

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MPIGI
CRIMINAL REVISION CAUSE NO. 04 OF 2022
(Arising from Criminal case No. 085 of 2022)

5 1. KADDU DUNSTAN }APPLICANTS
 2. MUKASA SAMUEL }

VERSUS

UGANDA.....RESPONDENT

10 **BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO. ANTHONY OJOK**

RULING

The applicants brought the instant application by way of Notice of Motion under **Sections 48, 50(2)** of the Criminal Procedure Code Act, and **Section 17** of the Judicature Act against the respondent seeking the following orders;

- 15 a. That the applicants be granted bail on such reasonable terms as this court deems fit.
- b. The decision and order of His Worship Byaruhanga dams (Magistrate Grade One) at Mpigi Chief Magistrate’s court of charging the Applicants with offences which are arising out of a civil transaction thereby criminalizing
- 20 civil matters be revised and set aside.
- c. In the alternative and without prejudice to the above prayers, proceedings in Criminal Case No. 085 of 2022 Mpigi Chief Magistrate’s court be stayed pending determination of High Court, land Division court case No. 131 of 2022.

25 The application is supported by an affidavit sworn by the 1st applicant and the grounds briefly are as follows;

- a. That the 1st applicant was the registered owner of land comprised in Block 326 Plot 109 land at Katereke, Kyengera Sub County, Mpigi District.
- 30 b. Unknown to him, his brother a one Nkugwa Zerubaberi without his authority got hold of the Certificate of Title and pledged it as a security to obtain a loan.
- c. Subsequently, the land was illegally transferred into the name of Mutumba Musoke Jimmy, Mutyaba Robert, Bekalaze Kiwanuka Fulge.

- d. The 1st applicant filed civil suit No. 131 of 2022 at the High Court land Division, Kampala for recovery of his land.
- e. In a bid to defeat the said civil suit, the said fraudsters who are defendants in civil suit No. 131 of 2022 at the High Court complained against the applicants who have been charged and remanded at Mpigi Prisons for malicious damage and conspiracy to commit a felony.
- f. The applicant's right to bail has been abused and are being oppressed not to pursue their high court case.
- g. Ordinarily the criminal case subject of the charge at Mpigi Chief Magistrate's court would have been filed at Nsangi Magisterial Court but was intentionally filed at Mpigi Chief Magistrate's court on instigations of the complainant to deliberately stifle their rights.
- h. The 2nd Applicant is diabetic and may die from prison if not allowed to access medic care.
- i. It is just and equitable that the said decisions of His Worship Byaruhanga Adams be revised and set aside.

The application was opposed by an affidavit in reply sworn by Nabbosa Salama, a State Attorney in personal conduct of Criminal Case No. 085/2022 wherein she stated that the applicants' contention that the criminal case in issue was filed at Mpigi Chief Magistrate's court instead of Nsangi Magistrate's court at the instigation of the complainant so as to stifle the applicant's rights is not true and is merely speculation. That whereas the case should ordinarily have been filed at Nsangi Magistrate's court; both courts are within the same magisterial area with Mpigi Chief Magistrate's Court having supervisory powers over Nsangi Magistrate's court. That the case being filed at Mpigi Chief Magistrate's court was therefore not irregular and it would occasion no miscarriage of justice to the applicants.

That the offences the applicants are charged with, that is, malicious damage and conspiracy to commit a felony contrary to **Sections 335(1) and 390** of the Penal Code Act respectively are distinct from the civil transactions that the applicants allege and there is therefore, no reason for the decision to charge the applicants with these offences to be set aside. And that the prayer for stay of proceedings in Criminal Case No. 085/2022 pending determination of High Court, Land Division Case No. 131/2022 be disregarded.

Brief facts:

The 1st applicant was bequeathed land comprised in Plot 109, Block 326, land at Katereke, Nsangi, Kyengeru Town Council. That the applicants are brothers and the 1st applicant instructed his other brother a one Nkugwa to transfer the said

land into his name. His brother instead upon transfer of the said land used it as collateral to borrow money from money lenders and forged the 1st applicant's signature to transfer the title into their names.

