



REPUBLIC OF KENYA



Francis & 2 others v Director of Public Prosecutions; M’Iruki (Interested Party) (Criminal Petition E014 of 2021) [2022] KEHC 14062 (KLR) (19 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14062 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL PETITION E014 OF 2021
EM MURIITHI, J
OCTOBER 19, 2022**

**IN THE MATTER OF CHAPTER FOUR - THE BILL OF RIGHTS OF THE
CONSTITUTION OF KENYA AND IN THE MATTER OF ARTICLES
20, 21, 22, 23, 157(II) & 165(6) OF THE CONSTITUTION AND IN THE
MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS
& FREEDOMS UNDER ARTICLES 47 & 50 OF THE CONSTITUTION**

BETWEEN

**HADSON MUTUGI FRANCIS 1ST PETITIONER
JOHN THURANIRA MIKUI 2ND PETITIONER
JACKSON MURIUNGI 3RD PETITIONER**

AND

DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

AND

NAFTALY M’IRUKI INTERESTED PARTY

JUDGMENT

1. By an Amended Petition dated January 6, 2022, the petitioners seek specific reliefs that:
 - a. A declaration that the petitioners’ right to a fair judicial process/right under article 50 of the Constitution shall be infringed by the respondent if allowed to perpetuate the arrest, detention, charge and prosecution of the applicants over plot no Meru Municipality Block 11/698 and related/incidental or axillary thereto pending in the Chief Magistrate’s Court Environment & Land Case no 34 Of 2020.



- ai) A declaration that the dominant purpose for the intended charge and prosecution of the petitioners is to achieve a purpose other than what is intended that is to frighten, threaten, coerce and eventually assisting the interested party in the pending Environment & Land Case no 34 Of 2020 in the chief magistrate so as to gain unfair advantage as the petitioners will be christened as criminals facing criminal charges no matter how frivolous the charges are with a view to assisting the interested party to wrestle the land from the 1st & 2nd petitioners and is therefore an abuse of criminal justice process/system.
- b. A declaration that the respondent shall infringe the petitioners' right to an administrative action that is lawful, reasonable and procedurally fair under article 47 of the Constitution if allowed to arrest and charge the petitioner over plot no Meru municipality block 11/698 or matters incidental and axillary thereto.
- c. An order of permanent injunction against the respondents, his 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.
- ci) An award of damages to the petitioners for infringing their right to a fair judicial process under article 50 of the Constitution.
- d) Costs of this Petition.

Petitioners' case

2. The 1st petitioner bought land from the 2nd petitioner who was the original allottee to the same but the same land is being claimed by the plaintiff (the interested party herein) in a suit which is pending for determination before the subordinate court. The 2nd petitioner has his original letter of allotment of the parcel in dispute being Meru Municipality Block 11/698 (hereinafter the suit property). Upon investigation of the plaintiff's letter of allotment by the registrar of land, it was discovered that the reference number belonged to a land allocation file at Isiolo, but the disputed land is at Meru Municipality. The director, department of land, physical planning, urban development and Public Works, namely J M Paul stated in his witness statement that the plaintiff in the suit has not presented any ownership documents for the plot in dispute. It was further discovered that the plaintiff could not have been issued with an allotment in 1997 since he was barely of the age of majority.
3. The petitioners allege that they are now being sought by the DCI Meru with instructions from the respondent to arrest and charge them, for unknown offences. They aver that the respondent's decision to seek, arrest and charge them is irrational, capricious, an abuse of the legal process and against the interests of fair administration of justice. They aver that the respondent is determined to embarrass, humiliate and treat them in undignified manner, as the dominant purpose of the intended criminal prosecution is to force, coerce and exert pressure on the 1st and 2nd petitioners to relinquish the proprietary rights of the contested plot in favour of the interested party.
4. They contend that the dominant purpose is to use the criminal justice system to try and assist the interested party and to taint the 1st and 2nd petitioners' ownership of the contested plot in order achieve a desired goal and not the interest of justice that is to tilt the scales in favour of the interested party. They accuse the respondent of acting in cahoots with the interested party to malign and try to influence the outcome of the civil case pending in the Environment and Land Court over this matter through



creation of a frivolous charge, and urge that their right to protection of the law, their fundamental rights and freedoms under articles 28, 47 and 50 of the Constitution have been violated.

