

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CONSTITUTIONAL, HUMNA RIGHTS AND JUDICIAL REVIEW
DIVISION
APPLICATION NO. E029 OF 2024

REPUBLIC.....APPLICANT

-VERSUS-

SENIOR PRINCIPAL MAGISTRATE

SHANZU LAW COURTS.....1ST RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS.....2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT

ex parte;

1. KAZUNGU CHARO alias RASHID.....1ST APPLICANT

2. MWALIMU CHAI KAZUNGU.....2ND APPLICANT

JUDGMENT

1. The applicants’ application is a motion dated 4 October 2024 expressed to be filed under articles 2, 10, 19, 20, 24, 27 29, 47 and 244 of the Constitution; sections 4, 7, 8,9, 10 and 11 of the Fair Administrative Action Act, 2015; sections 8 and 9 of the Law Reform Act, cap. 26; section 24 of the National Police Act, 2011 and, order 53 of the Civil Procedure Rules. In the main, the applicants seek the following prayers:

***“2. That this Honourable Court do hereby grant judicial review orders of certiorari for purposes of quashing the proceedings of the 1st Respondent from proceeding in Criminal Case Number 453 of 2024, Shanzu Law Court pending in court over charges relating to the two Applicants who are the Accused persons in the said matter.*”**

3. That this Honourable Court do hereby grant Judicial Review orders of prohibition for purposes of prohibiting the 1st Respondent from proceeding with the said matter as stated herein above.”

The applicants also seek for the costs of the suit.

2. The application is based on a statutory statement dated 4 September 2024 and an affidavit sworn on even date by the 1st applicant verifying the facts relied upon.
3. As much as I can gather from the applicants and the respondents' pleadings and affidavits, the applicants have been arraigned in Shanzu Senior Principal Magistrates' Court Criminal Case No. 453 of 2024 for the offence of forcible detainer contrary to section 91 as read with section 36 of the Penal Code, cap. 63 and trespass contrary to section 3(1) as read with section 11 of the Trespass Act, cap. 294.
4. As far as the offence of forceful detainer is concerned, the particulars in the charge sheet, a copy of which has been filed as amongst the applicants' documents, are as follows:

“On diverse dates between 1st and 31st December 2022 within Utange Area in Kisauni Sub County in Mombasa County, jointly with one (sic) not before court being in possession of land title deed no. CR no 13429 plot no. 77/11mm registered under the names of Bidala Athuman Mohamed without colour of right,

held possession of the said land in a manner likely to cause a breach of peace against Bidal Athuman Mohamed who was entitled by the law to the possession of the said land by constructing a temporary structure on the said land and remaining on the said land.”

5. As for the offence of trespass, the particulars have been stated as follows:

“On the 14th day of the year 2024 in Utange area in Kisauni sub-county within Mombasa County, with others not before court reasonable excuse entered into a private land owned by Bidala Athuman Mohamed plot no 77/11/MN, CR. No.13429 situated in Utange area without the consent of the owner.”

6. The charge sheet shows that the applicants were arrested on 14 April 2024 and arraigned on 7 May 2024 when, apparently, they entered a plea of not guilty.

7. The applicants are aggrieved by their prosecution because their arrest and prosecution are informed by a dispute over a landed property that is pending for determination in the Environment and land Court at Mombasa as ELC. No, 83 of 2018.

8. A copy of the plaint filed in court shows that Fatuma Niguzo Athuman and Mohamed Mwajasi Athuman are two of the plaintiffs who, in their capacity as the administrators of the estate of Athuman Benda Mohamed

alias Athman Bin Mohamed), have sued the 1st applicant in this suit. The other plaintiff is named as Biadal Athman Mohamed.

9. In the plaint, the plaintiffs have pleaded that they are the beneficial owners of Plot Subdivision Number 779 (Original No.383/2) Section II Mainland North in Utange. This property is registered in the name of Athuman Benda Mohamed alias Athman Bin Mohamed. The plaintiffs are said to have been born and raised on the property.

10. In 2011, the defendant visited the plaintiffs' family, apparently to console them after the demise of one of their family members. However, the 1st applicant never left; instead, he occupied one of the temporary structures on the land and declined to leave. It is for this reason that the plaintiffs filed a suit in court to assert their rights over the property. To be precise they sought the following orders:

“

a) An Order declaring the Defendant by himself, his agents, third parties, employees and/or any other party as trespassers on the Plot Subdivision Number 779 (Original No.383/4) Section 11 Mainland North.

b) Permanent injunction restraining the Defendant by himself, his agents, third parties, employees or any other party acting under him from occupying, trespassing, constructing, developing, selling, subdividing or in any way dealing/interfering with the

Plaintiffs' Plot Subdivision Number 779 (Original No.383/2)

Section II Mainland North.

