



**Republic v District Criminal Investigations Officer, Rongo & 3 others;  
Makongo (Interested Party); Nyamanga (Exparte) (Miscellaneous Civil  
Application 4 of 2018) [2023] KEELC 588 (KLR) (31 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 588 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MIGORI**

**MISCELLANEOUS CIVIL APPLICATION 4 OF 2018**

**MN KULLOW, J**

**JANUARY 31, 2023**

**IN THE MATTER OF AN APPLICATION BY JOSEPH OKECH NYAMANGA  
ALLAN FOR JUDICIAL REVIEW (CERTIORARI AND PROHIBITION)**

**AND**

**IN THE MATTER OF L.R. NO. KAMAGAMBO/ KANYAJUOK/1640**

**AND**

**IN THE MATTER OF CLAIM PERTAINING TO OWNERSHIP OF TITLE**

**AND**

**IN THE MATTER OF ALLEGATIONS OF FORCIBLE ENTRY**

**AND**

**IN THE MATTER OF FAIR ADMINISTRATIVE ACT, 2015**

**AND**

**IN THE MATTER OF ARTICLES 2(2), 10(2), 20(1) & (2), 23,27(1), 29(A),  
48, 50(1), 165 & 258 OF THE CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**DISTRICT CRIMINAL INVESTIGATIONS OFFICER, RONGO .... 1<sup>ST</sup>  
RESPONDENT**

**THE INSPECTOR GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTIONS ..... 3<sup>RD</sup> RESPONDENT**



**THE SENIOR RESIDENT MAGISTRATE'S COURT RONGO .... 4<sup>TH</sup>  
RESPONDENT**

**AND**

**PHILIP ODERO MAKONGO ..... INTERESTED PARTY**

**AND**

**JOSEPH OKECH NYAMANGA ..... EXPARTE**

**JUDGMENT**

1. The ex-parte Applicant herein vide an Application by way of an Ex-parte Chamber Summons dated 20<sup>th</sup> April, 2018 filed under Certificate of Urgency; sought Leave of the Court to file the present Notice of Motion.
2. The same was place before the Honourable Judge and Orders were issued on 24<sup>th</sup> April, 2018 granting the ex-parte Leave to file the substantive motion.
3. Consequently, the ex-parte Applicant filed the Notice of Motion dated 25<sup>th</sup> April, 2018 seeking the following orders: -
  - a. Spent.
  - b. The Honourable Court be pleased to grant an Order of Judicial Review in the nature of Certiorari to issue to remove unto the High Court and Quash the recommendations by and/or on behalf of the 3<sup>rd</sup> Respondent herein (the Director of Public Prosecution), contained vide letter dated 19<sup>th</sup> March, 2018, recommending the arrest and prosecution of the Ex-parte Applicant herein on account of Forcible entry/ Trespass onto L.R. No. Kamagambo/ Kanyajuok/1640, which lawfully belongs to the Ex-parte Applicant.
  - c. The Honourable Court be pleased to grant an Order of Judicial Review in the nature of Prohibition, to issue prohibiting the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein from arresting, charging, arraigning and/or prosecuting the Ex-parte Applicant on account of the tramped up charges founded on allegations of Forcible entry/ Trespass onto L.R. No. Kamagambo/ Kanyajuok/ 1640, which lawfully and legitimately belongs to the Ex-parte Applicant.
  - d. The Honorable Court be pleased to grant an Order of Judicial Review in the nature of Prohibition, to issue prohibiting the 4<sup>th</sup> Respondent from entertaining, further entertaining, proceeding with, deliberating upon, rendering any decision on and/or any other manner handling the intended Criminal Proceedings against the Ex-parte Applicant, founded and/or anchored on alleged Forcible entry/ Trespass onto L.R. No. Kamagambo/ Kanyajuok/ 1640, which lawfully and legitimately belongs to the Ex-parte Applicant.
  - e. Costs of this Application be borne by the Respondents and the Interested Party jointly and severally.
  - f. Such further and/or other Orders be made as the court may deem fit and expedient.
4. The Application is premised on the 40 grounds thereon, the Statutory Statement and the Verifying Affidavit both dated August 21, 2019.



