



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**MISC. CRIMINAL APPLICATION NO 22 OF 2014**

**IN THE MATTER OF AN APPLICATION UNDER ARTICLE 165 (6) OF THE CONSTITUTION  
OF KENYA 2010**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS  
AND FREEDOMS UNDER THE CONSTITUTION (SUPERVISORY JURISDICTION AND  
PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOM OF INDIVIDUAL, HIGH  
COURT PRACTICE AND PROCEDURE RULES-2006**

**AND**

**IN THE EXERCISING AUPERVISORY JURISDICTION OVER CRIMINAL PROCEEDINGS**

**IN THE CHIEF MAGISTRATES COURT AT NANYUKI CR. CASE NO. 253/2014 and  
578/2014**

**BETWEEN**

**REPUBLIC**

**VS**

**SAMUEL RORO GICHERU..... 1ST PETITIONER**

**PAUL WANGURA MUGO.....2ND PETITIONER**

**VERSUS**

**THE O.C.S. NANYUKI POLICE STATION.....1ST RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTION (DPP).....2ND RESPONDENT**

**JUDGEMENT**

By a petition dated 25<sup>th</sup> day of July 2014, expressed under the provisions of Article **165 (6)** of the Constitution of Kenya 2010, (alleged contravention of fundamental rights and freedoms under the constitution (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedom of Individual), the Petitioners herein, **Samuel Boro Gicheru** and **Paul Wangura Mugo** moved this honourable court seeking the following orders against the respondents:-

- i. *The charges at Nanyuki Cr. Case . No. 253 of 2014 and 578 of 2014 be declared a nullity.*
- ii. *The two criminal cases be permanently stayed.*
- iii. *Costs be provided for.*

The petition is supported by the affidavit of **Samuel Roro Gicheru** annexed thereto sworn on 25<sup>th</sup> July 2014, sworn on his behalf and on behalf of the second Respondent.

The Petitioners state that they were arrested on 24.3.2014 and 19.6.2014 respectively for allegedly pulling down a boundary and malicious damage to property and were charged in criminal case numbers **253 of 2014** and **578 of 2014** respectively. The petitioners' aver that they filed Civil Suit Number **9 of 2014** at Nanyuki against the complainant in the said criminal cases and obtained a temporary injunction against him restraining him from trespassing into their land parcels numbers **Nanyuki/West-Timau Block/605, 604 and 463** and that the issues in the said criminal cases are the same as the issues in the civil cases and as a consequence it's the petitioners contention that they fear that the criminal cases were instituted to compel them to drop the said civil cases. The petitioners further aver that the aforesaid criminal charges are an abuse of the criminal process aimed at intimidating them.

The Petition was accompanied by a chamber summons seeking orders to stay the proceedings in the said criminal cases which orders were granted on **17<sup>th</sup> September 2014** after the application was heard *inter partes*. The parties sought and obtained directions that this matter be disposed of by way of written submissions.

I note that the Respondents never filed **any replying** affidavit to this petition. To me, though that was apparently their preferred mode of handling this case, it was extremely necessary to rebut the allegations in the petition by way of a sworn affidavit. That way the court could have had had the opportunity to read their side of the story and possibly their rebuttals or such explanations as could have been necessary to justify the decision complained of. Thus, as far as the facts are concerned, the only material available to the court is what the petitioners provided.

In their submissions, the Petitioners counsel argued that criminalization of a civil dispute is an indication of improper and ulterior motives by the respondent and that the criminal; proceedings were commenced to exert pressure on the petitioners so as to compromise or settle the civil suit. Counsel cited several cases in support of his arguments among them:-

