



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT HOMA BAY
MISC. CRIMINAL APPLICATION NO.51 OF 2016

JAMES OBANDE OWUOR APPLICANT

VERSUS

REPUBLIC RESPONDENT

RULING

1. **JAMES OBANDE OWUOR** (the Applicant) has sought for the disqualification of the magistrate (**J.P. NANDI, SRM**) hearing **Criminal Case No.417 of 2014** at Oyugis Law Court. He urges the court to order for transfer of that file to another magistrate **OUTSIDE** Oyugis Law Courts.
2. The applicant is the accused in Oyugis Criminal Case No.417 of 2014 where he was charged with **a)** Malicious damage to property contrary to **Section 339 Penal Code**, **b)** Trespass on private land contrary to **Section 3 (1) (2)** of the **Trespass Act Cap 294**.
3. He has stated that the trial magistrate is biased and has shown deep interest in the matter and become hostile to him, while openly supporting the complainant.
4. He further states that the same trial magistrate sentenced him to 6 months imprisonment in **Oyugis Criminal Case No.192 of 2014** and after threatening him that he'd send him to jail without putting him on his defence. In that particular matter, there were a lot of discrepancies, yet he was still convicted, as he fears he will not get justice if the same magistrate hears the current case.
5. The applicant states that the trial magistrate is forcing everything and assisting the complainant directly, so he is convinced that he has been compromised. The applicant explains that the charges are just a means of efforts by police to have him sent to prison so that he can surrender land parcel **NO. KABONDO/KODUMO EAST NO.392** in favour of the complainant.
6. The applicant deposes in his affidavit that he had earlier been charged in **Criminal Case No.192 of 2014** for the offence of which was heard by **J.P. NANDI (SRM)** and he was eventually convicted and sentenced to serve 6 months imprisonment on
7. When he sought proceedings to enable him appeal against the sentence, the said magistrate blocked his efforts. He has also been denied copies of proceedings in that case, so he only annexed a receipt showing he paid Kshs.19,332/= as a fine in **Criminal case No.192 of 2014**.
8. The same magistrate allowed criminal charges against him in Criminal Case No.1364 of 2005 to be presented in court yet these proceedings were eventually dismissed under **section 210 Criminal Procedure Code**.

9. The applicant is convinced that the District Criminal Investigating Officer (DCIO) Rachuonyo South is working in cahoots with the said trial magistrate because he had been assaulted by police officers and the police want to instil a sense of desperation in him to dissuade him from suing the State on charges of assault by creating a rosy relationship between the police and the magistrate.
10. He alleges that the trial magistrate has promised the complainant and the police that he (applicant) will not escape a jail term. The trial magistrate and police are accused of encouraging the complainant to remain on the ground (I suppose meaning the disputed parcel) until the applicant is imprisoned.
11. He feels that the trial magistrate, having previously dealt adversely with him in Criminal case No.192 of 2014 should not be the proper person to hear his case, especially because in the current case he has allowed the prosecution to make amendments to the charge.
12. There was no formal response filed but Mr. Oluoch on behalf of the State addressed the court on issues of law.
13. The applicant submitted that the case at Oyugis had proceeded to the points where he was placed on his defence to answer the charges. However he felt that the case had a lot of discrepancy and urged the trial magistrate for a *De Novo* hearing which was rejected.
14. He was displeased by the manner in which the trial magistrate was handling his case because he was asking many questions which he perceived to be relevant to his case, but the trial magistrate would overrule him.
15. The applicant's biggest fear is that having filed his application, if it fails and he goes before the same trial magistrate, he will not get a fair hearing.
16. MR. OLUOCH in response pointed out that the applicant appears to be appealing against the orders by the trial magistrate placing him on his defence – only that he is cleverly couched it as an application for disqualification.
17. On this limb, counsel points out that the right to appeal accrues upon conviction and he ought to abide the outcome of the decision.
18. Counsel has drawn the court's attention to **Section 347 (a) Criminal Procedure Code** which lays a foundation on the appeal process saying that is a statutory procedure and not a matter calling for the court's discretion.
19. Counsel also points out that in a bid to delay proceedings at **OYUGIS** Court, the applicant consistently files endless applications – he has so far filed three applications in quick succession beginning with the ones dated 30/11/2016, 9/03/2017 and 03/07/17. He further contends that even with all the frivolous allegations made against the trial magistrate, the applicant has not attached a single page of the proceedings to enable the court to peruse and confirm his allegations.
20. Is there a likelihood of bias demonstrated against the trial magistrate –
21. The applicant refers to criminal case No.417 of 2014 and No.109 of 2014 – it seems he wants both cases halted and transferred from Oyugis court. He has not annexed proceedings related to those cases. He has not presented a single letter written to the magistrate in charge of Oyugis (who is not the trial magistrate) or the Executive Officer at Oyugis requesting for copies of proceedings in those cases, so as to persuade this court that his attempts to get the proceedings have been ignored.
22. I suspect that the applicant wants those proceedings given to him at no cost – which would explain the absence of a written request, which would elicit a written response, and which would then be kept in the court records. It would appear he has only made oral requests and made no payments for the proceedings requested.

23. The only proceedings he has attached relate to Oyugis Criminal case No.1364 of 2005 which was heard and determined in the year 2009, long before the trial magistrate herein was even posted to Oyugis – infact it was heard by a different magistrate who has since left the station.

24. There being no record from the trial court presented to this court to determine whether the allegations he makes against the trial magistrate are true, then the issue of bias, undue odd interest, and rejection of his questions on cross examination have no leg on which to stand.

25. Consequently the application lacks merit and is dismissed.

Delivered and dated this 2nd day of August, 2017 at Homa Bay

H.A. OMONDI

JUDGE