



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

MISCELLANEOUS CRIMINAL APPLICATION NO.93 OF 2017

LEONARD NJOROGE KARIUKI.....1ST APPLICANT

LOISE NDUTA MBUGUA.....2ND APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

KIIRU STEPHEN RICHARD.....2ND RESPONDENT

RULING

1. The Applicants approached the Court *vide* a Notice of Motion dated 27/10/2017. The Application seeks two substantive prayers: First, it seeks for orders staying the hearing and further proceedings in ***Kiambu Chief Magistrates Criminal Case No. 155 of 2017*** pending the hearing and determination of the present Application. Second, the Application seeks for orders transferring the ***Kiambu Chief Magistrates Criminal Case No. 155 of 2017*** (the “Criminal Case”) from the Kiambu Chief Magistrate’s Court to any other suitable magistrate’s Court of competent jurisdiction for hearing and disposal of the Criminal Case.

2. In the Criminal Case, the Applicants are faced with two counts: one of procuring execution of documents by false pretences contrary to section 355 as read together with section 349 of the Penal Code. The second one is the offence of conspiracy to defraud contrary to section 317 of the Penal Code.

3. In both offences facing the Applicants, the Complainants are the same. The course is listed before the Honourable J. Kituku, Principal Magistrate. After plea was taken in the case but before trial began, the Applicants became convinced that the Complainant had influenced both the investigators and the Presiding Judicial Officer. They approached this Court with the Application under consideration.

4. When the matter came before me on 30/10/2017, I formed the opinion that the Application is, functionally, an application for the Learned Trial Magistrate to recuse himself from hearing the case. Given the various serious allegations made against a serving magistrate and members of the Judiciary Staff, I also directed the Applicants to report the matter to the Police for investigations. I then set the case for a mention before me – after the Applicants had had an opportunity to make their Application before the Trial Court.

5. The operative claims that are central to this case are found in four paragraphs in the Supporting Affidavit of the 1st Applicant deponed on 27/10/2017:

9. THAT the Complainants are patriarchs of a very prosperous and influential family in Kiambu with vast investments and business interests within Kiambu town, Nairobi city, Thika and other parts of the country.

10. THAT the said Mrs. Grace Muthoni Githegi has been quoted by persons close to her whose identity ought to be protected in the first instance due to possible repercussions, as saying that she has compromised the Trial Court with the sum of Kshs. 3 Million to ensure our conviction and sentencing to jail terms.

11. THAT I have obtained credible and reliable information from Court Assistants to the effect that the relevant Police Officers who have been assigned to investigate our case are at loggerheads with one another apparently after one of them pocketed the sum of Kshs. 1 million out of the Kshs. 3 million he was to deliver to Court to influence the outcome of our case before the Subordinate Court and failed to share the loot with his other colleagues.

12. THAT the allegations contained in the revealed information as so serious and compelling to the effect that my Co-Applicant and I have lost faith not just with the present Trial Court but the entire Kiambu Court Station, as the Complainant seems to enjoy a status of considerable influence.

6. These four paragraphs form the gravamen of what animates the Applicants apprehension and pivots their Application.

7. When they returned to the Lower Court to prosecute the application for recusal as directed by this Court, the Learned Trial Magistrate declined to recuse himself. He ruled, in relevant part, as follows:

I have considered the issues [raised] by Mr. Wachira they (sic) are broad allegations with no specifications such as the source of the information. The Court has no control over what litigants say outside there and to allow such applications especially on the one of hearing (sic), will amount to abuse of the court process and undermine the independence of the Court. I dismiss the application for recusal.

The applicants advised they are at liberty to report the matter to the police for further investigations.

8. After this ruling, the Applicants came back to this Court to indicate that they are desirous of prosecuting their Application dated 27/10/2017 to its logical conclusion. They are persuaded that justice can only be served by transferring the criminal case to another station.

9. The ODPP, which was served with the Application, opposed it and filed Grounds of Opposition and a list of authorities.

10. When the parties appeared before me on 19/03/2018, Mr. Wachira for the Applicants and Mr. Kinyanjui of the ODPP, both agreed that the Application spoke for itself as did the Grounds of Opposition – and that the Court should pronounce itself on the Application on the basis of the material filed.

11. The Grounds of Opposition, in essence, state that the Application does not meet the reasonable person state to warrant recusal and transfer of the case as the allegations made are “vague, fuzzy, imprecise, nebulous, ill-defined and indefinable and are as such not supported by cogent evidence.” The Grounds further that that the Application ought to fail when “placed against the test and standard of a fair-minded and informed observer who is neither complacent nor unduly sensitive or suspicious in determining the real possibility of compromise or bias.”

