



**Warui v Thua & 3 others (Miscellaneous Application E003 of 2023)
[2023] KEELC 19322 (KLR) (14 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 19322 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
MISCELLANEOUS APPLICATION E003 OF 2023**

**AK BOR, J
JUNE 14, 2023**

BETWEEN

MARTIN KAMAU WARUI APPLICANT

AND

DOUGLAS GACHERU THUA 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION 2ND RESPONDENT

NATIONAL POLICE SERVICE 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

RULING

1. Through the application filed on March 1, 2023, the Applicant sought an order that would render the inquiry into the relationship between the complaint arising from the complaint in File Number E 1815 of 2022 derived from police case number 755/399 of 2022 at Nanyuki and ELC Appeal No 9 of 2021 stayed and an order to stop the 1st Respondent from instituting parallel court proceedings with a similar issue for determination as that in the appeal before the Environment and Land Court (ELC). The Applicant argued that the criminal proceedings amounted to an abuse of the court process.
2. He swore the affidavit in support of the application and deponed that he bought the parcel of land known as Nanyuki/ Marura Block III/1310 (suit land) which was the subject matter of the civil suit in which the Chief Magistrate gave judgment in his favour. The 1st Respondent lodged an appeal against the decision of the Learned Magistrate. That while the appeal was pending before this court, the 1st Respondent instituted parallel court proceedings to address the same issue. He exhibited the charge sheet dated 19/12/2022 giving particulars that on 4/2/2010 the Applicant wilfully procured the registration of Laikipia/Nanyuki Marura Block III/1310 (Sweet Waters) measuring 0.9838 ha by falsely pretending that he was the registered owner of the land. The 1st Respondent is indicated to be a witness on the charge sheet.



3. The 1st Respondent opposed the application through his replying affidavit sworn on 6/3/2023 in which he averred that he was the current registered owner of the land known as Nanyuki/ Marura Block III/1310 (Sweet Waters). He deponed that he was the complainant in Nanyuki Criminal Case No E 1815 of 2022 which he instituted to punish the Applicant for fraud and added that the criminal process was applicable any time where a crime is committed. He deponed that the criminal case had no bearing on the appeal before this court and that those were not parallel proceedings. Further, that the instant application should have been made in the criminal court because the ELC could not stay criminal proceedings. He denied that he was pursuing an appeal through the criminal proceedings.
4. The 2nd, 3rd and 4th Respondents filed a notice of preliminary objection dated 22/3/2023 intimating that the application was fatally defective, incompetent and bad in law and that the court lacked jurisdiction to hear the application pursuant to Section 13 of the ELC Act.
5. The court directed parties to file their written submissions on the issue of having the two sets of proceedings run concurrently. It would seem that the Applicant did not file any submissions as directed by the court.
6. The 1st Respondent submitted that the Applicant had not demonstrated that the criminal investigations were an abuse of the court process and an infringement of his right to a fair trial enshrined in Article 50 of *the Constitution*. He relied on *Republic v Attorney General & 4 Others, Ex-parte Kenneth Kariuki Gitthii* [2014] eKLR on the point that courts ought not to interfere with the investigative or prosecutorial powers of the police or the Director of Public Prosecutions. The 1st Respondent submitted that the police should be allowed to investigate every report made to their office to determine if a crime was committed. He contended that the Applicant had not demonstrated that the police investigation was not done properly or that his rights were infringed or he ought not to have been charged. He urged that it is in the interest of public policy that the criminal case proceeds. He relied on *Commissioner of Police & the Director of Criminal Investigations Department & Another v Kenya Commercial Bank Limited & 4 Others* [2013] eKLR where the court reiterated that courts should not interfere with investigations but should wait for the investigations to be completed and for the suspects to be charged.
7. The 1st Respondent emphasised that the decision to commence investigations against the Applicant was consistent with Article 157 of *the Constitution*, the *Office of the Director of Public Prosecutions Act* and the *National Police Service Act*. He contended that there was nothing to show that the police abused their powers. He relied on *Githunguri v Republic* [1985] LLR, *Ndarua v R* [2002] 1 EA 205 and *Kuria & 3 Others v Attorney General* [2002] 2KLR. He urged that in *Cyrus Shakhbalanga Khwa Jirongo v Soy Developers Ltd & 9 Others* the Supreme Court stated that the coercive nature of police interventions and criminal prosecutions should not be used to force a party to settle a civil dispute. The 1st Respondent failed to furnish copies of these authorities to the court.
8. The 1st Respondent maintained that the Applicant had not proved that the prosecution was being used to achieve collateral purposes and relied on *Republic v Chief Magistrate, Kilgoris, Ex parte Johana Kipngeno Langat* [2021] eKLR where the court is said to have stated that a party must prove that the criminal process was being used oppressively or in a charge of an offence not known in law or for purposes of obtaining collateral advantages other than bringing the applicant to justice. On the aspect of the burden placed on the petitioner in order to succeed in stopping a criminal trial, he relied on *Reuben Mwangi v Director of Public Prosecutions & 2 Others; UAP Insurance & Another (Interested Parties)*.
9. The 1st Respondent submitted that the Applicant had failed to demonstrate that his rights and fundamental freedoms had been violated or were in danger of being violated and relied on *Kuria & 3*



Others v AG [2002] 2 KLR and *Alfred N Mutua v Ethics & Anti-Corruption Commission & 4 others* [2016] eKLR.