- i. *Peter Macharia Ruchahu vs DPP & Another*[\[1\]](#) where the learned judge held that where criminal proceedings are instituted to bring pressure to bear upon an applicant to settle a civil dispute, such trial cannot be allowed to proceed.
- ii. *Republic vs Chief Magistrate's Court, Mombasa ex-parte Garnishee & Another*[\[2\]](#) where Waki J as he then was held that it is not the purpose of a criminal investigation or criminal charge or prosecution to help individuals in the advancement or frustration of their civil cases for that would amount to abuse of court process.
- iii. *Stanley Muga Githunguri vs Republic*[\[3\]](#) where Madan JA held that the High Court had inherent power to stop a prosecution that amounts to an abuse of the court process as it is oppressive and vexatious.
- iv. *Peter George Antony D'Costa vs V. A. G & Another*[\[4\]](#) where Majanja J observed that 'the process of the court must be used properly, honestly and in good faith and must not be abused, this means that the court will not allow its function as a court of law to be machinery for being used as a means of vexation or oppression in the process of litigation and where there is an abuse of court process there is a breach of petitioners fundamental rights as the petitioner will not receive a fair trial, and that it's the duty of the court to stop such abuse of the justice system.

The respondents counsel has in their submissions identified what they perceive to be issues for determination in the civil suit(s) and argued that the petitioners ought to wait for the court to determine the dispute first. It's their submissions that the petitioners were charged with the offence of malicious damage to property contrary to Section **339 (1)** of the Penal Code[\[5\]](#) and that the charges if proved shall

succeed, that the petitioners have not demonstrated that there were no investigations nor did they show that there was no sufficient evidence.

Counsel for the Respondent cited the provisions of Section **193A** of the Criminal Procedure Code[6] and the case of **Esther Nyamuiru Muchiri vs DPP & Another**[7] and **Dr. Peter G. Wilfred Njiri vs Daniel Ndungu T/A D. Ndungu & Co**[8] and submitted that the law allows concurrent criminal and civil proceedings based on the same subject matter, and added that as per the said section no proceedings including the case in question should stand on the way of a criminal proceedings or trial. Counsel added that the petition interferes with the powers of the DPP provided for under section **157 (6)** of the constitution, and that the proceedings being challenged should not be interfered with unless they contravene the constitution.(Emphasis added). (In my view the last part of this sentence provides the answer to the resolution of this petition, i.e. do the criminal cases complained of in this petition in any way violate the right of the petitioners?)

It is not in dispute that the Petitioners sued a one **Ndiritu Theuri** in Nanyuki Civil Suit Number **9** of **2014** and that the said **Ndiritu Theuri** is listed as the complainant in criminal cases number **253** of **2014** and **578** of **2014**. It's also not in dispute that the first Petitioner who is the plaintiff in civil case number **9** of **2014** is the accused in criminal case number **253** of **2014** while the second Petitioner who is the second plaintiff in the said civil case is the accused in criminal case number **578** of **2014**. The said civil suit was filed in court on **3<sup>rd</sup> February 2014** while the Petitioners were arraigned in court on **24<sup>th</sup> March 2014**.

In the plaint, it's clear that the Petitioners sued the complainant in the said criminal cases and the plaint contains the following averments:-

***Para 3:** That at all material times the plaintiffs are the registered proprietors of L.R. No. Nanyuki/west Timau Block 1/605, 604, and 463 respectively while the defendant is the registered proprietor of Nanyuki/West Timau Block 1/385.*

***Para 4:** That the defendant's land borders the plaintiff's lands.*

***Para 5:** That on or about 27/1/2014 without any colour of right or the plaintiffs permission the defendant trespassed into the plaintiffs parcels of land and encroached them by fencing round the plaintiffs parcels of land thus blocking the plaintiffs from accessing their lands.*

The petitioners in the said plaint pray for judgement for:-

***"An order or permanent injunction restraining the defendant, his agents, servants, children or anyone acting on his behest from trespassing encroaching and or interfering with the plaintiffs L.R. No. Nanyuki/West Timau Block 1/605, 604 & 463 respectively."***

The defendant in the said suit who is the complainant in the aforesaid criminal proceedings filed a defence and a counter claim denying the said claim and averred that the Petitioners herein trespassed into his land reference number **Nanyuki/West Timau Block 1/385** and destroyed his fence and claimed for judgement for **Ksh. 200,000/=** being alleged cost for the alleged destruction of the fence and a permanent injunction restraining the petitioners, their agents, servants or anyone acting on their behalf from trespassing, encroaching and or interfering with the said property. This defence and counter claim is dated **3<sup>rd</sup> March 2014** while the petitioners were arraigned in court on **24.3.2014**, slightly over three weeks after the filing of the said defence and counter claim.