12. I have had occasion, in a previous case (**R v Jane Mucheru & Another Kiambu High Court Criminal Case No. 89 of 2017**) to review our case law on the proper test to utilize when allegations of bias or lack of impartiality are made against a presiding officer of a court. The test in Kenya is laid out by the Supreme Court in **Jasbir Singh Rai & 3 Others v. Tarlochan Singh Rai & 4 Others [2013] eKLR**. In that case, the Supreme Court of Kenya gave the policy rationale and objective of the rule of recusal in these words:

.....Perception of fairness, of conviction, of moral authority to hear the matter, is the proper test of whether or not the non-participation 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.

13. Then Supreme Court, stated the test to be applied when a party requests a Judicial Officer to recuse themselves in the following terms:

[T]he test for establishing a Judge’s impartiality is the perception of a reasonable person, this being a “well-informed, thoughtful observer who understands all the facts”, and who has “examined the record and the law”; and thus, “unsubstantiated suspicion of personal bias or prejudice” will not suffice.

14. Ibrahim Mohammed, SCJ, in a concurring opinion clarified the test further in the following words:

Lord Justice Edmund Davis in Metropolitan Properties Co. (FGC) Ltd. Vs Lannon [1969] 1 QB 577 stated that disqualification was imperative even in the absence of a real likelihood of bias if a reasonable man would reasonably suspect bias. Acker LJ in R vs Liverpool City Justices, ex parte Topping [1983] 1 WLR 119 elaborated on the test applicable. The Court has to address its mind to the question as to whether a reasonable and fair-minded man sitting in Court and knowing all the relevant facts would have a reasonable suspicion that a fair trial for the applicant was not possible. If the answer is in the affirmative, disqualification will be inevitable.

*In an article by a writer, **Holly Stout (11 KBW)** on the subject of “Bias”, the author states:*

*“... The test to be applied by a judge who recognizes a possible apparent bias is thus a “double real possibility” test; the question he/she must ask him/herself is whether or not there is a real possibility that fair-minded and informed observer might think that there was a real possibility of bias.” (referred to **Porter –V- Magill (2002) 2 AC 357**).*

15. This is the same test contained in the **Commentaries on the Bangalore Principles of Judicial Conduct**, which, at paragraph 81 postulates that:

The generally accepted criterion for disqualification is the reasonable apprehension of bias. Different formulas have been applied to determine whether there is an apprehension of bias or prejudgment. These have ranged from “a high probability” of bias to “a real likelihood”, “a substantial possibility”, and “a reasonable suspicion” of bias. The apprehension of bias must be a reasonable one, held by reasonable, fair minded and informed persons, who apply themselves to the question and obtain the required information. The test is “what would such a person, viewing the matter realistically and practically – and having thought the matter through – conclude? Would such person think that it is more likely than not that the judge, whether consciously or unconsciously, would not decide fairly.”

16. The singular question at hand is whether, utilizing the appropriate test, one can fairly say that the apprehension by the Applicants that the Presiding Officer in their case will not be impartial is a reasonable one. The test insists that the apprehension of bias must be a reasonable one, held by reasonable, fair minded and informed persons, who apply themselves to the question and obtain the required information. Can this be said to the case here?

17. The Applicants have made very grave allegations that the Judicial Officer in question may have been compromised – and that the money used to pay the Judicial Officer was conveyed by the investigating officers in the case. Some of the allegations are based on what the Applicant says were boasts made by the complainants in the case to a third party who then purveyed them to the Applicants. Another set of allegations are based on what, apparently, some Court Assistants told the Applicants.

18. In both sets of allegations, the source of the allegations remain undisclosed. Indeed, everything about the source other than the allegation itself remains undisclosed. The Applicants say that the sources must remain anonymous so as to protect their identities so that they do not suffer serious consequences owing to the influence of the Complainants.

19. Unfortunately, this has deprived both the Lower Court and this Court the opportunity to test the relative veracity of the allegations and whether they warrant reasonable apprehension that the Applicants will not get a fair trial. As they stand now, the allegations are vacuous. They do not inspire reasonable apprehension in a fair-minded person that they are reasonably true and that the impartiality of the justice process is at stake.

20. Consequently, without more, the Applicants do not meet the test laid down in our law and international best practices to request a Judicial Officer who is seized of a matter to recuse himself. As the Learned Trial Magistrate observed in the Court below, much mischief can occur if Judicial Officers formed the habit of easily recusing themselves based on unproven allegations which are not reasonably capable of being plausible.

21. In the circumstances, it is my conclusion that the Application dated 27/10/2017 is bereft of merit. It is hereby dismissed in its entirety.

22. Orders accordingly.

Dated and delivered at Kiambu this 7th day of June, 2018.

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JOEL NGUGI

JUDGE