



**Njagi v Republic (Miscellaneous Criminal Application E314 of 2021)
[2023] KEHC 2803 (KLR) (Crim) (28 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 2803 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
MISCELLANEOUS CRIMINAL APPLICATION E314 OF 2021
JM BWONWONG'A, J
FEBRUARY 28, 2023**

BETWEEN

MORRIS GITONGA NJAGI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant filed the amended notice of motion dated December 16 2021 seeking a stay of the proceedings in Makadara Chief Magistrate's Court, in Criminal Case No. 2480 of 2018 pending his bankruptcy discharge.
2. The application is based on grounds on the face of the notice of motion which are reiterated in the applicant's supporting and supplementary affidavits.
3. He has averred as follows. In 2018, he was charged with the offence of obtaining money by false pretense contrary to section 313 of the *Penal Code* (Cap 63) Laws of Kenya. Before the charges were preferred against him, he had been doing business with the complainant for the supply of tea but faced financial difficulties. He filed for bankruptcy in Nairobi High Court Insolvency Cause No. 13 of 2018 to enable him pay his creditors.
4. On November 19, 2019 he entered into a settlement agreement with the complainant in the said criminal case before the Chief Magistrate's court sitting in Makadara.
5. On January 23, 2020 he was adjudged bankrupt and an official receiver was appointed. Subsequently, he served all his creditors including the complainant with the bankruptcy orders that were issued. However, the trial court set the criminal matter for hearing, despite the bankruptcy order being in force.



6. He is apprehensive that he will be exposed to illegitimate and unfair proceedings if the orders sought are not granted.
7. In response, the respondent filed grounds of opposition dated February 7, 2022. The grounds raised are that the applicant has not laid the basis for this court to draw an inference that the trial court is not being fair. The applicant has not demonstrated any prejudice he stands to suffer while undergoing his trial. The applicant being declared bankrupt is not a bar to criminal proceedings. The application is misconceived, an abuse of the court process and should be dismissed.

The applicant's written submissions

8. Mr. Madegwa learned counsel for the applicant submitted that the applicant did not obtain credit after the bankruptcy order was made. He has also submitted that he has demonstrated that he carried out business with the complainant for over 5 years. He obtained processed tea on credit before the circumstances leading to the bankruptcy order issued and is therefore entitled to the protection of the law.
9. Learned counsel further submitted that the applicant had demonstrated that the basis of his trial was a consequence of the credit obtained from the complainant. The complainant is therefore bound by the law within the provisions of the *Insolvency Act* not to continue any proceedings against him upon the grant of a bankruptcy order. Counsel argued that the applicant deserves the protection of the law and that the same cannot be taken away disguised as a criminal prosecution.

The respondent's written submissions

10. Ms. Edna Ntabo learned prosecution counsel submitted that the stay orders sought will prejudice the respondent and the complainant who are victims. That a victim has a right to have a trial begin and conclude without unreasonable delay. Further, the stay of proceedings cannot be granted in abeyance as litigation has to come to an end.
11. In addition, counsel submitted that the applicant has failed to demonstrate that the respondent lacked the requisite authority, and acted in excess of jurisdiction in directing the case to proceed in the trial court. The High court exercises powers of revision or supervisory jurisdiction in matters of a miscarriage of justice owing to a defect in procedure or manifest error on a point of law.
12. She argued that in this case, there was none. She urged the court to dismiss the application.

Issues for determination

13. Having considered the application, the response, the submissions and applicable law, I find that the issue for consideration is whether the applicant has made out a case for the grant of the orders sought.

Analysis and determination

14. Section 193A of the *Criminal Procedure Code* (Cap 75) Laws of Kenya provides:-

“193A. Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”



15. The law allows civil and criminal proceedings to run concurrently even where they are directly or substantially in issue in both cases. In the case of *Mule vs Republic* [1983] KLR, where the appellant had caused damage in a bar as he fought the complainant, Porter Ag. J held that; -

“Civil and criminal cases may run concurrently and the fact that an accused person may be liable in damages does not mean that he cannot be prosecuted for a criminal offence revealed in his action”
16. The existence of a civil suit cannot be a bar to criminal proceedings, simply because the subject matter in the criminal proceedings is directly in issue or substantially in issue in the pending civil suit. Where civil proceedings exist side by side with criminal proceedings, the latter would only be stayed or terminated altogether if there is every indication that they were initiated to bring pressure to bear upon a party to settle the civil suit; in that regard, the criminal proceedings are for ulterior motives and not for the purpose of which they are meant, which is, upholding criminal law.
17. The applicant is charged with one count for the offence of obtaining by false pretences contrary to section 313 of the Penal Code and three counts for the offence of issuing a bad cheque contrary to section 316 A (i) (a) (4) of the *Penal Code* (Cap 63) Laws of Kenya. More importantly in my view, the process of bankruptcy is to enable a person to re-organize his finances where it has been demonstrated that he needs the assistance of the court to do so.
18. In this case the applicant filed his petition in 2018 and obtained a receiving order in 2020. It is now almost three years since the same was issued and has not gone back to the court to process his petition to be issued with a bankruptcy order. Furthermore, the settlement agreement produced by the applicant indicates that the applicant should have settled the entire amount at the time of this ruling. Therefore, the respondent will have no reason to prosecute the case against him if he has paid what is owed to the complainant.
19. It is an abuse of the court processes and unlawful for the applicant to use the receiving order as a shield against the criminal proceedings.
20. This court cannot allow the use of the order to prevent the due legal process, whereas in this case it is abused.
21. In the premises, I find no merit in this application and the same is dismissed in its entirety.

JUDGEMENT SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 28TH DAY OF FEBRUARY 2023.

J M BWONWONG'A

JUDGE

In the presence of-

Mr. Kinyua court assistant

Mr. Madegwa for the applicant

Mr. Otieno for the Respondent

The applicant in person

