

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
ARUSHA SUB-REGISTRY
AT ARUSHA**

MISCELLANEOUS CRIMINAL APPLICATION NO. 66 OF 2022

(Originating from Criminal Case No 117 of 2021 before the Resident
Magistrates' Court of Arusha at Arusha)

HAYBE AHMED @ DUDEE.....APPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

RULING

15/02/2023 & 23/03/2023

KAMUZORA. J,

This application was brought by way of notice of motion filed under the provisions of section 191 (1) (b) and (2) (3) and (4) of the Criminal Procedure Act Cap 20 RE 2022. The said provision reads;

191.-(1) Whenever it is made to appear to the High Court-
(b) that some question of law of unusual difficulty is likely to arise;
(2) The High Court may act either on the report of the lower court or on the application of a party interested or on its own initiative.
(3) Every application for the exercise of the power conferred by this section shall be made by motion which shall, except where the Applicant is the Director of Public Prosecutions, be supported by an affidavit.

(4) Every accused person making an application shall give to the Director of Public Prosecutions notice in writing of the application, together with a copy of the grounds on which it is made and no order shall be made on the merits of the Applicant unless at least twenty-four hours have elapsed between the giving of such notice and the hearing of the application.

The application is supported by the affidavit of Applicant's counsel, Mr. Andrew Mosses Maganga. The Applicant is moving this to order for the change of venue in respect of Criminal Case No. 117 of 2021 from Arusha RM'S court to the HC itself and order that Criminal Case No. 117 of 2021 be stayed pending the determination of Civil Appeal No. 518 of 2020 which is pending before the Court of Appeal of Tanzania (CAT). In so doing, the Applicant urged this Court to hold that in the ongoing proceedings in Criminal Case No. 117 of 2021 which is pending before the Resident Magistrates' Court (RM'S court) of Arusha at Arusha there is a likelihood that a question of law of unusual difficult will arise. That this Court should also order that institution of the charge and prosecution of the Applicant in the said case is an abuse of court process which is aimed at circumventing the judgment and decree of the High Court at Arusha in Land Case No. 11 of 2017 and pre-empting the outcome in Civil Appeal No. 518 of 2020 which is currently pending before the CAT.

The Applicant urged this Court to determine this application based on the following grounds: -

- 1. The Criminal Case No. 117 of 2021 before the Resident Magistrates' Court of Arusha at Arusha is taking place while there is an ongoing and pending Civil matter of the same nature before the Court of Appeal of Tanzania (i.e., Civil Appeal No. 518 of 2020 in the Court of Appeal of Tanzania, originating from: Land Case No. 11 of 2017 in the High Court of the United Republic of Tanzania at Arusha.*
- 2. The issue of fraud relating to the transfer of a half (1/2) share in Certificate of Title No. 13556, Farm No. 4, Essimangor Area, Monduli District and the issue of legal right to occupy the same, are now being dealt with as per the Charge sheet in Criminal Case No. 117 of 2021, before the Resident Magistrates' Court of Arusha at Arusha and are of similar nature as the issues which are pending to be determined by the Court of Appeal of Tanzania in Civil Appeal No. 518 of 2020 in the Court of Appeal of Tanzania, originating from Land Case No. 11 of 2017 in the High Court of the United Republic of Tanzania at Arusha.*
- 3. The 1st Applicant herein who is being prosecuted as the 1st accused in Criminal Case No. 117 of 2021 before the Resident Magistrates' court of Arusha at Arusha was the Plaintiff and the successful party in Land Case No 11 of 2017 before the High Court of the United Republic of Tanzania at Arusha and is now the Respondent in the pending Civil Appeal No. 518 of*

2020 in the Court of Appeal of Tanzania at Arusha. Thus, he is currently facing both the Criminal Case No. 117 of 2021 and Civil Appeal No. 518 of 2020 while both Criminal and Civil Cases are based on the same subject and claims.

Submitting in support of the first ground, counsel for the Applicant argued that Criminal Case No. 117 of 2020 which is pending before the RM'S Court of Arusha at Arusha is taking place while there is ongoing and pending Civil matter of the same nature before the Court of Appeal of Tanzania (CAT) filed as Civil Appeal No. 518 of 2020. He referred paragraphs 3, 4, 5, 6 and 7 of the affidavit and annexures there in support of his argument. The annexures referred include JJM1 which is the charge sheet filed in the Resident Magistrates' Court containing two counts of forgery, three counts of uttering false documents and one count of unlawful occupation of land, all in relation to the transfer of the right of occupancy of certificate of title No. 13556, Monduli District (farm No.4). He also referred annexure JJM2 which is the written statement of defence and counter claim in Land Case No. 11 of 2017 which was determined by this court. More specifically, he referred paragraph 11 to 20 of the counterclaim which raised issue of ownership and the allegation of fraud in relation to the certificate of title No. 13556 Monduli (farm No. 4).

