



**Ongicho v Republic (Miscellaneous Criminal Application E359 of 2022)
[2023] KEHC 2523 (KLR) (Crim) (16 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2523 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
MISCELLANEOUS CRIMINAL APPLICATION E359 OF 2022
JM BWONWONG'A, J
MARCH 16, 2023**

BETWEEN

EVANS ASUGA ONGICHO APPLICANT

AND

REPUBLIC RESPONDENT

(Being an application for revision of the ruling delivered by Hon. C.M Njagi, SRM, on 19th August 2022 in Milimani Chief Magistrate's Court in Criminal Case No. E3774 of 2020 Republic vs Evans Asuga Ongicho)

RULING

1. The applicant filed a chamber summons dated November 7, 2022 pursuant to the provisions of article 25 (c), 50 (h) and (n) of the [2010 Constitution of Kenya](#) and sections 347, 349, 350 and 354 of the [Criminal Procedure Code](#) (Cap 75) Laws of Kenya.
2. The applicant has sought the following orders. An order to allow the preliminary objection. An order to dismiss all charges levelled against him by the respondent for lack of jurisdiction.
3. The application is based on the grounds that are set out on the face of the chamber summons and reiterated in the affidavit sworn by the applicant dated October 7, 2022. The grounds raised in support are as follows. The applicant is an advocate of the High Court of Kenya. He represented the complainant in a dispute before the Employment and Labour Relations Court. The applicant's firm of advocates received Kshs 5 million which was utilised. A dispute arose between the firm and the complainant/client. The complainant/client reported the matter to the Law Society of Kenya disciplinary committee and was set down for hearing. He also reported the matter to the police, who filed charges against the advocate.



4. The applicant raised a preliminary objection in the lower court, in which he challenged the lower court's jurisdiction to hear and determine the criminal case. That court dismissed the preliminary objection. His preliminary objection was that the charges against him were incompetent, misconceived and bad in law.
5. The allegation of professional misconduct against the applicant arises out of the advocate/client relationship, which is a privileged relationship that is governed by the *Advocates Act* (Cap 16) Laws of Kenya.
6. The criminal case in the lower court is premature and that court lacks jurisdiction, until the matter is heard and determined by the Law Society of Kenya disciplinary committee.
He urged the court to grant the orders sought.
7. In response, the respondent filed grounds of opposition dated January 19, 2023. The grounds raised are that the applicant has not demonstrated that the respondent is in breach of his fundamental rights. The applicant has not demonstrated the inappropriateness of the lower court decision. The applicant has not demonstrated how injustice will be occasioned against him.

The Applicant's Written Submissions

8. The applicant submitted that the *Advocates Act* governs the legal profession in Kenya. It provides for avenues and sanctions for those advocates that conduct themselves in contravention of its provisions. Section 57 of the Act establishes the Advocates Disciplinary Tribunal, where complaints are launched. He maintained that in this case, the dispute concerns money that was held by the applicant in his professional capacity on behalf of his client. That it is not until a report has been made by the tribunal that the matter is subject to prosecution as provided under section 80 of the Act.
9. He argued that a determination is yet to be made by the tribunal. Consequently, the charges by the prosecution are premature.

The Respondent's Written Submissions

10. Ms Akunja, Senior Principal Prosecution Counsel, submitted that the matter was properly investigated and criminal offences were disclosed. Consequently, the applicant was properly charged of the offence of stealing by agent. She maintained that the existence of proceedings before the disciplinary committee is not a bar to criminal proceedings being instituted, where it is clear that a criminal offence has been disclosed.
11. Learned prosecution further submitted that the applicant has not demonstrated any abuse of the powers of the Director of Public Prosecutions in making the decision to prosecute him. In addition, the applicant has not demonstrated any illegality, incorrectness or impropriety to warrant review of the orders of the lower court.
She has urged the court to dismiss the application.

Issues for Determination

12. I have considered the application, the response, the written submissions of the parties and the applicable law. The issue for Determination is whether the applicant has made out a case for the grant of the orders sought.



Analysis and Determination

13. The applicant filed the present application pursuant to sections 347, 349, 350 and 354 of the [Criminal Procedure Code](#) (Cap 75) Laws of Kenya. These provisions of the law are in relation to appeals and the powers of the High Court in making determinations on appeals. The present matter is not an appeal.
14. The applicant is essentially seeking an order of revision. Section 362 gives the High Court the jurisdiction to call for and examine the record of any criminal proceeding before any subordinate court to satisfy itself as to the correctness, legality, or propriety of any finding, sentence, or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court. Section 364 on the other hand, provides for the powers of the High Court on revision.
15. The application is grounded on the claim that the lower court lacks jurisdiction to hear and determine Criminal Case Number E3774 of 2020, which is pending in the lower court against the applicant. This is because there are pending proceedings before the LSK disciplinary committee emanating from the same complainant. He argued that the provisions of section 80 of the [Advocates Act](#) limit the jurisdiction of the lower court until the committee issues its report.
16. To begin with, the Advocates Disciplinary Tribunal is established under section 56 of the [Advocates Act](#). The act provides for the powers of the tribunal which does not extend to criminal cases. Secondly, before the lower court is a criminal case which can only be tried by the court and not the tribunal. I do find that it is within the mandate and jurisdiction of the criminal court to determine all matters connected with the offence.
17. The applicant also contends that the matter is before the tribunal and should not proceed before the lower court until a final report is made by that tribunal. Section 193A of the [Criminal Procedure Code](#) provides for the institution and prosecution of concurrent criminal and civil proceedings. That provision has been extensively discussed by the court in several decisions and one only need to cite [Republic v Chief Magistrate Criminal Division & Another, ex parte Mildred Mbuya Joel](#) [2013] eKLR, where the court delivered itself in the following words:

“It is not enough to simply state that the criminal proceedings ought to be halted because there are pending civil proceedings touching on the same subject matter. Neither does it suffice to be content with stating that because there is an existence of a civil dispute or suit; the entire criminal proceedings commenced based on the same set of facts are an abuse of the court process. There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution. In absence of concrete grounds for supposing that a criminal prosecution is an “abuse of process”, is a “manipulation”, “amounts to selective prosecution” or such other processes, or even supposing that the applicants might not get a fair trial as protected in the Constitution, it is not mechanical enough that the existence of a civil suit precludes the institution of criminal proceedings based on the same facts. As rightly submitted on behalf of the Respondents, section 193A of the Criminal Procedure Code Cap 75 Laws of Kenya provides for concurrent civil and criminal proceedings.”
18. In the instant application, the applicant has not demonstrated how his right will be infringed by the criminal proceedings in the lower court. He has also not demonstrated the prosecution is an abuse of the court process. It is only where an abuse of the court process has been established that the High



Court will intervene and stop the prosecution. See *Stanley Munga Githunguri v Republic* (1986) KLR 1

19. In the premises, I find that the criminal proceedings in the lower court were properly and legally instituted and ought to be allowed to proceed expeditiously before the lower court.

20. Consequently, I find that the application lacks merits and is dismissed in entirety.

JUDGEMENT SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 16TH DAY OF MARCH 2023.

J M BWONWONG'A

JUDGE

In the presence of-

Mr. Kinyua: Court Assistant

Mr. Kingoina for the applicant

Mr. Mutuma for the respondent

