



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

Miscellaneous Civil Case 140 of 2009

MONICA MORAA MENGE.....APPLICANT

-VERSUS-

SAMWEL BOSIRERESPONDENT

R U L I N G

There is an application being made by the defendant in SRMCC.NO.233 OF 2003 at Keroka that the case be transferred from the Resident Magistrate to any other competent court for trial and determination. The application is on the grounds that when the trial magistrate was faced with allegations of compromise and bias on 15/5/2009 he declined to allow the filing of an affidavit to that effect and further refused to disqualify himself from the hearing of the case. The defendant apprehends that justice may be miscarried in the case.

In the affidavit to support the application, the defendant has deponed that on 15/5/2009 she attended the hearing of the case and was in court precincts by 9.10 a.m and saw the plaintiff entering the door leading to the magistrate's chambers and remained there for about 30 minutes before he came out. The defendant later informed his advocate, Mr. Minda. The defendant states she was with her husband Jackson Menge Orori at the time she saw the plaintiff enter and come out of the chambers.

When the parties went to court Mr. Minda confronted the court with the information his client had given to him and asked it to disqualify itself. The matter had begun at noon because Mr. Minda had been in the High Court at Kisii that morning. The plaintiff was represented by Mr. Ochwangi. When the allegation was made Mr. Ochwang; stated that he was at the court at 9 a.m and knew the trial magistrate had not reported to work. He reported at about 10 a.m . The parties went to court and the file was called. Mr. Ochwangi informed court that Mr. Minda had indicated he would finish a matter in the High Court and then come. The court agreed to put the file aside until midday when the matter was called and the issue above was raised. Mr. Ochwangi told court he was at the court earlier with his client and that the defendant found them. He denied the allegations. Mr. Ochwangi submitted that this was a 2003 case and the allegation being made was a trick to delay the finalization of the case.

The court wrote a ruling refusing to disqualify itself. It indicated the allegation was not true as it would not allow any party to a case it is hearing to come to chambers. It declined to adjourn the matter. Mr. Minda walked out on the court. He then made present applicant.

It should be noted that the case was part-heard.

In the affidavit sworn in reply, the plaintiff stated he reached the court at about 10.15 a.m and contacted his advocate who informed him the matter had been placed aside for a while. He says that while at the corridor waiting for the case he saw the defendant who was with her husband also waiting. He at no time entered the magistrate's chambers, he stated.

It is material that the defendant's husband who allegedly saw the plaintiff enter into the magistrate's chambers did not swear an affidavit.

It is a serious matter when claim is made that a litigant has gone into a magistrate's chambers as the case that has brought the him his waiting to be heard by the same magistrate. A reasonable impression would immediately be created that they are going to discuss the pending case, especially when the litigant does not take his counsel along. The other side would not expect a fair deal in the circumstances and would be entitled to protest and to seek that another court hears the case. The trial court should be, and be seen, to be impartial for justice to not only be done but be also be seen to be done.

One would have expected that immediately Mr. Minda came from the High Court and his client informed him about what she had allegedly seen he immediately informs Mr. Ochwangi; and together they go to see the magistrate in chambers after Mr. Ochwangi's client had been confronted with the information. If the allegation was true and the magistrate fails to opt out of the case then a formal request be made in which the defendant would swear an affidavit. Mr. Minda did not talk to Mr. Ochwang about the claim. Mr. Ochwangi said he was at the court and had had the courtesy (and the record bears him out) to get the court put aside the matter to wait for Mr. Minda. Mr.Minda did not seek to go and find out from the magistrate in chambers. I have stated in the foregoing that the defendant's husband who was present did not swear an affidavit to say he saw the defendant enter the magistrate's chambers.

I have looked at the record of what transpired that morning and readily conclude that Mr. Minda's client misled him as the alleged meeting between the magistrate and the plaintiff did not happen. The court also deprecates in strong terms the conduct of counsel in not counter-checking the information he was given before going open with it in the plenary.

I do find that the application lacks merits and the same is dismissed with costs.

Dated, signed and delivered this 3rd day of November, 2009

A.O.MUCHELULE

JUDGE

3/11/2009

Before A.O.Muchelule-Judge

Mongare court clerk

Mr. oguttu for Respondent

Mr. Onyancha for Mr. Minda or applicant

COURT: Ruling in open court.

A.O.MUCHELULE

JUDGE

3/11/2009