



**Makokha v Sanya; Republic (Interested Party) (Miscellaneous Criminal Application E210 of 2024) [2025] KEHC 10998 (KLR) (28 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10998 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
MISCELLANEOUS CRIMINAL APPLICATION E210 OF 2024**

**AC BETT, J  
JULY 28, 2025**

**BETWEEN**

**VINCENT OSUNDWA MAKOKHA ..... COMPLAINANT**

**AND**

**MURIEMA SHIRANDULA SANYA ..... RESPONDENT**

**AND**

**REPUBLIC ..... INTERESTED PARTY**

**RULING**

1. By a Notice of Motion dated 19.12.2024, the Applicant made an application seeking the transfer of Butali SPM MCCR. E1162 of 2023 from the Senior Principal Magistrate's Court Butali to the Chief Magistrate's Court Kakamega.
2. The application was supported by an affidavit that was sworn by the Applicant and was premised on the grounds that the case had never taken off due to adjournments, the complainant had several cases before the same court against the Accused, both civil and criminal touching on the same subject matter, the complainant is apprehensive that having many matters before the same judicial officer may compromise the judgement and the Accused/Respondent has been bragging that the case cannot go anywhere.
3. The Applicant attached several documents to his affidavit in proof of his averment that there were several cases being handled by the court touching on the same subject matter. The documents were in respect of the following matters:-
  - i. Ruling delivered by Hon. J. Maragia (SRM) in Butali MCELC No. E060 of 2023: Harun Miheso Sagala v Muriema Shirandula.
  - ii. Ruling delivered by Hon. R.S. Kipngeno (PM) Misc. Civil Application No 5 of 2023, Vincent Onsundwa v Muriema Shirandula Sanya.



- iii. Orders signed by Hon. R. S. Kipngeno (PM) in Butali MCC No. E132 of 2024, *Vincent Osundwa Makokha and Harun Mibeso Sagala v James Wanjala and Butali Sugar Mills*.
- iv. Charge sheet dated 07.7.2024 in which Muriema Shirandula Sanya and John Barasa Kausi are charged with giving false information to a person employed in the Public Service contrary to Section 291(a) of the [Penal Code](#).
4. The Respondent opposed the application and swore on affidavit in which he denied the Applicant's claim that the matter had been adjourned severally and has never taken off. It was the Respondent's averment that Applicant had not tendered sufficient reasons for the orders of transfer to issue.
5. The application was canvassed by way of written submissions. The Applicant submitted that he had demonstrated that there were exceptional reasons to have the case, which had been commenced within the right jurisdiction, to be transferred to another court. He submitted that there have been other cases before the same court between the two parties herein in which the rulings tendered by the court were being reviewed or had been appealed at the higher court. The Applicant further submitted that the matter had come up for hearing twelve (12) times when it did not proceed and he understands that Butali court is currently overwhelmed. He cited the case of [Joseph Korir alias David Arap Chonjo v Republic](#) [2018] eKLR in support of his application.
6. The Applicant further submitted that the delay in the hearing of the case would be resolved by a transfer and that the Respondent would not be prejudiced by the transfer as he hails from Malava area which is still under the jurisdiction of the Magistrate's Court at Kakamega.
7. On his part, the Respondent submitted that the subject case had proceeded with the Applicant testifying twice and the Land Registrar also testifying. The Respondent also submitted that contrary to the Applicant's averments, the matters pending before the Magistrate's Court at Butali do not involve the two parties herein or the same subject matter. He contended that the Applicant has a habit of filing multiple suits even after they have been heard and concluded by a competent court as demonstrated by the striking out of his suits at the preliminary stage. He further submitted that the Applicant was engaged in forum shopping.
8. The only issue that the court has to consider is whether the Applicant has met the conditions necessary for transfer.
9. Section 81 of the [Criminal Procedure Code](#) 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.”

(2) The High Court may act on the report of the lower court, or on the application of a party interested, or on its own initiative.

(3) Every application for the exercise of the power conferred by this section shall be made by motion, which shall, except when the applicant is the Director of Public Prosecutions, be supported by affidavit.

(4) An accused person making any such application shall give to the Director of Public Prosecutions notice in writing of the application, together with a copy of the grounds on which it is made, and no order shall be made on the merits of the application unless at least twenty-four hours have elapsed between the giving of notice and the hearing of the application.

(5) When an accused person makes any such application, the High Court may direct him to execute a bond, with or without sureties, conditioned that he will, if convicted, pay the costs of the prosecutor”

10. I have perused the certified copy of the proceedings in the case that the Applicant seeks to transfer. From the record, plea was taken on 13.10.2023. On 13.3.2024, when the case was first scheduled for mention, it was adjourned at the instance of the Respondent whose Advocate had intended to appear online but could not do so due to power outage. The prosecution indicated that it had two (2) witnesses and was granted a last adjournment. On 6.5.2024, the matter was adjourned as the trial Magistrate was said to be attending a Head of Station workshop. The matter was adjourned to 5.6.2024 on which the day the Complainant who is the Applicant herein testified and was stood down. Thereafter, the matter was adjourned twice at the instance of the Respondent who said that his Advocate was absent. On 31.10.2024, the matter proceeded shortly but was once more adjourned because the prosecution had supplied the Respondent’s Advocate with the wrong documents. On 15.11.2024, the trial Magistrate was indisposed.

