



**Ndolo v Republic (Criminal Miscellaneous Application
E108 of 2022) [2023] KEHC 3323 (KLR) (19 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3323 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL MISCELLANEOUS APPLICATION E108 OF 2022**

TM MATHEKA, J

APRIL 19, 2023

BETWEEN

ANDREW NDOLA NDOLO APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant Andrew Ndola Ndolo is charged with two others Jairo Atenya Asitiba and Benson Njoroge Macharia with the following 10 counts in Kilungu MCCRC No E494 of 2022.

Count i: malicious damage to property contrary to section 339(1) of the *Penal Code*. Andrew Ndola Ndolo, Jairo Atenya Asitiba and Benson Njoroge Macharia on the July 21, 2022 at Kalimbini (B) village in Sultan Hamud sub-location within Mukaa sub-county in Makueni county jointly with others not before the court willfully and unlawfully damaged permanent house and household items estimated value at Kshs 1,140,000 (one million one hundred and forty thousand) the property of Titus Ngile Masila.

Count ii stealing from dwelling house contrary to section 279(b) of the *Penal Code*. Andrew Ndola Ndolo, Jairo Atenya Asitiba and Benson Njoroge Macharia on the 21st day of July, 2022 at Kalimbini (B) village in Sultan Hamud sub-location within Mukaa sub-county in Makueni county jointly with others not before the court stole clothing, shoes, jewelry, kitchenware, blow-dry machine, TV 43 Inch, decoder and microwave estimated valued at Kshs 234,000 (Kenya shillings two hundred and thirty four thousand) from a dwelling house of Chris Nzomo Ngile and the property of Titus Ngile Masila.

Count iii: malicious damage of property contrary to section 339(1) of the *Penal Code*. Andrew Ndola Ndolo, Jairo Atenya Asitiba and Benson Njoroge Macharia on the 21st day of July, 2022 at Kalimbini (B) village in Sultan Hamud sub-location within Mukaa sub-county



in Makueni county jointly with others not before court willfully and unlawfully damaged permanent house and household items estimated value at Kshs 2,710,000 (Kenya shillings two million seven hundred and ten thousand) the property of Chris Nzomo Ngila.

Count iv: stealing from dwelling house contrary to section 279(b) of the [Penal Code](#). Andrew Ndola Ndolo, Jairo Atinya Asitiba and Benson Njoroge Macharia on the 21st day of July, 2022 at Kalimbini (B) village in Sultan Hamud sub-location within Mukaa sub-county in Makueni county jointly with others not before the court stole TV inch make LG, decoder, hooper, speakers and sound system, wall hangings, kids toys, microwave wall clock cosmetics and beautify products, shoes and clothing, torches and two mobile phones estimated value at Kshs 195,000 (Kenya shillings one hundred and ninety five thousand) from the dwelling house of Chris Nzomo Ngile and the property of Chris Nzomo Ngila.

Count v: arson contrary to section 332(b) of the [Penal Code](#). Andrew Ndola Ndolo, Jairo Atinya Asitiba and Benson Njoroge Macharia on the 21st day of July, 2022 at Kalimbini (B) village in Sultan Hamud sub-location within Mukaa sub-county in Makueni county with others not before the court willfully and unlawfully set fire to an excavator machine registration No KBL 078N valued at Kshs 5,003,000 (Kenya shillings five million three thousand) and the property of Azicon Kenya Limited Company.

Count vi: assault causing actual bodily harm contrary to section 251 of the [Penal Code](#): Andrew Ndola Ndolo, Jairo Atinya Asitiba and Benson Njoroge Macharia on the 21st day of July, 2022 at Kalimbini (B) village in Sultan Hamud sub-location within Mukaa sub-county in Makueni county jointly with others not before the court willfully and unlawfully assaulted Mr Titus Ngile Masila thereby occasioning him actual bodily harm.

Count vii: assault causing actual bodily harm contrary to section 251 of the [Penal Code](#). Andrew Ndola Ndolo, Jairo Atinya Asitiba and Benson Njoroge Macharia on the 21st day of July, 2022 at Kalimbini (B) village in Sultan Hamud sub-location within Mukaa sub-county in Makueni county jointly with others not before the court willfully and unlawfully assaulted Mr Kennedy Mutua Kamuya thereby occasioning him actual bodily harm.

Count viii: assault causing actual bodily harm contrary to section 251 of the [Penal Code](#). Andrew Ndola Ndolo, Jairo Atinya Asitiba and Benson Njoroge Macharia on the 21st day of July, 2022 at Kalimbini (B) village in Sultan Hamud sub-location within Mukaa sub-county in Makueni county jointly with others not before the court willfully and unlawfully assaulted Mr Joseph Mangaya Masika thereby occasioning him actual bodily harm.

Count ix: assault causing bodily harm contrary to section 251 of the [Penal Code](#). Andrew Ndola Ndolo, Jairo Atinya Asitiba and Benson Njoroge Macharia on the 21st day of July, 2022 at Kalimbini (B) village in Sultan Hamud sub-location within Mukaa sub-county in Makueni county jointly with others not before the court unlawfully assaulted Mr Benedictor Mwangangi Muse thereby occasioning him actual bodily harm.