The Respondent's case

5. The respondent opposed the petition vide its replying affidavit sworn by Cpl. Kimathi Marete of DCI Imenti North, and the investigating officer herein, on December 2, 2021. He avers that on May 29, 2020 a report was made whereby the 1st petitioner and the interested party claimed ownership of the same plot BLK 11/698 within Meru township and each of the complainants had documents to support their allegations. He said that he, therefore, embarked on conducting investigations into the matter whereby he recorded the 1st petitioner's and the interested party's statements.
6. During the course of his investigations, he noted that the allotment letter in the name of the 2nd petitioner referenced 56045/XI for residential plot no BLK 11/698 Meru said to have been signed by one I A Machuka on behalf of the commissioner of lands was not authenticated by the National Lands Commission. The Ministry of Lands and Physical Planning vide a letter dated October 21, 2020 stated that they did not have in their records the allotment letter reference 56045/XI and plan no 167/15/04. The Physical Development Plan dated August 4, 2015 was prepared 15 years after the allotment letter referenced 56045/XI and further the same was not duly signed or approved as required by the authorized person, which was an illustration that the proper procedure was not followed.
7. The allotment letter reference no 31560/XIV dated February 20, 1997 and the attached PDP 167/95/26 dated February 12, 1997 belonging to the interested party were both confirmed and verified on September 25, 2020 by the National Land Commission and the Ministry of Lands as genuine documents.
8. The 2nd petitioner's letter of allotment referenced 56045/XI for the disputed land signed by I A Machuka as well as allotment letter referenced 31560/XIV Commercial plot no A Meru Municipality were examined by the document examiner who confirmed that the known signature of I A Machuka did not match that on the 2nd petitioner's letter of allotment.
9. The signature on the interested party's letter of allotment signed by James Nyarunda Ombati matched his own signature and therefore showed that the interested party's allotment letter was authentic whereas that of the 2nd petitioner was forged. The Director of Physical Planning and Urban Development Meru County as well as the chairman of the lands transactions committee namely Jefferson Musyoka confirmed that the disputed land was not listed as an agenda in the meeting held on January 15, 2020.
10. In the course of his investigations, he obtained a letter from the County Government of Meru dated July 13, 2020 from the department of lands, physical planning, urban development, housing and public works noting that they did not have records, a file or any information relating to the disputed land. He also obtained a letter from the County Government of Meru dated July 21, 2020 which indicated that PDP no 167/15/04 dated August 4, 2015 belonging to the 2nd petitioner was not prepared for residential purposes. After the conclusion of the investigations, the file was forwarded to the respondent, who recommended further investigations be undertaken.
11. Subsequently, the decision was reached to charge the petitioners for the alleged acts of forgery, fraud and alteration of public documents by the petitioners. It was contended that the investigations, which are known legal processes in our justice system, were conducted in line with section 49(4) and (10) of the National Police Service Act, and they do not amount to infringement of the fundamental rights and freedoms of any person. Under article 157(1) of the Constitution as replicated in section 6 of the



Office of the Director of Public Prosecutions Act, 2013, the respondent does not require the consent of any person or authority for the commencement of criminal proceedings.

12. In his view, the petition is an afterthought aimed at misleading the court and delaying the criminal case, as the petitioners do not meet the threshold of serious breach of their rights as alleged. He avers that the intended charges are constitutional and lawful, and urges the court to dismiss the petition.

Issue for determination

13. Upon consideration of the pleadings and affidavits filed herein and the oral submissions on record together with the authorities cited, it is clear to this court that the pertinent issue for determination is whether the petitioners have made out a case to warrant grant of the orders for stay of prosecution sought by the petitioners.
14. The petitioners' case is that, the respondent intends to arrest and charge them for undisclosed offences, which in their view is meant to exert pressure on them, coerce and intimidate them to relinquish the disputed land to the interested party. This court takes the view that the mere fact that a person has and/or is likely to be charged in court or that the said charges are unlikely to culminate in a conviction, does not in itself amount to a violation of a constitutional right.
15. The respondent, on the other hand, contends that the decision to charge the petitioners was reached after all the investigations in this matter had been concluded.
16. Without filing any Replying Affidavit, the interested party relied on the Replying Affidavit of the respondent, and his counsel made submissions thereon, accordingly.

Determination

17. It is trite law that the burden of proving violation or threat of violation is upon the petitioners and the manner in which the respondent has violated their rights as was established in Anarita Karimi Njeru v Republic (1976 – 80) I KLR 1272 and Matiba v Attorney General [1990] KLR 666.
18. The facts are both the 2nd petitioner and the interested party have allotment letters to the disputed land. The dispute relates to the authenticity of the distinct allotment letters. There is pending a civil suit ELC Case no 34/2020 in the Chief Magistrate's Court at Meru where the interested party herein is the plaintiff, the County Government of Meru is the 2nd defendant, while the 1st and 2nd petitioners are the 1st and 3rd defendants respectively. Both the petitioners and the interested party have filed their documents in support of their respective claims. In its amended statement of defence, the County Government of Meru averred at paragraph 6 that, "By way of defence and without prejudice to the foregoing, the 2nd defendant avers that they received application from the 3rd defendant the then alleged allotted owner of plot number block 11/698 for change of ownership of the said plot from the 3rd respondent to the 1st defendant which application was considered, approved and allowed."
19. This court has seen documentation relied on by the parties to this dispute. The court cannot however, pre-judge the merits of the case before the civil or criminal court. The Chief Magistrate's court already issued directions in regard to the pending ELC case no 34/2020 vide a ruling delivered on October 6, 2020. Of importance is number 5 where that court directed "The plaintiff to serve defendants with the copy of letter of investigations." The civil court is well and truly competent on its own standard of proof to determine an question of the validity of title and relevant allotment letters to the suit property. The court need not await the outcome of the proposed criminal trial. In this vein, the petitioners fear that the criminal prosecution is calculated to gain the Interested Party some advantage in the prosecution of his civil case is not entirely accurate.