5 The 1st applicant filed civil suit No. 131 of 2022 in the High Court, Land Division against his brother and all the persons involved in the fraudulent dealings. That the applicants were forcefully evicted from the suit land by the money lenders who subsequently complained at Police in Nsangi where criminal charges were preferred against the applicants vide Criminal case No. 85 of 2022.

10 The applicants were arrested, detained and remanded for several weeks at Mpigi Prison, hence this application.

Representation:

Mr. Joseph Luzige appeared for the applicants while Ms. Jackie Atim represented the respondent. Both parties filed written submissions.

Issues:

- 15
1. Whether or not this is a proper application for revision?
 2. What are the remedies available?

Submissions:

Issue 1: Whether or not this is a proper application for revision?

20 Counsel for the applicants submitted that it was irregular and against the law to charge the applicants with criminal offences arising out of transactions which are civil in nature.

25 That the 1st applicant is a registered proprietor of the suit land and the same was used by his brother as collateral without his consent and the title was illegally transferred to other individuals. Hence, Civil Suit No. 131 of 2022 for recovery of land was filed by the 1st applicant.

30 Counsel went on to submit that the criminal charges in the instant case arise out of transactions relating to the same land and civil matters are being criminalized. That it is trite law that land issues should not be confused with criminal issues. A claim of ownership is a civil right that ought to be allowed to be proved in a civil court and should never be criminalized. (See: **Sebulime Baker v. Uganda, Criminal Appeal No. 21 of 2018** citing the case of **Okello Chris Otama & Another v. Uganda, Criminal case No. 639 of 2013**).

Further, that in the instant case the respondent bringing a criminal action for malicious damage to property, conspiracy to commit a felony and obtaining money by false pretense in a land matter amounts to an abuse of court process.

5 Counsel added that this court should revise the decision of His Worship Byaruhanga Adams of charging the applicant with criminal cases arising from civil land transactions. Counsel still relied on the case of **Sebulime Baker v. Uganda (Supra)** on stay of criminal proceedings pending a civil suit, where it was held that;

10 *“The role of this court is to avoid the miscarriage of justice by criminalizing land disputes (civil disputes in this case) ... it is my opinion that once a civil matter and a criminal matter bearing the same questions of law are pending before different courts, the criminal matter must be stayed even if it were filed before the civil matter.”*

Counsel concluded with a prayer for court to grant the orders as sought.

15 Counsel for the respondent on the other hand submitted that institution of a civil suit is not a bar to criminal proceedings arising from the same facts. She cited the case of **Sarah Kulata Basangwa v. Uganda, Supreme Court Criminal Appeal No. 3 of 2018** which was also relied upon in the case of **Zedekia Kato v. Uganda, Court of Appeal Criminal Appeal No. 100 of 2019**, where it was held that;

20 *“It cannot be a correct proposition of the law that where a civil suit is pending between two parties, no criminal proceedings may be instituted against one of the parties arising from the same facts.*

It is not correct to suggest that whenever criminal proceedings are instituted in respect of (a) matter that is also a subject of civil litigation, that alone amounts to interference with the independence of the judiciary.”

25 The Supreme Court further held that;

“We are in agreement with the Court of Appeal that criminal proceedings may emanate from the same facts but it does not deter prosecutors to institute criminal proceedings because the facts are seminal to that (Sic) of a civil case.”

30 Counsel further to support her submission cited a Kenyan case of **Goddy Mwakio & Another v. Republic [2011] eKLR** in which the Court of Appeal of Kenya stated that;

“An order for stay of proceedings particularly stay of criminal proceedings is made sparingly and only in exceptional circumstances.”

