



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

MISC. CR. APPL. 11 OF 2013

JOHN MAINA MURAGE

PAUL WANJOHI KERU

SIMON IRUNGU GITHUMBI.....APPLICANTS

Versus

REPUBLIC.....RESPONDENT

RULING

1. By a notice of motion dated 27th May 2013 under section 362 and 364 of CPC and Article 22d, 23(1), 25(c), 27(1), 47, 39 50 (b) (j) and 165 (3) (a) (b) (6) (7) of Constitution of Kenya 2010 the applicants JOHN MAINA MURAGE, PAUL WANJOHI KERU and SIMON IRUNGU GITHUMBI moved this court for an order that the honourable court grant stay of proceedings in Criminal Case No. 75 of 2012 Nyeri wherein the applicants are charged with the offence of trespass contrary to section 3(1) of the Trespass Act Cap 294 Laws of Kenya pending the hearing and determination of summons for the revocation of grant in succession cause No. 349 of 2010.

2. The application was supported by the affidavit of Wanyiri Kihoro advocate wherein he deponed that the charge is based upon the complaint by one Rosemary Kanario who under the section must have a legal title to the land allegedly trespassed on or be in actual occupation of the same which was not the said.

3. It was deponed that the grant in Nyeri Succession Cause No. 349 of 2010 is challenged and therefore the complainant has no title to produce to court and that on that basis the applicants have sought the orders for stay until the questions of grant and ownership are settled.

4. In reply to the said application the respondent through Inspector RAPHAEL MUTUA filed a replying affidavit where it was deponed that there is sufficient evidence to demonstrate that the three applicants trespassed on to parcel No. Aguthi/Gatitu/2497 which belonged to late Macharia Kihoro and by extension to Rosemary Kanario Macharia Kihoro pursuant to grant of letters of administration issued by the High court on 9th August 2010.

5. It was deponed that until the grant is revoked or annulled by the court the administrator is deemed to be the bona fide beneficiary of the estate and that criminal procedure code section 193 A provides that for concurrent criminal and civil proceedings and therefore the application is an attempt to gag the judicial process and delay the expeditious prosecution and disposal of the case.

6. At the hearing of the application herein Mr. Wanyiri Advocates for the applicants submitted that the search certificate produced at the lower court shows that the complainant is not the registered owner and therefore if the proceedings is stayed the matter will be sorted out in the succession cause where the application for revocation of grant has been pending since 2nd October 2012.

7. Miss Kitoto for the state submitted that the complainant is the legal administrator of the estate of the deceased having been issued with the grant by the High Court and that at the time when the offence was committed she was the legal administrator of the estate.

8. I must point out that at the time of the ruling the proceedings in criminal case No. 75 of 2012 had not been placed before the court and therefore was unable to confirm the content of paragraph 11 of the affidavit of Raphael Mutua that Mr. Wanyiri Kihoro had been adversely mentioned by a witness in criminal case No. 75 of 2012 as being the one who instructed the applicants to invade the subject parcel of land. I am also unable to confirm the stage where the proceedings sought to be stayed have reached.

9. I have however had the privilege of perusing Nyeri High Court succession cause No. 349 of 2010 wherein the complainant was on 19th August 2010 issued with letters of administration to the estate of ROBERT MACHARIA KIHORO and the application for revocation of grant filed on 2nd October 2012 and affidavit in support thereof sworn by Mr. Wanyiri Kihoro.

10. I have noted that as at 23rd October 2009 AGUTHI/GATITU/1494 was registered in the names of the following:

JANE NYAMBURA KIHORO	-	2.9 acres
IRENE WAIGUMO KIHORO	-	1.3 acres
WAMAHIU S/O KIHORO	-	1.62 acres
WANYIRI S/O KIHORO	-	1.67 acres
MACHARIA S/O KIHORO	-	1.62 acres
MWAGARU S/O KIHORO	-	1.62 acres

11. On 25th September 2011 AGUTHI/GATITU/2497 was registered in the name of MACHARIA KIHORO and title deed issued on 7th November 2011 while the said Macharia had died on 15th November 2008.

12. Whereas these issue may be relevant during the succession cause as regards the charge of trespass in criminal case No. 75 of 2012 the complainant having been appointed the legal administrator of the estate of the registered owner of the property has the right to lodge a complaint as regards trespass to the same whether or not the prosecution case shall succeed is not the issue for this court to determine.

13. In the case of GODDY MWAKIO & ANOTHER v R [2011] 2KLR it was held that an order for stay of proceedings particularly criminal proceedings is made sparingly and only in exceptional circumstances.

14. I therefore find that the applicants have not demonstrated any exceptional circumstances to enable the court order stay of proceedings pending determination of the summons for revocation of grant in succession cause No. 349 of 2010 as to do so would be aiding the applicants to build a defence against the charges before the trial court which would amount to an abuse of the court process. It is clear that section 193 A of the Criminal Procedure allows the two proceeding to go on concurrently.

15. I therefore find no merit on the application dated 27th May 2013 which I hereby dismiss and order that criminal case No. 75 of 2012 proceed to its logical conclusion.

Dated, signed and delivered at Nyeri this 13th day of June 2014.

J. WAKIAGA

JUDGE

Coram: Before Justice J. Wakiaga

Court clerk - Ndungu

Mr. Wanyiri for the applicant

Mr. Cheboi for the state.

Court: The ruling is read in open court in the presence of the above named.

J. WAKIAGA

JUDGE

13/6/2014