



Kimuli v Inspector General of Police & 2 others; Morris (Interested Party) (Environment & Land Petition E006 of 2023) [2024] KEELC 3994 (KLR) (16 May 2024) (Ruling)

Neutral citation: [2024] KEELC 3994 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND PETITION E006 OF 2023
CA OCHIENG, J
MAY 16, 2024**

BETWEEN

NICODEMUS MWANZIA KIMULI PETITIONER

AND

THE INSPECTOR GENERAL OF POLICE 1ST RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATION 2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTION 3RD RESPONDENT

AND

CHRISTINA NDUNGE MORRIS INTERESTED PARTY

RULING

1. What is before Court for determination is the Petitioner's Notice of Motion Application dated the 2nd November, 2023 where he seeks the following Orders:-
 1. Spent.
 2. Spent.
 3. That upon inter-partes hearing of the Application and pending the hearing and determination of the Petition, the Honourable Court be pleased to issue a temporary injunction restraining the Respondents either by themselves, agents, servants from Summoning, Arresting and/ or Charging/Preferring Charges against the Applicant/Petitioner or in any way howsoever from investigating any matter in respect of the dispute between the Applicant/Petitioner and Christina Ndunge Morris in ELC 016/2023 Nicodemus Mwanzia Kimuli and Christina Ndunge Morris in relation to Mavoko Town Block 3/105602 and Mavoko Town Block 3/105603 all situated in Joska Sub County, Machakos County.



4. That the costs of this Application be in favour of the Applicant.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of the Petitioner Nicodemus Mwanzia Kimuli where he deposes that he entered into an Agreement for Sale of approximately ten (10) acres of land, with Christina Ndunge Morris, which land was to be subdivided from land parcel number Mavoko Town Block 3/60346. He confirms paying Kshs. 15,380,994 as purchase price and thereafter took possession in accordance with Clause 7 of the said Sale Agreement. Further, that he fenced the land and conducted limited development thereon. He avers that in November, 2022 the Vendor concluded the subdivision of the ten (10) acres of the aforementioned property, more particularly land parcel number Mavoko Town Block 3/103897. He states that sometime in August, 2023, the vendor proceeded to subdivide Mavoko Town Block 3/103897 into two pieces namely Mavoko Town Block 3/105602 and 105603 respectively, hereinafter referred to as the 'suit lands', which was in violation of the aforementioned Sale Agreement. He insists that he is the legal and beneficial owner of the suit lands. He explains that in September, 2023 he instituted ELCLC/ E016/2023 Nicodemus Mwanzia Kimuli v Christina Ndunge Morris seeking among others, orders of specific performance. Further, on 1st November, 2023 the Court issued orders of obtaining status quo, which order, entrenched and protected his possession including use of the suit lands. He avers that on 2nd November, 2023, he was summoned by one Benjamin Kiswili who is a DCI Officer attached to Joska Police Station, who informed him that he was being treated as a suspect under inquiry file No. 18/023, for the offence of Forcible Entry Contrary to Section 90 of the Penal Code as well as Forcible Detainer contrary to Section 91 of the Penal Code. He contends that the vendor is using the 1st and 2nd Respondents', who are abusing their office by investigating a matter that is before the court.
3. The Respondents' opposed the instant application by filing a Replying Affidavit sworn by No. 52374 Sgt. Benjamin Kiswii, a Police Officer attached at DCI Joska Police Station who is the Investigating Officer. He explains that on 24th October, 2023, a Complaint was lodged with the 2nd Respondent at DCI Joska Police Station vide OB No. 26/24/10/2023 which he was assigned to investigate. He confirms that the complaint regarded a dispute involving parcels of land known as Mavoko Town Block 3/ 105602 and 105603, between the Applicant and the Interested Party. Further, that the Applicant was summoned to DCI Joska Police Station to record his statement. He states that investigations are ongoing and upon completion of the said investigations, the inquiry file will be forwarded to the 3rd Respondent for independent review, to establish whether the evidence on record is sufficient to sustain criminal charges against the Applicant. He is aware of the ongoing ELC matter between the Applicant and Interested Party, being ELC No. 016 of 2023 in relation to the said suit lands. He contends that the Applicant has not demonstrated to the court that the investigations thus far have been conducted in a manner that is ultra vires, illegal, irrational or marred with procedural impropriety to warrant the intervention of the court. Further, that nothing stops the 1st and 2nd Respondents from carrying out its statutory and constitutional mandate once a lawful complaint is lodged with them. He reiterates that the investigations being conducted are lawful and in accordance with the law as the Applicant's constitutional rights are being observed.
4. The Interested Party did not file a response to oppose the instant Application.
5. The Application was canvassed by way of written submissions.

