



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

JUDICIAL REVIEW NO 1 OF 2020

IN THE MATTER OF CONTRAVENTION OF ARTICLE 27, 28, 29, 47 AND 48 OF THE CONSTITUTION

AND

IN THE MATTER OF ARTICLES 165 (3) (B) AND 165 (4) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE PROVISIONS OF POLICE ACT, CAP 84, LAWS OF KENYA

AND

IN THE MATTER OF ARTICLE 47 OF THE CONSTITUTION OF KENYA

AND IN THE MATTER OF AN APPLICATION BY JOHANA KIPNGENO LANGAT FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE DECISION OF THE KILGORIS CHIEF MAGISTRATE'S COURT IN CRIMINAL CASE NO. 873 OF 2018 ON THE 29TH FEBRUARY 2020

REPUBLIC.....APPLICANT

VERSUS

THE CHIEF MAGISTRATE, KILGORIS.....RESPONDENT

JOHANA KIPNGENO LANGAT.....EX -PARTE APPLICANT

RULING

Stay of criminal proceedings

1. Mr. Bosek applied for stay of Kilgoris CMCCRC No. 873 of 2018. I note, however, from the record that Bwonwonga J. on 22/7/2020 declined to order leave to apply for order of mandamus to operate as stay of the criminal proceedings. Nonetheless, I will determine Mr. Bosek's request on merit.

2. The major bone of contention is that a civil case Kilgoris ELC No. 46 of 2018 is pending in court over ownership of the land in issue in the criminal case. He was of the view that since ownership of the land is in dispute in a civil claim, the criminal proceedings are untenable and abuse of court process. I note according to the applicant's affidavit, it averred that the criminal case was instituted to harass, intimidate and evict people from the suit land so that the complainant may till the land. The applicant stated that he and other 34 people instituted the ELC case to challenge the fraudulent acquisition of title to the suit property by the complainant. They claim that they have lived on the land for 50 years.

3. According to Mr. Bosek, ownership is under challenge in the ELC case. Therefore, the criminal case in an abuse of process of court and should be stopped.

4. The prosecution filed submissions and argued that section 193A of CPC permits civil and criminal case on same issue or subject matter to be instituted concurrently. It was their argument that mere pendency of a civil claim is not a bar to criminal prosecution over same subject matter. To them the applicant will be afforded an opportunity to defend himself and adduce evidence in the criminal trial.

5. The DPP argued further that the mandate of DPP to prosecute is given by the constitution. Therefore, in the absence of proper justification, the court should not interfere with this powers lest it should prejudice the DPP's mandate to prosecute. They stated that the applicant did not appeal against the trial magistrate's decision rejecting their plea for stay of proceedings. They beseeched court to dismiss the application.

ANALYSIS AND DETERMINATION

6. Should the court stay criminal proceeding KILGORIS CMCCRC No. 873 of 2018 against the ex parte applicant?

7. For the court to stay a criminal proceeding, the applicant must show that the criminal proceeding is being used oppressively or it was instituted for reasons other than to bring the accused to justice. Abuse of process should be established.

8. It seems the applicant is making a claim that, because there is an existing civil case on the ownership of the land in court, the criminal cases cannot hold except as an abuse of court process. Section 193A of the CPC permits concurrent litigation of criminal as well as civil proceedings over same subject matter or issue. See the section below: -

193A. 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.

9. Therefore, mere existence of a civil case on the same subject matter as, is not a bar to institution of or continuation with criminal proceedings thereto. See *Kuria & 3 others vs. AG* [2000] 2 KLR 69. Except, however, in exercise of the power of prosecution, the DPP is guided by article 157(11) of the Constitution which provides as follows: -

157 (11) In exercising the powers conferred by this Article, the Director of Public Prosecutions 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.

10. In instituting criminal charges against a person, the DPP should act in good faith and be guided by public interest to bring criminals to justice as opposed to helping a complainant to gain collateral advantage towards settling a civil claim. The DPP should also ensure that cases which meet the evidentiary threshold go to court to avoid persons being arraigned on flimsy charges. Here, investigations must be properly grounded such that the DPP is satisfied that a criminal offence has been committed and is supported by evidence which he honestly believes will sustain a trial and yield conviction.

11. Article 157(11) of the Constitution also means that the DPP should prevent and avoid abuse of criminal process by complainants, say, to punish or oppress a person for whatever reason-political or otherwise-, or for collateral advantage such as to force settlement of a civil debt or transaction or dispute. He must always use the criminal process for purposes of bringing criminals to justice.

12. The interest of administration of justice stated in article 157(11) of the Constitution refers to adherence to the tenets of fair trial which starts with the process of investigations all the way to sentencing.

13. A violation of article 157(11) of the Constitution would certainly be abuse of public power bestowed upon the DPP by the people. Proof thereof is therefore necessary.

14. Is this the case live? Other than stating that there is a civil case on ownership of the land in question, there is no evidence that the prosecution is using the criminal case to derive collateral advantage to the complainant in the civil case or in the use of the land. I am aware the complainant has alleged that the criminal case is intended to frustrate them so that they are evicted to pave way for the complainant to take over the land and till it. I should state that institution of criminal proceedings per se does not mean eviction. Similarly, in light of the charge herein, which is forcible entry contrary to section 90 of the Penal Code, the claims herein constitute defenses to be tendered in the trial.

15. I must repeat that DPP has a constitutional mandate under article 157 to prosecute criminal cases. The mandate should not be disrupted unless for good reason; that it is being exercised in violation of the Constitution or rights and fundamental freedoms of the applicant. I should also quickly state that a criminal trial is constitutionally mandated and is clothed with staple protection for the accused. Therefore, being subjected to a criminal trial is not *per se* oppressive or a violation of a person's rights. Such succinct factors that the process is being used oppressively or on a charge of an offence not known to law, or for purposes of obtaining collateral or other advantages other than bringing the applicant to justice, etc. must be established. I find none of these things here. Accordingly, I reject the request for stay of criminal proceedings at Kilgoris CMCCRC No. 873 of 2018.

16. The substantive Notice of Motion be fixed for hearing. I however, note that only the first page of the Notice of Motion is in the file. The ex parte applicant to provide a copy of the Notice of Motion to the court.

Dated, signed and delivered at NAROK through Teams Online Application this 3rd day of February, 2021

F. GIKONYO

JUDGE

In the Presence of:

1. Ms Torosi for the Applicant
2. Mr. Kasaso – Court Assistant

F. GIKONYO

JUDGE