



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELC CASE NO. 401 OF 2013

BENARD NYAMANYA MOGAKA.....1ST PLAINTIFF

ALLOYS TUMBO MOGAKA.....2ND PLAINTIFF

DAVID ONSONGO MOGAKA.....3RD PLAINTIFF

VERSUS

PETER MOMANYI KEBATI.....1ST DEFENDANT

LAND REGISTRAR, KISII CENTRAL DISTRICT.....2ND DEFENDANT

AND

D.C.I KISII.....INTERESTED PARTY

RULING

1. This ruling is in respect of the 1st Defendant/ Applicant's application dated 6th October 2021 brought pursuant to Article 165 (6) and (7) of the Constitution of Kenya, 2010, Order 1 Rule 20 of the Civil Procedure Rules and sections 5, 101 and 103 of the Land Registration Act No. 3 of 2012 as well as sections 1A, 1B and 3A of the Civil Procedure Act.

The Applicant seeks the following orders:

1. That the Interested Party be admitted as a party for purposes of this application only.
2. That pending the hearing and final determination of this application, there be issued an interim order of stay of execution of any other proceedings, either civil or criminal in respect to land parcel No. CENTRAL KITUTU/MWABANDUSI/347.
3. That pending the hearing and final determination of this suit, there be issued an order of stay of execution of any other proceedings, either civil or criminal in respect to land parcel No. CENTRAL KITUTU/MWABANDUSI/347.
4. The costs of this application be provided for.

2. The application is based on the grounds stated on the face of the Notice of Motion and the Applicant's Supporting Affidavit sworn on the 6th day of October 2020. In the said affidavit he deposes that the Director of Criminal Investigations (DCI) intends to prefer charges of a criminal nature against him in respect of L.R No. Central Kitutu/Mwabundusi/347 before this case is concluded. He avers that the charges that the DCI intends to prefer against him can be addressed by this Honorable Court. He further deposes that there is likely to be conflicting rulings or judgments by different courts if the criminal charges are allowed to proceed concurrently with this case as the issues raised are the same and the witnesses are almost all the same.

3. He avers that one of the prayers in the suit is for this court to order that the illegal relocation of the suit property be investigated and therefore the DCI cannot do so before this court renders its judgment. He avers that this case is almost concluded as the Defence has called almost all its witnesses and it would be an infringement of the applicant's rights to be charged with criminal proceedings at the same time with this case.

4. He depones that this court has jurisdiction to enquire, investigate and determine disputes relating to the suit property during registration and after. He is of the view that criminal charges if instituted against him would complicate the matter and result in conflicting decisions.

5. The application is opposed by the 1st Defendant through his Grounds of Opposition dated 12th October 2020 in which he states that the application is an abuse of the court process. He states that the Applicant has introduced an Interested Party who is not a real party to this suit. He finally states that this court has no jurisdiction to issue the orders sought by the applicant.

6. The DCI was served with the application but he did not file any response. The application was canvassed by way of written submissions and the Plaintiff and 1st Defendant filed their submissions which I have considered together with the authorities cited to me.

ISSUES FOR DETERMINATION

7. The main issue for determination is whether the Applicant is entitled to the orders sought.

ANALYSIS AND DETERMINATION

8. Before delving into the merits of the application, it is important to determine the question of jurisdiction. As was held by Nyarangi JA in the case of the owners of **Motor Vessel Lillian S vCaltex Oil Kenya Limited (1989) KLR 1**

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools the moment it holds the moment it holds the opinion that it is without jurisdiction.”

9. This application has been brought pursuant to Article 165 (6) and (7) of the Constitution of Kenya. The said article provides as follows:

165(6). “The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi- judicial function but not over a superior court.

(7) For purposes of clause (6) The High Court may call for the record of any proceeding before any subordinate court or person, body or authority referred to in clause (6) and make any order or give any direction it considers appropriate to ensure the fair administration of justice”.

10. It is clear that the above provisions specifically refer to the High Court and not the courts of equal status with the High Court.

The jurisdiction of the Environment and Land Court is found in Article 162 (2) of the Constitution and section 13 of the Environment and Land Act.

Article 162(2) of the Constitution provides that:

Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to:

(a)Employment and labour relations

(b) The environment, use and occupation of, and title to land.

11. Section 13 of the Environment and Land Court Act elaborates the jurisdiction as follows:

13. (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162

(2) (b) of the Constitution, the Court shall have power to hear and determine disputes;

a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

b. relating to compulsory acquisition of land;

c. relating to land administration and management;

d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

e. any other dispute relating to environment and land.

12. The supervisory role of the ELC was removed by an amendment to the ELC Act No.12 of 2012.

What this means is that unlike the High Court, the ELC has no supervisory jurisdiction over subordinate courts or other quasi-judicial bodies, particularly in the exercise of their criminal mandate.

13. In the case of **Republic v Karisa Chengo 2 Others (2017)eKLR**, the Supreme Court considered the question of the constitutionality of mixed benches empanelled to hear criminal appeals and held as follows:

“It follows from the above analysis that although the High Court and the specialized courts are of the same status as stated, they are different courts. It also follows that judges appointed to those courts exercise varying jurisdiction depending upon the peculiar courts to which they are appointed. From a reading of the statutes regulating specialized courts, it is a logical inference in our view, that their jurisdictions are limited to the matters provided for in those statutes. Such an inference is reinforced and flows from Article 165 (5) of the Constitution , which prohibits the High Court from exercising jurisdiction in matters reserved for the exclusive jurisdiction of eh Supreme Court under the Constitution or (b) falling within the jurisdiction of the Courts contemplated in Article n this case that 162(2)”

In this case it therefore also follows that Angote J appointed as a judge of the Environment and Land Court and not the High Court had no jurisdiction to determine criminal appeals. Consequently we concur with the Court of Appeal that the Gazette Notice No. 1301 of 4th October 2013, by which the former Chief Justice empanelled him to sit and determine criminal appeals was unlawful and unconstitutional”

14. In the instant case, the Applicant would like this court to stay intended criminal proceedings against him. From the above decision in the Karisa Chengo case and the provisions of Article 165(5) of the Constitution the proper forum for making such an application is the High Court and not the Environment and Land Court.

15. Be that as may, Section 193 of the Criminal Procedure Act Cap 75, Laws of Kenya, provides that:

“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 criminal proceedings.

16. In the case of **Lee Mwathi Kimani v Director of Public Prosecutions & 2 others [2014] eKLR** Majanja J opined that:

“8. I am aware that this court should be slow to intervene in the prosecution of cases before the subordinate court as the discretion and authority to prosecute offenders is reserved for the Director of Public Prosecutions under Article 157 of the Constitution. I am also alive to the provisions of section 193A of Criminal Procedure Code (Chapter 75 of the Laws of Kenya) that permit criminal cases and civil cases based on the same facts to proceed concurrently. However, even in such cases the court must have regard to the facts in each case and determine whether the petitioner’s rights are violated or there is an abuse of the court process.

I need not say more.

17. In view of the foregoing, I find no merit in the application and I dismiss it with no order as to costs.

DATED, SIGNED AND DELIVERED AT KISII THIS 29TH DAY OF JULY, 2021.

J.M ONYANGO

JUDGE