Analysis and Determination

6. Upon consideration of the Notice of Motion Application dated the 2nd November, 2023 including the respective Affidavits and rivalling submissions, the only issue for determination is whether the



Petitioner is entitled to restraining orders as sought, against the Respondents, pending the hearing and determination of this Petition.

7. The Petitioner in his submissions reiterated his claim and averred that he is entitled to restraining orders as sought. To buttress his averments, he relied on the following decision: Petition No. 218 of 2011 KCB & Another v the Commissioner of Police & the Director of Criminal Investigations Department & Another.
8. The Respondents in their submissions reiterated their averments as per the Replying Affidavit and insisted that they are not abusing their office by investigating the matter. They relied on Article 245(4) (a) of *the Constitution*. To support their arguments, they relied on the following decisions: *Douglas Maina Mwangi v Kenya Revenue Authority & Another*, High Constitutional Petition No. 528 of 2013; and *Republic v Director of Public Prosecutions & 2 Others Ex parte Francis Njakwe Maina & Another* (2015) eKLR.
9. The Petitioner has sought for restraining orders against the Respondents or their agents from summoning, arresting or preferring charges against him or investigating any matter in respect to the dispute between him and the Interested Party in ELC E016 of 2023, concerning the suit lands. It is not in dispute that the Applicant and the Interested Party entered into a Sale Agreement dated the 18th March, 2021 in respect to land parcel number Mavoko Town block 3/60346 (mother title). It is further not disputed that the Applicant paid a portion of the purchase price to the Interested Party. Further, Clause 7 of the said Sale Agreement provided that:-

Upon payment of the 10% deposit of the Purchase price, the vendor shall give unlimited vacant possession and use of the property to the purchaser.”

10. In line with the aforementioned Clause 7, the Applicant proceeded to take possession of the suit lands. The Interested Party did not transfer the portion of land as purchased, to the Applicant, but instead proceeded to subdivide it, and this culminated in the Applicant instituting ELCLC/ E016/2023 Nicodemus Mwanzia Kimuli v Christina Ndunge Morris seeking orders of specific performance. During the pendency of the said suit, after this Court had issued orders of obtaining status quo pending outcome of the suit, the Interested Party proceeded to lodge a complaint at the Joska DCI culminating in the investigations being commenced against the Applicant for the offence of forceful detainer. It is interesting to note that the Interested Party despite being the one who lodged the complaint with the Joska DCI, leading to the commencement of the investigations, which forms the fulcrum of the dispute herein, has failed to file her response to controvert the Applicant’s averments. The Applicant hence seeks restraining orders to stop the investigations which fact is vehemently opposed by the Respondents. It is trite that both criminal and civil proceedings can be undertaken concurrently. Further, that nothing stops the 1st and 2nd Respondents from carrying out their statutory and constitutional mandate once a complaint is lodged with them. However, it is important for the Police to establish the basis of the complaint, whether there is good faith from the Complainant and if the said complaint is intended to defeat any pending court proceedings or not. In the current scenario, I note there was an entry on the disputed land, in accordance with Clause 7 in the Sale Agreement between the Applicant and Interested Party. Further, there was part performance, since a portion of the purchase price had been paid to the Interested Party. It is also evident that there is a pending civil suit in respect to specific performance over the suit lands, which the Respondents have confirmed they are aware of.



11. In the case of *Catherine Nyambura Muraria v Director of Public Prosecutions & another; Isaac Gathungu Wanjobi (Interested Party) [2019]* eKLR, Justice Chacha Mwita held that:-

It is not in dispute that the petitioner and the interested parties are involved in litigation over the ownership of the same parcel of land. That matter is live in court and each side claims to own the land and has what they say are valid ownership documents. Both sides claim to have purchased the land from the owner and paid the purchase price. That is a matter to be decided by the ELC. It is on that basis that the petitioner argues that the criminal case is intended to give advantage to her adversaries.

