



**Francis & 2 others v Director of Public Prosecutions; M'Iruki (Interested Party) (Criminal Petition E014 of 2021) [2023] KEHC 22997 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22997 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL PETITION E014 OF 2021  
EM MURIITHI, J  
SEPTEMBER 28, 2023**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS & FREEDOMS UNDER ARTICLES 47 & 50 OF THE CONSTITUTION**

**BETWEEN**

**HADSON MUTUGI FRANCIS ..... 1<sup>ST</sup> PETITIONER**

**JOHN THURANIRA MIKUI ..... 2<sup>ND</sup> PETITIONER**

**JACKSON MURIUNGI ..... 3<sup>RD</sup> PETITIONER**

**AND**

**THE DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT**

**AND**

**NAFTALY M'IRUKI ..... INTERESTED PARTY**

**RULING**

1. The application dated 18/7/2023 is brought by the DPP and supported by the interested parties seeking a review of this court Judgment herein staying the intended prosecution of the petitioners until the determination of a civil suit then pending before the Chief Magistrate Court Meru as Environment and Land Court Case No. 34 of 2020. The specific orders of the application are as follows:

- “(i) That this honourable court be pleased to certify this application urgent.
- (ii) That this honourable court be pleased to revise, review, vary and or set aside the orders issued on October 19, 2022.
- (iii) That this honourable court be pleased to make any orders that it deem fit in the interest of justice.”



2. It is founded on grounds set out in the application as follows:

- “(a) That the Judgement in this matter was delivered on October 19, 2022 where the court stayed the charge, arrest and prosecuting the Petitioners/ Respondents until the hearing and determination of the dispute in the Chief Magistrates Court in Enviromental & Land Case No.34 of 2020.
- (b) That further to above, the dispute in Chief Magistrates Court ELC No. 34 of 2020 was to be expedited for hearing and determination within 90 days from the day of judgement.
- (c) That the petitioners have subsequently frustrated the hearing and determination of the said matter by filing documents late, seeking unnecessary adjournments and filing Appeals arising from the decisions of the trial court vide ELC Appeal No. 13 of 2023.
- (d) That it is over 9 months since this honourable court made an order for the expedition of the matter within 90 days from the date of judgement.
- (e) That there exists compelling reasons to revise, review, vary and or set aside the orders dated October 19, 2022
- (f) That this inordinate delay is going to the root core of the Director of Public Prosecution ability to discharge its constitutional mandate of state prosecutorial powers and consequently hampering effective administration of justice in the criminal case.
- (g) That it is fair, just and equitable that this application be allowed.”

3. It is supported by affidavit of the Prosecution Counsel B. Nandwa on 18/7/2023, primarily urging the review on the ground that there the order for stay was hampering the DPP’s constitutional mandate in the face of complaints from the complainant Interested Party, at paragraphs 10-16 as follows:

- “10. That this office received a complaint letter dated February 24, 2023 from the interested party that the parties are not keen or interested in hearing the ELC Case No 34 of 2020 to conclusion. Attached herein is the said self-explanatory complaint letter marked BN 3.
- 11. That the respondent/applicant is seeking revision, review, vary and/or set aside the orders dated 19/10/2022 and allow the respondent discharge its mandate accordingly.
- 12. That it is not in doubt parties were not keen to comply with orders of this honourable court dated October 19, 2022 to hear and determine this matter within the stipulated time frame as none of the parties approached it for extension of time.
- 13. That any party can similarly move to the court of appeal in ELC appeal NO. 13 of 2013 or appeal similar applications at high court which anyway is their right BUT unfortunately it will go a long way by hampering the respondent/applicant in discharging its constitutional mandate. Attached herewith is the Memorandum of appeal marked BN 4.



14. That the continuous stay orders in this matter are thus in due respect going to the root core of the director of Public Prosecution ability to discharge its constitutional mandate of states prosecutorial powers and consequently hampering the effective administration of justice in criminal case.
  15. That justice delayed is justice denied
  16. That I in the light of the above I am humbly imploring this honourable court to revise, review, vary and/or set aside the orders dated October 19, 2022 and allow the respondent /applicant to proceed and commence criminal proceedings against the petitioners/respondent accordingly.”
4. The respondents oppose the application and they have filed a replying affidavit sworn on 15/8/2023 by the 1<sup>st</sup> petitioner on behalf of the co-petitioners urging denying any intentional delay on their part to the conclusion of the determination of the dispute, pointing out that the matter had a pending interlocutory appeal from the decision of the trial court refusing to admit some documents for the defence, and that the application of 18/7/2023 was “a deliberate attempt to try and make this court sit on appeal over its own judgment”.
  5. The interested party, who is the complainant in the criminal case, filed a replying affidavit sworn on 8/8/2023 supporting the application by the DPP and urging at paragraph 11 thereof that:
    - “ 11. That there's a clear effort to delay the speedy conclusion of the trial court file and since this court had made a finding that no impropriety was on myself or the respondent as to the intended charges against the petitioners and since further the court had made a finding at paragraph 37 of the judgment that its orders are not a bar to prosecution of the petitioners, then the same should be varied set aside to allow justice to flow like a river and have all the fraud perpetuated against me that lead to loss of my property brought to light as shown on my complaint letter annexed to the Motion dated February 24, 2023.”
  6. Counsel for the parties then made oral submissions on their respective contentions and ruling was reserved.

