



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

MISCELLANEOUS CRIMINAL APPLICATION NO E036 OF 2021

SOLOMON NDIBIU NGECHU.....APPLICANT

VERSUS

INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

OFFICER COMMANDING STATION KISUMU CENTRAL POLICE STATION....2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT

JUDGMENT

1. In his Notice of Motion application dated 22nd March 2021 and filed on 23rd March 2021, the Applicant sought an order that this court do restrain the Respondents from charging him at Kisumu Law Courts in respect to his dealings and /or business with Jumbo Steel Mills Limited. He swore an affidavit in support of his said application on even date.
2. He averred that he operated a business in the name and style of Gitaki General Supplies Limited at Kariobangi within Nairobi County. He stated that on 23rd January 2021 at about 3.00pm, he was at his hardware at Kariobangi, when officers whom he later learnt were from Kisumu Police Station arrested him.
3. It was his contention that the said officers neither introduced themselves to him nor informed him of the reason for his arrest. He added that they hurried him to a private vehicle registration number KCS 504C and took him to Kariobangi Police Station, booked him on OB Number 30/23/01/2021 and was subsequently transported to Kisumu Central Police Station. He averred that despite his enquiries, he was not informed of the reasons for his arrest.
4. He asserted that he was detained at the said Station until 24th January 2021 at 4.00pm when the 2nd Respondent authorised his release on cash bail of Kshs 60,000/=. It was at that time that he was informed that he would be facing charges of issuing bad cheques to Jumbo Steel Limited, a Company which he admitted he was familiar with as it had been supplying his hardware with steel since 2018.
5. He explained that Jumbo Steel Limited was situated in Kilifi and his place of business was in Kariobangi in Nairobi County. He denied having been in Kisumu for the past five (5) years prior to his arrest or operating any business in Kisumu and therefore having had no connection with Kisumu County, his intended prosecution at Kisumu for an offence allegedly committed at Nairobi was devoid of territorial jurisdiction and was only intended to misuse the court process for ulterior motives, it was malicious, was in bad faith and abuse of power on the part of the Respondents.
6. He added that the advocates for Jumbo Steel Limited and his advocates had substantially agreed on the debt repayment terms of Kshs 1,000,000=payable monthly and that the matter was purely commercial in nature. He confirmed having issued post-dated cheques numbers 208, 196, 202, 209, 200, 201, 219, 210, 211, 212, 221, 224, 213, 239, 225, 231, 233, 226, 230, 238, 232, 235 and 237.
7. In opposition to the said application, the Respondents filed Grounds of Opposition dated 2nd July 2021 and filed on 12th July 2021. They also indicated that it would be relying on the sworn affidavit of No 54819 CPL Gerald Njuguna dated 26th May 2021.
8. It contended that the application was inept, misconceived and amounts to abuse of the court process and was intended to delay and derail the delivery of justice to victims of crime. It added that the applicant had not demonstrated that his constitutional rights had been or are likely to be violated.
9. It further stated that to require the applicant to submit to investigations and prosecution does not in any way amount to a breach of his

fundamental rights. It added that the applicant had not demonstrated any peculiar or exceptional circumstances that warrant grant of the orders sought.

10. It was the State's contention that the Respondents had been conducting investigations on the Applicant who made an order for supply of goods from the complainant Jumbo Steel Industries but issued bad cheques. It added that the Respondents had completed investigations and intended to charge the applicant before Kisumu Chief Magistrate's Court.

11. It asserted that Kisumu Law Courts had jurisdiction to hear the matter for the reasons that the cause of action arose in Kisumu and that the witnesses lived in Kisumu and the Complainant's headquarters were in Kisumu. It added that the Applicant applied for orders for supply of goods through telephone call to the complainant's Kisumu Office and the bad cheques were issued by the Applicant to the complainant at their offices in Kisumu and therefore the Chief Magistrate's court in Kisumu had jurisdiction to hear and determine the matter.

12. The Applicant's Written Submissions were dated 2nd July 2021 and filed on 5th July 2021 while those of the State were dated 2nd July 2021 and filed on even date. Both parties relied entirely on their Written Submissions. This Ruling is therefore based on the said Written Submissions.

LEGAL ANALYSIS

13. Right at the outset, this court wished to point out that the said affidavit of No 54819 CPL Gerald Njuguna did not bear any court stamp. In other words, it was not filed in court. This court did not consider the same as it was inadmissible as it had no weight to be attached. It, however, considered the Respondents' Grounds of Opposition.

