



**Republic v Director of Public Prosecutions; Magut (Exparte); Jerop (Interested Party)
(Judicial Review Cause 2 of 2019) [2024] KEHC 13483 (KLR) (6 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 13483 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
JUDICIAL REVIEW CAUSE 2 OF 2019
JRA WANANDA, J
NOVEMBER 6, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

AND

THOMAS KIPRONO MAGUT EXPARTE

AND

SARAH JEROP INTERESTED PARTY

JUDGMENT

1. By the orders issued in Eldoret High Court Miscellaneous Judicial Review Cause No. 68 of 2019 by Hon. Lady Justice O. Sewe, the ex parte Applicant was granted leave to commence Judicial Review proceedings against the Respondent to challenge the Respondent’s decision to charge the ex parte Applicant with a criminal case, namely, Kapsabet Principal Magistrate’s Court Criminal Case No. 2481 of 2018. The leave granted was also ordered to operate as a stay of the said criminal charge.
2. Pursuant to the foregoing, the ex parte Applicant, through Messrs Magut & Sang Associates Advocates, filed the Notice of Motion the subject hereof, dated 25/04/2019, seeking the following orders:
 - i. An order of Certiorari to remove into the High Court and quash the decision of the Respondent to institute charges against the Ex Parte Applicant in respect of his depositions and pleadings in Kapsabet Principal Magistrate’s Court Succession Cause No. 155 of 2015 for no lawful or justifiable Cause notwithstanding the pendency of Eldoret High Court



Miscellaneous Succession Cause No. 2 of 2017 seeking revocation of the Grant issued in the said proceedings.

- ii. An order of Prohibition restraining the Respondent from causing the arrest of the ex parte Applicant or commencing any criminal proceedings relating to his depositions in Kapsabet Principal Magistrate's Court Succession Cause No. 155 of 2015 in view of the pendency of Eldoret High Court Miscellaneous Succession Cause No. 2 of 2017 over the same subject matter.
 - iii. The costs of this Application be borne by the Respondent.
3. The Petition is expressed to be brought pursuant to the provisions Order 53 Rule 3(1) of the Civil Procedure Rules, Section 8 and 9 of the Law Reform Act (Chapter 26) and "all other enabling provisions of the law".
 4. I am unable to find any specific Affidavit filed in the present Cause in support of the Notice of Motion herein I but note that the Application (Chamber Summons dated 4/04/2019) whereof the ex parte Applicant sought leave in Eldoret High Court Miscellaneous Judicial Review Cause No. 68 of 2019 as aforesaid, including the Statement and the Verifying Affidavit thereto, has been placed in this file. I cannot ascertain whether any orders were granted permitting the placing of the said Chamber Summons in this file, or whether the two files were consolidated but, in the absence of any specific Supporting Affidavit filed herein, it appears that the ex parte Applicant is relying on the same Verifying Affidavit filed in Eldoret High Court Miscellaneous Judicial Review Cause No. 68 of 2019.
 5. Be that as it may, I will recount what has been deponed in the said Verifying Affidavit, which is sworn by the ex parte Applicant, Thomas Kiprono Magut.
 6. In the Verifying Affidavit, the ex parte Applicant deponed that he is the Administrator of the estate of Kiplagat Arap Cheruiyot, that he followed due process in filing Kapsabet Principal Magistrate's Court Succession Cause No. 155 of 2015, that a Grant was issued to him on 10/02/2016 and confirmed on 27/03/2017 whereupon he was issued with a Title Deed as proprietor of the land parcel known as Nandi/Baraton/691, that on 25/06/2018, he was arraigned in Court in Kapsabet Principal Magistrate's Court Criminal Case No. 2481 of 2018 allegedly for obtaining land registration by false pretence. He deponed that following an objection to the charges, the same was withdrawn on 27/06/2018, that the Respondent, through the police, issued fresh Summons for plea taking on 5/04/2019 in Kapsabet Principal Magistrate's Court Criminal Case No. 1072 of 2019 for the offence of perjury and false swearing over his averments made in the Petition filed in Kapsabet Principal Magistrate's Court Succession Cause No. 155 of 2015. He averred that the said charges relate to the same subject matter as the Objection proceedings filed in Eldoret High Court Miscellaneous Succession Cause No. 2 of 2017 seeking revocation of the Grant issued therein. According to the ex parte Applicant, the decision to summon and charge him with the offence of perjury and false swearing is made in bad faith upon improper exercise of discretion to prosecute and amounts to an abuse of the criminal process as it constitutes a violation of his fundamental rights and freedoms guaranteed under the Constitution, that being a matter for determination before the High Court, the intended charges would amount to him being subjected to double jeopardy as in any event, there is no criminal element.
 7. He deponed that Article 50(2) of the Constitution entitles every Kenyan citizen to the right, among others, to be presumed innocent until the contrary is proved, and Article 157(11) provides that in exercising his powers, the Respondent shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process, that the import of the above provisions is that they impose upon the Respondent the duty to act in a judicious and reasonable/rational manner, in utmost good faith, with fairness and without malice. He deponed



