



**Kalii & 2 others (Suing as Chairman, Secretary and Treasurer of Mamukii Society on Behalf of 2500 Society Members) v National Land Commission & 4 others (Environment & Land Petition E004 of 2021) [2024] KEELC 7299 (KLR) (30 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7299 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MAKUENI**  
**ENVIRONMENT & LAND PETITION E004 OF 2021**  
**TW MURIGI, J**  
**OCTOBER 30, 2024**

**BETWEEN**

**JOSEPH MUTUKU KALII ..... 1<sup>ST</sup> PETITIONER**  
**PETER KISOLO MWAVU ..... 2<sup>ND</sup> PETITIONER**  
**PAULINE MWIKALI KAAZOO ..... 3<sup>RD</sup> PETITIONER**  
**SUING AS CHAIRMAN, SECRETARY AND TREASURER OF MAMUKII**  
**SOCIETY ON BEHALF OF 2500 SOCIETY MEMBERS**

**AND**

**NATIONAL LAND COMMISSION ..... 1<sup>ST</sup> RESPONDENT**  
**CHIEF LAND REGISTRAR ..... 2<sup>ND</sup> RESPONDENT**  
**HON ATTORNEY GENERAL OF KENYA ..... 3<sup>RD</sup> RESPONDENT**  
**MAKUENI COUNTY GOVERNMENT ..... 4<sup>TH</sup> RESPONDENT**  
**STANLEY & SONS LIMITED ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

1. This ruling is in respect of the Notice of Motion dated 20<sup>th</sup> March, 2024 brought under Sections 1A, 1B (a), 3A and 63(e) of the [Civil Procedure Act](#) and Order 51 Rule 1 of the Civil Procedure Rules, 2010 in which the Petitioners/Applicants seek the following orders: -
  - i. Spent.
  - ii. Spent.



- iii. That pending determination of the suit herein, the Honourable Court be pleased to stay proceedings in Kilungu Criminal Case being MCCR NO. E124 OF 2021.
  - iv. That the costs of this application be provided for.
2. The application is supported by the affidavit of Yvonne Mbithe Mutete Advocate sworn on even date.

### **The Applicants Case**

3. The deponent averred that Plot No. L.R No. 1748 situated at Kiima Kiu within Makueni County is ancestral land belonging to members of the Petitioner Society. That sometimes in the year 1931 to 1946, the Petitioner members were displaced from the suit property by a white settler named Robin Woodcraft Stanley who later in May 1975, transferred the same to his company the 5<sup>th</sup> Respondent herein.
4. She further averred that on 12/4/2021, the 5<sup>th</sup> Respondent lodged a criminal complaint at Salama Police Station which prompted the commencement of Kilungu MCCR No. E124 of 2021 where Joseph Mutuku Kalii, Pauline Mwikali Kaanzo and three others were charged with the offence of forcible detainer, malicious damage and trespass to the suit property.
5. The deponent contended that the criminal proceedings are irregular and improper since ownership of the suit property has not been determined in the Petition herein. She further contended that the criminal case would result to a trial by ambush since the 5<sup>th</sup> Respondent who is the complainant therein has not been declared the owner of the suit property. She further contended that the Applicants are apprehensive that criminal trial may be unfair which would lead to unlawful conviction based on false evidence.
6. The Deponent argued that the Respondents will not suffer any prejudice since the application is intended to avoid the irregular determination of Kilungu MCCR No. E124 of 2021. She further contended that, the significance of the Petition herein will be unappreciated should the trial of the criminal case proceed before the ownership of the suit property is determined. According to the deponent, the application is not res judicata as the issues raised herein have not been determined by any court. In conclusion, she urged the court to allow the application as prayed.

### **The 4<sup>th</sup> Respondent's Case**

7. The 4<sup>th</sup> Respondent filed a replying affidavit of Jackson Charo Daudi, the Chief Officer, Department of Lands, Makueni County in opposition to the application. The deponent contended that the civil proceedings herein are not a ground for stay, prohibition or delay of the criminal proceedings. He further contended that criminal and civil proceedings can run concurrently unless either one of the other is employed to perpetuate an ulterior motive or generally to abuse the court process
8. According to the deponent, the Applicants have not demonstrated how the criminal case will either be unfair, unlawful or an abuse of the court process. He argued that the application herein is incompetent and ought to be dismissed with costs.