- c) An Order directing the Defendant by himself, his agents, third parties, employees or any other party acting under him to pull down any illegal structure which he has erected on Plot Subdivision Number 779 (Original No.383/2) Section II Mainland North and to clear any debris at his own costs.*
- d) An Order of eviction do issue against the Defendant by himself, his agents, third parties, employees or an/other party acting under him.*
- e) An Order that the County Police Commander, Mombasa County through the O.C.S, Kiembeni Police Station to ensure that the orders herein are complied with to the extent that the illegal structures/developments on the Plot No. Subdivision Number 779 (Original No.383/2) Section II Mainland North are removed and the Plaintiffs enjoy quiet possession of the suit property.”*

11.It is against this background that the applicants’ claim that since facts forming the transaction out of which they have been charged are the very facts that form the basis of the civil suit, the criminal case is intended to bring pressure to bear upon them in the civil suit. Accordingly, they are

of the view that their prosecution is tainted on the judicial review grounds of illegality and irrationality.

12. In a replying affidavit filed in response to the application, police constable Joyce Gathuri has sworn that she is a police officer attached to Kiembeni police station and that on 7 April 2024, one Bidallah Athman reported at the station that one Kazungu Kalama had encroached on his family land. The report was registered as OB. No. 23/7/24.

13. According to Bidallah Athman, his siblings whom he named as Mohamed Mwajasi, Fatuma Ngiro and Kisiki Athuman were the rightful owners of land tile no. CR 13429 plot no. 77/11/MN which Kazungu Charo Kahindi had encroached upon.

14. As a result, they had filed a case in court which issued an order dated 8 October 2019, restraining any interference with the parcel of land pending the determination of the suit. According to Kahindi, the complaint was that despite the court order, the 1st applicant was not only constructing on the land but had also brought members of his family on the land.

15. Investigations revealed that the land in dispute was registered in the names of Bidalla Athuman Mohamed, Mariam Athuman Mwajasi, Mohamed Mwajasi Athuman, Fatuma Ngiro Athuman and Kisiki Thuman Mohamed. The transfer to these persons was effected on 21 March 2024 after they had

inherited the land from their father Athuman Mohamed (deceased) through a succession cause.

16. When the officers visited the land, they confirmed that the 1st applicant had constructed semi-permanent structures on the land. It is in these circumstances that the applicants were arrested and charged.

17. In **Peter Macharia Ruchachu versus Director of Public Prosecution & Another (2014) KEHC 7508 (KLR)** I noted that upholding criminal justice through a criminal prosecution as opposed to misusing the prosecution as an instrument to bring pressure to bear upon a party to settle a civil dispute is a question that has engaged the minds of judges from time to time. Whenever this question arises, courts have been consistent that the institution of a criminal case for a purpose other than that of upholding the criminal justice is an abuse of the criminal process and it is upon the courts, to rise to the occasion and halt such criminal proceedings.

18. The court in **Stanley Munga Githunguri versus Republic (1985) KLR 91**, for instance, held that if the prosecution of a person is oppressive and malicious, it would amount to an abuse of the criminal process and, therefore, it would not be in the public interest to continue with that kind of prosecution. The court was emphatic that whenever such a situation arises, this Honourable Court has inherent power and duty to intervene and prevent the abuse of the due process of the court and to secure fair

treatment for all persons who are brought before it or before a subordinate court.

19. And in **Samuel Kamau Macharia & Another versus Attorney General & Another, Nairobi High Court Miscellaneous App. No. 356 of 2000**, the court reiterated that the Director of Public Prosecution's discretion to arraign a person should be exercised in a quasi-judicial way. In this case, the court halted the applicant's trial because in its view, the Director of Public Prosecutions was prodded to act and did not act independently and more so, the intention of the complainant was driven more by his quest for payment than a genuine intention to have the applicant face a criminal trial.
20. But a criminal prosecution or process would not be halted merely because the transaction, the basis upon which a criminal prosecution is initiated, is a basis for a civil claim; in other words, the criminal process would not be halted only because of a pending civil suit based on the same facts. **Section 193A** of the Criminal Procedure Code contemplates the two processes running concurrently where facts which give rise to a cause of action are the same facts that would constitute an offence. It states as follows:-

193A. 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.