20. There could be an element of unfairness if the petitioners are prosecuted for the offences relating to acquisition of title to the suit property while the civil proceedings are pending or continuing. It would give credence to the petitioners' assertion that in intending to arrest and charge them, the respondent is clearly supporting the interested party to have an upper hand in the civil case. The court cannot, on the evidence, state that the intended prosecution has no legal or factual basis.
21. While there can be no doubt that the field of investigations of criminal offences is exclusively within the domain of the police and the respondent, this court has the powers to halt such a process if the intended criminal proceedings are oppressive, an abuse of the court process and amount to a breach of fundamental rights and freedoms. It has further been held that an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification. The court has inherent power to interfere with such investigation or prosecution process. (See *Ndarua v R* [2002] 1EA 205). This court in *Christina Gakubi Kubai v DPP* (2016) eKLR has on prosecutorial mandate and abuse of the legal process discussed the limit of the state's prosecutorial powers. See also *Samson Kabutbiuri Akotha v Ethics and Anticorruption Commission & 5 others* [2021] eKLR.
22. In *Christina Gakubi Kubai v DPP, supra*, this court observed that the provisions of section 193A of the *Criminal Procedure Code* which permits the concurrent institution of criminal and civil proceedings is subject to the abuse of process principle of article 157 (11) of the *Constitution*. I respectfully agree with the court in *Republic v Director of Public Prosecutions & 2 others ex parte Mildred Mbuya Muli & 3 others* [2015] eKLR, (Odunga, J, as he then was) as follows:
- “On the issue of the existence of the civil proceedings, section 193A of the Criminal Procedure Code Chapter 75 Laws of Kenya provides that notwithstanding the provisions of any other written laws, the fact that any matter in issue in any criminal proceedings is also directly and substantially in issue in any civil proceedings shall not be a ground for stay, prohibition or delay in criminal proceedings. However, although under section 193A of the Criminal Procedure Code the existence of civil proceedings do not act as a bar to the criminal process, where the criminal process has been instituted as a means of hastening the civil process by either forcing the applicants to concede the civil claim or abandon their claim altogether, the commencement of the criminal proceedings are an abuse of the process of the court and on the authority of *Stanley Munga Githunguri vs. Republic* Criminal Application no 271 of 1985, this court is obliged to stop such proceedings.”
23. In *Republic v Chief Magistrate's Court at Mombasa ex parte Ganjee & Another* [2002] 2 KLR 703, Waki, J (as he then was) observed that:
- “It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice and no one is allowed to use



criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, prohibition and/or certiorari will issue and go forth... When a remedy is elsewhere provided and available to person to enforce an order of a civil court in his favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement. For in a criminal case a person is put in jeopardy and his personal liberty is involved. If the object of the appellant is to overawe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court... In this matter the interested party is more actuated by a desire to punish the applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose is to further that ulterior motive and that is when the High Court steps in...”

24. This Court, respectfully, notes the decision in *Commissioner of Police and Director of Criminal Investigations Department v Kenya Commercial Bank and Others* [2013] eKLR (cited in *Republic v Director of Public Prosecutions & 2 others ex Parte Mildred Mbuya Muli & 3 others* [2015] eKLR (Odunga, J (as he then was))), where the Court of Appeal (Maraga, Ouko (as they then were) & Murgor JJA) held that:

“Clearly, the company and the guarantor through their directors were employing criminal process to assist them in resolving their civil dispute. 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 and 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. We have no doubt in our minds that the belated involvement of the police in this purely civil dispute is an abuse of their power. The police should direct their energies and resources to prevention of crime which we all know is rampant in this country and is about to get out of control.”

Verdict

25. The petitioners in this case have not demonstrated to the satisfaction of this court how their rights will be infringed by the prosecution per se for the alleged offence, if the intended criminal proceedings are not brought to a halt. This court does not see how the prosecution infringes on the petitioners’ rights, in view of article 157 (11) of the *Constitution* and the permissive section 193A of the Criminal Procedure Code.
26. It cannot be said that the criminal prosecution herein was commenced in absence of proper factual foundation as held in *R v Kipng’eno Arap Ng’eny*, High Court Civil Application no 406 of 2001 cited in *Peter Kaimba Kirimo v DPP* (2019) eKLR (Mabeya, J) cited by the petitioners.



