

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA
CRIMINAL REVISION CAUSE NO. 4 OF 2019
(ARISING FROM CRIMINAL CASE NO. 259 OF 2018 BUGEMBE
MAGISTRATES COURT

1. MUSUMBA YAHAYA
2. BATAMBUZE DAVID
APPLICANTS

VERSUS

UGANDA..... RESPONDENT

RULING

BEFORE HONOURABLE JUSTICE EVA. K. LUSWATA

This is an application brought by way of Notice of Motion under **Order 48, 50 (1) (b)** and **(5)** of the **Criminal Procedure Act** and **section 33** of the **Judicature Act** seeking the following orders: -

- a. That the criminal proceedings in **Criminal Case NO. 259 of 2018 Uganda Vs Musumba Yahaya and Batambuze David Munaza (Bugembe Magistrates Court)** be stayed pending hearing and determination of **Civil Suit No. 20 OF 2019 Musumba Yahaya Versus Rehema Talikangawo** (thereinafter the civil suit).
- b. That the costs of this application be provided for.

The grounds of this application are contained in the motion and supporting affidavit of Musumba Yahaya the 1st applicant. Briefly he deposed that he is the owner of a piece of land situated at Namulesa Busige village, Namulesa Parish, Namulesa sub county, Jinja District (hereinafter the suit land), that he acquired in 1997 and settled on it with his family and even sold portions of it to other people. That at the time he acquired the

suit land, one Rehema Talikangawo was also given a portion adjacent to his, and boundary marks were duly planted and exist to date.

Musumba continued that Talikangawo challenged his sale of a plot to one Allen Nakakawa in 2018, claiming that she owns the suit land. That Talikangawo's claims influenced one Allen Nakakawa (the complainant) to institute criminal proceedings against Musumba in the Bugembe Magistrate's Court, on a charge of obtaining money by false pretence on particulars that the land he sold, does not belong to him.

Musumba further stated that during the criminal trial, he discovered that Talikangawo had fraudulently processed and acquired a certificate of title in respect of the suit land without his knowledge and consent and that on the 3/1/2019, Talikangawo testified in Court that he sold her land which he denies. That having made that discovery, and contending that the Magistrate had no jurisdiction to determine the issue of land ownership, Musumba filed **Civil Suit NO. 20/2019** in the High Court, seeking for among others, orders for cancellation of Talikangawo's certificate of title. He continued that since the subject matter in issue in the criminal case is the same as that in the High Court, the latter which requires to be settled first, he applied to the Magistrate to stay the criminal proceedings so that the dispute of ownership of the suit land between him and Talikangawo is first be settled by this court. The Magistrate rejected the application and ordered the criminal matter to proceed, thus this application.

The respondent contested the application by filing an affidavit of Rania Naluyima, a State Attorney with the ODPP. She stated that the criminal matter cannot be stayed because the person claiming the suit land is not party to the criminal matter, and the civil claim of fraud in land is neither a criminal matter nor does it have nexus with the criminal offence of obtaining money by false pretense against the applicants herein. She continued that hearing of the criminal case will not prejudice the decision of court in **Civil Suit NO. 20/2019** because they are two different cases, and in different courts.

In rejoinder, Musumba stated that the dispute in the criminal case arises from sale of the suit land, a fact which is confirmed by prosecution evidence. That since Nakakawa and Talikangawo the principle prosecution witnesses gave detailed evidence that he sold land which does not belong to him, it is proper and prudent that the question of ownership, which is also a central issue in the criminal proceedings, is first settled by this court in the civil suit. He concluded that if the suits are treated as separate, the dispute of ownership of the suit land between him and Talikangawo is likely to prejudice both parties and will lead to multiplicity of suits, and conflict of judgments.

Both counsel filed substantial submissions which will not be repeated here. I have perused and will refer to them in my ruling.

Preliminary objection;

In their affidavit and submissions, the respondent raised an objection that the person claiming the suit land in the civil suit is not a party to the criminal proceedings, and neither is the respondent a party to the civil suit. That the two cases being independent of the other, can proceed concurrently in the two different courts.

Musumba is cited as the accused in the first count in the charge sheet dated 28/01/2019. He is charged with obtaining money by false pretense C/s 305 of the PCA. Again, Musumba Yahaya and Batambuze David Munaza are joint accused persons in count 2 on the offence of conspiracy to commit a felony C/s 390 PCA. Nakakawa Allen is the complainant in both counts. On the other hand, Musumba Yahaya and Talikangawo Namulinda Rehema are the parties in the civil suit.