61. The court will ordinarily be reluctant to interfere with the mandate of the 1st respondent to prosecute, except where it is shown that he is using his powers in an improper manner. That this the caveat placed by Article 157(11).

62. In *Republic v Attorney General & another ex parte Hussein Mudobe* (High Court Misc. Application No. 898 of 2003, the Court observed that:

“The constitutional court should not usurp the duties of the prosecutor or the jurisdiction of the trial court. The power of the court to halt criminal proceedings involves a delicate balance of the power of the state to prosecute and the right of the individual to liberty and freedom from malafide and oppressive prosecution.”

63. The Court of Appeal reiterated the same position regarding the powers of the Attorney General under the repealed Constitution, in *Meixner & Another vs. Attorney General* [2005] 2 KLR 189, thus;

“The Attorney General is not subject to the control of any other person or authority in exercising that discretion (section 26(8) of *the Constitution*). Indeed, the High Court cannot interfere with the exercise of the discretion if the Attorney General, in exercising his discretion is acting lawfully. The High Court can, however, interfere with the exercise of the discretion if the Attorney General, in prosecuting the appellants, is contravening their fundamental rights and freedoms enshrined in *the Constitution*.”

64. The rights and fundamental freedoms referred to in the above decision must include the right to fair hearing enshrined in Article 50(1) to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or another independent and impartial tribunal or body. In that regard, the decisions referred to above, are clear that the court will interfere with the 1st respondent’s discretion if it is shown that the impugned prosecution is intended to achieve a collateral purpose rather than the course of justice and will not result into a fair hearing.

65. The petitioner has argued that the decision to charge and prosecute her is meant to bring pressure to bear on her in order to force a certain outcome in the ELC suit. To back this up, it has been submitted that investigations and the subsequent decision to charge her were shrouded in secrecy so that it could catch her unaware. The respondents and interested parties have denied, though that this is the case.



66. The core issue here is about the land claimed by both the petitioner and the interested parties. It is a dispute that has had its way to Court in ELC No.641 of 2017. That suit is live in Court, and was instituted by the interested parties. The petitioner is one of the defendants in that suit. The others are; the Land Registrar Kajiado, Susan Wanjiru Mbugua and the Attorney General. It is also a fact that whereas the ELC case was initiated by the interested parties in 2017, the criminal proceedings were initiated in 2018 during the pendency of that suit.
67. So was the criminal prosecution intended to achieve criminal justice or some other purpose? According to the petitioner, which is supported by the record, investigations were conducted between 2012 and 2016. There are on record correspondences from officers of both the respondents to that effect. Some of the correspondences confirm that 1st respondent's office advised that investigations be closed and that the petitioner was at liberty to deal with the property as she wished. It was after that decision that the interested parties instituted the civil suit in 2017 against the petitioner and other persons who are not a party to this petition. The correspondences relied on by the respondents though referring to the same investigations, advised otherwise as already explained in this judgment.
68. As already pointed out, where the 1st respondent is not conducting prosecutions in accordance with his constitutional mandate and it is shown that the prosecution is for an improper purpose the court will intervene. See *Fredrick Okeyo Otieno v Director of Public Prosecutions & 4 others* [2017] eKLR. Similarly, in *Republic v Director of Public Prosecution & 2 others Ex parte Francis Njakwe Maina & another* [2015] eKLR, the Court observed that if the applicant demonstrates that the criminal proceedings constitute an abuse of process, the Court will not hesitate in putting a halt to them.
69. The respondents have not explained why the criminal proceedings have been instituted after the interested parties filed a civil suit in the ELC over the ownership of the same property against the same person who is the defendant in the suit. The respondents have argued that the law allows concurrent civil and criminal proceedings and existence of the civil suit should not be a basis for halting the criminal case. They rely on section 193(A) of the *Criminal Procedure Code* to advance their argument.
70. Section 193(A) 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.”
71. It is correct to say that section 193(A) permits concurrent criminal and civil proceedings and the court should not halt criminal proceedings merely because there are civil proceedings arising from the same facts. However, where circumstances show that the desire to mount prosecution is motivated by



extraneous matters, the court will stop criminal proceedings section 193(A) notwithstanding.

