



REPUBLIC OF KENYA



**Republic v Njoroge & another (Criminal Appeal E002 of 2022)
[2024] KEHC 1295 (KLR) (16 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1295 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL APPEAL E002 OF 2022
WM MUSYOKA, J
FEBRUARY 16, 2024**

BETWEEN

REPUBLIC APPELLANT

AND

SUSAN WANJA NJOROGE 1ST RESPONDENT

BAKHARI MOHAMED JUMA 2ND RESPONDENT

*(Appeal from acquittal by Hon. Mrs. Lucy Ambasi, Chief Magistrate, CM,
in Busia CMCCRC No. 130C of 2017, delivered on 20th September 2021)*

RULING

1. The application for determination is undated. It was filed herein on 12th October 2023. It seeks stay of proceedings in Bungoma CMCCC No E026 of 2023, between Susan Wanja Njoroge and Milka Jelimo Sambu and another, pending hearing and determination of the appeal herein.
2. The background is that Susan Wanja Njoroge and the other had been charged in Busia CMCCRC No 130C of 2017 of stealing goods in transit. The goods in question was maize. It was sold, and the proceeds of sale released to the complainant, Milka Jelimo Sambu, against a security or a recognisance. The criminal prosecution, in Busia CMCCRC No 130C of 2017, terminated in favour of the accused persons, the respondents herein. The appellant, the prosecution, was aggrieved and proffered the instant appeal; while the respondents commenced the civil suit in Bungoma CMCCC No E026 of 2023 against the complainant, in Busia CMCCRC No 130C of 2017, and another. The appellant feels that the civil proceedings should be stayed, to await outcome of the criminal appeal.
3. The respondents oppose the application. There is an affidavit sworn by the 1st respondent. She avers that she was never served with the criminal appeal documents, and that the said appeal has taken a long time, as it was filed on 20th September 2021. She avers that civil and criminal proceedings could run concurrently, under section 193A of the Criminal Procedure Code, Cap. 75, Laws of Kenya. She further



argues that the burdens of proof in both cases are different. She asserts that as a successful litigant in the criminal litigation, she is entitled to recoup her costs, by way of compensation, which she can only get in civil proceedings. She further asserts that the appellant was not privy to Bungoma CMCCC No E026 of 2023, as the same was a suit between 2 private citizens. She states that the suit in Bungoma CMCCC No E026 of 2023 seeks refund of the moneys that were released to the complainant in Busia CMCCRC No 130C of 2017, the criminal proceedings.

4. The application was canvassed by written submissions.
5. The matter is straightforward. In the criminal proceedings, the trial court ordered that certain moneys be released to the complainant, upon she entering into some form of recognizance. The criminal proceedings eventually terminated in favour of the accused persons, who have now commenced civil proceedings to recover the same moneys from the complainant. In the meantime, the prosecution has challenged the acquittal of the accused persons, through an appeal at the High Court. The question is, should the civil proceedings be stayed to await completion of the criminal appeal?
6. It is trite that criminal proceedings do not have to be stayed, to await outcome of a pending civil case. That is the purport of section 193A of the *Criminal Procedure Code*. The said provision says:

“Concurrent criminal and civil proceedings 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.”
7. I have not found a similar provision in the *Civil Procedure Act*, Cap 21, Laws of Kenya. Section 6 of the *Civil Procedure Act* is on stay of suits, but the provision is limited to stay of civil proceedings, for there is no mention, in that provision, of criminal proceedings.
8. So, what do I make of this? Section 193A of the *Criminal Procedure Code* is specific on stay of criminal proceedings to give way to civil proceedings. It is emphatic, that criminal proceedings are not to be stayed, prohibited or delayed because of pending civil proceedings. There is no provision which says the same about civil proceedings, prohibiting stay of civil proceedings to give way to criminal proceedings. I do not read section 193A as saying that civil and criminal proceedings, on the same facts or same issues, can or should run concurrently. I understand it to be stating that where it happens that there are concurrent civil and criminal proceedings, then criminal proceedings should not be stayed because of the pending civil proceedings.
9. To my mind, section 193A bars stay of criminal proceedings, and there is an implicit suggestion that in the event of concurrent civil and criminal proceedings, it should be the civil proceedings that ought to give way. That would be logical, given that the heavier burden of proof is in criminal proceedings. There is more rigour in criminal proceedings, as a result, and the outcome of criminal proceedings should carry more weight.
10. Consequently, there is absolutely nothing wrong, with having civil proceedings stayed to await determination of pending criminal proceedings. In the instant case, the subject matter of the criminal proceedings and the civil proceedings is the same, the moneys that were released to the complainant. It would embarrass the system should the outcome of the civil proceedings be inconsistent with that of the criminal process. It would only be logical to let one cause be determined first, to avoid such an eventuality. Furthermore, allowing both causes to proceed would ultimately waste judicial resources, in the incidence of contrary opinions and outcomes. The criminal process started earlier, with the prosecution before the trial court in 2017, and the appeal filed herein in 2021, although it bears a 2022



number. The civil suit followed in 2023. Logically, the latter suit should give way to the former criminal cases.

11. I find merit in the Motion, dated 12th October 2023, based on the discussions above, and I, consequently, hereby confirm the temporary stay of proceedings orders that I had made on 13th October 2023. The civil suit in Bungoma CMCCC No E026 of 2023 is hereby stayed, pending hearing and determination of the appeal herein. It is so ordered.

RULING DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 16TH DAY OF FEBRUARY 2024

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Ms. Chepkonga, instructed by the Director of Public Prosecutions, for the appellant.

Mr. Wekesa, instructed by Makokha Wattanga & Luyali Associates, Advocates for the 1st respondent.