The charge facing the petitioners is for malicious destruction of property, the particulars thereof in the charge sheet refer to the same fence, the subject of the above counter claim. The petitioner's contention is that the aforesaid criminal proceedings were instituted to exert pressure upon them so as to compel them to compromise the civil suit, alluding bad faith and abuse of court process.

Section **193A** of the Criminal Procedure Code[9] provides as follows:-

*“Notwithstanding the provisions of any 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”*

I have no doubt in my mind that Section 193A cited above envisages a situation whereby the civil and criminal cases have been instituted in good faith and without any motive of misusing the court process to achieve undue advantage. The moment a reasonable basis for misuse or abuse of court process or any other sufficient cause is established; the High court can stay, quash, or prohibit such proceedings to safeguard and uphold the dignity of judicial processes.

The provisions of the Constitution conferring powers upon the High Court to grant such remedies as certiorari, prohibition, Judicial review, mandamus or permanent stay of proceedings are a device to advance justice and not to frustrate it. In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the Court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Court’s inherent powers, both in civil and criminal matters is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceedings in the interest of justice. The ends of justice are higher than the ends of mere law though justice has got to be administered according to laws made by the legislature. The compelling necessity for making these observations is that without a proper realization of the object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice between the State and its subjects it would be impossible to appreciate the width and contours of that salient jurisdiction. [\[10\]](#)

The inherent power is to be exercised *ex debito justitiae*, to do real and substantial justice, for administration of which alone Courts exist. Wherever any attempt is made to abuse that authority so as to produce injustice, the Court has power to prevent the abuse. It is, however, not necessary that at this stage there should be a meticulous analysis of the case before the trial to find out whether the case ends in conviction or acquittal. [\[11\]](#)

In **Kuria & 3 Others vs Attorney General** [\[12\]](#) the High Court held:-

*“The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was formed to perform..A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society’s senses of fair play and decency and or where the proceedings are oppressive or vexatious.. The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the court’s) independence and impartiality.....The invocation of the law, whichever party in unsuitable circumstances or for the wrong ends must be stopped.....It would be a travesty to justice, a sad day for justice should the procedures or the process of the court be allowed to be manipulated, abused and or misused, all in the name that the court simply has no say in the matter because the decision to so utilize the procedure has been made. It has never been argued that because a decision has already been made to charge the accused person, the court should simply as it were fold its arms and stare at the squabbling litigants/disputants parade themselves before every dispute resolution framework one after another at every available opportunity until the determination of one of them because there is nothing, in terms of decisions to prohibit ...The intrusion of judicial review proceedings in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law....In this instance, where the prosecution is an abuse of the process of*

*court, as is alleged in this case, there is no greater duty for the court than to ensure that it maintains its integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by staying and or prohibiting prosecutions brought to not only for ulterior and extraneous considerations. It has to be understood that the pursuit of justice is the duty of the court as well as its process and therefore the use of court procedures for other purposes amounts to abuse of its procedures, which is diametrically opposite the duty of the court. It therefore matters not whether the decision has been made or not, what matters is the objective for which the court procedures are being utilized. Because the nature of the judicial proceedings are concerned with the manner and not the merits of any decision-making process, which process affects the rights of citizens, it is apt for circumstances such as this where the prosecution and or continued prosecution besmirches the judicial process with irregularities and ulterior motives. Where such a point is reached that the process is an abuse, it matters not whether it has commenced or whether there was acquiescence by all the parties. The duty of the court in such instances is to purge itself of such proceedings. Thus, where the court cannot order that the prosecution be not commenced, because already it has, it can order that the continued implementation of that decision be stayed...There is nothing which can stop the Court from prohibiting further hearings and or prosecution of a criminal case, where the decision to charge and or admit the charges as they were have already been made....”*

The High Court has inherent powers to quash, stay or prohibit criminal proceedings. These powers are wide as they imply the exoneration of the accused even before the proceedings have been culminated by way of trial. Noting the amplitude of these powers and the consequences which they carry, the Supreme Court of India in a recent decision<sup>[13]</sup> revisited the law on the issue and held that ‘these powers should be exercised sparingly and should not carry an effect of frustrating the judicial process.’ The said court delineated the law in the following terms:-

