



**Eregai & another v Principal Magistrate, Maralal & another;
Lengupae (Interested Party) (Miscellaneous Civil Application
E003 of 2021) [2023] KEHC 2677 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2677 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
MISCELLANEOUS CIVIL APPLICATION E003 OF 2021
HPG WAWERU, J
MARCH 23, 2023
(FORMERLY NYAHURURU HC MISC CIVIL APPLICATION NO E008 OF 2021)
IN THE MATTER OF MARALAL PM CRIMINAL CASES NOS E089 OF
2020, E034 OF 2022 AND E062 OF 2022**

BETWEEN

MARY EREGAI 1ST EXPARTE APPLICANT

EBENYON AIYUTE 2ND EXPARTE APPLICANT

AND

PRINCIPAL MAGISTRATE, MARALAL 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

AND

JENERICA LENGUPAE INTERESTED PARTY

RULING

1. This ruling concerns the amended chamber summons dated 24/03/2022. The original application was the chamber summons dated 20/03/2021 which concerned only Maralal PM Criminal Case No E089 of 2020. The amendment, it appears, was to include the other two cases mentioned, Maralal PM Criminal Cases Nos E034 of 2022 and E062 of 2022.
2. The Ex Parte Applicants seek leave of the court to apply for judicial review. The orders to be sought are certiorari and prohibition in respect to the three criminal cases. There is also a prayer that if leave is granted the same do operate as stay of the proceedings in the three cases, pending hearing and determination of the substantive motion.



3. Because of the nature of the background to the matter, the court directed on 12/04/2021 that the application be served upon the Respondents for hearing inter partes. Indeed the Respondents were served. On 15/07/2022 a replying affidavit was filed. It is sworn by a police officer named Cpl Stephen Ndonga. He deponed that he is the investigating officer of the criminal cases.
4. On 19/07/2022 in the presence of counsels for both sides, the court fixed the application for hearing inter partes on 01/11/2022, with leave for the Ex Parte Applicants to file and serve a supplementary affidavit if they were so minded in answer to any new issues raised in the replying affidavit. No supplementary affidavit was filed.
5. At the hearing on 01/11/2022 there was no appearance for the Respondents. In presenting the application, learned counsel for the Ex Parte Applicants merely stated that he relied on the statement of facts and supporting affidavit filed with the application.
6. I have read the statement of facts and supporting affidavit. I have also read the replying affidavit.
7. It is clear that there is an active civil dispute involving a plot of land in Maralal Township between the Ex Parte Applicants and the Interested Party. That dispute was taken to civil court by the Interested Party vide Maralal PMCC No 12 of 2020. The dispute is over ownership of the land. The Ex Parte Applicants say the land, on the ground, is Plot No 825, Maralal Township (Loikas Area) and that it belongs to them. The Interested Party on the other hand says the land is Plot No 825”A” and belongs to her. The dispute in civil court is pending hearing and disposal.
8. It appears that the Interested Party was not content to leave the dispute with civil court for resolution. She filed a complaint with the Directorate of Criminal Investigations against the Ex Parte Applicants regarding the same disputed plot of land. The ensuing investigation led to the criminal charges filed against the Ex Parte Applicants, and which are the subject of these proceedings. From the replying affidavit, it appears that the Ex Parte Applicants have been charged with forgery and other related offences in respect to documents connected with the disputed plot.
9. The stand of the Ex Parte Applicants is that the criminal charges against them have not been brought in good faith and are intended merely to gravely prejudice them while assisting the Interested Party in the civil dispute. The Respondents on the other hand urge that there is clear evidence of criminality sufficient to secure convictions in the criminal cases, and that the charges were brought in good faith. They further urge that the existence of a civil dispute per se should not be a bar to criminal prosecution where there is clear evidence of criminality. In any case, they further urge, the law permits both the civil and the criminal cases to proceed simultaneously.
10. I have considered the rival positions. At this stage I am satisfied that the Ex Parte Applicants have demonstrated, prima facie, that they could be prejudiced in the civil dispute with the Interested Party if at the same time they are criminally prosecuted over documents that support their claimed ownership of the plot of land in dispute.
11. Of course proper consideration and determination of all germane issues raised in the present application can only be done in the ruling over the substantive motion to be filed. For now, I will allow the application and grant leave to apply for judicial review. The substantive motion shall be filed within the time frame provided for in the law.
12. The leave herein granted shall operate as a stay of the proceedings in the three criminal cases mentioned in the title of these proceedings pending disposal of the substantive motion. It is so ordered.
13. Finally, costs of this application shall be in the substantive motion if one is filed; if not filed, the costs shall go to the Respondents.



DATED AND SIGNED AT NANYUKI THIS 6TH DAY OF MARCH 2023

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 23RD DAY OF MARCH 2023

