



REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

MISC. CRIMINAL APPLICATION NO. 24 OF 2019

LUKA NJERU NYAGA.....APPLICANT

VERSUS

REPUBLIC.....1ST RESPONDENT

HUMPHREY NYAGA NJIRU.....2ND RESPONDENT

R U L I N G

A. Introduction

1. This is a ruling for the application dated 27th September 2019 in which the applicant seeks stay of proceedings in Runyenjes Criminal Case No. 622 of 2018 pending the hearing and determination of Runyenjes Succession Cause No. 162 of 2013, In the Matter of the Estate of Kamwaro Muguru (Deceased).
2. It is the applicant's case that the criminal proceedings against him of are charges of malicious damage to property were instituted after he cut down trees for timber on land parcel No. Kyeni/Mufu/8398 on which he alleges to have resided with his family and developed for over 45 years.
3. It is the applicants case that he was not aware of the succession proceedings concerning the suit land herein until he was arrested on 3rd November 2018. He further states that the aforementioned succession proceedings relating to his grandfather's estate were filed secretly without the knowledge of the deceased's family by one Sopia Gicuku Elija who subsequently sold the suit land to the 2nd respondent.
4. It is the applicant's case that he has since applied for revocation and annulment of the said grant made to Sopia Gicuku Elija. The applicant further states that unless there is a stay of proceedings in Runyenjes SPM Criminal Case No. 620 of 2018, the ends of justice will be defeated and he will be exposed to illegitimate and unfair proceedings.
5. The parties opted to dispose of the application by way of submissions. The applicant filed written submissions while Ms. Mati for the 1st respondent made oral submissions.

B. Applicant's Submissions

6. The applicant reiterated the contents of his supporting affidavit in regard to the charges facing him and said that he had no knowledge that one Sopia Gicuku Elijah had filed succession proceedings in regard to the estate of the deceased comprising of LR. Kyeni/Mufu/8398 on which the trees allegedly damaged were located.
7. The applicant further submits that the 2nd respondent never resided or developed the suit land despite allegedly purchasing the said land and further that the 2nd respondent has never notified the applicant herein of his ownership of the suit land or attempted to evict the applicant.
8. It is submitted that the applicant has since applied for revocation and annulment of the said grant made to Sopia Gicuku Elija and in the event the application for revocation succeeds then the criminal proceedings will not be merited as it will be proven that he has not committed any crime.

C. 1st Respondent's Submissions

9. It is submitted on behalf of the 1st respondent that they are opposed to the instant application as it is provided in law that criminal and civil proceedings can move simultaneously.

D. Analysis & Determination

10. I have considered the application herein as well as the submissions by both the applicants and the respondent.

11. The High Court in **Republic v Chief Magistrate's Court at Mombasa Ex Parte Ganijee & another [2002] eKLR** quoted Kuloba J. in **H.C.Misc. Appl.839 and 1088/99 Vincent Kibiego Saina v. The Attorney-General** where it was held:

“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....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....”

12. In this case it is the applicant's case that the subject of the criminal proceedings is similarly subject of pending civil proceedings in which the ownership of the disputed parcel of land is pending determination. However, as stated hereinabove, the mere fact that the facts disclose both criminal offence as well as civil liability does not entitle this Court to bring to a halt to the criminal proceedings. Similarly, the mere fact that there are pending civil proceedings on the same subject matter does not *ipso facto* warrant the halting of otherwise *prima facie* proper criminal proceedings. It is however upon the person seeking that the criminal proceedings be halted to justify the grant of such orders.

13. In the instant case there is no evidence of malice, no evidence of unlawful actions, no evidence of excess or want of authority, no evidence of harassment or intimidation or even of manipulation of court process so as to seriously deprecate the likelihood that the applicant might not get a fair trial as provided under Article 50 of the Constitution. It is not enough to simply state that the criminal proceedings ought to be halted because there are pending civil proceedings touching on the same subject matter.

14. Neither does it suffice to be content with stating 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 demonstrate that abuse or misuse of the court process exists. It is also a requirement that the applicant demonstrate that the rights are under serious threat of being undermined by the criminal prosecution.

15. In absence of concrete grounds for supposing that a criminal prosecution is an “abuse of process”, is a “manipulation”, “amounts to selective prosecution” or such other processes, or even supposing that the applicants might not get a fair trial as protected in the Constitution, it is not mechanical enough that the existence of a civil suit precludes the institution of criminal proceedings based on the same facts. As rightly submitted on behalf of the Respondents, Section 193A of the *Criminal Procedure Code* Cap 75 Laws of Kenya provides for concurrent civil and criminal proceedings.

16. In this case I am not satisfied that the orders sought herein are merited since it has not been shown that the criminal proceedings have been instituted with a view to compromising the civil proceedings.

17. In the criminal trial, the applicant will be accord a fair trial where he will present his defence to the charges and leave it to the trial court to decide on his innocence or otherwise.

18. In the premises I am not satisfied that this is a proper case to justify putting to a halt to the criminal proceedings.

19. The trial court is obligated to examine the defence including that of the existence of the succession cause and the legal interest if any in the estate of the deceased.

20. It is my finding that the application dated 27/09/2019 has no merit and it is hereby dismissed.

21. Each party to meet their own costs.

22. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 30TH DAY OF JANUARY, 2020.

F. MUCHEMI

JUDGE

In the presence of: -

Ms.Mati for Respondent

Ms. Muriuki for Fatuma for Applicant

Mr. Ithiga for 2nd Respondent