5. The Ex-parte Applicant claims that he lodged a complaint before the Land Disputes Tribunal, Rongo District in respect to parcel No. Kamagambo/ Kanyajuok/ 572 and which was subsequently subdivided into L.R. Nos. 1639 & 1640. The said complaint was heard and a decision rendered; whose effect was to order for the transfer and registration of the suit parcel No. 572, into his name. The said decision by the Land Disputes Tribunal was thereafter adopted and ratified by the 4<sup>th</sup> Respondent on 27/09/2011.
6. Upon adoption and ratification of the Tribunal's decision by the court; the suit property No. 572 which had since been subdivided into Nos. 1639 & 1640 was transferred and registered his name and a title deed issued on the 09/10/2016 to that effect. He thereafter entered and took possession and has remained therein to date.
7. Further, it is his case that sometimes on 03/02/2017; the Interested Party caused to be published an illegitimate Gazette Notice and consequently, his title deed was revoked and the Land Registrar proceeded to issue a secondary title in favor of the Interested Party.
8. The Interested Party went ahead and lodged a complaint purporting that he had forcibly entered/ trespassed onto the suit property. That the said complaint of forcible entry was/is meant to attract his eviction from the suit parcel.
9. He further contends that the intended criminal prosecution against him was actuated by malice and ulterior motive; the same is vexatious, mischievous and meant to intimidate him. It is also his claim that intended criminal prosecution has been commenced without proper and appropriate investigations, aimed to achieve collateral purposes without any lawful cause/ basis.
10. He averred that the said intended criminal proceedings amount to a violation of his fundamental rights and freedoms pursuant to Articles 10,20(1), 27,29(d) & 50(1) of the Constitution; and thus amounts to an abuse of the statutory duty. He urged the court to allow the Application in the interest of justice.
11. The substantive motion was opposed; the Interested Party filed a Replying Affidavit and a Preliminary Objection both dated 14/05/2018 in response to the Application. He avers that the instant Application has been overtaken by events as the Ex-parte Applicant was already arrested and arraigned in Rongo Law Court vide Criminal Case No. 91 of 2020 and the orders sought have therefore been overtaken by events. In addition, it was his contention that the Application was res judicata.
12. He further stated that Application as filed is vexatious, frivolous and is intended to defeat justice. It was his contention that he was an innocent purchaser for value and that the Ex-parte Applicant had disqualified himself from being a beneficiary to the estate the late Nyamanga Opiyo and thus had no locus claiming the same. He therefore urged the court to dismiss the Application with costs.
13. The substantive motion was disposed by way of written submissions; both the ex-parte Applicant and the Interested Party filed their rival submissions together with authorities, which I have read and taken into account in arriving at my decision as hereunder. The Respondents on the other hand did not file any submissions, be that as it may, I will proceed to render my judgment.

### **Ex-parte Applicant's Submissions**

14. It was his submission he is the lawful and registered proprietor of the suit property; the same having been registered in his name on the 04/10/2016. That by virtue to utilize, cultivate of being the registered owner of the said land, he has legitimate rights over the same and is thus authorized to utilize, cultivate and occupy the said land without interference from any third parties. The rights conferred upon registration are absolute and exclusive.



15. He further submitted that his absolute and exclusive rights over the suit property as a registered proprietor cannot be criminalized. It is his claim that he was arrested, arraigned in court and is undergoing prosecution for using and working on portions of the suit parcel. He now avers that the said arrest and prosecution is calculated to intimidate and scare him from using, cultivating and undertaking any operations on the suit land or portions thereof.
16. With regards to the allegations made by the Interested Party; it was his submission that the Interested Party did not produce any documentary evidence to prove his averments on the ownership of the suit land. He also maintained that despite the said allegations, he remained the lawful and legitimate proprietor of the suit parcel, vested with all the rights and interests over the same.
17. In conclusion, he maintained that the criminal process was meant to deprive, deny and prevent him from using the suit land and thus amounted to an abuse of the due process of court.
18. He relied on the following cases in further support of his case; *Ocean View Plaza Limited v Attorney General* [E&L] KLR 1, *Republic v Attorney General & 4 Others*, Ex-parte Kenneth Kariuki Githii [2013] eKLR, *Samwel Kamau Macharia & Anor v Attorney General* [2001] KLR, *Stanley Munga Githunguri v Republic* [1986] KLR and *Joram Mwenda Guantai v the Chief Magistrate Nairobi*, Court of Appeal, Civil Appeal No. 228 of 2003.

### **Interested Party's Submissions**

19. It was his submissions that the investigations were done diligently and exercised within the confines of law and the Applicant having been charged already, the granting of the orders sought would be an exercise in futility.
20. He further submitted that Applicant had not sufficiently demonstrated that his arrest and subsequent arraignment was unlawful, improper, irrational and an abuse of power. It is his claim that the Applicant's title was recalled by the Land Registrar- Migori County vide a letter dated 08/02/2018, for cancellation having been obtained fraudulently.
21. On the issue of res judicata, it was his submission that the matter had been heard and determined on different for a; including the Rongo District Land Tribunal case, Kisii High Court Misc. Application No. 249 of 2017 and Succession Cause No. 24 of 2018. He thus urged the court to dismiss the Applicant's claim for being res judicata.
22. He relied on the following cases in further support of his claim; *Peter Ngunjiri Maina v DPP & 2 Others* [2017] eKLR, *R v DPP & 2 Others Ex-parte Nomoni Saisi* [2016] eKLR, HCC No. 958 of 2001 *George W.M. Omondi & Anor v National Bank of Kenya Ltd & 2 Others*, *Mwangi Njangu v Meshack Mbogo Wambugu* and Nyeri HCCC No. 87 of 2007 *Mbeu Kithakwa v Phillip Muchiri Mugo*.