Under **section 50(5) of the Criminal Procedure Code Act**, any person aggrieved can move court to exercise its powers of revision. One need not be party to the suit or complainant; it is sufficient that they are legally aggrieved. It is provided that:

“Any person aggrieved by any finding, sentence or order made or imposed by a magistrates court, may petition the High Court to exercise its powers of revision

under this section, but no such petition shall be entertained where the petitioner could have appealed against the finding, sentence or order and has not appealed.’

The applicant being the accused person will be, and is in fact legally affected by the finding of the learned magistrate Grade 11 not to stay criminal proceedings. He is one well qualified to apply for a revision of that decision.

The objection is accordingly overruled.

My decision

The law

Section 48 of the Criminal Procedure Code Act provides that;

“The High Court may call for and examine the record of any criminal proceedings before any magistrate’s court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of the magistrate’s court.’

Section 50 of the same Act provides for powers of the High Court on Revision. It provides that:

“In the case of any proceedings in a magistrate’s court, the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, when it appears that in those proceedings an error material to the merits of any case or involving a miscarriage of justice has occurred, the High Court may.

(b) in the case of any other order other than an order of acquittal, alter or reverse the order.’

Section 17(1) of the Judicature Act is to the effect that the High Court shall exercise general powers of supervision over the magistrates’ courts’.

(2) *With regard to its own procedures and those of the Magistrates' Court, the High Court shall exercise its inherent powers:-*

(a) *To prevent abuse of process of the Court by curtailing delays of judgment including the power to limit and discontinue delayed prosecutions.*

(b) *To make orders for expeditious trial and*

(c) *To ensure that substantive justice shall be administered without undue regard to technicalities.*

No statutory law requires that a civil or criminal matter should take precedence over the other and the MCA made no provision for staying of criminal proceedings in preference of hearing a civil matter. However, the authorities available seem to suggest that due to their public nature, and the fact that they address wrongs against society generally, criminal matters should take precedence. For example in the case of **Joseph Agenda Vs Uganda HCT-00-CR-CM 003 of 2011**, Justice Lameck N Mukasa when highlighting the dichotomy between civil and criminal proceedings held *that:*

“There is a clear distinction between civil and criminal actions. The civil proceedings determine the civil litigants’ civil claims or liabilities and the standard of proof is on the balance of probabilities. There is a public interest in the criminal proceedings and the required standard of proof is beyond reasonable doubt. The civil proceedings are individualistic in nature while the criminal proceedings are public in nature. Administrative policy therefore gives priority to the public interest in law enforcement”.

Also see **Uganda Vs. Ssonko Edward Criminal Revision Application No. 12/2019.**

That said, the development in our jurisdiction is that land disputes especially where ownership is at stake should be left for arbitration by the civil courts. It was for

example held in the case of **Okello Chris Otama & Another vs. Uganda Cr. Session Case No. 639/13** that;

“Issues of land should not be confused with criminal issues. Claim of ownership is a civil right that ought to be allowed to be proved in a Civil Court and should never be criminalized as this would amount to persecution. Land matters have been criminalized and courts of law are convicting accused persons who have a constitutional right to claim what truly belongs to them”.

Counsel for the applicant also rightly referred to the case of **Sebulime Baker Vs Uganda Criminal Appeal NO. 21 OF 2018** where Justice Flavia Senoga Anglin held that;

“There is no universal principle that proceedings in a criminal case must necessarily be stayed when a similar or identical matter is pending before a civil court. However, in the present case, the criminal proceedings arise out of complaints for offences allegedly committed during the pendency of the civil suit, involving the same facts and allegations. The issue of ownership of the disputed land is pending decision before the Land Division and also the Court of Appeal. The dispute involved in the criminal proceedings is purely of a civil nature and if allowed to continue while the civil matters are pending, it will create complications instead of facilitating the matter. ‘

She continued that:

“Any decision given by the trial Magistrate Court on the issue of criminal trespass over land where the appellant is the one in occupation and there is an injunction to maintain the status quo, issued by the High Court, would have a direct bearing on the result of the criminal trial. And if the same issue is pending before different courts, there is an inherent danger of conflicting judgments. To avoid such a situation, it is

better to stay proceedings of the lower court till the decision of the Land Division and of the Court of Appeal are given”.