The counsel for the Applicant also referred annexure JJM3 which is the judgment and decree of the High Court in Land case No. 11 of 2017 which determined the issue of ownership of title No. 13556 Monduli (farm No.4) and declared the same to have been legally obtained and owned by the estate of one Ahmed Haji Mohamed which is administered by the first Applicant herein. He further referred annexure JJM4 which are; Notice of Appeal and Memorandum of Appeal in Civil Appeal No. 518 of 2020 which is currently pending before the CAT where the issue of fraud in obtaining half share in farm No. 4 and issue of legal ownership of the same determined by the High Court has been challenged and yet to be determined. He added that the 1st Applicant herein is the Respondent in the said appeal before the CAT and the 1st accused in Case No. Criminal 117 of 2021.

Submitting on the 2nd ground, counsel for the Applicant referred paragraph 3,4,5,6, and 7 of the Applicant's affidavit together with the same annexures mentioned and explained in the 1st ground. He argued that the facts deponed under the said paragraphs are clear that the 1st Applicant emerged victorious before the HC and the decree was issued in his favour which also makes it clear that Civil Appeal which is now pending before the CAT involve one subject matter which is the ownership of the

land under certificate of title No. 13556 Monduli (farm No.4). That, issues of fraud and other illegalities in obtaining the said farm are of the same and similar nature such as those in criminal case before the RM'S court.

On ground No. 3, counsel for the Applicant also referred paragraphs 3, 6, 7, 8, 9, 10 and 11 and the same annexures mentioned in ground 1 and 2 and argued that the 2nd Applicant was a witness in the HC land case. That, both Applicants are now being prosecuted before the RM'S court in a matter which is before the CAT on the same issues of ownership, fraud and illegalities in obtaining the farm and which are yet to be determined by the CAT.

The counsel further submitted that the position of the law as under section 4 (3) of the CPA Cap 20 RE 2022 states clearly that where any matter is of civil or criminal nature, it is mandatory to exhaust civil remedies prior to invocation of criminal process. He supported his argument with the decision of this Court in the case of **DPP Vs. Jitesh Jiyantilal Ladwa and another**, Criminal Appeal No. 11 of 2020, HC at DSM pages 10 to 11. He insisted that the issue on the legal ownership of farm No. 4 and the issue of fraud in relation to the transfer of half share of the farm is now pending before the CAT where the 1st Applicant is the Respondent and evidence by the 2nd Applicant is challenged before the

CAT. That, it is not right to proceed with the prosecution of Criminal Case No. 117 of 2021 on the same subject matter as it will be challenging the decision of the HC in Land Case No. 11 of 2017 and pre-empting the outcome of the appeal before the CAT.

The counsel for the Applicant added that in the counter affidavit by the Respondent in this application it is claimed under paragraph 4 that it was Ahmed Hajo Mohamed, (the deceased) who fraudulently procured the half share in farm No. 4 and not the Applicants who are prosecuted before the RM'S court. The counsel for the Applicant contended that, the Applicant is doubtful of the intention of the Republic in prosecuting the Applicants personally. He therefore called upon this court to grant the prayers sought in the Notice of Motion and act under section 191 (2) of the CPA to order the change of venue in respect of Criminal Case No. 117 of 2021 from Arusha RM'S court to the HC itself and order that Criminal Case No. 117 of 2021 be stayed pending determination of Civil Appeal No. 518 of 2020 which is pending before the CAT.

In his reply, the learned State Attorney, Ms. Riziki Mahanyu had no dispute to the fact that there is pending Criminal Case No 117 of 2021 before the RM'S court at Arusha and that there was Land Case No. 11 of 2017 that was determined by the HC, Gwae J. That, the subject matter in

this application and in Land Case No. 11 of 2017 is land Farm No. 4 with title No. 13556. She submitted that, Land Case No 11 of 2017 was filed before the High Court as there was dispute over ownership of the half share of the farm in question. That, the decision of the HC was made in favour of the 1st Applicant but there was an issue that arose resulting to the institution of Criminal Case No. 117 of 2021. That, the offences which the Applicants are charged with includes forgery and uttering false document and unlawful occupation of land and the offences of forgery are associated with transferring of the right of occupancy of title No.13556. That, this relate directly to the land case that was decided by the High Court as the disputed land is the same.

Ms. Riziki submitted further that the charge sheet was signed in October 2021 and the decision of the High Court was delivered in 19th May 2022. That, while the land case was in progress, the witnesses tendered exhibits which resulted to the decision being made in favour of the 1st Applicant. That, based on the contradiction to the exhibits tendered before the High Court, the criminal case was instituted to investigate if the documents were legally issued. That, the criminal case involved police force for investigation and after investigation the criminal case was instituted before the RM'S court at Arusha where the witnesses have

already started to testify. That, in course of hearing criminal case before the RM'S Court, an objection was raised that criminal case before the RM'S court related to the HC land case which its appeal is before the CAT. The prayer was made for the RM'S court to stay the criminal case pending determination of the civil appeal before the CAT.

The counsel for the Respondent acknowledged the existence of the notice to CAT and the memorandum of appeal but claimed that no records indicating that the said appeal was registered as No. 518 of 2020. She insisted that the Applicant's counsel raised the objection before the RM'S court and the ruling was made to the effect that Criminal Case No. 117 of 2021 should proceed on hearing. In her view, if the Applicant's counsel was not satisfied he could have appealed against that ruling and not to file a fresh application. She urged this court consider that Criminal Case No. 117 of 2021 need to be investigated and its evidence cannot be similar to Land Case No. 11 of 2017.

The Respondent's counsel further submitted that, the appeal which is pending before the CAT cannot cure the allegation of ownership of half of the disputed property as the genuineness of the documents supporting ownership are challenged. That, the criminal case will cure the issue of ownership because the documents that were tendered before the HC are

the same documents which are the basis of Criminal Case No. 117 of 2021. That, even if the criminal case is stayed pending the decision of the CAT, still there will be a problem as there is an allegation of forgery on the same documents alleged to pass title to another person. It is the Respondent's prayer that Criminal Case No. 117 of 2021 should proceed on being determined so that the legality of the documents can be determined. The counsel for the Respondent insisted that forgery case is different from land case and prayed for this application to be dismissed.

In rejoinder Mr. Maganga added that it is not true that Criminal Case No. 117 of 2021 was filed while the land case was still in progress. That, as per the affidavit of the Applicant, the HC decision was delivered on 11th May 2020 and the notice of appeal against that decision was filed on the 9th June 2020 but Criminal Case No. 117 of 2021 was filed in 2021. That, the 1st Applicant emerged a winner before the HC and the defendant to land case before the HC appealed to the CAT. That, despite being declared lawful owner, the Applicant was charged for unlawful occupation of the same land in criminal case. That, the HC decision has never been overturned and what is before the CAT is the whole evidence including the evidence used in the criminal case. The Applicant's counsel insisted that investigation in criminal case does not bless the illegality meaning,

prosecuting the Applicants before RM'S court while there is a pending appeal on the same subject matter.

The counsel for the Applicant admitted existence of a ruling on objection before the RM'S court but insisted that, in that ruling there are no words stating that these are two different cases. That, it was the reason the Applicant thought that there is question of law of unusual difficult likely to arise before the subordinate court. That, in arguing the preliminary objection (PO) one cannot submit evidence and the decision of the PO is not appealable thus, the accused before the RM'S court preferred the current application which this court is empowered to act upon to prevent the illegality.

Mr. Maganga further added that the submission by the State Attorney suggest that the appeal before the CAT has to be stayed pending determination of the criminal case. That, it is wrong to stay the case before the CAT as it was filed before the case at the RM'S. He reiterated that under section 4 of the CPA, civil remedies must be exhausted before embarking into criminal remedies. He thus prayed for the stay of the criminal case pending determination of the civil appeal before CAT.

I have considered the grounds raised in the notice of motion, affidavits for and against the application, the submissions by counsel for

the parties, the record in Criminal Case No. 117 that was filed before the Resident Magistrates' Court of Arusha. There is no dispute that the 1st Applicant herein was a party in Civil Case No 11 of 2017 that was heard and determined before Hon. Gwae J. The records are clear that the decision in that case was in favour of the 1st Applicant and there is a pending appeal before the CAT against that decision. It is also not disputed that the first Applicant is also the 1st accused in Criminal Case No. 117 of 2021 before the RM'S court of Arusha at Arusha. The charged sheet reveals that the 1st Applicant herein is charged jointly with the 2nd Applicant one Zilhija Ramadhani @ Chalema with two counts of forgery and three counts of altering false documents contrary to sections 333, 335 (a), (d)(i) and 337, of the Penal Code Cap. 16 RE 2002. The 1st Applicant herein is further charged separately for the offence of unlawful occupation of land contrary to section 177 (3) of the Land Act, Cap 113 RE 2018.