that despite the above provisions, the Respondent has gone ahead to purport to institute criminal proceedings against the ex parte Applicant based on the same facts as the pending High Court case and despite the absence of any criminal element, that one of the Advocates before whom the alleged oaths were taken (Bartamutta Sang) is now deceased hence there is no basis to determine whether indeed he is the one who administered the oaths, and that the decision by the Respondent was made in violation of the rules of natural justice as the ex parte Applicant was not afforded the opportunity to be heard or to make representations before making the decision.

8. He deponed further that the decision was made in an arbitrary manner and frustrates his legitimate expectation of fair play, that the Respondent breached a fundamental principle of law by making a decision with glaring errors of facts and arriving at a conclusion that was not supported by evidence, that the material errors of fact renders the decision ultra vires, that the decision is so outrageous in its defiance of logic and accepted moral standards that no sensible person applying his mind to the question to be decided could have arrived at it. He deponed further that the Respondent misdirected itself by taking into account wholly irrelevant, illegal and extraneous considerations thereby arriving at an unlawful decision, and breached the principle of proportionality by failing to maintain an appropriate balance between the adverse effects which its decision may have on the right, liberties or interests of the persons concerned and the purpose for which the Respondent is seeking to pursue.
9. Subsequently, upon an Application made before the Court, Hon. Justice E. Ogola, by his Ruling delivered on 29/11/2022, allowed the Interested Party to join the matter as such. The Interested Party then, through Messrs C.F. Otieno & Co. Advocates filed a Replying Affidavit on 30/11/2022.

Interested Party's Replying Affidavit

10. In her Replying Affidavit, the Interested Party deponed that she is the Administratrix of the estate of the late Lawrence Kibiego Kosgei, as appointed in Kapsabet PM Succession Cause No. 19 of 2015, and the Applicant is the Administrator of the estate of the late Kiplagat Arap Cheruiyot, as appointed in Kapsabet SPM Succession Cause No. 155 of 2015. She deponed that her late husband, Lawrence Kibiego Kosgei, had 2 parcels of land, namely, Nandi/Baraton/691 and Nandi/Baraton/775 and, that the Applicant included the Interested Party's husband's said parcel number Nandi/Baraton/691 when he applied for Letters of Administration in Kapsabet SPM Succession Cause No. 155 of 2015, that upon realizing that the Kapsabet Court had no jurisdiction to issue the Grant, she (Interested Party) filed a fresh Petition, namely, Eldoret High Court Succession Cause No. 325 of 2015 in which Grant was confirmed on 16/07/2018.
11. She deponed further that the original Title Deed to the parcel number Nandi/Baraton/691 had been surrendered to the Nandi County Lands Registry by Advocate Kipkosgei Choge, who had earlier acted for the Interested Party in the Kapsabet Succession Cause. She also deponed that the Applicant has no relation to her and had petitioned for a Grant of Letters of Administration to the estate of his grandfather, Kiplagat Arap Cheruiyot in Kapsabet SPM Succession Cause No. 155 of 2015, that Nandi/Baraton/691 originally belonged to Kiplagat Arap Cheruiyot but it was transferred to the Interested Party's late husband, Lawrence Kibiego Kosgei on 7/07/1976 and a Title Deed issued in his favour on 24/09/1976. She therefore contended that as at the time that the Petitions for both the estates cited herein were filed, Nandi/Baraton/691 was registered in the name of the Interested Party's said husband, that at no point in time did she ever report the Title Deed thereof as having been lost and/or misplaced, and that the Applicant listed the property as part of the estate of his said grandfather, a fact he knew to be false.
12. She contended further that the Green Card for the property was presented to the Magistrate's Court but despite the anomaly, the Magistrate still went ahead and confirmed the Grant and thus allocated



