



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 228 OF 2010

ARNOLD MUATHA MAINGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 229 OF 2010

JOSEPHINE NZULA MAINGI.....APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

1. The background of this matter is that the appellants, **Arnold Muatha Maingi** and **Josephine Nzula Maingi** were jointly charged with the offence of **Malicious Damage** to property contrary to **Section 339 (1)** of the **Penal Code**. The damage alleged to have been caused included a fence valued at Kshs. 3000/=; 56 posts and barbed wire valued at Kshs. 56,000/= and 82 seedlings of eucalyptus trees valued at Kshs.16,270/= on three(3) different occasions/dates.
2. On the 21st May 2010 an oral application was made by the appellants seeking discontinuance of the Criminal Proceedings to pave way for making of a constitutional reference to the Superior Court under **Rule 8** of the **Constitution of Kenya** (supervisory), jurisdiction Protection of Fundamental Rights) High Court **Practice** and **Procedural Rules 2006**, (Rules) concerning the legality of the Criminal Proceedings before the Subordinate Court that were being heard simultaneously with High Court Civil Case Number 54 of 2010 instituted by the appellants.
3. By a Preliminary Ruling dated 27th July, 2010, the court disallowed the application. Being aggrieved with the ruling the appellants filed a Petition of Appeal whereby they relied upon five (5) grounds; that the learned trial magistrate erred in both law and fact:-
 - i. In dismissing the application without due judicial consideration;
 - ii. In holding that the provisions of **Section 193A** of the **Criminal Procedure Code** allows Criminal Proceeding to continue alongside Civil Proceedings where an application of the nature before court is raised;
 - iii. He misapprehended the provisions of the **Constitution** of **Kenya** and **High Court Practice Rules**
 - iv. The ruling had the potential of contradicting the findings in the civil case in the High Court;
 - v. He erred in holding that without a stay order from the High Court; nothing could stop the Lower

Court from proceeding with the Criminal Proceedings before it, thus not appreciating the nature of the application before it.

4. I am reminded of the requirement to re-reconsider averments in the Lower Court in order to reach my own independent conclusion.
5. The trial magistrate is faulted for having not given the application judicial consideration. The application was made pursuant to the provisions of **rule 8** of the rules which provides-

“Where a party to proceedings in subordinate court alleges that there is a question as to the interpretation of the Constitution and the court is of the opinion that it involves a substantial question of law, the party shall informally request the Presiding Officer of the court to refer the question to the High Court and the Court shall do so in form C in the Schedule to these rules.”

Section 77(1) of the Constitution (now repealed) provides;-

“If a person is charged with a criminal offence, then, unless the charge is withdrawn, the cause shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by Law”.

6. Counsel for the appellant **Mr. Kituku** made an informal request (application) to the court, as provided by the law. He posed two (2) questions.
 - i. Whether the continuation of the proceedings would prejudice the accused’s right to a fair trial;
 - ii. Whether the continued proceedings on facts that were similar to the issue before the superior court was constitutional.
7. Having posed the questions that required interpretation, the court was obligated to consider the issue and act accordingly as provided by the law. The court was required to form an opinion whether or not the questions involved a substantial question of law. It was also required to form an opinion that the questions raised were not frivolous or vexatious prior to making a reference to the High Court. Framing questions to be determined by the High Court would be the duty of the magistrate (vide Rules 24, 25 and 26 of the (Rules.)
8. In order to come up with the decision the trial magistrate heard both the applicant and respondent. The applicant’s counsel stated facts in support of the questions raised. The basis was that the appellant had filed a suit in the High Court No. 54/2010 by way of Originating Summons seeking amongst other prayers issuance of an injunction against the complainant from interfering with property L.R. Machakos/Block/1155. In response thereto the Prosecuting Officer of the court alluded to **Section 193A** of the **Criminal Procedure Code** which provides for concurrent criminal and civil proceedings not being a ground for staying proceedings. The appellant’s counsel was accorded a right of reply.
9. The learned magistrate considered issues raised and reached a finding that no constitutional issue touching on the appellants’ rights had been raised to warrant a reference of the case to the High Court. In other words the magistrate found issues raised to have been frivolous. No substantial question of law had been raised. From the foregoing it is apparent that the magistrate dismissed the application after following due process therefore the first ground of appeal must fail
10. Was holding that **Section 193A** of the **Criminal Procedure Code** provided for concurrent **Criminal** and **Civil Law** proceedings erroneous? The alluded to **Section** provides:-

“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”.

11. The marginal note specifically stipulate that;-

“Concurrent criminal and civil proceedings”

12.The law allows Civil and Criminal proceedings to run concurrently even where they are directly or substantially in issue in both cases. In the case of **Mule -versus- Republic [1983] KLR**, the appellant had caused damage in a bar as he fought the complainant, **Porter Ag. J** held that;-

“Civil and criminal cases may run concurrently and the fact that an accused person may be liable in damages does not mean that he cannot be prosecuted for a criminal offence revealed in his action”

13.In the instant case the appellants were charged with the offence of damaging property alleged to belong to the complainant. The offence is alleged to have been committed on the 24th February, 2010 then on subsequent dates, 8th, 9th and 10th of March, 2010. The Originating Summons was filed on the 12th March, 2010. In the application he seeks to be declared the owner of Machakos Town Block 3/1155 by way of prescription / adverse possession and consequently to be registered as its owner. He also seeks injunctive orders. Seeking such orders would not absolve one from the blame of damaging another’s property unlawfully if the charge is proved. The appellants cannot move to court after the allegations of commission of a criminal act in an endeavor to escape criminal liability. Therefore the trial magistrate did not misdirect himself in holding that criminal and civil proceedings could run concurrently.

14.Did the learned magistrate misapprehend the law? Although the magistrate did not allude to specific rules that he applied, he followed the procedure outlined by the rules as aforesaid. The right to fair hearing has not been violated in anyway. The learned magistrate correctly stated that in the absence of the order of the High Court staying proceedings, the case should continue.

15.A re-consideration of the application reveals that there were no constitutional issues regarding the rights of the appellant that would require a reference to the High Court. Consequently, there will be no contradiction between the findings of the High Court and those of the Lower Court.

16.From the foregoing, the appeal must fail. Accordingly it is dismissed. Four purposes of expeditious disposal of the matter, the file shall be placed before the **Chief Magistrate, Machakos** on **28th January, 2015** for further orders.

DATED, SIGNED and DELIVERED at MACHAKOS this 15TH day of JANUARY, 2015.

L.N. MUTENDE

JUDGE