10. It was the 1st Respondent's contention that the outcome of the criminal case had no bearing on the appeal and that there was no nexus between the criminal case and the appeal. He concluded that the application was defective because it was not made under any legal provision and the orders sought were ambiguous.
11. The 4th Respondent submitted that criminal proceedings can proceed concurrently with civil proceedings pursuant to Section 193A of the Criminal Procedure Code. Further, that the Applicant had not presented evidence to invoke the operation of the exceptions to the principle that criminal and civil proceedings can run concurrently. To buttress his arguments, the Honourable Attorney General relied on the decisions in *Maina & 4 Others v Director of Public Prosecutions & 4 Others* [2022] KEHC 15 KLR and *Alfred Lumiti Lusiba v Pethad Ranik Shantilal & 2 Others* [2016] eKLR.
12. The court has considered the rival arguments and submissions. The issue for determination is whether it would serve the interest of justice to have the criminal investigations commenced against the Applicant run parallel to the appeal pending before this court regarding ownership of the suit property. It is helpful to look at the jurisdiction of the ELC. Article 162 (2)(b) of *the Constitution* mandated Parliament to establish a court with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to land. Pursuant to this, Parliament enacted the ELC Act which establishes the ELC and gives it jurisdiction in Section 13.
13. The subject matter of the criminal proceedings according to the charge sheet is the registration of the Applicant as the owner of the suit property which is also the subject of the appeal pending before this court.
14. The genesis of the appeal which this court heard and was on the verge of making a determination on relates to ownership of the suit property. Two persons filed a suit challenging cancellation of their title over the suit land by the Land Registrar and issuance of a title over the suit land to the 1st Respondent. The two plaintiffs bought the suit land from the Applicant.
15. In the judgment delivered by the Learned Magistrate, the court found that the Plaintiffs had proved their case and dismissed the 1st Respondent's counterclaim. Following that decision, the 1st Respondent lodged ELC Appeal No 9 of 2021.
16. The appeal was heard and the parties filed their written submissions. While the appeal was pending before this court for the delivery of judgment, the 1st Respondent also instituted criminal proceedings relating to the same land following which the Applicant was charged with obtaining the title over the suit land by false pretences.
17. In *Alfred Lumiti Lusiba v Pethad Ranik Shantilal & 2 others* [2016] eKLR (supra) Ngaah J stated as follows:

“ Ordinarily, whenever the prosecution of a person is based on the same facts which invariably constitute the basis of a civil suit against the same person, it is common in this sort of scenario for the person to apply to stay the criminal proceedings usually on the ground that his prosecution is meant to bring pressure to bear upon the applicant to settle the civil suit against him; or the prosecution is meant for a purpose other than upholding the criminal justice; or that the prosecution is an abuse of the criminal process of the court; or that it amounts to harassment of the applicant and contrary to public policy. Normally, a successful



applicant would have the criminal proceedings stayed, prohibited or quashed altogether on all or any of the foregoing grounds.”

18. Section 193A of the *Criminal Procedure Code* provides 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 should not be a ground for any stay, prohibition or delay of the criminal proceedings.
19. The Learned Magistrate found that the 1st Respondent’s title to the suit property was improperly obtained. An appeal against such a finding can only be made to the ELC and not to the criminal court. The danger of having concurrent criminal and civil proceedings over ownership of the same piece of land is that the ELC and the criminal court could end up giving conflicting decisions regarding the same land which would yield an undesirable outcome.
20. It is in the wider interest of the administration of justice that the criminal proceedings to wit E1815/2022 in relation to Police Case No 755/399/2022 be stayed pending determination of ELC Appeal No 9 of 2021 to obviate a situation where two courts may give conflicting decisions regarding ownership of the same piece of land which in effect would embarrass the court.

Each party will bear its costs for the application.

DELIVERED VIRTUALLY FROM NAIVASHA THIS 14TH DAY OF JUNE 2023.

K. BOR

JUDGE

In the presence of:

Ms. Anne Thung’u for the Applicant

No appearance for the other parties

