



REPUBLIC OF KENYA



**Ethics & Anti-Corruption Commission v Kinuthia & 15
others (Anti-Corruption and Economic Crimes Case 5 of 2018)
[2021] KEHC 9789 (KLR) (Commercial and Tax) (29 January 2021) (Ruling)**

Neutral citation: [2021] KEHC 9789 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
ANTI-CORRUPTION AND ECONOMIC CRIMES CASE 5 OF 2018**

**JO NYARANGI, J
JANUARY 29, 2021**

BETWEEN

ETHICS & ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

**STEPHEN NDUNGU KINUTHIA 1ST DEFENDANT
INTEGRATION (OSI) KENYA LIMITED 2ND DEFENDANT
CHARLES KARISA MWADUNA 3RD DEFENDANT
MARS TECHNOLOGY ASSOCIATES LTD 4TH DEFENDANT
CHARMAINE NJERI KINUTHIA 5TH DEFENDANT
ENKEI HOLDINGS 6TH DEFENDANT
KENYA MILK FARMERS INVESTMENT LTD 7TH DEFENDANT
CHARLES GITHINJI GICHOBI 8TH DEFENDANT
MAINA SHEM KAMAU PATRICK 9TH DEFENDANT
EPHANTUS KAIRU KAHWAE 10TH DEFENDANT
SYLVESTER KIPTOO KIPLAGAT 11TH DEFENDANT
ANNETTE MWANGI 12TH DEFENDANT
JUSTUS ONGERA 13TH DEFENDANT
DESMOND IRUNGU KINUTHIA 14TH DEFENDANT
NELSON KARANJA KINUTHIA 15TH DEFENDANT**



RULING

1. From the onset, I wish to state that this is a matter that has been pending since 2018 and basically not proceeded owing to a multiplicity of all manner of applications from the defendants.
2. This matter has severally been fixed for hearing of the main suit but it could not proceed as various advocates appearing for their respective clients kept applying for leave to cease acting for their clients due lack of instructions. Finally, the hearing of the main suit was fixed for hearing on 23rd September 2020. Before then, the instant application dated 18th September 2020 and filed on 22nd September 2020 by the firm of Nyachoti appearing for the 1st, 5th, 6th, 7th, 14th and 15th came up.
3. The said application filed pursuant to Sections 1A, 1B, 3, 3A and 63 (e) of the CPA and Order 51 rule 1 of the *Civil Procedure Rules* sought orders that:
 - (1) Pending the hearing and determination of this application interpartes, hearing of this suit scheduled for 23rd September 2020 and all other further proceedings herein be and are hereby stayed.
 - (2) Pending the hearing and final determination of Chief Magistrate’s Court ACEC case No. 28/2019, Director of Public Prosecutions vs Stephen Ndungu Kinuthia and 21 others this suit and all other further proceedings herein be and are hereby stayed.
 - (3) That this honourable court do make any such further orders and issue any other relief it may deem just to grant in the interest of justice in light of the circumstances of this matter.
 - (4) That costs be provided for.
4. The application is based on the grounds set out on the face of it and averments contained in an affidavit sworn on 18th September 2020 by Stephen Kinuthia with authority from the other applicants thus stating that:
 - (1) The applicants appointed the firm of Nyachoti and Company Advocates to represent them in this matter but the said firm has not been able to obtain the applicants’ files from their previous advocates.
 - (2) That Nyachoti and Co. Advocates have not been able to obtain copies of pleadings filed herein from other advocates as well as the court file hence the late filing of this application.
 - (3) That from the pleadings in this case i.e. witness statements, list of documents and issues for determination, it is clear that they are similar to those relied on by the prosecution in ACEC Case No. 28/19 in DPP vs Stephen Ndungu Kinuthia and 21 others wherein the applicants are charged with corruption related matters which is the subject of this civil proceeding.
 - (4) That the applicants are justifiably apprehensive that their defences will be prejudiced should the two (2) matters proceed parallel to one another in view of the fact that determinations made by this court in respect of the matter herein will automatically become binding on the court in Chief Magistrate’s ACEC Case No. 28/2019.
 - (5) That there is a likelihood of the two courts making conflicting decisions on the basis of the same set of facts and evidence thereby exposing the applicants into jeopardy.



