



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL MISC.APPL. NO.11 OF 2015

DAVID OMWENGA MAOBE - APPLICANT

VERSUS

REPUBLIC - RESPONDENT

RULING

1. This application dated 5th March 2015 is by one **David Omwenga Maobe**. The said application is brought under **Section 69 of the Criminal Procedure Code**.

The application seeks the **TRANSFER** of Kilgoris Criminal Case No.1194 of 2014 to Kisii Chief Magistrate's Court for hearing and disposal.

The applicant is an accused person in that Criminal Case No.1194 of 2014 in Kilgoris.

He was charged with perjury contrary to **Section 108(1) (a)** as read with **Section 110 of the Penal Code**.

The particulars are on the 18th day of May 2009 at Kisii High Court in Kisii County in a Judicial proceeding, Civil Suit No.149 of 2005 in the High Court of Kenya in which **David Omwenga Maobe** was the applicant and **John Teleyio Ole Sawoyo** the Respondent, while on a sworn oath before Hon. Justice Musinga knowingly gave false testimony touching on a matter which was material to a suit pending in that proceeding, namely denial of having sold a piece of land marked **49/Osinoni** adjudication Section to John Teleyio Ole Sawoyo.

2. He relies on five (5) grounds:
 - a. **That this court be pleased to order that Kilgoris Criminal Case No.1194 of 2014 be transferred to Kisii Chief Magistrate's Court Kisii for hearing and disposal.**

UPON GROUNDS:

- b. **That the subject matter in this case is the Kisii High Court Civil No.149 of 2005.**
- c. **That the offence is alleged to have been committed at Kisii and not Kilgoris.**
- d. **That there is no reason why the case should not be transferred and heard in Kisii CMCC.**
- e. **That the application is highly meritorious and should be allowed as prayed.**

3. By his supporting affidavit sworn on 5th March 2015, depones as follows:

1. **That I am a male adult of sound and disposition competent to swear this affidavit on my own behalf.**
2. **That I am the applicant in this proceedings.**
3. **That I know of my own knowledge that I am the accused person in Kilgoris Criminal Case No.1194 of 2014 attached is a copy of the charge sheet.**
4. **That I know of my own knowledge that the charges I am facing is “perjury contrary to Section 108 (1) (a) of the Penal Code.”**
5. **That the whole issue relates to the judicial proceedings in Civil Suit No.149 of 2005 in the High Court of Kenya at Kisii.**
6. **That I am advised by my advocate on record which advise I believe to be true that the same file shall be produced as evidence in this case.**
7. **That I know of my own knowledge that the case was concluded in my favour and the complainant having not been satisfied appealed to the Court of Appeal in Kisumu which appeal was also in my favour.**
8. **That it is my humble prayer that this case be transferred from Kilgoris to Kisii for hearing and disposal at the Kisii CMCC Court.**
9. **That the transfer of the said suit shall not prejudice the respondents at all.**
10. **That it is fair and just that the application be allowed as prayed.**
11. **That what is deponed to herein is true to the best of my own knowledge, information and belief.**

4. In his further affidavit sworn on 22nd day of April 2015, he further depones as follows:

1. **That I am male adult of sound and disposition competent to swear this affidavit on my own behalf.**
2. **That I am the applicant/accused in this proceedings.**
3. **That in further affidavit to my affidavit dated 5th day of March 2015 I wish to state as follows:-**
4. **That I have been reliably informed which information I verify believe to be true that the complainant is a member of the Court Users Committee at Kilgoris Law Courts and well known to the judicial staff.**
5. **That since the complainant being a member of the Court Users Committee he can easily influence, coerce, intimidate and/or do anything to prevent the justice being done to my case hence this application.**
6. **That the transfer of this case to Kisii Law Court and/or jurisdiction cannot in anyway prejudice the State or the complainant as interest to this court.**
7. **That what is deponed to herein is true to the best of my own knowledge information and belief.**

