



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BOMET

MISCELLANEOUS CRIMINAL APPLICATION NO. 4 OF 2020

RAYMOND KIPCHIRCHIR CHERUIYOT.....1ST APPLICANT

DAVID KIMUTAI CHERUIYOT.....2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Application before me was brought through a Notice of motion filed under certificate of urgency. It is a miscellaneous application stated to be brought under Articles 22, 23 (1), (2), (3) b & c of the Constitution of Kenya 2010 and Rule 4, 13 and 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and all enabling provisions of the law. The Applicants seek the following orders:

- a) That the instant Application be certified as urgent.
- b) That there be a stay of proceedings in Criminal **Case Number 3993/19** filed in the Magistrates Court at Bomet pending the hearing and determination of the current Application.
- c) That there be a stay of proceedings in Criminal **Case Number 3993/19** filed in the Magistrates Court at Bomet pending the hearing and determination of **Bomet Succession Cause No. 2 of 2019**.
- d) Such other order(s) as the Court may deem fit.

2. The Application is supported by the Supporting Affidavit of the 2nd Applicant, David Cheruiyot sworn and filed on 4th March 2020. The Applicant has stated in various averments that they were facing criminal charges in **Criminal Case Number 3993/19, Republic v. Raymond Cheruiyot & David Cheruiyot**. That the charges were instigated to advance the complainant's civil case in High Court Succession Cause No. 3 of 2019. The charges in the criminal matter are:-

- i) Intermeddling with deceased person's property contrary to Section 45 as read together with section 45(2) (a) of the of the Succession Act, Cap 160; and
- ii) Fraudulently procuring the registration of document relating to land contrary to Section 157 (1) (c) (1) of the Land Act No 6 of 2012.

3. The Applicants contend that the majority of the issues raised in the criminal proceedings were already being substantially addressed in the succession cause. That the criminal proceedings violated their rights, and were intended to advance individual interests in respect of the existing **High Court Succession Cause No. 3 of 2019**.

4. The Respondents filed a Replying affidavit dated 12th November 2020 sworn by the SCCIO Mweni Mulatya and also the Investigating Officer in the criminal case. In various averments, he stated that the complainant, Davis Kiprono lodged a complaint on the basis of documents lodged in court in order for the investigators to ascertain whether the said documents were procured fraudulently. That their investigations disclosed that certain offences may have been committed. That upon completion of the investigation, he sent the file to the Office of the Director of Public Prosecutions (ODPP) who reviewed the evidence and approved the charges. The Investigating Officer also deposed that both the investigation and prosecution were not accentuated by malice and neither was it clothed with an ulterior motive.

5. The Application was urged through written submissions. The Applicants' submissions dated 30th October 2020 were filed on 4th

November 2020, while the Respondent's submissions are dated 12th November, 2020 and filed on the same date.

6. The Applicants submitted that the charges occasioned against them were trumped up charges and an abuse of the law by the Office of the Director of Public Prosecution (ODPP) contrary to their mandate under Article 157 of the Constitution. They stated that the said criminal suit would highly prejudice them as it would put in jeopardy their personal liberties and propagate a travesty of justice because of the concurrence of the criminal and civil suits against them. They submitted that they had made an application for revocation of grant dated 8/11/2019 in the succession cause and that following that application, the complainant Davis Kipronoh Cheruiyot lodged a complaint with the police which led to the criminal case in contention. In support of their submissions, the applicants cited **Republic vs. Chief Magistrates Court at Mombasa ex parte Ganjee & Another, Bennet vs. Hoseferry Magistrates Court & Another, Joram Mwenda Guantai vs. The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 (2007) 2 EA 170.**

7. The Respondents (ODPP) on the other hand urged the court to dismiss the application for lack of merit. They submitted that the Magistrate's court had the proper jurisdiction to determine the criminal charges of intermeddling under Section 45 of the Law of Succession Act brought against the accused persons and that a decision emanating therefrom had no binding effect on the High court and therefore was unlikely to affect the Succession Cause. The Respondents further argued that the High court lacks the jurisdiction to hear the cases relating to the said offences. They relied on the case of **Owners of the Motor Vessel 'Lilian S' vs. Caltex Oil (Kenya) Limited (1989) eKLR.**

8. The Respondents further contended that the present application was an abuse of the process of court and an affront to the independence of the DPP provided by Article 157 (10) of the Constitution. That courts should be reluctant to interfere with the decision of the DPP to prosecute a matter unless it is established that the said office acted *ultravires* as held in **CCK vs. ODPP & 2 Others [2018] eKLR.**

9. Finally, the Respondents submitted that the Applicants had failed to demonstrate how the prosecution was an infringement of their rights. That the Applicants had not challenged the process leading to prosecution. They argued that for the court to issue an order of prohibition, it must satisfy itself that there was enough evidence to demonstrate that there was manipulation, abuse or misuse of court process or that there was a danger that the accused person would not get a fair trial. They urged that the applicants had not shown how their fair trial rights had been infringed.