In the instant case, the trial magistrate in her ruling stated that;

“The offences are clear and stipulated in the PCA as criminal not civil. They have their own ingredients and remedies. Count one the complainant is Nakakawa. If AI has any matter with state witness PW11 Rehema, that is a different matter. Bugembe Court has no powers to stay or dismiss a complaint where there are witnesses to it and where the DPP sanctioned to proceed as a criminal matter”.

The subject matter of the dispute in **Criminal Case NO. 0259 of 2018** is the same as that in **Civil Suit NO. 20 of 2019**. The particulars of the offence, evidence of the complainant and State witnesses all relate to ownership of the suit land as court has to determine whether or not the 1st accused person owned and therefore had the power to sell the suit land to the complainant. In my view, the facts would make the dispute more or a civil than a criminal matter.

If I may make specific reference to some of the evidence on the record of the lower Court. In particular **PW1 Kamba** testified that;

“We were directed to one Yahaya Musuba that he had land, we were directed where he was, we found him at his home. I asked him whether he had land for sale, he said yes, he showed us land, that was behind his house, I liked it, I went to my wife’s work place, I told her we had got land at Namulesa from one Musumba Yahaya. My wife asked me to take her to see the land. I took her there after one day, she liked the land and place. We asked Yahaya how much he was selling the land. We agreed at six million five hundred thousand shillings only (6,500,000) of 100ft x 50ft total. When we were going to pay, we told him to bring some elders and authorities in the area, he called his neighbors.....I paid six million five hundred thousand shillings (6,500,000)

.....accused 2 wrote for us the sell agreement. I told him to write the sale agreement in the names of my wife Allen Nakakawa.....When we reached the windows. We heard that it was not accused's land that we bought.

He testified further that Rehema told him *“she said I had bought air, accused had no authority to sale it. I had paid to him six million.*

On the other hand, PW2 testified in cross-examination that;

“accused 1 from what is going on now he sold to us what is alleged not to be his”

“it is my land I bought”,.....

Further, **PW3** testified that;

“That land of Namulesa was for my late fatherI have never given Yahaya powers to sell my land. I have the land title and other documents of that land.

“He pleaded to give him time to vacate, I gave him time, he failed, I fenced my land and he again remained there. He cut my barbed wire, what were the poles of the barbed wire, he chopped them for firewood.

I am accusing accused 2 when he was the chairman LCI, we were given when he was there, he is aware we were three daughters (sisters) he was always stamping for me wherever I sold, let him tell now who authorized him to sell off my land.”

She continued in cross-examination that;

*“I went to lawyers, they wrote to Yahaya to vacate my land in seven days but he refused..... The case in court is a land dispute.”*Emphasis of this Court.**

From the above evidence, there is no doubt in my mind that the sale of the suit land by the applicant here to Nakakawa was the root of her complaint. It is the same land that Talikangawo claimed she owed as a registered proprietor. The applicant sued her in the High Court challenging her registration on the same land as fraudulent. I do agree

with respondent's counsel that this application was filed late into the criminal proceedings, however, that is explained by the fact that Musumba only came to know about Talikangawo's title during her testimony, and thereupon acted on it. Again, that complaint is greatly outweighed by the facts of the case.

I find that the determination of ownership rights of the suit land which are best resolved through a civil will have a direct bearing on the criminal suit. For if Musumba is found to own an interest in the suit land, then his sale to Nakakawa would be valid, and the criminal proceedings then rendered moot. The reverse could also support the prosecution's case. Allowing the criminal proceedings to continue when there is a pending civil suit in the High Court to determine ownership rights will amount to an abuse of court process and can result into conflicting judgments. **See Sebulime Baker Vs Uganda (Supra)**. The High Court case should be resolved first.

The learned Magistrate did not exercise proper discretion and her decision to decline to stay proceedings was irregular. Allowing the High Court to give her decision on the ownership rights to the suit land, will save time and avoid multiplicity of suits.

I accordingly allow the application to direct that hearing of the criminal trial against Musumba Yahaya and Batambuze David in the Bugembe Magistrate's Court, be stayed until the final disposal of the civil proceedings in High Court Civil Suit No. 20/2019.

The applicants shall meet the costs of the application.

Eva K. Luswata

JUDGE

10/03/2021

