Kitiyo & another v Mwoi & 2 others (Environment & Land Case 184 of 2016) [2024] KEELC 3608 (KLR) (12 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3608 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 184 OF 2016

FO NYAGAKA, J

APRIL 12, 2024

BETWEEN

MICHAEL FRANCIS CHEMONGERS KITIYO ..... 1ST PLAINTIFF

BIBLE CHRISTIAN FAITH CHURCH ..... 2ND PLAINTIFF

AND

STEPHEN LOWASKOU MWOI ..... 1ST DEFENDANT

THE CHIEF LAND REGISTRAR ..... 2ND DEFENDANT

THE ATTORNEY GENERAL ..... 3RD DEFENDANT

RULING

The Application

1. The Application before me was made orally on 22/02/2024 when this matter came up for further Defence hearing. Although learned counsel for the 1st Defendant moved the court orally he did not cite the specific provisions of law he brought it under. Nevertheless, he sought the following relief:

   That this Honourable Court issues an order barring the police or any other person from arresting or confining the 1st Respondent, one Stephen Lowasikou Moi in relation to issues touching on land parcel No. Kitale Municipality Block 3/474, pending the determination of this suit, by this Court.

2. The Application was based on the grounds that in the morning, before the 1st Defendant, who was present in the Court room on the material date would testify, he was arrested, from within the Court room by the Officers of the Directorate of Criminal Investigation Office (DCIO), Kitale branch and whisked away to the station. The further grounds were that the arrest was pursuant to a complaint that had been made to the said offices by the Plaintiff herein more than or about three years before the arrest over the same subject matter that was in Court for determination. The Applicant was of the view that the arrest was an abuse of the process of the police and an indirect way of causing an

adjournment, intimidating the witness and harassing him so that he does not testify hence scuttle the hearing and the matter. That the arrest was sub judice since the issues he was arrested over were still pending determination in Court hence there was need to have the witness protected. Thus, he should not be arrested or confined by the police or any other persons in relation to the matters that touch on parcel number Kitale Municipality Block 3/474 until this Court concludes the matter.

3. The applicant argued that indeed the 1st Plaintiff admitted that the 1st Defendant was actually arrested in the morning of the material date on account of a complaint he had made to the police, against the latter, about or over three years before yet the suit had been in Court since 2016. The actions by the police were thus a design to encroach the independence of the Court and interfere with the facts of the case and intimidate the witness.

4. The Application was opposed. Learned counsel for the Respondent called upon the Court to consider whether it had the requisite jurisdiction to grant anticipatory bail because to him, that was what the 1st Defendant was seeking, having been arrested in the morning of the material date. He argued that the production of the 1st Defendant in Court after the arrest was only for him to testify and not for release from police custody. He argued that since the witness had already testified upon being produced in Court following the order issued after his arrest, it was proper that he be taken to custody for further processing. And further that since the witness had already testified there was no threat of intimidation or interference with him. He submitted that none would know the likely charges the witness would face hence he needed to voluntarily go to the police station to face the charges he would.

5. As for learned counsel for the other parties they left the matter to be determined by the Court. However, in so doing, the learned State Counsel submitted that he would be guided by Article 156(4) of *the Constitution* of Kenya which is to the effect that the Attorney-General is the principal legal advisor of the government and represents the national government in court proceedings.

6. Learned counsel for the 1st Applicant submitted that the Court had the duty to protect the witness and there should be no parallel proceedings over the same issue, particularly when a judge was seized of the same facts for determination. Further, that the complaint was initiated by the 1st Plaintiff after so many years of institution of the instant suit. It was his view that even if the evidence in court pointed otherwise, it should not undermine the sub judice rule.

Analysis and Disposition

7. I have considered the Application, the law and the submissions by both learned counsel. The issue that commends to me for determination is whether the application is merited.

8. The law regarding concurrent criminal and civil proceedings is to be found in the Criminal Procedure Code, Chapter 75 of the Laws of Kenya. Section 193A provides that

> "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."

