



Abdullahi v Director of Public Prosecutions & 5 others (Constitutional Petition E021 of 2024) [2025] KEHC 703 (KLR) (23 January 2025) (Ruling)

Neutral citation: [2025] KEHC 703 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CONSTITUTIONAL PETITION E021 OF 2024
HM NYAGA, J
JANUARY 23, 2025**

BETWEEN

ABDI ABDULLAHI PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

CHIEF MAGISTRATE’S COURT TIGANIA 2ND RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS 3RD RESPONDENT

THE HON ATTORNEY GENERAL 4TH RESPONDENT

JOHNSON MBAABU MBURUGU 5TH RESPONDENT

CATHERINE GAKII MBAABU 6TH RESPONDENT

RULING

1. This ruling relates to the Notice of Motion dated 14th October 2024 in which the Applicant has sought the following prayers;
 - a. Spent
 - b. Spent
 - c. Spent
 - d. At the hearing of this application inter partes, this Honourable Court be pleased to issue a stay of proceedings in respect of Tigania Magistrate’s Court Criminal Case Number E717 of 2024, Republic –vs- Abdi Abdullahi alias Abdi Viazi pending the hearing and determination of the petition filed herein.



- e. Alternatively, at the hearing of this application inter partes, this court be pleased to issue conservatory orders directing that the proceedings in Tigania Magistrate's Court Criminal Case Number E717 of 2024, Republic –vs- Abdi Abdullahi alias Abdi Viazi be suspended or stayed pending the hearing and determination of the petition filed herein.
2. The Application is supported by the grounds set out on the face of it and the affidavit of the Applicant, sworn on even date.
3. In a nutshell, the Applicant states that he has preferred the petition herein detailing infringement, denial and threats to his fundamental rights with respect to Tigania Magistrate's Criminal case Number E717 of 2024, Republic vs Abdi Abdullahi alias Abdi Viazi.
4. It is Applicant's case that the said criminal case is based on a purely civil dispute that has mutated into a criminal process amounting to an abuse of the criminal jurisdiction of the court.
5. The Applicant further avers that the Respondents are fully aware of the existence of Meru ELC case No. E018 of 2024, Johnson Mbaabu Mburugu and Catherine Gakii Mbaabu vs Abdi Abdullahi in which the Judge has issued conservatory orders in favour of the Petitioner/Applicant.
6. It is further averred that this court has a duty and power to stop an abuse of the court process as the applicant's trial is potentially scandalous as there are in subsistence other suits regarding the same subject matter, namely:-
 - a. Tigania CMELC No. E137 of 2023.
 - b. Meru CMELC No. E065 of 2024
 - c. Meru CMELC No. 90 of 2018
 - d. Meru CMELC No. 123 of 2019
7. In response thereto, the 1st Respondent filed a replying affidavit sworn by one Masila E. Masila, Principal Prosecution Counsel, Meru, on 15th November 2024.
8. In a nutshell, it is the 1st Respondents averment that the 5th Respondent made a complaint to the Tigania DCI office vide OB Number 10 of 18th December 2023 in respect to land parcel No. Mbwa One/1492. That the 5th and 6th Respondent recorded their statements on 9/1/2024 after which the Petitioner/Applicant was summoned and he recorded his statement on 22/1/2024. That investigations commenced and after visiting the Ministry of Lands and Physical planning, Tigania West, it was established that the land in question was registered in the names of the 5th and 6th Respondents. That subsequently, the enquiry file was sent to the 1st Respondent, who vide a letter dated 18th April 2024, directed that the Applicant be charged in court.
9. The 1st Respondent further states that the 5th and 6th Respondents were not parties to Meru ELC case No. 123 of 2019, which was between the Applicant and one Charles Murithi Limbwa. That the latter was even arrested and charged with others over the land in question, which is in the name of the 5th and 6th respondent.
10. It is further stated that the 1st Respondent has acted within its mandate as conferred to it by Article 157 of *the Constitution*, the ODPP Act and the National Prosecution Policy.
11. The 1st Respondent urges the court to exercise caution so as not to interfere with its functions as conferred by law in a manner that will disable its operations and thus cause injustice to members of the public who are in pursuit of criminal justice.