Count x: assault causing actual bodily harm contrary to section 251 of the [Penal Code](#). Andrew Ndola Ndolo, Jairo Atinya Asitiba and Benson Njoroge Macharia on the 21st day of July, 2022 at Kalimbini (B) village in Sultan Hamud sub-location within Mukaa sub-county in Makueni county jointly with others not before the court unlawfully assaulted Mr Timothy Musyoka Maitha thereby occasioning him actual bodily harm.

2. There are 7 complaints as per the charge sheet.



3. According to the applicant, the complainant in count 1,2, and 6 is a party to Nairobi ELC 3/2022 Titus Ngile Masila v Elizabeth Kamene Ndolo where the suit property is LR 1757/6 registered in the name of his mother one Elizabeth Kamene Ndolo.
4. It is the applicant's position that the events in the criminal case occurred on this parcel of land.
5. To that end the applicant filed notice of motion dated December 15, 2022 seeking orders:
 - a. That this honourable court be pleased to certify this application as extremely urgent and hear it *ex-parte* at the earliest opportunity and service of the same be dispensed within the first instance.
 - b. That there be a stay of proceedings in Kilungu criminal case No E494 of 2022 – Republic v Andrew Ndola Ndolo & 2 others – pending the hearing and determination of this application.
 - c. That there be a stay of proceedings in Kilungu criminal case No. E494 of 2022 – Republic v Andrew Ndola Ndolo pending the hearing and determination of Nairobi ELC Case No 3 of 2022 (o.s) – Titus Ngile Masila v Elizabeth Kamene Ndolo.
 - d. That there be a stay of execution and enforcement of the warrants of arrest issued against the applicants herein as ordered by the principal Magistrate's Court at Kilungu in Kilungu criminal case No E494 of 2022 on September 30, 2022 pending the hearing and determination of this application.
 - e. That there be a stay of execution and enforcement of the warrants of arrest issued against the applicants herein as ordered by the Principal Magistrate's Court at Kilungu criminal case No E494 of 2022 on September 30, 2022 pending the hearing and determination Nairobi ELC Case No 3 of 2022 (OS) – Titus Ngile Masila v Elizabeth Kamene Ndolo.
 - f. That the costs of the application be provided for.
6. The grounds for the application are set out on its face and in the affidavits sworn by the applicant: - these are inter alia:- that because the dispute at ELC court is about the rightful ownership of the parcel of land and the registration of a portion of the same and because this is the same dispute in the criminal proceedings – the applicant is of the view that in the event the ELC court finds in his favour, the decision will render the decision arrived at in the criminal case baseless; that it is only fair and just that the criminal proceedings, that may lead to the applicant losing his liberty be held in abeyance pending the determination of the storm of these matters.
7. The application is opposed through the replying affidavit of the respondent/ complainant detailing the history behind the land dispute – more importantly he sets out the facts supporting the charges against the accused person in Kilungu Mccrc No 494/2022 – that the applicant and some goons descended on his home on July 21, 2022 beat him up as per the P3 form, damaged his property as per the photos annexed, and his house and household goods – in the name of an eviction – yet he was never shown any eviction order. – That the alleged suit – ELC 3/2022 is pending before the court in Wote (sic).
8. Parties filed written submissions – which I have considered. The only issue for determination is whether the prayer for stay of proceedings in Kilungu Mccrc No E494/2022 has any merit.
9. It appears to me that the happenings of July 21, 2022 are not disputed by the applicant. His problem is that they happened on a piece of land whose ownership and registration is in dispute.



10. It is also not in dispute, as can be seen clearly from the pleadings annexed to the parties' affidavits, that there have been several suits with respect to the said parcel of land by various parties who are not parties to the criminal proceedings and this application.
11. Hence it is a fact that there are both civil and criminal proceedings involving some of the parties involved in the events of July 21, 2022.
12. From the onset, it is important to point out that our Constitution provides for equality before the law ; our article 50(1) states:-

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body”.