### **Determination**

7. In its Judgment delivered herein on 19/10/2022, the court ruled as follows:
  - “ 34. Article 23 (3) of the Constitution empowers the High Court to fashion appropriate relief depending on the circumstances of the case in petitions for enforcement of rights and fundamental freedoms under article 22 of the Constitution. The right of an accused to fair trial is unlimitable and entrenched under article 25 (c) of the Constitution, and one of its cardinal subsets under article 50 (2) (c) is the opportunity and facility to prepare for his defence, which would be hampered in the event of simultaneous multiple legal process over the same, similar or related subject matter.
  35. In the respectful view of this court, it is possible to uphold the petitioners' right to a fair trial as well as the State's prosecutorial authority by staying rather than stopping the prosecution of the petitioners in a fair trial for the alleged



offences pending the hearing and determination of the civil suit. There is no time limitation to criminal prosecution. A fair criminal process must include a fair opportunity for the prosecution to present its case against an accused in a fair trial where the rights of the accused are guaranteed.

#### ORDERS

36. Accordingly, for the reasons set out above, the court considers it an appropriate relief to order for a stay of the criminal prosecution until the hearing and determination of the civil suit before the Environment and Land Court by issuing as prayed in Prayer No. (c) of the Amended Petition dated January 6, 2022 that –

“An order of Permanent Injunction against the respondents, their agents, servants and/or any other person acting on his behalf or behest and/or direction from charging and/or prosecuting the applicants over Plot No. Meru Municipality Block 11/698 or matters incidental and axillary thereto pending the hearing and determination of the dispute in the Chief Magistrate’s Court in Environment & Land Case No. 34 of 2020.

37. For the avoidance of doubt, the injunction herein granted does not bar the criminal prosecution of the Petitioners upon the determination of the civil suit Chief Magistrate’s Court Environment & Land Case No. 34 of 2020.”

8. The rationale for the decision to staying being the simultaneous exposure of the petitioners to parallel court proceedings hampering his opportunity to prepare for the criminal trial and therefore infringing on his constitutional right to a fair trial is still extant. Perhaps even to a heightened degree because the dispute has now been escalated to a higher court, the Environment and Land Court with status equal to the High Court in accordance with article 162 (2) of the *Constitution*.
9. It has not been demonstrated that the petitioners are deliberately delaying the fair conclusion of the civil dispute at the appellate level. Indeed, upon the delivery of the ruling in the trial court on 7/2/2023, the Petitioners filed a Memorandum of Appeal dated 18/2/2023 and on the same date requested for certified copy of proceedings for purposes of appeal, in accordance with the rules of the court.
10. The civil dispute is still active litigation and the petitioners would still be exposed to prejudice by way want of opportunity to adequately prepare and present their defences to the criminal charges. There is still justification for the continuation of the order for stay of the criminal proceedings until the hearing and determination of the appeal and subsequently the civil suit in the trial court. This court cannot anticipate the course of litigation such determination and no direction is, therefore, given in that regard.
11. This court already considered the issue of the DPP’s prosecution mandate and balanced it with the applicants’ right to a fair trial and resolved it as set out in paragraph 35 of the Judgment as quoted above. needless to state, if the contention by the prosecution and the interested party is that the court erred in granting the stay of criminal proceeding, the correct action should be an appeal to a higher court. See *National Bank of Kenya v. Ndungu Njau* (1997) eKLR where the Court of Appeal (Kwach, Akiwumi and Pall, JJA) held that:

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a



sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”.

12. If the interested party's interest is the recovery of his plot, he should keenly pursuing the prosecution of the civil suit not so much worry about the criminal prosecution of the alleged offenders, whose business it is for the Prosecution to pursue and which has as observed in the Judgment not affected by any statute of limitation of actions! The rationale for stay remains relevant in the circumstances of the case obtaining today, and the court does not see any justification to lift the stay orders.
13. Consequently, the court will main the order of stay against commencement of the intended criminal trial against the petitioners.

## **ORDERS**

14. Accordingly, for the reasons set out above, the court makes the following orders:
  1. The respondent's applicant dated 18/7/2023 is declined.
  2. The interested parties are at liberty to move the appellate court of the Environment and Land Court for dismissal of the appeal for want of prosecution or abuse of the court process if it is contended that the petitioners herein are delaying the fair determination of the appeal and abusing the process to prevent the expeditious disposal of the dispute.
  3. Each party shall bear its own costs.

Order accordingly.

**DATED AND DELIVERED ON THIS 28<sup>TH</sup> DAY OF SEPTEMBER, 2023.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

Mr. Mwanzia for the Petitioners.

Mr. Masila for the DPP.

Mr. Mutuma, J. for the Interested Parties.

