



REPUBLIC OF KENYA



KENYA LAW
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**Mulwa v Ndunda & 2 others (Environment & Land Case
E067 of 2022) [2025] KEELC 1300 (KLR) (18 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1300 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E067 OF 2022**

AY KOROSS, J

MARCH 18, 2025

BETWEEN

JUSTUS MUTHUI MULWA PLAINTIFF

AND

PETER METI NDUNDA 1ST DEFENDANT

MACHAKOS LAND REGISTRAR 2ND DEFENDANT

THE ATTORNEY GENERAL 3RD DEFENDANT

RULING

1st defendant's case

1. This ruling seeks to determine the notice of motion that has been moved under several provisions of law, and it is dated 1/10/2024. It seeks numerous reliefs from this court, some of which are spent, and the residual prayers for determination are: -
 - a. There be an order of stay of the criminal proceedings in Mavoko MCCR/E1119/2024, Republic v. Peter Meti Ndunda pending the hearing and determination of this suit by this Honourable Court.
 - b. This Honourable Court issues such further or other orders that may be deemed fair and just in its discretion.
 - c. Costs of this motion to be provided for.
2. The motion is supported by the grounds set out in the body thereof and the supporting affidavit of the 1st defendant, Peter Meti Ndunda, which he deposed on 1/10/2024.



3. In brief, it was his position that the plaintiff had instigated criminal proceedings against him in Mavoko MCCR/E1119/2024, Republic v Peter Meti Ndunda, where he was indicted for obtaining the registration of the property known as LR No. 25960 (subject property) by false pretence.
4. He argued the subject matter which is the suit property in this case, was yet to be determined on the merits of the issue of legitimate ownership. He contended that his title reads LR No. 29826 (IR No. 177827) while that of the plaintiff is LR No. 25960.
5. According to him, only this court has jurisdiction to handle disputes on ownership of land. In his view, it would be in the interest of justice and good order if the criminal proceedings are stayed pending the hearing and determination of the suit in this matter.
6. Furthermore, he stated he had lodged a counterclaim against the plaintiff in this suit, and he would suffer irreparable harm if this court did not intervene and grant an order of stay of the criminal proceedings pending before the lower court.

Plaintiff's case

7. The motion was opposed by the plaintiff's replying affidavit deposed on 1/11/2024. He asserted that as far back as 2012, when he noticed a trespass on the suit property, he pursued his interests through various offices, including the Ministry of Lands, Director of Criminal Investigations (DCI), Independent Policing Oversight Authority (IPOA) and lastly, Office of the Ombudsman.
8. According to him, the DCI carried out investigations and found the 1st defendant culpable, and it would have been prudent if the Office of the Director of Public Prosecution (ODPP) had joined these proceedings as they were the ones prosecuting the criminal case. In his opinion, a miscellaneous notice of motion would suffice for such a joinder.
9. He maintained that even though this court has jurisdiction to stay the criminal proceedings, he urged the 1st defendant was using the court process to shield himself and that the outcomes of the 2-court process were independent of each other.
10. Additionally, he asserted that though this court has jurisdiction to deal with ownership of land, what was before the criminal court was an entirely different issue, which was the criminal charge of obtaining registration by false pretence which was contrary to Section 320 of the *Penal Code*.
11. He urged the court to dismiss the motion. Significantly, the other defendants did not participate in these proceedings.

Parties' submissions

12. The court directed the parties to file written submissions, and only the law firm of M/s. B M Musau & Co., Advocates LLP Advocates who are on record for the 1st defendant filed written submissions dated 6/12/2024.
13. In them, they only framed 2 issues for resolution: (a) whether the criminal proceedings should be stayed pending the determination of this suit and (b) who bears the costs of this motion.
14. Therefore, upon identifying and considering the issues for determination, this ruling shall, later on in its analysis and determination, consider the arguments contained on the particular issue and also bear in mind the law and judicial precedents.



Issues for determination.

15. I have carefully considered the motion, its grounds and affidavits and the filed written submissions, and this court will adopt the issues as raised by the 1st defendant in his submissions and also address the issue of whether it was necessary to join the ODPP and other parties to the proceedings.
16. This court proposes to deal with the issue of non-joinder of the office of the ODPP before dealing with the other 2 issues conjunctively.

Analysis and Determination

- a. Whether the ODPP and other government offices participating in the criminal proceedings needed to be joined in the application for a stay of proceedings
17. Firstly, our law does not bar the conduct of parallel civil and criminal proceedings over the same subject matter, and this is found in Section 193A of the *Criminal Procedure Code* (CPC).
18. This law 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, prohibition or delay of the criminal proceedings.
19. As rightfully pointed out by both counsels, the jurisdiction of the ELC is derived from Article 162(2) of *the Constitution* and Section 13 of the *Environment and Land Court Act* (ELC Act).
20. By these provisions of law, this court has exclusive jurisdiction over all matters relating to environment and land, including land's use, ownership, use, tenure, title, overriding interests, and occupation, amongst others.
21. Although both counsels are in concurrence, this court has jurisdiction to entertain an application for a stay of proceedings including those of a criminal nature, the plaintiff contends this court should have been moved by a miscellaneous application as by doing so, the ODPP which is in the conduct of the criminal proceedings, will be given a right to be heard.
22. Indeed, this court agrees with the plaintiff's counsel that the ODPP has a stake in the criminal case and probably the Directorate of Criminal Investigations, the Office of National Police Service and or the Office of Inspector General and it would have been appropriate if they were intitled and joined in appropriate proceedings.
23. These offices, which constitutionally and/or statutorily handle criminal investigations and or prosecution, are not parties to these civil proceedings, yet they have a right to be heard on this motion as the outcome directly affects a criminal case that they are handling. This right to a fair hearing is underpinned in Article 50 of *the Constitution*.
24. The Supreme Court of Kenya decision of *Kidero & 4 others v Waititu & 4 others* [2014] KESC 11 (KLR) recognized that this right is buttressed on the rules of natural justice, which includes the concept of audi alteram partem (hear the other side, no one is to be condemned unheard) and nemo judex in causa sua (no man shall judge his own case).
25. Ultimately, I am inclined to find the motion dated 1/10/2024 incompetent, and I hereby strike it out with costs to the plaintiff. This matter shall be mentioned for further directions on 5/6/2025.

Orders accordingly.

RULING DELIVERED AND DATED AT MACHAKOS THIS 18TH DAY OF MARCH, 2025



HON A. Y. KOROSS

JUDGE

03.2025

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

M/s Evelyn Kyania for Dr Musau for 1st defendant

Mr.Opiyo holding brief for Mercy Baraza for plaintiff.

Ms Kanja- Court Assistant

