**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA HOLDEN AT MUKONO**

**CRIMINAL REVISION APPL. NO. 12 OF 2019**

**Arising out of criminal case No 760/2018**

**UGANDA (DPP):::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::: APPLICANT**

**VERSUS**

**SSONKO EDWARD:::::::::::::::::::::::::::::::::::::::::::::::::::::::::: RESPONDENT**

**BEFORE HON. LADY JUSTICE MARGARET MUTONYI, JUDGE HIGH COURT**

**RULING**

1. This Application was brought by way of Notice of Motion under Section 14(2)(c), 17 and 33 of the Judicature Act and section 48 and 50 of the Criminal Procedure Code Act.

The Applicant seeks to move this Honorable Court to call for and examine the record of proceedings in Mukono Criminal case No CO-0760 of 2018 pending at the Chief Magistrates court of Mukono for purposes of examining the propriety of the Ruling and Orders recorded and passed by the trial court against the Applicant.

The application is supported by the affidavit of Ms. Tebasulwa Jane Flavia Mukiibi one of the complainants in the criminal case mentioned above which states the grounds as follows:

1. The order to stay Criminal Case No Co-0760-2018 in preference of civil suit No 172/2018 was improper and offends the well-established legal position that gives criminal cases precedence over civil matters.
2. The Application of section 209 of the Magistrates Courts Act as a basis for stay of the criminal trial was a misapplication of the law as the same does not relate to a conflict between criminal and civil cases.
3. The civil case is incapable of offering the requisite legal sanctions for the actions of destroying growing crops, Forcible entry, Forcible detainer and unlawful eviction of the complainants by the Respondent.

In essence the Applicant is seeking a revision of the decision of the learned Chief Magistrate of Mukono Her Worship Juliet H. Hatanga made on the 11th of May, 2019.

In her Ruling she decided to entertain the **Civil Suit No. 170 of 2018** and stayed C**riminal Case No. 760 of 2015.**

In the criminal matter, Ssonko Edward, hereinafter referred to as the Respondent was charged with the offences of destroying or damaging growing plants contrary to **Section 329(a) of the Penal Code Act**, Forcible Entry contrary to **Section 77 of the Penal Code Act**, Forcibly Detainer contrary to **Section 78 of the Penal Code Act** and Unlawful Eviction contrary to **Section 92(1) (e) of the Penal Code Act**.

It was alleged that on the 18th day of February 2017 at Mabuye village in Mukono District, the Respondent and others still at large willfully and unlawfully destroyed the growing plants to wit maize, cassava, bananas, coffee and cocoa plants of **Tebasulwa Jane Flavia Mukiibi** who is a Kibanja holder on the land comprised in Kyaggwe, Block 96 Plot 20 at Mpoma, Mukono District.

The Learned State Attorney Kimono Agnes represented the Applicant and Counsel Patrick Semakula represented the Accused/ Respondent.

**2**. Both Counsel filed written submissions that are on record and I have referred to them while writing this Ruling.

In her submission, the learned Resident State Attorney argued that the order to stay **Criminal Case No. 07660 of 2018** in preference for **Civil Suit** **No. 172 of 2018** was improper and offended the well-established legal position that gives criminal cases precedence over civil cases.

She also argued that the application of **Section 209 of the Magistrate’s Court Act** as a basis for the stay of the criminal trial was a misapplication of the law as the same does not relate to the conflict between civil and criminal cases.

She continued to argue that the civil case is incapable of offering the requisite legal sanctions for the actions of Destroying growing crops, forcible entry, Forcible detainer and unlawful eviction for which the Respondent is charged.

She further argued that at the time that the civil case was instituted, there was an already ongoing criminal case in respect of the aforementioned offence and the prosecution had already led evidence of PW1, Tebasulwa Jane Flavia Mukiibi

She further submitted that the High Court has unlimited original jurisdiction over all matters to revise the lower court decision and restate the correct position of the law above indicated and order that the criminal case against the Respondent should proceed as before.

In response, the learned counsel for the Respondent submitted that the order for stay of **Criminal Case No. 0760/2018** pending the determination of **Civil Suit No. 172/2018** was proper and doesn’t offend any law.

He further argues that the dispute between the parties is not of a criminal nature.

This is demonstrated in the Respondent’s affidavit in reply which shows that the kibanja dispute had been handled by a number of authorities and in their pleadings each of the parties contended that the suit kibanja belonged to them. The most decisive question therefore pertained to the ownership of the kibanja.

Having considered the submissions of both Counsels, I will now resolve the issue.

**3.Whether the order to stay criminal case No. C0-0760-2018 in preference for civil suit No. 172/2018 was improper and offended the well-established legal position that gives criminal cases precedence over civil cases?**

Before I consider the merits of this application, I want to consider the law under which the application is brought**. Section 50 (2)** of the Criminal Procedure Act provides for the power of the High Court on Revision and is to the effect that no order under this Section shall be made unless the DPP has had an opportunity of being heard and no order shall be made to the prejudice of an accused person unless he or she has had an opportunity of being heard either personally or by an advocate in his or her defense.

**Section 48** **of the Criminal Procedure Code Act** further provides that, the High Court may call for and examine the record of any criminal proceedings before any Magistrates’ 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 Magistrates court.

S**ection 17(1)** **of the Judicature Act** is to the effect that the High Court exercises 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.

The above provision of the law illustrates that the inherent powers of the High Court are intended to curtail delays, to ensure expeditious trial and to ensure that technicalities are not used to defeat substantive justice. The High Court also has unlimited original jurisdiction over all matters to revise the lower court decision and restate the correct position of the law above.

In view of the above provisions of the law, perusal of the lower record revealed that on 1/10/2018 one Jane Flavia Mukiibi testified in the criminal case as PWI. Her evidence against Sonko Edward was basically a land dispute over a Kibanja. She stated “I ***know the accused, he is Mr. Sonko. He came to my Kibanja and sprayed my crops and sealed it off with barbed wire. I no longer have access to my crops. The Kibanja is located in Mabuye village Kabenge……..The accused claims that the Kibanja belongs to him. At the police, he showed me a document and it is that document which stated that Benerdate Mukalazi was giving Edward Ssonko the Accused property belonging to Kawalya Mukalazi.***

***I saw the document at the police…. This is the document that the accused brought at the police…. “***It was all about her claim over the land.

She went on to state that she was given the Kibanja by her late Mother, Harriet Kawalya Kaggwa Nasikombi.

On 14th January 2019. Counsel for the accused informed court that “***I am ready to proceed. However, the parties have a civil suit between them in respect to the Kibanja which is the subject of these proceedings. This court is handling the civil suit as well. When this case came up in December, this court had advised that we concentrate on the civil suit to determine the owner of the property”.***

The State Attorney responded that ***“much as there was an ongoing civil suit, the prosecution was uncomfortable with staying the proceedings. There are criminal elements in the criminal case that the state is interested in”.***

Court adjourned the case to enable the state cause a meeting to enable parties to deal with the case in the most appropriate way forward in handling **Civil Suit No. 172/2018.**

On 18th February 2019 Ms. Kiconco Agnes for the state addressed court as follows:

“***This matter is coming up for further hearing. The last time we had a discussion, where in counsel Ssemakula had told this court that the parties have filed civil proceedings before this court wherein the accused is the plaintiff seeking remedies for damages to his property which is on the said land and the complainant in this file are the defendants who have also filed a counter claim seeking similar remedies. We pray for Court guidance”***

The learned Chief Magistrate then gave a short adjournment to 20th February and came up with the following ruling after perusing the civil case file.

“***When this case came up for hearing on 14th January 2019, Counsel Ssemakula raised concern that the parties in this case are the same parties in civil suit No 172 of 2018. He further informed court that the parties herein are seeking for similar remedies in the civil suit. I have had the opportunity to peruse the civil suit No 172 of 2018 which is also before this court.***

***I am of the opinion that by entertaining the civil suit, this court shall be at a better position to resolve the issues raised in this criminal case and grant the appropriate remedy. Consequently this case is stayed under section 209 of the MCA until after the determination of the civil suit No 172 of 2018”.***

Section 209 of the MCA provides for stay of suits as follows:

***“No magistrates court shall proceed with a trial of any suit or proceeding in which the matter in issue is also directly or substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim litigating under the same title, where the suit or proceeding is pending in the same or any other court having original or appellate jurisdiction in Uganda to grant the relief claimed”.***

The essential constituents of section 209 of the MCA are the following:

***1) That there are two concurrent suits or proceeding one of which is previous or filed earlier than the other before the same court or any other court vested with jurisdiction to hear the suit or proceeding***

***2) The suit or proceeding is between the same parties or parties under whom they claim or litigate***

***3) The subject matter of the suit or proceedings are directly or substantially the same.***

The matter before court involves civil and criminal proceedings which are different in nature in terms of remedies sought.

