



**Siele & another v Republic (Miscellaneous Criminal Application
E016 of 2024) [2025] KEHC 606 (KLR) (28 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 606 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
MISCELLANEOUS CRIMINAL APPLICATION E016 OF 2024**

**RL KORIR, J
JANUARY 28, 2025**

BETWEEN

SIMON KIPRONO SIELE 1ST APPLICANT

PHILIP KIPLANGAT TOWETT 2ND APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicants filed a Notice of Motion Application dated 9th July 2024 where they sought the following Orders:-
 - i. Spent.
 - ii. Spent.
 - iii. That this honourable court be pleased to stay proceedings in Bomet Criminal Case Number 545 of 2023 pending the hearing and determination of Sotik ELC Case Number E003 of 2021.
 - iv. That this honourable court do issue an order compelling the Land Registrar Bomet to avail original green card and original transfer forms with respect to Kericho/Sotik Township/402 before the trial court.
 - v. That a permanent injunction be issued restraining the Respondent and/or arresting officer from prosecuting the Applicants before Bomet Law Courts on any offence touching on the land parcel known as Kericho/Sotik Township/402.
 - vi. That this honourable court be pleased to issue such orders that it deems fit and just to grant in the circumstances.



2. The Application was brought under Articles 1, 22, 23(1) (2), 48, 50 and 159 of the *Constitution* of Kenya. It was based on the grounds listed on the face of the Application and the Supporting Affidavit sworn by Philip Kiplangat Towett on 9th July 2024.

The Applicants' case.

3. The 2nd Applicant stated that in the year 2006, he bought the parcel of land known as Kericho/Sotik Township/402 (hereinafter referred to as the subject land) from the 1st Applicant and the subject land was transferred to him and a Title Deed secured. The 2nd Applicant further stated that one David Cheruiyot trespassed on his land claiming to have purchased the same from the 1st Applicant.
4. It was the 2nd Applicant's case that from the green card, the said David Cheruiyot was not a registered owner of the subject land. It was the 2nd Applicant's case that sometime in the year 2021, David Cheruiyot conspired with officers from the criminal investigations department to charge him with the offence of conspiracy to defraud in Bomet Criminal Case Number E148 of 2021.
5. The 2nd Applicant stated that together with the 1st Applicant, they lodged a complaint with the Respondent through the office of the Director of Public Prosecutions and the charges against them were dropped due to insufficient evidence. That Bomet Criminal Case Number E148 of 2021 was subsequently closed.
6. It was the 2nd Applicant's case that he later filed an ELC suit at Sotik Law Courts (Sotik ELC Number E003 of 2022) jointly with his daughter against the complainant (David Cheruiyot) seeking a declaration that the subject land belonged to the 2nd Applicant. That the question of ownership of the subject land has never been determined as the case was still pending.
7. The 2nd Applicant stated that during the pendency of the ELC suit, he was arrested together with the 1st Applicant and charged with the same offence that he had been charged with in Bomet Criminal Case Number E148 of 2021. That he was now charged in Bomet Criminal Case Number 545 of 2023 that was now pending. The 2nd Applicant further stated that no new evidence had been brought before the trial court to warrant reinstatement of the previous charges.
8. It was the 2nd Applicant's case that he was served with a copy of a transfer form and a Certificate of Lease which showed that proprietary interests in the subject land had been transferred to David Cheruiyot (complainant). That the said documents were not registered in the Lands Registry and were therefore a forgery. It was the 2nd Applicant's further case that the charges against them were malicious.
9. The 2nd Applicant stated that the Land Registrar was called to testify on 5th June 2014 and she failed to produce the ownership documents claiming that the same were misplaced during the transition from the old Lands Registry to the new Lands Registry. That it was evident that the Land Registrar was compromised. The 2nd Applicant further stated that in the absence of the ownership documents, there was no basis of charging them with the offence of conspiracy to defraud and procuring registration of a document related to land.
10. It was the 2nd Applicant's case that the subject land was located in Sotik and there was no reason why his criminal case should not be heard in Bomet. That Bomet Law Courts lacked the requisite jurisdiction to handle the matter. It was his further case that the decision to charge him in Bomet was mischievous and suspicious.
11. The 2nd Applicant stated that the complainant was forum shopping. The 2nd Applicant further stated that David Cheruiyot had filed a counterclaim in the Sotik ELC Suit Number E003 of 2021.