13. It is important to note that this is about fair hearing of any dispute – whether criminal or civil, it does not matter – what is emphasized here is the right of the person involved in that dispute to be heard and the matter to be determined according to the law and in a fair manner. Hence both the applicant and the respondent, each has the right to have their respective disputes determined in accordance with the law.
14. The argument by the applicant is that the criminal proceedings have been brought in bad faith, are oppressive, vexatious and an abuse of the process of the court. That they are a breach of his fundamental rights and freedom and must be halted . To support this position, the applicants cite several authorities:
 1. Lalchand Fulchand Shah v Investments & Mortgages Bank Ltd & 5 others (2018) eKLR.
 2. Samuel Roro Gicheru and Anor v OCS Nanyuki police station and Anor (no citation)
 3. Meme v Republic & Anor
 4. Peter George Anthony D’Costa v Attorney General & Anor Nairobi petition No 83/2010
 5. Kuria & 3 others v AG
 6. Bitange Ndemo v DPP & 4 others (2016) e KLR.
15. The applicant argues that these criminal proceedings are a harassment by the process of law, they lack justification and are intended to harass him.
16. The ODPP on his part argues that the complaint by the complainant with respect to the happenings on July 21, 2022 were investigated by Mukaa DCI office as evidenced by the affidavit of IP Antony Okumu. That the office of the DPP exercised its decision to charge as is expressly provided for under article 157 of the Constitution upon being satisfied that there was sufficient ground to do so. That the applicant acted without any court orders from the court case pending in court and proceeded to destroy the complainant’s property with the help of goons. That he acted with impunity. Relying on R v ODPP & Anor Ex Parte Chamanlal Uraslal Kamani & others (2016) e KLR – they want the court to find that:-
 1. The existence of criminal proceedings whilst civil proceedings are pending does not amount to abuse of process unless the criminal proceedings are used to push for an outcome in the civil case.
 2. That the decision of the DPP should not be interfered with unless proof is shown of arbitrary use of the decision to prosecute.



17. The 1st complainant also filed submissions urging this court to uphold the rights of the victim as per the *Victim Protection Act*. He urged the court to dismiss the application. While citing, s. 193A of the *Criminal procedure Code; James Mutisya & 5 others v Alphayo Chimwanga Munda & 2 others* (2021) eKLR ‘s interpretation of section 193A he urged that the applicant had not established that the criminal proceedings were an abuse of the court processes/how they had breached fundamental rights as per the Peter George Anthony D’Costa and that per *R v Chief Magistrate Kilungu Ex Parte Jobana Kipng’eno Lang’at* (2021) eKLR it was the duty of the petitioner to prove that the proceedings were being used oppressively/had been instituted for any other reason other than to bring the accused person to justice. It was submitted that the duty remains with the applicant to prove abuse of the process.
18. All the parties have made reference to the statutory provision relating to the situation – section 193 A of the *Criminal Procedure Code* which states
- “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.
19. The law is clear on this one – the fact that in the concurrent criminal and civil proceedings the matter in issue is “directly and substantially” the same is not a ground for any “stay, prohibition and delay” of the criminal proceedings. This is why courts in interpreting section 193A have gone on to set out the grounds upon which such stay, prohibition or delay can be grounded on.
20. Has the applicant established those grounds and has he laid any grounds before this court to show that the respondent/the complainant acted in bad faith?
21. I agree with the applicant’s submissions that where the criminal process is being used for any other purpose other than that intended by the law , it must be halted – but I hasten to add that the old adage, which is laos the requirement of the law of evidence, that he who alleges must prove hold forte– the mere statement that these things happened on a parcel of land whose ownership and registration is in dispute cannot be a ground – because the law provides for the process of determining those issues which process does not amount to the violation of other people’s rights – It must be said loudly that the criminal process through the criminal justice system is provided for by the *Constitution* with clear protections for the accused person – balanced through the protections provided for the victim in the *Victim protection Act* as per article 50 (9) of the *Constitution* which states; Parliament shall enact legislation providing for the protection, rights and welfare of victims of offences.
22. As per Mumbi J as she then was –
- “The criminal justice system is a critical pillar of our society. It is underpinned by the *Constitution*, and its proper functioning is at the core of the rule of law and administration of justice. It is imperative, in order to strengthen the rule of law and good order in society, that it be allowed to function as it should, with no interference from any quarter, or restraint from the superior courts, except in the clearest of circumstances in which violation of the fundamental rights of individuals facing trial is demonstrated.”
23. The applicant and others are alleged to have committed criminal acts prohibited by the *Penal Code*. The prosecution state they have the evidence to prove their case – that is why they brought the charges – the applicant has the right to challenge through evidence – the complainant/respondent in this application has the right to be heard – and so do the other 6 complainants – the findings of the criminal court are



not dependent on the findings of the Environment and Land Court – as the standards of proof are different and the evidence cannot be the same.

24. There is nothing before me to show that any acts committed/alleged to have been committed by the applicant were supported by any law/statutory provisions/ the court orders – to support the claim of abuse of court process.
25. The charge sheet/charges as framed have not been challenged before the trial court, the other complainants are not parties to the ELC suit neither did the applicant join them in this application yet they would be adversely affected by the orders sought by the applicant without their being heard, as those orders would affect their right to a fair hearing .They have a right to be heard.
26. Clearly in my view, the applicant has not laid anything before the court to show that his case is the exception to section 193A of the Criminal Procedure Code. There are no clear circumstances demonstrated by the applicant to warrant this court’s interference with the criminal process in the subordinate court.
27. The sword of justice cuts both ways - the applicant will have to go through the criminal trial and continue with the case at the ELC court.
28. Having failed in merit the application is dismissed with costs to the respondent/complainant

DELIVERED, SIGNED & DATED THIS 19TH DAY OF APRIL, 2023.

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MUMBUA T. MATHEKA

JUDGE

N/A Appearance for the applicant

Mr. Tanui for ODPP