72. In other words, the court must bear in mind the circumstances of each case in making a decision on whether or not to terminate criminal proceedings. In my view, it is not the mere fact of there being concurrent criminal and civil proceedings. Rather it is the purpose for which the criminal proceedings have been commenced that the court should interrogate. The purpose should be attainment of criminal justice and nothing else. If its initiation is for an improper purpose, the court will intervene.
73. It was in that regard that the court observed in Republic v Director of Public Prosecution & 2 others Ex parte Francis Njakwe Maina & another (supra) that:
- “[T]he concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim.”
72. It will be considered an abuse of the Court process to mount a criminal prosecution for extraneous purposes such as to secure settlement of a civil debt or to settle personal differences. In that respect, it will not matter whether or not the complainant has a prima facie case. In deciding whether to commence or pursue criminal prosecution the 1st respondent must consider the interests of the public and ask himself whether the prosecution will enhance public confidence or whether the case can be easily resolved by civil process without putting an individual’s liberty at risk. (See R v Attorney General Ex parte Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001)
73. In the present case, the 1st respondent does not seem to have taken into account the possibility that the dispute being over ownership of land, it could easily be resolved through the civil process, given that the interested parties had already filed a suit against the petitioner over the ownership of the same parcel of land. To a keen observer, the criminal process may not have been geared towards achieving the cause of justice when all the circumstances of this case are taken into account, including the fact that the decision to prosecute was shrouded in mystery and secrecy.
74. Where it is clear to the court that institution of the criminal process is guided by extraneous matters divorced from the goals of justice, it has a duty to prohibit the continuation of the criminal prosecution to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to the cause of justice, public interest and fair play. (Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69).
75. I have carefully considered this matter and perused the record. There is no doubt that even though the respondents and the interested parties have denied it, the criminal proceedings were not initiated against the petitioner in good



faith. Whereas at one point the 1st respondent's office advised on closure of the investigations, it sanctioned the petitioner's prosecution a week later without offering any explanation at all. There is also no evidence that the petitioner was called upon to say something before her prosecution. Criminal proceedings against her were instituted in 2018 after investigations had been closed. If on the other hand it is the respondents' case that recommendation for the petitioner's prosecution was made in 2016, no explanation has been given why she was not charged between then and 2017 when the interested parties file the civil suit.' Emphasis Mine

12. Further, in *Republic v Director of Public Prosecution & 2 others Ex parte Francis Njakuwe Maina & another* [2015] eKLR the court held that:-

The concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim." Emphasis Mine

13. Based on the facts as presented while associating myself with the decisions quoted, it is my considered view that this court has jurisdiction to challenge the decision of Respondents' who have commenced investigating the Applicant for the offence of forceful detainer, noting that there is already a pending civil case in respect to specific performance over the suit lands. I hence beg to disagree with the Respondents that the criminal process can proceed concurrently with the civil one. I opine that, there was an element of bad faith on the part of the Interested Party as they had an agreement with the Applicant, but she opted to use the criminal process perhaps to defeat the orders of obtaining status quo, which were issued in the aforementioned Civil Case. The Respondents' have not demonstrated the import of the investigations, they are undertaking in respect to the suit lands, since they are aware there is a pending civil case over the said lands. To my mind, the purported investigation are not necessary and there is no prejudice if the Respondents, awaited the outcome of the civil case which was filed first, after which they can proceed with the criminal proceedings if need be.
14. In the foregoing, I find the Notice of Motion Application dated the 2nd November, 2023 merited and will allow it, in the following terms:-
- a. That pending the hearing and determination of the Petition, an order of temporary injunction be and is hereby issued restraining the Respondents either by themselves, agents, servants from Summoning, Arresting and/or Charging/ Preferring Charges against the Applicant/Petitioner or in any way howsoever from investigating any matter in respect of the dispute between the Applicant/Petitioner and Christina Ndunge Morris in ELC 016/2023 Nicodemus Mwanzia Kimuli and Christina Ndunge Morris in relation to Mavoko Town Block 3/105602 and Mavoko Town Block 3/105603 all situated in Joska Sub County, Machakos County.
 - b. Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 16TH DAY OF MAY, 2024.

CHRISTINE OCHIENG

JUDGE

In the presence of;



Mwalo for Petitioner

No appearance for Respondents

Court Assistant – Simon/Ashley