14. Turning to the substance of the present application, this court noted the Applicant's submissions that the Respondent's decision to charge him in Kisumu despite the alleged offence, if any, occurring in Kariobangi in Nairobi offended Section 71 of the Criminal Procedure Code Cap 75 Laws of Kenya. In that regard he relied on the case of **Abdalla Awadh Abubakar vs Inspector General of the National Police Service & Another [2019] eKLR** where the factors to be considered in choosing the place of trial were the place of the alleged omission, place of arrest, place where the accused is in custody on the date of the charge or trial and where the accused appeared to answer to summons lawfully issued.

15. He was categorical that these above-mentioned confines were for the general purpose of criminal justice that sought a fair process devoid of undue hardship to the accused be it in terms of access on account proximity, fiscal constraints or otherwise. He appreciated that even though proximity must be for the convenience of all involved, the person with the most stake in a trial was the accused person.

16. He was apprehensive that preferring charges against him in Kisumu would violate Article 201 of the Constitution of Kenya which demands prudent use of public resources. He stated that it was in the interest of criminal justice under Article 48 and 50 of the Constitution of Kenya to have any proceedings in Kisumu quashed to ensure that his rights to access of justice were not violated by the Respondents. He further argued that the Respondents had not raised any iota of evidence of impartiality on any court within Nairobi in conducting the trial against him.

17. On its part, the Respondents placed reliance on Article 157 (6)(a) of the Constitution of Kenya 2010 as read with Section 10 of the Office of the Director of Public Prosecutions Act and the case of **Florence Dorothy & 2 Others vs DPP and 3 Others High Court Petition No 341 of 2012** (eKLR citation not given) in submitting that nothing had been presented before this court to demonstrate that the constitutional rights of the Applicant have been violated.

18. It argued further that the Respondents had been investigating the Applicant who made an order for supply of goods from the Complainant Jumbo Steel Industries but issued bad cheques for payment at the Complainant's Kisumu Office.

19. It added that the 1st and 2nd Respondent had completed investigations and found that the cause of action arose in Kisumu and therefore intended to charge the Applicant before Kisumu Chief Magistrate's Court. It was the Respondents' submissions that the present application was meant to delay the delivery of Justice to victims of crime.

20. The power of this court to transfer a case from one subordinate court to another is provided for in Section 81 (1) of the Criminal Procedure Code. The same provides as follows:-

1. "Whenever it is made to appear to the High Court-

a. that a fair and impartial 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; or

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**

21. It was only if any of the above conditions and/or all of them were met that the High Court could order the transfer of a case from one court to another. Further, it is not mandatory that it transfers a suit. The key word is “**may**” connoting that it must exercise its discretion in granting an order for transfer. The discretion to transfer a suit must therefore be exercised with caution as it must not only look at the allegations made by an accused but it must also look at the effect the order of transfer will have on the overall administration of justice.

22. Notably, this court noted the Respondents’ submissions that the 3rd Respondent was governed by the provisions of Article 157 of the Constitution of Kenya in making decisions to charge and its undertaking that it would comply with the aforesaid provisions when making a decision to charge him.

23. This court did not want to delve into the arguments as to whether or not the Chief Magistrate’s Court had jurisdiction to hear and determine the charge against the Applicant. Doing so would be premature for the reason that making such a determination had the potential of shutting out the Applicant from applying to court under the provisions of Section 81 of the Criminal Procedure Code at the appropriate time.

24. This court had due regard to the case of **Abdalla Awadh Abubakar vs Inspector General of the National Police Service & Another** (Supra) that was relied upon by the Applicant herein as it was distinguishable from the facts of this case. In that case, the applicants had sought that the matter that had been commenced at the Senior Principle Magistrates court, JKIA be transferred to the Principal Magistrate Court, Shanzu or any other nearby court for hearing and determination.

25. As the Applicant was yet to be charged in any court, this court came to the firm conclusion that it ought not to issue orders in a vacuum and only do so under circumstances envisaged under the law. In other words, this court took the view that an application for transfer under Section 81 of the Criminal Procedure Code ought to be made once charges are instituted in a court and not before as that would be tantamount to interfering with the independence of the office of the Director of Public Prosecutions in determining where to prefer charges against an accused person.

DISPOSITION

26. The upshot of this court’s decision therefore was that the Notice of Motion application dated 22nd March 2021 was not merited and be and is hereby dismissed. There will be no order as to costs as the Respondents are government institutions and/or offices.

27. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 26TH DAY OF OCTOBER 2021

J. KAMAU

JUDGE