



Ng'ang'a v Director of Public Prosecutions & another (Miscellaneous Criminal Application 405 of 2019) [2022] KEHC 16246 (KLR) (Crim) (17 November 2022) (Ruling)

Neutral citation: [2022] KEHC 16246 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
MISCELLANEOUS CRIMINAL APPLICATION 405 OF 2019
JM BWONWONG'A, J
NOVEMBER 17, 2022**

BETWEEN

ERASTUS MUNYUA NG'ANG'A APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

ESTHER WANGARI KARANJA 2ND RESPONDENT

(Being an application from the prosecution of the applicant in Nairobi Chief Magistrate's Court in Criminal Case No. 2256 of 2019 Republic v Erastus Nganga Munyua)

RULING

- 1 In his notice of motion dated August 14, 2019 the applicant seeks the following orders:
 - i. A declaration that the decision by the 2nd respondent to criminalize and at the same time commercialize the same cause of action (Criminal case Number 2256 of 2018 Republic vs Erastus Munyua Ng'ang'a and Kiambu Civil Case No. 580/17 – Erastus Munyua Ng'ang'a vs Esther Wangare Karanja) regarding a private contract entered into by the 2nd respondent's husband, Alfred Karanja Munyua on allegations of forgery and the applicant, amounts to an abuse of power and an abuse of the court process
 - ii. A declaration that the contract between the applicant and the 2nd respondent's husband represents a valid and binding obligation between the parties thereto and can only be pursued in a civil claim, which is ongoing more particularly after the 2nd respondent's husband received part payment



- iii. An order staying and/or terminating the prosecution of the applicant before the Chief Magistrate’s Court in Nairobi in Criminal Case No. 2256 of 2018.
 - iv. An order to make provision for costs of this application
- 2 The application is supported by grounds that are set out on the face of the notice of motion and a supporting affidavit dated August 14, 2019, sworn by the applicant. The grounds raised in support of the application are that the applicant is the plaintiff and the 2nd respondent is the defendant in Civil Case No. 580 of 2017 in the Chief Magistrate’s Court in Kiambu. That the dispute involves an alleged lease transaction between himself and the 2nd respondent’s husband, Alfred Karanja Munyua, over a lease of the property known as Kabete/Nyathuna/1536.
 - 3 The applicant has deposed that despite the existence of the civil case in court which is yet to be determined, he was charged with forgery. That this constitutes an abuse of power and the Court process by the respondents. Further, that this is an attempt to criminalize valid contracts that are part performed.
 - 4 He further claims that the criminal trial is based on a complete falsehood on the part of the state. That the case is not designed to attain a conviction or punish criminal conduct, but rather is extraneous to the purposes of criminal prosecution. He further claims that the decision by the respondent to prosecute a commercial dispute before the criminal court is unreasonable and amounts to an abuse reviewable by this Court. Further, that it is in violation of article 27(1) of the Constitution of Kenya.
 - 5 The applicant contends that no actions of parties done in the fulfillment of duties and obligations emanating from a contract should be criminalized. He argues that the decision to criminalize a commercial agreement is an abuse of the constitutional powers, and is unreasonable. Further, that the dispute in issue has been reported to Kangeero Police Station, Kabete, and Kibiku Police Station and later on at Central Police Station. That all this was an attempt by the 2nd Respondent to have him drop the Kiambu civil claim. He asserts that the 2nd respondent is using coercive and powers of the state to criminalize a civil dispute of a land transaction. He contends that unless this court intervenes, he will continue to suffer prejudice in the hands of the respondent.

The applicant’s submissions

- 6 Messrs T.T Ng’ang’a & Associates Advocates for the applicant filed written submissions dated November 19, 2019 in support of the application. They submitted that the 1st respondent is empowered by the Constitution under article 157 to institute and undertake criminal proceedings against any person in respect of any offence alleged to have been committed. In discharging this function, the 1st respondent is enjoined to uphold the principles of the Constitution, constitutionalism and those found in the Office of Director of Public Prosecutions Act. Therefore, the 1st respondent being aware that the transaction in dispute is civil in nature, grossly abused its prosecutorial powers by instituting criminal proceedings, where there existed a civil claim over the same cause of action. Further, that the criminal proceedings that were instituted pursuant to the complaint of the 2nd respondent do offend the sub judice rule.
- 7 It was further submitted for the applicant that the nature of the criminal trial herein was meant to intimidate, coerce, force and trample on the civil and human rights of the applicant. Counsel referred to articles 25, 27 and 50 of the Constitution of Kenya, which brings into focus the actions by the government. Counsel further cited Petition No 390 of 2009, Nedermar Technology BV v The Kenya Anti-Corruption Commission and the AG, Petition No 390 of 2009 [2008] e-KLR and Midland Finance & Securities Globetel Inc vs The AG and Kenya Anti-Corruption Commission [2005] e-KLR,



