



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R MWONGO, J)

MISCELLANEOUS CRIMINAL APPLICATION NO. 28 OF 2018

DIRECTOR OF PUBLIC PROSECUTIONS.....APPLICANT

-VERSUS-

PERRY MANSUKH KANSAGARA.....1ST RESPONDENT

VINOJI JAYA KUMAR.....2ND RESPONDENT

WINNIE MUTHONI MUTISYA.....3RD RESPONDENT

TOMKIN ODO ODHIAMBO.....4TH RESPONDENT

JACINTA WERE.....5TH RESPONDENT

WILLIEC OMONDI WERE.....6TH RESPONDENT

LYNNETE JEPCHIRCHIR CHERUIYOT.....7TH RESPONDENT

JOHNSON KAMAU NJUGUNA.....8TH RESPONDENT

LUKA KIPYEGEN.....9TH RESPONDENT

JUDGMENT

1. On 5th September, 2018, the state applied to this Court, under certificate of urgency, to transfer **Naivasha CMCC No 977 of 2018** to the Chief Magistrate's Court at Nairobi. This Court declined the said transfer in its judgment of 2nd October, 2018 in High Court Miscellaneous Criminal Application No 23 of 2018. The lower court case referred to concerns the prosecution of accused persons in respect of the Solai Dam tragedy in which 48 persons lost their lives when the dam broke its banks on 5th July, 2018.

2. By a notice of motion dated 12th November, 2018, the DPP again seeks to transfer Naivasha Criminal Case No 977 of 2018 from the Chief Magistrate's Court in Naivasha to the Chief Magistrate's Court at Nairobi or any other court of competent jurisdiction. In summary, the grounds are that :

- a. On 5th September, 2018 the applicant applied to the High Court to have the matter transferred from Naivasha to Nairobi; which application was unsuccessful and the High Court directed that the matter "*proceeds before the same trial court*";
- b. That on 6th November, 2018 "the Trial Court did recuse itself from hearing and determining Criminal Case No 977 of 2018"
- c. That it is in the interest of justice that the file be transferred to another court

As a matter of correction, this court did not order that the matter be heard by the same trial court.

3. From the above cited grounds and the supporting affidavit of Catherine Mwaniki, it is clear that the core reasons for the application, and thus the issues for determination are:

a) Whether the recusal by the Trial Court (Hon. J. Karanja PM) was a confirmation that a fair and impartial trial cannot be assured at the Naivasha Law Courts.

b) Whether it is ascertained that most prosecution witnesses reside outside Naivasha and Nakuru and are currently in Nairobi.

4. When this matter first came up for hearing on 20th November, 2018 Mr. Masinde for the 1st and 2nd Respondent (1st and 2nd Accused in the lower court) said he was not ready to proceed as he had not received full instructions. The court noted that the application, having not been filed under urgency, no prejudice would be suffered if more time were given for the 1st and 2nd Respondents to engage.

5. On the application of the state the court then ordered a stay of the proceedings in the lower court to the extent that Pre-Trial directions and the Pre Trial should not proceed until the hearing and determination of this application, but that other processes and applications in the lower court may proceed. The hearing was then fixed for 27th November, 2018.

6. On 21st November 2018, the state filed another application seeking the disqualification of Mr. Ogola for 5th Respondent from acting on grounds of conflict of interest. It was agreed by consent that that application be heard before the present application. By a ruling delivered on 14th February, this court ordered Mr. Ogola to elect whether to act for the 5th Respondent or for the Victims, but not for both.

7. On 21st February 2019, at the hearing of the present application, Mr. Mburu for the 3rd and 4th Respondents indicated that the 5th Respondent had appointed Mr. Achieng Owuor to act for her for hearing of the application in place of Mr. Ogola. Mr. Mburu was holding brief for Mr. Owuor.