### **The 5<sup>th</sup> Respondent's Case**

9. The 5<sup>th</sup> Respondent filed a replying affidavit of its Managing Director Robin Alan Stanley in opposition to the application. According to the deponent, the application is an attempt by the Petitioners to further delay the expeditious determination of the proceedings herein. He deposed that



the application is fatally defective as it offends the provisions of Rule 9 of the Advocates (Practice) Rules in addition to Order 19 Rule 3 (1) of the Civil Procedure Rules.

10. He further contended that Section 193A of the Criminal Procedure Code, does not bar civil and criminal proceedings from running concurrently. It was further contended that some of the Petitioners have been charged with offences that are unrelated to the Petitioners' claim of ownership over the suit property to wit malicious damage contrary to Section 339 of the Penal Code and preparation to commit a felony contrary to Section 309(1) of the Penal Code.
11. The deponent relied on the provisions Section 26 (1) of the *Land Registration Act* to argued that the 5<sup>th</sup> Respondent having been issued with a Certificate of title is evidence that it is the absolute and indefeasible owner of the suit property. He further argued that the Petitioners have not pleaded fraud or provided particulars of illegality on the part of the 5<sup>th</sup> Respondent.
12. He deposed that the criminal proceedings in Kilungu MCCR No. 225 of 2021 were commenced three years ago during the pendency of the proceedings herein and that the Petitioners have not explained the three-year delay in bringing the present application. He further averred that if the orders sought are granted, the 5<sup>th</sup> Respondent will suffer prejudice in that the criminal case will be delayed further.
13. According to the deponent, the Petitioners have not demonstrated merit in their application to enable the court to exercise its discretion in their favour. He urged the court to dismiss the application.

### **The Response**

14. The Petitioners filed a further affidavit in response to the replying affidavits filed by the 4<sup>th</sup> and 5<sup>th</sup> Respondents. The deponent argued that Section 193A of the Criminal Procedure Code is a miscellaneous provision whose applicability cannot outweigh the absolute right to fair trial. She argued that proceedings can be stayed at any stage and reiterated that it is in the interest of justice that the application be allowed as prayed.
15. The application was canvassed by way of written submissions.

### **The Applicants' Submissions**

16. The Applicants filed their submissions dated 14<sup>th</sup> May, 2024.
17. In their submissions, Counsel reiterated the contents of the affidavit in support of the application. Counsel contended that in the event the court finds that the Petitioners are the rightful owners of the suit property, the charges will have to be dropped as the case shall have no legs to stand on. Counsel submitted that the application is intended to temporarily hold the proceedings in the criminal case so as to avoid a situation where the Applicants might lose their liberty when the subject matter is yet to be determined. Counsel urged the court to stay the proceeding in the criminal case pending the outcome of the Petition herein. Counsel argued that the criminal case is an intimidating tactic to bar the Applicants from pursuing the ownership of the suit property.
18. Counsel further submitted that the 5<sup>th</sup> Respondent's allegation that the Petitioner's Advocate ought not to have sworn the affidavit is unfounded for the reason that the source of the information is disclosed in the various annexures in the affidavit in support of the application. Counsel argued that the contents of the supporting affidavit are on matters within the Advocate's knowledge and can be verified by the court file. Learned Counsel submitted that the contentious matters contained in the supporting affidavit of Ms. Mutete are not specified hence leaving the court to speculate. Counsel further submitted that Article 159 of *the Constitution* provides that no application shall be defeated



on a technicality of form that does not affect the substance thereof. In urging the court to allow the application with costs, reliance was placed on the following authorities: -

- i. Jackson (Suing on behalf of Somet Ole Tanyaag) v Sigei [2023] KEELC 20110 (KLR)
- ii. Maina & 4 others v Director of Public Prosecutions & 4 others [2022] KEHC 15 (KLR)

