



Nganga v DCI & 2 others; Muchira (Interested Party) (Miscellaneous Criminal Application E044 of 2022) [2023] KEHC 2711 (KLR) (Crim) (31 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2711 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
MISCELLANEOUS CRIMINAL APPLICATION E044 OF 2022
PM MULWA, J
MARCH 31, 2023**

BETWEEN

AUGUSTINE MUCHIRI NGANGA APPLICANT

AND

DCI 1ST RESPONDENT

NPS 2ND RESPONDENT

DPP 3RD RESPONDENT

AND

GODFREY MUCHIRA INTERESTED PARTY

RULING

1. By way of a notice of motion dated February 15, 2022, the applicant is seeking for orders as here below reproduced;
 - i. Spent
 - ii. That the honorable court be pleased to call for and examine the record of the criminal proceedings in Criminal Case No 4368 of 2021 Republic v Augustine Muchiri Nganga for the purpose of satisfying itself as to the correctness, legality or propriety of the orders of the learned principal magistrate dated February 11, 2022
 - iii. That the proceedings in Makadara Criminal Case No 4368 of 2021 be temporarily stayed pending the hearing and disposal of the revision already lodged
 - iv. That the costs of this application be provided for.



2. On July 25, 2022, this file was consolidated with Misc criminal application No E044 of 2022 yet another application dated March 18, 2022 substantially a replica of the application dated February 15, 2022 seeking identical orders.
3. However, before delving into the substance of the matter, brief background facts will suffice for better understanding thereof. On September 28, 2021, the applicant was arraigned before the Chief Magistrate’s Court in Makadara, charged with the offence of obtaining money by false pretences contrary to section 313 of the *Penal Code*. He pleaded not guilty to the charge.
4. On October 18, 2021, the matter was set for hearing for November 19, 2021. However, the same did not kick off that day. The matter was given a further hearing date for January 5, 2022 but the matter did not proceed. On February 11, 2022, when the matter came for hearing, the applicant’s advocate, made an oral application for the parties to be given 60 days to solve the matter by way of alternative dispute resolution. However, the complainant opposed the same. He urged the court to have the trial proceed being that the case arose from a claim of 2019. By a ruling of the same date, the trial magistrate dismissed the application and ordered the trial to proceed.
5. The respondent’s opposed the application through grounds of opposition dated April 28, 2022 on grounds that;
 - i. The application is defective.
 - ii. The application is without merit as it does not exhibit how the court’s order was illegal, improper, incorrect and/or the proceedings leading thereto irregular.
 - iii. A court’s criminal jurisdiction cannot be taken away on the basis of an agreement by the parties.
 - iv. The trial court has geographical jurisdiction to hear and determine the matter.
 - v. The applicant has not met the threshold for the grant of orders of stay of proceedings.
 - vi. The applicant has abused the process of court by filing HCCR Misc Appl E090/2022 Augustine Muchiri Ngángá v DCI & 2 others before this honourable court seeking similar orders of stay of proceedings.
 - vii. The application lacks merit, is a delaying tactic, a waste of court’s time and should accordingly be dismissed.
6. The parties agreed to proceed by way of written submissions. The applicant filed their submissions on June 23, 2022 whereas the respondent filed theirs on June 22, 2022 and the interested party on October 12, 2022.
7. I have carefully considered the application, the affidavits, submissions and the grounds of opposition on record by the parties and the issue which I need to decide on is whether the application meets the threshold of the parameters within which this court’s revisional jurisdiction should be exercised.
8. The revisional jurisdiction of this court is donated by section 362 of the *Criminal Procedure Code* which provides that:

“The High Court may call for and examine the record of any criminal proceedings before any subordinate 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 any such subordinate court.”



9. From the above provision, it is clear that the court can only revise orders or decisions of the lower court if it was satisfied that they were tainted with illegality, errors of law or impropriety or that there was irregularity in the proceedings which gave rise to the impugned order, finding or decision.
10. I shall first deal with the issue of whether or not this court should grant an order for transfer of Makadara criminal case No 2577 of 2021 to Milimani Law Courts.
11. The provisions relating to transfer of cases are found in section 81 of the [Criminal Procedure Code](#).