- the entire parcel of land belonging to the Interested Party's husband, to the Applicant, that the actions of the Magistrate amounted to a gross abuse of judicial powers and caused the Interested Party's late husband's estate serious loss that she is trying to reverse in a suit that is to be filed at any time now as the paperwork is ready. She contended further that the Applicant had filed a caveat in Kapsabet SPM Succession Cause No. 19 of 2015 (the Interested Party's husband's estate Cause) in which the Interested Party was to cross-examine the Applicant but the Applicant avoided to attend Court.
13. She deponed that in the interim, the Head of Station at Kapsabet Court, who incidentally was also the trial Magistrate introduced a procedure (only known in the Court of Appeal and in the Supreme Court, but unknown at the subordinate Courts) whereof matters under Certificate of Urgency were registered separately, new files opened and the files taken before the Presiding Magistrate without the benefit of the parent file. She contended that the Applicant found a lifeline in this unauthorized new procedure, abandoned his Application for Review and filed another Application in a new file, without serving it upon the Interested Party, and which was registered as Kapsabet SPM Certificate No. 38 of 2017, and applied to lift the caveat that he himself had lodged in Kapsabet PM Succession Cause No. 19 of 2015. She then deponed that now armed with the confirmed Grant in Kapsabet SPM Succession Cause No. 155 of 2015, where he had been irregularly and illegally awarded Nandi/Baraton/691, the Applicant also applied for removal of the Interested Party as Administrator in respect of Nandi/Baraton/691 and that he (Applicant) be appointed in her place, and that with this fraudulent arrangement, the Applicant was able to register the land in his name.
 14. She also deponed that the Applicant caused a Gazette Notice to be published to the effect that the Title Deed for the property Nandi/Baraton/691, was misplaced, a fact which was false, that as at the date of the said Gazette Notice on 7/07/2017, the Applicant's said grandfather, Kiplagat Arap Cheruiyot was not alive, the land in question was not registered in his name and the Title Deed was not lost or misplaced as it was lying in the Nandi County Lands Registry having been deposited there by the Interested Party's Advocate and that therefore the Gazette Notice was false. The Interested Party deponed further that she has obtained a confirmed Grant to the estate of her late husband in Eldoret High Court Succession Cause No. 325 of 2015, and she has been pursuing a criminal prosecution of the Applicant which has run into rough waters with the police officers fearing to take statements from the two Magistrates who handled the two files at the Kapsabet Court and also by the Applicant's act obtaining orders in this Cause and that therefore, she has decided to pursue cancellation of the Applicant's name in the Title Deed for Nandi/Baraton/691 through a civil suit and the criminal process to run concurrently.
 15. She urged that the Applicant's actions are detrimental to the Interested Party's interests, those of her children and the estate of her late husband and deprives them of the ownership and use of the said property, that there was no cross-Petition by the Applicant and his presence in the Interested Party's Petition was not as an Objector and he was equally not one of the beneficiaries to the Interested Party's husband's estate. According to her therefore, the Applicant had no right to any portion of that estate, and that the Applicant, when he obtained the orders, also irregularly purported to be acting for himself when he still had an Advocate on record. In conclusion, she deponed that the instant Application is a gross abuse of the Court process and is aimed at avoiding criminal prosecution for a deliberate and fraudulent act committed by the Applicant and that the criminal process in Kapsabet PM Criminal Case No. 2481 of 2018, should be allowed to take its course and serve as a warning and a lesson to others with a similar mindset.



