



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISC. CRIMINAL APPLICATIONS NOS. 47 OF 2017 & 61 OF 2018

REV. NEMUEL MOMANYI.....APPLICANT

-VERSUS-

1. THE CHIEF MAGISTRATE KISII.....1ST RESPONDENT

(ON BEHALF OF MR. ONJORO –SENIOR RESIDENT MAGISTRATE)

2. DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

RULING

CONSOLIDATED RULING IN MISC. CRIMINAL APPLICATIONS Nos.47 of 2017 & 61 of 2018

1. Rev Nemwel Momanyi hereinafter referred to as the applicant has filed 4 Notice of Motions in Misc. Criminal Applications Nos. 47 of 2017 and 61 of 2018. In Misc. 47 of 2017 through a Notice Motion dated 24th May 2017 he seeks an order that;

i. That Criminal Case No.921 of 2012 to be transferred to Kisumu Law Courts.

2. In addition in Misc. 47 of 2017 the Applicant filed a 2nd Notice of Motion dated 20th February 2018 and a further Notice of Motion 22nd of March 2018. In his application dated 20th of February 2018 he seeks a **stay of Lower Court proceedings** to allow time for the application in Misc. Application 47 of 2017 to be heard and determined.

3. In Misc. Criminal Application No.61 of 2018 by an application dated 6th of June the applicant seeks orders that the Criminal Case No.921 of 2012 be transferred to a neutral court for reasons given in Misc. 47 of 2017.

4. The Applicant cites Article 50 (2) (c) of the Constitution stating that he has a right to a fair trial which includes adequate time to prepare his defense to be submitted before Court 3. The affidavits supporting these applications are dated 25th May 2017, 19th February 2018 and 22nd March 2018. The Respondents opposed the 4 applications. The Respondents filed ground of opposition dated 14th of April 2018.

5. This court decided to consolidate the 4 applications because each relate to Criminal Case No. 921 of 2012, which is before Kisii Law Court specifically before Hon. Njoro. This is what the Applicant deposes in his affidavits. He is the accused in Criminal Case 921 of 2012. He was put on his defense on 14th of March 2018 despite informing the court that he was unwell. That the Bar Bench resolved he should not be allowed to enter the court premises or transact any business. That he is the patron of IDPs in Kisii and Nyamira Counties and as chairman of Kisii South sub-county he was forced to make up follow-ups of the GK 2012 compensation. That he seeks a stay of the Lower Court proceedings and transfer of the same to Kisumu Law Courts or a neutral court. He avers that the prosecution proceeded with the lower Court matter disregarding the High Court order that he files a response in Misc.47 of 2017. That what has taken place in the Lower Court has resulted in procedural technicalities. The Applicant cites Articles 22, 23, 27, 50, 159, 160, 162 and 165 of the Constitution in support of his application.

6. The Respondents through Mr. Otieno for the DPP submitted as follows; that purported resolution by the Bar Bench committee which is undated and unsigned by any party cannot be authenticated. That despite the purported resolution by the Bar Bench committee restricting the applicant from transacting business in the court precincts, the applicant still transacts business in the in the court precincts and this can be seen by the present application filed by the Applicant himself and he has appeared on several occasions for its mention and hearing and filed numerous other applications in almost all courts. That the application to transfer CMCrC No.921 of 2012 is misconceived and aimed at derailing the hearing of a very old case which has been pending defense hearing since 10th December 2012 when the applicant was placed in his defense. That to date the matter has not proceeded due to applications attributed to the applicant and in fact, a warrant for his arrest was issued on 14th March 2018 when he failed to attend court claiming sickness which was not satisfactorily explained to the court. The applicant was charged with incitement to violence on 15th May 2012. That the attempt at having the matter transferred to Kisumu for defense hearing

is untenable because this is an offence that was committed within the jurisdiction of the Kisii Chief Magistrate's Court and the Applicant has not shown that the said court has pronounced itself of its unwillingness to hear the case. No material has been placed before the court to show that the applicant will not get a fair hearing in the court that is currently seized of the matter.

DETERMINATION

7. The applicant like any litigant has a right to fair hearing. Under Article 22 (1) of the Constitution, *every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened*". The applicant must demonstrate that his right or fundamental freedom has been denied, violated or infringed or is threatened. Under Article 50 (1) of the Constitution, *'every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body*. Under Article 50 (2), *"every accused person has the right to a fair trial, which includes the right, under sub article (c) an accused has "a right to have adequate time and facilities to prepare a defence and under sub article (e) a right to have the trial begin and conclude without unreasonable delay. Under Article 50 (f) a person has to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed.*

8. Back to the applicant's application he alleges that the Bar Bench passed a resolution that he should be restricted from transacting business within Kisii Law Courts. What is attached in the applicant's affidavit is not a resolution but a bare document. Its source is not indicated nor is it signed, stamped by any official from either the Bar or Bench. The applicant should have tendered a proper document from the meeting mentioned in the paper attached in his affidavit. There is therefore no resolution tendered before this court to show that the applicant was restricted from transacting business.

9. His other issue is that Criminal Case No. 921 of 2012 should be transferred to a neutral court or to Kisumu Law Courts. He alleges he was put on his defence at a time he was unwell and a warrant of arrest issued for failure to attend court. As already stated an accused is entitled to a fair hearing. In my view an accused or litigant has to show bias or prejudice on the part of the trial Magistrate hearing his case to be entitled to have his case transferred to another court. He states that he was not allowed to give his defence and that he sent his wife to seek an adjournment. That applicant has failed to demonstrate that he went back to the same court and sought to be heard and that he was denied a chance to address the court or that he was put on his defence whilst he was unwell. He did not attach the court proceedings to show what happened in court. He has failed to show bias or prejudice on the part of Hon. Njoro.

10. Mr. Otieno submitted that the matter has been in court since 2014 and that the applicant has been stalling the case by filing one application after another. The applicant has a right to give his defence however he also has a duty to ensure that he is in court at the required time and if he is not able to attend he has to present himself in court at the earliest time possible to explain his absence. If he fails to attend court, then the prosecution has a right to seek a warrant of his arrest and the said warrant may be lifted once he presents himself in court and gives a reasonable explanation of his failure to attend court. The applicant too has a duty to ensure that his case is heard and concluded without delay. I note that the Criminal Case has been in court since 2012. The applicant has failed to show that he will not get a fair hearing in the court seized of the criminal case. I therefore decline to grant his plea to transfer the matter to a neutral court or to Kisumu Law Courts. The applicant shall present himself before the court seized of the matter and proceed as directed by the said court. The applicant has a right of appeal from the decision of the court. All in all I find no merit in all the applications filed in Misc. Criminal Application. Nos. 47 of 2017 and 61 of 2018. Each is dismissed with no order as to costs.

11. Final Orders

- i. Application dated the 24th May 2017, 20th February 2018 and 22nd March 2018 are hereby dismissed.
- ii. The applicant to present himself before the court seized of his matter and proceed as directed by the said court.
- iii. No order as to costs.

Dated signed and delivered this 19th Day of July 2018

R. E. OUGO

JUDGE

In the presence of;

Applicant in person

Mr. Otieno For the Respondents

Mr. Omwoyo Court/ clerk