



McTough v Director of Public Prosecutions & another (Miscellaneous Criminal Application E163 of 2022) [2022] KEHC 15607 (KLR) (Crim) (25 November 2022) (Ruling)

Neutral citation: [2022] KEHC 15607 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
MISCELLANEOUS CRIMINAL APPLICATION E163 OF 2022
K KIMONDO, J
NOVEMBER 25, 2022**

BETWEEN

JOHN ROBERT MCTOUGH APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

WILLIAM ROMAN MCTOUGH 2ND RESPONDENT

RULING

1. William Roman McTough (hereafter William or the accused) was charged in the Chief Magistrates Court at Nairobi in Criminal Case No 205 of 2012. He faced six counts of forgery of land documents relating to properties in Kisumu; one count of forging a power of attorney; and, another count for obtaining money by false pretences.
2. The complainant was John Robert McTough (hereafter John). Pursuant to an application brought by the accused at the High Court and dated June 4, 2012, the proceedings in the magistrates court were transferred to the Chief Magistrates Court at Kisumu. The order was issued on July 12, 2012. A new file was opened at Kisumu Chief Magistrates Court Criminal Case No E129 of 2021.
3. John has now presented a notice of motion dated May 31, 2022 seeking stay of the proceedings of the criminal case at Kisumu; and, for re-transfer of the case to Nairobi. He claims that he is 72 and sickly and unable to travel to Kisumu for the hearing of the matter; that the case has been adjourned on many occasions; and, that in any case, the material witnesses reside in Nairobi. The grounds are buttressed further in his affidavit of even date.
4. The application is fervently opposed by both respondents through the 1st respondent's grounds of opposition dated October 4, 2022 and the accused's replying affidavit sworn on June 28, 2022.



5. On November 4, 2022, I heard submissions from all the learned counsel for the disputants.
6. My take of the matter is as follows. Firstly, the applicant had lodged a prior motion dated January 1, 2013 seeking to set aside the order of the High Court of July 12, 2012 transferring the criminal matter to Kisumu. That application was not prosecuted for many years. On September 2, 2021, the High Court (Nzioka J) ordered that the file be closed for non-prosecution. It follows as a corollary that the orders in that file staying the matter in Kisumu are spent.
7. I am alive that the applicant blames his former legal counsel “for failing to accord [him] sufficient representation as the application was dismissed for want of prosecution”. At the time, he was “shuttling between South Africa and the UK” on official assignments. That may as well be the case but the delays in prosecuting the motion for years was inordinate. Furthermore, the applicant should have moved the High Court for reinstatement but not to lodge a fresh application seeking similar reliefs.
8. Secondly, the charge sheet and particulars are express that the alleged offences were committed “within Kisumu County”. Some of the offences are alleged to have been perpetrated way back in the year 1998. Since the matter is pending, the less I say about it the better.
9. Thirdly, I note from the proceedings annexed to the replying affidavit of the accused, that the lower court is seized of the matter at Kisumu. Learned counsel informed me at the hearing that the case is set down for further hearing in December 2022. To order for a re-transfer of the criminal matter to Nairobi will defeat the ends of justice.
10. Fourthly, I accept that the complainant resides in Nairobi, is elderly and ailing which all prejudice long journeys. I empathize with his circumstances but the trial, unfortunately, cannot be re-transferred to Nairobi purely for the convenience of the complainant or the witnesses.
11. The upshot is that the applicant’s notice of motion dated May 31, 2022 is devoid of merit and is hereby dismissed.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF NOVEMBER 2022.

KANYI KIMONDO

JUDGE

Ruling read virtually on Microsoft Teams in the presence of: -

Mr. Kegode for the applicant instructed by Agimba & Associates Advocates.

Ms. Odhiambo for the 1st respondent instructed by the Office of the Director of Public Prosecutions.

Mr. Kasamani for the 2nd respondent instructed by Kasamani & Associates Advocates.

Mr. Edwin Ombuna, Court Assistant.

