



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

PETITION NO.33 OF 2015

**IN THE MATTER OF AN APPLICATION UNDER ARTICLES 1, 2,3,19,20,21,22 & 23 OF THE CONSTITUTION OF KENYA
2010**

AND

IN THE MATTER OF VIOLATION OF BILL OF RIGHTS UNDER ARTICLES 27, 28 & 29

BETWEEN

SAMWEL BIGINGI OUKO

MARGARET MONG'INA RATEMO.....PETITIONERS

-VERSUS-

1. WALTERSON ATINDA OKWOYO

2. JAPHET NYAUGO

3. PRINCIPAL MAGISTRATE'S COURT –KEROKA

4. DIRECTORATE OF PUBLIC PROSECUTIONS

5. ATTORNEY GENERAL.....RESPONDENTS

JUDGMENT

1. By a petition dated the 27th July 2018 the petitioner seek to have;

(a) That Criminal proceedings before Keroka Principal Magistrate Court in Criminal cases of 2013, 612 of 2014 and 516 of 2014 be stayed and or be halted.

(b) That the proceedings in Keroka Principal Magistrates' Court in CR. Case No.533 of 2013, 612 of 2014 and 561 of 2014 be quashed.

2. The Petitioners are husband and wife. The First and Second Respondents are all male adults. The third Respondent is a Court established under an Act of Parliament. The Fourth Respondent is a Prosecution Agency established under an act of Parliament. The Fifth Respondent is the Principal Legal officer of the Government. The 2nd Petitioner claims to be the absolute registered owner of that entire land parcel described as **NYANSIONGO SETTLEMENT SCHEME/2736**. He avers in the petition that by written agreement dated 17th April 2013 the Second petitioner sold ½ acre of his land parcel to the 1st Respondent for Kshs.1,000,000/= only. That the 1st Respondent took occupation of the sold portion of land and had planted crops thereon. The 1st Respondent paid Kshs.700, 000/= leaving a balance of Kshs.300, 000/= only. That subsequently the 1st Respondent withdrew from the Land Parcel even after having taken occupation and commenced criminal proceedings against the petitioners. That the 2nd Respondent also by land Sale Agreement dated 27th December, 2012 bought a portion of land measuring 30ft by 100ft from the Petitioners at consideration of Kshs.140,000/= .That the 2nd Respondent out of his own volition left the suit land. That the 1st and 2nd Respondents decided to sue the Petitioners at Keroka Court vide **Keroka SRM CR CASE NO.612 OF 2014, 561 OF 2014 and 533 of 2013** all with the offence of obtaining money by false pretences C/S 313 of the Penal Code. That the 1st and 2nd Respondents now are hell bent at harassing the petitioners when whatever criminal charges they have preferred against the Petitioners arose from civil contracts entered between the petitioners and the Respondents. That the 2nd Petitioner is the registered owner of

land parcel **NYANSIONGO SETTLEMENT SCHME/2736** wherein the sale of portions of land emanated. That all the Respondents particularly the 3rd and 4th Respondents, if competent professional and acting impartially could not have reached the decision to charge the petitioners with the offences of obtaining money by false pretenses. The Petitioners content that all the proceedings touching on Keroka Criminal cases be stayed and/or halted. That criminal cases pending Keroka Law Courts against the petitioners be quashed. That the prosecution of the Petitioners is an abuse of the court process. That unless this court halts the said proceedings, the trial will proceed before establishing the genesis of the criminal charges facing the petitioners. That an Objection and Impartial assessment as an analysis of the criminal charge facing the Petitioners leads to one inescapable conclusion that the prosecution hinges on abuse of office and abuse of the Bill of Rights of the Petitioners. That the petitioners are apprehensive that Criminal hearings are scheduled for 3rd August 2015 and orders to halt the proceedings need to be issued urgently.

3. In a supporting affidavit dated the 27th of July 2015 the 1st petitioners reiterate what is averred in the petition and has attached copies of the charge sheet in the subordinate court.

4. The respondents were served and none of them entered appearance. On the 10th February 2016 the court granted a temporary prohibitory order prohibiting the 3rd respondent from hearing and/or proceeding in Keroka Criminal case 533 of 2013,612 of 2014 and 516 of 2014 pending the hearing and determination of the petition.

5. The matter came from hearing on the 18/10/2018 and again the respondent was not respond. The petition filed submissions. The Submissions again reiterate what is the petition. In the submission it argued that the respondents action were actuated with malice, that the 4th respondent did not do proper investigations into the matter thus flouting the due process of law. That the 2nd petitioner is only a witness in the sale of land transactions and it was unfair to remotely connect her with the offence of obtaining money by false pretense. That the 1st petitioner entered into the sale agreements with the 1st and 2nd respondents and all agreements were done by advocates. That the respondents are criminalizing a civil transaction. That the petitioners rights in the constitution will stand violated if the said criminal cases before Keroka court are not quashed.

6. I have considered the petition before me; the petitioners' complaint is that they were charged before the lower court yet the matter between them and 1st and 2nd respondents is of a civil nature and that the respondents are malicious in charging them in the criminal cases before the subordinate court. In my view the mere fact that their criminal proceedings is not a ground to quash proceedings in the lower court. The petitioners have failed to demonstrate that the proceedings in the lower court are malicious or an abuse of the court process and that their constitutional rights are being infringed in any way. The DPP has a right to investigate a matter reported to them by a complainant and prefer the appropriate charges, the accused is given a chance to defend himself a court of law. In **Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR**, it was held:

“The police have a duty to investigate on any complaint 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...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”.

In **JR 561 of 2016 Eklr** Judge Odunga held that, ***‘facts constituting the basis of a criminal proceeding 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 criminal 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 recognised aim’(emphasis mine).***

7. The court has the duty to stay criminal prosecution if extraneous matters are evident in the case, an abuse of the court process or ulterior motives. This has not been demonstrated in this case. The petitioners' case is that they sold land to the 1st and 2nd respondent who thereafter did not take possession and then they were charged. Although there has been no response by the respondents, in my view it is premature to stay the criminal proceedings, the petitioners will be able to demonstrate that they did not obtain the monies by false pretense they will be afforded an opportunity to defend themselves, cross-examine witnesses and adduce evidence in support of their case and that in my view is the proper course to take in the circumstances of this case. The trial court will be able to make an appropriate finding if it finds that the matter before it is not one of a criminal nature, I therefore decline to grant the orders being sought by the petitioners. The criminal proceedings shall proceed before Keroka Law court. The petition therefore fails and is dismissed with no orders as to costs.

Dated signed and delivered at Kisii this 19th day of December 2018

R.E. OUGO

JUDGE

In the Presence of;

Mr. Abobo For the Petitioners

Respondents Absent

Ms. Rael Court Clerk