- (6) That it is fair that the proceedings herein be stayed pending the outcome of the criminal proceedings.
- (7) That the respondents will not suffer any prejudice by staying these proceedings.
5. When the application came up for directions very earlier in the morning of 23rd September 2020, the same day the main hearing was scheduled to commence, the court did not certify it urgent and instead it directed for service of the same upon the respondents and mention fixed at 10.00am same day when hearing of the main suit was scheduled.
6. At 10.00am when the file was called out, Mr. Nyachoti for the applicants sought an adjournment to enable him prosecute his application before the main hearing. M/s Ocharo for the plaintiff orally opposed the application terming it as an abuse of the court process. Mr. Mworira for the 12th defendant indicated his willingness and readiness to proceed with the main suit. Mr. Wachira for the 17th defendant also expressed his desire to proceed with the hearing of the main suit. Equally, Mr. Odongo for the 16th defendant supported the application although he was also ready either way with the hearing of the main suit. Also, Mr. Masinde holding brief for Mr. Mungai for the 2nd, 8th, 9th, 10th and 11th defendants stated that they had no role to play in the application and that they were ready to proceed.
7. Upon considering parties' views, the court adjourned the hearing of the main suit and fixed interpartes hearing of the application on 30th September 2020. Parties were directed to file their responses within 3 days.
8. On 30th September 2020, Mr. Nyachoti indicated that he had filed a further affidavit and submissions albeit without leave of the court but prayed for them to be deemed as duly filed. M/s Ocharo for the plaintiff/1st respondent stated that she had filed a replying affidavit and pleaded for 14 days to enable her file submissions. She then sought for a ruling date.
9. Mr. Nyachoti concurred with M/s Ocharo's sentiments. The court allowed a further affidavit filed without leave and deemed it as duly filed and granted the plaintiff 14 days to file their submissions. Ruling was then fixed for 11th November 2020.
10. In response to the application, the plaintiff/1st respondent filed 23 disguised grounds of opposition but which ideally are a reflection of an affidavit in reply stating that; proceedings in this case have been pending over a period of time; that the applicants have not demonstrated any prejudice should the hearing proceed; the pendency of criminal proceedings does not at all affect the applicant's defence in this case; that under Section 193 A of the Criminal Procedure Code, criminal proceedings relating to the same subject matter can proceed concurrently with civil proceedings; that the application is intended at frustrating these proceedings; and, that it is in the public interest that this suit be heard and determined expeditiously.
11. In their rejoinder, the applicants filed a further affidavit which is not dated claiming that the witnesses scheduled to testify in the criminal case now pending are the same ones scheduled to testify in this case. To prove that allegation, a list of witnesses and their statements was attached.

Submissions

Applicant's Submissions

12. Mr. Nyachoti filed his submissions dated 29th September 2020 thereby reiterating the averments contained in the affidavit in support. He submitted that the criminal proceedings pending before the Magistrate's court against the applicants is similar to this suit in all material respects. Counsel



emphasized that the number of witnesses intended to testify in the Chief Magistrate's court case are the same ones listed in this case hence likely to prejudice the applicant's defence in the criminal proceedings should this case be finalized first and vice versa. Counsel attached a list of witnesses and their statements and a list of authorities.

13. Learned counsel opined that in the event this court delivers its judgment before the criminal proceedings are finalized, the magistrate's court will be bound by this court's decision as its precedent. To support that position, counsel made reference to the case of *John Kimathi Marete v Kenya Wild Life Services* (2018) eKLR cited by the Court of Appeal in *National Bank of Kenya LTD v Wilson Ndolo Ayab* (2009) KLR762.
14. Mr. Nyachoti asserted that Section 193A of the CPC is not applicable in this case as it only applies where one is seeking to stay criminal proceedings and not a civil suit like it is in this case.

Plaintiff's/1st Respondent's Submissions

15. M/s Viola Ocharo appearing for the plaintiff/1st respondent filed her submissions dated 7th October 2020. Counsel literally adopted her grounds of opposition and further submitted that under Section 193A of the CPC, both criminal and civil proceedings can be prosecuted concurrently. In support of this proposition, counsel placed reliance in the case of *Republic vs Chief Magistrate Criminal Division and Another Exparte Mildred Mbuya Joel* (2014) eKLR.
16. Learned counsel submitted that pendency of criminal proceedings is not a bar to civil proceedings. Ms Ocharo contended that the objective of criminal proceedings is different from those of a civil suit.
17. Counsel further submitted that it is not automatic that a court presiding over criminal case proceedings will be bound by the judgment arising from the civil suit where similar facts are in controversy. In support of this assertion, counsel made reference to the case of *V vs C* (2001) EWCA CV 1509 (16th October 2001) where the court held that:

“It is suggested that the prosecuting authorities might use the judgment obtained and the recent judgments. That seem to me fanciful. No reliance could be placed on the civil judgment in the criminal trial so as to prove the guilt of the defendant”.

