



Momanyi t/a Nyaingiri & Co Advocates v Director of Public Prosecutions & another (Miscellaneous Criminal Application 3 of 2020) [2023] KEHC 18270 (KLR) (27 April 2023) (Ruling)

Neutral citation: [2023] KEHC 18270 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
MISCELLANEOUS CRIMINAL APPLICATION 3 OF 2020**

**RL KORIR, J
APRIL 27, 2023**

BETWEEN

**NYAINGIRI THADDEUS MARTIN MOMANYI T/A NYAINGIRI & CO
ADVOCATES APPLICANT**

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS 2ND RESPONDENT

RULING

1. The Applicant filed a Notice of Motion Application dated March 2, 2020 where he sought the following Orders:-
 - I. Spent.
 - II. That this Honourable Court do stay the proceedings in Criminal Case Number 3393/2019 against the Applicant pending the hearing and determination of this Application.
 - III. That this Honourable Court do stay Criminal charges against the Applicant pending the hearing and determination of the Succession Cause proceedings pending before Bomet High Court in Succession Cause Number 3 of 2019.
2. The Application is based on the grounds on the face of the Application and the Supporting Affidavit sworn by Thaddeus Martin Nyaingiri Momanyi on March 2, 2020.



The Applicant's Case

3. The Applicant stated that he was arrested by the 2nd Respondent on March 22, 2020 outside Bomet High Court. That he was presented before the Senior Principal Magistrate on the same day in Criminal Case Number 3393 of 2019 where the warrants of arrest were lifted.
4. It was the Applicant's case that the genesis of the criminal proceedings was Succession Cause Number 3 of 2019 before the High Court, Bomet. That on July 2, 2018, he was instructed to act for the Citees in Citation Proceedings Number 10 of 2018 before Bomet Law Court against the Citor who was the Complainant in the criminal proceedings. It was the Applicant's further case that upon determination of the citation proceedings, he instituted Succession Cause number 74 of 2018 before Sotik Law Courts. That the said proceedings had a Will and Codicil attached.
5. The Applicant stated that the Complainant (Citor) filed an Objection in the Sotik succession proceedings where the Will was challenged. That the 1st and 2nd Respondents in this Application made several Applications touching on the succession matter and when a determination was made in Sotik, they withdrew their Application. The Applicant further stated that after the Respondents withdrew their Application, they arrested his client, Raymond Kipchirchir Cheruiyot and charged him at Bomet Law Courts.
6. It was the Applicant's case that the Respondents were forum shopping as they moved the case from Sotik Law Courts to Bomet Law Courts in order to invent criminal charges in a matter that was civil in nature and contractual between an advocate and his client. That at all times, he acted as an advocate on behalf of his clients and that he was not a beneficiary to the estate.
7. The Applicant stated that he was being investigated for an allegation of forging a Will and intermeddling with the estate of the deceased. That the Respondents have not produced another Will which they deem to be original. The Applicant further stated that the validity of the Will had been challenged before this court and that the court was yet to make a finding on the same.
8. It was the Applicant's case that the actions of the Respondents have subjected him to public humiliation and embarrassment, infringed upon his fundamental rights and freedoms and had demonstrated no respect for the law or the rights of suspects. The Applicant stated that there were no legal safeguards against abuse of power by the 2nd Respondent and that this court had the mandate to check such abuses.

The Applicant's Submissions

9. The Applicant filed submissions dated October 17, 2022. He submitted that his Application remained unopposed and that no explanation had been availed to the court for the non responsiveness of the Respondents. That those entrusted with the administration of justice have remained silent.
10. It was the Applicant's submission that the police neither served him any document to attend court nor did they grant him bail. That the alleged offence arose out of the succession cause in Konoin sub county and not in Bomet sub county.
11. The Applicant submitted that the succession cause was before this court and that the police had already made a determination on a matter that was yet to be determined. The Applicant further submitted that the *Penal Code* did not override offences under the *Succession Act*.



