



**Republic v County Government of Machakos & 2 others; Kavisu & another (Exparte Applicants); Injora & another (Interested Parties) (Environment and Land Judicial Review Case E001 of 2023) [2023] KEELC 17114 (KLR) (2 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17114 (KLR)

**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E001 OF 2023**

**CA OCHIENG, J**

**MAY 2, 2023**

**IN THE MATTER OF ORDER 53 RULE 1 OF THE CIVIL PROCEDURE ACT**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015**

**AND**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR**

**JUDICIAL REVIEW ORDER OF CERTIORARI AND PROHIBITION**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**COUNTY GOVERNMENT OF MACHAKOS ..... 1<sup>ST</sup> RESPONDENT**

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

**THE SENIOR PRINCIPAL MAGISTRATE MACHAKOS ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**JACKSON KASAMU KAVISU ..... EXPARTE APPLICANT**

**HEZEKIEL KARIUKI MWANGI ..... EXPARTE APPLICANT**

**AND**

**LEO INJORA ..... INTERESTED PARTY**

**SHIVAM PINDORIYA ..... INTERESTED PARTY**



## RULING

1. What is before Court for determination is the Ex parte Applicants' Notice of Motion Application dated the March 10, 2023 where they seek the following orders:
  1. Spent.
  2. That this Court be pleased to grant leave to the Ex parte Applicants to file Judicial Review Application seeking Judicial Review Orders of:
    - i. Certiorari against the Decision of the Government of Machakos to prosecute the Ex parte Applicants over unfounded charges and/or allegations which are malicious in their very nature.
    - ii. Prohibition against the Inspector General of Police (i.e the IG) restraining him whether by himself and/or through his Junior Officers within Machakos County from illegally demolishing the Ex parte Applicants' property AND from illegally and unlawfully harassing, arresting, attacking, threatening and/or from aiding and abetting the said demolitions, harassment, attacks, threats and intimidation against the persons of the Ex parte Applicants herein, their families, farm hands, servants, employees, workers and all other persons living on and within the neighbourhood of Mulinge Scheme particularly those living on LR No 20442, 20443, 20444, 20449, 20450, 20451 and 20452.
    - iii. Prohibition against the GOvernment Of Machakos restraining them from illegally and/or unlawfully evicting AND from aiding and abetting the forceful, illegal and unlawful eviction of the Ex parte Applicants herein, their families, farmhands, employees, workers and all other persons living on Mulinge Scheme particularly those living on LR No 20442, 20443, 20444, 20449, 20450, 20451 and 20452.
    - iv. Prohibition against the Chief Magistrate Machakos prohibiting them from commencing and/or continuing with the Criminal Proceedings against the Ex parte Applicants herein instituted in Machakos County Government Criminal Case No E 037 of 2023; Republic (i.e Machakos County Government) v Jackson Kamau Kavisu & Hekeziel Kariuki Mwangi.
    - v. Mandamus directing the Inspector General of Police to maintain Law & Order within Mulinge Scheme And to in particular provide security to the Ex parte Applicants herein and to all persons living on LR No 20442, 20443, 20444, 20449, 20450, 20451 and 20452 of Mulinge Scheme.
  3. The Leave so granted under prayer No 2 hereinabove do operate as a Stay of the Criminal Proceedings instituted against the Ex parte Applicants herein in Machakos County Government Criminal Case No E 037 of 2023; Republic (i.e Machakos County Government) v Jackson Kamau Kavisu & Hekeziel Kariuki Mwangi.
2. The Application is founded on the grounds set out in the Statutory Statement as well as the Verifying Affidavit of the 2<sup>nd</sup> Ex parte Applicant Hezekiel Kariuki Mwangi. They explain that together with other families they have resided on LR No 20442, 20443, 20444, 20449, 20450, 20451 and 20452 of Mulinge Scheme. They confirm that one Shivam Pindoriya owns LR No 20447 and 20448 but in