Hearing of the Appeal

16. The Respondent, Director of Public Prosecutions (DPP), did not participate in the matter. On several occasions, I directed that he be served and indeed, several Affidavits of Service have been filed on several occasions herein, to demonstrate that such service was effected.
17. It was then agreed between the ex parte Applicant and the Interested Party, and I directed, that the Application be canvassed by way of written Submissions. Pursuant thereto, the ex parte Applicant, through his new Advocates, Martim & Co. Advocates, filed his Submissions on 14/12/2023. On the part of the Interested Party, however, up to the time of concluding this Judgment, I had not come across any Submissions filed by or on her behalf

Applicant's Submissions

18. In respect to the purpose of Judicial Review, Counsel cited the case of Municipal Council of Mombasa vs Republic, Umoja Consultants Ltd, Nairobi Civil Appeal No. 185 of 2007 [2002] to the effect that in Judicial Review, the Court is only concerned with the process leading to the making of the decision and not to act as a Court of Appeal over the decider and does not involve going into the merits of the decision. He also cited the case of Pastoli vs Kabale District Local Government Canal & Others (2008) 2 EA 300 to the effect that in order to succeed in an Application for Judicial Review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.
19. In regard to the prayer for Certiorari, Counsel submitted that Section 47 of the *Law of Succession Act* empowers the Magistrate's Court to hear and determine Succession matters and issue and confirm grants, that the Court issuing grants confirms whether the Applicants are heirs to the estate, that any decision made by the Magistrate's Court is subject to Appeal and that therefore, disputing parties have this avenue for remedy. He submitted that there is a Succession Cause in which revocation of the Grant issued to the Applicant has been sought, that being a matter for determination before the High Court, the intended charges would amount to the Applicant being subjected to double jeopardy as in any event, there is no criminal element in the Court documents. He cited the case of Keneth Litswa Asega v Alice Muhonja [2016] eKLR. According to Counsel therefore, the Respondent has acted ultra vires and irrationally in commencing proceedings against the Applicant yet the matter is before the High Court for determination of the fate of the Grant issued by the Magistrate Court.
20. In respect to the prayer for Prohibition, Counsel cited Article 157(11) of *the Constitution* of Kenya, which, he submitted, provides that in exercising his powers, the DPP shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. He reiterated that the provision imposes upon the DPP the duty to act in a judicious and reasonable/rational manner, in utmost good faith, with fairness and without malice towards the parties concerned before the decision is made. He reiterated that in this case, the DPP acted capriciously, maliciously and in total disregard to the said provisions, that the decision was made in violation of the rules of natural justice as the Applicant was not afforded the opportunity to be heard or to make representations before making the decision which adversely affects him. He then prayed that the Application be allowed with costs to the Applicant.

Determination

21. The issue for determination herein is "whether the decision by the DPP to institute a criminal prosecution case against the Applicant when there is an ongoing Succession Cause before the High



Court allegedly dealing with the same facts, should be terminated by this Court by issuance of orders of Certiorari and Prohibition”.

22. Article 47 of *the Constitution* provides for the right to a fair Administrative Action and to give effect to the provision, Parliament enacted the *Fair Administrative Action Act* No. 4 of 2015. Section 2 of that Act defines an “administrative action” to include – “the powers, functions and duties exercised by authorities or quasi-judicial tribunals”; or “any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates”.
23. The duty of a Court in Judicial Review proceedings was set out in the case of *Pastoli v Kabale District Local Government Council and Others* (2008) 2 E.A 300 as follows:

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ... Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provisions of a law or its principles are instances of illegality Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards ... Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.”

24. As was also restated in the Court of Appeal case of *Republic Vs Kenya Revenue Authority Ex-parte Yaya Towers Limited* (2008) eKLR, the remedy of judicial review is concerned with reviewing, not the merits of the decision of which the application for judicial review is made, but the decision-making process itself.
25. Further, Mativo J (as he then was) in the case of *R vs Chief Magistrate Court Milimani and Director of Public Prosecutions & 3 Others* JR Misc. Application No. 662 of 2018 (eKLR) restated the same principle as follows

“Judicial Review is about the decision-making process, not the decision itself. The role of the court in Judicial Review is supervisory. It is not an appeal and should not attempt to adopt the 'forbidden appellate approach'. Judicial Review is the review by a judge of the High Court of a decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised.”

