



**Mwathe v ODPP & another (Criminal Miscellaneous Application
E413 of 2024) [2025] KEHC 1326 (KLR) (Crim) (17 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1326 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL MISCELLANEOUS APPLICATION E413 OF 2024
AM MUTETI, J
FEBRUARY 17, 2025**

BETWEEN

ELIZABETH MWATHE APPLICANT

AND

ODPP 1ST RESPONDENT

JUDICASTER NTHAMBI NTHUKU 2ND RESPONDENT

RULING

1. The applicant by way of chamber summons expressed to be brought under Articles 21,22,23 ,159(1) (2) (3) 165 (3) (6) of *the Constitution* and Under Sections 81 (1) (2) (3) and (4) *Criminal Procedure Code* Cap 75 laws of Kenya and all enabling provisions of the law has approached this court seeking the following orders;
 - i. That this Application be certified urgent and service be dispensed with in the first instance.
 - ii. That pending the interpartes hearing and determination of this application all further proceedings in Criminal Case No. E 1027 of 2023 be stayed.
 - iii. That all further proceedings in Criminal Case No. E 1027 of 2023 be stayed pending hearing and determination of this Petition
2. The applicants application is premised on the following grounds that;-
 - a. The Respondents instituted Criminal charges over what was purely commercial dispute.
 - b. Simultaneously with the criminal charges the 2nd Respondent filed a commercial claim in the small Claim's Court which claim related to the same subject matter as the Criminal charge.



- c. The parties in the commercial dispute recorded a consent and a Decree was issued which inter alia required that 2nd Respondent withdrew the criminal charges immediately.
- d. Despite the Decree the 2nd has failed to withdraw the charges.
- e. Meanwhile, the Petitioner has made substantial payment of the Decretal amount despite failure on the part of the 2nd Respondent to comply with the Decree.
- f. The continuation of the criminal proceedings in the Chief Magistrates Court is an abuse of Court process and a violation of the petition right to a fair trial as well as protection of the law because;
 - (a) The Petitioner relying on the promise and representation made by the 2nd Respondent conceded to a consent order.
 - (b) That consent order seriously compromises the Petitioner's defence.
 - (c) The proceedings would be in violation of a valid order of the Court that has not been set aside.
3. In support of the application the petitioner has filed an affidavit sworn by Elizabeth Mwathe on 29th October 2024.
4. In the said affidavit, the petitioner concedes that by an agreement dated 4th March 2023 through a company known as Bloom Foundation Agencies borrowed Kshs.750,000 as a director from the 2nd respondent.
5. The 2nd respondent filed a claim in the Small Claims Court for the recovery of the sum of Kshs.950,000 being Claim No. SCCOMM. E1787. According to the petitioner during the pendency of the claim she was arrested and charged in the Chief Magistrate's Court Milimani Cr. Case No. E1027 of 2023.
6. The said criminal case is still pending in the Chief Magistrates court Milimani and is scheduled for hearing on 18th February 2025.
7. The petitioner has placed before this court by way of an annexure the agreement signed between the parties for the loan facility as well as a consent order adopted by the court on the 28th February 2021 settling the civil claim.
8. The full text of the consent order is set out hereunder for purposes of this court fully analyzing it;-

“Republic Of Kenya

In The Small Claims Court At Milimani

Case Number: Scccomm/e7817/2023

Parties

Judicaster Nthambi Nthuku -----1st Claimant

- Versus -

Bloom Fountain Agencies Ltd -----1st Respondent

Elizabeth Mwathe -----2nd Respondent

Decree

Claim For:



Judgement in the sum of KES 907,000/=

Costs of the claim (To be assessed by the court)

Interest accrued to date.

By the Judgement of this Honorable Court dated, signed and entered on 28th February 2024 b Hon. Caroline Ileri - Resident Magistrate/ Adjudicator.

It Is Hereby Ordered And Decreed:

That By Consent:

Judgement Be and is hereby entered in favor of The of The Claimant Against The Respondent For Kes 950,000/= All Inclusive.

The Said Sum To Be Settled As :

1. 200,000/= Kes to be paid on or before 10/03/2024. Thereafter Monthly Installments Of Kes 200,000/= payable on 10th of every Month.
2. In Case of Default On Any Installment Execution to proceed on Remaining Balance.
Upon Recording of the Consent, The Claimant Will Withdraw The Criminal Case No E1027 of 2023 pending before Chief Magistrates Court at Milimani.

