



**Karani & another v Republic; Ndege (Interested Party) (Criminal Revision
E004 of 2023) [2023] KEHC 19023 (KLR) (19 June 2023) (Revision)**

Neutral citation: [2023] KEHC 19023 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL REVISION E004 OF 2023
WM MUSYOKA, J
JUNE 19, 2023**

BETWEEN

CYRIL JUMA KARANI 1ST APPLICANT

GEORGE KARANI 2ND APPLICANT

AND

REPUBLIC RESPONDENT

AND

WILLIAM WANYAMA NDEGE INTERESTED PARTY

*(Revision arising from the proceedings in Busia CMCCRC No.
E324 of 2023, Republic vs. Cyril Juma Karani and another)*

REVISION

1. The proceedings herein were initiated by way of a letter dated May 18, 2023, and lodged herein on even date. The letter is addressed to the Judge, and it urges that the proceedings in Busia CMCCRC No E324 of 2023 be called for, for the purpose of being examined to assess their legality, correctness or propriety. They are said to be unconstitutional and amounted to double jeopardy; to be unfair; the issues raised had been subject to determination in civil proceedings in Kisumu CACA No 142 of 2007 and Busia HCCC No 40 of 1997 (OS), and the trial court could not sit on appeal or reverse decisions made in civil proceedings in criminal proceedings; and the interested party had filed Busia CMC ELC No E004 of 2023 raising the same issues as had been raised and determined in Busia ELC No 35 of 2020. It is urged that the criminal proceedings be terminated.
2. The letter was lodged at the registry simultaneously with a Motion, dated May 18, 2023, which seeks interlocutory orders, to stay a visit to the land in dispute, Bunyala/Bukoma/2135 and 2136, the subject of the proceedings in Busia CMCCRC No E324 of 2023, and to stay the proceedings in Busia



CMCCRC No E324 of 2023 pending hearing and determination of these revision proceedings. The trial criminal court had ordered a visit to the land on May 26, 2023, with land surveyors and land registrars, to show to the court the extent of the land belonging to the interested party. The applicants, the accused persons in Busia CMCCRC No E324 of 2023, are of the view that their mother, one of the principal litigants in the civil cases, would be prejudiced, should that visit happen, and should the land registrar and land surveyor act on the land, as she is not party to the criminal case. They assert that Bunyala/Bukoma/2135 and 2136 were subject to civil proceedings, where certain determinations had been made, and that a court seized of a criminal case ought not seek to determine ownership in criminal proceedings. They further argue that the interested party had sued them before the civil court, and was the complainant in the criminal court, and that exposed them to double jeopardy, and exposed them to unconstitutional treatment, as it denies them access to justice. They assert that the criminal proceedings are unconstitutional and unlawful, and were instituted with ill spite on the part of the respondent and the interested party.