21. Thus, the pendency of a civil suit is not a bar to criminal proceedings. In the *Vincent Kibiego Saina versus the Attorney General (Nairobi High Court Miscellaneous Application No. 839 and 1088 of 1999)* Kuloba, J. (as he then was) emphasised that it is not the policy and the practice of this Honourable Court to curtail criminal prosecution merely because the matter with which the prosecution is concerned is also a subject of a civil litigation between the same parties or their privies. The learned judge was of the view that criminal prosecution can proceed alongside a civil suit based on the same or related facts; he held as follows:

“The High Court does not hold the view that no criminal prosecution should be instituted side by side with a civil suit based on the same or related fact; nor does it hold that a person should never be prosecuted in criminal proceedings when he has a civil suit by or against him which relates to matters in the criminal case.”

22. There shouldn't be any doubt that both civil and criminal jurisdictions can run concurrently and that neither can stand in the way of the other unless either of them is being employed to perpetuate ulterior motives or generally to abuse of the process of the court, in whatever manner.

23. In **Peter Macharia Ruchachu versus Director of Public Prosecution &**

Another (supra) I halted the prosecution process because I established that the prosecution of the applicant was for a collateral purpose and for ulterior motives. I held the prosecution of the applicant to be for a purpose other than upholding the criminal justice. In particular, the prosecution was meant to bring pressure to bear upon the applicant to settle a civil dispute.

24. The Court of Appeal in **Cruisair Ltd versus CMC Aviation Ltd (Ltd),**

(1978) KLR 131, cited with approval in **Vincent Kibiego Saina versus the Attorney General, (supra)** addressed this particular question on the abuse of prosecution in civil disputes and in winding up proceedings, in particular, and held that:

“...a winding up court is not to be used for debt collection purposes, or to exert pressure to force payment of a debt which is bona fide disputed and contested. A fortiori, to institute or sustain or prop criminal proceedings, like bring winding up proceedings, to exert pressure for the payment of a debt or sum which is disputed in good faith, that which is disputed on substantial and not insubstantial grounds, and the criminal proceedings cannot decide the disputed debt or sum, constitutes an abuse of the process of the court, is oppressive, mala fides...” (Underlining mine)

25. Turning back to the applicants' application, my attention has been drawn to the respondent's own acknowledgement that the arrest and prosecution was informed by, among other things, the existing civil case against the 1st applicant and crucially, an interim order for injunction against the 1st applicant restraining him from interfering with the suit land. In her affidavit, the police constable swore, *inter alia*, as follows:

“5. That from the narration of the complainant he stated that they had filed an ELC case no. 83 of 2018 at the chief Magistrate court Fatuma Nguzo Athuman ,Mohamed Mwajasi Athuman and Bidala Athman vs Kazugu Kalama and there was a court order dated 8/10/2019 which had directed non interference with the parcel of land 779(original no 383/2) section II Mainland North pending determination of the suit. Annexed hereto and marked "JG 2" is a copy of the court order in MOMBASA CMCC ELC 83 OF 2018.”

26. The police then proceeded with their investigations which revealed that the land belonged to Bidalla Athuman Mohamed, Mariam Athuman Mwajasi and Mohamed Mwajasi Athuman. Others registered as owners were named as Fatuma Nigiro Athuman and Kisiki Thuman Mohamed.

27. These persons may very well be the owners of the property in dispute, based on the evidence gathered by the police and going by the applicants' own admission that the property belongs to somebody else. But

ownership of the property is the very question that is pending determination before the civil court. In these circumstances, the police could not invoke the pending case and proceed as if the question of ownership had been determined or pre-empt the outcome of the pending case.

28. More importantly, as far as I understand the interim order, the 1st applicant had been cited for contempt for the disobedience of the court order. The order reads as follows:

“ORDER

UPON READING the application dated 29th April, 2019 presented to this Honourable Court by the counsel for the applicant and brought article 48 and 159(2) of the Constitution of Kenya 2010 Section 27(b) & 28 of the Contempt of Court Act No. 46 of 2016 Section 1A, 1B, 3 & 3A of the Civil Procedure Act Cap 21 Laws of Kenya, under order 40 Rule 3 & order 51 rule 1 of the Civil Procedure Rules 2010 It is hereby ordered :-

“1. That this Honorable court is pleased to issue an order directing the o.c.s Kiembeni Police station and the Public Health officer Mombasa to certify and./or ensure exhumation for one ATHUMAN KAZUNGU [Deceased] the late son of KAZUNGU KALAM also known as RASHID the Respondent from plot

subdivision Number 779 (originat No. 383/2) section II Mainland North and be buried at the nearest Islamic burial site forthwith.