**Justice Lameck N Mukasa** now retired while handling the case of **Joseph Agenda Vs Uganda** **HCT-00-CR-CM 003 of 2011** which had similar facts clearly brought out the distinction between civil and criminal proceedings where he 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.***

Under Criminal Law, the crime is considered to be an offence against society as a whole that is why it is the state that starts the criminal prosecution and controls prosecutions generally even where there is private prosecution. If the state finds merit in the case, it may take over or discontinue the proceedings. A recent case in point is the case of Uganda versus Aidah Nantaba and others. Mkn Criminal case No.153/2019 that was discontinued by the DPP.

The results in a criminal trial at the end of the proceedings are either to acquit or convict. The court may acquit on no case to answer or after the defence is given.

Counsel for the state submitted in rejoinder that section 209 of the MCA was misapplied since the same does not apply to conflict between civil and criminal and that the civil matter is not capable of offering the requisite legal sanctions for destroying growing crops.

My understanding of Section 209 of the MCA is that it applies to both civil and criminal cases.

In this particular case the criminal case was filed before the civil matter and therefore a previously instituted suit or proceeding.

In the civil matter, the accused is Plaintiff / Counter Defendant while the complainants are Defendants/ Counter Claimants. They are therefore same parties involved, save for the state which however prosecutes cases on behalf of complainants in criminal cases.

The subject matter is a Land dispute where each party is claiming ownership and destruction of crops.

The Trial Chief Magistrates relied on section 209 to stay the criminal matter that was previously instituted in preference of the civil matter.

At common law, criminal matters take precedence over civil matters, but the Trial Chief Magistrate did not even apply common Law which is basically the law of precedence. She applied the substantive Law in the Magistrates Courts Act.

Revisionary powers of the High court is not doubted and while exercising those powers, court looks at the correctness of the proceedings, Application of the law to the facts, legality and propriety .

In the instant case, the law provides ***for stay of the new suit or proceeding, not the previous suit or proceeding***.

On the element of propriety***, the conventionally accepted principle is that criminal matters that involve wrongs against society generally should take precedence over the civil matters. This court considers destruction of growing crops, forceful eviction where one claims ownership of land as crimes against society and therefore should take precedence over Civil.***

These two points alone point to the fact that the trial Magistrate erred in law and fact when she stayed the criminal proceedings in preference to the civil. She should have stayed the civil proceeding and proceeded with the criminal matter.

It is however apparent from the two proceedings that the subject matter and cause of the conflict is purely a land dispute where both parties claim ownership of the 6 or seven acres of land.

Article 120 (4) and (5) of the Constitution provides “The functions of the Director of Public prosecutions under clause (3) of this article

1. May, in the case of the functions under clause (3) (a). (b) And (c) of this article, be exercised by him or her in person or by officers authorized by him or her in accordance with the general or specified instructions.

120(5) “In exercising his or her powers under this article ,the Director of Public Prosecutions **shall have regard to the public interest, the interest of the administration of justice ,and the need to prevent abuse of the legal process”.**

The above provisions and especially Article 120(5) require the office of the DPP and his representatives the state Attorneys to be mindful of cases that would appear to be abusing the legal process, which is very common in land disputes. Courts have taken judicial notice of the state criminalizing land disputes and would look for possible charges under the Penal code Act to criminalize a civil land matter.

***It is also common knowledge that disagreements in Land matters ESPECIALLY OVER LAND OWNERSHIP have also led to commission of crime in either defence of the land or in an effort to grab the land.***

***It is therefore the responsibility of the court to execute its constitutional mandate of resolving disputes between the parties following the well laid legal principals of the law and procedure. Where evidence adduced before court shows that it is purely a land matter that was criminalized, by the officers of the DPP working in cohorts with the complainant, the court should pronounce itself on the criminal matter using the known standard and burden of proof and where necessary award damages for malicious prosecution against the complainants.***

***This might deter instances of criminalizing land or civil matters because there is no justification whatsoever for criminalizing civil matters when we have functioning civil courts, delays and challenges notwithstanding.***

The learned State Attorney in this case sought guidance from court which in my opinion gives the impression that she is aware that the controversy between the parties is arising out of the land dispute.

As to whether they have a strong criminal case is for the trial court to determine.

***Conclusion***

In view of the above I find that the learned Chief Magistrate erred in law and fact by staying the previously filed criminal matter which was already under hearing in preference to the civil suit that was filed after the criminal matter. The Application is allowed and order to stay the criminal matter is hereby set aside.

It is further directed that the criminal case be fast tracked and concluded expeditiously.

The Application accordingly succeeds.

Dated this **02nd** day of **October 2019.**

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Margaret Mutonyi

**RESIDENT JUDGE**

**MUKONO HIGH COURT**