3. In the affidavit in support, Cyril Juma Karani, avers that he and his co-accused are sons of Leonora Nerima Karani, and that the interested party was their neighbour, and the complainant in the criminal case. He explains that the charge they faced in the criminal case was for forcible entry, contrary to section 91 of the Penal Code, Cap 63, Laws of Kenya. He gives the factual background to the matter. He explains that the interested party had begun, in the 1980s, calling them squatters on Bunyala/Bukoma/1433. Their mother, Leonora Nerima Karani, then sued the interested party in Busia HCCC No 40 of 1997 (OS), but lost to him. She then appealed against the High Court decision in Kisumu CACA No 142 of 2007, which was resolved in her favour. The interested party then initiated Busia ELC No 35 of 2020, which was struck out, for being res judicata. The interested party then caused Bunyala/Bukoma/1433 to be subdivided into Bunyala/Bukoma/2135 and 2136, and caused them to be registered in his name. He thereafter commenced proceedings in Busia CMC ELC No E004 of 2023, against the accused persons in the criminal matter, and he obtained injunctive orders against them. It was while a determination was pending in Busia CMC ELC No E004 of 2023 that the subject criminal proceedings were initiated. There are allegations that the criminal matter proceeded while the accused persons were not ready, as they had not been provided with witness statements. The deponent has attached copies of the judgments in Kisumu CACA No 142 of 2007 and Busia ELC No 35 of 2020.
4. The respondent filed grounds of opposition, saying that the issues raised on revision were frivolous and without merit, the applicants stood to suffer no prejudice, the dispute between the interested party and the applicants could only be resolved by experts through a visit to the site, and the application was in bad faith.
5. The interested party swore an affidavit on May 22, 2021. He concedes to be the complainant in Busia CMCCRC No E324 of 2023, asserting that the applicants had forcefully entered his land, being Bunyala/Bukoma/2135. He states that the issue of ownership of Bunyala/Bukoma/1433 was resolved in Kisumu CACA No 142 of 2007, where the mother of the applicants was awarded a portion. He proceeded to subdivide Bunyala/Bukoma/1433 into Bunyala/Bukoma/2135 and 2136, in line with the said judgment. Bunyala/Bukoma/2135 was his, while the mother of the applicants was entitled to Bunyala/Bukoma/2136, in respect of which he had no claim. He asserts that the applicants had encroached his portion, that is Bunyala/Bukoma/2135. He asserts that the site visit was necessary to establish which portion was his and which belonged to the mother of the applicants. He has attached various documents to his affidavit, however, the copies are so faint as to be totally illegible. I had asked his Advocate, Mr. Ashioya, to avail legible and readable copies, but that has not been done, so I have not had the advantage of reading the documents that he is relying on.



6. The matter was urged orally before me on June 23, 2023. Mr. Athung'a for the applicants, Mr. Namasake for the respondent and Mr. Ashioya for the interested party addressed me at length on the revision sought. They all bespoke the contents of the filings that they had placed on record in support of their various positions.
7. Revision, which is provided for under section 362 of the *Criminal Procedure Code*, Cap 75, Laws of Kenya, targets orders, decisions and sentences made or imposed by the trial court, with a view to address any incorrectness, irregularity, illegality or impropriety in them, or the manner that the proceedings leading up to them were conducted. The provision targets the act of or conduct by the trial court, with the intent to correct or straighten out or smoothen any mistakes or errors made by that court, which rendered its decision or proceedings irregular, improper, incorrect or illegal.
8. It is common ground that Bunyala/Bukoma/2135, the land that the applicants are alleged to have encroached upon, was part of Bunyala/Bukoma/1433, which was the subject of the judgment in Kisumu CACA No 142 of 2007. It is also common ground that the mother of the applicants was awarded a portion of Bunyala/Bukoma/1433. There is a dispute as to whether the judgment in Kisumu CACA No 142 of 2007 was ever executed. According to the applicants it has not, according to the interested party it has been. Apparently, the interested party caused Bunyala/Bukoma/1433 to be subdivided into Bunyala/Bukoma/2135 and 2136, in purported execution of that judgment, and that, according to him, Bunyala/Bukoma/2135 was his, while Bunyala/Bukoma/2136 was meant for the mother of the applicants. The interested party complains that Bunyala/Bukoma/2135 has been encroached upon. The applicants dispute that, claiming that their mother was not involved in that subdivision, and that the 2 parcels, Bunyala/Bukoma/2135 and 2136, are all in the name of the interested party. They further claim that they have not moved out of the portion that they had always occupied. It is common ground that after the judgment in Kisumu CACA No 142 of 2007, the interested party has gone on to file other suits, such as Busia CMC ELC No 35 of 2020 and Busia ELC No E004 of 2023, some of which are still ongoing. The criminal proceedings in Busia CMCCRC No E324 of 2023 were brought into this mix.
9. Issues as to who owns what land, and who is entitled to occupy and use which land, falls in the realm of civil law. Land ownership and use is governed by land legislation, and not criminal statutes, and resolution of disputes around those issues should be in accordance with the land legislation. The criminal court and criminal proceedings are never the appropriate fora for resolution of land ownership disputes. In total, the interested party, the applicants and the mother of the applicants are or have been party to 4 civil cases. 1 of those is still pending, Busia CMC ELC No E004 of 2023. The judgement in Kisumu CACA No 142 of 2007 has never been executed, for the mother of the applicant has never been registered as proprietor of the portion of Bunyala/Bukoma/1433 that was awarded to her. The interested party claims to have subdivided the land, and that 1 of the resultant subdivisions is meant for the mother of the applicants, yet that portion is still in his name. It appears that the subdivision he did was carried out unilaterally, and there appears to be a dispute on what portion exactly was meant for the mother of the applicants. Clearly, the civil dispute has not been resolved, and criminal proceedings ought not have been loaded over the civil dispute.
10. I am cognisant of the principle that the pendency of civil proceedings ought not be a bar to criminal proceedings being mounted, and that the 2 proceedings can run parallel to each other. See section 193A of the *Criminal Procedure Code*. However, such parallel proceedings are often fraught with difficulties, and it would be prudent, in some cases, to have one process give way to the other. Firstly, there is always the embarrassing spectre of the civil court and the criminal court arriving at conflicting outcomes. Secondly, 1 of the processes is always more suitable to resolve certain disputes than the other. Where the overriding dispute is on ownership of land or the right to use or occupy it, the civil process would



