



**IN THE HIGH COURT AT NAIROBI**

**MILIMANI LAW COURTS**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 161 OF 2014**

**BETWEEN**

**LEE MWATHI KIMANI ..... PETITIONER**

**AND**

**DIRECTOR OF PUBLIC**

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

**DIRECTOR OF CRIMINAL**

**INVESTIGATION DEPARTMENT ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**JAMES WAMBUGU NDIANG'UI.....INTERESTED PARTY**

**JUDGMENT**

1. The petitioner has moved the Court by the petition dated 8<sup>th</sup> April 2014 and he seeks the following reliefs set out in the petition.
  - i. *A declaration that the respondents have infringed the petitioner's constitutional rights contrary to Article 27, 47, 48 and 50 of the Constitution of Kenya.*
  - ii. *An injunction restraining the Respondents either jointly or severally through any person claiming their authority from prosecuting the Petitioner in Criminal Case No. 177 of 2014 or in any matter concerning Land Parcel L R NO. NAIROBI BLOCK 97/482 situated at TASSIA ESTATE IN NAIROBI until the conclusion of High Court Civil Appeal No. 618 of 2013 and any reviews or appeal therefrom.*
  - iii. *And any such other order(s) as this Honourable Court shall deem just in the circumstances.*
2. The petitioner is facing a charge of forcible detainer contrary to **section 91** of the **Penal Code (Chapter 63 of the Laws of Kenya)** as read with **section 36** of the **Penal Code** before the **Nairobi Chief Magistrates Court, Criminal Case No. No. 177 of 2014**. The particulars of the charge are that, *“in the month of November 2013 at Tassia Estate in Embakasi within Nairobi County, being in actual possession of Plot No. NAIROBI/BLOCK 97/482 measuring 0.0675/BLOCK Ha belonging to JAMES WAMBUGU NDIANGUI without any colour of right, held the said land in a*

*manner likely to cause a breach of the peace against the said JAMES WAMBUGU NDIANGUI who was entitled by law to possession of the said land.”*

3. I have read the depositions and heard the evidence of the investigating officer and it is clear that there is a dispute as to the ownership of the subject property. The complainant, who is the interested party, filed a civil suit, **Nairobi CMCC No. 6700 of 2013 (Lee Mwanthi Kimani v James Wambugu Ndiangu’i)** in which he prayed for a permanent injunction to be issued against the defendant restraining him from interfering with the subject property on the basis that he was the registered owner having been issued with a certificate of lease by the National Social Security Fund.
4. The subordinate court issued an injunctive order following an interlocutory application. The effect of the order was to restrain the petitioner from entering, erecting any structures or in any interfering or trespassing the subject property pending hearing and determination of the suit. The order provoked an appeal to the High Court by the petitioner; **Civil Appeal No. 618 of 2013**. In that appeal, the petitioner challenges the injunctive orders and seeks the same to be set aside.
5. It is not in dispute that the appeal is still pending and on 6<sup>th</sup> December 2013, the parties appeared before the High Court (Onyancha J) and recorded a consent staying the orders of stay issued by the subordinate court. The application for stay pending appeal is scheduled for hearing inter parties hearing on 17<sup>th</sup> June 2014.
6. What is important to note at this stage is that by virtue of the order of the High Court, obtained by consent, the petitioner is entitled to remain on the suit property pending determination of the Motion which may or may not be granted pending the appeal. The effect on the *status quo* is that the petitioner remains on the property.
7. On the other hand and given the nature of the charge, if the pending trial proceeds and there is a conviction, the petitioner will be required to vacate the property. In order to establish its case, the prosecution must of necessity prove ownership of the property which is the same issue that the interested party brought to the subordinate court for consideration.
8. I am aware that this court should be slow to intervene in the prosecution of cases before the subordinate court as the discretion and authority to prosecute offenders is reserved for the Director of Public Prosecutions under **Article 157** of the Constitution. I am also alive to the provisions of **section 193A** of **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)** that permit criminal cases and civil cases based on the same facts to proceed concurrently. However, even in such cases the court must have regard to the facts in each case and determine whether the petitioner’s rights are violated or there is an abuse of the court process.
9. As I have outlined above, the parallel proceedings may have conflicting outcomes which is not a salutary position for the High Court and subordinate court to find themselves in. The High Court has the jurisdiction and duty to protect the integrity of the court process. In my view such process would be achieved by staying the criminal case in these circumstances.
10. My reason for taking this approach is that, the issue of ownership is common to both cases and it is the complainant who initiated the civil case. The High Court has issued consent orders which would in effect negate a decision in favour of the prosecution in the criminal case. It is for this reason that I grant an order of stay.
11. I therefore issue the following orders;
  - a. **Nairobi Chief Magistrates Criminal Case No. 177 of 2014 (Republic v Lee Mwanthi Kimani) be and is hereby stayed until conclusion on Nairobi CMCC No. CMCC No. 6700 of 2013 (Lee Mwanthi Kimani v James Wambugu Ndiangu’i).**
  - b. **There shall be no order as to costs.**

**DATED and DELIVERED at NAIROBI this 13<sup>th</sup> day of May 2014**

**D.S. MAJANJA**

**JUDGE**

Mr Muli instructed Munyalo Muli and Company Advocates for the petitioner.

Ms Ngalyuka, Prosecution Counsel, instructed by the Directorate of Public Prosecution for the respondents.

Mr Isoe, instructed by Isoe, Nyakwana Associates and Company Advocates for the interested party.