REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 16 OF 2016

DENNIS NDOLO MUTUNGA……..……....…APPLICANT

VERSUS

REPUBLIC…….....RESPONDENT

RULING

1. The applicant on 11.7.2019 approached this court and made an undated application under Section 81 of the Criminal Procedure Code seeking transfer of the criminal matter to another high court for hearing and determination. It is evidently clear that section 81 of the Code allows a high court to transfer proceedings from one subordinate to another subordinate court. Therefore the instant application is brought under the incorrect provisions of the law.

2. In the spirit of Article 159 of the Constitution, I shall disregard the impropriety and address the substance of the application. In effect the applicant seeks that I disqualify myself from hearing the appeal.

3. In support of the application was a supporting affidavit that the applicant averred that he felt that if the appeal is heard before court two then he will not get justice. There is no indication of any reply from the respondent.

4. In support of the application, the applicant submitted that the registry staff delayed in availing the lower court proceedings on time and this delayed the hearing of an earlier application that he had filed and in this regard he had the right to have the appeal transferred.

5. Learned Counsel for the state submitted that there had been no demonstration of likelihood of bias by the court and that the applicant has presented unsubstantiated claims and he thus urged the court to find that the application lacked merit.

6. I therefore have to deal first with the issue of jurisdiction of the High Court to transfer a suit from itself to another High Court and vice versa. The law, as was stated by Nyarangi JA in **The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989)** KLR 1, is:

> **"Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".**

7. Article 165(3)(a) of the Constitution provides that subject to clause (5), the High Court shall have unlimited original jurisdiction in criminal and civil matters. Clause (5) of the said Article provides that the High Court shall not have jurisdiction in respect of matters (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or (b) falling within the jurisdiction of the courts contemplated in Article 162 (2). Article 162(2) on the other hand provides that Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to (a) employment and labour relations; and (b) the environment and the use and occupation of, and title to, land. It is therefore clear that the High Court no longer has original and unlimited jurisdiction in all matters as it used to have under the old Constitution. However, the jurisdiction of the High Court can only be limited as provided by the Constitution itself and hence I find that the court has jurisdiction to entertain the application.

8. After satisfying myself that the court has the requisite jurisdiction, I shall address the merit of the application. In the case of **Hangzhou Agrochemicals Industries ltd v Panda Flowers Ltd (2012) eKLR** Justice Odunga addressed conditions to be considered in determining whether or not to grant an order transferring a suit, thus:

> **" ..In my view, which view I gather from authorities and from the law, the court should consider such factors as the motive and the character of the proceedings, the nature of the relief or remedy sought, the interests of the litigants and the more convenient administration of justice, the expense which the parties in the case are likely to incur in transporting and marinating witnesses, balance of convenience, questions of expense, interest of justice and possibilities of undue hardship. If**

the court is left in doubt as to whether under all the circumstances it is proper to order transfer, the application must be refused. Being a discretionary power, the decision whether or not to exercise it depends largely on the facts and circumstances of a particular case".

9. I am cognizant of the provisions of Article 50 (1) of the Constitution that provides as follows, ***"every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body"***. Then the question flows; has the applicant demonstrated that this court has exhibited bias that is likely to compromise a fair and impartial trial?

10. The Black's Law Dictionary, 8th Edition at page 171 defines the word bias as;

> ***"Inclination; prejudice,…., judicial bias. A Judge's bias toward one or more of the parties to a case over which the Judge presides. Judicial bias is usually insufficient to justify disqualifying a Judge from presiding over a case. To justify disqualification or recusal, the Judge's bias usually must be personal or based on some extra judicial reason."***

11. The English case of **Metropolitan Properties CO. (FG.C) LTD. v Lannon & Others (1969) 1 Q.B. 577**, proceeded to summarize the legal position in Kenya as follows: -

"That being the position as I see it when the courts, in this country are faced with such proceedings as these, [i.e. proceedings for the disqualification of a judge] it is necessary to consider whether there is a reasonable ground for assuming the possibility of a bias and whether it is likely to produce in the minds of the public at large a reasonable doubt about the fairness of the administration of justice. The test is objective and the facts constituting bias must be specifically alleged and established. It is my view that where any such allegation is made, the court must carefully scrutinize the affidavits on either side, remembering that when some litigants lose their cases before a court or quasi -judicial tribunal, they are unable or unwilling to see the correctness of the verdict and are apt to attribute that verdict to a bias in the mind of the Judge, Magistrate or Tribunal."

