



**Araka & 2 others v Republic (Criminal Appeal E025 of 2022)
[2023] KEHC 26783 (KLR) (22 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 26783 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL APPEAL E025 OF 2022
HI ONG'UDI, J
DECEMBER 22, 2023**

BETWEEN

ANDREW OMBASA ARAKA 1ST APPELLANT

NELSON ONDIEKI MARIGIRI 2ND APPELLANT

PETER NYAMAGWA 3RD APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the Ruling delivered by Hon. P.C. Biwott on 14th October 2022)

JUDGMENT

1. The appellants are the 2nd, 3rd, and 4th accused respectively in Original Ogembo SPM's Court Cr. Case No. E035 of 2020 (Ogembo MCCR No. 248 of 2021). In the said case they are charged with the offence of forcible detainer contrary to Section 91 as read with Section 36 of the [Penal Code](#).
2. In the course of the hearing of the said case the appellants filed an application dated 3rd October 2022 in which they sought stay of the criminal proceedings in Ogembo Cr. Case No. E035 of 2020 pending the hearing and determination of Kisii OS ELC No. 37 of 2019 Peter Nyamagwa Araka & Another vs. Daniel Ombeo (Sued as a Representative of Teresa Ombeo).
3. A Ruling which is the subject of this Appeal and which dismissed the said application was delivered on 14th October 2022. The Petition of Appeal dated 16th November 2022 was filed by Masire & Mogusu Advocates raising the following grounds:
 - i. The Learned Trial Magistrate erred in law and fact by failing to properly evaluate the evidence before him thus reaching an erroneous decision.



- ii. The Learned Trial Magistrate erred in law and fact by dismissing the application dated 3rd October 2022 without giving proper basis thus occasioning miscarriage of justice.
 - iii. That the Learned Trial Magistrate erred in law by failing to appreciate that there is a High Court case touching on the issue of ownership of the land that is pending and is yet to be concluded.
4. The respondent opposes the Appeal through the following grounds:
- i. Section 193A of the [Criminal Procedure Code](#) allows for concurrent proceedings of both criminal and civil matters.
 - ii. The Trial Magistrate rightfully dismissed the application to stay the proceedings in the criminal matter based on paragraph 1 above.
 - iii. The issue raised in the current application can be brought up in the trial of the criminal case.
 - iv. No prejudice will be occasioned to the appellants if the criminal and civil matter proceed concurrently. Their rights i.e. the rights of the accused persons are well protected by [the Constitution](#).
 - v. The appeal lacks merit.
5. The appeal was canvassed by way of written submissions.

The Appellants' submissions

6. These are dated 8th November 2023 having been filed by Masire & Mogusu Advocates. A brief history of the matter is that there is a dispute between the appellants and the Estate of the late Teresa Ombeo in respect to the ownership of the land the appellants are alleged to have encroached on. The dispute is before the ELC Kisii for determination.
7. Counsel has submitted that the matter before the ELC Kisii was filed on 3rd October 2022 before the filing of the criminal case meant to intimidate them. Counsel has referred to several decided cases on the issue of stay of proceedings pending hearing of another related dispute. See: *Republic v The Kenya Anti-Corruption Commission & 2 Others*- Civil Application No. Nairobi 51 of 2008 (unreported); [Lalchand Fulchand Shah v Investments & Mortgages Bank Limited & 5 Others](#) [2018] eKLR; [Commissioner of Police & the Director of Criminal Investigations Department v Kenya Commercial Bank and Others](#) Nairobi Civil Appeal No. 56 of 2012 [2013] eKLR.
8. Based on the above, Counsel submitted that under Section 193A of the [Criminal Procedure Code](#) any matter in issue in any criminal proceedings which is also directly or substantially in issue in any pending civil proceedings does not bar the commencement of criminal proceedings themselves. However, where the criminal proceedings are oppressive, vexatious and an abuse of the court process or amounts to a breach of fundamental rights and freedoms, the High Court has the powers to intervene. This is the appellants' major argument
9. Counsel, while relying on the case of *Kuria & 3 Others v AG* [2000] 2KLR, submitted that it is their contention that the criminal proceedings herein were instituted to circumvent the results of the civil suit pending. That the issues in contention in both courts are the same.



