



**Ochiel v OCS Rongo Police Station & 4 others; Ochiel & another (Interested Parties)  
(Constitutional Petition E003 of 2022) [2023] KEHC 2003 (KLR) (9 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2003 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
CONSTITUTIONAL PETITION E003 OF 2022**

**RPV WENDOH, J**

**MARCH 9, 2023**

**BETWEEN**

**WYCLIFFE OMBUORO OCHIEL ..... PETITIONER**

**AND**

**OCS RONGO POLICE STATION ..... 1<sup>ST</sup> RESPONDENT**

**OCS KAMAGAMBO POLICE STATION ..... 2<sup>ND</sup> RESPONDENT**

**INSPECTOR GENERAL OF THE NATIONAL POLICE  
SERVICE ..... 3<sup>RD</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... 4<sup>TH</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT**

**AND**

**ADAMS SAMO OCHIEL ..... INTERESTED PARTY**

**RACHAEL AMONDI OCHIEL ..... INTERESTED PARTY**

**JUDGMENT**

1. This ruling is in respect to the amended notice of motion dated August 1,2022. The applicant seeks the following orders:-
  - a. Spent.
  - b. This court be pleased to issue an order staying the proceedings in Rongo MCCR Criminal Case No E173 of 2022 Republic v Wycliff Ombuoro Ochiel) pending the hearing and determination of this application;



- c. This court be pleased to issue an order staying the proceedings in Rongo MCCR Criminal Case No E173 of 2022 Republic v Wycliff Omburo Ochiel) pending the hearing and determination of this petition;
  - d. This court be pleased to issue a conservatory order forthwith restraining the respondents, their agents, servants, assistants from harassing, re-arresting, arraigning, and/or charging/prosecuting the petitioner/applicant herein until the hearing and determination of this application;
  - e. This court be pleased to issue a conservatory order forthwith restraining the respondents, their agents, servants, assistants from harassing, re-arresting, arraigning, and/or charging/prosecuting the petitioner/applicant herein until the hearing and determination of this petition;
  - f. Costs be provided for;
  - g. Any other order that this court may deem fit and just.
2. The application is based on the grounds found on its face and the amended supporting affidavit of Wycliffe Omburo Ochiel (the petitioner) sworn on April 15, 2021. The petitioner deposed that he is a resident of Opapo Rongo in Migori County; that on February 8, 2022 at around 10.30 pm, a personal vehicle approached his house and three police officers dressed in civil clothing disembarked from the vehicle; that the three police officers arrested him, put him in the said vehicle and drove off; that he knew they were police officers because he had previously encountered them at the Rongo Police Station while reporting an assault claim against his brother Adam Samo Ochiel; that he was locked up in the police cell where he stayed the rest of the day; that between 6.30 pm to 7.00 pm he overheard the police officers receive a call from his elder brother Adam Samo Ochiel and he was unconditionally released without any charges being preferred against him; that he was informed the reasons for his arrest was causing disturbance; that prior to his release he did not record any statement.
3. Further, the applicant deposed that on June 26, 2022, he was arrested from his mother's house and driven to Kamagambo Police Station without any warrant; that he was not questioned nor given an opportunity to record a statement; that he was arraigned in court the following day and charged with two counts of causing disturbance; that on 27/2/2022, the plea was deferred to June 26, 2022 on allegations that he is mentally unstable; that on June 26, 2022, he was shocked that the prosecutor framed up another charge sheet with a third count of being in possession with narcotic drugs; that the 3<sup>rd</sup> charge is an afterthought and amounts to abuse of the legal process and gross violation of the Constitution; that the charge of being in possession with narcotic drugs was instigated by his elder brother, the 1<sup>st</sup> interested party herein who wants to keep him from their rental premises which he has rented out to six tenants and sending rent to his wife; that upon being granted bail, he was released on 8/6/2022 upon payment of the bail by his sister Jael Ochiel.
4. The applicant contended that upon return to his parents' home, he was chased away by workers under the orders of the 1<sup>st</sup> and 2<sup>nd</sup> interested parties; that the unlawful arrest of 8/2/200 and the subsequent re-arrest on 26/5/2022 and the criminal charges are being used to keep him from his parents' home; that the harassment is informed by a succession dispute over their late father's estate and the 1<sup>st</sup> interested party has assumed the responsibility of administration without undertaking succession proceedings; that the interested parties are intermeddling with the estate of their late father to the detriment of their mother and other beneficiaries of the estate. The applicant stated that the proceedings in Rongo MCCR No E173 OF 2022 should be stayed or he will suffer prejudice of the violation of his constitutional rights.