27. It cannot also be said that the intended prosecution must succeed. There would, however, appear to exist genuine concerns as to the validity of the process of allotment of the plot subject of these proceedings, in the manner of allotment and approval for transfer. The question before the court is, therefore, whether, on the evidence, the court should stand in the way of prosecution of the matter in this case?
28. The High Court in applications for stay of criminal proceedings is not sitting, and cannot, sit as a trial court. The accused is entitled to a full trial before a competent criminal trial court properly constituted. The court's duty in considering whether to stay intended or impugned criminal proceedings is whether there is reasonable basis for the prosecution, and the prosecution is being conducted in a manner consistent with the rights of the accused and without ulterior or improper motive.
29. The matter is before the civil court but it also has a criminal element of forgery and fraud, and the discharge of the DPP's prosecutorial mandate in the circumstances of the case is justified. The only limited extent to which the petitioners' fair trial rights may appear to be affected, is in the simultaneous mounting and progression of multiple legal process of the civil and criminal trials.
30. The Court does not hold that the criminal prosecution is purely a civil matter as held in *Commissioner of Police and Director of Criminal Investigations Department v Kenya Commercial Bank* case. There is a clear and distinct case of forgery and fraudulent dealing which ought to be investigated and redressed by criminal prosecution and criminal sanction as necessary. However, the timing of the prosecution for the offence immediately after the commencement of the suit on the title to property, and simultaneously thereto, may dilute the petitioners' ability to respond effectively and defend or pursue their interest in the subject matter through the concurrent civil process. The Replying Affidavit of Cpl Kimathi state that the report on the matter was made on May 29, 2020. The Environment and Land Court Suit no 134 of 2020 is dated May 22, 2020, just a week prior.
31. I would agree that prosecution must be stopped where, as found by the Court in *Musyoki Kimanthi v Inspector General of Police & 2 Ors* (2014) eKLR (Majanja, J):

“ [T]he purpose of the lodging the complaint was to assist the plaintiff in the ELC Case make out its case that the defendant's title to the suit property was a forgery. The very purpose of the civil proceedings was to establish the owner of the suit property and the police were drawn in to assist the plaintiff make out its case.”

In that case, the petitioner who was counsel for the plaintiff in a civil suit had written a letter to the registrar of lands whose delivery stamp was sought to be the basis of the prosecution for forgery but the court found that-

“The facts I have outlined are clear that the petitioner was at all material times the advocate for the plaintiff in the ELC Case, he acted in the best interests of the client in accordance with the dictates of the legal practice. The letter petitioner confirms that he wrote the letter which made the inquiry to the land registrar about the authenticity of the title. There is no evidence that he delivered it and no inference can be made that he forged the delivery stamp when a third party affirmatively states the he effected delivery and procured a response to it. In my view therefore, the criminal proceedings are in the circumstances of this case oppressive to the petitioner and must be stopped.”

The circumstances of the present case are wholly different.

Conclusion



32. In this case, there is no evidence that the police and the DPP are being drawn in to assist the plaintiff make out his case. It would appear to me that the prosecution is carrying out its mandate scrupulously in accordance with the law on the basis of evidence gathered upon investigations into the existence of two different allotment letters to the same suit property issued to the two litigants. There is no evidence that the interested party has secured prosecution of the petitioners in order to aid his cause in the civil suit or to punish the petitioners for whatever wrong doing. It appears to me to be a prosecution driven by the outcome of investigations upon a complaint of existence of two allotment letters on the same suit property. Without prejudice to the finding of the trial court, this court observes that there is evidence upon which a prosecution for forgery may be mounted and upon which a fair tribunal may properly convict for the offence of forgery intended to be charged against the petitioners.
33. In the circumstances of this case, the interest of justice will be met in balancing and upholding the petitioners' individual rights to a fair trial against the DPP's state prosecutorial powers by protecting the petitioners from a potentially oppressive trial which exposes them to the hardship of responding, simultaneously, to legal attacks from two fronts, as it were, on the civil front through the suit pending hearing and determination before the Environment and Land Court and on the criminal front through the intended criminal prosecution with criminal sanctions hanging over their heads as the Sword of Damocles!
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 Block11/698 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 Of2020.
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.
38. There shall be no order as to costs.



Order accordingly.

DATED AND DELIVERED THIS 19TH DAY OF OCTOBER, 2022.

EDWARD M MURIITHI

JUDGE

APPEARANCES:

****Mr Mwanzia advocate for the petitioners.****

Ms Nandwa prosecution counsel for the respondent.

Mr Mutuma advocate for the interested party.