5. The Respondent has opposed the Accused/Applicant's application.

The State sets out (8) eight grounds of opposition, as follows:

1. **The application is brought under Section 69 of the Criminal Procedure Code which does not invoke the courts power of transfer of cases.**
2. **The subject property is situated in Kilgoris and the consequence of the offence the accused is charged with ensues in Kilgoris/Narok County i.e. 49/Osinoni adjudication section and the consequence of the offence that relates to it ensued in Kilgoris. Pursuant to Section 72 of the Criminal Procedure Code the Principal Magistrate Court at Kilgoris is vested with jurisdiction.**
3. **The 1st Schedule of the Criminal Procedure Code, read with Section 2 (the interpretation section) of the Magistrates Courts Act Cap.10) also confers jurisdiction on the Principal Magistrate Court at Kilgoris to hear the matter.**
4. **Almost all the prosecution witnesses, including the investigation officer reside and earn a living within the local limits of the Magistrate Court at Kilgoris and convenience dictates that the trial be conducted by the Principal Magistrate's Court at Kilgoris.**
5. **The only connection with Kisii that this case has is Kisii High Court Civil Case No.149 of 2005 of which the file and certified proceeding can be availed at the Kilgoris Court without undue difficulty to the State.**
6. **Criminal Case No.1194 of 2014 is a charge of perjury against the applicant. Perjury falls under Chapter 11 of the Penal Code Cap.63 as an offence relating to the administration of justice. This means that even the state is a complainant. The allegation therefore that the complainant is a member of Kilgoris Court Users Committee does not hold water. This fact alone cannot be reason to transfer the case to Kisii because it is not in any way inappropriate for the complainant to be a member of the Court Users Committee.**
7. **The reasons adduced by the applicant are not as envisaged by the Criminal Procedure Code and the application should consequently be dismissed.**
8. **If the court is inclined to allow the application, the court should invoke Section 8(5) of the Criminal Procedure Code and direct that the accused be directed to execute a bond, with or without sureties, conditioned that he will pay the costs of the prosecutor if convicted.**

6. **The applicant's submission:**

Essentially he puts forward five points in his submissions, that is:-

- a. *That the complainant is a member of the Court Users Committee together with the presiding magistrate in this criminal case at Kilgoris, therefore he is likely to influence, coerce or intimidate the magistrate to find the case in his favour, he is thus apprehensive of this likely outcome.*
- b. *That all the documents for this case are in custody of the Chief Magistrate or the Deputy Registrar, Kisii Law Courts, hence the need to transfer the case to Kisii.*
- c. *That he invokes the provision of article 159 of the Constitution.*
- d. *That the accused person fears for his life if the proceedings continue being heard in Kilgoris.*
- e. *That Justice is for all parties, the complainant as well as the accused person.*

7. The Respondent's submissions were:

- a. *That the application has no merit because Section 72 of the Criminal Procedure Code, confers jurisdiction on the Principal Magistrate's Court to hear the case of perjury such as this one at Kilgoris within Narok County, within its jurisdiction.*
- b. *That the only connection of this Kilgoris matter with Kisii Law Courts in HCCC No.159 of 2005 which was heard and disposed off in Kisii High Court before Hon. Justice Musinga, (as he then was). The alleged perjury is alleged to have been committed in that case by the accused person. However, all the witnesses did not come from Kisii, they came from Kilgoris.*
- c. *In the charge-sheet with which the accused is charged, all the witnesses named therein, are from Kilgoris, none is from Kisii.*
- d. *That since the offence of perjury is an offence against the administration of justice, the complainant here is not John Teleyio Ole Sawoyo, it is the State.*
- e. *That the accused seeks the transfer.*
- f. *That on the issues of Court Users Committee, even the State Counsels are members of the same, not only the magistrates.*

Even in Kisii to which the transfer is craved, the magistrates, the prosecution counsels would be members of the Court Users Committee.