*“The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and in the rarest of rare cases and the Court cannot be justified in embarking upon an inquiry as to the reliability or otherwise of allegations made in the complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at uncalled for stage nor can it ‘soft-pedal the course of justice’ at a crucial stage of proceedings.....The power of judicial review is discretionary, however, it must be exercised to prevent the miscarriage of justice and for correcting some grave errors and to ensure that esteem of administration of justice remains clean and pure. However, there are no limits of the power of the court, but the more the power, the more due care and caution is to be exercised in invoking these powers”<sup>[14]</sup>*

Courts have an overriding duty to promote justice and prevent injustice. From this duty there arises an inherent power to ‘stay’ an indictment or stop a prosecution in the magistrates courts if the court is of the opinion that to allow the prosecution to continue would amount to an abuse of the process of the court.

The leading case on the application of abuse of process remains **Bennet vs Horseferry Magistrates Court & another**.<sup>[15]</sup> The court confirmed that an abuse of process justifying the stay of a prosecution could arise in the following circumstances:-

- i. *Where it would be impossible to give the accused a fair trial; or;*
- ii. *Where it would amount to a misuse/manipulation of process because it offends the court’s sense of justice and propriety to be asked to try the accused in the circumstances of the particular case.*

The above categories are not mutually exclusive and the facts of a particular case may give rise to an application to stay involving more than one alleged form of abuse, and that staying a proceeding is a discretionary remedy and each case will depend on its set of facts and circumstances.

**Chris Corns** in his Article entitled ‘*Judicial Termination of Defective Criminal Prosecutions: Stay*

Applications” [16] argues that the grounds upon which a stay will be granted have been variously expressed in the cases. These grounds can be classified under three categories;-

- i. *When the continuation of the proceedings would constitute an ‘abuse of process,’*
- ii. *When any resultant trial would be ‘unfair’ to the accused, and*
- iii. *When the continuation of the proceedings would tend to undermine the integrity of the criminal justice system.*

The latter ground is not limited to abuse of the trial court procedures and processes but extends more generally to abuse of the administration of criminal justice process as a whole. Clearly, there can be significant overlap between these various grounds for the stay; an unfair trial, for example would tend to bring the administration of justice into disrepute. Conversely, in some circumstances the holding of a trial may not be technically unfair to the accused yet still undermine the integrity of the legal system because of some impropriety in the investigation or prosecution of the case. The justification for granting a stay extends beyond any abuse of process and includes circumstances where it would be ‘unfair’ to the accused for the proceedings to continue. [17]

In **Republic vs Chief Magistrate’s Court at Mombasa ex-parte Ganjee & Another**[18] it was held that:-

*‘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. No matter how serious the criminal charges may be, they should be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice and no one is allowed to use a criminal proceeding to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, prohibition and or certiorari will issue and go forth..... When a remedy is elsewhere provided and available to person to enforce an order of a civil court in his favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement.....If the object of the appellant is to over awe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court....In this matter the desire of the interested party is more actuated by a desire to punish the applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose is to further the ulterior motive and that is when the High Court steps in.....’*

It is clear the criminal prosecution began about three weeks after the civil cases were filed in court. The complainant in the criminal case filed a defence and a counter claim, and then later instituted the criminal proceedings. The petitioners argue that the criminal case was commenced to exert undue pressure upon them to drop or compromise the civil cases. It is their case that the criminal case was brought in bad faith, hence a misuse of the court process. The decision of the supreme court of Nevada in the case **Bull vs McCuskey**[19] is relevant to the present case. In the said case, a doctor filed an abuse claim in response to a medical malpractice suit that was brought to induce a nuisance settlement. The Nevada Supreme court held that the medical malpractice claim was a nuisance case and upheld the doctor’s abuse of process claim.

Criminal proceedings commenced to advance other gains other than promotion of public good are in my view vexatious and ought not to be allowed to stand. The word “vexatious” means “harassment by the process of law,” “lacking justification” or with “intention to harass.” It signifies an action not having sufficient grounds, and which therefore, only seeks to annoy the adversary. The hallmark of a vexatious proceeding is that it has no basis in law (or at least no discernible basis); and that whatever the intention of the proceeding may be, its only effect is to subject the other party to inconvenience, harassment and

expense, which is so great, that it is disproportionate to any gain likely to accrue to the claimant; and that it involves an abuse of process of the court.