26. Regarding whether the criminal prosecution instituted by the DPP violates the Applicant’s rights, although the DPP is not subject to the control of any person or authority in exercising its mandate as conferred by *the Constitution*, the exercise of that power and discretion must be exercised in accordance with the law. Where it is demonstrated that the DPP has overstepped his mandate by misusing his powers, the High Court is empowered to, and should intervene. Abuse of such discretionary powers would include, for instance, the employment of extraneous factors to achieve ulterior goals separate



from ends of justice. On this point, I cite the case of Kuria -vs- Attorney General [2002], in which the Court stated as follows:

“The court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is the duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform a stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles which underlie the society's sense of fair play and decency and/or where the proceedings are oppressive or vexatious"

27. Similarly, in the case of Joram Mwenda Guantai vs. The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170, the Court of Appeal held as follows:

“...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. 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 the High Court has an inherent power and the 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.”

28. Although therefore the mandate to prosecute rests with the DPP as enshrined under Article 157 of *the Constitution*, in exercising this mandate, the DPP is required to review and determine the “prosecutability” of cases forwarded for his action. As aforesaid, the DPP is under obligation to exercise this discretion judiciously.

29. The procedure is that prosecution is preceded by an investigation which tackles the question whether there was an offence committed and *the Constitution* and the *National Police Service Act* give the Police the mandate to conduct such investigations. On this aspect, I refer to the following remarks of Warsame J (as he then was) made in the case of Republic vs. Commissioner of Police and Another ex-parte Michael Monari & Another [2012] eKLR:

“The Police have a duty to investigate once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.”

30. In Douglas Maina Mwangi vs. KRA & Another, 213 eKLR, Majanja J also addressed the same issue in the follow manner:

“ 15. The office of the Director of Public Prosecution under Article 157 of *the Constitution* is an independent office under *the Constitution* like its predecessor office, the office of the Attorney General under section 26 of the former Constitution. When dealing with the decision as to whether or not to prosecute, the office exercises independent judgment and this court cannot interfere unless it is shown that the exercise is contrary to *the Constitution*, in



bad faith or amounts to an abuse of process. This has been the holding of this court in several decided cases

31. As already stated therefore, this Court has the constitutional mandate and power to stop any criminal prosecution which has been demonstrated to have been preferred maliciously, with ulterior or selfish reasons. That is not in doubt. However, in exercising that power, the Court must also be cautious and careful not to overstep or exceed its mandate by usurping or unduly interfering with the prosecutorial powers of the DPP similarly donated by the same Constitution. For the need for such caution, I again refer to the case of Republic vs. Commissioner of Police and Another ex-parte Michael Monari (supra) where Warsame J (as he then was), expressed himself as follows:

“Under Article 157(4) of *the Constitution*, the Director shall have power to direct police to investigate any information or allegation of a criminal conduct and it is mandatory for the police to comply with any directions or instructions given by the Director of Public Prosecution. Under article 157(10) the Director of Public Prosecution shall not require the consent of any person or authority for commencement of criminal proceedings and shall not be under the direction or control of any person.

It is not the duty of the court to go into the merits and demerits of any intended charges to be preferred against any party. It is the function of the court before which the charge shall be placed and which shall conduct the intended trial to determine the veracity and the merit of any evidence to be tendered against an accused person. It would be improper for this court to try and/or attempt to determine the intended criminal case which is not before it. There is no evidence to show that the respondents exceeded jurisdiction, breached rules of natural justice or considered extraneous matters or were actuated by malice in undertaking the investigations against the applicants. The purpose of criminal proceedings is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and on that account is deserving punishment.”

32. In this instant case, the Applicant’s complaint is against the DPP’s decision to charge him on matters that, according to him, are under active civil litigation before the Succession Court. It is however important to mention that Section 193A of the Criminal Procedure Code contemplates both civil and criminal proceedings going on side by side without interfering with each other. It provides as follows:

“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.”