11. On 29.11.2024, the prosecution was allowed to place the Land Registrar on the stand whereby he testified partially before the prosecution had him stand down to enable him prepare adequately for the case. The Complainant then took the stand, completed his testimony, and was duly cross-examined after which the matter was adjourned to 6.12.2024 for further hearing. On 6.12.2024, the prosecution sought an adjournment on the ground that the Land Registrar was held up in another case and the matter was adjourned to 14.2.2025. On 19.12.2024, the Applicant/Complainant filed the instant application.



12. I have set down the chronology of events in view of the Applicant's position that the case has never taken off due to adjournments. From the record, it is clear beyond peradventure that the matter is parheard and the adjournment of the case has been largely due to the prosecution's lack of preparedness followed by the Respondent's Advocate's absence. The trial Magistrate was only absent twice and both times were understandable as one was due to sickness and the other one was due to his being engaged in official work away from the station. Secondly, the time between each hearing date was an average of two months. In the premises, the Applicant's claim that the matter has never taken off and has been adjourned severally due to the fact that Butali Court is overwhelmed is not tenable.
13. In regard to the ground that there are several cases pending before the same court between the two parties herein touching on the same matter, I have gone through the copies of the documents annexed to the affidavit. It is only Butali PM's Misc. Civil Application No. 5 of 2023 that is between the two parties herein and was handled by the same court. In that matter, the Respondent had even filed an application seeking the recusal of the trial Magistrate on the grounds that he was biased. It is therefore apparent that even the Respondent had a perception at the time that the court was biased against him based on utterances that were allegedly made by the Applicant that he was a friend of the court.
14. In any event, the said case was struck out on 6.2.2023 at the preliminary stage on the ground that it was res judicata having been heard before the Kakamega Environmental and Land Court earlier. That being the case, there is no case touching the same subject matter that is between the two parties herein, that has been proven to be pending before the trial Magistrate. The Applicant's apprehension that there could be some miscarriage of justice in his case is therefore not reasonable or founded on sufficient material. In the case of *Joseph Korir alias David arap Chonjo v Republic* [2018]eKLR that relied on *Kamande & 3 others v Republic* [2014] eKLR the court held as follows:-
- “When giving consideration to an application for the transfer of a case, the court will assess whether the applicant's apprehension was reasonable and founded on sufficient material. The reason for laying emphasis on these factors is that the court has a duty to encourage trust in the integrity and independence of the Judiciary. Therefore, allegations which may be directed at Judicial Officers, alleging bias and lack of fairness must not therefore be accepted without there being substantive evidence to back them.
- If a court was too quick to accept allegations of bias directed against its officers, without first demanding proper substantiation, it would erode the very foundation upon which the judiciary was founded. At the same time, the court must balance this consideration with the need to ensure that justice is not only done, but also seen to be done.”
15. For the Applicant to succeed in his application, he needs to demonstrate that a fair and impartial trial could not be had at Butali Law courts. The courts cannot order a transfer of a case on whimsical and capricious reasons as it would foster the impression that the courts lack integrity or can be swayed by unfounded allegations of bias. This would lead to chaos in case management and result in injustice to parties.
16. The right to a fair and impartial trial is guaranteed to both parties as this ensures that all parties to a case are treated equally and are granted the opportunity to present their case before an independent and impartial court. See Article 50 of the *Constitution*
17. The Applicant did not furnish the court with any material to suggest that his right to a fair trial is likely to be compromised if the matter proceeds to conclusion in Butali.



18. As it stands, the matter that is sought to be transferred is parheard and to transfer the same at this juncture would necessitate a fresh trial. This would be prejudicial to the Respondent who is the Accused in that case. The Respondent's right to a fair and speedy trial should not be denied on the unsubstantiated claims of the Applicant.
19. An analysis of the Applicant's application lends credence to the Respondent's submissions that the Applicant is forum shopping. The cases being cited by the Applicant as being related to the subject case were all pending in court at the time the subject criminal case was filed. It is therefore unjustifiable that after twelve (12) court attendances and after the matter has proceeded to hearing, the Applicant should make an application for transfer. The move to apply for transfer at this stage is clearly an attempt to "forum shop". In the case of *Stanley Muia Makau v Republic* [2020] eKLR D.K. Kemei J held that :-
- “On the other hand, "Forum shopping" typically refers to the act of handpicking a venue in which to try a case for purposes of gaining some unfair advantage or opportunity to throw the dice in one's favor. Such an action would be a subversion of justice with a resultant undermine in the principle of equal protection of the law. In *McShannon v Rockware Glass Ltd.* [1978] AC 795, Lord Diplock rejected existence of forum non conveniens (the non-convenience doctrine positing the discretionary power that allows courts to dismiss a case where another court, or forum, is much better suited to hear the case) in common law stating that for the interests of all the parties and for the ends of justice, the jurisdiction must be exercised - however desirable it may be on grounds of public interest or public policy that the litigation should be conducted elsewhere and not in the English courts.”
20. Flowing from the above, I find that the Application dated 19.12.2024 lacks merit and I therefore dismiss the same.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 28<sup>TH</sup> DAY OF JULY 2025.**

**A. C. BETT**

**JUDGE**

In the presence of:

Applicant present in person

Respondent present in person

Ms. Chala for Interested Party

Court Assistant: Polycap