The particulars reveal that the Applicants forged documents with intention to show that one Ally Warsama transferred half share of the right of occupancy of Tittle No. 13556 to one Ahmed Haji Mohamed. It was contention by the counsel for the Applicant that since the same matter was determined by this Court in Land Case No 11 of 2020, it cannot

be dealt with in criminal matter in considering that there is a pending appeal before the CAT against the decision of the High Court

It is my view that the pending civil appeal does not bar the Respondent from charging the Applicants with criminal case if there is allegation that criminal offence was or is about to be committed. I do agree with the argument by Mr. Maganga that there is established principle that where there is criminal and civil allegation, civil remedy has to be exhausted before embarking into criminal remedy. However, this principle does not apply in all matters. For instance, it can be relevant where the criminal act alleged is criminal trespass as no trespass can be proved where the dispute over ownership is yet to be determined. This is different from the case at hand. What is alleged against the Applicants herein is forgery and altering false documents. In itself forgery is an offence regardless whether one is in lawful occupation of the property or not. It does not need determination of ownership for one to be charged for forging or altering false document. Thus, in my view the principle raised by the counsel for the Applicant cannot apply in the matter at hand.

I do not agree with the counsel for Applicant's argument that determination of criminal case is an abuse of the court process or that it

will pre-empt the pending appeal before the CAT. The issue of forgery is explicitly different from the claim of ownership.

The counsel for the Applicant alleged that the High Court determined the legality of the document and resolved the issue of forgery in course of determining Land Case No. 11 of 2020 hence the same issue cannot be raised in a criminal case. It is unfortunate that he did not refer this court to a specific page where the High Court held so. Going through the High Court judgment, at page 8 the High Court noted that the authenticity of the document transferring ownership was disputed. The court after analysing the evidence of both parties believed the evidence by the plaintiff as it appeared credible on the balance of probabilities. The HC at page 12 of the judgment further stated that the allegation of forgery ought to have seriously been proved and preferably in criminal court forum where there is high degree of proof. Thus, filing a criminal case could still be an option to determine the allegation of forgery.

Turning to the Applicant's prayers, this court was moved to order Criminal Case No. 117 of 2021 to be transferred to itself as there is likelihood that the question of law of unusual difficult may arise. I am aware that under section 164 (1) of the Criminal Procedure Act, any offence under the Penal Code may be tried by the High Court, where the

offence is shown in the fifth column of Part A of the First Schedule to the CPA as triable by a subordinate court it may be triable by a subordinate court. The offences of forgery and altering false documents as shown in the fifth column of Part A of the First Schedule to the CPA is triable by subordinate court; the Resident Magistrates' Courts and the District courts. Although the High Court have unlimited jurisdiction, the prudence requires the case to start at the court of the lowest grade with competent jurisdiction to try the matter. In our case, it is the District Court or Resident Magistrates' Court which has that jurisdiction. In my view, the fact that the High Court has unfettered jurisdiction to entertain civil and criminal matters does not mean or intend to turn the High Court into a garbage pit to receive everything brought before it even where the matter can be dealt with by a subordinate court.

The Applicant invited this court to transfer to itself Criminal Case No. 117 of 2021 which is before the RM'S court for the reason that there is a likelihood that a question of law of unusual difficult will arise. The question unusual difficult referred to by the Applicant is that, the institution of the charge and prosecution of the Applicants in the Criminal Case No 117 of 2017 will pre-empt the outcome in Civil Appeal No. 518 of 2020 which is currently pending before the Court of Appeal (CAT). As

discussed before, the two cases apply different approach. Existence of a Civil case does not in any way bar institution of criminal charges based on allegation of forgery or altering false document. The Applicant was unable to demonstrate any fact which could be regarded as unusual difficult on matter of law that may require this court to step into the shoes of the subordinate court and assume jurisdiction to matters triable by subordinate court. Thus, the prayer to transfer the criminal case from the RM'S court to this court is unmaintainable.

Similarly, the prayer that Criminal Case No. 117 of 2021 be stayed pending the determination of Civil Appeal No. 518 of 2020 which is pending before the CAT is as well unmaintainable. I reiterate my reasoning above and maintain that there is nothing demonstrated to persuade this court to stay the proceedings in Criminal Case No. 117 of 2021. The allegation of forgery and altering false documents are criminal in nature distinct from a civil claim based on ownership. In other words, a determination in a claim for ownership cannot bar a person from being charged with criminal offence where there is allegation of forgery or altering false documents. Thus, the prayer to stay criminal proceedings stand rejected.

In conclusion, I find no merit in this application and the same is hereby dismissed. For avoidance of doubt, the case file for Criminal Case No. 117 of 2021 be remitted back to the Resident Magistrates' Court for continuation of the trial.




D.C. KAMUZORA

JUDGE

23/03/2023