where the courts held that contractual cases could not simply be transformed into criminal cases at the election of the state and that parties are required to seek remedies in civil court.

- 8 Counsel for the applicant argued that the 1st respondent acted in contravention of articles 25 and 27 of the Constitution. This is because the right to fair trial under article 27 (1) is completely obliterated by the actions of the 1st respondents, when it converted a civil contract into a criminal act. That equality and equal protection before the law is thus thrown out of the window. Further, that the respondent commenced criminal proceedings in bad faith.
- 9 In conclusion the applicant deposed that his averments have not been rebutted and therefore the prosecution of the applicant was wrongful and should be set aside.

The case for the 1st respondent

- 10 In response to the application, the 1st respondent filed a relying affidavit dated October 25, 2019 sworn by No. 85475 PC Onesmus Mutua; who states that he is employed by the National Police Service. He avers that the 2nd respondent lodged a complaint of forgery against the applicant, who is her deceased husband's brother vide OB No. 23/20/11/2018. That pursuant to the report, investigations were conducted and the applicant was charged with the offences of forgery contrary to section 345 as read with 349 of the Penal Code and uttering a false document contrary to section 353 as read with 349 of the Penal Code in the Chief Magistrate's at Nairobi in Court Criminal Case No. 2256 of 2018, Republic v Erastus Munyua Ng'ang'a.
- 11 He has averred that the allegations against the applicant are that the applicant forged the signature of the 2nd respondent's husband, who is deceased. Further, that two witnesses have already testified against the applicant (accused person) and there are two more witnesses remaining being himself and the document examiner. He avers that the application is an abuse of the court process and is intended to defeat the course of justice. He has therefore urged the court to dismiss it.

The case for the 2nd respondent

- 12 The 2nd respondent through Messrs Chuma Mburu and Company Advocates, filed grounds of opposition dated October 14, 2019. The grounds raised are as follows:
- i. That the application is an abuse of the court process
 - ii. That the application is brought in bad faith and is a fishing expedition
 - iii. That the applicant is guilty of material non-disclosure
 - iv. That the application is misconceived.
 - v. "That the said application is a disguised similar suit to ELC Civil Suit No. 17 CMCC Kiambu as well as Succession Cause No. 376 of 1996 CMCC Kiambu."
 - vi. That the 1st respondent in initiating criminal proceedings in Criminal Case No. 2256 of 2018 is based on the offence of forgery, which has been confirmed by a document examiner, thus the charges are not malicious.
 - vii. That the application should be dismissed with costs.



The submissions of the 1st respondent

- 13 Counsel for the 1st respondent (Mr. Momanyi Nyaberi) submitted that the applicant has not demonstrated or alleged that the criminal proceedings he is facing will compromise the ongoing case in Kiambu Civil Case No 580/2017 Erastus Munyua Ng'ang'a versus Esther Wangare Karanja. Furthermore, that the applicant has not demonstrated that the 1st respondent's conduct in preferring the charges against him in the face of the existing civil case is reprehensible and an abuse of the court process.
- 14 Counsel has urged the court not to usurp the constitutional mandate of the Director of Public Prosecutions (DPP) to undertake prosecution in the exercise of the discretion conferred upon the office. That the mere allegation that the ongoing criminal proceedings are likely to fail is not a ground for stopping the criminal proceedings. He has submitted that section 193(A) of the *Criminal Procedure Code* (cap 75), Laws of Kenya allows concurrent litigation of criminal and civil proceedings arising from the same issues. Reliance was placed in the Court of Appeal decision in *Commissioner of Police and Director of Criminal Investigations Department v Kenya Commercial Bank and others* Nairobi Civil appeal No 56 of 2012 [2012] e-KLR.
- 15 It was further submitted that the court in *Republic v Director of Public Prosecution & 2 others ex parte Francis Njakwe Maina & another* [2015] e-KLR, held that courts ought to be extremely cautious in its findings so as not to prejudice intended or pending criminal proceedings. It was submitted that the applicant will be afforded an opportunity to defend himself, cross examine witness and adduce evidence in support of his case.
- 16 Counsel urged the court to dismiss the application.