2.That Kazungu Kalam also known as Rashid the Defendant/Respondent herein be cited for contempt of the consent Order given on the 4th April, 2019 and be committed to civil prison for such period as this Honourable Court may deem fit and just. In that, the said Kazungu Kalam also known as Rashid, has disobeyed the Consent Order made herein by this Honourable Court on the 4th April, 2019 inter alia:

a. That interim injunction is hereby issued restraining the Respondent herein by himself, his agents, assigns, third parties, employees or any other parry from trespassing, constructing, occupying, developing, selling, subdividing or in any way dealing with the Applicants plot Subdivision Number 779 (Original No. 383/2) section II Mainland North pending hearing and determination of this application.

3.That an Order do issue directing the O.C.S Kiembeni Police Station to ensure that Third parties/land grabbers/agents/assigns do not interfere with the property known as plot Subdivision Number 779 (Original No. 383/2) Section II Mainland North pending hearing and determination of this suit.”

29. The order was granted on 8 October, 2019 but it was not until 8 October 2019 when it was extracted.

30. As far as they are relevant to this application, two important points to note from this order are that, first, that the 1st applicant was cited for contempt and was to be committed to civil jail for six months. Secondly, the involvement of the police was limited to ensuring that ***“third parties/land grabbers/agents/assigns do not interfere with the property known as plot Subdivision Number 779 (Original No. 383/2) Section II Mainland North pending hearing and determination of this suit.”***

Whether the police could enforce an order issued in a civil matter is a question that could be raised about the legality of the order but for purposes of determination of the application before me, it is not necessary to venture into that direction.

31. Suffice it to say, notwithstanding the outcome of police investigations, the final decision on the question of ownership of the property still lay with the civil court, its jurisdiction to that end having been properly invoked. In the face of the civil case before court, the police could not interpret and act on the court order as if it the court had ceded its authority to determine the question of ownership of the property.

32. If the prosecution is allowed to proceed, the extent to which the civil case would be intertwined with the prosecution of the applicant is quite clear.

No doubt, the police would be relying on the evidence they have gathered

in their investigations, as they should; since this evidence includes the civil case and the court order, in particular, they cannot possibly prosecute the applicant without reference to the case and the order.

33.If the prosecution is allowed to proceed in the circumstances, it would be difficult not to argue that the criminal case has been initiated for a collateral purpose which is to bring pressure to bear upon the applicants to concede to the plaintiffs' claim in the civil case. In such circumstances, this Honourable Court is enjoined to intervene and stop what, in effect, is abuse of the prosecutorial power.

34.It has been held that where there is a clear abuse of power by a public authority, the court is bound to intervene and stop the authority in its tracks by way of an order of certiorari and prohibition. To this end, I adopt the words of Lord Salmon in **D.P.P versus Humphrey's (1976) 2 ALL ER 497 at 527-8** where he expressed himself as follows:

“A judge has not and should not appear to have any responsibility for the institution of prosecutions, nor has he any power to refuse to allow a prosecution to proceed merely because he considers that as a matter of policy, it ought not to have been brought. It is only if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious that the judge has the power to interfere. Fortunately, such prosecutions are hardly brought but the power of the court to prevent them is,

in my view, of great constitutional importance and should be jealously preserved". (Emphasis added)

35. Considering that the investigations revealed that the applicants are not the owners of the land in dispute, it is possible that the police may have acted in good faith to arrest and charge the applicants. However, the shadow of the civil case which, as noted, was instituted to determine the ownership of the property and the court order which the police were ostensibly seeking to enforce, looms large over such a prosecution.

36. Circumstances are such that the prosecution of the applicants cannot be sustained independent of the civil case and, therefore, to extent that the two processes would be intricately intertwined, the prosecution of the applicant is tantamount to an abuse of the process of the court.

37. Speaking of the need to halt a criminal prosecution if it is simply employed to advance a civil cause, the court in **Republic vs. Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Another (2002) 2 KLR 703**, held as follows:

"It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of

criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice and no one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, prohibition and/or certiorari will issue and go forth... When a remedy is elsewhere provided and available to person to enforce an order of a civil court in his favour, there is no valid reason why he should be permitted 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. If the object of the appellant is to over-awe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court... The predominant purpose is to further that ulterior motive and that is when the High Court steps in..."

38. For the forgoing reasons, I am satisfied that the applicants' application is merited. It is allowed in the following terms:

(a) The proceedings in Shanzu Senior Principal Magistrate's Court Criminal Case 453 of 2024 are hereby brought to this Honourable Court and quashed.

(b) The 1st respondent is hereby prohibited from proceeding with the criminal case against the applicants in Shanzu Principal Magistrates Court Criminal Case 453 of 2024.

(c) Parties will bear their respective costs.

Orders accordingly.

Signed, dated and circulated on the CTS on 26 February 2026

Ngaah Jairus
JUDGE