33. In analyzing Section 193A above, the Court of Appeal in the case of Commissioner of Police and Director of Criminal Investigations Department vs. Kenya Commercial Bank and Others Nairobi Civil Appeal No. 56 of 2012 [2013] eKLR stated as follows:

“While the law (section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that the power must be exercised responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings? It is not in the



public interest or in the interest of administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and travesty of justice for the police to be involved in the settlement of what is purely dispute litigated in court. This is a case more suitable for determination in the civil court where it has been since 1992, than in a criminal court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations.

34. Further, in regard to Section 193A above, in the case of *Kuria & 3 Others vs. AG* (2002) 2 KLR, the following was stated:

“... The normal procedure in the co-existence of civil and criminal proceedings is to stay the civil proceedings pending the determination of the criminal case as the determination of civil rights and obligations are not the subject of a criminal prosecution ... A prerogative order should only be granted where there is an abuse of the process of the law, which will have the effect of stopping the prosecution already commenced. There should be concrete grounds for supposing that the continued prosecution of criminal case manifests an abuse of the judicial procedure, much that the public interest would be best served by the staying of the prosecution It is not enough to state 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 the absence of concrete grounds... it is not mechanical enough that the existence of a civil suit precluded the institution of criminal proceedings based on the same set of facts. The effect of criminal prosecution on an accused person is adverse but so also are their purpose in the society, which are immense... an order of prohibition cannot also be given without any evidence that there is manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial. (emphasis added).

35. Similarly, in the case of *Amir Lodges Ltd & another v Mohammed Omar Shariff & another* [2022] eKLR, Mrima J stated as follows:

“43. From the discussions in the superior Courts decisions and the other comparative decisions from foreign jurisdictions, the rule of the thumb in respect of concurrent criminal and civil proceedings based on similar set of facts and circumstances is that the criminal case ought to proceed unless it can be demonstrated that the prosecution of the criminal case will either result to infringement of the rights and fundamental freedoms of the accused persons or will lead to the contravention of *the Constitution*.

44. In agreeing with the above position, I will attempt two practical assumptions based on the facts in this matter. The assumptions are on terminating the investigations or staying the civil case in favour of the investigations.

.....

49. From the two scenarios, there is, therefore, logic in the general position that where there are concurrent criminal and civil cases based on similar facts and circumstances, the criminal case or investigations ought to be first dealt with.



50. Having said so, it remains clear in the mind of this Court that the foregoing general position is subject to exceptions including whether the criminal case infringes the rights and fundamental freedoms of the accused or is in contravention of *the Constitution*.
51. This Court, therefore, finds and hold that a Court cannot terminate a criminal case or criminal investigations solely on the basis of a pending civil case based on similar facts and circumstances.
52. For a Court to so halt a criminal case or investigations, there must be more to the pendency of a civil claim. In this case, the Petitioners attempted to demonstrate how the investigations will prejudice the civil case and infringe their right to fair trial. However, from the foregoing analysis, this Court is unable to agree with the Petitioners. I say so because the Petitioner's claim is largely based on the fact that they filed a civil claim. The allegations of impropriety on the part of the Respondents remain too remote, if any.
53. In the end, this Court is persuaded that the Petitioners have not demonstrated any prima facie case at the moment. The position may, however, change at the main hearing of the Petition.”
36. It is therefore not in doubt, that in spite of the provisions of Section 193A above, in appropriate cases, the High Court can stop a criminal prosecution if the issues involved are matters already under active litigation in the civil Courts. However, a Court will not terminate a criminal case solely on the basis of a pending civil case being based on similar facts and circumstances. It must be clearly demonstrated that the criminal case infringes the rights and fundamental freedoms of the accused or is in contravention of *the Constitution*.
37. Applying the principles enunciated in the authorities cited above, I observe that the Applicant's argument is that the criminal case, Kapsabet Principal Magistrate's Court Criminal Case No. 2481 of 2018, should be terminated because there is ongoing litigation (Application for Revocation of Grant) in Eldoret High Court Miscellaneous Succession Cause No. 2 of 2017 in which the same issue of alleged fraud in acquisition of the title to the property known as Nandi/Baraton/691 which is the same charge preferred in the criminal case, has also been raised by the Interested Party and is therefore also in contention therein. As aforesaid, leave to commence Judicial Review proceedings to challenge the Respondent's decision to charge the Applicant with the criminal case was granted in Eldoret High Court Miscellaneous Judicial Review Cause No. 68 of 2019 on 5/04/2019. As further stated, the leave granted was also ordered to operate as a stay of the criminal case. The criminal case has therefore been stayed for 5 years now.
38. Strangely, neither of the parties found it fit to address the Court on the status of the said Eldoret High Court Miscellaneous Succession Cause No. 2 of 2017. Considering that it is now 5 years since the stay was granted, I got curious and called for the Court file in the said Eldoret High Court Miscellaneous Succession Cause No. 2 of 2017. After a very long and arduous search, it was eventually traced. To my astonishment, the Application for Revocation for Grant had clearly stalled with no activity at all. The last time that the parties attended Court for any proceeding was on 17/10/2022. Basically, no steps have been taken to prosecute the Application and in fact, the case has no Court attendance date for the taking of any action or step. In the Court Registry, it is categorized as a dormant file and the same ought to have been therefore closed by now. It is the kind of files that unnecessarily clog the Court system and add to the presumed high volume of presumed backlog of cases within the Court system.



