent a violation of the rules of natural justice in that they were not heard before the said action was taken.
4. I have considered the applicants’ application together with the accompanying verifying affidavit and statutory statement. What I need to determine is whether the applicants have made a case for the grant of the leave sought and whether leave if granted should operate as a stay. In *Njuguna v. Minister for Agriculture* [2000] 1 E.A 184, it was held that:
- the test as to whether leave should be granted to an applicant for judicial review is whether, without examining the matter in any depth, there is an arguable case, that the reliefs might be granted on the hearing of the substantive application.”
5. In *Republic v. County Council of Kwale & Another Ex Parte Kondo & 57 Others* [1998] 1 KLR (E&L) the court stated as follows:
- The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration.”
6. The court’s power to grant leave is discretionary. In his book; *Public Law in East Africa* published by Law Africa, Ssekaana Musa stated as follows on page 250:
- Judicial review is a discretionary jurisdiction. The prerogative remedies, the declaration and the injunction are all discretionary remedies with exception of habeas corpus which issues ex debito justitiae on proper grounds being shown. A court may in its discretion refuse



to grant a remedy, even if the applicant can demonstrate that a public authority has acted unlawfully.”

7. The applicants have sought leave to apply for an order of prohibition to restrain the respondent from blocking the applicants from accessing the suit property. The applicants who are the administrators of the estate of the deceased who own the suit property have contended that the respondent has blocked the entrance to the suit property and prevented them from accessing the same. The applicants have termed the action an abuse of power, a violation of a right to property and a breach of the rules of natural justice.
8. Section 24 of the *National Police Service Act*, Chapter 84 Laws of Kenya provides as follows on the functions of the Kenya Police Service:
The functions of the Kenya Police Service shall be the—
 - (a) provision 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.”
9. The applicants have not disclosed what prompted the respondent to deny them access to the suit property assuming that he did. The applicants have also not come out clearly whether the respondent in his alleged blockade of the entrance to the suit property was acting in his capacity as a Police Officer or in his private capacity. It appears from the annexures to the applicants’ affidavit that there is an underlying dispute over the ownership of the suit property between the applicants and third parties that has resulted in a criminal case being preferred against the said third parties with some of the applicants as the complainants. It is not clear as to the role being played by the respondent in the said criminal proceedings. The impression created from the correspondence attached to the applicants’ verifying affidavit is that the respondent is not doing enough to ensure the successful prosecution of the said third parties. I am of the view that judicial review is not best suited for resolving land disputes. I think that the acts complained of by the applicants if true amount to trespass to land. The respondent has been accused of installing a gate at the entrance to the applicants’ property and preventing the applicants from accessing the property. The respondent could not have done that in the exercise of the powers conferred upon him under Section 24 of the *National Police Service Act* aforesaid. The act complained of if established, amounts to trespass to land and should attract a civil remedy of injunction and damages rather than judicial review. It is in a civil suit that the court can interrogate the circumstances under which the respondent took the action complained of.



10. I am therefore not satisfied that the applicants have established a prima facie case against the respondent that warrants the grant of the leave sought. In Halsbury's Laws of England, 4th Edition paragraph 46, the author has stated as follows:

The courts have inherent jurisdiction to review the exercise by public bodies or officers of statutory powers impugning on legally recognized interests. Powers must not be exceeded.”

11. In Kenya National Examination Council v. Republic, Ex-parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR, the court stated as follows on the scope and efficacy of the remedy of Prohibition:

...prohibition is an order from the High Court directed to an inferior tribunal or body which prohibits that tribunal or body to continue proceedings in excess of its jurisdiction or in contravention of the laws of the land...”

12. I am not persuaded that the respondent was exercising statutory power when he allegedly installed a gate at the entrance of the applicants' property and prevented them from accessing the same. The act was personal and should be remedied as such. It is no wonder that the respondent was sued in his personal name. I am of the view that the applicants are trying to use judicial review proceedings to resolve a land ownership dispute which they have with third parties. In Republic v. National Land Commission Ex-Parte Ephrahim Muriuki Wilson & others [2018] eKLR), the court stated as follows:

In this regard, it is important to mention that what emerges is that there is a land dispute, and this Court cannot allow itself to be used to resolve a land dispute disguised as a Judicial Review application. Behind the curtain of these Judicial Review proceedings is the real dispute, namely, ownership, use and or occupation of land. These questions call for the need for this Court to exercise caution, care and circumspection. First, there is the question of jurisdiction discussed earlier. Second, there is a real danger of this Court rendering a decision that will have the implication of determining ownership of the disputed land. I decline the invitation to venture into this forbidden territory.”

13. I have said enough to show that the applicants' application is not for granting. I am not inclined for the reasons given to exercise my discretion in favour of granting the leave sought by the applicants. I have formed the opinion that the applicants' remedy lies elsewhere. Given that conclusion, I do not need to consider whether leave should operate as a stay pending the hearing of the judicial review application. The applicants' Chamber Summons application dated 22nd July 2024 is dismissed with no order as to costs.

DELIVERED AND SIGNED AT KISUMU ON THIS 31ST DAY OF JULY 2024

S. OKONG'O

JUDGE

Ruling delivered through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Odeny for the Applicants

The Respondent present in person

Ms. J. Omondi-Court Assistant