### **Analysis And Determination**

23. The issues for determination from the present Application are as follows: -
  - a. Whether this court has the requisite jurisdiction to entertain the Application herein
  - b. Whether the Ex-parte Applicant is entitled to the Orders sought in the Substantive Notice of Motion dated April 25, 2018.



## **I. Whether this court has the requisite jurisdiction to entertain the Application herein**

24. The jurisdiction of this court flows from Article 162 (2) (b) of the Constitution as read with sections 4 and 13 of the Environment and Land Court Act, 2015.
25. It is a well settled principle in law that jurisdiction is everything and a court without jurisdiction must down its tools. A court's jurisdiction flows from either the Constitution or an Act of Parliament; the court cannot confer jurisdiction on itself where none existed. See Hussein Khalid & 16 Others v Attorney General & 2 Others [2020] eKLR.
26. Further, The Court of Appeal in Adero & Another V Ulinzi Sacco Society Limited [2002] 1 KLR 577, addressed the law on jurisdiction as follows;
- “ 1. ....
2. The jurisdiction either exists or does not ab initio and the non-constitution of the forum created by statute to adjudicate on specified disputes could not of itself have the effect of conferring jurisdiction on another forum which otherwise lacked jurisdiction.
3. Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.
4. Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.
5. Where a cause is filed in Court without jurisdiction, there is no power on that Court to transfer it to a Court of competent jurisdiction.....”
27. I have carefully looked at the Notice of Motion herein, the grounds outlined thereon and the response filed by the Interested Party; It is my considered opinion that the core issue in dispute is the alleged criminal trespass and/or forcible entry and the intended Criminal Proceedings, which forms the basis of the instant Application. The same has been reiterated by the Ex-parte Applicant throughout his pleadings and submissions.
28. The Ex-parte Applicant has sought Judicial Review Orders in the nature of Certiorari for purposes of quashing the recommendations by the 3<sup>rd</sup> Respondent (Director of Public Prosecutions), of the arrest and prosecution of the Ex-parte Applicant on account of forcible entry and/or trespass. He further sought an Order of Prohibition; prohibiting his arrest, being charged and/or arraigned in court or prosecuted for the alleged charges of forcible entry or trespass and further prohibiting the 4<sup>th</sup> Respondent from entertaining, proceedings with, deliberating upon and in any manner handling the intended criminal proceedings.
29. Even though the Ex-parte Applicant contends that the issue in dispute is the ownership of the suit parcel L.R. No. Kamagambo/ Kanyajuok/ 1640; I must point out that the orders sought herein are all intended in preventing/ stopping and addressing the impending criminal proceedings on the alleged forcible entry/ trespass against him and not the determination of the ownership status of the subject land.



30. In *Municipal Council of Mombasa v. Republic & Umoja Consultants Ltd* Civil Appeal No. 185 of 2001 the court stated as follows: -

“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision, the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”

31. The decision making process in this case, which ought to be interrogated is the process leading to the recommendation of charging the Ex-parte Applicant for forcible entry and/or trespass into the suit property and further the intention to arraign him in court for prosecution. This in my view, does not fall within the purview of section 13 of the *Environment and Land Court Act* nor Article 162 (2) (b) of the *Constitution* of Kenya; it is criminal in nature and thus should be filed at the appropriate forum.

32. Further and without prejudice to the foregoing; a determination of the ownership status of the subject land herein and the rights, interests and privileges accruing thereto cannot be made in a Judicial Review Application. The scope of Judicial Review writs are very specific and are all aimed at addressing specific issues and a determination of ownership of private land between individuals is not within the said scope.

33. Guided by the aforementioned cases and the legal framework which vests this court with the requisite jurisdiction; I find no basis on the jurisdiction of this court to entertain the instant Judicial Review Application as filed.

34. In the premises having held that this court does not have the requisite jurisdiction to entertain the Application herein; the Notice of Motion dated 25<sup>th</sup> April, 2018 is hereby struck out. Each party to bear their own costs of the Application. It is so ordered!

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 31<sup>ST</sup> DAY OF JANUARY, 2023.**

**MOHAMED N. KULLOW**

.....

**JUDGE**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

**In presence of; -**

Nonappearance for the Ex-parte Applicant

Nonappearance for the Respondents

Nonappearance for the Interested Party

Court Assistant - Tom Maurice/ Victor