2. In Case of default on any Installment Execution to proceed on remaining Balance.

Upon Recording of the Consent, The Claimant Will Withdraw The Criminal Case No E1027 of 2023 Pending Before Chief Magistrates Court At Milimani.

Particulars Of Decree:

Principal Amount ----- Kshs. 950,000.00/=

Total Amount ----- Kshs. 950,000.00/=

Given: under my hand & seal of the Honorable Court this .. 28th .. day of .. February .. 2024

Signed BY: Hon. Kiongo Kagenyo (MR) (RM)”

3. The petitioner contends that the 2nd respondent has failed to honor the undertaking given in the consent to have the Criminal case withdrawn.
4. The petitioner argues that the consent order is expressed in very clear and succinct terms and that it is not open to interpretation regarding the continuance of the criminal case.
5. The crux of the petitioner’s argument is that maintaining the criminal case in court amounts to a direct violation of the order and that the criminal matter is being pursued for a collateral purpose.
6. Further, the petitioner contends that he has made substantial repayment of the loan in the sum of Kshs.350,000 and that the action of the 2nd respondent is calculated at coercing her to settle the remainder of the loan.
7. The petitioner has therefore urged the court to intervene and halt the criminal proceedings since the 2nd respondent is seeking to enforce a commercial agreement through the criminal justice system.



8. The 1st respondent did not file a response to this matter despite the orders of this court issued on 23rd January 2025 directing them to do so within 7 days of service.
9. Ms Ogega Prosecution Counsel admitted that there was a consent filed in the civil matter. She however submitted that since the parties had breached the order the court should allow the criminal trial to proceed to its logical conclusion.
10. According to counsel for the petitioner has not come to this court with clean hands and therefore the application should not be entertained. Further, Ms.Ogega argued that the 2nd respondent has the option of pursuing recovery of the money by way of execution of the decree issued by the Small Claims Court.
11. According to Ms.Ogega none of the parties deserve any redress from this court. However, pressed by this court, Ms. Ogega maintained that the prosecution is keen on proceeding with the criminal trial notwithstanding the consent order by the parties.
12. Mr. Musya counsel for the 2nd respondent conceded that there was indeed a valid decree issued by the Small Claims court by consent of the parties.
13. The 2nd respondent argued that the petitioner has defaulted in payment thus the 2nd respondent should not be ordered to withdraw the matter by this court since the two court processes can proceed simultaneously.
14. Counsel further submitted that the criminal matter was not initiated to pressurize the petitioner to settle the debts even though counsel took the position that they were indeed pursuing the repayment through the parallel proceedings.
15. The 2nd respondent therefore urged the court to decline the application and allow the matter in the criminal court to proceed to its logical conclusion.

Analysis And Determination

16. The application by the petitioner seeks to halt the proceedings in the criminal matter and this court is called upon to determine whether there is good cause to allow the criminal case to continue in the face of the consent order recorded by the party.
17. The jurisdiction of this court has been invoked in order to prevent the abuse of the Criminal Justice process in the face of what is purely a commercial dispute.
18. The petitioner and the 2nd respondent out of their own free will agreed to settle the civil matter amicably and from a reading of the consent order there is no doubt that there was a meeting of the minds by the two parties in entering into the consent.
19. It has not been denied by either party that the order issued in the civil matter is still in force and is capable of being enforced by either party.
20. The petitioner has indicated to this court that she has partially honored the consent by paying a total sum of Kshs.350,000 a fact that the 2nd respondent did not deny. It follows therefore that the petitioner is willing to satisfy the decree thus if the 2nd respondent feels that there has been a delay in settling the full decretal amount nothing stops her from proceeding to initiate the process of execution.
21. This court has taken note of the last limb of the consent order which reads : “upon recording of the consent, the claimant will withdraw the criminal case No. E1027 of 2023 pending before chief magistrates court at Milimani.” . It is clear that the intention of the parties in filing the consent was to



immediately have the criminal matter brought to a halt. No doubt the intention was not to have the criminal case sustained until the full payment of the loan.