12. It is further stated that under section 193A of the Criminal Procedure Code(CPC), simultaneous civil and criminal proceedings can go on parallel to each other.
13. The 1st Respondent urged the court to discuss the application.
14. The 5th Respondent swore an affidavit in response to the application on his behalf and on behalf of the 6th Respondent.
15. The 5th Respondent avers that the applicant has concealed material facts and made false allegations. That the applicant has never laid claim to land parcel No. 1488 situated in Mbwaa 1 Adjudication Section or land parcels No. 2613 and 1055 situated in Ruiiri Rwarera Adjudication Section. That the applicant has failed to disclose that he was charged in court over land parcel No. 3099 situated in Mbwaa 1 Adjudication Section, which is registered in the Adjudication Register in his name and that of the 6th respondent. That the said land, which is adjacent to land parcel 1488, has no recorded dispute, as evidenced by the documents annexed in the affidavit. Thus, it is averred their rights over land parcel No. 3099 have been ascertained.
16. It is further deponed that on or about 15th December 2023 the applicant entered upon their land parcel No. 3099 and began digging trenches. That despite being told to stop the applicant did not do so, resulting in them going to report the matter to Tigania Police Station. That they also went to the Land Adjudication Office over the matter. That the applicant then began to put up a perimeter wall on their land, with the intention of combining land parcel No. 1488 and land parcel No. 3099. They then visited the land with the Land Adjudication and Settlement Officer, and police officers. It was confirmed that the applicant was constructing the wall on land parcel No. 3099.
17. It is further deponed that the 5th and 6th Respondents have never litigated with the applicant over land parcels Numbers 1488, 2613 or 1055. That they are not parties in the Meru CMELC 90 of 2018 or Meru CMELC123 of 2019. That they only came to learn of the case in Tigania Court CMELC No. 137 of 2023 when the applicant filed HCC Misc. Application No. 026 of 2023 which was dismissed by the Court. That their civil case ELC No. E018 of 2024 has merits and it has nothing to do with the matters arising in the criminal case.
18. To the 5th and 6th respondents, the applicant was properly charged after investigations were done. That the applicant should defend himself in the criminal case and not seek to stop the trial. They thus urged the court to dismiss the application.
19. The applicant and 5th and 6th respondents filed their respective submissions which I shall not rehash word for word. I will refer to them where necessary.
20. The application seeks interlocutory relief, pending hearing and determination of the petition filed herein. The gist of the applicant's case is that the dispute herein ought to be settled in a civil court, and that the criminal process is an infringement of his rights.
21. The court has noted that the applicant had sought anticipatory bail and conservatory orders vide Meru HCC Misc. Application No. E026 of 2024, which application was dismissed as the applicant had not shown how his rights were being infringed at the time. The decision was made on the circumstances that were prevailing at the time, and the material placed before the court at the time, which was during the investigative period.
22. The question to be answered is whether the Applicant has now met the threshold for the grant of the orders sought in the present application. If it is shown that the threshold has been met, then this



court may depart from the finding of the court in the said application, as it is a court of concurrent jurisdiction.

23. The jurisdiction of this court is established under Article 165 of *the Constitution* which provides as follows:-
- (1) There is established the High Court, which—
 - (3) Subject to clause (5), the High Court shall have—
 - (a) unlimited original jurisdiction in criminal and civil matters;
 - (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
 - (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
 - (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
 - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - (iv) a question relating to conflict of laws under Article 191; and
 - (e) any other jurisdiction, original or appellate, conferred on it by legislation.
 - (5) The High Court shall not have jurisdiction in respect of matters—
 - (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
 - (b) falling within the jurisdiction of the courts contemplated in Article 162
 - (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
 - (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.
24. The only limit to this court’s jurisdiction as set out under Article 165(5) above.
25. Thus, if the court is satisfied that there is a breach or denial of a fundamental right, or threat thereof, it will act accordingly.
26. The gist of the Applicant’s case is that his prosecution before the Tigania Magistrates Court was carried out despite the existence of civil proceedings regarding the subject parcel of land.



27. There is no dispute that the 1st Respondent is an independent institution, but its mandate under Article 157 of *the Constitution* cannot be beyond interrogation by the court. Indeed, the said Article provides for the manner in which the 1st respondent is to act. Article 157 (10) and (11) provides as follows:-

(10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.

(11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

28. I agree with the 1st respondent that that this court ought, as much as possible, to allow independent institutions to perform their Constitutional or statutory functions. However, those institutions are not beyond the reach of this court to put a check on any errant acts or omissions. Thus, if any act by the 1st Respondent is found to be against public interest, against the administration of justice, or is an abuse of the legal process, then the court will no doubt step in. This position was confirmed in *Republic vs AE and 4 Others: Exparte Kenneth Kariuki Githii* [2014] eKLR where the court held that:-

“It is therefore clear that whereas the discretion given to the 3rd respondent to prosecute criminal offences is not to be lightly interfered with, that discretion must be properly exercised and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence such as with a view to forcing a party to submit to a concession of a civil dispute, the Court will not hesitate to bring such proceedings to a halt.”

29. Having stated the above, I will now delve into the matter at hand.

30. It is not in dispute that under section 193A of the Criminal Procedure Code (CPC) parallel civil and criminal proceedings can take place. The section states as follows;

“193A. Concurrent criminal and civil proceedings.

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.”

