



**Sukunya & others v Republic (Criminal Revision E026 of 2022)
[2022] KEHC 15310 (KLR) (28 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 15310 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CRIMINAL REVISION E026 OF 2022
SN MUTUKU, J
SEPTEMBER 28, 2022**

BETWEEN

STANLEY SUKUNYA & OTHERS APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Background

1. The applicants are charged in the lower court at Ngong in Ngong Criminal Case No 504 of 2019 Republic v Stanley Subnkuyia Olkworr & others with the offence of forcible detainer contrary to section 91 of the *Penal Code*. The particulars of that offence are that on diverse dates between October, 2015 and February 12, 2019 at Oletepesi area in Keekonyokie Location, Kajiado West Sub-county within Kajiado County, jointly with others not before the court were in possession of parcel of land No Kajiado/Loodariak/1183 of Proactive Air Service Limited without color of right, held possession of the said land.
2. They have moved this court seeking orders to recall the file from the lower court and order that the hearing of the said criminal case be stayed on the strength of the consent entered into by parties in the ELC case to forestall any adverse orders that may issue in the criminal proceedings and that such stay of proceedings in the criminal case be in force until the decision of the ELC is delivered.

Submissions

3. Parties submitted for and against the application. Ms Kyeva for the applicants. She reiterated the contents of the application that are contained in the letter seeking revisions addressed to this court and dated March 3, 2022. She submitted that should the criminal case be allowed to proceed the decision will prejudice the applicants and that the criminal court lacks requisite jurisdiction to determine



- ownership of the land in issue and that ELC should be allowed to determine ownership before criminal proceedings can proceed.
4. Counsel further submitted that although the law allows criminal and civil proceedings to move concurrently, the issue of ownership of the suit land is central and that this dispute dates back to adjudication period and has not been determined.
 5. The ODPP filed submissions in court dated July 18, 2022 in addition to oral submissions. They cited section 193A of the *Criminal Procedure Code* to the effect that both civil and criminal cases can proceed concurrently without any problem. It was submitted that the ELC case was filed after the applicants were charged with the criminal case and that the applicants are abusing the process of this court.
 6. Mr Wainaina, appearing for the complainant submitted that the application is defective and incurable in law for reasons that the applicants are inviting this court to revise orders of the lower court that are not annexed to the application; that it is not indicated whether a ruling was issued or annex any ruling of the lower court in which they invite this court to revise.
 7. Mr Wainaina further submitted that the criminal proceedings in Ngong do not prejudice the applicants in any way; that they have admitted that the complainant holds the title and therefore ownership is clear; that they cannot be prejudiced for occupying land that is not theirs; that the ELC matter, which was filed in 2012, is an afterthought, filed after the applicants were charged with the criminal case and is meant to frustrate the lower court proceedings.

Determination

8. Section 193A *Criminal Procedure Code* allows concurrent criminal and civil proceedings in the following terms:

"Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also direly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings."
9. I appreciate that all counsel agreed on this point of law.
10. I have considered the arguments in support of stay of criminal proceedings and against the same. It is not for this court to determine ownership. It is not for the lower court, sitting as a criminal court, to determine ownership. It does not possess that jurisdiction nor does this court. It is for the ELC to determine ownership.
11. I have noted that parties entered a consent before the ELC to the effect that *status quo* be maintained and that the *status quo* is that the plaintiffs are in occupation of the suit land while the defendant is the registered proprietor. This consent must have been adopted by the ELC as an order of that court. Any disobedience of the said order will attract contempt of court proceedings. That is the law.
12. Therefore, flowing from paragraph 11 above, it is erroneous to state that "If the criminal proceedings continue and in the unlikely event the accused persons are found to be guilty, they would then have to be evicted from the suit land. This will be in conflict with the existing consent order recorded in the superior court that the accused persons should not be evicted from the suit land."
13. Any person accused of a criminal offence is accorded a fair trial and if this is not done, the trial is challenged in a higher court in hierarchy. The accused persons will be given a chance to litigate their case in the criminal matter. They will be accorded opportunity to cross examine witnesses and put in



their defence. All the issues they now bring up in this application for review will come out. The trial court will decide if they are guilty or not.

14. The duty of the criminal trial court is to determine culpability or otherwise of the accused persons not ownership by adverse possession. Given the provisions of section 193A *Criminal Procedure Code* cited above, I do not see any prejudice if the ELC and the criminal matters proceed concurrently.
15. This court has not been persuaded why it should interfere with the criminal trial. I am inclined to allow law and procedure to take its course and have the criminal trial proceed because the applicants will be accorded the opportunity to defend themselves. The outcome would be either guilty or not guilty and not who owns the land. Besides, the consent order is from a superior court and parties are at liberty to rely on it in challenging any eviction.
16. For the above reasons I decline to allow this application, which I hereby dismiss. The criminal trial shall proceed.
17. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED ON 28TH SEPTEMBER, 2022.

S. N. MUTUKU

JUDGE