12. **In The President of The Republic of South Africa & 2 Ors v South Africa Rugby Football Union & 3 Ors (1999) ZACC 11** the Constitutional Court held:-

> ***"Success or failure of the government or any other litigant is neither ground for praise or condemnation of a court. What is important is whether the decisions are good in law and whether they are justifiable in relation to the reasons given for them. There is unfortunate tendency for decisions of court with which there is disagreement to be attacked by impugning the integrity of the judges, rather than by examining the reasons for the judgment. Decisions of our courts are not immune from criticism. But political discontent or dissatisfaction with the outcome of the case is no justification for recklessly attacking the integrity of judicial officers."***

The court went ahead to state:-

> ***"While litigants have the right to apply for recusal of judicial officers where there is a reasonable apprehension that they will not decide a case impartially, this does not give them the right to object to their cases being heard by particular judicial officer merely because they believe that such persons will be less likely to decide the case in their favour. The nature of the judicial function involves the performance of difficult and at times unpleasant tasks. Judicial officers are nonetheless required to administer justice to all persons alike without fear, favour or prejudice in accordance with the constitution and the law. To this end they must resist all manner of pressure, regardless of where it comes. This is the constitutional duty common to all judicial officers. If they deviate, the independence of the judiciary would be undermined and in turn the constitution itself."***

13. Justice Bruno Leopizzi of The Supreme Court of NEW JERSEY held in **State of New Jersey v Rubin Carter and State of New Jersey v John Artis, 85 N.J. 300 (1981);**

> ***"A review of the basic cases …… indicates that the challenger must adduce proof of the truth of the charges and as to the sufficiency of such proof the judge himself must decide. …….. Not only is a judge not required to withdraw from the hearing of a case upon a mere suggestion that he is disqualified to sit, but it is improper for him to do so unless the alleged cause of the recusal is known by him to exist or is shown by proof to be true in fact. …… A mere suggestion, that the court is disqualified to sit is not sufficient and it is in fact improper for him to do so."***

14. In the matter before me I am not satisfied that the applicant had any reason or cause to make the application for recusal nor did he produce any proof that bias existed. His aspersions are not backed by any cogent reasons. The applicant's entire submissions seem to relate to his grievances against the lower court wherein he had filed a miscellaneous application number 76 of 2015 seeking the High court's intervention to order his case to be heard before another magistrate. Apparently the lower court record was not availed in time and that the lower court later finalized the trial and convicted him together with the second appellant herein. The appellant herein lodged petition of appeal on 30/3/2016 and which made his earlier application in Hcmisc Application 76/2015 to be overtaken by events. Already directions on the appeal have been taken .The 2nd appellant is ready to proceed with the appeal and feels that the 1st appellant herein is out to delay the case for no reason at all. The applicant's application number 76 of 2015 was filed much earlier before I took over the matter. The issue of delay regarding the lower court record was not intentional on the part of the relevant registry and that the applicant still has an opportunity to tackle any issues to do with the trial court in the appeal. The applicant has not given any reasons at all to warrant this court to recuse itself. He has not availed even an iota of evidence of bias by this court since upon the conviction and sentence of the applicant by the trial court the applicant's application in Hcmisc 76/2015 became overtaken by events and that the remaining issue was the determination of the appeal. It is

obvious that the applicant is out on a forum shopping which is untenable. The request that I disqualify myself from the conduct of this case is not legally sufficient for me to grant the prayer in the absence of cogent evidence.

15. In the result the 1st Appellant's application lacks merit and is dismissed. The parties herein are now directed to proceed to file their respective submissions as directed on 12/10/2017.

It is so ordered.

Dated and delivered at **Machakos** this **18th** day of **December, 2019**.

D. K. Kemei

Judge