5. The application was opposed. PC Albert Nyabando No 70123 filed a replying affidavit dated November 14, 2022. He deposed that he is the investigating officer in Rongo Principal Magistrate Court Criminal Case No E173 of 2022; that the applicant is charged with two counts of creating disturbance and one count of possession of narcotic drugs being Cannabis Sativa; that the applicant was arrested on May 1, 2022 and arraigned in court on May 27, 2022 for plea taking; that owing to the conduct of the applicant in court, the state applied that he be taken for mental assessment and the plea was deferred to June 26, 2022; that upon being certified fit to stand trial, he pleaded not guilty and he was granted bail of Kshs 40,000/=; that the matter proceeded and two witnesses testified; that during the pendency of the proceedings, the applicant was represented by Counsel who later withdrew; that there are only 2 more witnesses remaining before the close of the prosecution's case.
6. It was further deposed that the subsequent arrest was not in relation to Criminal Case No E173 of 2022; that the applicant is at liberty to pursue the complaints he has with the complainants in Criminal Case No E173 of 2022 using the right channels; that the petition is ill timed, it is meant to scuttle the criminal proceedings, is an abuse of the court process as it is depicted in paragraphs 23 to 26 of the applicant's supporting affidavit as this applicant wants to settle their succession squabbles through this court and it should be dismissed with costs.
7. This court directed that the application be canvassed by way of written submissions but none of the parties complied. I have carefully considered the application, the supporting affidavit, annexures and the replying affidavit. The main issue for determination is whether the orders sought by the applicant should be granted.
8. The applicant's case is centred around the alleged unlawful arrest on 8/2/2022 and subsequent re-arrest on 26/2/2022. The applicant contended that the charges of causing disturbance and being in possession of narcotic drugs are malicious and the real issues in controversy are the yet to commence succession proceedings. The prosecution through PC Albert Nyabando No 70123 stated that the application is meant to scuttle the criminal proceedings which have progressed to an advance stage.
9. The jurisdiction of the High Court to stay of criminal proceedings was well elaborated in the case of *Joram Mwenda Guantai v The Chief Magistrate* (2007) eKLR where the Court of Appeal held as follows:-

“It is trite that an Order of Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings... Equally so, the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. It was succinctly put in *Stanley Munga Githunguri v Republic* [1985] KLR 91 that if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious the Judge has the power to intervene and that the High Court has an inherent power and a duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court.”



10. The decision to grant a stay of proceedings is discretionary. The Court of Appeal in Goddy Mwakio & Another v Republic (2011) eKLR stated that:

“An order for stay of proceedings, particularly stay of criminal proceedings is made sparingly and only in exceptional circumstances”.
11. I must add that it also depends on the circumstances of each case. The charge sheet annexed to the applicant’s supporting affidavit “WOO-1” shows that the applicant was arrested on May 27, 2022 and the charges preferred against him were creating disturbance in a manner likely to breach peace contrary to Section 95 (1) (b) by chasing one Thomas Ombogo Nyaosi with a wooden stick. There is also another charge sheet “WOO - 3” in which there are other two counts of creating disturbance in a manner likely to cause breach of peace contrary to Section 95 (1) (b) of the Penal Code by abusing and chasing Reuben Ondieki with a wooden stick and being in possession of narcotic drugs (bhang) contrary to section 3 (1) as read with section 3 (2) (a) of the Narcotic Drugs and Psychotropic Substances Control Act No 4 of 1994.
12. The applicant’s complaint is that his brother (1<sup>st</sup> interested party) is using the criminal process to harass him yet the complainants in the lower court are other parties and there is no known nexus between them and the 1<sup>st</sup> interested party. This court has not had the privilege of reading the proceedings in the trial court to have the true picture of the nature of the proceedings. The applicant has not made any allegations that his basic rights to fair trial have been infringed among others, the right to be granted bail, to be supplied with the witness statements and evidence the prosecution intends to rely on and representation by Counsel. The applicant is before an independent and competent court which is there to protect the rights of an accused as the conferred under the Constitution. There is no evidence that the court is compromised or is incompetent.
13. The complainants, Thomas Ombogo Nyaosi and Reuben Ondieki are not parties to these proceedings. The applicant has not denied the existence of the two complaints but instead chose to deflect the blame to successions squabbles between the siblings over their deceased father’s estate. There is a guiding law for settling succession disputes which the applicant is at liberty to follow. If the brother has not taken out succession proceedings what has stopped him from approaching the court? On the allegations that the applicant was arrested on 26/2/2022, there is nothing to support this assertion by the applicant.
14. From the narration of the events which led to the applicant’s arrest and subsequent charge on the aforementioned criminal charges, there are no exceptional circumstances and compelling reasons for this court to stay the proceedings before the Rongo Principal Magistrate Court Criminal Case No E173 of 2022. As it was held in the case of Joram Mwenda Guantai (supra) stay orders in criminal proceedings are issued where there is excess of jurisdiction or absence and also where there is a departure from the rules of natural justice. The applicant has not demonstrated that the prosecution case is bought with malice, vendetta or meant to vex him. The trial court must be allowed to hear the evidence and arrive at his/her independent decision. The result is that the applicant has not demonstrated any exceptional circumstances that can warrant the grant of the orders sought.
15. The foregone position is that the applicant’s application dated 28/7/2022 is devoid of merit and it is hereby dismissed with no orders as to costs. The upshot is that the matter before the trial court should proceed to full trial.

**DATED, SIGNED AND DELIVERED AT MIGORI THIS 9<sup>TH</sup> DAY OF MARCH, 2023**

**R. WENDOH**

**JUDGE**



Ruling delivered in the presence of;

Ms. Kosgei for State

Mr. Asitaba for the Applicant

No appearance for the 1<sup>st</sup> - 4<sup>th</sup> Respondents.

No appearance for the 5<sup>th</sup> Respondent.

No appearance for the Interested Parties.

Nyauke Court Assistant