#### **The 4<sup>th</sup> Respondent's Submissions**

19. The 4<sup>th</sup> Respondent filed its submissions dated 15<sup>th</sup> May, 2024. On its behalf, Counsel identified the following issues for the court's determination:-
  - i. Whether the proceedings in Kilungu MCCR NO. E124 OF 2021 should be stayed pending the determination of this suit?
  - ii. Who should bear the costs of the application?
20. On the first issue, Counsel submitted that the Applicants have not stated how the concurrent proceedings will infringe on their right to a fair trial and how they will lead to the irregular determination of the criminal case. Counsel relied on the provisions of Section 193A of the Criminal Procedure Code to submit that the law allows for civil and criminal proceedings to run concurrently.
21. Counsel further submitted that the Applicants have not met the threshold for the grant of the orders sought as they have not demonstrated impropriety in support of the application.
22. It was submitted that the application is fatally defective for the reason that it is inviting the court to determine stay of proceedings at the exclusion of the Office of the Director of Public Prosecutions who has not been added as party to the application herein. Counsel submitted that the Applicants have not applied for stay of the criminal proceedings in accordance with Section 25 of the [Office of the Director of Public Prosecutions Act](#).
23. With regards to the second issue, Counsel submitted that the application is fatally defective, a waste of judicial time and ought to be dismissed with costs. To buttress his submissions, Counsel relied on the following authorities: -
  - i. Amir Lodges Ltd & another v Mohammed Omar Shariff & another [2022] eKLR
  - ii. Maina & 4 others v Director of Public Prosecutions & 4 others [2022] KEHC 15 (KLR)

#### **The 5<sup>th</sup> Respondent's Submissions**

24. The 5<sup>th</sup> Respondent filed its submissions dated 20<sup>th</sup> May, 2024. On its behalf, Counsel submitted that the main issue for determination is whether the Applicants have satisfied the test for stay of the criminal proceedings pending the hearing and determination of this suit.
25. As a preliminary issue, Counsel submitted that the affidavit in support of the application sworn by Yvonne Mbithe Mutete Advocate is fatally defective as she has deponed on contested matters of fact contrary to Rule 9 of the Advocates (Practice) Rules and Order 19 Rule 3 (1) of the Civil Procedure Rules. Counsel contended that paragraphs 2, 3, 4, 5, 6, 8 and 19 of the supporting affidavit refer to matters that have been pleaded in the Petition and in the verifying affidavit sworn on 26<sup>th</sup> April, 2021 by Joseph Mutuku Kalii. Counsel maintained that Yvonne Mbithe Mutete Advocate has not disclosed in her affidavit the sources of the purported information.
26. Counsel further submitted that the contents of paragraphs 2, 3, 4, 5, 6, 8 and 19 of the supporting affidavit were very contentious during the hearing of the Petition. Counsel insisted that the said



contents are not within the personal knowledge of the Petitioners' Advocate and that the deponent ought to have confined the affidavit to such facts as she was able to prove. For that reason, Counsel urged the court to strike out and/or disregard the said paragraphs.

27. On whether the Applicants have met the test for grant of the orders sought, Counsel submitted that the stage at which the application is made is a crucial factor to be considered by the court. Counsel contended that the application has been brought three years after the criminal proceedings were commenced by the State against Joseph Mutuku Kalii, Pauline Mwikali Kanzo and three others and that the delay has not been explained. Counsel further contended that the present application is intended to delay both the Petition herein and the criminal proceedings.
28. Counsel further submitted that the Applicants have not demonstrated any exceptional and compelling circumstances to warrant the court to exercise discretion in their favour. Counsel contended that there was nothing unusual about the concurrent proceedings since there is no substantial similarity between the issues before this court and in the criminal proceeding. In addition, Counsel contended that the accused persons in the criminal case have been charged with offences which are unrelated to the Petitioners' claim of ownership of the suit property to wit, malicious damage to property contrary to Section 339 of the Penal Code and preparation to commit a felony contrary to Section 308 (1) of the Penal Code. Counsel further submitted that the 5<sup>th</sup> Respondent is the registered proprietor of the suit property and that the title has not been cancelled.
29. Counsel further submitted that the application herein is res judicata in view of the judgment in Makueni HCJR Case No. 2 of 2021 delivered on 18<sup>th</sup> May, 2022. Counsel asserted that the court dismissed the Judicial Review case on the grounds that the Applicants failed to establish a prima facie case with a probability of success.
30. Counsel submitted that the criminal proceedings sought to be stayed were the subject matter in the Makueni Judicial Review Case No. 2 of 2021.
31. Counsel further submitted that the omission of the Director of Public Prosecutions (DPP) from the proceedings herein is an affront to the rules of natural justice. Counsel argued that the Court cannot entertain the application without receiving the input of the DPP who is a necessary party.
32. Concluding his submission, Counsel urged the Court to dismiss the application with costs. To buttress his submissions, Counsel relied on the list and bundle of authorities dated 20<sup>th</sup> May, 2024.