Response

(Complainant)

12. The complainant (David Cheruiyot) filed a Replying Affidavit dated 4th November 2024. He stated that on 3rd October 2005, he purchased the subject land from the 1st Applicant at Kshs 550,000/=. That due to limited resources, he decided to partner with the 2nd Applicant to develop the subject land. The complainant stated that as a sign of good faith, he agreed to register the subject land in his name and that of the 2nd Applicant and they were issued with a Certificate of Lease and they constructed a commercial building on the subject land.
13. It was the complainant's case that a dispute arose between him and the 2nd Applicant in the year 2009 and the same was resolved by clan elders in a meeting held on 14th March 2009. That following that meeting, the complainant agreed to surrender the Certificate of Lease to as to have the subject land divided into two equal portions and thereafter have fresh Certificates of Lease issued. It was the complainant's further case that upon surrendering the Lease, the 2nd Applicant entered into a separate Sale Agreement with the 1st Applicant and caused the entire parcel to be transferred and registered in his sole name.
14. The complainant stated that when the 1st Applicant's signatures in the two Sale Agreements were subjected to forensic examination, it was determined that both Sale Agreements (with the complainant and with the 2nd Applicant) were executed by the 1st Applicant. That he then reported the matter to the police and the Applicants were arrested, charged and arraigned in Bomet Criminal Case Number E148 of 2021 to answer charges of conspiracy to defraud and procuring registration of document related to land.
15. It was the complainant's case that Bomet Criminal Case Number E148 of 2021 was withdrawn under section 87(a) of the *Criminal Procedure Code* despite there being solid and compelling evidence. That withdrawal under section 87(a) of the *Criminal Procedure Code* did not operate as a bar to subsequent proceedings and that the 2nd Applicant could be charged again for the same offences.
16. The complainant stated that after the evidence was reviewed, the Applicants were re-arrested and arraigned in court *vide* Bomet Criminal Case Number 545 of 2023 to answer to the previous charges. That the matter had proceeded where a total of 8 prosecution witnesses had testified and the prosecution had one remaining witness before they close their case. The complainant further stated that he stood to suffer prejudice if the criminal case was stayed. The complainant further stated that in line with section 5 of the Penal Code, the trial court in Bomet was seized with the requisite jurisdiction to handle the criminal matter.
17. It was the complainant's case that the pendency of Sotik ELC Number E003 of 2021 had no bearing or nexus with the ongoing criminal matter. That in regards to the prayer to compel the Land Registrar to issue the green card of the subject land, the complainant stated that nothing barred the Applicants from making such an Application before the trial court.
18. The Respondent filed a Replying Affidavit sworn by No. 90923 PC Patrick Nyoike on 19th November 2024. The Respondent's Replying Affidavit was similar to the complainant's Replying Affidavit.

The complainant's written submissions.

19. The complainant submitted that the trial court in Bomet had the jurisdiction to hear and determine the criminal proceedings before it. That the Applicants did not raise the issue of jurisdiction before



the trial court and that the instant Application had been brought in bad faith. He relied on section 5 of the Penal Code.

20. It was the complainant's submission that this court should not stay the criminal proceedings in Bomet Criminal Case Number E545 of 2023 pending the hearing and determination of Sotik ELC Number E003 of 2021. That the pendency of a civil suit did not have a bearing on criminal proceedings. It was his further submission that the two matters were separate and distinct.
21. The complainant submitted that the Applicants should have made the present Application in the trial court and not this court.
22. It was the complainant's submission that this court could only stay the criminal proceedings if the Applicants demonstrated exceptional circumstances that warranted the grant of such a prayer. That they Applicants failed to demonstrate any such circumstances and they further failed to show how they would suffer prejudice if the criminal case proceeded.
23. Similarly, the Respondent filed its written submissions on 19th November 2024 and they were similar to the complainant's written submissions.
24. The Applicants' failed to file their written submissions.
25. I have gone through and considered the Notice of Motion dated 9th July 2024, the complainant's Replying Affidavit dated 4th November 2024, the Respondent's Replying Affidavit dated 19th November 2024, the Respondent's written submissions dated 19th November 2024 and the complainant's written submissions dated 11th November 2024. The only issue for my determination is whether the Bomet Criminal Case Number 545 of 2023 should be stayed pending the hearing and determination of Sotik ELC Suit Number E003 of 2021.
26. The law guiding stay of criminal proceedings can now be said to be well settled. The Court of Appeal in Joram Mwenda Guantai vs. The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 (2007) 2 EA 170, held that:-

“...the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has an inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court.”
27. However, the power of the court to stay proceedings is discretionary. In Godly Mwakio & Another vs. Republic (2011) eKLR, the Court of Appeal stated that:-

“An order for stay of proceedings, particularly stay of criminal proceedings is made sparingly and only in exceptional circumstances.....The order is not given as a matter of course.”
28. In Republic v Chief Magistrate, Kilgoris; Ex -parte Applicant: Johana Kipngeno Langat [2021] KEHC 9509 (KLR), Gikonyo J. held:-

“For the court to stay a criminal proceeding, the applicant must show that the criminal proceeding is being used oppressively or it was instituted for reasons other than to bring the accused to justice. Abuse of process should be established.”