It's not clear whether the complainant in the said criminal cases disclosed to the police that there was a civil dispute pending in court where he had also sued for monetary compensation but whatever the case, the police must have interrogated the petitioners and before they preferred the charges certainly they knew there was another dimension to the dispute, namely a civil case pending in court and on that note they were under a duty to weigh the available options and in particular satisfy themselves that the complainant was not in any manner out to misuse their police powers to secure an undue advantage in the civil case.

Article **157 (10)** of the Constitution of Kenya 2010 provides as follows:-

*“The director of public prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.”*

However, Article **157 (11)** provides that:-

*“In exercising the powers conferred by this article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process”*

There was an existing legal process touching on the same dispute and it was incumbent upon the police to bear in mind the clear wordings of the above sub-article and in particular avoid acting in any manner that could amount to abuse of the legal process. In fact the police were under a legal duty “to prevent and avoid abuse of the legal process”. Their actions were not in public interest or made for the public good but were geared to advancing individual interest. They put the administration of justice into jeopardy by acting in a manner that can be perceived to be aiding the complainants have an upper hand in a civil dispute.

I find useful guidance in the case of **The Institute of Social Accountability & others vs The National Assembly & Others**[20] where the court stated as follows:-

- i. *Under Article 259 of the constitution, the court is enjoined to interpret the constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the bill of rights and in a manner that contributes to good governance. In exercising its judicial authority, this court is obliged under Article 159 (2) (e) of the constitution to protect and promote the purposes and principles of the constitution.*
- ii. *The constitution should be given a purposive, liberal interpretation.*
- iii. *That the provisions of the constitution must be read as an integrated, whole, without any one particular provision destroying the other but each sustaining the other.*[21]

I also bear in mind the words in the Namibian case of **State vs Acheson**[22] ‘.....The spirit of the constitution must, therefore preside and permeate the process of judicial interpretation and judicial discretion.’ The disposition of Constitutional questions must be formidable in terms of some Constitutional principles that transcend the case at hand and is applicable to all comparable cases. Court decisions cannot be *had hoc*. They must be justified and perceived as justifiable on more general grounds reflected in previous case law and other authorities that apply to the instant case.[23] The need to safeguard court proceedings against any form of abuse or misuse must be zealously protected at all times and that the integrity of court process must not be brought into disrepute.

I have carefully analysed the facts of this case, authorities cited in both parties submissions and I find that the criminal proceedings were instituted with the motive of harassing the petitioners, and that there is an

element of bad faith. The complainant had already filed a counter claim and may have hoped to use the criminal process to not only harass the petitioners but also to coerce them to settle or compromise the counter claim. I find that the petition herein has merit.

As was held in the above cited case of **Republic vs Chief Magistrate's Court at Mombasa ex-parte Ganjee & Another**[24]:-

*“When a remedy is elsewhere provided and available to person to enforce an order of a civil court in his favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement.....If the object of the appellant is to over awe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court....In this matter the desire of the interested party is more actuated by a desire to punish the applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose is to further the ulterior motive and that is when the High Court steps in.....”*

The complainant had filed a defence and a counter claim. He has remedy in the said case hence there was no valid reason for him to invoke the assistance of criminal proceedings nor did he explain why he waited until he was sued then he invoked the criminal process. The suspicion for ulterior motive could have been less if he resorted to the criminal process before he was sued.

In the circumstances I find that the petition has merits and I hereby allow it.

Accordingly I make the following orders:-

- i. That the criminal charges against the Petitioners herein in Nanyuki Criminal Case numbers **253 of 2014** and **578 of 2014** be and are hereby declared a nullity.
- ii. That an order of stay be and is hereby issued permanently staying Nanyuki criminal Cases numbers **253 of 2014** and **578 of 2014**.
- iii. That no orders as to costs.

Orders accordingly

Dated at Nyeri this 30<sup>th</sup> day of October 2015

**John M. Mativo**

**Judge**

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