### **Analysis And Determination**

33. Having considered the application in light of the pleadings, the respective affidavits and the rival submissions, the main issue that arises for determination is whether the court should stay the proceedings in Kilungu Criminal Case MCCR NO. E124 of 2021 pending the hearing and determination of this suit.
34. Stay of proceedings is a discretionary power which must be exercised judiciously and in exceptional circumstances. The test for stay of proceedings was stated in the case of Global Tours & Travels Limited Nairobi HC Winding up Cause No 43 of 2000 as follows:-

“As I understand the law whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice...the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pro and cons of granting or not granting the



order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

35. Similarly, in the case of *Kenya Power & Lighting Ltd vs Esther Wanjiru Wokabi* (2014) eKLR the court held that:-

“The court’s discretion in deciding whether or not to grant stay of proceedings as sought in this application must be guided by any of the following three main principles;

- a. Whether the applicant has established that he/she has a prima facie arguable case.
- b. Whether the application was filed expeditiously and
- c. Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.”

36. The Applicants are seeking to stay the proceedings in Kilungu Criminal Case No. E124 of 2021 pending the determination of this Petition. They argued that the criminal proceedings are irregular since ownership over the suit property has not been determined. They further argued that they are apprehensive that an unfair trial of the criminal case may ensue which may lead to a conviction based on false evidence. The 4<sup>th</sup> and 5<sup>th</sup> Respondents contended that the law allows for civil and criminal proceedings to run concurrently.

37. The jurisdiction of a court over a civil matter is distinct from the court’s jurisdiction in a criminal matter. Civil cases involve disputes between individuals or entities regarding their rights, obligations or liabilities. For civil matters, the cause of action arises from a wrong committed by one person to another while in criminal matters the charge arises from a breach of law already prescribed by the law. The Office of the Director of Public Prosecutions (ODPP) established under Article 157 of *the Constitution* is charged with the mandate to institute and undertake criminal proceedings against any person in terms of the powers specified under Article 157 (6) thereof.

38. It is not in dispute that the Chairman, Secretary and Treasurer of the Petitioner herein and two others were charged in Kilungu MCCR No. E124 of 2021 with the offences of forcible detainer, malicious damage and trespass to the suit property. This court is called upon to determine whether civil and criminal proceedings can run concurrently. Section 193A of the Criminal Procedure Code provides as follows: -

‘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.’

39. The net effect of this provision is that the institution of either proceeding of criminal or civil nature is not a bar to the institution and progression of the other. A civil case can run concurrently with a criminal case and vice versa notwithstanding that they both relate to similar set of facts.



40. In Robert Waweru Maina & 4 others v Director of Public Prosecutions & 3 others [2022] eKLR the court held that: -

“A court could only block parallel proceedings in special circumstances. A defendant could move for a stay to block parallel proceedings, which would be granted only if the defendant could prove either that the government was acting in bad faith and using malicious tactics to circumvent the strict criminal discovery rules, or that there was a due process violation. Even if a defendant met one of those requirements, a stay might not be guaranteed. The court took as many other factors into account in deciding whether a stay was appropriate in a specific situation. Those factors included; the commonality of the transaction or issues, the timing of the motion, judicial efficiency, the public interest, and whether or not a petitioner was intentionally creating an impediment.”

41. The Applicants contended that the criminal case would result to a trial by ambush since the complainant (the 5<sup>th</sup> Respondent herein) has not been declared the owner of the suit property. They further contended that the proceedings in the criminal case are irregular since the ownership of the suit property has not been determined. The 5<sup>th</sup> Respondent averred that the criminal case was scheduled for defence hearing on 20<sup>th</sup> May, 2024 a fact which was not disputed. One of the conditions that the court should consider is whether the application has been made expeditiously. Looking at the charge sheet, it is clear that the accused were charged 3 years ago. The present application was filed on 21<sup>st</sup> March 2024. The delay of 3 years has not been explained. I therefore find that there has been unreasonable delay in bringing the application herein.

42. The Applicants must show that the ODPP acted in bad faith in preferring the charges against them. Having perused the charge sheet (annexure YMM5), it is not in dispute that besides the offences of trespass and forcible detainer, the Applicants have also been charged with the offences of malicious damage to property and preparation to commit a felony. While the nexus of these proceedings is land parcel No. 1748 which both parties are laying a claim to, the Applicants did not demonstrate that the ODPP acted in bad faith or out of malice in preferring the charges against them.