March 2023 he encroached on LR No 20449 and 20450 which belongs to them. They contend that the Inspector General of Police (IG) and his officers have failed to maintain law and order on land located in Mulinge Scheme. They claim the IG and his officers attack residents of Mulinge Scheme, harass as well as demolish their property and arbitrarily arrest them in an attempt to intimidate including scare them to vacate. They challenge the decision by the 1<sup>st</sup> Respondent to illegally, unlawfully and unprocedurally summon, charge and prosecute them. Further, they proceeded to explain how the summons were served by a person not legally allowed to do so. They further challenge the decision by the Senior Principal Magistrate at Machakos to entertain Summons unlawfully/illegally issued and charges illegally preferred against them, in what is a clear abuse of the Court process. They explain their reason for failure to attend court culminating in the issuance of a warrant of arrest. They reiterate that the scheme to arrest them is orchestrated to attempt to evict them from the aforementioned parcels of land which they have called home for thirty (30) years.

3. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents opposed the instant Application by filing Grounds of Opposition on March 22, 2023. They insist the Application is fatally defective, incompetent, malapropism and untenable in substance as well as form. They aver that the Application is hopeless, misleading and devoid of merit as the Applicants have failed to demonstrate that the actions of the Respondents were laced with abuse of process. Further, that there is no specific allegation and or any evidence provided by the Ex parte Applicants as against the Respondents on the alleged violations of their rights. They contend that the Ex parte Applicants have failed to demonstrate that the purported summons were irregularly issued as alleged. Further, that the instant Application is bad in law and the court lacks jurisdiction to grant the prayers sought. They reiterate that the instant Application is incompetent and untenable as the issues raised herein can only be dealt with by the court that issued the said summons. They explain that the instant Application is based on an erroneous and misleading assumption and misapprehension of the law in that the Applicants are relying on documents which fail to demonstrate the alleged decision is illegal, unfair as well as irrational. Further, the allegations that the Police abdicated their roles as enforcers of the law is merely speculative.
4. To oppose the instant Application the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties filed a Notice of Preliminary Objection on March 20, 2023; Grounds of Opposition on March 20, 2023 and a Replying Affidavit sworn by Leo Ijora Nyongesa. They state that the instant Application is defective as well as res judicata as the issues raised herein were determined in Machakos County Government Criminal Case No E037 of 2023: Republic v Jackson Kasamu Kavisu & Hezekiel Kariuki Mwangi vide Notice of Motion dated the March 8, 2023, wherein the 3<sup>rd</sup> Respondent issued an order on March 16, 2023 directing the Ex parte Applicants to appear in Court on March 20, 2023 for plea taking. Further, that by dint of Article 162 (2) (b) of the Constitution, and Section 13(1) of the Environment and Land Court Act, this court lacks jurisdiction to deal with the instant matter. They contend that the Ex parte Applicants failed to disclose to court that they sought similar orders in the aforementioned Application and the prayers sought have been overtaken by events. Further, that the instant Application seeks to scuttle the proceedings before the Trial Court, yet the Ex parte Applicants have failed to appear to take plea on 8<sup>th</sup> March, 13<sup>th</sup> March and March 16, 2023 respectively. They insist that the Application is misconceived and incompetent since the office of Director of Public Prosecutions (ODPP) whose decision the Ex parte Applicants are challenging is not a party herein. They claim the Application is without lawful basis as the Ex parte Applicants forcefully entered into land that does not belong to them and commenced subdividing it culminating in the Interested Parties report to the Machakos Police Station leading to the charges being preferred against them. Further, that the decision to charge them was informed by the sufficiency of the evidence on record and law. They reaffirm that the orders sought against the 3<sup>rd</sup> Respondent cannot issue as it is a statutory body with a duty as well as jurisdiction to try the case involving the Ex parte Applicants pursuant to the provisions of the Magistrate's Act. They



reiterate that the Ex parte Applicants have not demonstrated any incompetency and impartiality on the part of the 3<sup>rd</sup> Respondent. Further, that the Application does meet the threshold set for issuing orders of prohibition. They aver that the Application is premature, ill-founded and incompetent. Further, that the Ex parte Applicants are not entitled to the orders sought as they will have an opportunity to present their defence in the trial Court. They explain that the Ex parte Applicants averments that they were not given an opportunity is untenable and have not demonstrated any ground to warrant the orders sought. Further, that they have failed to demonstrate what prejudice or injustice will be occasioned if stay of proceedings is not granted.