22. A consent order is in the nature of a contract between the parties to the consent. If any party to a consent at some stage wishes to withdraw from the terms of the consent, such a party can only do so by seeking to have the order set aside by the court that recorded and adopted the consent.
23. The 2nd respondent is clearly dissatisfied with the pace at which the petitioner is settling the debt and it is precisely for that reason that the 2nd respondent has urged this court not to halt the criminal proceedings in the Chief Magistrate's court. It is obvious that the 2nd respondent believes that if the two matters remain in court and more so the criminal matter, the Petitioner will be under pressure to settle the debt.
24. It is thus the duty of this court to come out strongly and state unequivocally that parliament in enacting the Section 193A of the *Criminal Procedure Code* which allows civil proceedings to run simultaneously with criminal proceedings, never intended that matters that are purely civil in nature be criminalized to cause pressure to bear upon those that fail to meet their obligations in under civil law.
25. The section must have been enacted to allow parallel proceedings only where in the cause of dealings of a civil nature, one of the parties commits a crime such as obtaining by false pretenses, forgery, uttering false documents or generally commits fraud against the other party. The list of the offences highlighted here are by no means exhaustive of the myriad of offences a person may commit within a commercial transaction. It is precisely for that reason that the 1st respondent is constitutionally mandated to ensure that only these cases that merit prosecution are presented to our courts for adjudication. The cases must prima facie bear the hallmarks of a criminal case that has a realistic prospect of a conviction.
26. The 1st respondent is enjoined under Article 157 (11) of *the Constitution* to ensure that the Criminal Justice system is not abused and the interests of justice are protected in the course of any criminal prosecution the prosecution counsel stunned this court when she insisted on the criminal matter being allowed to proceed to its logical conclusion against the express consent order.
27. Counsel for the 1st respondent did not address this court on the obvious exercise of prosecutorial power to assist the 2nd respondent recover her debt. The criminal justice system should not be utilized for purposes of assisting parties and force what are purely commercial disputes or assuage the feelings of frustrated parties in a civil course such as the 2nd respondent in this matter.
28. The mere fact that the facts of the case constitute both criminal and civil liability does not warrant the maintenance of simultaneous proceedings. In *Republic v Chief Magistrate's Court at Mombasa Ex Parte Ganijee & another* [2002] 2 KLR 703, 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. No matter how serious the criminal charges may be, they should not 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 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. 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 criminal proceedings 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. For in a criminal case a person is put in jeopardy and his personal liberty is involved. If the object of the appellant is to overawe 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 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 that ulterior motive and that is when the High Court steps in...”.

29. The facts in the instant matter point to the fact that the 2nd respondent is a frustrated lender keen on recovering her money from the Petitioner. It is clear when she entered into the consent, she was interested in getting her money back and nothing more. The criminal case cannot, strictly speaking, help her achieve that purpose as quickly as she desires. Secondly, the criminal justice system is intended to ensure that those that commit crimes are brought to justice but should never be used as a default tool to coerce people to meet their debts.
30. It is clear to me that the 2nd respondent is simply insisting on the prosecution being pursued to aid her in recovering the debt. The 2nd respondent should know that if the courts were to permit that to happen then there would be no end to such prosecutions. A criminal prosecution must be based on a proper factual foundation. It must also meet the evidential and public interest test. In the view of this court the criminal case that the 2nd respondent is bent on pursuing cannot pass the evidential test of mens rea on the part of the petitioner. Nothing has been placed before this court to show that when the petitioner borrowed the loan, she was bent on defrauding the 2nd respondent.
31. Further, if this court was to allow the criminal case to proceed against the express consent of the parties and considering that the 2nd respondent has the option of executing the decree, it would be against the public interest.
32. In R v Attorney General exp Kipngeno Arap Ngeny High Court civil application No 406 of 2001 the court held that: “ A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable”. The prosecution in this matter has not persuaded this court why the prosecution must be allowed to continue. The factual foundation does not support the prosecution and therefore this court must intervene to protect the petitioner from what clearly is a prosecution initiated for a collateral purpose that being the collection of the debt owed to the 2nd respondent.
33. The Petitioner and the 2nd respondent having entered into the consent voluntarily they must live by the consequences of their choice and enforce the consent strictly.
34. The criminal case cannot therefore be allowed to proceed and as a consequence therefore, this court issues an order of prohibition under Article 23(3)(f) of *the Constitution* of Kenya directing the Chief Magistrates court to cease hearing the matter any further.
35. It is so ordered.



DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 17TH DAY OF FEBRUARY 2025.

A. M. MUTETI

JUDGE

In the presence of:

Court Assistant: Kiptoo

Njuguna for the Applicant

Ms Ogega for the 1st Respondent

Musya for 2nd Respondent

Applicant:

