

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CRIMINAL DIVISION)

CRIMINAL APPEAL NO. 21 OF 2018

**(ARISING FROM CRIMINAL CASE NO. 217 OF 2015 OF
MWANGA II COURT, MENGO)**

SEBULIME BAKER ----- APPELLANT

VERSUS

UGANDA ----- RESPONDENT

BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN

JUDGMENT

The Appellant Sebulime Baker being aggrieved and dissatisfied with the
Ruling of His Worship Nyakaana Allan delivered on 13.02.18, appealed
to this court against the entire ruling.

The ground of appeal is that the trial Magistrate erred in law and fact
when he held that the criminal proceedings against the Appellant could
not be stayed pending the disposal of the civil proceedings in the High
Court, relating to the same subject matter.

It was prayed that the appeal be allowed, the ruling of the trial
Magistrate set aside and the criminal proceedings in the lower court
stayed pending the disposal of the civil proceedings in the High Court.

The appeal was heard on 06.06.18.

Counsel for the Appellant gave the background to the appeal. He
submitted that the Appellant was charged with Criminal trespass and
malicious damage to property in respect of land at Masanafu.

The land is the subject of a civil dispute. In fact, there are three civil disputes over the same piece of land:-

- 5 - C.S 256/15 pending before the High Court and where an injunction maintaining the status quo was issued.
- Civil Revision 15/15 pending before Justice Damalie Lwanga and is going on appeal.
- 10 - MA 625/18 before Justice Nkonge.

The ruling of his Worship Nyakaana declined the oral application of the Appellant to stay the two criminal matters pending before him. That is:-

- 15 - Criminal case 244/17 and Criminal Case 217/15 until the disposal of the civil appeal.

One of the cases of 2017 was about to be concluded when the prosecution introduced another charge that re-opened the proceedings.

20 Counsel argued that, the trial Magistrate erred in refusing to stay the criminal proceedings on the ground that the matters before the High Court had no bearing on the criminal matter and can proceed simultaneously.

25 That the Appellant disagreed with the Magistrate's decision because the charges in the criminal matters are underpinned by the concept of ownership of the land.

30 S.30 (a) of the Penal Code Act that provides for criminal trespass makes ownership of the property a central ingredient. And the same applies to charges of malicious damage to property.

35 If the civil matters are to determine the question of ownership as well, it follows that the disputes are directly linked, Counsel asserted.

Further that, the charges in the criminal matter have already been affected by the temporary injunction issued by the High Court.

The injunction allows the accused person to continue making his enterprise of laying bricks on the suit land and accessing it but not to interfere with it by way of sale or otherwise.

- 5 It also forbids the complainant from dealing with the land in any way.

In light of that order to maintain the status quo, it becomes problematic if not unnecessary for the Appellant to continue to be prosecuted for something the court has already legalized, Counsel argued.

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The logical thing would be to halt the criminal proceedings pending determination of the matter by the High Court.

- 15 Counsel pointed out that, the complainant is already using the proceedings in the civil case as evidence in the criminal matter – pp9-19 of the record of proceedings. The reasoning that the two matters are not related cannot therefore stand as one is being used as evidence in the other. The case of **Okello Chris Otama & Another vs. Uganda Cr. Case No. 639/13** was cited in support.

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- In that case, Counsel pointed out, the Judge vehemently stated 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”*.

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- 30 Counsel then prayed that appeal be allowed and the criminal proceedings stayed pending the disposal of the civil suits in the High Court.

- 35 In reply, Counsel for the State submitted that, the Appellant was charged on two counts of criminal trespass and malicious damage to property.

- 40 When the trial commenced, Counsel for the Appellant raised a point of law that the proceedings be stayed pending the disposal of the civil suits before the High Court.

A ruling was delivered, wherein the application by Counsel was dismissed on the grounds that, the criminal proceedings before court had no bearing on the civil proceedings in the High Court.

5 Further that, court should note that the proceedings before Mwanga II Court are legal. They were properly instituted by the Director of Public Prosecutions who has power to institute criminal proceedings under Article 120 of the Constitution of Uganda.

10 Secondly that, the two offences criminal trespass and malicious damage for the prosecution to secure conviction, the ingredients have to be proved beyond reasonable doubt.

For both offences, Counsel stated the ingredient of ownership is a
15 prerequisite which the prosecution has to prove.

And that, before offences of this nature are sanctioned, the sanctioning Officer bears in mind that the ingredient is not in dispute.

20 As pointed out by Counsel for the Appellant, the cases before the High Court are civil cases relating to the subject matter.

However that, the issue of ownership is and not in dispute as it was already determined in C.S. 005/2010 by His Worship Sayekwo, Senior
25 Principal Magistrate, where the complainant in the criminal proceedings at Mwanga II Court, Herman Semakula was pronounced as the lawful owner of the land in dispute that the Appellant is claiming to be his.