12. It was the Applicant's submission that justice ought to be administered according to the law and not to the whims and caprices of a police officer. That the police had stopped pursuing the matter. It was the Applicant's further submission that the lapses on the part of the Respondents were not excusable.
13. The Applicant submitted that this was a constitutional court that has inherent powers to issue an order of prohibition to a subordinate court to stop it from trying any criminal case against him. That the Application before this court was proper as it was meant to protect his fundamental rights and freedoms.
14. It was the Applicant's submission that he was never given any chance to explain himself or respond to allegations raised against him as envisaged under Article 50 of the [*Constitution of Kenya*](#).

Respondents' Case and Submissions.

15. The Respondents did not file any response to the Application. When the matter came up before Dulu Judge on March 5, 2020, the Applicant sought leave to file further affidavits and to serve the Director, Criminal Investigation office in Nairobi. The matter thereafter was left unprosecuted. When it came up on July 12, 2022, the Prosecution Counsel sought dismissal which the court declined to grant as there was no evidence of service of notice.
16. The court directed service upon the Respondents' offices in Bomet and granted leave for them to file responses within 7 days. The matter came up on October 3, 2022 when Mr Njeru Prosecution Counsel sought time to familiarize himself with the matter as he was newly posted to the DPP's office.
17. When the matter came up on February 21, 2023, the learned Prosecution Counsel Mr Njeru made Oral submissions before court. He submitted on behalf of the 1st Respondent that this file was related to Petition Number 1 of 2020 before the High Court where the Applicants were Raymond Cheruiyot and David Cheruiyot. That the Applicants sought stay of proceedings against them in the trial court which application was declined by the High Court.
18. It was the 1st Respondent's submission that the Applicants were charged in Criminal Case Number 3393 of 2019 before the Magistrate's Court in Bomet where the case was now awaiting Judgment.
19. The 1st Respondent submitted that they had now reviewed the evidence and were satisfied with the prosecution of the two Accused in Criminal Case No 3392 of 2019 and that the prosecution of the Applicant was no longer tenable in the circumstances. Counsel summed his submissions by stating that the 1st Respondent did not oppose the present Application.
20. On costs the 1st Respondent asked the court not to grant costs.
21. The law guiding stay of criminal proceedings can now be said to be well settled. The Court of Appeal in [*Joram Mwenda Guantai vs The Chief Magistrate, Nairobi*](#) Civil Appeal No 228 of 2003 (2007) 2 EA 170, held that:-

“...the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has an inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court.”



22. However, the power of the court to stay proceedings is discretionary. In *Goddy Mwakio & Another vs Republic* (2011] eKLR, the Court of Appeal stated that:-

“An order for stay of proceedings, particularly stay of criminal proceedings is made sparingly and only in exceptional circumstances.”

23. The genesis of the arrest of the Applicant and subsequent charging in Bomet Criminal Case Number 3393 of 2013 was on account of his work as an advocate representing one of the parties in Succession Cause Number 3 of 2019 that is before this court. The Applicant contended that he was arrested because it was alleged that he had a forged written Will that was a subject of the aforementioned Succession Cause. That he was humiliated by his arrest outside Bomet Law Courts.

24. I have considered the submissions of the 1st Respondent that they did not wish to continue with the prosecution of the Applicant and were therefore not opposed his Application dated March 2, 2020.

25. Flowing from the above, I find the Notice of Motion Application dated March 20, 2020 merited. I grant the prayers set out in the Application in terms that:-

- i. There shall be stay of the proceedings in Criminal Case Number 3393/2019 against the Applicant pending the hearing and determination of Succession Cause Number 3 of 2019 in this Court.
- ii. There shall be stay of Criminal charges against the Applicant related to Criminal Case No 3393 of 2019 pending the hearing and determination of the Succession Cause Number 3 of 2019 pending before Bomet High Court.

26. There shall be no order on costs.

Orders accordingly.

RULING DELIVERED, DATED AND SIGNED AT BOMET THIS 27TH DAY OF APRIL, 2023

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R. LAGAT-KORIR

JUDGE

Ruling delivered in the presence of Mr. Nyaingiri for the Applicant, Mr. Wainaina for the 1st Respondent, No appearance for the 2nd Respondent and Siele (Court Assistant)

