



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

PETITION NO. 01 OF 2019

EBRAHIM OMWENYI AMBWERE.....PETITIONER

VERSES

THE DISTRICT CRIMINAL INVESTIGATING

OFFICER KWANZA DIVISION.....1ST RESPONDENT

THE OFFICE OF THE DIRECTOR

OF PUBLIC PROSECUTION.....2ND RESPONDENT

RULING

1 By his application dated 16th January 2019 the applicant prays for temporary orders of injunction to restrain the respondents jointly from instituting criminal proceedings against him. The matter came under certificate of urgency and this court did certify the same as urgent and ordered the respondents to be served.

2 The said application is based on the supporting affidavit of the applicant sworn on the even date. The crux of his application is that the issues which the respondents seeks to charge him are purely civil in nature namely and old debt between him and one Simon Lodeki.

3 He deponed that the same matter is pending before the Environment and Land court at Kitale being case number 98 of 2018. He has attached a copy of the court order which the said court has issued some restraining orders. In the said order Paul Amisi Sagara and Simon Ludeki are parties.

4 The next annexure to the said supporting affidavit is a bond and bail demand from the police in which they intend to charge the applicant with the offence of obtaining money by false pretences.

5 It is the opinion of the applicant that the matter is civil in nature which should be handled by the civil court and not through the criminal trial. He concluded by stating that the whole scheme is to use the criminal process to pressurise him to settle the civil case.

6 One **PC DANCUN MWANGI** through the replying affidavit sworn on 1st February 2019 avers that the issue surrounding his investigation has to do with land parcel number **TRANS NZOIA /LIYAVO/245** and parcel number 246 as claimed by the applicant.

7 That the issues at the ELC court are different from the issues he was investigating.

8 The applicant countered this vide the supplementary affidavit which stated that the matter at the lands court was not specific on the parcel number but the receipts which the respondents relied on were the same.

9 Apparently none of the parties in the civil case including the complainant choose to file any affidavit in support of what the investigator stated.

10 After perusing the application and the relevant supporting affidavits especially that of the applicant I find that he has established prima facie that the issues between him and the respondent revolves around a transaction in rent and sale of land. In my view, the issues are for now, appear civil in nature and the civil court should be able to litigate.

11 It is obvious that nothing can subsequently stop the respondent from pursuing criminal charges against the applicant but for now I find that the Land and Environment court is seized of the matter.

12 It was held in the case of *KIGOROGOLO verses RUESHERIKA (1969) EA 426* that;

“when a remedy is elsewhere provided and available to a person to enforce an order of a civil court in his favour ,I see no valid reason why to invoke the assistance of the criminal law for the purpose of enforcement. For in a criminal case a person is put in jeopardy and his personal liberty is involved.....”

13 For now let the applicant enjoy his liberty and the parties pursue their claim through a civil process as by law provided.

14 A temporary order is therefore issued stopping the respondents, their servants and or agents from pursuing a criminal action against the applicant only to the extent that it relates to the matter pending before the Environment and Land court stated above.

15 Costs in the cause.

Signed, sealed and delivered this 13th day of May, 2019.

.....

H.K CHEMITEI

JUDGE

13/5/19

In the presence of:

Mr. Khisa for the Petitioner

No appearance for the Respondents

Court Assistant – kiron

Ruling read in open court.