The Respondent's submissions

10. These are dated 20th November 2023 having been filed by Learned Counsel Brian P. Ayodo for the ODPP. He submitted that the impugned Ruling dismissed the appellants' application because the two cases are different as the present one is criminal while the other is civil. Secondly that the delay in filing the application was a ploy to delay the trial process and deny the victims justice. He further argues that the proceedings in the ELC are independent and do not affect the criminal case as the parties are different and the appellants will not suffer any prejudice if the criminal case is heard to its conclusion.
11. Counsel submitted that the appellants have not demonstrated any damages or loss they will suffer if the orders sought are not granted. He further argues that they did not annex the proceedings in the ELC to enable the Trial Magistrate appreciate the gist of their application and how it related to the criminal case.

Analysis and Determination

12. Having carefully considered the grounds of appeal, facts of the case, both parties' submissions and cited authorities and the law, I find the main issue for determination to be whether this Court should allow the proceedings in Kisii ELC No. 37 of 2019 and Ogembo SPM MCCR No. 248 of 2021 to proceed concurrently.
13. Section 193A of the *Criminal Procedure Code* which governs the operation of such a scenario provides:
193A. Concurrent criminal and civil proceedings
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.
14. In the present case, there is no dispute that the criminal case and the land matter before the ELC Kisii are live matters before our courts. The request by the appellants are not to have the criminal case terminated but to have it put on hold/stayed to await the outcome in the ELC matter.
15. From the Record of Appeal which contains several documents from the Lower Court plus the evidence adduced before the said Court, the issue is whether the appellants who live on the disputed land are entitled to adverse possession. Adverse possession once proved confers title or ownership.
16. As provided for under Section 193A of the *Criminal Procedure Code*, both proceedings may be run concurrently. In this case the issue is title and occupation. What would happen if the appellants who are the Accused Persons in Ogembo MCCR E035/2020 are convicted of being forcible detainers, before the determination of the ELC case and later on the ELC (which is the court endowed with the power to determine titles to land) finds in favour of the appellants? Which of the two decisions will carry the day? The criminal court has no jurisdiction to determine title to ownership of land.
17. To avoid placing the two courts in an embarrassing scenario, one of them should be stayed. I have read through the impugned Ruling and besides stating that the two matters are different, there is no reason given as to why the order sought could not be granted. The Learned Trial Court further stated that a civil process cannot stop a criminal process. This one is an issue which can only be determined after considering all factors and not just a mere issue of elevating the criminal process above the civil one. In the current scenario, the matter has been fully investigated and the criminal case has taken off. The evidence is safely with the ODPP and the Court.



18. The Court of Appeal in Commissioner of Police and Director of Criminal Investigations Department (Supra) stated thus:

“While the law (Section 193A of the *Criminal Procedure Code*) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that the power must be exercised responsibly, in accordance with the laws of the land in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings? It is not in the public interest or in the interest of administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and travesty of justice for the police to be involved in the settlement of what is purely dispute litigated in court. This is a case more suitable for determination in the civil court where it has been since 1992 than in a criminal court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations.”

19. Having considered all the circumstances of this case plus the various decisions, I find that the ends of justice demand that the ELC be given the opportunity to determine the ownership of the land in dispute before the criminal case proceeds from where it has reached. I therefore find merit in the Appeal and allow it. The impugned Ruling dated 14th October 2022 is hereby set aside and substituted with an order staying the proceedings in Ogembo SPM’s Cr. Case No. MCCR No. 248 of 2021 (E035 of 2020) pending the hearing and determination of Kisii OS ELC No. 37 of 2019 Peter Nyamagwa Araka v Daniel Ombeo.

20. This being a very sensitive matter the stay shall be limited to 12 months from today’s date for purposes of speedy disposal.

21. The matter to be mentioned before the SPM Ogembo in the criminal case for an update on the progress at the ELC and if there is need for extension of the orders staying the proceedings.

22. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED AT KISII THIS 22ND DAY OF DECEMBER, 2023.

H.I. ONG’UDI

JUDGE

In the presence of:

M/s Gogi for the Appellants

Mr. Ochengo for the State

Otieno: Court Assistant