9. The provision is quite clear as with regard to the existence of concurrent proceedings both in criminal and civil proceedings in courts over the same subject matter. However, this provision, in my view does not give both the complainant and the prosecution a blank cheque or red carpet opportunity to abuse the process of the Court, the pendency of the concurrency must be looked at from the prism of the due administration of justice whether on the criminal or civil aspects of jurisdiction. Where the criminal jurisdiction is being used in a manner as to scuttle the civil jurisdiction, torment the defendant or

respondent or even settle scores or cause pain to the other party it loses the good faith and incense that the criminal jurisdiction was designed to product and must be abhorred, shunned and stopped at its tracks. This is particularly so where a party voluntarily subjects himself, herself or itself to the civil jurisdiction first for it to determine the issue and then moves to the criminal jurisdiction to adjudicate over the same. To me there would be absolutely no good faith in that step and there is nothing more telling in the process than that the complainant is on a plain trajectory to abuse the process of Court.

10. The situation is different from the one where a criminal matter is pending in a court and the complainant decides to sue over the same issue in a civil matter. There ought to be a consideration as to which one came first, and in my humble view, once the party has placed themselves on the 'blessed path' of civil proceedings they would be like the proverbial hyena that smelt nice food and followed the scent until it got to a junction and on the direction of the source being indeterminate, and due to her greed, it began walking with the right legs on one path and the left on the other to the effect that as the paths led further from the junction and the greedy creature opened its legs further and further it split in the middle. Hence once one had placed themselves on the civil path of determination of the issue they ought not to be permitted to place themselves on the 'blessed path' of the criminal jurisdiction.

11. The purpose of criminal law is to punish a suspect whom the Court finally convicts of the offences he/she is charged with. By the time a complainant elects to go the criminal jurisdiction way he or she is convinced fully, as they say "one hundred percent" that the offence has been committed by the suspect. That is why the standard of proof is that of beyond reasonable doubt. Therefore, when he is not sure about the prosecution obtaining a conviction on the matter he may sue in the civil jurisdiction. But when he is not sure about the offence having been committed and resorts to the civil jurisdiction to obtain a declaration or finding about the issue, which in the humble opinion of this Court falls under Section 44(2) of the *Evidence Act*, Chapter 80 of the Laws of Kenya, it is not open for him to run a parallel process simultaneously. He is by law duty-bound to await the finding of the civil jurisdiction, unless he withdraws the matter before that Court. This is because, the main reliefs sought in this matter are in rem, and even if they were not, as I have explained above, and will add below when I address the issue of subject matter (doctrine of lis pendens) the complainant who goes to the civil court first places the matter squarely before the Court for determination. He has to hold his horses with regard to pushing for punishment by way of a criminal trial.

12. Again, what makes this Court consider whether its process is being abused is both the timing of the arrest and the alleged delay in prosecuting the complaint the 1st Plaintiff made to the police. In regard to the decision to charge an accused person after the passage of time, the Court in in the case of Republic v Attorney General & Another ex parte Ngeny (2001) KLR 612, stated that:

> " In the case before us, the delay was nine years. No attempt has been made to explain it. The subject matter of the charges against the applicant is a colossal sum involving an institution that was strategic to the Government when the losses were occasioned; so why did the State not mount a prosecution immediately? Nine years is too long a delay. We cannot think anything else but that the criminal prosecution against the applicant was motivated by some ulterior motive. It is not a fair prosecution. It was mounted quite late: ..."

13. In addressing the issue of delay in prosecution of a criminal matter, the High Court, in the case of George Joshua Okungu & Another v The Chief Magistrate's Court Anti-Corruption Court at Nairobi & Another [2014] eKLR, held and I am persuaded by its reasoning that:

> " .... Rather, it is the effect of the delay that determines whether or not the proceedings are to be halted. In this case, there is no allegation made by the petitioners to the effect that the

delay has adversely affected their ability to defend themselves. In other words, the Petitioners have to show that the delay has contravened their legitimate expectations to fair trial."

14. In Jirongo v Soy Developers Ltd & 9 Others (Petition 38 of 2019) [2021] KESC 32 (KLR) (16 July 2021) (Judgment) the Supreme Court of Kenya held that:

> " ...where the delay was occasioned by deliberate inaction on the part of a complainant with the intent of getting at a suspect to force the suspect's hand in say, a different transaction between them at a later date or even use the complaint to force settlement in ongoing civil proceedings, then, again the High Court, as a court of first instance, must step in because the intended prosecution is tainted with malice and not the otherwise unassailable intent to furnish criminal wrong doing, promptly.
>
> In the present case, all the evidence before us points to the fact that ... and we agree with the learned Judge of the High Court that, where both parties have admitted that the same issues are also pending resolution in another court, and that the issue of lost documentation remains unresolved, it would be most unfair to subject the appellant to a criminal trial, 24 years after the impugned transaction.
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> Lastly, in instituting the prosecution, the ODPP, without in any way taking away the constitutional mandate to prosecute crimes, ought always to act judiciously and not act in perpetuation of an unfair and malicious criminal complaint. In doing so, that office must always be guided by the principle that the right to a fair trial cannot be limited thus raising the bar in the determination of the question whether to prosecute or not."