That the rationale for this was discussed by Gikonyo J in *Kenya Wildlife Service v. James Muetmbei* [2019] eKLR where he stated that;

5 *“Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right to access of justice, right to be heard without delay, an overall right to fair trial. Therefore, the test for stay of proceedings is high and stringent. This is a power which, it has been emphasized, ought to be exercised sparingly and only in exceptional cases.”*

10 In regard to the revision powers of the High Court, counsel for the respondent submitted that there is nothing on record to show that the proceedings in criminal case No. 85 of 2022 were irregular nor that the decision to charge the applicants was incorrect, illegal or improper.

Analysis of court:

The law:

15 **Section 48** of the Criminal Procedure Code Act provides that;

20 *“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 (1) (b) of the same Act provides for powers of the High Court on revision and states as follows;

25 *“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.”

30 **Section 17(1)** of the Judicature Act provides that;

“The High Court shall exercise general powers of supervision over magistrates’ courts.”

Counsel abandoned the order sought under (a) above which was on bail, since it was granted by the Chief Magistrate’s court. Ground (f) in the affidavit in support

of the application was also abandoned. These are hereby disregarded because they have been over taken by events.

I will resolve the issues jointly.

5 In the instant case the applicants contend that the criminal case in the Magistrate's court arose from civil transactions and as such it should never have been sanctioned and this court should therefore, revise the Magistrate's decision to allow the charge.

10 I have carefully looked at the application, the affidavits for and against the application, annexures thereto and the submissions of the applicant, and it is my finding that indeed the proceedings in the criminal case are substantially arising from the same subject matter in the civil case that is before the High court. However, institution of criminal proceedings is usually done by the State prosecuted by the Director of Public Prosecutions. Therefore, when one is arrested charges are preferred by Police and the file is forwarded to the office of the Director
15 of Public Prosecutions and when merit is found in the case the file is sanctioned and a case is filed in court. Thus, the Magistrate in this case had no powers to decline the matter from being filed since he is not the one that prefers charges or sanctions criminal matters before they are brought to court. The decision to file a matter before court is solely on the office of the Director of Public Prosecutions on
20 behalf of the State.

It was therefore rightly submitted for the respondent, that there is nothing on record to show that the proceedings in criminal case No. 85 of 2022 were irregular nor that the decision to charge the applicants was incorrect, illegal or improper.

25 I am therefore, unable to grant this prayer and it is my considered view that the instant application is not one that falls under the ambit of a grant of revisionary orders in accordance with the law as cited above.

Secondly, counsel for the applicants submitted that the criminal matter should not have been filed in Mpigi but rather in Nsangi.

30 The respondent in their affidavit in reply admitted that the matter would have ordinarily been filed at Nsangi Magistrate's court but went on to add that the two courts are within the same magisterial area. Counsel for the respondent also submitted that both courts are competent to handle the matter.

35 I disagree with this submission, and I do associate myself with the findings in the case of **Uganda v. Wadri & 31 Others, Criminal Revision 2 of 2018 [2018] UGHCCRD 151 (20 August 2018)**, where it was stated that;

5 “Whereas there is a distinction between jurisdiction and venue, depending
on the category of case brought before a magistrate’s court under Section
42 of the Magistrate’s Courts Act, Section 34 of the Act does not reflect it.
Under the latter section, both jurisdiction and venue are defined by the
10 location of criminal activity. That section provides that subject to the
provisions relating to transfer conferred by the Act, every offence is to
“ordinarily be inquired into or tried” by a court within the local limits of
whose jurisdiction it was committed. Consequently, the personal
15 jurisdiction of courts in a criminal case is established by the location of
where a crime is committed. In the same vein, the power of courts to take
cognizance of offences is prima facie local, limited to the territory over
which legislation has granted it jurisdiction, and does not extend to
offences committed beyond its confines. On the face of it, courts can take
cognizance or try offences perpetrated only by certain individuals or under
certain circumstances and within a specified territory.”