31. That said, the superior courts have always expressed their abhorrence to the use of the criminal justice system to settle a matter which is in essence seems to be civil in nature. For instance, in *Republic vs Chief Magistrate’s Court Mombasa Ex-parte Ganijee and Another*(2002) KLR 703 the High Court expressed itself as follows;-

“It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest. When a prosecution is not impartial or when it



is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice and no one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, prohibition and/or certiorari will issue and go forth... When a remedy is elsewhere provided and available to person to enforce an order of a civil court in his favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement. For in a criminal case a person is put in jeopardy and his personal liberty is involved. If the object of the appellant is to overawe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court... In this matter the interested party is more actuated by a desire to punish the applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose is to further that ulterior motive and that is when the High Court steps in..."

32. In *Rosemary Wanja Mwangi vs A. E. and 3 Others* [2013] eKLR the court held as follows:-

"It is, I believe, undisputed, as provided under Section 193 A of the Criminal Procedure Code, that the institution of civil proceedings does not preclude the State from undertaking criminal proceedings against a party with respect to an issue which is also directly in issue in a pending civil suit.

That notwithstanding, it is the duty of the Court to exercise its inherent jurisdiction so as to prevent its process being used to perpetrate injustice or otherwise as an abuse of its process. Since *Githunguri v Republic* (supra), it has been established that the High Court is entitled to exercise its jurisdiction to avert abuse of power, discretion or process. Thus, an examination of the events unfolding prior to the institution of the five civil suits and the eventual institution of the criminal complaints by the 2nd and 3rd respondents causes serious unease about the institution of the criminal process. Given the timing of the criminal complaint and the institution of the criminal prosecutions immediately following upon the filing of five civil claims involving the same parties over the same subject matter, and an application for orders of contempt against the petitioners in the Winding Up Causes which they had lodged against the 2nd and 3rd respondents, it is difficult to reach a conclusion other than that the criminal case was calculated to harass, coerce, oppress or otherwise intimidate the petitioners".

33. Similarly, in *Reuben Mwangi vs DPP and 2 Others* [2012] eKLR the court held that;

"It is, hence, a settled legal principle and position that whenever a Petitioner sufficiently demonstrates the stifling of or threats of infringement of rights, fundamental freedoms, *the Constitution* and/or the law by the investigative and prosecutorial agencies, a Court should not hesitate to intervene and stop such a prosecution. Such intervention by the Courts should, however, be in clearest of the cases.

34. Lastly, in *Kuria and 3 Others vs AE* (2002) 2KLR 69 the Court held that:-

"The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for



personal score settling or vilification on issues not pertaining to that which the system was even formed to perform.....A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious... The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court's) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process).”

35. The applicant is charged with the offence of forcible detainer contrary to section 91 of the Penal Code. The relevant dates are between 16th November 2023 and 10th December 2023. He was arraigned in court on 29th July 2024.
36. From the O/B Report of 18th December 2023, the complainant lodged was in respect to a parcel of land known as 3099 Mbwaa One, measuring 5 acres. According to the statements by the 5th and 6th respondents, this was the parcel of land that contained their borehole.
37. The charge sheet in the matter at hand refers to land parcel Mbwaa One/1492. It is not clear if this is the same as land parcel Mbwaa One 3099, to which the 5th and 6th Respondents are laying claim.
38. The court also states that in the suit CMELC No. E065 of 2024, the Applicant has sued the 5th and 6th Respondents over 3 parcels of land known as Mbwaa 1/1488, Ruiru Rwarera/2613 and Ruiru Rwarera/1055. It is also not clear whether those parcels are the same as parcel 3099 Mbwaa one and Parcel No. 1492 Mbwaa one.
39. In ELC case no. E018 of 2024 the 5th and 6th Respondents have sued the Applicant over land parcel No. 3099.
40. The court also notes that in Tigania ELC case No. E137 of 2023, the Applicant herein was sued by an entity known as World Faith Church regarding land parcel No. 3099.
41. To me the matter in dispute is so convoluted that it is difficult to state with certainty how the 1st Respondent came to conclude that the Applicant was in forceful occupation of land parcel No. 1492, which is not the land claimed by the 5th and 6th respondents. The two have categorically stated that their land is parcel No. 3099.
42. I agree with the Applicant that the intended criminal process pose a potential threat to his rights of liberty. Suppose the courts which are seized of the civil cases are to find in his favour, will he not have been unduly prosecuted?
43. Given the confusing circumstances as to which land is being contested and who owns what, I think that the applicant deserves the orders sought. That will give the courts seized of the civil suits to make their determination. If he is found to be on the wrong, then he can always be prosecuted.
44. Having considered the matter, I find that the applicant has met the threshold to warrant the grant of interlocutory relief sought.
45. Consequently, I grant the following orders;
 - a. There shall be a stay of the proceedings in Tigania Criminal Case No. E717 of 2024 pending hearing and determination of the petition herein.



b. The costs of the application shall be in the cause.

46. The court will grant further directions as regards the petition itself after delivery of this ruling.

DATED, SIGNED & DELIVERED AT MERU THIS 23RD DAY OF JANUARY, 2025.

H.M. NYAGA

JUDGE