5. In rebuttal, the Ex parte Applicants filed a Further Affidavit sworn by Hezekiel Kariuki Mwangi where they reiterate their averments as per their Verifying Affidavit as well as Statement of Facts and presented the chronology of events leading to the filing of the instant Judicial Review. They allege that the Interested Parties hatched a plan to fabricate trumped up charges against them in order to have them incarcerated. Further, that the finding of the trial court that the summons served were invalid, is an indictment to the 1<sup>st</sup> Interested Party. They insist that the person handling prosecution on behalf of the 1<sup>st</sup> Respondent is not fit to be a prosecutor. They aver that the real issue at the centre of this matter relate to an ownership dispute over LR No 20449 and 20450 respectively. Further, that the 2<sup>nd</sup> Interested Party has filed two ELC Cases at Mavoko Law Courts being Mavoko ELC No E035 of 2023 Maracy Limited v Comfort Homes Limited & Others and Mavoko ELC E 036 of 2023 Shreeji Group Limited v Comfort Homes Limited & Others.
7. The instant Application was canvassed by way of written submissions.

### **Analysis and Determination**

8. Upon consideration of the instant Notice of Motion Application including the respective Affidavits, Statement of Facts, Annexures, Grounds of Opposition, Notice of Preliminary Objection and rivaling submissions, the following are the issues for determination: Whether this Court has jurisdiction to handle the instant application. Whether the Ex parte Applicants are entitled to leave to commence proceedings of certiorari, mandamus as well as prohibition and if such leave can operate as stay of the Criminal Proceedings instituted against the Ex parte Applicants herein in Machakos County Government Criminal Case No E 037 of 2023; Republic (i.e Machakos County Government) v Jackson Kamau Kavisu & Hezekiel Kariuki Mwangi.
9. The Ex parte Applicants in their submissions insist that this court has jurisdiction to handle the matter as the fulcrum of the dispute revolves around land. To support their arguments, they relied on Article 157 of the Constitution as well as the following decisions: *Jared Benson Kangwana vs Attorney General Nairobi HCCC No 446 of 1995* and *Taib A. Taib v Minister for Local Government & Others*.
10. The 1<sup>st</sup> Respondents in its submissions contend that this court does not have jurisdiction to handle this matter as it relates to summons in a criminal case. Further, that this Application has been overtaken by events as a Ruling was already delivered on March 16, 2023 where the Court struck off the impugned summons for being invalid. Further, that Ex parte Applicant has not met the threshold for leave to be granted.
11. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in their submissions contend that what the Ex parte Applicants' seek the Court to stay is outside the scope Of Judicial Review as from a reading of the impugned summons, the Respondents were merely fulfilling their statutory including Constitutional mandate. To buttress their averments, they relied on the following decisions: *R (H) vs Ashworth Special Hospital Authority (2003) 1 WLR 127*; *Jared Benson Kangwana vs Attorney General, Nairobi HCCC No 446 of 1995* and *Taib A Taib vs The Minister for Local Government & Others*.