It was further held that;

 “Thus, while a magistrate’s court may be competent to try a misdemeanor
offense or a non-capital offence, if the offence occurs outside its
geographical territory, the court lacks jurisdiction over the offense.”

20 I find that in the instant case, the matter ought to have been filed in Nsangi where
the suit property is located and the alleged offences were committed.

I accordingly, find and hold that Mpigi Chief Magistrate’s court does not have the
territorial jurisdiction to try the criminal matter filed before it. Let the file therefore
be transferred to Nsangi; the court with the proper jurisdiction over the offenses.

25 Thirdly, counsel prayed that the criminal case be stayed pending the determination
of the civil suit before the High court to avoid a miscarriage of justice and relied
on the case of **Sebulime Baker v. Uganda (Supra)**.

30 Counsel for the respondent cited a number of authorities in opposition of the stay
of the criminal proceedings however, I find the said authorities distinguishable
from the instant case as they discuss that a pending civil case does not bar
institution of criminal proceedings and not stay of criminal proceedings pending
a civil suit.

35 The Kenyan persuasive authority of **Gikonyo J in Kenya Wildlife Service v. James
Muetmbei, (Supra)** does not relate to instances where there are civil and criminal
proceedings arising from the same facts ongoing concurrently.

The case of Sarah Kulata Basangwa v. Uganda, (Supra) discussed limitations of investigations by IGG the under Section 19 (1) of the Inspectorate of Government Act, 2002 where of court found that the IGG is not barred from instituting criminal proceedings pending a civil matter. I find this authority though good law is not applicable to the instant case.

Also, in the case of Goddy Mwakio & Another v. Republic, (Supra) it was observed that;

“Further, it is plain from Section 193 A of CPC that the fact that any matter in issue in criminal proceedings is also directly or substantially in issue in any pending civil proceedings should not be a ground for any stay, prohibition or delay of the criminal proceedings.

The applicants have not disclosed the grounds of the intended appeal on the body of the application or in the supporting affidavit. Furthermore, the applicants’ counsel has not identified any specific errors of law made by the learned judge, which would form the grounds of the intended appeal. Lastly, the applicants do not claim that they will not get a fair trial.

An order for stay of proceedings, particularly stay of criminal proceedings is made sparingly and only in exceptional circumstances (see Halsbury’s Laws of England, 4th Edition Re-issue page 290 paragraph 926). The order is not given as a matter of course.”

The law in our jurisdiction is very clear, Section 209 of the Magistrate’s court Act provides as follows;

“No Magistrate court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceedings between parties under whom they or any of them claim, litigating under the same title, where that 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 case of Goddy Mwakio & Another v. Republic, (Supra), is therefore not applicable to the instant as Section 209 of the Magistrate’s Court Act is very clear in regard to stay of proceedings that are before the Magistrate’s court that are substantially in issue in another court between the same parties. In line with the authorities as cited by counsel for the applicant and the case of Musumba Yahaya and Another v. Uganda, (Criminal Revision Cause 4 of 2019) [2021] UGHC 8 (10 March 2021), I find no reason to deny the prayer for stay of the criminal proceedings pending the determination of the civil matter before the High Court, Land division and the subject matter between the two cases being the same. I agree

with the holdings in the authorities as cited by counsel for the applicants. The criminal case touches on issues to do with land that are civil in nature and not staying the said proceedings in this case will amount to an abuse of court process.

5 I accordingly order that the criminal proceedings in criminal case No. 085 of 2022 be stayed until the determination of Civil Suit No. 131 of 2022.

In a nut shell I allow this application with the following orders;

1. That criminal case No. 085 of 2022 be transferred to Nsangi court for proper management.
- 10 2. That criminal case No. 085 of 2022 be stayed until the determination of Civil Suit No. 131 of 2022.
3. I make no order as to costs.

I so order.

Right of appeal explained.

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OYUKO. ANTHONY OJOK
JUDGE
13/02/2023

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