43. The Applicants have not demonstrated that the proceedings are an abuse of court process or that due process is not being observed in order to qualify for the orders sought. The Applicants have not satisfied the court that they stand to suffer prejudice if both criminal and civil proceedings continue concurrently or shown that they will be prejudiced by the progression of the criminal case. I am of the view that the application has been made when the case is at an advanced stage as it is pending for defence hearing.

44. The 5<sup>th</sup> Respondent contended that the application is res judicata to Makueni HCJR No. 2 of 2021. Counsel submitted that the criminal proceedings sought to be stayed were the subject matter in Makueni HCJR No. 2 of 2021. The Applicants on the other hand contended that the issues raised in the application herein have not been determined by any court.

45. The doctrine of res judicata is anchored in Section 7 of the *Civil Procedure Act*, Cap 21 Laws of Kenya which provides as follows:-

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.



Explanation. - (1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it...

Explanation. - (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit...

Explanation. - (6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

46. The doctrine of res judicata has been defined in the Black’s Law Dictionary, 9<sup>th</sup> Edition at page 1425 as follows:

“a thing adjudicated” 1. An issue that has been definitively settled by judicial decision. 2. An affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been but was not raised in the first suit.”

47. The elements which must be present to succeed on a defence of res judicata were enunciated in Independent Electoral & Boundaries Commission Vs Maina Kiai & 5 Others [2017] eKLR where the Court of Appeal held that: -

“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

- a. The suit or issue was directly and substantially in issue in the former suit.
- b. That former suit was between the same parties or parties under whom they or any of them claim.
- c. Those parties were litigating under the same title.
- d. The issue was heard and finally determined in the former suit.
- e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

48. From the foregoing, it is clear that for res judicata to suffice, a Court should look at all the five elements set out above namely; the matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suits; the former suit must have been between the same parties or parties under whom they claim; the parties must have litigated under the same title; the Court which decided the former suit must have been competent and the former suit must have been heard and finally decided by the Court in the former suit.

49. In Kilungu MCCR No. E124 of 2021, the accused persons Joseph Mutuku, Pauline Mwikali, Kaloa Mailu, John Muma and John Mwangi are charged with the following offences:-

- i. Count I Forcible detainer contrary to Section 91 of the Penal Code.
- ii. Count II Malicious damage contrary to Section 339 of the Penal Code.
- iii. Count III Trespass with intent to commit an offence contrary to section 5(1)(a)(b) of [Trespass Act](#).



- iv. Count IV Preparation to commit a felony contrary to Section 308(1) of the Penal code.
50. In Makueni HCJR No. 2 of 2021 the Applicant, Pauline Mwikali, had sought to stay the proceedings in Kilungu Criminal Case No 225 of 2021 where she was charged with the following offences:-
- i. Count I Forcible detainer contrary to Section 91 of the Penal code.
- ii. Count II Malicious damage contrary to Section 339(1) of the Penal Code.
- iii. Count III Trespass with intent to commit an offence Contrary to Section 5(1)(a)(b) of Trespass Act.
51. It is clear from the charge sheet that the accused persons in Kilungu MCCR No. E124 of 2021 with the exception of Pauline Mwikali were not charged in Criminal Case No. 225 of 2021. Although the charges relate to the same cause of action, the parties in the two cases are not the same. The court in its ruling in HCJR No 2 of 2021 declined to grant the orders as sought on the grounds that the Applicant had not established a prima facie case. The 5<sup>th</sup> Respondent did not adduce any evidence to show that Kilungu Criminal Case No. 225 of 2021 has been heard and determined.
52. The 5<sup>th</sup> Respondent contended that the affidavit in support of the application herein is fatally defective as it offends the provisions of Order 19 Rule 3 of the Civil Procedure Rules and Rule 9 of the Advocate (Practice) Rules. However, the 5<sup>th</sup> Respondent did not raise the preliminary objection against the offending paragraphs as being oppressive and prejudicial to the 5<sup>th</sup> Respondent's case.
53. In the end I find that the application is not merited and the same is hereby dismissed.

**HON. T. MURIGI**

**JUDGE**

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 30<sup>TH</sup> DAY OF OCTOBER, 2024.**

In The Presence Of:

Jelagat holding brief for Osoro for the 1<sup>st</sup> Respondent.

Ms Makaba for the 4<sup>th</sup> Respondent.

Ms Nyabuto for the Petitioner/Applicant.

Ms Thuku holding brief for Dr Musau for the 5<sup>th</sup> Respondent.

Deya together with Kuyo for the 5<sup>th</sup> Respondent.