Issues for determination

10. I have considered the rival affidavits and submissions. The germane issue in this application is whether the criminal proceedings in question should be stayed for being an abuse of the court process. Other issues pertinent for consideration are:

- i) Whether the criminal proceedings were a violation of the constitutional rights of the Accused.
- ii) Whether the Office of the Director of Public Prosecutions acted within its mandate in mounting the prosecution.
- iii) Whether concurrent civil and criminal proceedings were lawful and just, and finally;
- iv) Whether the Application for stay of criminal proceedings in the Magistrate's Court pending the determination of the Succession cause should be allowed.

11. I will begin with the issue whether the constitutional rights of the applicants have been or were likely to be violated by the prosecution. I must observe from the outset that although this is a miscellaneous criminal application, it is stated to be brought under numerous articles of the Constitution including Articles 2(1) & (2), 3(1), 10, 19, 20, 21, 22, 23, 27(1) & (4), 47, 157(11), 159, 165(3)(d)(ii), 6 & 7, 258, 259 of the Constitution of Kenya, 2010. I have closely looked at the applicant's supporting affidavit and submissions. Nowhere in these pleadings have I found an articulation of how the constitutional provisions cited have been violated. In **Anarita Karimi Njeru vs. Attorney General (1979) KLR 154/[1976-1980, KLR 1272]**, the court held as follows:-

"We would however again stress that if a person is seeking redress from the High Court on a matter which involves a reference of the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed."

12. I will nonetheless, and to the extent that the Applicants have alleged violation of their rights, look at the various articles of the Constitution relevant to their claim. The following Articles are pertinent:-

Article 22 (1) – Every person has a right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened.

Article 23

(1) The High Court has jurisdiction, in accordance with Article 165 to hear and determine Applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to a right or fundamental freedom in the Bill of Rights.

(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including –

(b) an injunction

(c) a conservatory order

Article 47 – Fair Administrative Action

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom is likely to be adversely affected by the administrative action, the person has the right to be given written reasons for the action.

13. It is the duty of the court to protect citizens against harsh and unfair treatment and to grant appropriate relief as mandated by Article 23 (3). This was aptly captured in **Reginal vs. Ittoshat (1970) CRNS, 385** where the court held that:-

“This court not only has a right but a duty to protect citizens against harsh and unfair treatment. The duty of this court is not only to see that the law is applied but also, which is of equal importance, that the law is applied in a just and equitable manner.”

14. In the present case, the Applicant’s contention is that the intended or on-going prosecution was a violation of their constitutional rights. They claim that the criminal suit is an infringement of their rights and was likely to affect the Succession Cause.

15. I have, based on the foregoing principles and the facts pleaded by both the Applicants and the Respondent, found no demonstration of actual or intended violation of the applicant’s fundamental rights. A perusal of the trial court proceedings annexed the application and the affidavits show that the Applicants were duly charged, took plea and the prosecution supplied them with the documents to be relied on in the trial. These to the mind of the court are fair trial rights which have not been derogated from either by the prosecution or the trial court.

16. The second issue is whether the DPP acted within its mandate in prosecuting the applicants. The criminal process is regulated by the Penal Code, the Criminal Procedure Code and the Evidence Act as well as safeguards enshrined in the Constitution.

17. A prosecution is preceded by an investigation which answers the question whether or not an offence or crime has been committed. The Constitution and the National Police Service Act give the Police the mandate to investigate. In **Republic vs. Commissioner of Police and Another ex-parte Michael Monari & Another [2012] eKLR**, it was stated as follows:-

“The Police have a duty to investigate 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.”

18. The Applicants have faulted the DPP’s decision to charge them on the grounds that the prosecution was mounted as a result of the complaint filed by one Davis Kiprono who was also an Interested Party in the Succession Cause. They contend that the complaint was made because the Applicants sought the revocation of grant in the Succession Cause. They therefore see their prosecution as being aimed at aiding the complainant in the Succession Cause.

19. The mandate to prosecute rests with the Office of the Director of Public Prosecutions as enshrined under Article 157 of the Constitution of Kenya. In exercising this mandate the Director of Public Prosecutions (DPP) is required to review and determine the ‘prosecutability’ of any matters forwarded for their action. At all times, the decision facing the Director of Public Prosecutions (DPP) or its agents is whether or not to prosecute. The decision must however be made judiciously in all cases.

