



Dopp Investments Limited v Kenya Railways Corporation & another; Kahia Transporters Ltd & 5 others (Interested Parties) (Environment & Land Case 39 of 2019) [2024] KEELC 3716 (KLR) (23 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3716 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 39 OF 2019
NA MATHEKA, J
APRIL 23, 2024**

BETWEEN

DOPP INVESTMENTS LIMITED PLAINTIFF

AND

KENYA RAILWAYS CORPORATION 1ST DEFENDANT

NATIONAL LAND COMMISSION 2ND DEFENDANT

AND

KAHIA TRANSPORTERS LTD INTERESTED PARTY

TRADE LEAD LTD INTERESTED PARTY

KACHUNGO EDWARD BEKWEKWE INTERESTED PARTY

CHARLES MULOLE SHANGA INTERESTED PARTY

HAMISI TSUMA MWERO INTERESTED PARTY

REDALU MBOVO MGAIDI INTERESTED PARTY

RULING

1. The application is dated 22nd January 2024 and is brought under Articles 25 (c), 50, 165 (6) and (7) of the [Constitution](#) of Kenya, Section IA, 1B, 3A of the [Civil Procedure Act](#), and Order 51 Rule 1 of the [Civil Procedure Rules](#) seeking the following orders:
 1. Spent
 2. That this Honourable Court be pleased to issue an order staying proceedings in the instant suit pending the inter partes hearing of this Application.



3. That this Honourable Court do issue an order staying proceedings in the present suit pending the conclusion of criminal investigations by the Directorate of Criminal Investigations into the circumstances surrounding the Awards dated 11th October 2017 and 31st March 2023 in favour of the 1st respondents/plaintiff herein.
4. That the costs of this application be provided for.
2. The application was opposed by a replying affidavit sworn on 28th February 2024 by one Harshil Patel a director of the plaintiff. He avers that the application is brought in bad faith, after inordinate delay, it is a fishing expedition and that it seeks to further delay the dispensation of justice. He also states that there is no provision in law that gives the court powers to stay proceedings pending investigation. The 1st defendant filed grounds of opposition dated 22nd February 2024 stating that the application has been brought after unreasonable delay and it has failed to meet the threshold for granting stay of proceedings. The 3rd respondent through Mr. Makuto, state counsel filed grounds of opposition also dated 22/2/2024 stating that the nature of the prayers are eternal with no limiting period and that the evidence that will emerge after investigations can always be presented to court. Further, Mr Makuto stated that under section 193A of the *Criminal Procedure Code*, any investigation or criminal proceedings is not a bar to this court's proceedings.
3. Counsel for the 1st defendant filed their submissions and argued that is no legal provision enabling this court to grant stay of proceedings pending investigation by the EACC and DCI. They relied on several cases such as *Watu Credit vs Geoffrey Mokaya Aboki and Karen Chepkurui* (2022) where the court held that stay of proceedings interferes with a litigant's right to be heard without delay. Counsel reiterated that the application was brought under unreasonable delay as the report to the DCI and EACC was made on 4th October 2023 yet the application was filed on 23rd January 2024. Furthermore, counsel also argues that staying the proceedings would have be akin to the court helping the 1st and 2nd interested parties gather evidence which they can rely on which should not happen and they relied on *Agneta Masha Msechu vs Naomi Wanjiru Kamau* (2018) eKLR. Counsel also alleged that it would cost the taxpayer Kshs. 72 million per annum if the proceedings are stayed.
4. Counsel for the plaintiff submitted that the power to stay proceedings is a discretionary power and ought to be exercised with careful consideration and relied on the Court of Appeal case *David Morton Silverstein vs Atsango Chesoni* (2002). Counsel introduced a report by the DCI which was done after investigations as to who is the real owner of L.R 1040/2 (IR 21749) and stated that the DCI is functus officio.
5. Having perused and considered the application, the replies and submissions therein, the issue arising is whether or not the court should stay proceedings in the instant suit. It is trite to note that stay of proceedings is an equitable relief which therefore means that it can only be approached through equity. All the parties opposing the application have argued that the application was brought with unreasonable delay. In the affidavit sworn on 22nd January 2024 the annexure marked as OSM 11 shows that the report was made to the DCI and EACC was written on 4th October 2023 yet this application was filed on 22nd January 2024. Annexure OSM 12 shows that the 1st interested party was even invited to write statements sometime in October. Equity aids the vigilant and not the indolent. This application seems like an afterthought, a ruse to delay the proceedings in this Honourable court.
6. I am alive to section 193A of the *Criminal Procedure Code* that any criminal proceeding which has a subject matter directly and substantially in issue with a civil proceeding shall not stop the proceedings of that civil court. However, there are no criminal proceedings but just investigations. In *Maina & 4 others vs Director of Public Prosecutions & 4 others* (Constitutional Petition E106 & 160 of 2021