Powers of High Court to change venue

- (1) Whenever it is made to appear to the High Court —
 - (a) That a fair trial cannot be had in any criminal court subordinate thereto; or
 - (b) That some question of law of unusual difficulty is likely to arise, or
 - (c) That a view of the place in or near which any offence has been committed may be required for the satisfactory trial of the offence;
 - (d) That an order under this section will tend to the general convenience of the parties or witnesses; or
 - (e) That such an order is expedient for the ends of justice or is required by any provision of this Code;

It may order—

- (i) That an offence be tried by a court not empowered under the preceding sections of this part but in other respects competent to try the offence;
 - (ii) That a particular criminal case or class of cases be transferred from a criminal court subordinate to its authority to any other criminal court of equal or superior jurisdiction;
 - (iii) That an accused person be committed for trial to itself.
- (2) The High Court may act 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 when the applicant is the Director of Public Prosecutions, be supported by affidavit.
- (4) An accused person making any such 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 application unless at least twenty-four hours have elapsed between the giving of notice and the hearing of the application.
- (5) When an accused person makes any such application, the High Court may direct him to execute a bond, with or without sureties, conditioned that he will, if convicted, pay the costs of the prosecutor.

12. The provision relating to place of trial are found at section 71 of the [Criminal Procedure Code](#) as follows: -

Ordinary place of inquiry and trial



Subject to the provisions of section 69 and to the powers of transfer conferred by sections 79 and 81, every offence shall ordinarily be tried by a court within the local limits of whose jurisdiction it was committed, or within the local limits of whose jurisdiction the accused was apprehended, or is in custody on a charge for the offence, or has appeared in answer to a summons lawfully issued charging the offence.

13. It is argued by the applicant stated in his grounds that being that the transactions took place in Nairobi CBD, his trial ought to have been conducted in Milimani Law Courts as opposed to Makadara Law Courts. In their grounds of opposition, the 3rd respondent stated that the trial court has geographical jurisdiction to hear and determine the matter. The interested part submitted that the applicant was rightly charged in Makadara court being that under section 5 of the penal code, the applicant could have been charged in any court within Kenya. In support, he cited the case of *Stanley Muia Makau v R* Machakos HCCR Misc Appl No 109 of 2019.
14. Having perused the charge sheet by which the applicant was charged, this court observes that the offence took place at the Central Business District Nairobi county. Going by the provisions of section 71 aforesaid, it being that the offence took place in Nairobi County, and that the offence was reported at Huruma Police Station, the 3rd respondent rightfully instituted the proceedings at Makadara Law Courts.
15. In my view, the applicant has failed to demonstrate that there is proper reason to warrant transfer of the criminal matter from Makadara Law Courts to Milimani Law Courts. Further, no sufficient reason is given within the provision of section 81 of the *Criminal Procedure Code* for the order for transfer.
16. Reverting back to the revision herein. The applicant sought review of the order by the learned trial magistrate on adjournment.
17. In dismissing the application, the learned trial magistrate held that the course of action arose in 2019, the matter was brought to court on September 17, 2020 yet the applicant had not made any steps in terms of ADR. The trial court went further to state that the request for adjournment was a delaying tactic by the applicant. He therefore found that the applicant had not approached the court with clean hands in seeking to set aside the proceedings.
18. Upon a careful perusal of the record of proceedings, I note as follows with regard to hearing dates and failure of the trial to take off. The main trial was first fixed for hearing on November 19, 2021, the trial was adjourned at the instance of the applicant as his counsel stated they wanted to attempt out of court settlement. There was no opposition to the adjournment, and the trial was adjourned to January 5, 2022.
19. I have noted from the proceedings that at the hearing of January 5, 2022, the court stated:

“ this case is coming up for hearing on February 11, 2022.”
20. When the matter came up on February 11, 2022, the applicant’s counsel indicated that he was not ready to proceed for the sole reason that they were still pursuing the settlement. The state counsel opposed the application and stated that the court gave the applicant opportunity to try and settle the case with the complainant and has not borne any fruit.
21. It is clear that a decision whether or not to set aside proceedings is an exercise of discretion. In *Mbogo & Another v Shab* (1968) EA 93 at 96, the Court of Appeal stated that an appellate court will not interfere with the exercise of discretion by a trial court unless the discretion was exercised in a manner that is clearly wrong because the judge misdirected himself or acted on matters which it should not have acted



upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.

22. In this case the learned trial magistrate order cannot be said to be tainted with illegality, error of law or impropriety or that there was irregularity in the proceedings. In my view, as far as learned trial magistrate was concerned, he gave the applicant an opportunity to try out of court settlement but the applicant did not utilize the same. Such a party only has himself to blame if the court, in the exercise of its discretion, decides to proceed as was in this case.
23. Regarding the prayer for stay of proceedings in the lower court, the same has been overtaken by events and is not tenable anymore.

Final Orders

24. The applicant’s notice of motion dated February 15, 2022 is wanting in merit and is hereby dismissed.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT MILIMANI THIS 31ST DAY OF MARCH, 2023

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P.M. MULWA

JUDGE

In the presence of:

Ms. Karwitha – Court Assistant

For State: Ms. Akunja

Applicant: Present

