



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI Miscellaneous Criminal Application 39 of 2009

WILSON MWADUNA MWAMBIRE }

SAMMY MRANDA WANJE }.....APPLICANTS

VERSUS

THE HONOURABLE ATTORNEY GENERAL.....RESPONDENT

R U L I N G

By a Notice of Motion application dated 29th June 2009, the applicants who have been charged in Mld Cr. Case No. 1256 of 2008 seek that the said case be transferred from The Senior Principal Magistrate's court Malindi, to any other court of equal or superior jurisdiction and/or competent to try the case.

The applicants are ready to execute a bond with or without sureties that they will, if convicted, pay costs to the prosecution. The application is premised on grounds that applicants are apprehensive that a fair and impartial trial cannot be achieved in any criminal court subordinate thereto.

(2) The complainant herein is an influential person, capable of interfering with the hearing of the case if it is heard in the Malindi courts, by virtue of his dealings with the court.

(3) The complainant has harassed the Applicants at will, he has recently broken the boundary wall of a company associated with the Applicants and even upon reporting the incident to Watamu Police station, no action has been taken against the Complainant.

The affidavit in support of the application is sworn by the 1st applicant on his own behalf and on behalf of the 2nd Applicant. He explains that both he and the 2nd applicant face charges of malicious damage to the property of Vitorio Vaenezolani.

He points out that the said complainant Vitorio has his company, ITAL BUILD LTD, which has been contracted to build the High Court at Malindi and the Senior Principal Magistrate as the administrative head of the station, is in constant contact with the complainant regarding the progress of the construction and this therefore creates a conflict of interest and applicants are apprehensive that they may not get a fair and just hearing.

To demonstrate why they harbour such fears, the applicants point out that initially 1st applicant was charged in Mld Cr. C 654 of 2008 on 21st May 2008 and he appeared before the Senior Resident Magistrate Malindi on charges of malicious damage and stealing, and the Senior Resident Magistrate set bond terms of kshs. 20,000/= and a surety for the sum of ksh. 50,000/=.

He paid the cash bail.

On 1st September 2008, the 2nd applicant appeared before the Senior Principal Magistrate Malindi in Criminal Case No. 1256 of 2008 for plea, on a charge of malicious damage to the same property and their advocate requested the court to give similar bond terms as in Cr. 654 of 2008 in the interest of justice but the Senior Principal Magistrate declined and gave higher bond terms of kshs. 100,000/= cash bail with as alternative of bond with a surety of a similar amount.

The application is opposed and Mr. Ogoti on behalf of the State submits that the allegation about the complainant being likely to interfere with the court process has not been demonstrated and is scandalous. Further that if the complainant is harassing the applicants, then that is a criminal matter that should be handled by police and is different from the one pending in court.

Mr. Ogoti argues that the likelihood of there being an unfair trial has not been demonstrated and that the claim about what their advocate experienced in the lower court should be expunged from the record as counsel can only advise on matters of law and not fact. With regard to the different courts, Mr. Ogoti submits that the Trial Magistrates had discretion to impose a different bond term since in any event the applicants were not charged at the same time.

It is argued that just because the Trial Magistrate is in charge of an administrative function regarding construction does not mean she will be unable to discharge her duties effectively.

The issue here is simply whether there is a real likelihood of bias or a reasonable suspicion of bias, based on the complainant's association with the Malindi Law Courts, in view of the construction of the new Malindi Court Building.

The issue regarding the differing bond terms by the two Magistrates over the same offences must be seen in the wide context of the applicant's state of mind. That although it is within each Magistrate's discretion to set bond terms and even conditions, their minds became suspicious that the only reason why the Senior Principal Magistrate was setting a higher terms (even after being made aware of the terms in a similar matter) was because of her association as the administrative head, with the complainant as the director of the construction company contracted to build the new courts. That may not necessarily be true, yet it has already created a reasonable suspicion in the minds of the applicants that they may not enjoy a fair trial at Malindi Court.

I don't need to call for the original court file, the copies of the cash bail receipts support what they state and aren't they now jointly charged in Cr. 1256 of 2008?

But just apart from those bond terms which seem to have triggered off an alarm in the applicant's mind, I think of greater significance is the relationship the complainant has with Malindi Law courts – which for all practical purposes is a client of Ital Build Ltd – it is not denied that the administrative head of Malindi law court has frequent interactions with the owner (director) of Ital Build Ltd in her bid to follow up the progress of the building and it is this scenario, more than the first one which creates a real suspicion in the minds of applicants that they may not get fair trial and this is where the concept of National Justice comes in.

National Justice consists of two rules.

- (a) A person affected by a decision has a right to be heard.
- (b) The person taking the decision must not be biased (ie the rule against bias)

In the present instance, it is not so much that the Senior Principal Magistrate is likely to be biased – certainly it could well be able to discharge her judicial mind completely independent of any other considerations, association and influences – rather it is the perception of the recipients of her services that create a state of reasonable suspicious – this rule was well discussed in two English **decisions Hendon**

R.D.C exparte Charley (1933) 2 KB page 696 where X agreed to buy land from Y subject to the condition that the council's consent was first obtained to X's proposal to erect buildings therein. The council resolution granting him permission was quashed on grounds that one of the councilors who voted for it was acting as Y's estate agent in the transaction. But an interest other than pecuniary can also invalidate's one's participation in a matter as was demonstrated in the case of **Metropolitan Properties Co. (F.G.C. Ltd. B Lannon (1968) 3 All ER pag 304** – which is discussed in detail in DAVID FOULKES: INTRODUCTION TO: ADMINISTRATIVE LAW , 4th Edition (Butter worths) 1976 at page 175 – the summary is that actual bias was not alleged and indeed it was in that connection that Lord Hewart C.J. enunciated his famous dictum, that

*“Justice should not only be
done but should manifestly
and undoubtedly be seen to be done”*

In my mind the test here is not the real likelihood of bias but rather reasonably suspicion of bias as Lord Denning stated in the Metropolitan Properties case.

*“There must be circumstances from
which a reasonable man would think
it likely or probably that the justice
..... would or did favour
one side unfairly at the expense
of the other. The court will not
inquire whether he did in fact favour
one side unfairly. Suffice it that
reasonable people might think that he did”*

That completely captures the position here, a person with inside knowledge might say there was no real likelihood of bias, but that would be beside the point because the question is whether a reasonable man with no inside knowledge might well think the court is biased I have paraphrased this last paragraph from what Sachs J. stated in **Hannan V Bradford City, Council** (1970) 2 All ER 690.

I am totally persuaded that as reasonable persons, the applicant's apprehension is justified and for justice to be seen to be done I must direct that Mld Crc 1256 of 2008 be transferred from the jurisdiction of Malindi law courts to, Mombasa Law Courts for hearing and determination by a Magistrate of competent jurisdiction. To that effect then the applicants shall appear before the Chief Magistrate Mombasa Law Courts on 6th August 2009 for taking of hearing date and trial directions.

Delivered and dated this 23rd day of July 2009 at Malindi.

Mr. Gekanana holding brief for Matini

Mr. Ogoti for State

H.A. OMONDI

JUDGE