(Consolidated)) (2022) KEHC 15 (KLR) (Constitutional and Human Rights) (27 January 2022) (Judgment) A.C Mrima J. cited with approval [*Commissioner of Police & the Director of Criminal Investigation Department & another vs Kenya Commercial Bank & 4 others*](#) (2013) eKLR where the court of appeal stated as follows;

Clearly, the company and the guarantor through their directors were employing criminal process to assist them in resolving their civil dispute. While the law (section 193A of the [*Criminal Procedure Code*](#)) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that that power must be exercised responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings? It is not in the public interest or in the interest of the administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and a travesty of justice for the police to be involved in the settlement of what is purely a civil dispute being litigated in court....”

7. It was also held in Nairobi High Court Constitutional Petition No. E033 of 2021 [*Maura Muigana vs Stellan Consult Limited & 2 Others*](#) (unreported) A.C Mrima J. discussed section 193A of the [*Criminal Procedure Code*](#) and expressed as follows: -

In an Article titled ‘Unjust Justice in Parallel Proceedings: Preventing Circumvention of Criminal Discovery Rules, the author, Randy S. Eckers, defines concurrent proceedings as independent, simultaneous investigations and prosecutions involving substantially the same matter and parties.

63. More often than not, the currency of the twin proceedings is challenged before Courts. In the above article, the author reiterates that a determination to either stay or allow the continuation of parallel proceedings depend on existence of certain requirements. He observes: -

The Courts only block parallel proceedings in special circumstances. A defendant may move for a stay to block parallel proceedings, which will be granted only if the defendant can prove either that the government is acting in bad faith and using malicious tactics to circumvent the strict criminal discovery rules, or that there is a due process violation....

Even if a defendant meets one of these requirements, a stay is not guaranteed. The Court takes many other factors into account in deciding whether a stay is appropriate in a specific situation. These factors include the commonality of the transaction or issues, the timing of the motion, judicial efficiency, the public interest, and whether or not the movant is intentionally creating an impediment.” Absent special circumstances, both cases will probably proceed.

64. It is, hence, deducible that the quest to stay concurrent proceedings must first be premised on the fact that there is in existence two or more active cases of civil and criminal nature in respect of the same entity or person. While discussing the general principles applicable in such scenarios, the Supreme



Court of Appeal of South Africa in *Law Society of the Cape of Good Hope vs MWW Randell* (341/2012) [2013] ZASCA 36 (28 March 2013) stated as follows:

...it applies where there are both criminal and civil proceedings pending which are based on the same facts. The usual practice is to stay the civil proceedings until the criminal proceedings have been adjudicated upon, if the accused person can show that he or she might be prejudiced in the criminal proceedings should the civil proceedings be heard first....

65. The Learned Judges of the Supreme Court of Appeal further stated that it was not automatic for an Applicant to be awarded stay of the civil proceedings. It found support in numerous English decisions among them, *Jefferson Ltd v Bhetcha* [1979] 2 All ER 1108 (CA) and *R v BBC, x p Lavelle* [1983] 1 All ER 241 (QBD) and observed as follows;

[24]. In dismissing the application, the Court emphasized that there was no established principle of law that if criminal proceedings were pending against a defendant in respect of the same subject matter, he or she should be excused from taking any further steps in the civil proceedings which might have the result of disclosing what his defence or is likely to be, in the criminal proceedings.”

8. I am also sensitive to the allegation that stay of these proceedings would be causing unnecessary costs to the tax payer. Mr. Osman Kahia who swore the afore mentioned supporting affidavit is apprehensive that if the proceedings are not stayed the court would not have the benefit of relying on the findings of the investigations. It is therefore clear that there are no pending criminal proceedings and I find that the possibility of the DCI and EACC conducting prolonged investigations will hamper this court in disposing its mandate under section 1A, 1B & 3A of the [civil procedure](#) as well as Article 50 of the [Constitution](#). I find that the findings of the DCI and the EACC can be later used in court or be used by the ODPP in framing charges for criminal proceedings against those found culpable. I find that this application is not merited and I dismiss it. Costs to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 23RD DAY OF APRIL 2024.

N.A. MATHEKA

JUDGE

