



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIVASHA**

**MISC. CRIMINAL APPLICATION NO. 7 OF 2014**

**SIMON K. WANUTHIA.....1<sup>ST</sup> APPLICANT**

**GRACE W. MUTUMWO.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The two applicants herein **SIMON KAMANGARA WANUTHIA** and **GRACE WAIRIMU MUTUMO** jointly face several counts of Obtaining money by false pretences contrary to section 313 of the Penal Code, before the Chief Magistrate’s Court Naivasha, and the Chief Magistrate’s court in Kiambu. In the former court, criminal cases No. 57 of 2014 and 2899 of 2013 have been consolidated.

2. Through Miscellaneous Criminal Application No. 3 of 2014, they sought to have the case before the Kiambu Court, namely, Criminal 2434 of 2014 consolidated and heard together with the Naivasha cases. The application dated 15<sup>th</sup> September 2014 appears to have been filed on 3/10/14. Before the application could be heard the applicants filed a second application on 9/10/14, being Miscellaneous Criminal Application No. 7 of 2015 which is expressed to be brought under several provisions of the law.

3. This latter application was seeking leave to apply for orders of prohibition to restrain the respective courts from trying or determining the pending criminal cases, and secondly, for leave to apply “for orders not to continue to be held in custody”. In support of the two applications are “statements” and affidavits sworn jointly by the two applicants.

4. Although the applicants withdrew the first application on 2/12/14, and despite the wording of the second application, the applicants in their oral submissions made on 4/12/14 appeared not only to argue the withdrawn application, but also argued the second application, not as one seeking leave but one for orders of prohibition. As the applicants are acting in person the court extended some latitude towards them.

5. As far as I can tell the applicants’ request before this court is three fold:-

- 1. That there be stay of the prosecution in the 3 cases because they emanate from a civil dispute in respect of which there exists an adequate remedy outside the criminal process.**

2. **In the alternative, the three cases be consolidated and heard together before one court.**
3. **In respect of the 1<sup>st</sup> Applicant, reinstatement of bail in Naivasha Criminal case No. 57 of 2014.**

6. The gist of the applicants' arguments is that all the offences facing them are similar and emanate from transactions of a civil nature and that they should be stayed or consolidated and heard together while the 1<sup>st</sup> Applicant is re-admitted to bail. The state opposed the applications through Miss Kavindu. She stated that while the matters may have arisen from civil transactions, criminal offences have arisen. The DPP opposed consolidation on grounds that the cases involve different witnesses, complainants and that the offences were committed on different dates and places. Miss Kavindu stated that the 1<sup>st</sup> applicant's bail was cancelled after he absconded for 6 months.

7. In his response, the 1<sup>st</sup> Applicant denied absconding and presented copies of charge sheets in the respective cases. The court also called for and perused the proceedings in Naivasha Criminal case No. 57 of 2014, now consolidated with criminal case No. 2899 of 2013.

8. With regard to the prayer for prohibition of prosecution, I agree with the state that no valid reasons have been presented by the applicants. The fact that the matters arose from civil transactions are issues to be canvassed at the trial, which has yet to commence. This and the existence of other civil remedies cannot be justification for suspending the trial there being no evidence that the applicants' right to a fair trial will be or has been somehow prejudiced. Indeed there is no allegation of violation of any constitutional right

9. The prosecutorial mandate is vested in the DPP by virtue of Article 157 of the Constitution Article 157 (10) states:-

**“The Director of Public Prosecutions shall not require the**

**consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.”**

In appropriate cases however the constitutional court can intervene to secure the rights of those prosecuted (**see Githunguri Versus Republic (1986) (KLR 1)**). No cause therefore has been demonstrated to justify intervention in this case.

10. Regarding the plea for consolidation of the Kiambu case with the Naivasha cases, I note that each of the respective charge sheets carries at least eleven counts. In my considered view lumping a total of over 20 counts against the applicants' in one case would definitely embarrass the applicants, and separate trials appear more appropriate (see section 135 (2) CPC).

11. Besides, a perusal of the charge sheets in the cases reveal that the offences were committed in the jurisdictions of the two trial courts namely, Nairobi County and Naivasha Municipality. The Applicants' arraignment before these courts is in accordance with the provisions of section 72 CPC and in the best interest of quick disposal of the trial, as witnesses will be readily available to testify. The trial would no doubt be slowed down if the multiple witnesses were, to be required to travel long distances to attend the hearing. The prayer for consolidation of the pending cases is therefore rejected.

12. On the question of bail, I have perused the record of the lower court. Even though the 1<sup>st</sup> applicant has not formerly appealed the decisions forfeiting his cash bail and cancelling his bond, as anticipated by

section 131 CPC, this court, in exercise of its power under section 123 (3) and 132 CPC directs that the 1<sup>st</sup> Applicant renews his application for the reinstatement of bail before the trial court in Naivasha which will have the opportunity to consider all relevant matters and to make appropriate orders. For this purpose the 1<sup>st</sup> Applicant will be produced before the trial Court in Naivasha on **22<sup>nd</sup> December 2014**. The applications have succeeded only in this latter respect.

Delivered and signed this 19<sup>th</sup> day December,2014

Applicants present

Mr. Koima for the state

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**C.W. Meoli**

**JUDGE**



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