It is therefore not tenable to argue that a magistrate being a member of the Court Users Committee should disqualify himself, or a file removed from him/her on that basis done.

- g. *That being a member per se confirms no influence on judicial decision of the court.*
- h. *That there are more than one court in Kilgoris. The court has not been told who cannot hear that case.*
- i. *That what appears clear is that the accused person is shopping for a suitable court to hear his case.*
- j. *That since all witnesses are in Kilgoris, as earlier submitted, the transfer puts a strain of costs and difficult on the State.*

The only request required of "Kisii" is certified copies of the proceedings of the High Court in HCCC No.159 of 2005, nothing else. This, it seems, is cost effective.

- k. *If this application were allowed on such flimsy grounds, it would open up a Pandora box, when the accused will only need to raise a little apprehension, to get his case transferred to other courts of the accused's liking in the hope of delaying justice.*
- *That if, however, this court is inclined to allow this application as presented, the State would urge the court to invoke Section 81(5) of Criminal Procedure Code and direct that the accused be directed to execute a bond with or without surety on condition that he will pay the costs of the prosecution if he is convicted.*
- m. *That therefore I urge this court to dismiss this application as it has no merit.*

8. The applicant, in response, conceded as follows:

First, has no objection to the terms of **Section 81(5) of the Criminal Procedure Code** being

complied by the applicant-accused in the event of his conviction.

Second, that the respondent does not deny the membership of the complainant in the Court Users Committee.

Third, that the applicant fears for his life if the proceedings against him continue in Kilgoris. And state that, the same could be transferred to any court in Nyamira, Ogembo or Keroka.

9. ISSUES FOR DETERMINATION:

- I. Has the applicant made out the case for transfer of Kilgoris Criminal Case No.1194 of 2014 to Kisii Chief Magistrate's Court or to any court within the jurisdiction of the Chief Magistrate, Kisii?
- II. Are reasons given adequate, cogent and persuasive to convince the court to transfer the said case?

10. ANALYSIS AND FINDINGS

First, the applicant's only assertion that the complainant is a member of the Court Users Committee in which the presiding magistrate of the case, the accused is involved in, without pointing out that he has knowledge the complainant is overtly close to the magistrate hearing this case, is not persuasive enough.

Second, the assertion that the documentary evidence is in Kisii Law Courts, disregarding the fact that in the charge sheet, the people listed as potential witnesses are in Kilgoris, within the court's jurisdiction, who if the matter were to be transferred to Kisii, these witnesses would be required to travel to Kisii, outside their area of residence, an onerous and arduous exercise in itself.

Third, the final assertion by the applicant that the accused person's life is in danger if the proceedings continued in Kilgoris, is but a flimsy excuse because there is no evidence that the accused has brought this to the attention of the court in Kilgoris in which he is the accused, and neither is there evidence that the accused has reported the matter to Kilgoris Police Station.

11. I agree with the counsel for the Respondent that the accused person is shopping for suitable court to hear his case. This, in my view, is not tenable.

I further agree that such application as this were allowed on such flimsy grounds, as a mere membership of the Court Users Committee being a bar to criminal proceedings in which some members are complainants, and on a whiff of fear being felt by the accused person, this would not be in the interest of smooth judicial administration. In my view, if these were to be permitted, it would be construed as the subversion of the administration of justice, just as perjury is the subversion of the administration of justice.

Therefore this court is not persuaded that the applicant has made out a case to warrant the transfer of this case from Kilgoris Law Courts to Kisii Law Courts, or to any court outside Kilgoris.

And since no sufficient cause has been made out to transfer this case, I find that this application has no merit and, must accordingly, be dismissed with costs.

It is so ordered.

Dated, signed and delivered in open court at Kisii this 10th day of July, 2015

HON. C. B. NAGILLAH

JUDGE

In the presence of:

- M/S Sagwe holding brief for Anyona for the Applicant
- M/S Otieno for the Respondent
- Samuel Omuga: Court clerk