



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

MISCELLANEOUS CIVIL APPLICATION NO. E015 OF 2021

PACIFICA NYABATE MABEYA & 3 OTHERS.....APPLICANTS

VERSUS

EVE ADHIAMBO OKUKU.....RESPONDENT

RULING

1. The applicants moved the court by way of Notice of Motion dated 28th April, 2021. It was brought under sections 1A (1) (2) and (3) 1B (1) (a), (b), (c), & 3A of the Civil Procedure Act, CAP. 21 laws of Kenya. They are seeking the following orders:

- a) That this court be pleased to certify the application urgent and service of the same be dispensed with in the first instance. [Spent]
- b) That this honourable court be pleased to call for the file number CMCC E031 of 2021 and make the necessary and applicable orders.
- c) That this honourable court to order the case to be transferred from the learned magistrate Tom Olando to another court of similar jurisdiction and issue orders that the matter be heard expeditiously.
- d) That the costs of this application be in the cause.

2. The application was premised on the following grounds:

- a) That the learned trial magistrate has made a ruling in respect of jurisdiction erroneously.
- b) That the body of the deceased is lying at the mortuary and thus attracting charges.

3. The respondent opposed the application on the following grounds:

- a) That the application lacks merit.
- b) That the application was brought on the basis of personal vendetta between the applicant's advocate and the learned trial magistrate.

4. In order for a court to make a finding that the trial court was biased, the apprehension must be real and based on facts. In the case of **Republic vs. Independent Electoral and Boundaries Commission & 3 others ex parte Wavinya Ndeti [2017] eKLR**, the court stated:

... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information...[The] test is what would an informed person, viewing the matter realistically and practically - and having thought the matter through – conclude.

5. Earlier in **Jasbir Singh Rai and 3 Others vs. Tarlochan Singh Rai and 4 Others (2013)eKLR**, the Supreme Court addressed the issue of recusal as follows:

Recusal, as a general principle, has been much practised in the history of the East African judiciaries, even though its ethical dimensions have not always been taken into account. The term is thus defined in Black's Law Dictionary, 8th ed. (2004) [p.1303]: "Removal of oneself as judge or policy maker in a particular matter, [especially] because of a conflict of interest."

From this definition, it is evident that the circumstances calling for recusal, for a Judge, are by no means cast in stone.

Perception of fairness, of conviction, of moral authority to hear the matter, is the proper test of whether or not the nonparticipation of the judicial officer is called for. The object in view, in the recusal of a judicial officer, is that justice as between the parties be uncompromised; that the due process of law be realized, and be seen to have had its role; that the profile of the rule of law in the matter in question, be seen to have remained uncompromised.

6. In the instant case, other than the impugned ruling, there are no allegations of bias. It would be improper for a court to be asked to recuse itself on the basis of a decision that did not go well with a party. A judicial officer or judge cannot be asked to recuse himself/herself on the basis of a mistake, unless it is clear that such a mistake was made deliberately which is not the case in this matter.

7. The applicant, if dissatisfied ought to have appealed against the ruling.

8. Certainly the trial court did not address the issue of jurisdiction as provided for under section 15 of the Civil Procedure Act. The section provides:

Subject to the limitations aforesaid, every suit shall be instituted in a court within

the local limits of whose jurisdiction—

(a) the defendant or each of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain;

or

(b) any of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain, provided either the leave of the court is given, or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid acquiesce in such institution; or

(c) the cause of action, wholly or in part, arises.

9. Had the learned trial magistrate appreciated the provisions herein, he ought to have realized that the case was filed in a court without territorial jurisdiction. He therefore lacked the jurisdiction to entertain it. Though there was no appeal on the ruling, the most practical order to make is that Homa Bay chief magistrate's court lacks territorial jurisdiction to entertain the dispute. I therefore order that the dispute in Homa Bay CMCC E031 of 2021 be and is hereby ordered transferred to Kitale Chief Magistrate's Court. Each party will bear own costs.

DELIVERED and SIGNED at HOMA BAY this 6th day of May, 2021

KIARIE WAWERU KIARIE

JUDGE.