12. The 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties in their submissions insist the Ex parte Applicants' case is unmerited to justify leave. Further, that the Ex parte Applicants have been charged with a criminal offence known in law and the impugned summons were struck out and fresh summons issued. Further, there is no evidence that the Police and Prosecution have acted contrary to the Law. On the issue of stay, they argue that it would be tantamount to granting substantive orders sought. To support their averments, they relied on the following decisions: *Peter Ngungiri Maina v Director of Public Prosecution & 2 Others (2017) eKLR*; *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others (2017) eKLR*; *Johnson Kamau Njuguna & Another v Director of Public Prosecutions (2018) eKLR*; *Beatrice Kwamboka v Leader of Majority of the Nairobi County Assembly (2016) eKLR*; *Nicholas Mwaniki Wawere & Another v AG & DPP* and *Republic v Director of Public Prosecution & Another Ex parte Chamanlal Vrajlal Kamani & 2 Others (2015) eKLR*.
13. On granting of leave to commence proceedings of Judicial Review, Order 53 Rule 1 of the *Civil Procedure Rules* which stipulates inter alia:
- (1) 'No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule. (2) An application for such leave as aforesaid shall be made Ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on. (3) The judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit including cash deposit, bank guarantee or insurance bond from a reputable institution. (4) The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise: Provided that where the circumstances so require, the judge may direct that the application be served for hearing inter partes before grant of leave. Provided further that where the circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days.'
14. It is trite that Judicial Review is concerned with the administrative action of a person in position of authority. In the current circumstances, the Ex parte Applicants seek to challenge the decision of the Respondents in Charging them vide Machakos County Government Criminal Case No E037 of 2023: Republic v Jackson Kasamu Kavisu & Hezekiel Kariuki Mwangi. They claimed that they were served with summons by a person not authorized to do so. It emerged that the trial court actually struck off the said summons for being invalid and fresh ones were re issued. The Respondents contend that this court is devoid of jurisdiction to handle the instant Application. Further, that it is not only res judicata but has also been overtaken by events. I will deal with the issue of jurisdiction first, before determining whether the Ex parte Applicants are entitled to the orders as sought. On jurisdiction of this court, the *Constitution* at Article 162 (2) (b) states that:
- (2) 'Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to — (b) the environment and the use and occupation of, and title to, land.'
15. While Section 13 of the *Environment and Land Court Act* provides that:
- (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the *Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.



Section 13 (2) (c) & (d) further stipulates that ‘in exercise of its jurisdiction under Article 162 (2) (b) of the Constitution, the Court shall have power to hear and determine disputes - (c) relating to land administration and management;

(d) Relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land.’

16. Nyarangi JA in *The Owners of Motor Vessel 'Lillian S' vs Caltex Oil Kenya Limited (1989) KLR 1*, while dealing with the issue of jurisdiction held that:

‘Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.’

17. In this instance, I note the fulcrum of the Application herein revolves around criminal prosecution commenced in the Machakos Chief Magistrate’s Court vide Machakos County Government Criminal Case No E037 of 2023: Republic v Jackson Kasamu Kavisu & Hezekiel Kariuki Mwangi. Further, there was a dispute in respect service of summons emanating from the lower court case but on the March 16, 2023, the trial Court struck them off, for being invalid as it was served by one not authorized to do so and ordered for fresh ones to be reissued. The Ex parte Applicants insist that the fulcrum of the dispute is about ownership of land but at this juncture I beg to disagree. I opine that if indeed there was a dispute over land, they should have commenced civil proceedings so as to tender evidence to prove ownership of the said land. However, in relying on the legal provisions cited above as well as associating myself with the decision I have quoted, I find that this court is devoid of jurisdiction to handle the instant Application for leave to quash decisions emanating from a criminal process. Further, since I have declined to grant leave, I will also not handle the application as to whether leave should operate as a stay of the criminal proceedings in Machakos County Government Criminal Case No E 037 of 2023: Republic v Jackson Kasamu Kavisu & Hezekiel Kariuki Mwangi.

18. In the circumstances, I find the instant Notice of Motion Application unmerited and will strike it off but make no order as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 2<sup>ND</sup> DAY OF MAY, 2023**

**CHRISTINE OCHIENG**

**JUDGE**