Issues for Determination

- 17 I have considered the affidavits of the parties and their submissions. As a result, I find that the following are the issues for determination.
1. Whether the 1st respondent executed its mandate constitutionally and within the law in the prosecution of the applicant.
 2. Whether the applicant has made out a case for the stay of the criminal proceedings against him.

Analysis and determination

Issue 1

- 18 Section 193A of the *Criminal Procedure Code* states that: -

193A. 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.”



19 It is clear that the law allows civil and criminal proceedings to run concurrently even where they are directly or substantially in issue in both cases. In the case of *Mule v Republic* [1983] KLR₂, the appellant had caused damage in a bar as he fought the complainant, Porter Ag J held that: -

Civil and criminal cases may run concurrently and the fact that an accused person may be liable in damages does not mean that he cannot be prosecuted for a criminal offence revealed in his action”

20 The existence of a civil suit cannot be a bar to criminal proceedings simply because the subject matter in the criminal proceedings is directly in issue or substantially in issue in the pending civil suit. Where civil proceedings exist side by side with criminal proceedings, the latter would only be stayed or terminated altogether if there is every indication that they were initiated to bring pressure to bear upon a party to settle the civil suit; in that regard, the criminal proceedings are for ulterior motives and not for the purpose of which they are meant, which is, upholding the criminal law.

21 The applicant has claimed that the prosecution in Criminal Case No. Criminal Case Number 2256 of 2018 Republic vs Erastus Manhua Ng’ang’a was made with ulterior motives and to coerce him to withdraw the civil cases before the court.

22 However, the 1st respondent avers that the prosecution arose when the 2nd respondent made a complaint regarding documents which he claimed had been forged. Furthermore, that the applicant was only charged after an investigation was done and he was found culpable.

23 The institution of either criminal or civil proceedings is not a hindrance and/or a bar to the institution and progression of the other. A civil case can run concurrently with a criminal case and vice versa notwithstanding that they both relate to similar sets of facts. Furthermore, the finding of the court in either the criminal or civil proceedings does not stop the court confronted with the other matter from applying its own independent mind and analysis of the facts and issues, in tandem with the respective rules of procedure.

24 Consequently, there is nothing wrong with the prosecution of the applicant due to the existence of a civil case arising from the same facts.

25 The second question is whether the criminal prosecution is proper. As has been held time and time again that the court ought not to usurp the constitutional mandate of the Director of Public Prosecutions (DPP) to investigate and undertake a prosecution in the exercise of the discretion conferred upon that office under article 157 of the *Constitution* of Kenya.

26 The mere fact therefore that the intended or ongoing criminal proceedings are in all likelihood bound to fail, is not as a result a ground for stopping those proceedings. An applicant who alleges that he or she has a good defence in the criminal proceedings ought to ventilate that defence before the trial court and ought not to invoke the same to seek the stopping of the criminal proceedings. This court is not the correct forum where the defences available in a criminal case ought to be examined and a determination made thereon. However, if the applicant demonstrates that the criminal proceedings that the DPP intends to carry out constitute an abuse of the process, the court will not hesitate in stopping such proceedings.

27 Article 157(10) of the *Constitution* provides that the Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority, article 157 (11) provides that:



- 28 In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.”
- 29 Further, section 4 of the [Office of Public Prosecutions Act](#), No 2 of 2013 provides:
- 30 In fulfilling its mandate, the Office shall be guided by the [Constitution](#) and the following fundamental principles—
- (a) the diversity of the people of Kenya;
 - (b) impartiality and gender equity;
 - (c) the rules of natural justice;
 - (d) promotion of public confidence in the integrity of the Office;
 - (e) the need to discharge the functions of the Office on behalf of the people of Kenya;
 - (f) the need to serve the cause of justice, prevent abuse of the legal process and public interest;
 - (g) protection of the sovereignty of the people;
 - (h) secure the observance of democratic values and principles; and
 - (i) promotion of constitutionalism.”
- 31 In the case of [Stanley Munga Githunguri v Republic](#) (1985) KLR 91, the court under the 1963 Independence *Constitution* observed that;
- 32 The Attorney-General in Kenya by section 26 of the [Constitution](#) is given unfettered discretion to institute and undertake criminal proceedings against any person “in any case in which he considers it desirable so to do.”...this discretion should be exercised in a quasi-judicial way. That is, it should not be exercised arbitrarily, oppressively or contrary to public policy.”
- 33 In cases where it has been alleged that the standards set out in the [Constitution](#) and in the aforesaid Act have not been adhered to, this court cannot evade its constitutional mandate to investigate the said allegations and make a determination thereon. To hold that the discretion given to the DPP to prefer charges ought not to be questioned by this court would be repugnant to justice and against the [Constitution](#) itself.
- 34 Where it is clear that the discretion is being exercised with a view to achieving certain extraneous goals other than those legally recognized under the [Constitution](#) and the [Office of the Director of Public Prosecutions Act](#), that would, in my view, constitute an abuse of the legal process and would entitle the court to intervene and end such wrongful exercise of discretion. As was held by this court (Wendoh, J) in [Koinange v Attorney General and others](#) [2007] 2 EA 256:

Under section 26 of the [Constitution](#) the Attorney General has unfettered discretion to undertake investigations and prosecute. The Attorney Generals inherent powers to investigate and prosecute may be exercised through other offices in accordance with the [Constitution](#) or any other law. But, if the Attorney General exercises that power in breach of the constitutional provisions or any other law by acting maliciously, capriciously, abusing the court process or contrary to public policy the Court would intervene under section 123(8) of the [Constitution](#) and in considering what constitutes an abuse of the court process the following principles are relevant: (i) Whether the criminal prosecution is instituted



for a purpose other than the purpose for which it is properly designed; (ii) Whether the person against whom the criminal proceedings are commenced has been deprived of his fundamental right of a fair trial envisaged in the provisions of the Constitution; (iii) Whether the prosecution is against public policy.”

35 Further, as was observed in Republic v Commissioner of Police and another ex parte Michael Monari & another [2012] e-KLR to the effect that before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. In that case it was held:

“the police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene”.

36 Where therefore the predominant reason for the institution of the criminal proceedings is not the vindication of the criminal justice, such proceedings will be liable to be terminated. From the pleadings by the applicant, he alleges that the 1st respondent’s application is an abuse of the court process and is meant to coerce him to withdraw the civil cases before court. However, no evidence has been produced to support these allegations.

37 In instituting criminal charges against a person, the DPP should act in good faith and be guided by public interest to bring criminals to justice as opposed to helping a complainant to gain collateral advantage. The DPP should also ensure that cases which meet the evidentiary threshold go to court to avoid persons being arraigned on flimsy charges. Here, investigations must be properly grounded such that the DPP is satisfied that a criminal offence has been committed and is supported by evidence which he honestly believes will sustain a trial and yield conviction.

38 From the record, there is nothing to show this did not happen. As a consequence, I do not find any cogent material to stay the criminal proceedings.

39 As regards payment of costs, I hereby adopt what this court (J M Bwonwong’a, J) said in Tom Oywa v Director of Public Prosecutions, in Nairobi High Court Criminal Appeal No E100 of 2021, in the following terms:

40 A perusal of the Criminal Procedure Code clearly shows that costs in this type of application are not provided for. Costs are only provided for in what is popularly known as private prosecutions in terms of section 171 (1) and (2) of the Criminal Procedure Code.

41 Additionally, only the High Court has inherent powers to order for the payment of costs at common law. See Municipal Council of Dar es salaam v Almeida (1957) EA 244. I find nothing in the circumstances of this application to warrant the making of an order for the payment of costs. I therefore make no order as to costs.

42 In the premises, I find that the applicant has failed in his application with the result that the application is hereby dismissed in its entirety.

43 The application dated August 14, 2019 fails and is hereby is dismissed.



RULING SIGNED, DATED AND DELIVERED IN OPEN COURT THROUGH VIDEO CONFERENCE AT NAIROBI THIS 17TH DAY OF NOVEMBER 2022.

J M BWONWONG'A

JUDGE

In the presence of:

Mr. Kinyua: Court Assistant

Mr. Nyaga for the applicant

Ms Ntabo for the Respondent.