15. In the case of Commissioner of Police & the Director of Criminal Investigation Department & Another v Kenya Commercial Bank & 4 Others [2013] eKLR the Court of Appeal stated in that:

> " 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. This is a case more suitable for determination in the civil court where it has been since 1992, than in a criminal court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations. We have no doubt in our minds that the belated involvement of the police in this purely civil dispute is an abuse of their power. The police should direct their energies and resources to prevention of crime which we all know is rampant in this country and is about to get out of control."

16. I am fully aware that to issue an order to stop criminal proceedings is not within the jurisdiction of this Court. That is the preserve of the High Court when moved appropriately. But should this Court be helpless in the site of abuse of its process or indeed the other courts' process? If the 1st Plaintiff was of the view that this Court did not have the ability and authority to determine the issue of prayers for declarations about the ownership of parcel Numbers Kitale Municipality Block 3/973 and 974 or

the subject matter herein he ought to have elected not to institute the suit before this Court first, but pursue the criminal matter. As I pen off from that point, the question that lingers in the mind of this Court is, the Plaintiffs did not allege fraud as against the Defendants and even if they did what justice would be served to all parties herein when the issue is squarely before this Court for determination and peradventure the Court does not find that the Plaintiffs' claims are valid yet the 1st Defendant has already suffered incarceration and loss of his liberty? The answer is obvious: none.

17. The 1st Plaintiff consciously understood that this Court is clothed with the jurisdiction to determine the same and filed the instant matter. Having done so, he placed the subject before the Court, and the doctrine of lis pendens would apply mutatis mutandis to the same issue. This Court is seized with the jurisdiction to determine the issue of a declaration as to whether the Plaintiffs or the 1st Defendant are the true owners of the suit land. In the instant application, the Court was not called upon to stop the criminal charges that may ensue over the same subject matter forever or declare that the same were a nullity and so on: it was only called upon to suspend any such actions until it renders itself on the issues that were presented to it earlier than the ensuring criminal process steps. To be clear, the Court is not being moved to prohibit the police from, forever, commencing, conducting or concluding investigations over the subject before this Court, or to issue an order of certiorari to remove and quash the actions or steps already taken by the DCI. That is the jurisdiction of the High Court, and this Court will not arrogate itself of the jurisdiction. Instead, the Court is being asked to find that there is abuse of its process by the 1st Plaintiff first instituting this suit for a finding as to who the true owner of the suit land is, and before the Court concludes the matter, three or so years later he makes a report about alleged criminal conduct over the same and keeps quiet for another three years or so and on the eve of the evidence of the alleged suspect he 'unleashes' the police on the suspect or Defendant, and shamefully so, from the court room so as to incarcerate him thereby preventing him from giving evidence over the same issue in a bid to tell the whole world that a criminal process was being effected. No human being however debased in mind cannot see that the police are being used in that process to satisfy the selfish ends of a party, and this Court, together with this nation as a whole cannot permit that. There is no public interest being served by that 'immediate' prosecution of the complaint the 1st defendant made to the DCI.

18. There is no evidence whatsoever, that nothing would stop the Director of Criminal Investigation or the Director of Public Prosecutions to exercise their mandate over the same subject suit land if actions of a criminal nature other than the ones before this court have allegedly occurred.

19. For the reasons above that I find that the Application dated 22/02/2024 is merited an is hereby allowed with costs to the 1st Respondent. For avoidance of doubt, this Court hereby issues an order suspending and/or barring the police or any other person from arresting or confining the 1st Respondent, one Stephen Lowasikou Moi in relation to the issues touching on land parcel No. Kitale Municipality Block 3/474 and which are the subject of the instant proceedings, pending the determination of this suit.

20. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE IN OPEN COURT THIS 12TH DAY OF APRIL 2024.

HON. DR. IUR FRED NYAGAKA

JUDGE