8. The highlighting of written submissions then proceeded on that day.

9. All parties filed their responses to the application and submissions thereon. Mr. Makori appeared for the state, Mr. Masinde for 1st and 2nd Respondents, Mr. Mburu for 3rd and 4th Respondents; Mr. Mburu held brief for Mr. Owuor for 5th Respondent; Mr. Karanja for the 8th and 9th Respondents also held brief for Mr. Were and Mr. Orare for the 6th and 7th Respondents respectively.

10. I now to consider each of the arising issues.

Effect of recusal by Trial Court

11. Mr. Makori for the applicant submits that there are changed circumstances and new facts necessitating the fresh application for transfer filed by the applicant. He relies on the case of **Republic v. Diana Suleman Said & Another [2014] eKLR** in which the court, dealing with the issue of bail, stated that a court could review its own orders in the face of changed circumstances.

“The changed circumstances test is one of common sense that where the circumstances of the case are so altered that compelling reasons are disclosed for the refusal of bail or for review of terms thereof, the court as a court of justice must reserve for itself a power to revisit the issue in the interest of justice not only for the accused but also for the complainant and the society at large. In the same way that an unsuccessful applicant for bail may repeat his application if his circumstances changed in such a manner as to favour his release on bail, so may the prosecution urge that the situation has deteriorated to compel a reconsideration of bail granted to the accused.”

12. The applicant’s point here was that the recusal by the trial court (Hon. J. Karanja, PM) amounts to a changed circumstance the substance of which affirms that a fair and impartial trial cannot be held in Naivasha. That such recusal is a new fact that this court needs to take into account.

13. The 3rd and 4th Respondent, opposing the application, submitted that this was a repeat application for transfer of the file to Nairobi. Mr. Mburu pointed out that it was not an application for review of the court’s earlier judgment of 2nd October 2018, and no prayer for review had been sought. Further, that the said judgment had not been appealed against, that the cause of action arose in Solai, Nakuru and there are Magistrate’s Courts in Nakuru, Molo, Eldama Ravine, Kabarnet and Nyahururu, all of which are closer to the site of the tragedy than Nairobi.

14. The 8th Respondent filed a preliminary objection arguing that the present application is *res judicata*, the issue of transfer having already been determined by this court. The objection was argued together with the main application herein, and I will deal with it later in this judgment.

15. Upon close consideration of the application and perusal of the file in **CMCR No. 977 of 2018**, I note that the Hon. J. Karanja is the magistrate in the lower court who recused himself. He stated as follows when recusing himself on 6th November, 2018:

“Appearances all noted. Before we proceed further with this matter, I would like to give some brief directions. Due to personal reasons, it has become untenable for me to continue handling this matter, and I do therefore recuse myself from the same. The matter is now referred to Court 1 before the Hon. Chief Magistrate for directions.”

He gave as his grounds for recusal “personal reasons” leading to untenability to continue handling the matter. The Hon. Magistrate did not say that recusal was due to inability to assure a fair and impartial trial in Naivasha.

16. The file was taken to Court 1 on the same day and the parties appeared before Hon. Bidali, CM. In that court, the parties sought directions from the Chief Magistrate. As there was a pending application on the file, counsel sought directions and stated that they were ready to proceed. In particular, Mr. Muteti for the state said:

“We filed our affidavit. We had not filed written statements. We will be ready to argue the application.”

It is therefore clear that at the instance of the parties the Hon. Chief Magistrate seized jurisdiction and took over the file, and heard the pending application. On 12th November 2018, he issued a Ruling in relation to the said application.

17. There is no doubt in my mind, and no dispute amongst the parties, that the said file was then taken over by Hon. K. Bidali, Chief Magistrate. He has also undoubtedly been in conduct of the matter since then. No application for his recusal has been made, neither has he opted to recuse himself. Further, the order for stay of Pre Trial and substantive proceedings issued by this court pending the determination of the present application is still in place.

18. In this Court’s judgment in **DPP v Perry Kasangara & 8 Others[2018] eKLR** I highlighted the statutory requirements for transfer under **Article 157(6)** of the **Constitution** and **Section 81** of the **Criminal Procedure Code** and noted in respect of transfer of files:.

