



**Ngugi v Director of Public Prosecutions & 3 others (Constitutional
Petition 3 of 2022) [2022] KEHC 10497 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 10497 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CONSTITUTIONAL PETITION 3 OF 2022**

RB NGETICH, J

JULY 28, 2022

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

**IN THE MATTER OF CRIMINAL CASE NO 750 OF 2015
REPUBLIC VERSUS JOHN MUNYUA NGUGI, ROBERT
KINYANJUI MUNYUA AND SIMON NGUGI MUNYUA AT
KIKUYU MAGISTRATE COURT**

AND

IN THE MATTER OF ABUSE OF THE COURT PROCESS

AND

**IN THE MATTER OF ARTICLE 157(11) OF THE
CONSTITUTION OF KENYA ON THE NEED FOR THE
DIRECTOR OF PUBLIC PROSECUTIONS TO GUARD
AGAINST ABUSE OF THE LEGAL PROCESS**

AND

**IN THE MATTER OF THE USE OF THE CRIMINAL JUSTICE
SYSTEM TO SETTLE PURELY CIVIL MATTER**

AND

**IN THE MATTER OF FAIR TRIAL AS PROVIDED FOR UNDER
THE CONSTITUTION OF KENYA, 2010**

BETWEEN

LEORNARD JOHN MUNYUA NGUGI PETITIONER



AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT
DIRECTOR OF CRIMINAL INVESTIGATIONS 2ND RESPONDENT
CHIEF MAGISTRATE COURT KIKUYU 3RD RESPONDENT
ATTORNEY GENERAL 4TH RESPONDENT

RULING

1. The petitioner filed the current petition together with the notice of motion dated December 14, 2021, in Nairobi HCCHRPET NO. E066 of 2022. It was transferred to this court due to supervisory jurisdiction of this court over the Kikuyu Magistrate Court.
2. The application which is before this court for determination seeks the following orders;
 - a. Spent.
 - b. Pending the hearing and determination of this application, and petition this court do stay the proceedings of Kikuyu Criminal Case No. 750 of 2015.
 - c. Costs of the suit.
3. The application is premised on the grounds that the applicant is an elderly man aged 70 years and in bad health charged with the offence of Forgery Contrary to section 349 of the *Penal Code*. The charge emanates from a sale of land of Kabete/Karura/1149 in the year 1996. He is accused of forging the signature of Ndirangu Karanja in the consent application for the Land Control Board.
4. He averred that the police gained forceful entry into his premises and demanded the title documents to the parcel and failure to surrender the same saw him charged with Criminal Case No. 750 of 2015.
5. He further averred that Ndirangu Karanja did adduce evidence that he lawfully sold the property to the applicant and was not coerced in any way and neither was his signature forged.
6. The application is supported by the annexed affidavit of Leonard John Munyua Ngugi sworn on December 14, 2021. He averred that he is charged alongside his two (2) sons on the allegation of forging a signature in the Land Control Board transfer forms in respect to Parcel No. Kabete/Karura/1149 which was purchased in 1996. In addition, him and his two sons are charged with the charge of obstructing justice when the sons restrained his arrest.
7. He further stated that at the Kikuyu Police Station their rights were infringed as they were beaten by the police. He averred that he is a bonafide purchaser of the property in dispute and the continued prosecution of the Kikuyu Criminal Case is an abuse of the court process as the claim for forgery of documents cannot stand without a document examiner's report.
8. He averred that there has been a miscarriage of justice since his arrest and the principles of the spirit of *the Constitution* will be breached unless the prosecution withdraws the Kikuyu Criminal Case under section 87A.
9. This matter was placed before me on March 7, 2022. I directed the Director of Public Prosecutions (DPP) to be served and the same be fixed for further directions.



10. On July 4, 2022, the prosecution counsel opposed the application on ground that Kikuyu Criminal Case was at the defence stage in that the prosecution case has already been closed and informed the court they intended to file a response.