Determination

18. I have considered the application herein, response thereto and submissions by the applicants and plaintiff/1st respondent. The applicants herein are seeking stay of proceedings basically on three grounds. Firstly, that Mr. Nyachoti has not been able to secure his clients' file from their previous advocates; secondly, that Mr. Nyachoti has not been able to serve and peruse several pleadings filed by the other advocates appearing in this matter as well as copies from the court file.
19. Thirdly, that the suit herein when compared with criminal case ACEC No. 28/2019 pending before the Chief Magistrate's court is similar in all material respects and that the outcome from both courts is likely to be conflicting thus embarrassing the judicial system. Further, that the judgment in this case will most likely influence the outcome in the criminal proceedings.
20. I will start with the 1st and second grounds. The issue of Mr. Nyachoti wanting to secure his clients' file from their previous advocate is a personal affair which should not have any bearing with the expeditious disposal of this case. In my view that is not a ground to stay proceedings. One simply needs to apply for an adjournment to enable him secure proper instructions and access his clients' file from their former advocate and not staying proceedings.



21. As regards the ground that Mr. Nyachoti has not obtained copies of pleadings from the court or the advocate appearing for the rest of the defendants, that is a non-issue. The court file has always been available. All that Mr. Nyachoti needed to do is to apply for copies from the court file but not staying proceedings. In my view, the two grounds are simply frivolous and therefore not available for purposes of staying proceedings.
22. The above notwithstanding, the main ground relied on in support of this application is that, criminal proceedings pending against the applicants are related in material facts, with same witnesses and documentary evidence. That the outcome in this case will most likely affect the applicants' defence in the criminal case and that this being a senior court, its decision might influence the outcome in the criminal case thus prejudicing their defence.
23. The law governing concurrent Prosecution of criminal and civil cases touching on the same subject matter is clear. Section 193A of the CPC clearly states that,

“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, prosecution or delay of the criminal proceedings”.
24. In the case of Republic vs Chief Magistrate's Criminal Division and another Exparte Mildred Mbuya Joel (Supra) the court held that:

“The fact however that the facts constituting the basis of criminal proceedings may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore, the concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the court unless the commencement of the civil proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognized aim”.
25. There is no provision in law providing that criminal and civil proceedings touching on the same subject cannot proceed concurrently; the degree of proof in criminal cases is that of beyond reasonable doubt and in civil is on a balance of probability. It then follows that a civil court applying a lesser degree of proof on liability may enter judgment against a person charged in a criminal case while the criminal court may acquit the same person for lack of proof of a case beyond reasonable doubt.
26. The objective of each proceedings is distinct from the other. I do not think the Magistrate's court finding will be influenced by the outcome of the civil suit. Again, the issue of conflicting judgments is not fatal as the law already recognizes that fact by giving different degrees of proof in either case. I do not see the basis for apprehension by the applicants.
27. I am alive to the fact that stay of proceedings is at the discretion of the trial which must however be used sparingly and with extreme caution. It is only applicable if proceedings are manifestly vexatious and frivolous. See Global Tours Ltd Nairobi HC Winding up Cause No. 43/2000 where the court stated that:

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice to order for stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and



cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will possibly succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously”.

28. Although this is not an appeal, the principles for stay of proceedings are similar and to some extent related in that the court should be mindful of the fact that proceedings must be disposed of expeditiously and that there must be proof of prejudice to be suffered should the proceedings continue.
29. From the record of this case, this matter has been pending since 2018. The pre-trial proceedings were conducted and parties filed their witness statements and documents they intended to rely on. The matter has even come up for hearing of the main suit severally. None of the applicants herein ever raised the issue of staying proceedings. Why now?
30. I do not think the application was filed in good faith. I do agree with M/s Ocharo that the application is intended to scuttle expeditious disposal of this suit. The rest of the parties are ready to proceed with the main hearing. It will be improper to stay proceedings for some parties and proceed with the others.
31. Considering all the issues in totality, I would conclude that the outcome of these proceedings will not be of any consequence to the aforesaid pending criminal proceedings. The applicants’ apprehension is not based on sound and factual foundation. Accordingly, the application is hereby dismissed. Costs shall be in the cause. The suit to be set down for hearing expeditiously and on priority basis.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 29TH DAY OF JANUARY 2021.

J.N. ONYIEGO

(JUDGE)