“The DPP does not exercise that power and discretion willy-nilly. In carrying out his mandate under Article 157(11), the DPP must:

...have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.”

Further, in respect of **section 81 CPC** this court held:

“...it is clear that, textually, there are five situations in which the court can transfer a hearing in a lower court. These are situations where:

i. A fair and impartial trial cannot be had in any subordinate court

ii. Difficult or unusual questions of law are likely to arise in the trial

iii. For a satisfactory trial of the offence, a view of the place at or near where the offence was committed is required

iv. It is more convenient to the parties or the witnesses that the trial be moved

v. It is in the interest of justice or the provisions of the Criminal Procedure Code that the trial be moved”

19. In my view what has been placed before the court is in respect of the recusal by Hon Karanja. Since such recusal, however, the file moved on to Hon Bidali who has been in conduct of the same. No recusal has arisen on the part of Hon Bidali, and parties have been appearing and arguing applications before him without hindrance or complaint. To that extent, therefore, there can be no basis for complaint that the recusal by Hon Karanja is reflective of a position that a fair and impartial trial cannot be had in the trial court manned by Hon Bidali. Indeed Hon Karanja’s recusal was expressed to be for personal reasons and the file was taken over by another trial court.

20. Accordingly, this ground fails

Prosecution Witnesses

21. The applicant has also relied on the ground that most prosecution witnesses reside outside Naivasha and Nakuru and are currently in Nairobi.

22. In the supporting affidavit of Catherine Mwaniki nothing was annexed in support this assertion on witnesses. One would have expected to see a list of witnesses showing those residing in Nairobi, and that an underwhelming number of them were in Naivasha or Nakuru. Accordingly, the applicant’s affidavit in respect of witnesses is merely a bare assertion without demonstrable proof, does not aid the application.

Preliminary Objection

23. The 8th and 9th Respondent filed a Preliminary Objection submitting that the application for transfer was *res judicata*. Counsel cited two authorities namely as follows:

- **KMM v JIL [2016] eKLR** where the High Court stated that the principle of *res judicata* aims to prevent multiple litigation of issues

- **John Florence Maritime Services & Another v. Cabinet Secretary for Transport & Infrastructure & 3 Others [2015] eKLR** where the Court of Appeal held that the principle of *res judicata* does indeed apply to “constitution-based litigation”. The Court nevertheless opined:

“However, we must hasten to add that it [the principle of res judicata] should only be invoked in constitutional litigation in the clearest of cases. It must be sparingly invoked and the reasons are obvious as rights keep on evolving, mutating and assuming multifaceted dimensions.”

24. On their part, the applicant did, however, avail an authority namely **Stephen Gikonyo Kirugumi v Willam Onwonga & Another [2017] eKLR** in which Kasango, J. stated:

“It is important to state that the principle of res judicata raised by William in his replying affidavit does not apply to criminal cases. The doctrine applies only to civil action. What would apply in criminal cases and in probably similar to that doctrine is the issue of abuse of court process if a party indeed files more than one application in the same matter.” (Emphasis supplied)

25. During submissions, Mr. Karanja did finally concede that the doctrine of *res judicata* applies to matters of a non-criminal nature. I am of the view of that the doctrine of *res judicata* does not apply in this matter and the preliminary objection therefore fails.

Disposition

26. The prosecution’s application fails and is hereby dismissed. Equally, the 8th and 9th Respondent’s preliminary objection fails and is hereby dismissed.

27. In light of the foregoing, Orders 1 to 3 of the orders for stay of execution issued by this court on 20th November, 2018 are hereby forthwith vacated.

28. Orders accordingly.

Dated and Delivered at Naivasha this 14th Day of March, 2019

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Makori for the Applicant ODPP
2. Masinde for 1st and 2nd for Respondents
3. Mburu F. I. for 3rd and 4th Respondents
4. Owuor for 5th Respondent
5. Wabuoto for 6th and 7th Respondents
6. Karanja for 8th and 9th Respondents
7. Onyango & Ms Nakhungu for Victims

Court Clerk – Quinter Ogutu