- 39. In view thereof, would it really be justiciable for the criminal case to continue being held at ransom by a civil action that has for all intents and purposes stalled? I do not think so. Granted, the issue of fraud in the said Eldoret High Court Miscellaneous Succession Cause No. 2 of 2017 was brought up by the Interested Party who filed the Application seeking Revocation of the Grant of Letters of Administration obtained by the Applicant and there is also no explanation why the Interested Party has never really appeared keen to prosecute the Application. I note that even in this instant action, the Interested Party’s Counsel has also not been actively participating and has regularly skipped Court attendances and also never bothered to file Submissions as directed by the Court. Be that as it may, I do not think that it will be an act of judicial wisdom to allow and, in fact, assist the Applicant to use or to continue using the Interested Party’s lethargy in prosecuting her said Application to his advantage and to continue citing the same to avoid the criminal case. Although it is clear that the Applicant would love that the delay and/or inaction in the prosecution of the Interested Party’s Application in the said Eldoret High Court Miscellaneous Succession Cause No. 2 of 2017 persists as it is his shield against the criminal prosecution, allowing him to continue doing so would amount to abdication of this Court’s duty.
- 40. In the circumstances, I do not find any exceptional circumstances that would warrant this Court to continue shielding the Applicant from the criminal case when the civil or Succession clung on has remained dormant for 5 years and has for all intents and purposes, long stalled. Granting the Application for Certiorari and/or Prohibition would, in my view, amount to a clear case of abuse of the judicial process.
- 41. Having found as above, I see no reason to belabour the issues whether the Respondent, in preferring the criminal case, was actuated by malice or acted illegally, or irrationally or was guilty of procedural impropriety. Even if such was the case at the relevant time, that consideration is no longer presently worthy of argument considering the dormancy of the said Eldoret High Court Miscellaneous Succession Cause No. 2 of 2017.
- 42. In any event, while the basis of the charges preferred against the Applicant was his alleged actions committed in the Succession Cause, he has not alleged that the charges are unknown in law. Where an alleged criminal act is committed within the course of a civil or probate matter, nothing prohibits the institution of criminal prosecution against the suspected perpetrator of such acts. This, indeed, is the import of Section 193A of the Criminal Procedure Code, which as aforesaid, permits civil and criminal proceedings to proceed concurrently.

Final Orders

- 43. In the premises, the Notice of Motion dated 25/04/2019 is hereby dismissed with no order on costs since the Respondent (DPP), despite there being evidence of service upon him, did not participate in the case and the Interested Party also did not actively continue participating, even after initially filing a lengthy and arguable Replying Affidavit.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 6TH DAY OF NOVEMBER 2024

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WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

Kipngetch h/b for Martim for ex parte Applicant



N/A for other parties

Court Assistant: Brian Kimathi