20. In **Douglas Maina Mwangi vs. KRA & Another, Constitutional Petition No. 528 of 2013**, the court addressed the issue as follows:-

“When dealing with the decision as to whether or not to prosecute, the office of the DPP exercises independent judgement as envisaged under Article 157(1) of the Constitution and Section 5 the DPP Act 2013, and the court cannot interfere unless it is shown that the exercise is contrary to the Constitution, is bad in faith and amounts to an abuse of the process.”

21. This independence, though discretionary, must be exercised within Constitutional limits with principles governing public interest, proper administration of justice and prevention of the abuse of the court process. This was the court’s determination in **R vs. DPP & 2 Others ex-parte Dismas Ndege Ogwoka (2014) eKLR**.

22. The determination of whether or not to prosecute a matter by the ODPP must be made on reasonable and probable cause as was decided in the case of **Kagane vs. Attorney General (1969) E.A 643** where it was stated as follows:-

“Where the available evidence may not be sufficient to determine the evidential test, that is, determining a realistic prospect of conviction, prosecutors should apply the “Threshold test” in order to make a decision whether to charge or not.”

23. This therefore requires a prosecutor to undertake a complete assessment of the existing evidence in totality both against the accused and

for the accused in order to satisfy himself that a prosecution has established a realistic prospect of conviction as outlined in the **National Prosecution Policy 2007**. The same policy provides that evidential test should require that the prosecuting officer inquires whether an impartial tribunal is likely to convict based on the availed evidence. It continues further that:-

“Where the case does not satisfy the evidential case, it must not go ahead, no matter how serious it may be. Prosecutors can only apply the public interest test if the Evidential Test is satisfied.”

24. In this case, the Applicants have alleged that their prosecution has been commenced with an ulterior motive. That the complaint was filed by a litigant in the Succession Case. Other than the manner of commencement of the investigation, the Applicants have not shown the court that there was no factual foundation to the prosecution. On the other hand, a perusal of the annexures to the Replying Affidavit shows that an investigation has been done by the Investigating Officer and that became the basis of the charge.

25. In **Republic vs. Attorney General ex-parte Kipng'eno Arap Ngeny, H.C. Civil Application No. 406 of 2001**, the court emphasized that:-

“A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive of improper purpose. 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. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable.”

26. I have perused the annexures to the Replying affidavit filed by the prosecution. Among them are 2 letters dated 29 August 2019 by the Lands Registrar providing the legal ownership and status of the property in question and a Forensic Expert Examiner's Report dated 20th November, 2019. While it is in the province of the trial court to try the case and arrive at the decision whether or not there was a proper basis for the charge, prima facie there appears to have been investigations conducted and a factual foundation for the charges.

27. It is my finding therefore that the Director of Public Prosecutions (DPP) acted within its mandate in initiating the prosecution of the Applicants. It has not been demonstrated by the Applicants that they acted with ulterior or improper purpose.

28. The third issue in this application is whether a criminal case and a civil suit can run concurrently. As earlier stated, the Applicants argue that the criminal proceedings were prompted by a party in the Succession Cause. They contend that if left to run, they would be prejudiced and the criminal trial would advance the civil suit. They pray that the criminal proceedings be halted until the Succession Cause is determined because the criminal suit will interfere with the Succession Cause.

29. I agree with the Applicant's argument and submission that criminal proceedings should not be used to advance a civil matter. This principle of law was restated in **Republic Vs. Chief Magistrate's Court, Mombasa Ex Parte Ganjee & Another (2002) KLR 703** that:-

“A criminal investigation, a charge or prosecution should not be used to advance civil cases.”

30. Further in **Kuria & 3 Others Vs. AG (2002) 2 KLR 69** the court emphatically stated thus:-

“The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tolls for personal score-settlings or vilification of issues not pertaining to that which the system was even formed to perform..... The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court's) independence and impartiality [as per Section 77(1) of the Kenya Constitution (now referred to as the old Constitution- addition mine) in relation to criminal proceedings and Section 79(9) for the civil process.]..... It has to be understood that the pursuit of justice is the duty of the court as well as its processes and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the Court.... What matters is the objective for which the court procedures are being utilized, because the nature of judicial proceedings are concerned with the manner and not the merits of any decision-making process, which process affects the rights of citizens, it is apt for circumstances...where the prosecution and/or continued prosecution besmirches the judicial process with irregularities and ulterior motives...”

