



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAROK**

**MISC CR. APP. NO 51 OF 2018**

**PHILIPO SEKENDO..... APPLICANT**

**VERSUS**

**DPP.....1<sup>ST</sup> RESPONDENT**

**CHIEF MAGISTRATE COURT, NAROK.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The applicant through his notice of motion dated 23/4/2018 seeks the following orders from this court.

*i. ... spent*

ii. An order to stay criminal proceedings in Criminal Case No. 268 of 2018 before the Chief Magistrate's Court in Narok pending the hearing and determination of Land Case No. 83 of 2017 before the ELC Court in Narok.

iii. An order that costs of this application be provided for.

2. The application is brought under section 3A of the Civil Procedure Act (Cap 21) Laws of Kenya, Order 51 of the 2010 Civil Procedure Rules and articles 47, 48 and 50 of the 2010 Constitution of Kenya.

3. The application is supported by six grounds that are set on the face of the notice of motion. The major grounds are as follows. First, there is a pending land case No. 83 of 2017 between the applicant and Samaire Ole Montet and Tobiko Ole Montet, which is yet to be determined. Second, the said land, the subject matter of this suit is registered in the name of the father of the applicant, who is deceased.

4. Furthermore, the applicant states that there are several civil and criminal matters that are pending in the magistrate's court in Narok involving the suit land namely:

i. Civil Case NO. 80 of 2008

ii. Criminal Case No. 1177 of 2016

iii. Criminal Case No. 15 of 2018

iv. Civil Case No. 83 of 2017

v. A letter of complaint in respect of an assault against the applicant by persons known to him addressed to the Director of Public Prosecutions dated 1/8/2016

In view of these cases the applicant states that the ongoing Criminal Case No. 268 of 2018 will be prejudicial to him and will escalate the position on the ground and cause a breach of peace.

The applicant therefore submits that the land dispute be determined first. This will then be clear as to who is encroaching on the other's land.

5. In addition to the foregoing, the applicant has deponed to an eleven (11) paragraphs supporting affidavit. He has deponed to the following matters. The applicant is an accused in Criminal Case No.268 of 2018 and one of the several parties in other civil and criminal cases. Furthermore, the applicant has stated that there is a long standing dispute between his family and their neighbour among them, Tobiko Ole Montet, who filed land case No.1034 of 2001, now ELC Case No.83 of 2018, which is still pending hearing and determination.

6. In the light of the affidavit evidence, the rival submissions of both counsel and the applicable law, I find the following to be the issues for determination.

- i. Whether or not the prosecution of the applicant on charges of grievous harm and assault is an abuse of the court process.
- ii. Who bears the costs of this application?

#### **ISSUE 1**

7. The applicant seeks stay of the criminal proceedings against the applicant on the grounds that there is pending in Land Court (ELC) Case No. 83 of 2017, which is between the applicant on the one hand, and Samaire ole Montet and Tobiko ole Montet, on the other hand. It is clear that the victim of the alleged offence of grievous harm in count 1 is Victor Leshan Kuspel. In count 2, the victim of the alleged offence of assault is Tryson Kamau Mwaura. Additionally, the victim of alleged offence of assault in count 3 is Daniel Saitabau Montet.

8. It is therefore clear that the victims in those three counts are not parties to the land dispute namely ELC Case No. 83 of 2017. Furthermore according to section 193A of the Criminal Procedure Code [Cap 75] Laws of Kenya, directs that: *“Notwithstanding the provisions of any other 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. In other words, the provisions of section 193A allow both civil and criminal proceedings to run concurrently. It should always be borne in mind the criminal law is designed to operate on individuals and not families. It is concerned with the guilt or innocence of an individual accused person. There is no such thing as family or communal guilt.

10. Paragraph 2 of the applicant’s supporting affidavit states: *“That there is a long pending land dispute involving our family and our neighbour amongst them Ole Montet filed in 2001 (Civil case No. 1034 of 2001 now ELC No. 83 of 2018 which has not been determined to date”* It seems from this paragraph that the land dispute involves one family and its neighbour. The applicant’s affidavit evidence does not show any connection between the applicant as an accused person and the land dispute between the parties in ELC case No.83 of 2017.

The upshot of the foregoing is that the application fails and is hereby dismissed.

**Ruling delivered in open court this 18<sup>th</sup> day of July 2018** in the presence of Mr. Kiptoo holding brief for Mr. Lempaa and Ms Nyaroita for the respondents.

**J. M. BWONWONGA**

**JUDGE**

**18/7/2018**