There is no evidence on record as to whether or not an appeal was filed
30 against the decision and it therefore remains binding.

It is on that basis that the charges were sanctioned against the Appellant, Counsel contended.

35 Regarding the revision case before Justice Damali Lwanga, Counsel stated that the same was determined and dismissed on 02.05.18.

As for the civil case before Justice Nkonge, the Appellant is not a party thereto. It is therefore not connected to the criminal proceedings at
40 Mwanga II Court.

The civil suit while involving the same subject matter, and there is an injunction restraining the Respondent Semakula the complainant in the criminal proceedings, from interfering with the status quo; that does not give the Appellant a right to interfere with the land.

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It was emphasized by Counsel that, the basing on the fact that the issue of ownership was determined by a competent court, the civil proceedings at the High Court have no bearing on the criminal matter at Mwanga II.

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Counsel then prayed for dismissal of the appeal for lack of merit and for an order that the criminal proceedings go ahead.

In rejoinder, Counsel for the Appellant submitted that, the Constitutional mandate of the Director of Public Prosecutions to sanction criminal matters does not stop at Article 120 but includes Article 120 (5) of the Constitution; which enjoins the Director of Public Prosecutions to take into account public interest and policy while sanctioning criminal charges that are of a civil nature.

20

While the prosecution was convinced that the issue of ownership was settled by the decision of His Worship Sayekwo in C.S. 05/10; and the application for revision C. Rev 171/18 was dismissed, the Appellant has since filed an appeal pending in the Court of Appeal and two applications for stay of execution pending appeal.

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The revision and appeal emanated from the premise that His Worship Sayekwo did not have the pecuniary jurisdiction to handle the matter.

Counsel pointed out that, this was raised in the proceedings as part of law but His Worship declined and overruled the objection.

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While the ruling of Justice Lwanga only stated that the boundaries were demarcated but the subject matter is above jurisdiction and hence the appeal.

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It was then emphasized that the matter of ownership is therefore not settled because of the appeal and the subsequent applications for stay of execution.

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Further that in respect of C.S 256/15 where it is alleged that the Appellant is not a party, MA 625/18 is seeking to have the Appellant added as a party, more so since he has been appointed as Administrator of the Estate to which the suit land was attached.

Also that, the ruling of Justice Nkonge grants the Administrators power to maintain the status quo. They are to report back in six months. That entitles the Appellant to access the land and continue the day to day activities although they cannot sell.

It is therefore not true that the temporary injunction does not allow the Appellant access to the land. Yet, it is in respect of these normal activities that criminal charges are being brought against the Appellant; Counsel added.

And as an Administrator, the Appellant becomes a defacto owner of the property, which further raises issues of ownership.

The issue is therefore not settled as alleged by the prosecution.

Counsel then reiterated the earlier prayers, asserting that the matter is in all aspects a civil dispute relating to land ownership which has not been resolved. Therefore that the criminal proceedings should be stayed until the issue of ownership is resolved.

The issue for court to determine is **whether the appeal should be allowed and the criminal proceedings in the lower court stayed.**

Upon giving the submissions of both Counsel the best consideration. I can in the circumstances, and upon appraising the evidence on record as required of first Appellant Courts, I find that I am more persuaded by the submissions of Counsel for the Appellant.

While I wish to point out from the outset that this court is cognizant of the fact 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.

I find that 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.

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 damage 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.

It is also trite law that *“where a civil court has taken cognizance and is deciding the same issue, the criminal proceedings before the trial court amount to abuse of process of law. Proceedings pending before the trial court in such circumstances ought to be stayed till the disposal of the civil suit(s)”*.

For all those reasons, I agree with Counsel for the Appellant that the Trial Magistrate erred in law and fact when he held that the criminal proceedings against the Appellant could not be stayed pending the disposal of the civil proceedings in the High Court and Court of Appeal relating to the same subject matter.

Staying the proceedings before the trial court does not mean that they are illegal and it does not in any way interfere with the power of the Director of Public Prosecutions to institute criminal proceedings, as Counsel for the Respondent would like court to believe

But as was observed by Counsel for the Appellant and rightly so in my view and as already indicated herein *“criminalizing land disputes is an abuse of court process and perverts the course of justice”*. – Refer to **Okello Oris Atana & Another vs. Uganda Cr. App 0035/2013**.

And as earlier indicated in this judgment poses a danger of conflicting judgments.

The appeal is allowed for all those reasons.

5 The ruling of the trial Magistrate is set aside. And the criminal proceedings in the lower court are stayed pending the disposal of the civil proceedings in the High Court and the Court of Appeal.

10 **FLAVIA SENOGA ANGLIN**
JUDGE
19.07.18