be best suited to deal with that. The function of the criminal process is to address criminality, and not ownership and related disputes. So, much as the law permits the 2 to run parallel, prudence and expediency often dictates that 1 of them ought to give way to the other.

11. Section 193A of the *Criminal Procedure Code* states as follows:

“193A. 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.”

12. Which of the 2 should have given way to the other here? The civil processes came earlier. There are numerous of them. The criminal process ought not to have been added to the mix. The criminal justice authorities ought to have waited for the civil processes to be exhausted, and should have moved in after the civil dispute had been settled, to address any aspects of criminality arising thereafter. Where the ownership dispute is still raging, bringing in the criminal process would only exacerbate the dispute. Indeed, adding a criminal process to an ongoing civil process or processes would suggest that the criminal process is being employed for ulterior motives, besides finding justice, for if the parties are really in pursuit of justice, they would concentrate on the civil process, and would pursue the same to its logical conclusion.

13. It was said, in *Republic vs. Chief Magistrate’s Court at Mombasa Ex parte Ganijee & another* [2002] 2 KLR 703 [2002] eKLR (Waki, J), that:

“It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in their advancement or frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil case of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest. Where a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process.”

14. One gets the impression that the criminal proceedings herein are being employed to advance the civil process. The interested party is using the criminal process to achieve that which he has been unable to get from the civil process, or that which is taking too long to achieve from the civil process, for if he was keen on justice, he would be working overtime to get the judgment in Kisumu CACA No 142 of 2007 executed or implemented.

15. I am persuaded that the criminal proceedings herein are irregular or improper, for they are being employed for ulterior purposes, and what is sought to be achieved, through these proceedings, can best be achieved through the completed civil processes, which only await execution. Consequently, I do hereby order that the prosecution of the applicants, that is to say Cyril Juma Karani and George Karani, in Busia CMCCRC No E324 of 2023, be halted, and the said criminal proceedings terminated. Let the parties pursue execution of the judgment in Kisumu CACA No 142 of 2007, and exhaust all the civil processes emanating from Kisumu CACA No 142 of 2007 and Busia HCCC No 40 of 1997 (OS). The revision proceedings herein are hereby disposed of in those terms. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 19TH DAY OF JUNE 2023

W MUSYOKA



JUDGE

Mr. Arthur Etyang, Court Assistant.

Appearances

Mr. Athung'a, instructed by Athung'a & Company, Advocates for the applicants.

Mr. Namasake, instructed by the Director of Public Prosecutions, for the respondent.

Mr. Ashioya, instructed by Ashioya & Company, Advocates for the interested party.