29. The Applicants wanted this court to stay the criminal proceedings facing i.e. Bomet Criminal Case Number 545 of 2023 pending the hearing and determination of Sotik ELC Number E003 of 2021. From the pleadings on record, it was evident that the criminal matter in Bomet and the Environmental and Land Case Matter in Sotik were both live. Section 193A of the *Criminal Procedure Code* provides:-
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.
30. This therefore meant that the existence of a civil case and a criminal case on the same subject matter was not a bar to stay the criminal case. As earlier stated, this court had discretionary power to determine whether or not to stay the criminal proceedings. In my view, it is in the interest of justice that courts decide such cases depending on the unique facts of each case. In the present case, the ownership of Kericho/Sotik Township/402 was the sole dispute between the Applicants and the complainant, David Cheruiyot.
31. I concur with Ong’udi J. in *Araka & 2 others v Republic* [2023] KEHC 26783 (KLR), when she was faced with similar circumstances. She held:-

“As provided for under Section 193A of the Criminal Procedure Code, both proceedings may be run concurrently. In this case the issue is title and occupation. What would happen if the appellants who are the Accused Persons in Ogembo MCCR E035/2020 are convicted of being forcible detainers, before the determination of the ELC case and later on the ELC (which is the court endowed with the power to determine titles to land) finds in favour of the appellants? Which of the two decisions will carry the day? The criminal court has no jurisdiction to determine title to ownership of land.

To avoid placing the two courts in an embarrassing scenario, one of them should be stayed.....”

32. The Court of Appeal in *Commissioner Of Police & The Director Of Criminal Investigation Department & Attorney General v Kenya Commercial Bank Limited, David Kiprop Malakwen, Wilfred Kipkorir Sang, Muiri Coffee Estate Limited & Benjob; Amalgamated Limited* [2013] KECA 182 (KLR) held:-

“.....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 the power must be exercised responsibly, in accordance with the laws of the land in good faith.....

.....It is not in the public interest or in the interest of administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and travesty of justice for the police to be involved in the settlement of what is purely dispute 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.”



33. I am further persuaded by the decision of the High Court in *Maina & 4 others v 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) where the court observed:-

“We respectfully agree and adopt this position in this case but must add that where it is obvious to a court, as it is to us and was to the learned judge of the High Court, that a prosecution is being mounted to aid proof of matters before a civil court or where the hand of a suspect is being forced by the sword of criminal proceedings to compromise pending civil proceedings, then section 193A of the Criminal Procedure Code cannot be invoked to aid that unlawful course of action. Criminal proceedings, whether accompanied by civil proceedings or not, cannot and should never be used in the manner that the 2nd and 3rd respondents have done. It is indeed advisable for parties to pursue civil proceedings initially and with firm findings by the civil court on any alleged fraud, proceed to institute criminal proceedings to bring any culprit to book...” (Emphasis added)

34. Having considered all the circumstances of this case, I find that it is in the interest of justice halt the criminal case (Bomet Criminal Case Number 545 of 2023) pending the conclusion of Sotik Elc No. E003 of 2021.

35. In the end, I find merit in prayer III of the Notice of Motion Application dated 9th July 2024. I hereby stay the proceedings in Bomet Criminal Case Number 545 of 2023 pending the hearing and determination of Sotik ELC Number E003 of 2021. Prayers IV and V cannot be granted and are declined. That is to say that this court cannot order the Land Registrar to avail documents in a matter which is not being litigated before this court. This court cannot also injunct the Respondent from prosecuting its cases. With respect to Prayers VI, I direct that Sotik ELC E003 of 2021 be heard and concluded expeditiously. Parties are at liberty to apply to this court should either party actively delay proceedings in the civil suit.

36. I make no order on costs.

Orders accordingly.

RULING DELIVERED, DATED AND SIGNED THIS 28TH DAY OF JANUARY 2025.

.....

R. LAGAT-KORIR

JUDGE

Ruling delivered in the absence of the Parties. Siele (Court Assistant).

