



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CRIMINAL APPLICATION NO. 175 OF 2018

STEPHEN NJOROGE GIKERA.....APPLICANT

VERSUS

REPUBLIC..... 1ST RESPONDENT

MAGDALINE WANJIKU MAKARA.....2ND RESPONDENT

COOPERATIVE BANK OF KENYA..... 3RD RESPONDENT

RULING

This matter now comes up before this court for the application of the applicant **STEPHEN NJOROGE GIKERA** dated 25.4.2018. Attached to the said application, and in support of the said application sworn on the same date i.e 25.4.2018. The principal prayers to this application are prayers (3)(4) and (5) that;

(3). THAT this Honourable court be pleased to issue an order to transfer Milimani Magistrate's court Criminal Case No. 1831/2012, currently being tried by Hon. P. Ooko (Principal Magistrate) for hearing before another magistrate having competent jurisdiction.

(4). THAT this Honourable court be pleased to direct and or order that Milimani Criminal Case No. 1831/2012, be placed before the Chief Magistrate (Court 1) for purposes of allocating the same for trial before another magistrate having competent jurisdiction to handle same.

(5). THAT this Honourable Court be pleased to issue an order to secure the right of the applicant to fair trial including but not limited to orders expunging from the record the proceedings resulting from the consent dated 19.10.2017 filed by the parties on 30.10.2017 in Criminal Case Number 1831/2012.

The applicant has canvassed this application by way of written submissions filed on 16.4.2021. I have perused the said submissions whose gist are the issue for determination are the re-allocation of the case to another magistrate and expunging from the record of the lower court, the proceedings resulting from the consent dated 19.10.2017 and filed on 30.10.2017. It was submitted that the Hon. Trial Magistrate had without evidence, found suo moto that the consent had fallen through and proceeded to hear the case on 22.3.2018, an action that are prejudicial and which denied the applicant the opportunity to a fair and just trial.

Mr. Ontum, for the state Respondent, on the other hand, only made oral submissions that the prayers in this application are spent since the Hon. P. Ooko, Principal Magistrate has since been transferred. And that in any case, the applicant did not first file an application for recusal before the trial court.

Counsel for 3rd Respondent, the Cooperative Bank, did not make any submissions, other than aligning himself with the submissions of counsel for the state, 1st Respondent.

I have considered the submissions of the 3 parties before the court. It is clear from the application and the submissions made by counsel for the applicant, that the main prayer is this application was that this criminal case No. 1831/2012 be transferred for hearing by a different magistrate other than the Hon. P. Ooko, Principal Magistrate. It has now come out, a fact admitted by the applicant also that the said Hon. P. Ooko has since been transferred from the Chief Magistrate's Court, Milimani (Criminal). Effectively, this spends this prayer.

The main prayer having been spent, the only other issue remaining for determination is whether this court can rightly issue an order expunging from the record, proceedings resulting from the consent dated 19.10.2017 and recorded in court on 30.10.2017.

My answer to this is and without going into the merits or otherwise of the alleged consent, and its interpretation, that the original jurisdiction

to try the applicant for the offence charged i.e Criminal Case Number 1831/2012 lies with the magistrate's court. For our case, it is specifically the chief magistrate's court, Milimani Law Courts. The Jurisdiction to try the applicant for the offence charged i.e Criminal Case Number 1831/2012 lies with the magistrate's court. For our case, it is specifically the Chief Magistrate's court, Milimani Law Courts. The jurisdiction does not lie with the High Court. And in carrying out its jurisdiction, the trial court (Magistrate's Court) is constitutionally bound to independently consider the evidence as presented before it before making its independent decisions. It should carry out its mandate without the influence of a towering High Court. Should the High Court extend its supervisory and or revisionary powers on virtually all decisions of the subordinate court, it would in fact be micro-managing the subordinate court, and thereby eroding the independence of the subordinate courts.

In my view, what the applicant seeks from this courts i.e that an order do issue expunging sections of the record of the trial court, would be tantamount to interference with the judicial independence of the lower court. This would be irregular just as much as it would be unconstitutional. I associate myself with the holding of the Hon. Mwongo J. in Republic Versus Perry Kusangara and others, (HCCR No. 4/2020) that;

“a balance has to be struck in the exercise of constitutional jurisdiction to ensure there is no appearance that its objective is to micro manage the trial court's independence and conduct and management of its proceedings and that supervisory, jurisdiction should not be used as a short cut for an appeal where circumstances for the appeal clearly pertain and are more appropriate.”

It has been stated severally by this court (Sic the High Court) and indeed even the Court of Appeal (Thomas Patrick Gilbert Cholmondeley Versus Republic (2008)KLR), that the practice of filing interlocutory applications midway trials must be frowned up and be discouraged. They lead to undue delay in the determination of such trials. In our instant case, it is unfortunate that a trial which commenced before the subordinate court in 2012 (plea taken on 5.12.2012) is yet to get past the evidence of PW1, whose evidence was taken on 9.7.2014, about 7 years ago. All this, thanks to this application the applicant filed before this court. I shall leave it at that.

In view of the above observations, I find absolutely no merit in the applicant's application dated 25.4.2018. order as follows:

i) The application dated 25.4.2018 is wholly dismissed.

ii) The original Criminal file No. 1831/2012, to be returned forthwith to the Hon. Chief Magistrate, Milimani Law Courts for allocation to a Honourable magistrate with jurisdiction for hearing and determination of this case. The deputy Registrar of this court to immediately forward this original file to the Honourable Chief Magistrate for execution of these ordered.

Orders accordingly

D. O. OGEMBO

JUDGE

16.6.2021.

Court:

Ruling read out in court (online) in the presence applicant Mr. Musyoka for accused, Mr. Mugune for the 2nd Respondent and Mr. Chebii for the state.

D. O. OGEMBO

JUDGE

16.6.2021.

Mr. Chebii:

We ask for date before the Chief Magistrate.

Mr. Musyoka:

That is okay

Court:

Case to be mentioned before the Chief Magistrate for allocation. Applicant/accuseds to attend. Mention 22.6.2021.

D. O. OGEMBO

JUDGE

16.6.2021.