31. In the persuasive authority of **The State of Maharashtra & Others vs. Arun Gulab & Others, Criminal Appeal No 590 of 2007**, the Supreme Court of India set out the grounds upon which a prosecution may be prohibited as follows:-

(i) Where institution or continuance of criminal proceedings against an accused may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice;

(ii) Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding e.g. want of sanction;

(iii) Where the allegations in the First Information Report or the complaint taken at their face value and accepted in their entirety do not constitute the offence alleged; and

(iv) Where the allegations constitute an offence alleged but there is either no legal evidence adduced clearly or manifestly fails to

prove the (iv) Charge.

32. The hard question in the present application is however whether the complaint made by the complainant who was also a party in the Succession Case ought not to have been entertained by the investigators and prosecution mounted. Can it be said in this case that the criminal process was being used for a collateral purpose? On the face of it, it may appear so merely because the complainant in the criminal case was a party in the Succession Cause. However looking at the subject matter of the Succession proceedings referred to, being revocation of grant, and the criminal charges brought against the Applicants, being intermeddling with a deceased's estate and fraudulent procurement of title, it is clear that the prosecution was within the public interest. It is the criminal court that is best placed to try the alleged offences. Further, having considered the opposing arguments, I am not persuaded that the Applicants rights will be prejudiced in the trial.

33. The concurrence of criminal and civil proceedings is not without legal basis. **Section 193 A of the Criminal Procedure Code** as follows:-

“Notwithstanding the provisions of written law, the fact that any matter in issue in any criminal proceedings is also directly in issue in any civil proceedings shall not be a ground for stay, prohibition or delay of the criminal proceedings.”

34. In **Kuria & 3 Others vs. AG** (*supra*) the court held that:-

“...The normal procedure in the co-existence of civil and criminal proceedings is to stay the civil proceedings pending the determination of the criminal case as the determination of civil rights and obligations are not the subject of a criminal prosecution...A prerogative order should only be granted where there is an abuse of the process of the law, which will have the effect of stopping the prosecution already commenced. There should be concrete grounds for supposing that the continued prosecution of criminal case manifests an abuse of the judicial procedure, much that the public interest would be best served by the staying of the prosecution... It is not enough to state that because there is an existence of a civil dispute or suit, the entire criminal proceedings commenced based on the same set of facts are an abuse of the court process. There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the Applicant are under serious threat of being undermined by the criminal prosecution. In the absense of concrete grounds.... it is not mechanical enough that the existence of a civil suit precluded the institution of criminal proceedings based on the same set of facts. The effect of criminal prosecution on an accused person is adverse but so also are their purpose in the society, which are immense... an order of prohibition cannot also be given without any evidence that there is manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial.”

35. It is not therefore automatic that where there are concurrent criminal and civil proceedings, that one should first be stayed. The stay would only be granted on a case by case basis, and only then if the stay would meet the ends of justice.

36. The final issue is whether the court should stay the criminal proceedings pending the determination of the succession cause as prayed by the Applicant. The power to stay, discontinue, prohibit or quash criminal prosecutions must be exercised sparingly and with circumspection. Case law, some of which has been referred to earlier in this ruling has set out the principles upon which the power is exercised.

37. In **Judicial Termination of Defective Criminal Prosecutions – Stay of Applications**, *Chris Corns* notes that the grounds for staying a prosecution are categorized as follows:-

(i) When the continuation of the proceedings would constitute an abuse of the process;

(ii) When the resultant trial would be unfair to the accused; and

(iii) When the continuation of the proceedings would tend to undermine the integrity of the criminal justice system.

38. It has been demonstrated in this ruling that the High Court has the jurisdiction to stay the proceedings in the lower courts. However in order to do this, it must satisfy itself that those proceedings, if allowed to proceed, would amount to an illegality, an abuse of the process and further, a travesty of justice.

39. In this case, the application sought a stay of the criminal proceedings pending conclusion of a Succession matter. The wording of the prayer implies that the criminal trial would proceed after the conclusion of the Succession Cause. Having not been persuaded that there was abuse of the court process in the trial, I have come to the conclusion that there was no necessity to stay the criminal proceedings. A stay order if granted would only cause unnecessary delay.

40. In the final analysis, I have come to the finding that the application has no merit. It is dismissed without costs. The interim stay orders are discharged.

41. Orders accordingly.

Ruling delivered, dated and signed this 20th day of May, 2021.

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R. LAGAT-KORIR

JUDGE

Ruling delivered in the presence of the Applicants, Mr. Murithi for the Respondents, and Kiprotich (Court Assistant).