Replying Affidavit

11. The respondent filed response on July 19, 2022 by a replying affidavit sworn by Harry Nyamesa. He averred that the Director of Public Prosecutions (DPP) derives mandate from article 157 of *the Constitution* of Kenya and the decision to charge the applicant and his two sons was well reasoned and in line with the ODPP Act and ODPP Decisions to Charge Guidelines.
12. He urged the court not to usurp the constitutional mandate of the DPP as the allegation by the applicant that the Kikuyu Criminal proceedings are bound to fail is not a ground for halting the proceedings in the trial court. He further stated that the applicant has failed to prove how his right has been violated by the 1st and 2nd respondents.
13. The respondent further averred that the prosecution acted in line with *the constitution* in deciding to charge the applicant and cited the case of the Hon. *James Ondicho Gesami vs the Attorney General & others*, Petition no. 376 of 2011 where the court held as follows:-

” the DPP is at liberty to prefer charges against any party in respect of whom he finds sufficient evidence to prefer charges...in my view, requiring that the petitioner subjects himself to the normal criminal prosecution process mandated by law where he has all the safeguards guaranteed by *the constitution* does not in any way amount to an attack on his human dignity in violation of his constitutional rights.
14. He averred that proper investigations were conducted by the 2nd respondent who compiled all the evidence and submitted relevant information; the charge sheet is therefore proper, lawful and accurate. There was no malice or unreasonable cause when the applicant was arrested. The criminal process entails safeguards which are meant to ensure that an accused person is afforded a fair trial as envisaged under article 50 of *the Constitution*.
15. At the time of writing this ruling none of the parties herein had filed written submissions despite being given up to 22/7/2022 to file written submissions.

Analysis And Determination

16. I have considered grounds of the application, averments in support and the affidavit in response. What is in issue is whether the applicant is entitled to the conservatory orders sought.
17. The applicant seeks to stay the proceedings of the trial court on ground that the prosecution is not seized off with evidence incriminating the applicant.
18. The 1st and 2nd respondents are investigative and prosecuting bodies that derive their mandate under *the Constitution*.
19. The position of the superior court on granting stay orders in criminal proceedings pending before the subordinate court is well stated in the case *Republic v The Kenya Anti-Corruption Commission & 2 others* Civil Application No. Nbi 51 of 2008 (2009) eKLR where the court held:-

“...It would appear logical to say that it seems that the court can [grant an order of stay] if petitioned on time to stay the order and/or decree of the superior (sic) court which will, in turn, have the effect of staying the criminal proceedings in the superior (sic) court. Further,



as to whether it can do so or not depends on the particular circumstances of each case and especially so, what exactly the applicant is asking the Court to do and how the Court is approached.”

20. I believe the Judge intended to write stay criminal proceedings in the “lower court” in the quote above. The court after the above quotation considered various authorities and concluded as follows:

“...From my consideration of the above somewhat conflicting decisions I would hold therefore that whether rule 5(2)(b) of the rules does apply to criminal proceedings and as to whether this Court can issue an order for prohibition in a criminal case against the Magistrate’s court pending appeal depends on what prayers an applicant is seeking under the rule and the particular circumstances of each case.”

21. I note that the criminal investigations in this case were instituted in the year 2015. Even after the applicant was arraigned in court, he did not challenge the arrest at that time. It is not disputed that the prosecution has already closed its case and the matter is pending for defence hearing. No explanation has been given for delay in seeking conservatory orders. In my view this application is an afterthought.

22. The applicant has not demonstrated any prejudice he is likely to suffer if the matter continues to conclusion in the lower. The issue he has raised of document not being examined by Government Examiner are issues which he has opportunity to canvass in the trial court or in appellate court if not satisfied by determination of the trial court. In my view if orders sought are granted, will contribute to derailing and delaying the determination of the criminal matter before the trial court.

23. The criminal matter has been pending in the trial court for a long time. There is a need to have the matter concluded. No sufficient reason has been advanced to warrant a stay of the proceeding of the trial court proceedings

Final Order

1. Application dated December 14, 2021 is hereby dismissed.
2. No orders as to costs.

RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KIAMBU THIS 28TH DAY OF JULY, 2022

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RACHEL NGETICH

JUDGE

In the Presence of:

Kinyua – Court Clerk

Ms. Wekesa and Dr. Khaminwa for Applicant

Mr. Nyamesa for the State

